VEDLEGG 206

SANDEFJORD TINGRETT

RETTSBOK N 2952
FOR
SANDEFJORD TINGRETT

År 2oo2, den 23. januar, ble rett holdt i Drammen Tinghus

Dommer:	Tingrettsdommer Terje Hagelund (settedommer)
Sak nr.:	277/96 A
Saksøker:	Anders Jahres dødsbo, under offentlig skiftebehandling ved Sandefjord skifterett
Prosessfullmektig:	Bugge, Arentz-Hansen & Rasmussen, v/ advokat Karstein J. Espelid
Saksøkt nr. 1:	Lazard Bank Limited
Prosessfullmektig:	Advokatfirmaet Schjødt AS v/ advokat Einar Irgens
Saksøkt nr. 2:	Robert Hugh Molesworth Kindersley
Prosessfullmektig:	Advokatfirmaet Schjødt AS v/ advokat Dagfinn Clemetsen
Saksøkt nr. 3:	Bjørn Bettum
Prosessfullmektig:	Advokat Hans Stenberg-Nilsen
Saken gjelder:	Inngåelse av rettsforlik mellom saksøker og saksøkte nr. 1 og 2
Til stede:	Saksøkeren ved bobestyreren advokat Even Wahr-Hansen, advokat Karstein J. Espelid, advokat Einar Irgens, advokat Dagfinn Clemetsen og advokat Hans Stenberg-Nilsen

D2
J 003824
XII
#1404

Dommeren åpnet rettsmøtet og erklærte retten lovlig satt. N 2953

Advokatene Karstein J. Espelid og Dagfinn Clemetsen meddelte at Anders Jahres dødsbo og Lazard Bank Limited (Lazard) og Robert Hugh Molesworth Kindersley (Lord Kindersley) for sin del har fremforhandlet forlik i saken og at forliket forutsettes inngått som rettsforlik.

Advokat Dagfinn Clemetsen fremla fullmakter til seg, datert henholdsvis 16. januar og 8. januar d.å., fra Lazard og Lord Kindersley til å undertegne rettsforliket på vegne av disse to parter.

Retten aksepterte fullmaktene og orienterte om at rettsforlik har samme virkning som en rettskraftig dom, jfr. tvml. § 286, jfr. §.99.

Advokat Dagfinn Clemetsen opplyste:

I lys av det bevismaterialet som har vært fremme i søksmålet, erkjenner idag Lazard at.

- Anders Jahre selv eller på vegne av norske selskaper han kontrollerte og/eller disponerte, hadde eksklusiv og total råderett over selskapet CTC og verdiene der da han gjennom Bjørn Bettum i 1976 instruerte Lazard om å bistå med opprettelsen av Continental Foundation samt at - uten Lazards vitende den gangen - et av formålene for Anders Jahre og Bjørn Bettum med opprettelsen av Continental Foundation i 1976 var å skjule eierskapet i CTC for omverdenen. Selv om Lazard den gangen trodde at Continental Foundation var gyldig stiftet, aksepterer Lazard som et resultat av avgjørelsen i Privy Council at Continental Foundation ikke var en gyldig "charitable foundation", og følgelig at opprettelsen av den ikke hadde betydning for eierforholdet til CTC;

- Thorleif Monsen ikke var reell eier av CTC eller verdiene der, da han opptrådte som formell stifter av Continental Foundation. Lazard aksepterer boets anførsel om at Thorleif Monsen opptrådte som formell stifter i henhold til instruks gitt av Bjørn Bettum på vegne av Anders Jahre eller selskaper Anders Jahre kontrollerte og/eller disponerte;

- den formelle overføring av 65 aksjer i Bulls Tankreder AS i 1975/76 fra Anders Jahres Rederi AS til Lazard, hadde til hensikt å muliggjøre/sikre bruk av utenlandsmidler til delvis finansiering av Rådhusgaven.

D2

J 003825

XII

#1404

Det ble deretter mellom Anders Jahres dødsbo og Lazard og Lord Kindersley inngått slikt

r e t t s f o r l i k :

1. Lazard og Lord Kindersley har betalt til Anders Jahres dødsbo USD 41,5 millioner kontant som oppgjør for den del som er henførbar til Lazard og Lord Kindersley, av det krav som boet har gjort gjeldende mot Lazard, Lord Kindersley og Bettum i fellesskap som solidarskyldnere. Forlikssummen omfatter ikke Bjørn Bettums del av det kravet som dødsboet hevder det har mot Lazard, Lord Kindersley og Bettum i felleskap, og det omfatter heller ikke tapsposter som dødsboet hevder Bjørn Bettum alene har påført boet ved uttapping av verdier og/eller bruk av utenlandsformuen for å hindre boets arbeid.

2. Lazard har tilbakeført aksjene i Bulls Tankrederi AS til Anders Jahres Rederi AS gjennom overdragelsesmelding til Bulls Tankrederi AS, og har samtidig oversendt til Bulls Tankrederi AS de aksjebrevene som var i bankens besittelse.

3. Lazard og Lord Kindersley har refundert Anders Jahres dødsbo motverdien av GBP 170.000 kontant. Beløpet utgjør saksomkostninger betalt av Anders Jahres dødsbo i forbindelse med hevingen av søksmålet i Storbritannia høsten 1995

4. Anders Jahres dødsbo som saksøker og Lazard som saksøkt nr. 1 sammen med Lord Kindersley som saksøkt nr. 2 begjærer søksmålet hevet som forlikt ved at hver side bærer sine saksomkostninger. Søksmålet fortsetter mellom dødsboet og saksøkt nr. 3 Bjørn Bettum.

D2

J 003826

XII

#1402

N 2955

Sandefjord tingrett, den 23. januar 2002.

For Anders Jahres dødsbo

Even Wahl-Hansen

For Lazard og Lord Kindersley i henhold til fullmakter

Dagfinn Clemetsen

Etter dette forelå ikke mer til behandling. Søksmålet vil ble hevet for Anders Jahres dødsbo, Lazard og Lord Kindersley ved særskilt kjennelse som avsies idag.

Retten hevet

Terje Hagelund

Rett kopi bekreftes

Sign. Sandefjord tingrett

D2

XII

J 003827

#1402

RETTSBOK

FOR

SANDEFJORD TINGRETT

År 2oo2, i tidsrommet 3o. september til 4. oktober, ble rett satt i Drammen tinghus.

Dommer:	Tingrettsdommer Terje Hagelund (settedommer)
Protokollfører:	Dommeren
Sak nr.:	277/96 A
Saksøker:	Anders Jahres dødsbo under offentlig skifte ved Sandefjord skifterett, Boks 73, 32o1 Sandefjord
Prosessfullmektig:	Bugge, Arentz-Hansen & Rasmussen v/advokat Karstein J. Espelid, Boks 1524 Vika, o117 Oslo
Saksøkt:	Bjørn Bettum, nå hans dødsbo under offentlig skifte ved Sandefjort skifterett, Boks 73, 32o1 Sandefjord
Prosessfullmektig:	Advokat Hans Stenberg-Nilsen, Grensen 12, o159 Oslo
Saken gjelder:	Erstatning

Den 8. november s.å. ble rett satt på nytt. Det ble i saken avsagt slik

D O M :

Saken gjelder erstatningskrav fremsatt av Anders Jahres dødsbo (heretter benevnt "Jahreboet"). Kravet ble reist ved stevning datert 29. april 1996 mot Lazard Bank Limited, London, Robert Hugh Moleworth Kindersley, Kent i England, og Bjørn Bettum, Sandefjord.

Saken er deretter forlikt mellom Jahreboet og Lazard Bank Limited og Robert Hugh Molesworth Kindersley ved rettsforlik inngått for Sandefjord Tingrett den 23. januar d.å. Søksmålet ble deretter hevet for disse parter ved kjennelse av samme dato.

Saken fortsatte deretter mot Bjørn Bettum og endelig tidspunkt for hovedforhandling ble berammet til tidsrommet 3o. september d.å. til 19. desember. Hovedforhandling mot de 3 saksøkte ble opprinnelig påbegynt den 2o. mars 2ooo og fortsatte til 18. mai s.å., da hovedforhandlingen ble utsatt som følge av alvorlig sykdom hos Bjørn Bettum. Senere er hovedforhandlingen utsatt flere ganger idet Bjørn Bettum ikke ble frisk nok til å avgi møte.

Bjørn Bettum døde den 16. mars d.å. Saken fortsatte mot hans dødsbo, jfr. tvml. § lol.

Bjørn Bettums dødsbo (heretter benevnt "Bettumboet") ble tatt under offentlig skifte ved Sandefjord skifterett den 27. mars d.å.

Anders Jahres dødsbo ble tatt under offentlig skiftebehandling ved Sandefjord skifterett den 6. april 1982.

Kravet mot Bettum er basert på 2 grunnlag:

1. Mislighold av tilsyns- og kontrollfunksjoner som Bettum pätok seg i forhold til håndteringen av Anders Jahres utenlandsformue, og

2. Mislighold av opplysningsplikt overfor Jahreboet (skifterett og bobestyrelse).

For nærværende sak har Bettumboet meddelt retten og Jahreboet at det forsåvidt gjelder mislighold av tilsyns- og kontrollfunksjoner ikke vil bli bestridt at det foreligger nødvendig ansvarsgrunnlag og erstatningsrettslig adekvans. Heller ikke den erstatningsberegning som Jahreboet har foretatt i saken vil bli bestridt. Bettumboet gjør imidlertid gjeldende at ethvert krav basert på dette grunnlag er **foreldet**.

Forsåvidt gjelder mislighold av opplysningsplikten har Bettumboet på samme måte meddelt at dersom retten kommer til at det forelå opplysningsplikt for Bjørn Bettum vis a vis Jahreboet, så foreligger det mislighold av denne og erstatningsrettslig adekvans i forhold til skadefølgen. Erstatningsberegningen bestrides heller ikke for dette grunnlagets vedkommende. Bettumboet **bestrider** imidlertid at det forelå slik opplysningsplikt for Bjørn Bettum som Jahreboets krav bygger på.

Etter dette dreier erstatningssaken seg om hvorvidt krav som følge av tilsidesettelse av tilsyns- og kontrollfunksjonene er foreldet, samt om hvorvidt det forelå opplysningsplikt for Bjørn Bettum i forhold til Jahreboet under boets arbeide fra 1982 og frem til Bettums død den 16. mars d.å.

Det er heller ikke bestridt at hver at de to påberopte ansvarsgrunnlag hver for seg leder til det tap som er påstått og som er ubestridt i saken.

De refererte begrensninger i sakens tvistetemaer ble bekreftet av Bettumboet og protokollert ved påbegynnelse av hovedforhandlingen den 30. september d.å., jfr. tvml. § 126, nr. 1.

Den historiske utvikling i saksforholdet:

Hensett til at tvistetemaene i saken er spørsmålet om Bjørn Bettum har misligholdt sine kontroll- og tilsynsplikter for Anders Jahre i forhold til utenlandsformuen, samt om hans opplysningsplikt overfor Jahreboet er tilsidesatt, anses det tilstrekkelig at saksforholdet gjengis i grove trekk. Jahreboets fremstilling av den faktiske utvikling fra

det tidspunkt Anders Jahre i 1939 startet sin shippingvirksomhet og hvorledes han og hans medhjelpere håndterte utenlandsvirksomheten og utenlandsformuen frem til Anders Jahre døde i 1982 er ikke bestridt. Bjørn Bettums faktiske opptreden i forhold til å gi opplysninger om Jahres forhold til Jahreboet er heller ikke bestridt.

Uenigheten mellom partene knytter seg således ikke til faktum. Spørsmålet om opplysningsplikt er av rettslig karakter og når det gjelder foreldelsesspørsmålet dreier uenigheten seg om subsumsjonen basert på den faktumfremstilling som Jahreboet har gitt. Særlig gjelder dette spørsmålet om når foreldelsesfristene begynte å løpe for de enkelte krav og når tilstrekkelig kunnskap forelå for å reise søksmål, alt basert på Jahreboets faktumfremstilling.

Anders Jahre bygget fra 1939 opp en betydelig utenlandsformue organisert gjennom Panamaselskapet Pankos Operating Company SA. Selskapet skiftet i 1958 navn til Continental Trust Company (CTC). Pankos' hovedformål var i henhold til vedtektene rederi- og investeringsvirksomhet.

Bjørn Bettum var Anders Jahres nære medarbeider og kompanjong gjennom hele 197o-tallet og bisto frem til Jahres død i 1982.

Eierforholdet til Pankos var basert på ihendehaveraksjer. Det fremgikk derfor ikke hvem som var den reelle eier. Jahres representasjon for selskapet ble ivaretatt gjennom selskapets vedtekter hvor han ble oppnevnt som selskapets europeiske agent og legitimert til å opptre på vegne av selskapet uten å fremstå som eier. Pankos drev gjennom årene en meget inntektsgivende virksomhet.

I tillegg til virksomheten gjennom Pankos involverte Jahre seg i hvalfangst gjennom Panamaselskapet Spermacet Whaling Company SA og drev aktivitet i Sverige gjennom AB Jan.

De økonomiske resultater som ble oppnådd gjennom Panamaselskapene ble imidlertid ikke hjemført til Norge. Midlene ble i hemmelighet akkumulert og investert i utlandet. Dette gjaldt også resultatene fra svenske AB Jan.

Etter 2. verdenskrig ble Jahre gjenstand for omfattende undersøkelser fra norske myndigheters side, som mistenkte at han hadde betydelige interesser og ubeskattede midler i utlandet. Etter betydelig press hjemførte han i 1955 og 1956 en rekke skip ved

kjøp fra Sverige og Panama. Vederlagene tilfløt den formue han hadde bygget opp utenfor Norge.

Som angitt foran skiftet Pankos i 1958 navnt til Continental Trust Company SA. Navneendringen fant ifølge dokumentasjonen sted i Sandefjord hvor generalforsamling ble avholdt den 2. februar 1958. Det fremgår av protokollen at samtlige aksjer, som var ihendehaveraksjer, var representert på generalforsamlingen. Protokollen er undertegnet av Anders Jahre som selskapets president og Frithjof Bettum som assistant secretary. Dette forhold viser Jahres eierskap til selskapet. Bjørn Bettum har i en skriftlig redegjørelse av 16. november 1994 støttet den oppfatning at Jahre i alle fall etter 1954 anså selskapet som sitt eget.

Nye aksjebrev i CTC ble imidlertid ikke utstedt i 1958, men først 16 år senere, slik fremstillingen nedenfor vil vise.

Det er uomtvistet at CTC forvaltet betydelig verdier på 1950 og 1960-tallet. Midlene representerte likvider for Anders Jahre som ble benyttet til forskjelligartede investeringer i den shippingvirksomhet han drev i stor målestokk.

Anders Jahres vilje og evne til å gi betydelige pengebeløp til veldedige formål er også et ubestridt faktum knyttet til hans liv. I tråd med med dette besluttet han i 1968, på vegne av CTC, å donere NOK 40 mill. til nytt rådhus i Sandefjord. I hans første tilsagnsbrev av 14. oktober 1968 ble ikke CTC som giver nevnt. I det mer konkretiserte tilsagnsbrev av 13. mars 1972 fremgikk det at CTC var den reelle giver og det ble anført at han selv hadde en betydelig interesse i selskapet, dog ikke aksjeinteresse.

Overføringen til Sandefjord kommune ble i gaveløftet fastsatt til 4 overførsler, hver på NOK 10 mill. De nøvendige søknader om valutalisens avstedkom imidlertid omfattende forklaringsproblemer overfor Norges Bank med hensyn til hvor pengene kom fra og hvilken tilknytning Jahre hadde til CTC som gjorde det mulig for ham å initiere en vederlagsfri overføring i den aktuelle størrelsesorden. Det viste seg at CTC's formelle selskapsorganer ikke hadde vært i funksjon siden 1958 (ved navneendringen). De styremedlemmer Jahre oppga i brevet til Sandefjord kommune av 13. mars 1972 var ikke medlemmer av styret og han hadde således feilaktig oppgitt at et styre hadde gitt sin tilslutning til gaven. Det er ikke bestridt at beslutningen om å gi den såkalte Rådhusgaven var Anders Jahres egen beslutning og at de midler det gjaldt var hans egne.

Beslutningen gjorde det imidlertid nødvendig å foreta en rekke tilbakedateringer i forbindelse med produksjon av selskapsprotokoller som overfor valutamyndighetene skulle vise at det forelå formelt korrekte beslutninger i CTC's styrende organer.

Bjørn Bettum var initiativtaker og besørget gjennomføringen av dette. Det ble fabrikert styrebeslutninger, generalforsamlingsbeslutninger og forklaringer til Norges Bank som var tilbakedaterte og uriktige i sitt innhold. Hensikten var å dokumentere at CTC i forhold til Rådhusgaven hadde fungert på selskapsrettslig korrekt måte, at Rådhusgaven var lovlig besluttet i selskapets styrende organer, samt at begrunnelsen fra CTC's side var å takke Anders Jahre for hans langvarige og betydelige tjenester for selskapet.

På samme tidspunkt foranlediget også Bjørn Bettum at den svenske SE-banken, som over år hadde forvaltet betydelige deler av CTC's likvider, for fremtiden skulle stile all korrespondanse til det nå formaliserte CTC i Panama. Bettums instruks var imidlertid at korrespondansen skulle legges i konvolutt og de facto sendes til Anders Jahre i Sandefjord.

Ingen del av dette faktum er bestridt. Det er heller ikke bestridt at begivenhetene peker mot Anders Jahre som eier av CTC's aktiva.

Norske myndigheters mistanke og undersøkelser rundt CTC-formuen gjorde det aktuelt for Jahre og de personer som bisto ham å drøfte tiltak for å skape inntrykk av at andre enn Jahre var eier av CTC. Tiltakene måtte samtidig sikre Jahres kontroll og disposisjonsrett over formuen. Fra 1974 til 1976 ble ulike alternativer drøftet, herunder opprettelse av en mulig stiftelse som skulle eie CTC's aksjer eller eventuelt selskapets midler direkte. Indirekte måtte stiftelsen kontrolleres av Jahre og sikre ham tilgang til midlene når han måtte ønske det.

I et notat til Anders Jahre av 28. mai 1975 behandler Bjørn Bettum denne problemstilling. Annet og tredje avsnitt i notatet gjengis:

> Etter erfaringene med Norges Bank i forbindelse med Continentals bidrag til Rådhuset i Sandefjord, er det enighet om at det ikke er mulig å bringe Continentals verdier inn i Norge, i hvert fall innen en overskuelig fremtid. Den eneste løsning vil på denne bakgrunn være at Continental på en eller annen måte organiseres som selveiende stiftelse med et passende internasjonalt formål. Dette

formål burde defineres slik at det også ville være mulig i fremtiden å tilgodese Anders Jahres fond til vitenskapens fremme og Anders Jahres Humanitære Stiftelse både med kapital og avkastning. Anders Jahre burde antyde visse retningslinjer for hvordan han mener stiftelsens formål i fremtiden skulle fortolkes.

Anders Jahre har gitt uttrykk for at Bess Jahre på en eller annen passende måte må tilgodesees, og jeg kunne tenke meg å foreslå at f.eks. 10 millioner dollar utskilles på hensiktsmessig måte fra Continental så snart som mulig. Ved inneværende års utgang vil det da være igjen verdier på rundt 50 millioner dollar i selskapet, som kunne overføres til den foreslåtte stiftelse. Et beløp på 10 millioner dollar kunne gi både Anders Jahre og Bess Jahre den nødvendige bevegelsesfrihet.

Sommeren 1976, muligens foranlediget av den samtidige siktelse mot skipsreder Hilmar Reksten, oppfattet kretsen av rådgivere rundt Anders Jahre at noe måtte gjøres raskt for å dekke forbindelseslinjene mellom Jahre og formuen i CTC.

Det ble avholdt møter i London i tidsrommet 1. til 3. juli hvor Bjørn Bettum, Lazard og Roberta R. Aleman deltar. Sistnevnte en panamansk advokat. Det fremgår av et memorandum fra møtene at Bettum er pådriver og i det vesentlige forslagsstilleren forsåvidt gjelder opprettelse av en stiftelse som eier av CTC's aksjer eller midlene direkte. Bettum fremmet også forslag om at en del av midlene skulle holdes utenfor stiftelsen, jfr. foran om den foreslåtte avsetning til Anders og Bess Jahre på USD 10 mill.

Planen om opprettelse av en stiftelse som eier av CTC's aksjer ble nedfelt i et notat av 2. juli s.å. Notatet ble signert og dermed godtatt av Anderes Jahre personlig.

Notatet beskriver overføring av aksjene til en veldedig stiftelse hvor formålet er definert så vidt at utdeling av midlene kan skje til enhver ønskelig person/institusjon. Stiftelsens trustee skal være en større amerikansk bank eller lignende og midlene kontrolleres av et antall advisors/rådgivere som av skattemessige grunner skal være bosatt i ulike jurisdiksjoner.

"Aksjonærene" er ifølge notatet bosatt i de vestindiske øyer. Det dreiet seg om Thorleif Monsen som senere underslo vesentlige deler av midlene i Anders Jahres

utenlandsformue.

Den 2o. juli 1976 ble stiftelsen Continental Foundation (heretter benevnt "CF") stiftet i London. 8o % av aksjene i CTC ble lagt inn i stiftelsen.

Av stiftelsesdokumentet fremgår at Thorleif Monsen er den formelle stifter (settlor). I henhold til kravene oppnevnes samtidig advisors (rådgivere) og trustee (forvalter) for stiftelsen.

CF ble senere kjent ugyldig som veldedig stiftelse i det stiftelsens formål ble vurdert å være for vidt og dermed gikk ut over grensene for hva som kan være lovlige formål for en veldedig stiftelse. Avgjørelsen om å kjenne CF ugyldig som stiftelse er stadfestet av engelsk Privy Council og er dermed endelig. Privy Councils avgjørelse er datert november 2ooo.
I forbindelse med rettsforliket mellom Jahreboet og Lazard av 23. januar d.å. har Lazard erkjent at CTC var eiet av Anders Jahre og at opprettelsen av CF kun hadde som formål å skjule eierskapet for myndigheter og andre. Erkjennelsen er inntatt i rettsforliket.

Bettumboet har også senere erkjent dette forhold.

De resterende 2o % av aksjene i CTC ble angivelig på samme tidspunkt overført til Thorleif Monsen Trust som var til fordel for Anders og Bess Jahre.

Jahreboet har ubestridt anført at hovedpunktene i det oppdrag/avtale som ble inngått mellom Anders Jahre og bl.a. Bjørn Bettum i tilknytning til omorganiseringen i 1976, og som delvis fremgår av Bettums eget notat om dette av 22. oktober 1976, var følgende:

- formålet med arrangementet var å "parkere" midlene inntil videre, og ikke med bindende virkning å overføre disse til stiftelsen

- Anders Jahre hadde fortsatt en eieres rådighet over midlene og kunne disponere disse til eget formål

- Anders Jahre kunne på ethvert tidspunkt omgjøre oppdraget eller kalle dette tilbake

- formålet med stiftelsen skulle defineres så vidt som mulig slik at utdeling fra denne kunne skje til ethvert formål

- stiftelsen skulle videre kunne deles opp og formålet endres slik at Anders Jahre beholdt den nødvendige handlingsfrihet

- samtlige av de involverte skulle kontrollere hverandre - gjensidige kontrollfunksjoner

- stråmannen Thorleif Monsen skulle ikke få tilgang til midlene

- Lazard skulle forestå forvaltningen av CTC's midler og på denne måten skulle Lazard utøve sin kontroll med CTC's verdier

- Lazard skulle oppbevare aksjebrevene, og derved ha den fysiske kontroll med adkomstdokumentene til formuen

- for å sikre kontrollen med partene i proforma arrangementet skulle det holdes jevnlige møter mellom de implisерte parter.

Som påpekt foran ble 20 % av aksjene i CTC ikke lagt inn i stiftelsen, men overført til Thorleif Monsen Trust. For å kontrollere Monsen skulle Lazard også forvalte disse midlene. Jahreboet har anført at boet ikke er sikker på om det faktisk ble opprettet en særskilt stiftelse for 20 % andelen, eller om Monsen selv sto som stråmann direkte overfor Anders Jahre. 20 % av CTC's aksjer ble imidlertid fysisk oppbevart i Lazard fra 1976 inntil disse aksjer ble innløst ved en kapitalnedsettelse i CTC i 1979, jfr. nedenfor.

Det er ubestridt at Bjørn Bettum var utpekt av Anders Jahre til å sørge for gjennomføringen av omorganiseringen i 1976. Det er likeledes ubestridt at han faktisk deltok i det arbeide som var nødvendig og senere deltok i de møter og virksomhet forøvrig som skulle kontrollere de personer som var formelt legitimerte til å råde over Jahres midler etter omorganiseringen.

Etter 1976 er det påvist at Anders Jahre fortsatte å disponere CTC's midler, bl.a. i tilknytning til sin private eiendom Ousbyholm i Sverige.

For saken er det også vesentlig at norske skattemyndigheter avholdt bokettersyn hos Anders Jahre i tidsrommet 1978-1980. Den norske stat v/ finansdepartementet begjærte i forlengelsen av skatteundersøkelsene arrest i CTC's konti med SE-banken. Arresten ble iverksatt ved beslutning av 21. april 1980. Senere ble arresten opphevet av svensk domstol. Dette avstedkom at midlene i SE-banken umiddelbart ble overført til Lazard og fra dette tidspunkt er Lazard eneste forvalter av CTC's likvider og nye tiltak ble satt i verk for å distansere midlene fra norske myndigheter.

Etter omorganiseringen i 1976, men før Anders Jahres død i 1982, ble det også foretatt vesentlige disposisjoner over CTC- formuen.

I 1979 ble aksjeposten på 20 % i CTC innløst av selskapet ved kapitalnedsettelse. Innløsningsbeløpet utgjorde USD 14,25 mill. og ble overført til et selskap ved navn Harmon Corporation. Disse midlene var etter hensikten ment å sikre Anders og Bess Jahre, jfr. det tidligere forslag om dette i notat fra Bjørn Bettum til Anders Jahre. Det er antatt at Thorleif Monsen, Bjørn Bettum og Lazard gjennomførte kapitalnedsettelsen i CTC. Nærmere om hvor disse midlene endelig tok veien behandles nedenfor under fremstillingen av hendelsesforløpet etter Anders Jahres død.

Etter innløsningen var CF eier av samtlige aksjer i CTC.

CTC's midler var nå i sin helhet forvaltet av Lazard idet innskuddene i SE-banken etter opphevelsen av skattemyndighetenes arrest umiddelbart ble flyttet dit. De involverte fryktet imidlertid videre pågang i Storbritania og en ny løsning for CTC-midlene måtte utarbeides.

Det er godtgjort at Bjørn Bettum sommeren 1980 diskuterte med representanter for Lazard å flytte midlene til et nyopprettet fond på Cayman Island. Fondet var drevet av Lazard og navnet var Lazard Brothers International Income Fund. Fondet skulle forvaltes av en ny bank stiftet av Thorleif Monsen og Lazard på Cayman Island som het All Trust & Banking Corporation. Den endelige beslutning om overføring av midlene til fondet ble tatt på CTC's styremøte den 25. september 1980 på Hawai. Det er godtgjort at Bjørn Bettum var til stede på det hotel styremøte fant sted og på det aktuelle tidspunkt. Det er overveiende sannsynlig at han derfor var involvert i beslutningen om å flytte CTC- midlene.

Kort tid etter dette ble midlene flyttet over i enda et nytt selskap ved navn Blue Range Corporation, som ble stiftet i Panama 23. februar 1981. Det er fra Jahreboets side hevdet at bakgrunnen var et ønske om å kvitte seg med CTC-navnet og gjøre oppsporingen av midlene ytterligere vanskelig. Flyttingen ble teknisk gjennomført ved at CTC utbetalte alle sine aktiva, med unntak for det såkalte Contingency Fund, jfr. nedenfor, til CF. CF plasserte deretter midlene i Blue Range Corporation.

Aksjene i Blue Range Corporation ble lagt inn i CF. Blant styremedlemmene i Blue Range Corporation var Thorleif Monsen. Styresammensetningen var identisk i CTC og Blue Range Corporation.

Etter at CTC hadde overført det vesentlige av sine aktiva, totalt USD 61 mill., til CF som uthytte til CF, sto CTC igjen med en aksjepost i Bulls Tankrederi og et beløp på USD 1,456 mill. som ble reservert for å dekke den del av Rådhusgaven som det var nektet valutalisens for, og som Anders Jahre i henhold til den personlige garanti han ga for Rådhusgaven hadde dekket via norske selskaper.

Ved **Anders Jahres død i 1982** besto utenlandsformuen etter dette av 3 komponenter:

1. Midlene som var plassert i Blue Range Corporation
2. Den innløste 20 % andel av aksjene i CTC og som var overført til Harmon Corporation, og
3. Gjenværende midler i CTC, det såkalte Contingency Fund

Det er ubestridt at utenlandsformuen deretter kom i urette hender på følgende måte:

Contingency Fund:

20 % av Contingency Fund ble overført til Thorleif Monsen høsten 1982.

80 % av Contingency Fund forble inntil videre i CTC. CTC ble imidlertid oppløst i 1984 og 80 % andelen av Contingency Fund ble utdelt til CF (eneste aksjonær) som likvidasjonsutbytte. Midlene forble i CF frem til 7. februar 1985. På dette tidspunkt ble Contingency Fund, som da hadde en verdi på USD 7.814.190 overført til stiftelsen New World Trust. Den juridiske rådgiver i tilknytning til transaksjonen, den kanadiske

advokaten F. Douglas Gibson, rådet imidlertid til å ha et selskap under stiftelsen som besitter av midlene. New World Trust hadde et slikt selskap ved navn All Maritime Consultants Ltd. Dette selskapet mottok midlene. Selskapet skiftet i februar 1987 navn til Forrester Maritime, et selskap som er antatt å være eid av Monsenfamilien.

Bjørn Bettum som Anders Jahres kontrollør forhindret ikke at overføringen skjedde. Overføringen var i direkte motstrid til CF's vedtekter hvor det var eksplisitt bestemt at Monsen som settlor (stifter) av CF ikke skulle motta noen av stiftelsens midler.

Blue Range Corporation:

De midler som ble utbetalt i utbytte fra CTC til CF (ca. USD 61 mill.) ble som påpekt ovenfor investert i Blue Range Corporation, et selskap som var heleid av CF.

CF' aksjer i Blue Range Corporation ble i 1982 overført til All Foundation.

All Foundation ble stiftet av Thorleif Monsen i 1982. Kort tid etter etableringen av stiftelsen ble det besluttet at samtlige aksjer CF hadde i Blue Range Corporation skulle overføres til All Foundation. Dermed var den vesentlige delen av Anders Jahres utenlandsformue kontrollert av All Foundation og første skritt var tatt mot det resultat at Monsen fikk herredømme over midlene.

Persongalleriet som kontrollerte CF og som kontrollerte All Foundation var reelt det samme. Detaljene om dette representer begivenheter underveis. De fratrådte etter hvert og ble økonomisk belønnet av Monsen ved sin fratreden. Det er ubestridt og avgjørende vesentlig at familien Monsen fra årsskiftet 1984/85 kontrollerte stiftelsen All Foundation hvor midlene fra Blue Range Corporation på dette tidspunkt var plassert.

All Foundation var eier av aksjene i Blue Range Corporation, mens den konkrete forvalting av selskapets midler var plassert i Lazard Brothers International Income Fund som ble forvaltet av All Trust & Banking Corporation under veiledning av Lazard. Lazard og Monsen utpekte to styremedlemmer hver i forvaltningsfondet. Lazard rapporterte fortløpende til Bjørn Bettum, slik at han selv har bekreftet i sin skriftlige redegjørelse om saksforholdet av 1994.

I oktober 1984 oppga Lazard sin forvaltning av midlene gjennom Lazard Brothers International Income Fund. Midlene ble i stedet overført til All International Fund som var eneeid av Thorleif Monsen og han fikk direkte tilgang til også denne del av utenlandsformuen.

Det er ikke sannsynliggjort at Bjørn Bettum protesterte.

2o % av CTC aksjene - innløst og verdien plassert i Harmon Corporation:

Verdien utgjorde som referert ovenfor USD 14,25 mill.

Harmon Corporation ble oppløst ved vedtak i generalforsamling den 25. oktober 1984. Generalforsamlingen ble avholdt i Tokyo og det er godtgjort at Bjørn Bettum var i Tokyo på det aktuelle tidspunkt.

Midlene fra Harmon Corporation antas å være utdelt som likvidasjonsutbytte til selskap kontrollert av Thorleif Monsen.

Oppsummert er Anders Jahres utenlandsformue, opprinnelig eiet av CTC, ved dette kommet under Thorleif Monsens kontroll. Det som pr. idag er i behold av formuen holdes av All Foundation på Cayman Island og hvor Jahreboet gjør rettslig pågang for å få midler tilbakeført.

Gjennomgangen av saksforholdet så langt har vært relatert til de begivenheter som vedrører Jahreboets anførsel om tilsidesettelse av kontroll- og tilsynsplikter fra Bjørn Bettums side, og som resulterte i at Anders Jahres utenlandsformue kom på urette hender.

I det følgende fremstilles saksforholdet i tilknytning til Jahreboets anførsel om Bjørn Bettums tilsidesettelse av **opplysningsplikten** overfor boet. Også dette saksforholdet er ubestridt fra Bettumboets side, men det anføres fra Bettumboets side at det **ikke** forelå en slik opplysningsplikt som Jahreboet hevder. Dersom det foreligger opplysningsplikt, er det enighet om at denne er misligholdt.

Etter at Anders Jahres dødsbo ble tatt under offentlig skiftebehandling ved Sandefjord skifterett den 6. april 1982 ble advokat Per Brunsvig oppnevnt som bostyrer.

Advokat Brunsvig tok umiddelbart kontakt med Bjørn Bettum for å få hans bistand i arbeidet med å skaffe oversikt over boet, herunder boets aktiva. Bettum ga til tross for sin kunnskap om forholdene ingen opplysninger til advokat Brunsvig om eksistensen av utenlandsformuen og hvor den befant seg.

Vestfold Fylkesskattestyre traff i 1983 vedtak om etterligning av Anders Jahre, i det vesentlige basert på antatt eierskap til CTC's midler i SE-banken.

Advokat Brunsvig var på det tidspunkt villedet av Bjørn Bettum, Lazard og Kindersley til å tro at Jahre ikke hadde noen eiertilknytning til midlene i SE-banken. Han valgte derfor å påklage vedtaket til Riksskattenemnda og Jahreboets eneste loddeier, Bess Jahre, uttok stevning mot staten for å få kjent vedtaket ugyldig.

Dette søksmålet ble senere trukket, men Riksskattenemnda for sin del opprettholdt Fylkesskattestyrets vedtak ved kjennelse av 2. november 1990.

Regjeringsadvokaten på vegne av skattekreditorene anmeldte i tråd med dette et krav i boet som pr. 27. desember 1990 utgjorde NOK 778.447.385,-.

Det legges til grunn at advokat Brunsvigs strategi, som følge av manglende kunnskap om utenlandsformuen, primært var å redusere boets passivaside i stedet for å søke etter aktiva ute og hjemme.
Det er fra Jahreboets side anført at dersom Bjørn Bettum på et tidlig tidspunkt av bobehandlingen hadde gitt de opplysninger han hadde om CTC-formuen, så ville denne kunne vært hjemført før Thorleif Monsen tilegnet seg den, og med langt lavere kostnader enn hva som nå er påløpt i forbindelse med boets langvarige og omfattende arbeide.

Boets hovedeksempel på dette er resultatet av søksmålet på Cayman Island om gyldigheten av stiftelsen CF. Stiftelsesdokumentet hadde en rekke klausuler som tillot utbetalinger til ikke veldedige formål og stiftelsen ble kjent ugyldig som "charitable foundation" i år 2000. Dersom Jahreboet hadde hatt kunnskap om stiftelsen og dens vedtekter kunne dette resultat vært oppnådd på 1980-tallet.

Etter at advokat Brunsvigs helse sviktet ble ny bostyrer, advokat Even Wahr-Hansen, oppnevnt i skiftesamling den 17. januar 19991.

Fortielsene og villedningen fortsatte fra Bjørn Bettums side ved at ingen opplysninger om utenlandsformuen ble gitt, til tross for gjentatt pågang og spørsmålsstilling vedrørende disse forhold fra bostyrerens side. Med den kunnskap partene nå har om hans rolle er det heller ikke fra Bettumboet bestridt at han unnlot å opplyse om hva han visste og til dels ga positivt uriktige og ufullstendige opplysninger.

Først ved Økokrims dokumentbeslag hos Bjørn Bettum i oktober 1994 fikk Jahreboet ytterligere kunnskap om hans forhold rundt håndteringen av utenlandsformuen.

Forutgående, i løpet av 1993, hadde boet også fått innsyn i deler av det samme ved den dokumenttilgang boet fikk fra Henry Mc Kinnell. Henry Mc Kinnell var Thorleif Monsens tidligere svigersønn. Jahreboet inngikk i mai 1993 avtale med Mc Kinnell om å få tilgang til relevante dokumenter i Mc Kinnells besittelse mot vederlag.

Det var dokumenttilfanget fra disse to kilder som etter Jahreboets oppfatning ga grunnlag for å utta stevning mot Bjørn Bettum i nærværende sak den 29. april 1996.

Anders Jahres dødsbo har i det vesentlige anført:

Mislighold av kontroll- og tilsynsplikter - foreldelsesspørsmålet:

Foreldelsesspørsmålet har kun betydning i forhold til Jahreboets påberopte ansvarsgrunnlag i form av misligbold fra Bjørn Bettums side av de kontroll- og tilsynsplikter han hadde på vegne av Anders Jahre. Det er i forhold til dette ansvarsgrunnlag Bettumboet har anført at ethvert krav må anses bortfalt som følge av foreldelse.

Jahreboets anførsler vedrørende anvarsgrunnlag, adekvans og erstatningsutmåling er som nevnt ikke bestridt.
Foreldelsesspørsmålet reiser 3 problemstillinger:

1. Når fant mislighold sted for de enkelte krav, d.v.s. kravet på erstatning for tap av

    a) midlene fra Blue Range Corporation
    b) midlene fra Harmon Corporation
    c) 8o % andelen av Contingency Fund, og
    d) 2o % andelen av Contingency Fund

2. Er fristavbrudd skjedd i tide etter foreldelseslovens regler, og

3. I tilknytning til pkt. 2, når hadde Jahreboet tilstrekkelig kunnskap til å foreta fristavbrudd ved anlegg av søksmål.

Misligholdstidspunktet:

Midlene fra Blue Range Corporation:

Jahreboet har anført at mislighold for disse midler fant sted i oktober 1984.

Denne del av utenlandsformuen ble, som allerede fremstilt, i 1981 overført til Blue Range Corporation som var heleiet av CF. Aksjene i Blue Range Corporation ble deretter i 1982 overført som eneste aktivum til det nystiftede All Foundation. Midlene ble deretter forvaltet i fond i Lazardsystemet frem til oktober 1984 da midlene ble overført til All International Fund som var heleiet av Thorleif Monsen.

På dette tidspunkt fant Bjørn Bettums mislighold av kontroll- og tilsynsplikten sted. Midlene var nå ute av det kontrollsystem som var etablert og hvor Lazard og Bjørn Bettum hadde avgjørende kontrollfunksjoner for å unngå at de formelt legitimerte personer, herunder Monsen, med urette tilegnet seg midler.

De facto var det nettopp dette som skjedde ved overføringen til Monsens eget fond.

Foreldelsesfristen ved mislighold i kontraktsforhold er 3 år, jfr. foreldelsesloven § 2, og løper fra det tidspunkt mislighold inntrådte, jfr. § 3, nr. 2.

Jahreboet påberoper tilleggsfrister etter samme lovs § 10 med tilsammen 10 år. Samlet foreldelsesfrist er således 13 år, og denne var ikke utløpt ved uttak av stevning den 29. april 1996.

Midlene fra Harmon Corporation:

20 % av aksjene i CTC som etter omorganiseringen i 1976 ble holdt av Thorleif Monsen som stråmann for Anders Jahre, ble innløst ved kapitalnedsettelse i 1979. Innløsningsbeløpet på USD 14,25 mill. ble overført til selskapet Harmon Corporation og forble der til dette selskapet ble oppløst den 25. oktober 1984. Midlene antas å ha blitt delt ut som likvidasjonsutbytte til annet selskap kontrollert av Thorleif Monsen.

Ved utbetalingen av likvidasjonsutbyttet fant misligholdet sted. Kravet er ikke foreldet idet det er tale om samme misligholdstidspunkt som for midlene fra Blue Range Corporation.

80 % andelen av Contingency Fund:

Selskapet CTC ble besluttet oppløst i mai 1984 og midlene i selskapet ble betalt som likvidasjonsutbytte til CF. Den 7. februar 1985 ble samlet utbytte på USD 7.814.190 overført til stiftelsen New World Trust og forholdet representerer etter Jahrebocts oppfatning mislighold av Bjørn Bettums kontrollfunksjon. Misligholdstidspunkter er dermed 7. februar 1985. Heller ikke denne del av erstatningskravet er dermed foreldet.

2o % andelen av Contingency Fund:

Høsten 1982 ble 2o % av Contingency Fund - USD 1,456 mill. - utbetalt til Thorleif Monsen, og mislighold av Bjørn Bettums kontrollplikter fant sted samtidig ved at han tillot/ikke hindret utbetalingen, slik han åpenbart pliktet som representant for eieren Anders Jahre.

Jahreboet har også for denne post anført at det gjelder en foreldelsesfrist på 13 år. Fristavbrudd fant sted **før** høsten 1995 idet boet ved avtale med Bjørn Bettum av 13. juni 1995 ble avtalt at boets krav mot ham ikke var å anse som foreldet, dersom stevning ble tatt ut innen 3 år fra avtaledato. Avtalen forutsatte at eventuelle krav ikke var foreldet allerede på avtaletidspunktet. Det heter i avtalens pkt. 3.1:

> Bjørn Bettum forplikter seg til ved denne avtale å frafalle enhver passivitets-eller foreldelsesinnsigelse vedrørende boets krav som angitt i pkt. 2, med mindre bortfall eller foreldelse allerede var inntrådt ved avtalens underskrift.
> Dette innebærer at tidsforløpet etter denne avtales inngåelse ikke skal ha betydning for eventuelle passivitets- eller foreldelsesspørsmål, forutsatt at boet innleder rettslig forfølgning mot Bjørn Bettum i løpet av de nærmest følgende 3 år.

Boet har gjort gjeldende at kravet ikke var foreldet pr. 13. juni 1995. Stevning ble deretter tatt ut innen den avtalte 3 årsfristen.

Foreldelsesavtalen er hjemlet i foreldelsesloven § 28.

Er fristavbrudd skjedd i tide:

For midlene fra Blue Range Corporation, midlene fra Harmon Corporation og 8o % andelen av Contingency Fund fant mislighold sted i 1984 og 1985. Jahreboet er berettiget til lo års forlengelse av foreldelsesfristen via tilleggsfrister etter foreldelsesloven § lo og samlet foreldelsesfrist blir derfor 13 år.

Stevning ble tatt ut den 29. april 1996 og kravene er ikke foreldet.

Vedrørende 2o % andelen av Contingency Fund medfører foreldelsesavtalen med Bjørn Bettum av 13. juni 1995, sammenholdt med kravet på 13 års foreldelsesfrist, at heller ikke dette kravet er foreldet.

Grunnlaget for Jahreboets krav på tilleggsfrister fremstilles nedenfor under avsnittet som gjengir anførslene knyttet til når boet fikk tilstrekkelig kunnskap til å gå til søksmål, jfr. foreldelsesloven § lo.

Jahreboet har også påpekt at fristavbrudd for NOK 13,5 mill. av totalkravet mot Bjørn Bettum fant sted særskilt ved forliksklage mot ham for dette beløp ved Sandefjord forliksråd datert den lo. mai 1994. Dette beløp er imidlertid absorbert av hovedkravet og går inn i dette.

Subsididært anføres at denne del av kravet under enhver omstendighet ikke er foreldet.

Kunnskapskravet - foreldelsesloven § lo:

Bettumboets hovedanførsel er at det forelå tilstrekkelig kunnskap på Jahreboets hånd **før** 13. juni 1994, som er ett år før inngåelse av foreldelsesavtalen med Bjørn Bettum, og at det derfor ikke var grunnlag for videre tilleggsfrist i 1994. Kravene er derfor foreldet idet foreldelsesavtalen bestemmer at den avtalte suspensjon av foreldelsesfristen ikke gjelder dersom krav allerede var foreldet på avtaletidspunktet den 13. juni 1995.

Jahreboet har bestridt dette, og anført at det ikke forelå nødvendig kunnskap til å reise søksmål mot Bjørn Bettum pr. 13. juni 1994. Dermed løp ny tilleggsfrist og ingen del av kravene var foreldet da avtalen om forlenget frist ble inngått. 13-årsfristen for det først misligholdte kravet (2o % andelen av Contingency Fund) utløp høsten 1995.

Det er anført at kunnskapskravet innebærer at fordringshaveren har slik tilgang på kunnskap om skyldneren og kravet at denne har oppfordring eller rimelig foranledning til å gå til søksmål med utsikt til et positivt resultat. Denne forståelsen av kunnskapskravet følger særlig av rettspraksis. Det er også påpekt at det vil dreie som en konkret og helhetlig vurdering av de samlede omstendigheter og at vurderingen må

foretas i samtid slik forholdet artet seg for boet i takt med informasjonstilgangen.

Konkret om kunnskapstilgangen og situasjonen pr. juni 1994 har Jahreboet anført:

Ved starten av bostyrer Even Wahr-Hansens arbeide i 1991 var utgangspunktet for bostyrerens etterforskning de opplysninger som fremgikk av Riksskattenemndas vedtak av 2. november. Dette vedtaket var i hovedsak truffet på grunnlag av opplysninger Anders Jahre selv hadde gitt til Valutakontoret i Norges Bank, informasjon mottatt fra SE-banken i Stockholm, opplysninger fra handelsregisteret i Panama og informasjon innhentet gjennom bevisopptak av tjenestmenn tilknyttet SE-banken og Lazard. Riksskattenemnda visste videre at aksjene i CTC i 1976 var overført til en veldedig stiftelse, men navnet på stiftelsen var ukjent.

Riksskattenemndas kjennelse omhandlet imidlertid ikke Bjørn Bettums forhold og rolle knyttet til utenlandsformuen.

På begynnelsen av 1990-tallet hadde boet fra flere hold indikasjoner på at utenlandsformuen var under Thorleif Monsens kontroll. Imidlertid forelå ingen eksakte opplysninger eller dokumenter. Bostyreren møtte i det vesentlige taushet og holdninger som tilkjennega misnøye med at noen befattet seg med forhold som innebar risiko for Anders Jahres ettermæle.

Jahreboet fikk i 1992, gjennom journalist Alf R. Jacobsen, kontakt med Thorleif Monsens tidligere svigersønn Henry Mc Kinnell. Mc Kinnell hadde indikert til Jacobsen at han hadde informasjon som kunne være viktig og kanskje avgjørende for oppsporingen av Anders Jahres utenlandsformue.

Etter lengre tids forhandlinger inngikk boet i mai 1993 avtale med Mc Kinnell om tilgang til hans dokumenter. Fra første kontakt med Mc Kinnell i 1992 og frem til avtaletidspunktet i 1993 fikk boet liten tilgang til opplysninger. Mc Kinnells holdning var at det måtte foreligge en ferdigforhandlet avtale om vederlag før han ønsket å eksponere materialet for bostyreren.

Materialet fra Mc Kinnell ble oversendt boet suksessivt i 3 forsendelser. Første forsendelse fant sted 9. mai 1993, deretter en ytterligere forsendelse i slutten av mai måned og siste forsendelse i november måned 1993.

Dokumentene fra Mc Kinnell hadde svært begrensede opplysninger om Bjørn Bettums forhold. Bostyreren hadde sin første samtale med Bjørn Bettum høsten 1993. Samtalen var unyttig. Bettum vegret seg, visste lite og sporet gjentatte ganger av samtalen. Dette gjentok seg i senere møter mellom de to.

Det er anført at Mc Kinnell-dokumentene i det vesentlige ga Jahreboet opplysninger om følgende forhold:

- at Continental Foundation var navnet på stiftelsen aksjene i CTC formelt ble overført til i 1976

- at Thorleif Monsen som stråmann for Anders Jahre opptrådte som stifter av CF i 1976

- at Thorleif Monsen i egenskap av stråmann for Anders Jahre ble "nominal owner" av 2o % av aksjene i CTC

- at Thorleif Monsen senere innløste 2o % aksjeposten i CTC og urettmessig disponerte over innløsningsbeløpet

- at midlene i CF etter Anders Jahres død var overført til en ny stiftelse ved navn All Foundation

- at Thorleif Monsen urettmessig hadde disponert over utenlandsformuen til egne formål

Ytterligere informasjon fulgte av Alf R. Jacobsens bok "Uten skrupler" som utkom i 1993. Det dreide seg likevel om journalistisk materiale og boken inneholdt svært begrensede opplysninger om Bjørn Bettums rolle i saken.

Det samme gjaldt Jacobsens tidligere utgivelse "Eventyret om Anders Jahre" fra 198o-tallet.

Jacobsens siste bok medførte imidlertid en endret holdning hos de kilder bostyreren henvendte seg til. Bokens avdekking av at Thorleif Monsen og hans krets av personer hadde beriket seg urettmessig på Jahrefamiliens midler medførte at tausheten avtok og skapte en større forståelse for boets arbeide.

Våren 1994 uttok Jahreboet søksmål i London mot en rekke personer og selskaper i Lazard og Monsensfæren. Bjørn Bettum ble ikke saksøkt ved dette søksmålet. Boet har anført at årsaken var at man ønsket et samarbeide med Bettum, at man var engstelig for at hans posisjon som saksøkt ville forkludre valget av vernteting i London og skyve saken til Cayman Island samt at boet på dette tidspunkt langtfra hadde nødvendig kunnskap om hans forhold til å gjennomføre søksmål mot ham.

Boet har hevdet at bildet ikke var komplett i forhold til noen saksøkt på det tidspunkt stevning ble tatt ut i London. Saksanlegget ville imidlertid medføre "discovery" etter de engelske prosessystemet, hvilket innebærer at alle parter har en ubetinget og strengt sanksjonert plikt til å fremlegge alt materiale partene besitter. Boets analyse av situasjonen ville derved enten bli bekreftet eller avkreftet.

Jahreboet har i sammenheng med Bettumboets anførsel under hovedforhandlingen om at tilstrekkelig kunnskap forelå til å reise søksmål pr. 13. juni 1994 forøvrig påpekt at Bettum selv i tilsvaret av 1. oktober 1996 har karakterisert boets saksfremstilling i stevningen som basert på en lang rekke hypoteser. Denne karakteristikk står i sterk kontrast til hva som nå hevdes om boets kunnskapsgrunnlag allerede 2 år før stevningen ble tatt ut.

Etter saksanlegget i London har Jahreboet mottat betydelig og avgjørende materiale til belysning av Bjørn Bettums funksjoner knyttet til håndteringen av Jahres utenlandsformue.

Dette gjelder materiale fra All Foundation og fra Bjørn Bettums arkiver i forbindelse med Økokrims beslag hos Bettum.

Et helt sentralt dokument mottatt fra All Foundation var CF's stiftelsesdokument som ble fremlagt under søksmålet på Cayman Island, anlagt i september 1994. Tidligere hadde boet bare vært kjent med et kort utdrag av stiftelsens formålsparagraf.

Økokrims beslag hos Bjørn Bettum ble gjennomført i oktober 1994.

Disse dokumenter ble avgjørende for saksanlegget mot Bjørn Bettum. Bostyreren har bekreftet dette i sin partsforklaring og forholdet representerer Jahreboets hovedanførsel til spørsmålet om når boet hadde tilstrekkelig kunnskap til å gå til søksmål med utsikt

til positivt resultat.

Via Økokrimbeslaget fikk boet særlig kunnskap om alle forhold rundt Rådhusgaven, med unntak for korrespondansen til og fra Norges Bank. Dette omfatter samtlige av Bettums utallige notater og omfattende korrespondanse med medhjelpere i Sverige, Paris, Panama og Londen. Beslaget viser også dokumenter som beskriver bakgrunnen for, forberedelsene og gjennomføringen av antedateringene i CTC som var nødvendige for å dokumentere at Rådhusgaven var gyldig besluttet m.v.

Beslaget inneholdt også alt materiale som viser omorganiseringen av CTC over årene 1974 til 1976 samt Bjørn Bettums saksredegjørelse av 16. november 1994. Dokumentene avdekker hans rolle og hans kunnskap om utenlandsformuen, hvorledes denne ble forsøkt skjult og hvorledes disposisjonene medførte at midlene kom i urette hender, alt med Bjørn Bettum som deltager i prosessen.

Endelig avdekket beslaget en avtale av 12. februar 1985 mellom Bjørn Bettum og Thorleif Monsen om betydelig økonomisk kompensasjon til Bettum.

Jahreboets konklusjon er at boet først ved årsskiftet 1994/95 hadde tilstrekkelig kunnskap om fordringen mot Bjørn Bettum til at boet hadde rimelig foranledning til å gå til søksmål med utsikt til å vinne frem, slik det ble gjort ved stevningen av 29. april 1996. Kunnskapen var et resultat av boets eget arbeide. Bjørn Bettum hadde i hele tidsperioden motarbeidet boets innhenting av informasjon. Dette forhold må hensyntas ved vurderingen av boets fremdrift.

Ingen av kravspostene var dermed foreldet ved saksanlegget, jfr. foreldelseslovens regler om tilleggsfrister og foreldelsesavtalen mellom boet og Bjørn Bettum av 13. juni 1995.

Bjørn Bettums mislighold av opplysningsplikten overfor Anders Jahres dødsbo:

Jahreboet gjør gjeldende at Bjørn Bettum ga misvisende og mangelfull informasjon/opplysninger til boet fra 1982 og frem til hans død 16. mars d.å.

Hvorledes Jahreboet ble unndratt Bjørn Bettums kunnskap er fremstilt foran under

avsnittet om den historiske utvikling av saksforholdet. Dette faktum er ikke bestridt og fremstillingen er i det vesentlige dekkende for Jahreboets anførsler om hvorledes Bjørn Bettum unndro boet fra kunnskap og hvorledes det ble gitt ufullstendige og til dels misvisende opplysninger.

Ansvarsgrunnlaget forutsetter logisk at det forelå en opplysningsplikt for Bjørn Bettum vis a vis Jahreboet. Jahreboet har nærmere begrunnet dette.
Det er vist til at boåpningen representerer et generalbeslag som innebærer at boet trådte inn i alle Anders Jahres rettigheter av økonomisk art, og de av hans beføyelser som er nødvendige for å gjøre disse rettighetene gjeldende. Denne rettslige situasjon er senere kodifisert gjennom dekningsloven § 2-2 som også får anvendelse på insolvente dødsbo (som Anders Jahres dødsbo), jfr. samme lovs § 2-1.

Generalbeslaget innebærer at boet "går i Anders Jahres juridiske sko", d.v.s. at boet har overtatt samtlige av Anders Jahres rettigheter.

I forlengelsen av dette synspunkt er påpekt at det er uomtvistet at det forelå en kontrakt/avtale mellom Anders Jahre og Bjørn Bettum om kontroll og tilsyn med de arrangementer som ble etablert for utenlandsformuen, slik at de legitimerte - særlig stråmannen Thorleif Monsen - ikke skulle få tilgang til noe av midlene.

Boet har som Anders Jahres rettsetterfølger de samme rettigheter som Anders Jahre etter kontrakten hadde i forhold til Bjørn Bettum. Dette innebærer at den rett til opplysninger Anders Jahre hadde i forhold til Bettum , ved Jahres død ble overført til hans dødsbo ved skifterett og bobestyrelse.

Boet er et selvstendig rettssubjekt og er ikke bundet av Anders Jahres disposisjoner i større grad enn han selv ville vært. Boet er derfor berettiget til eventuelt å omgjøre Anders Jahres disposisjoner, herunder omgjøre en eventuell beslutning som måtte være truffet om at Bjørn Bettum skulle bevare taushet om utenlandsformuen. Han kan derfor ikke møte boet med den innsigelse at han har avtalefestet taushetsplikt. Han hadde uansett ikke taushetsplikt overfor Jahre og således heller ikke overfor hans dødsbo. Bjørn Bettums plikt til å videreformidle relevant informasjon til boet følger videre av den alminnelige lojalitets- og opplysningsplikt i kontrakt begrunnet i hans oppdrag for Anders Jahre og hans posisjon ved de begivenheter som fant sted rundt utenlandsformuen.

Bjørn Bettum forsto at midlene tilhørte Anders Jahre og dette forhold utløste opplysningsplikt. Til tross for en serie forespørsler og henvendelser fra bostyreren gjennom en årrekke valgte han å villede ved å holde tilbake informasjon samt gi direkte misvisende opplysninger. Det er etter Jahreboets oppfatning åpenbart at han forsto at kunnskapen han satt på var avgjørende for boets arbeid med å oppspore Jahres midler.

Det er fra Bettumboets side vist til at Bjørn Bettum ikke hadde plikt til å gi opplysninger som kunne inkriminere ham selv, og at dette i stor grad ville vært tilfelle dersom han hadde fremstått og redegjort for alle forhold.
Jahreboet har imøtegått denne rettsoppfatning. Vernet mot selvinkriminering er anerkjent og har lang tradisjon innenfor straffcrettspleien, jfr. strpl. § 167 om siktedes rett til straffritt å gi uriktig forklaring og vitner og mistenktes rett til å nekte å gi forklaring for politiet, jfr. § 230, samt vitners rett til å nekte å gi forklaring for retten dersom deres forklaring kan medføre straffeansvar.

Tilsvarende hjemler foreligger ikke i privatrettslige forhold. Selvinkrimineringsforbudet regulerer kun forholdet mellom borger og stat, ikke forholdet mellom to private parter, i kontraktsforhold eller forøvrig. Bettumboets analogisering fra strafferetten til kontraktsretten er derfor uholdbar.

I den foreliggende sak dreier det seg om opplysningsplikter overfor en kontraktspart som Bjørn Bettum frivillig har inngått avtale med. Det er ikke opplysningsplikter overfor et statlig forvaltningsorgan slik at selvinkrimineringsforbudet gjelder. Dersom det i erstatningsforhold skal være slik at skadevolderen ikke har opplysningsplikt dersom den skadevoldende handling er så grov at hans forklaring vil utsette ham for straff, men full forklaringsplikt dersom dette ikke er tilfelle, vil det representere en uforståelig og helt urimelig løsning.

At Bjørn Bettums opplysninger til boet ville utsatt ham for mulig straffeansvar, kan dermed ikke frita ham for opplysningplikt.

Dersom det konstateres opplysningsplikt, har Bettumboet ikke bestridt at denne ble misligholdt med det erstatningsansvar til følge som Jahreboet har påstått.

Tapsberegningen:

Tapsberegningen er ikke bestridt. Det er heller ikke bestridt at de to ansvarsgrunnlag, mislighold av kontroll- og tilsynsplikter samt mislighold av opplysningsplikt, hver for seg og samlet leder til det påståtte økonomiske ansvar.

Jahreboets erstatningskrav består av 3 tapsposter:

- verdien av Anders Jahres utenlandsformue

- differansen mellom skattekravets morarente og ordinær avkastning på samme beløp, og
- boets meromkostninger grunnet Bjørn Bettums forhold.

Verdien av Anders Jahres utenlandsformue:

Beregningen er basert på verdien av den formue som Anders Jahre hadde i utlandet på det tidspunkt Bjørn Bettum misligholdt sine plikter etter Jahres død. Misligholdet av kontroll- og tilsynspliktene fant sted i perioden 1982 - 1985.

Beregningen av tapet er for det første foretatt ved at de enkelte tapsposter er rentcberegnet (avsavnsrentc beregnet som gjennomsnitt av kassekredittrenten i perioden) frem til 7. februar 1985 da siste mislighold av noen tapspost fant sted.

Dette gir for de enkelte tapsposter følgende beregning:

2o % andelen av Contingency Fund:

Hovedstol USD 1.456 ooo. Avsavnsrente USD 314.639. Totalt USD 1.77o.639.

80 % andelen av Contingency Fund:

Hovedstol USD 4.814.190. Avsavnsrente er null. Totalt USD 4.814.190.

Blue Range Corporation:

Hovedstol USD 92.394.828. Avsavnsrente USD 33.851.177. Totalt USD 95.780.005.

Harmon Corporation:

Hovedstol USD 14.250.000. Avsavnsrente USD 11.358.458. Totalt USD 25.608.458.
Totalverdien pr. 7. februar 1985 utgjorde således **USD 127.973.292.**

Som følge av forliket mellom Jahreboet og Lazard og Kindersley vinteren 2002, hvor boet pr. 31. juli s.å. ble tilført USD 41,4 mill., har boet videre foretatt en felles beregning av avsavnsrente fra 7. februar 1985 til 1. august d.å. Rentebeløpet utgjør USD 120.820.510.

Verdien av formuen pr. 31. juli d.å. utgjør dermed samlet USD 248.793.862.

Fra dette beløp har boet trukket forliksbeløpet på USD 41.500.000 og verdien av formuen etter nevnte fradrag utgjør pr. 31. juli d.å. USD 207.293.862.

Deretter er det foretatt en beregning av avsavnsrente av dette beløp frem til 31. august Beløpet utgjør USD 2.358.185 og gir en samlet totalverdi pr. samme dato på USD 209.652.046.

De midler som pr. idag er i behold av utenlandsformuen ligger hovedsaklig i stiftelsen All Foundation på Cayman Island. Boets rett til disse midler er gjenstand for lokal rettslig prøvelse. Bjørn Bettum har opplyst at stiftelsen pr. august 1999 hadde verdier for USD 66 mill. Boet besitter ikke nå eksakte opplysninger om dagsverdien av All Foundations midler. Det antas imidlertid at verdien er i regionen USD 75 mill.

Dette beløp er for nærværende sak trukket ut av Jahreboets krav mot Bjørn Bettum og påstandsbeløpet vedrørende utenlandsformuen blir således **USD 134.652.046.**

Kemneren i Sandefjord har meldt et skattekrav i boet som etter ajourført morarenteberegning pr. 31. august d.å. utgjør NOK 1.407.567.452.

Jahreboet må betale den beregnede morarente. Boet har derfor beregnet differansen mellom den avsavnsrenten som er lagt inn i kravet ovenfor og skyldig morarente. Differansen kreves erstattet av Bjørn Bettum fordi den er påført boet ved det mislighold av kontroll- og tilsynsplikter, samt opplysningsplikten, som han har begått overfor boet.

Differansen utgjør NOK 491.573.454, som inngår i boets påstand.

Jahreboet har endelig krevd kompensasjon for de merkostnader knyttet til bobehandling som Bjørn Bettums mislighold har foranlediget.

Kravet utgjør NOK 68.500.000.

Kostnader i advokat Per Brunsvigs periode som bostyrer er holdt utenfor kravet.

Jahreboet har vedgått at det er vanskelig å fastslå eksakt hvilke merkostnader Bjørn Bettums forhold har påført boet, og kravet er derfor i det vesentlige beregnet skjønnsmessig.

Saksomkostninger forbundet med nærværende søksmål er holdt utenfor beregningen.

For perioden 1991 - 1993 utgjør de totale bobehandlingskostnader avrundet NOK 16 mill. Disse kostnader er påført som en direkte følge av Bjørn Bettums forhold og kreves dekket i sin helhet.

Pr. 1994 var de totale kostnader kommet opp i avrundet NOK 36 mill. Hoveddelen av disse kostnader refererer seg til London-søksmålet i 1994 og til søksmål samme år på Cayman Island hvor boet ble saksøkt. Boet har gjort et skjønnsmessig fradrag på NOK 25 mill. og krever NOK 11 mill. dekket av Bettumboet.

For perioden 1995 - 2001 har boet skjønnsmessig trukket ut kostnader til søksmålene på Cayman Island og ved Sandefjord tingrett.

Søksmålet ble ved stevningen anlagt mot tre saksøkte, Lazard, Kindersley og Bettum som solidarisk ansvarlige for Jahreboets samlede tap.

Etter prinsippet i skadeserstatningsloven § 5-3, nr. 2, vil fordelingen av ansvaret mellom solidarskyldnere bero på hvor stor innvirkning på skaden den enkelte har hatt. Jahreboet hevder at Bjørn Bettum er å anse som hovedskadevolder, og at den alt vesentlige skyld for boets tap er hans.

Begrunnelsen for boets oppfatning på dette punkt er fremstilt foran.

Forliksbeløpet med Lazard og Kindersley på USD 41,5 mill. er derfor etter Jahreboets syn representativt for den innvirkning på skaden som disse to saksøkte har hatt. Det er gjort fradrag for forliksbeløpet ved beregningen av utenlandsformuens nåverdi. Noe ytterligere fradrag i tapsberegningen for de engelske saksøktes forhold er derfor ikke aktuelt, jfr. prinsippene i skadeserstatningsloven § 5-3, 2. ledd og gjeldsbrevloven § 2, 2. ledd.

Anders Jahres dødsbo har nedlagt slik

p å s t a n d :

1. Bjørn Bettums dødsbo dømmes til å betale til Anders Jahres dødsbo under offentlig skifte ved Sandefjord skifterett:

   - motverdien av USD 134.571.877 med tillegg av rentetapserstatning tilsvarende gjennomsnittlig kassekredittrente fra 1. september 2002 frem til betaling skjer,

   - NOK 491.573.454 med tillegg av rentetapserstatning tilsvarende gjennomsnittlig kassekredittrente fra 1. september 2002 frem til betaling skjer,

   - NOK 68.500.000 med tillegg av renter etter forsinkelsesrenteloven fra 1. januar 2002 til betaling skjer.

2. Bjørn Bettums dødsbo dømmes til å betale sakens omkostninger til Anders Jahres dødsbo under offentlig skifte ved Sandefjord skifterett med tillegg av renter etter forsinkelsesrenteloven fra forfallsdag til betaling skjer.

Bjørn Bettums dødsbo har i det vesentlige anført:

Fremstilling todeles på tilsvarende måte som for Jahrebocts anførsler.

Bjørn Bettums mislighold av påstått opplysningsplikt overfor Anders Jahres dødsbo:

Bettumboet bestrider at slik opplysningsplikt forelå.
Dersom det likevel fastslås av retten at opplysningsplikt forelå, bestrides ikke at denne er misligholdt og at misligholdet står i erstatningsmessig sammenheng med det økonomiske tap Jahreboct har påstått.

Bettumboet har imøtegått Jahreboets anførsel om at det foreligger en kontraktsmessig opplysningsplikt. Det bestrides ikke at Bjørn Bettum hadde en slik opplysningsplikt overfor Anders Jahre selv, men det forelå ingen gjensidig bebyrdende kontrakt mellom de to som Jahreboet har trådt inn i etter Jahres død. Dette må få betydning ved vurderingen av Bjørn Bettums plikter etter avtalen med Anders Jahre.

Den kontrakt Jahreboet legger til grunn at forelå er heller ikke dokumentfestet og en fortolkning av Bjørn Bettums plikter overfor Anders Jahre kan ikke naturlig forstås slik at retten til informasjon ble overført til Jahres dødsbo.

Anders Jahres klare forutsetning var at det skulle bevares taushet. Jahrebocts påstand om at Bjørn Bettum skulle bryte denne forutsetning og eksponere de forhold overfor Jahres dødsbo som Jahre selv forutsatte hemmeligholdt, kan ikke utledes av noe avtaleforhold mellom Anders Jahre og Bjørn Bettum.

Bettumsboets konklusjon er således at opplysningsplikt i kontraktsforhold ikke forelå.

Spørsmålet er dernest om opplysningsplikt kan utledes av alminnelige rettsregler forøvrig.

Det er enighet mellom partene om at det ikke eksisterer noen lovhjemmel som pålegger Bjørn Bettum opplysningsplikt overfor Jahreboet om Anders Jahres utenlandsformue. Jahreboet bragte aldri Bjørn Bettum i en vitneposisjon som ville utløst forklaringsplikt. Selv da ville han kunne blitt fritatt etter tvistemålslovens regler om unntak fra forklaringsplikt, jfr. særlig tvistemålsloven § 2o8 som gir et vitne rett til å nekte å svare på spørsmål som kan utsette vitnet for straff eller tap av borgerlig aktelse.

Det er svært nærliggende å legge til grunn at dersom Bjørn Bettum hadde snakket, så ville han inkriminert seg selv i forhold til flere straffebud. Det er tale om medvirkning til skatteunndragelser, dokumentfalsk, underslag og utroskap, dersom Jahreboets faktumbeskrivelse er korrekt. Under enhver omstendighet ville han tapt borgerlig aktelse.

Jahreboet er ingen offentlig myndighet og boets underbygging av opplysningsplikten ved analogisering med forklaringsplikten vis a vis offentlige myndigheter er uriktig. Den som mottar spørsmål fra et boorgan har ikke større plikt til å svare enn hva vedkommende ville hatt overfor andre private. Det er vesentlig ved bedømmelsen av spørsmålet om opplysningsplikt for Bjørn Bettum at det dreier seg om forhold mellom to private parter og hvor det ikke foreligger noen kontraktshjemmel for å avkreve opplysninger.

Bettumboet har videre imøtegått Jahreboets oppfatning om at selvinkrimineringsforbudet i norsk rett ikke gjelder mellom private parter. Bettumboet mener at også dette rettslige aspekt kan påberopes og gir grunnlag for å avise påstanden om opplysningsplikt.

I denne forbindelse er hovedpoenget, slik Bettumboet ser det, at borgerne selv overfor domstolene er berettiget til å tie, dersom besvarelse av de spørsmål som stilles vil kunne utsette vedkommende for straff eller tap av borgerlig aktelse. Slik er reglene for vitner. For siktede i straffesaker går vernet enda lenger idet man også straffritt kan forklare seg uriktig overfor domstolene, dersom man ikke benytter seg av retten til å

nekte å avgi forklaring. Når borgerne har en slik adgang overfor domstolene, må prinsippet desto mer gjelde mellom parter i privatrettslige forhold.

Konklusjonen fra boets side er at Bjørn Bettum, slik de konkrete omstendigheter var, ikke hadde opplysningsplikt etter alminnelige regler. Som påpekt innledningsvis hadde han heller ingen opplysningsplikt i kontraktsforhold.

Foreldelsesspørsmålet:

Problemstillingen er relatert til ansvarsgrunnlaget mislighold av kontroll- og tilsynsplikter. Foreldelsesinnsigelsen er Bettumboets eneste innsigelse mot dette ansvarsgrunnlag.

Det reises 3 hovedspørsmål:

- foreligger hjemmel for tilleggsfrister
- fra hvilke tidspunkt løper foreldelsesfristen for de enkelte krav, og
- er foreldelsesfristen avbrutt i tide.

Spørsmål om hjemmel for tilleggsfrister:

Det er på dette punkt fra Bettumboets side vist til at den tidligere foreldelseslov hadde bestemmelse i lovens § 9 om tilleggsfrist på ett år når fordringshaveren døde, forsvant, ble umyndiggjort eller kom under konkursbehandling. Ytterligere hjemmel for tilleggsfrist i disse tilfelle forelå ikke. En tilsvarende regel ble ikke tatt inn i den nye foreldelsesloven av 18. mai 1979, idet lovgiveren mente at dette var omstendigheter som var så sterkt knyttet til fordringshaverens eget forhold at det var naturlig at han selv bar risikoen for dem.

I forarbeidene til loven av 18. mai 1979 (proposisjonen side 63) ble det påpekt at det var "mulig" at bestemmelsen om tilleggsfrister i § 10, nr. 1, ville få anvendelse i enkelte av

de tilfelle som var regulert i den tidligere lovs § 9. Matningsdal har i sin kommentarutgave uttalt at det er tvilsomt om slike tilfelle overhodet kan tenkes.

Bettumboet har reist dette lovanvendelsesspørsmål og anført at dersom den forståelse det er vist til hos Matningsdal er korrekt, så har Jahreboet ikke hjemmel for de tilleggsfrister på tilsammen lo år som er påberopt. I så fall er alle krav utvilsomt foreldet allerede på dette grunnlag.

Fra hvilke tidspunkt løper foreldelsesfristen for de enkelte krav:

Bettumboet gjør gjeldende at midlene fra **Blue Range Corporation (8o % av CTC)** gikk ut av Jahrekretsens kontroll senest i desember måned 198o da de fysiske aksjebrev til CTC ble utlevert fra Lazard. All Trust & Banking Corporation overtok videre forretningsførselen høsten 198o og misligholdet av Bjørn Bettums kontroll- og tilsynsplikter skjedde da. At Bjørn Bettum opprettholdt sin posisjon som adviser i Thorleif Monsens familiestiftelse All Trust frem til 1985 har mindre betydning så lenge Monsen allerede hadde etablert sin kontroll over Jahres midler. Heller ikke har det betydning av Bettum opprettholdt sin posisjon som innsatt testamentsfullbyrder for Monsen frem til 1985, som er det tidspunkt da det er sannsynlig at Thorleif Monsen og Bjørn Bettum fjernet seg fra hverandre.

Misligholdet vedrørende **midlene i Harmon Corporation (2o % av CTC)** fant sted i 1979 da denne aksjeposten i CTC ble innløst ved kapitalnedsettelse og midlene overført til Monsenselskapet Harmon Corporation.
Midlene i **Contingency Fund** ble i sin helhet flyttet i All Trust & Banking Corporation i 198o og misligholdet fant sted ved dette. Midlene kom ved flyttingen ut av Lazard og Bettums kontroll.

Etter dette var samtlige krav foreldet senest i 1993. På dette tidspunkt hadde ingen fristavbrudd funnet sted.

Er fristavbrudd foretatt i tide:

Retten oppfatter at denne drøftelse fra Bettumboets side har som forutsetning at misligholdene tidfestes som anført av Jahreboet.

Bettumboet har for drøftelsen tatt utgangspunkt i foreldelsesavtalen mellom Jahreboet og Bjørn Bettum av 13. juni 1995, som bestemmer i pkt. 3.1. at foreldelsesfristen suspenderes i 3 år fra avtaledato, **med mindre bortfall eller foreldelse allerede var inntrådt ved avtalens underskrift** (uthevet her).

I samsvar med foreldelseslovens regler om tilleggsfrister på ett år av gangen blir det dermed avgjørende om Jahreboet pr. 13. juni 1994 allerede hadde tilstrekkelig kunnskap om skyldneren og fordringen til å gå til søksmål. Hadde Jahreboet det, vil boet ikke ha krav på den siste tilleggsfristen på ett år, og kravene var foreldet ved inngåelse av foreldelsesavtalen den 13. juni 1995.

Bettumboet har hevdet at Jahreboet pr. 13. juni 1994 hadde slik nødvendig kunnskap.

På dette punkt er anført at meget lange undersøkelser om Bettums rolle allerede var gjennomført, og Jahreboet visste tilstrekkelig til å gå til søksmål. Jahreboet hadde lenge møtt motstand og ikke fått forventede svar. Nærmer aksjon burde derfor vært tatt fra boets side.

Konkret hadde Jahreboet den 10. mai 1994 tatt ut forliksklage mot Bjørn Bettum for Sandefjord forliksråd i anledning påståtte uberettigede uttak fra utenlandsformuen på NOK 12,5 mill. Boet hadde derfor kjennskap til Bjørn Bettums tilgang til midlene, eller i alle fall noe av disse.

Pr. 13. juni 1994 hadde boets organer allerede vært i besittelse av Riksskattenemndas kjennelse siden 1990. CF's formål hadde vært kjent siden 1980. Boet hadde advokat Brunsvigs kunnskap via hans arkiver og hadde informasjonen som var alminnelig kjent fra journalist Alf R. Jacobsens to bøker. Den siste utkom i 1993.

Videre inngikk Jahreboet dokumentavtalen med Mc Kinnell den 3. mai 1993. Det har formodningen mot seg at boet inngikk denne avtalen, som innebar en forpliktelse for boet til å yte svært betydelige vederlag for dokumentene, uten at boet visste mye om

innholdet i de dokumenter avtalen gjaldt.

Alle dokumenter knyttet til Mc Kinnell-avtalen ble dessuten oversendt bostyreren i løpet av 1993. Siste forsendelse var av november 1993. Jahreboet har uttalt at dette var vesentlig dokumenter for opplysning av saken, herunder Bettums forhold.

Londonsøksmålet som ble anlagt i mai 1994 avdekker også at Jahreboet hadde betydelig kunnskap om utenlandsformuen og dens skjebne. Årsaken til at Bjørn Bettum ikke ble saksøkt i dette søksmålet var ifølge bostyrerens partsforklaring at boet ikke ville "forkludre" vernetinget i London og at man ønsket samarbeide med Bettum.

Det konfidensialitetspåbud som bostyreren har fra domstolen på Cayman Island i forhold til Mc Kinnell-dokumentene ble pålagt ham i 1995, og kan heller ha representert noen hindring for uttak av stevning mot Bjørn Bettum våren 1994.

Den forsinkelse med søksmålet mot Bettum som gjøres gjeldende var ikke foranlediget av at Jahreboet hadde for liten kunnskap til å reise søksmål, men at Jahreboet subjektivt vurderte det slik uten at dette var nødvendig og i samsvar med kunnskapskravet i foreldelsesloven § 10.

Denne feil må Jahreboet selv bære risikoen for.

Bettumboet har endelig anført at Jahreboet må identifiseres med Bess Jahre i spørsmålet om tilstrekkelig kunnskap forelå pr. 13. juni 1994. Bess Jahre er eneste loddeier i Anders Jahres dødsbo, og den kunnskap hun hadde må boet også anses å ha hatt. Bettumboet legger til grunn at Bess Jahre kjente til at Anders Jahre hadde en utenlandsformue og at denne på 1970-tallet ble håndtert og plassert i regi av blandt andre Lazard og Thorleif Monsen. Dette følger særlig av at Bess Jahre hadde deltatt på det såkalte Midtåsen-møtet den 23. oktober 1976 hvor reorganisering av CTC-formuen med overføring av aksjene til en veldedig stiftelse ble grundig drøftet og besluttet.

Forutgående for møtet hadde Bjørn Bettum sendt Bess og Anders Jahre et memorandum hvor alle detaljer vedrørende reorganiseringen var forklart.
At hun må ha hatt vesentlig kunnskap følger forøvrig av hennes langvarige ekteskap med Anders Jahre.

Anførslene leder etter Bettumboets oppfatning til at det er tilstrekkelig sannsynliggjort at

Jahreboet, i foreldelseslovens forstand, hadde tilstrekkelig kunnskap til å foreta fristavbrudd ved stevning mot Bjørn Bettum **før** 13. juni 1994. Dette ble ikke gjort og kravene var dermed foreldet ett år senere og omfattes derfor ikke av den suspensjon av fristen som ble avtalt mellom Jahreboet og Bjørn Bettum den 13. juni 1995.

Bjørn Bettums dødsbo har nedlagt slik

p å s t a n d :

Bjørn Bettums dødsbo frifinnes og tilkjennes saksomkostninger med tillegg av høyeste lovlige forsinkelsesrente fra forfall og til betaling skjer.

Retten bemerker:

Retten behandler først spørsmålet om når foreldelsesfristen startet å løpe for de enkelte krav.

Det dreier seg om kravene knyttet til midlene i Blue Range Corporation (8o % av aksjene i CTC), midlene i Harmon Corporation (2o % av aksjene i CTC), 8o % andelen av Contingency Fund og 2o % andelen av Contingency Fund.

Blue Range Corporation:

Partene er i det vesentlig enige om faktum og retten legger til grunn som anført av Jahreboet at de midler det under denne kravspost dreier seg om i 1981 ble overført fra CTC til selskapet Blue Range Corporation, som på det tidspunkt var datterselskap av CTC. Aksjene i Blue Range Corporation ble deretter i oktober 1982 overført som eneste aktivum til Thorleif Monsens nyopprettede stifelse All Foundation.

Denne del av formuen ble forvaltet av fond i Lazard-systemet frem til oktober 1984 da midlene ble overført til All International Fund som var heleiet av Thorleif Monsen.

Jahreboet har hevdet at det var på dette tidspunkt Bjørn Bettums mislighold fant sted, og at foreldelsesfristen da begynte å løpe, jfr. foreldelsesloven § 3, nr. 2.

Begrunnelsen fra Jahreboets side er at Lazard/Bettum var kjent med at midlene tilhørte Anders Jahre og med sine kontrollplikter. Så lenge midlene var styrt av Lazards forvaltningsfond lå derfor kontrollen hos de som hadde påtatt seg plikter overfor Anders Jahre og ingen kunne mot kontrollørenes vilje tilegne seg noen del av formuen.

Retten er enig i at dette ble radikalt annerledes på det tidspunkt midlene fra Blue Range Corporation ble overført til Thorleif Monsens heleide fond All International Fund. Forsåvidt er dette selvforklarende idet Lazard/Bettum fra dette tidspunkt ikke lenger har medbestemmelsesrett i disponeringsspørsmål. I 1985 forlot også Bjørn Bettum sin funksjon som adviser i Monsens familietrust All Trust og han fratrådte som innsatt testamentsfullbyrder for Thorleif Monsen. Jahreboet har anført at dette åpenbart innebar at noe skjedde mellom de to som reduserte Bjørn Bettums innflytelse. På samme tidspunkt ble også den fremlagte avtale om økonomisk kompensasjon fra Monsen til Bettum inngått (12. februar 1985).

Bettumboet har for sin del hevdet at flyttingen av aksjene i CTC ut fra Lazard i 1980 innebar at Jahres medhjelpere mistet kontrollen over formuen. Det samme ble resultatet av at All Trust & Banking Corporation samme år angivelig overtok forretningsførselen vedrørende de aktuelle midler.

Rettens problem ved bedømmelsen av faktum i saken er at begivenhetene slik de er fremstilt av partene knytter seg til funn av dokumenter og fortolkning av disse. Aktørene er til dels døde og det som foreligger av bevisopptak og notater fra de involverte er preget av at saksforholdet er gammelt og at erindringene fra det tidsrom det dreier seg om er delvis utvisket.

Retten kan på det grunnlag som foreligger ikke se at selve flyttingen av aksjene fra Lazard til personer utenfor Anders Jahres krets av hjelpere/kontrollører i seg selv innebar at midlene uten videre ble tilgjengelige for besitteren. Aksjebrev gir ikke rett til å disponere over et selskaps midler fra dag til dag. Aksjonæren, eller den som er legitimert som aksjonær, kan styre selskapet ved avgjørende beslutninger om

utbytteutdeling, oppløsning m.v., men kun etter beslutninger i relevante selskapsorganer.

Lazard Brothers International Income Fund som forvaltet midlene fra Blue Range Corporation fra høsten 1980 skulle etter de vedtak som var truffet styres av den nye banken All Trust & Banking Corporation. Denne banken var stiftet av Thorleif Monsen og Lazard i fellesskap, og det er således ikke sannsynlig at noen kunne treffe dramatiske beslutninger om utbytteutdeling, oppløsning e.a. i CTC uten at fondsforvalteren ble kjent med beslutningene og kunne gripe inn.

Samme synspunkt gjør seg gjeldende i forhold til forvaltningen av Lazardfondets midler. Jahreboets anførsel om at All Trust & Banking Corporation var stiftet av Monsen og Lazard i fellesskap er ikke imøtegått, heller ikke at Lazard Brothers Internation Income Fund skulle styres av nevnte bank.

Det legges etter dette til grunn at bestyrelsen av fondet hvor midlene fra Blue Range Corporation var plassert, var en fellesfunksjon mellom Monsen og Lazard. Det er derfor ikke sannsynlig at midlene kom ut av kontroll før overførselen til All International Fund i oktober 1984.

Ved denne overførselen fant dermed misligholdet sted, og foreldelsesfristen ble påbegynt.

Harmon Corporation:

Denne del av erstatningskravet gjelder 20 % av aksjene i CTC som etter omorganiseringen i 1976 ble holdt av Thorleif Monsen som stråmann for Anders Jahre. Dette er tilstrekkelig sannsynliggjort.

Aksjeposten ble innløst i 1979 og innløsningsbeløpet ble overført til Monsenselskapet Harmon Corporation. Midlene forble i dette selskapet inntil det ble oppløst ved generalforsamlingsbeslutning den 25. oktober 1984. Som likvidasjonsutbytte ble verdien av selskapet overført til det selskap i Monsengruppen som eiet Harmon Corporation. Navnet på det aksjeeiende selskap er ikke kjent.

Jahreboet har gjort gjeldende at Bjørn Bettums mislighold fant sted ved oppløsningen av Harmon Corporation og at foreldelsesfristen løper fra dette tidspunkt.

Bettumboet har anført at misligholdet fant sted ved kapitalnedsettelsen i CTC i 1979 idet Thorleif Monsen da fikk den faktiske kontroll via Harmon Corporation.

Ingen av partene har vært i stand til å redegjøre for de nærmere omstendigheter omkring den tidsperiode fra 1979 til 1984 da innløsningsbeløpet ble holdt av Harmon Corporation. Det legges til grunn at det var kjent for samtlige involverte, herunder Thorleif Monsen, at midlene var ment som en avsetning for Bess og Anders Jahre. Dette forhold var bl.a. fremme på Midtåsenmøtet den 23. oktober 1976 hvor de sentrale aktører, bl.a. Thorleif Monsen, var til stede.

Utgangspunktet for vurderingen er på denne bakgrunn at øremerkingen av midlene var kjent for Monsen. Det var også avgjørende vesentlig at midlene ble holdt kamuflert så godt som mulig, og det er derfor ikke tilstrekkelig til å konstatere at midlene var ute av kontroll at de befant seg i et av Monsens selskaper. Slik strategien var hos de impliserte måtte forbindelseslinjen til CTC og Anders Jahre dekkes over og Monsen var et vesentlig redskap i denne forbindelse.

Etter oppløsningen av Harmon Corporation har det derimot ikke vært mulig å etterspore midlene, og det anses tilstrekkelig sannsynliggjort at kontrollen ble mistet senest på dette tidspunkt.

Da fant misligholdet sted og foreldelsesfristen startet.

Contingency Fund:

80 % av Contingency Fund ble betalt som likvidasjonsutbytte til CF ved oppløsningen av CTC i mai 1984. Disse midler ble deretter, den 7. februar 1985, overført til Monsenstiftelsen New World Trust.

Jahreboet har gjort gjeldende at misligholdet da fant sted.

20 % av Contingency Fund ble utbetalt til Thorleif Monsen høsten 1982 og det er

Jahreboets anførsel at misligholdet da fant sted.

Bettumboet har hevdet at hele Contingency Fund ble flyttet til All Trust & Banking Corporation i 1980 og at mislighold derfor fant sted allerede på dette tidspunkt.

Som påpekt ovenfor er det rettens vurdering at flyttingen av midler i 1980 til Lazard Brothers International Fund, som ble forvaltet av den nyopprettede All Trust & Banking Corporation - eiet av Monsen og Lazard - ikke innebar at midlene var ute av Lazards og Bjørn Bettums kontroll. Dette skjedde først ved den senere overføring av forvaltningen til All International Fund, hvor Thorleif Monsen etter det som er opplyst var eneeier.

I mangel av annet grunnlag legges derfor til grunn at mislighold av begge andeler av Contingency Fund skjedde henholdsvis i 1982 og 1985, som hevdet av Jahreboet.

Fristavbrudd:

Fristavbrudd skjedde for NOK 12,5 mill. av kravet ved forliksklage mot Bjørn Bettum til Sandefjord forliksråd av 10. mai 1994.

Fristavbrudd skjedde dernest ved foreldelsesavtalen mellom Jahreboet og Bjørn Bettum av 13. juni 1995.

Dersom det legges til grunn at Jahreboet hadde krav på tilleggsfrister med tilsammen 10 år, vil resultatet være at ingen av kravene var foreldet ved avtaleinngåelsen. Tidligste misligholdt, og dermed oppstart av foreldelsesfrist, fant sted høsten 1982. 13 år regnet fra dette tidspunkt medfører foreldelse høsten 1995. Ved avtalen av 13. juni 1995 ble foreldelsesfristen forlenget med 3 år. Stevning ble deretter tatt ut innenfor 3 års-fristen.

Avgjørende for foreldelsesspørsmålet blir etter dette om noen del av kravene var foreldet ved avtaleinngåelsen. Svaret avhenger av når Jahreboet fikk tilstrekkelig kunnskap etter foreldelsesloven § 10 til å reise søksmål.

Dersom slik kunnskap forelå tidligere enn ett år før foreldelsesavtalen ble inngått, d.v.s.

tidligere enn 13. juni 1994, vil vedkommende krav være foreldet.

Ingen av partene har anført at kunnskapskravet stiller seg forskjellig for de 4 separate erstatningsposter, og det foretas derfor en samlet behandling av spørsmålet om når tilstrekkelig kunnskap forelå.
Før drøftelsen av kunnskapskravet bemerkes at Bettumboet har reist spørsmål om det i saken er hjemmel for å innvilge tilleggsfrister etter foreldelsesloven § 10. Det er vist til at tidligere foreldelseslov hadde eksplisitt bestemmelse om at det ved fordringshaverens død gjaldt en absolutt frist på ett år for å fremme avdødes krav. Tilsvarende bestemmelse er ikke inntatt i loven av 1979, men forarbeidene indikerer at det er naturlig at fordringshaveren selv bærer risikoen for egne forhold, dog slik at det er mulig at reglene om tilleggsfrister i den nye lovens § 10 kommer til anvendelse. Matningsdal har uttalt i sin kommentar til den nye loven at det er tvilsomt om slike tilfelle overhodet kan tenkes.

Avgjørende for utfallet av denne problemstilling vil etter rettens oppfatning være at de fordringer det er tale om ikke eksisterte på Anders Jahres hånd før hans død. Det vises til de misligholdstidspunkter retten har lagt til grunn og som viser at samtlige erstatningskrav i saken oppsto ved mislighold etter Anders Jahres død.

Parallellen til tidligere foreldelseslov § 9 er derfor ikke til stede. Det dreier seg ikke om fordringer som forelå ved fordringshaverens død, og tidligere regelverk om frist for å gjøre slike fordringer gjeldende har uansett ingen direkte eller analogisk betydning for resultatet i nærværende sak.

Bettumboet har videre anført at Jahreboet må identifiseres med den kunnskap eneste loddeier Bess Jahre hadde. Jahreboet har vist til at dødsboet er eget og separat rettssubjekt og at identifikasjon med loddeier og hennes eventuelle kunnskap ikke er hjemlet.

Retten går ikke nærmere inn på drøftelse av dette rettsspørsmålet.

Det er i saken ikke ført tilstrekkelig bevis for at Bess Jahre under noen omstendighet selv hadde tilstrekkelig kunnskap om Bjørn Bettums forhold til å gå til det erstatningssøksmål saken omfatter. Det som i hovedsak er bevisført er at Bess Jahre deltok på og mottok forhåndsinformasjon om det såkalte Midtåsen-møtet høsten 1976 hvor Lazard, Monsen, ektefellene Jahre og Bjørn Bettum drøftet og i realiteten vedtok

omorganiseringen av CTC-formuen ved opprettelsen av CF og fordelingen av CTC's aksjer. Utover dette har retten liten kunnskap om hva Bess Jahre visste. Bostyreren har i sin forklaring referert at Bess Jahre overfor ham har forklart at hun fulgte svært lite med i mannens forretningsforhold og at hun bl.a. ble overrasket da det ble foreholdt henne at USD 10 mill. var ment avsatt til hennes og Anders Jahres personlige behov.

Spørsmålet om omfanget av Bess Jahres kunnskap har i liten grad vært bevistema under saken.

Kunnskapskravet:

Jahreboet har hevdet at tilstrekkelig kunnskap til å reise søksmål først forelå ved årsskiftet 1994/95.

Før bostyrerskiftet i 1991 hadde boet foretatt undersøkelser hos nærstående personer av Anders Jahre, Kosmos, SE-banken og Lazard. Dette fremgår av Riksskattestyrets vedtak. Det var også foretatt bevisopptak av tjenestemenn i de to banker.

Jahreboet har imidlertid understreket at det i dette materiale var fragmentariske opplysninger om hvilken rolle Bjørn Bettum hadde spilt, bortsett fra at han ledsaget Anders Jahre i forretningssammenheng etter hvert som Jahre ble gammel.

Om CTC og CF hadde Riksskattenemnda ingen opplysninger bortsett fra at CTC's aksjer i 1976 ble overført til en veldedig stiftelse. I tillegg hadde Riksskattenemnda opplysninger om hvem som var stiftelsens advisors. Navnet på stiftelsen var ukjent.

Riksskattenemnda konkluderer med at det ikke hadde vært mulig å fremskaffe opplysninger om verken stiftelsens navn, formål eller hvem stiftelsen hadde gitt eller kunne gi bidrag til etter vedtektene.

Journalist Alf R. Jacobsens bok "Eventyret om Anders Jahre" utkom i 1982. Boken ga ingen avgjørende opplysninger om Bjørn Bettums deltagelse i håndteringen av utenlandsformuen.

Retten legger etter dette til grunn at det ved bostyrerskiftet i 1991 ikke forelå noe som

helst grunnlag for erstatningssøksmål mot Bjørn Bettum.

I løpet av 1993 fikk Jahreboet alle dokumenter med tilknyttet informasjon fra Henry Mc Kinnell. Bostyreren har bestridt, og retten legger til grunn, at han før avtaleinngåelsen med Mc Kinnell 3. mai 1993 ikke hadde vesentlig informasjon fra Mc Kinnells materiale. Informasjonen kom derfor ved to forsendelser til bostyreren i mai måned og en forsendelse i november måned 1993.

Med disse dokumentene fikk Jahreboet viten om navnet (Continental Foundation) på den veldedige stiftelsen, at Thorleif Monsen var stråmann for Jahre ved stiftelsen, at han fikk hånd om 2o % av aksjene i CTC og senere innløste disse, at aksjene senere ble overført til All Foundation og at Thorleif Monsen i det etterfølgende tidsrom antagelig underslo vesentlige midler fra Jahreformuen.

Som påstått av Jahreboet legger retten videre til grunn at Bjørn Bettums rolle ved operasjonene rundt utenlandsformuen i liten grad ble eksponert gjennom Mc Kinnell-dokumentene. Dokumentene har ikke for noen del vært fremlagt under saken idet bostyrereren, som personlig er part i søksmålet mot All Foundation på Cayman Island, er pålagt taushet om innholdet fra domstolen på Cayman Island.

Dette har vært akseptert av Bettumboet og retten er henvist til å legge bostyrerens partsforklaring om dokumentinnholdet til grunn.

Journalist Alf R. Jacobsens andre bok om saksforholdet, "Uten skrupler" utkom i 1993. Boken kaster lys over utenlandsformuen, men i mindre grad over hvilken rolle Bjørn Bettum presist hadde hatt. Boken i seg selv ga derfor ikke grunnlag for søksmål. Dette forhold er etter rettens oppfatning selvforklarende.

Ved utgangen av 1993 er det på denne bakgrunn ikke tilstrekkelig sannsynliggjort at Jahreboet hadde nødvendig søksmålsgrunnlag mot Bjørn Bettum.

Den lo. mai 1994 ble det som gjengitt foran tatt ut forliksklage med påstand om tilbakeførsel av NOK 12,5 mill. som representerte uttak fra Jahres midler i utlandet, og det ble reist søksmål mot Lazard- og Monsenrelaterte personer og selskaper i London.

Forsåvidt gjelder forliksklagen mot Bjørn Bettum var dette et separat forhold og gjaldt ikke hans rolle i videre forstand i det sakskompleks denne saken gjelder. Det fremgår

av boets interne behandling, og særlig av notat datert 18. august 1994 fra advokat Karstein J. Espelid til bostyreren, at vurderingen av det krav som lå til grunn for forliksklagen og mulige videre krav mot Bettum var forskjellig. Advokat Espelid konkluderte slik i notatet:

> Det er fortsatt vår vurdering at boet har en prosedabel sak mot Bjørn Bettum. I tillegg til krav om tilbakebetaling/erstatning for direkte utbetalinger i millionklassen, er det grunnlag for å vurdere nærmere Bjørn Bettums ansvar for boets eventuelle tap av midler bestyrt av andre i utlandet.

Notatet ble senere behandlet i skiftesamling den 25. august og bostyreren fikk fullmakt til å reise det begrensende søksmål på NOK 12,5 mill.

Notatet viser at pr. august 1994 forelå etter prosessfullmektigens vurdering ikke tilstrekkelig søksmålsgrunnlag, men det forelå grunnlag for å vurdere nærmere Bjørn Bettums ansvar "for boets eventuelle tap av midler bestyrt av andre i utlandet".

Økokrims dokumentbeslag hos Bjørn Bettum fant sted i oktober 1994, og dette materialet ble stilt til boets disposisjon i desember måned s.å. I samme tidsrom mottok boet også dokumenter direkte fra Bjørn Bettum og fra All Foundation.

Jahreboet har hevdet, hvilket er i samsvar med den rettslige vurdering av søksmålsgrunnlaget prosessfullmektigen ga den 18. august 1994, at det var denne dokumenttilgangen som medførte at boet fikk tilstrekkelig kunnskap om Bjørn Bettums forhold til å gå til søksmål mot ham.

Boet hadde dermed ikke tilstrekkelig kunnskap pr. 13. juni 1994 og den inngåtte foreldelsesavtale medfører at kravene ikke var foreldet på stevningstidspunktet 29. april 1996.

Via de dokumenter boet fikk stilt til disposisjon fra Økokrims beslag, Bjørn Bettum direkte og All Foundation ble Bettums rolle avdekket.

Opplistingen av disse dokumenter er foretatt, men gjentas for oversiktens skyld. Det dreide seg om alle forhold rundt Rådhusgaven, med unntak for korrespondansen til og fra Norges Bank. Dette omfatter samtlige av Bjørn Bettums utallige notater og

omfattende korrespondanse med kontakter i Sverige, Panama, Paris og London. Dokumentene viser også bakgrunnen for, forberedelsene og gjennomføringen av antedateringene i CTC som var nødvendige for å dokumentere at Rådhusgaven var gyldig besluttet og at det dreiet seg om midler som ikke tilhørte Anders Jahre.

Dokumentene inneholdt også alt materiale som viser omorganiseringen av CTC over årene 1974 til 1976, samt Bjørn Bettums saksredegjørelse av 16. november 1994. Dokumentene avdekker hans rolle og hans kunnskap om utenlandsformuen, hvorledes denne ble forsøkt skjult og hvorledes disposisjonene medførte at midlene kom i urette hender, alt med Bjørn Bettum som deltager og pådriver i prosessen.

Endelig avdekket Økokrimbeslaget en avtale av 12. februar 1985 mellom Bjørn Bettum og Thorleif Monsen om betydelig økonomisk kompensasjon til Bettum.
Den foretatte dokumentasjon av dette materialet sannsynliggjør på tilstrekkelig måte Jahreboets anførsel om at boet først ved årsskiftet 1994/95 hadde tilstrekkelig kunnskap til å reise nærværende søksmål mot Bjørn Bettum.

Kravene er dermed ikke foreldet.

Avslutningsvis bemerkes at Jahreboet åpenbart har møtt betydelig og bastant motstand i arbeidet med å få tilgang til kunnskap om Anders Jahres utenlandsformue og de implisertes håndtering av denne før og etter Anders Jahres død.

Denne motstanden har ikke minst kommet fra de opprinnelig tre saksøkte i dette søksmålet, og har vedvart inn i hovedforhandlingen. Dette er hovedårsaken til den lange tid som viste seg nødvendig å bruke før Jahreboet fikk slik kunnskap om saken at boet ut fra norske prosessregler hadde rimelig foranledning til å gå til søksmål.

Slik faktum ligger an blir det etter rettens vurdering unødvendig å gå nærmere inn på de kriterier teori og rettspraksis har trukket opp for når nødvendig kunnskap må anses å foreligge.

Det er på det rene at foreldelsesavtalen mellom Jahreboet og Bjørn Bettum av 13. juni 1995 suspenderte foreldelsesfristen i 3 år fra avtaledato, dersom kravene ikke var foreldet før avtaleinngåelsen. Gjennomgangen av faktum viser at det ikke var tilfelle. Det var dokumenttilgangen i oktober/november/desember 1994 som ga grunnlag for søksmålet ved at disse dokumenter avdekket at Bjørn Bettum klart hadde kunnskap om

utenlandsformuen, at han deltok og var pådriver i omorganiseringene for å skjule formuen og sviktet i sine kontrollfunksjoner ved at han iakttok Thorleif Monsens overføringer til seg uten å gripe inn på nødvendig måte.

Etter at dokumentene forelå ultimo 1994 var boet etter foreldelsesavtalen berettiget til å benytte et tilstrekkelig tidsrom til utarbeidelse av stevning. Dette arbeidet tok ca. 1 1/2 år. Tidsbruken på dette punkt har ingen rettslig relevans.

Idet foreldelsesinnsigelsen knyttet til Jahreboets søksmålsgrunnlag som gjelder mislighold av kontroll- og tilsynsplikter ikke har ført frem, går retten ikke nærmere inn på det søksmålsgrunnlag som gjelder mislighold av opplysningsplikt.

Det er ikke bestridt at begge søksmålgrunnlag, hver for seg og samlet, medfører det erstatningsansvar som er beregnet av Jahreboet.

Dom avsies etter dette i samsvar med den påstand Jahreboet har nedlagt.

Saksomkostninger:

Anders Jahres dødsbo har vunnet saken og skal etter hovedregelen i tvml. § 172, 1. ledd tilkjennes saksomkostninger hos Bjørn Bettums dødsbo.

Retten finner ikke grunnlag for å anvende unntaksbestemmelsen i § 172, 2. ledd i forhold til det søksmålsgrunnlag Jahreboet har vunnet frem på.

Jahreboets prosessfullmektig har innlevert omkostningsoppgave med til sammen kr. 9.300.000,-, hvorav kr. 8.500.000,- utgjør salær. Kr. 800.000,- vedrører utgifter til sakkyndig bistand i inn- og utland, oversettelser, reise og oppholdsutgifter, reiseutgifter og diett i tilknytning til hovedforhandlingen, utarbeidelse av utdrag/kopiering, møteutgifter m.v.

Det er opplyst at salær og omkostninger er redusert med vesentlig mer enn 2/3 parter i forhold til det samlede salær og de samlede utgifter i saken mot de opprinnelig tre saksøkte. Hovedårsaken til dette er oppgitt å være at Bjørn Bettum ikke bestred vernetinget. Saksforberedelsen omkring dette spørsmål var vesentlig og det ble

berammet særskilt hovedforhandling til behandling av vernetingsspørsmålet. Umiddelbart før hovedforhandlingen trakk imidlertid de engelske saksøkte vernetingsinnsigelsen.

Saksomkostningsoppgaven er forelagt Bettumboets prosessfullmektig. Han stiltc deretter spørsmål om fordelingen av kostnader til bevisopptak i utlandet, hvilke kostnader som utelukkende vedrører nærværende søksmål og om noen bevisopptak også har betydning for andre søksmål. Forøvrig ble det ikke fremsatt innvendinger mot Jahreboets salær- og omkostningsoppgave.

Retten anser at de spørsmål som ble stilt er tilfredsstillende besvart i etterfølgende prosesskrift av 14. oktober d.å. fra Jahrebocts prosessfullmektig.

Hensett til sakens ekstraordinære omfang, kompleksitet og tilknyttet behov for tidsbruk, godkjenner retten omkostningskravet.

D O M S S L U T N I N G :

1. Bjørn Bettums dødsbo dømmes til å betale til Anders Jahres dødsbo under offentlig skifte ved Sandefjord skifterett:

   - motverdien av USD 134.571.877 med tillegg av rentetapserstatning tilsvarende gjennomsnittlig kassekredittrente fra 1. september 2oo2 frem til betaling skjer,

   - NOK 491.573.454 med tillegg av rentetapserstatning tilsvarende gjennomsnittlig kassekredittrente fra 1. september 2oo2 frem til betaling skjer,

   - NOK 68.5oo.ooo med tillegg av renter etter forsinkelsesrenteloven fra 1. januar 2oo2 til betaling skjer

2. Bjørn Bettums dødsbo tilpliktes å erstatte Anders Jahres dødsbo under offentlig skifte ved Sandefjord skifterett saksomkostninger med NOK 9.300.000 med tillegg av renter etter forsinkelsesrenteloven fra forfall til betaling skjer.

3. Oppfyllelsesfristen er 2 - to - uker fra forkynnelse av dommen.

Dommen forkynnes for partene ved deres prosessfullmektiger.

Retten hevet

Terje Hagelund

VEDLEGG 208

ADVANCE COPY

Privy Council Appeal No. 37 of 1998

The Attorney-General of the Cayman Islands (Third Appellant) and Others — *Appellants*

v.

Even Wahr-Hansen — *Respondent*

FROM

THE COURT OF APPEAL OF THE CAYMAN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 26th June 2000

Present at the hearing:-

Lord Browne-Wilkinson
Lord Steyn
Lord Clyde
Lord Hobhouse of Woodborough
Lord Millett

[Delivered by Lord Browne-Wilkinson]

This appeal raises a short question as to the validity of a memorandum of agreement dated 20th July 1976 ("the Continental Foundation"). Although the point is a short one, in order to understand how it arises it is necessary to give some background information.

Mr. Anders Jahre was ostensibly a wealthy Norwegian shipowner. However, when he died on 26th February 1982 he appeared only to have left a small estate. The sole respondent to this appeal, Mr. Wahr-Hansen, is the administrator of that estate. In that capacity the respondent has brought proceedings in England and elsewhere to recover assets alleged to be, in truth, beneficially owned by Mr. Jahre. Amongst the claims put forward it was

alleged that Mr. Jahre was the true beneficial owner of the property the subject matter of the Continental Foundation. It is said that in June 1976 it was reported that Mr. Jahre's business affairs were the subject of an investigation by the Norwegian central banking and revenue authorities and that the Continental Foundation was purportedly then set up with assets primarily provided by Mr. Jahre. The ostensible settlor of the Continental Foundation was Mr. Monsen but it is alleged that the true settlor was Mr. Jahre.

Following Mr. Jahre's death, on 8th October 1982 Mr. Monsen established a new foundation, the Aall Foundation, which was regulated by a memorandum of agreement of 7th October 1982. On the same day, 8th October 1982, the trustees of the Continental Foundation in purported exercise of powers contained in the Continental Foundation Trust Deed transferred all the assets subject thereto to the Aall Foundation. In these proceedings the respondent claims that the trusts of both the Continental Foundation and the Aall Foundation are void and that accordingly the assets subject to those foundations have at all times been held on resulting trusts for the original settlor, be he the ostensible settlor Mr. Monsen or, as the respondent alleges, Mr. Jahre. It was to determine that issue that the trustees of the Aall Foundation started these proceedings in 1994 in the Grand Court of the Cayman Islands (where the Aall Foundation is located) raising the questions:

1. whether the trusts of the Continental Foundation were valid or void;
2. whether the trusts of the Aall Foundation were valid or void;
3. on what trusts the trustees held the assets vested in them.

Preliminary issues were directed to be heard to determine whether the trusts of the Continental Foundation and Aall Foundation were valid or void. Those preliminary issues were heard by Harte C.J. who on 30th April 1996 declared that the Trusts of both funds were valid.

The respondent appealed to the Court of Appeal against the decision that the trusts of the Continental Foundation

were valid. There was no appeal to the Court of Appeal against the decision that the trusts of the Aall Foundation were valid since it is immaterial whether or not they are valid: if, as the Court of Appeal held, the trusts of the Continental Foundation were void the purported vesting of the funds subject to the Continental Foundation in the trustees of the Aall Foundation would be invalid and those funds would at all times have been held on resulting trusts for the settlor of the Continental Foundation.

Against that background their Lordships turn to the terms of the Continental Foundation as declared by the memorandum of agreement of 20th July 1976. This memorandum was expressed to be made between Mr. Monsen as settlor of the first part, trustees of the second part and three persons defined as the "Advisors" of the third part. The first recital recorded that the settlor wished "to establish a Trust for the benefit of worthy individuals organizations and corporations all upon the terms and conditions hereinafter set forth, and to be known 'The Continental Foundation'". The memorandum then provided as follows (so far as relevant):-

> "3. The Trustees may accumulate and add to the capital, the net annual income derived from the Trust Fund for so long as the law applicable to the Trustees permits them so to do. In any year that the law applicable to the Trustees requires them to distribute income or in any year that the Trustees not being required to distribute income decide in the exercise of an absolute discretion to distribute income then such income or any part thereof shall be paid to any one or more religious, charitable or educational institution or institutions or any organizations or institutions operating for the public good (and the Trustees shall be the sole and absolute judges of whether any organization or institution so qualifies ... as a beneficiary hereunder) the intention being to enable the Trustees to endeavour to act for the good or for the benefit of mankind in general or any section of mankind in particular anywhere in the world or throughout the world. In the case of any question as to the propriety of any distribution or selection by the Trustees the written approval of the Advisors to the

Trustees, if such exist, shall be an absolute and final determination which shall not be open to question. ...

4. The Trustees may at any time or from time to time prior to the date of final distribution provided they first obtain the written approval of the Advisors but otherwise in their discretion, pay or transfer any part of the capital of the Trust Fund (and even if it shall result in a complete distribution of the entire Trust Fund), to any person, persons, institution or organization who at that time qualify as beneficiaries who are entitled or contingently or prospectively entitled to receive income as hereinbefore provided.

5. The Trustees may at any time or from time to time prior to the date of final distribution provided they first obtain the written approval of the Advisors but otherwise in their discretion pay or transfer part or the whole of the Trust Fund, including any accumulated or undistributed income on hand, to any person or persons or other Trustee or Trustees whomsoever and wheresoever resident or situate for the purpose of resettling a new trust or trusts on such persons as Trustees so that the fund resettled shall be administered for the benefit of any persons, institutions, organizations or corporations who at the time of such resettlement qualify as beneficiaries or prospective or contingent beneficiaries of this Trust ...

31. By unanimous agreement at any time between the Trustees and upon obtaining the written approval of the Advisors to the Trustees any term or provision of the Trust may be amended or revoked or additional terms may be added thereto provided always that in no event shall any amendment whatsoever be made which results in any part of the capital or income of the Trust Fund being paid to the Settlor or to a person who is or has been a Trustee hereunder."

Under clause 32 the Trustees were given power with the approval of the Advisors to move assets of the Trust from one jurisdiction to another.

A number of different points were argued before the Court of Appeal of the Cayman Islands (Zacca P., Kerr

and Collett JJ.A.). In the event, the Court of Appeal allowed the appeal of the respondent on the grounds that the Continental Foundation Trusts were not valid charitable trusts and were therefore void. The Attorney-General of the Cayman Islands, representing the interests of charity, brought this appeal to their Lordships. Although there are numerous other parties to the litigation, only the Attorney-General as appellant and the respondent as respondent appeared on the appeal.

On the appeal, the Attorney-General had to confront two major problems. First, the Continental Foundation does not contain any express mandatory obligations: everything is expressed in terms of powers. Therefore, it is said by the respondent, no valid trusts at all (whether charitable or otherwise) have been established and the funds have been held from the outset on resulting trust. Their Lordships find it unnecessary to express any view on this point since, in their view, the Attorney-General's case fails on the second issue, viz. assuming there to be trusts declared by the memorandum of agreement those trusts were not charitable. There being no time limits as to the vesting of interests or the exercise of powers all provisions of the Continental Foundation are void for perpetuity.

In order to demonstrate that trusts are, in law, charitable it must be shown that those trusts are exclusively charitable. If it is shown that, consistently with the provisions of the trust deed, property can be applied for purposes other than charitable purposes the trust will fail. In the present case the purposes stated by clause 3 fall into two groups. The first group consists of "any one or more religious, charitable or educational institution or institutions". The second group, crucially introduced by the word "or", consists of "any organizations or institutions operating for the public good". The objects specified in the first group are plainly charitable. But, on their literal construction, the purposes stated in the second group are not exclusively charitable. Applications of monies for public philanthropic or benevolent purposes would be for the public good but would not necessarily be legally charitable: *In re Macduff* [1896] 2 Ch. 451; *Chichester Diocesan Fund and Board of Finance Inc. v. Simpson* [1944] A.C. 341. Accordingly, unless the Attorney-General can demonstrate that the words of clause

3 are not to be given their literal meaning the trusts and powers declared concerning the Continental Foundation are not charitable and are all void from the outset.

How then does the Attorney-General seek to restrict the meaning of the words used in the second group of purposes? First he points to the so-called locality cases. These are cases where the gift is made, for example, to a parish (*West v. Knight* (1669) 1 Ch. Cas. 134) or "for the good of" a specific county (*Attorney-General v. Lord Lonsdale* (1827) 1 Sim. 105) or for "charitable, beneficial, and public works" (*Mitford v. Reynolds* (1842) 1 Ph. 185) or for "the benefit and advantage of Great Britain" (*Nightingale v. Goulburn* (1847) 5 Hare 484) or "unto my country England" *In re Smith* [1932] 1 Ch. 153). In all these cases the gifts were held to be valid charitable trusts, even though the breadth of the words used, literally construed, would certainly have authorised the applications of the funds for non-charitable purposes in the specified locality. The courts have held that such purposes are to be impliedly limited to charitable purposes in the specified community. So, it is argued in the present case, although the second group of purposes ("organizations or institutions operating for the public good") is not limited to a particular locality, the same principle ought to be applied and the purposes should be limited to those organisations operated for the public good by charitable means.

In their Lordships' view, this argument is fallacious. There is a limited class of cases where gifts in general terms are made for the benefit of a named locality or its inhabitants. For reasons which are obscure, such cases have been benevolently construed. They are now so long established that in cases falling within the very circumscribed description of gifts for the benefit of a specified locality they remain good law. But they have been widely criticised and indeed have been said to be wrongly decided: see, for example Michael Albery, Trusts for the benefit of the inhabitants of a locality (1940) 221 L.Q.R. 49. To apply the same principle to all cases where there are general statements of benevolent or philanthropic objects so as to restrict the meaning of the general words to such objects as are in law charitable would be inconsistent with the overwhelming body of authority which decides that general words are not to be artificially

construed so as to be impliedly limited to charitable purposes only.

The Attorney-General sought to pray in aid the remarks of Russell L.J. in *Incorporated Council of Law Reporting for England and Wales v. Attorney-General* [1972] Ch. 73. In considering the proper approach to the question whether or not a specified purpose fell within the fourth head in *Pemsel's* Case [1891] A.C. 531, i.e. as being a purpose for the benefit of the public at large within the spirit and intendment of the preamble to the Statute of Elizabeth I, Russell L.J. said (at page 88E-G):-

> "... the courts, in consistently saying that not all such are necessarily charitable in law, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is prima facie charitable in law, but have left open a line of retreat based on the equity of the Statute in case they are faced with a purpose (e.g. a political purpose) which could not have been within the contemplation of the Statute even if the then legislators had been endowed with the gift of foresight into the circumstances of later centuries.
>
> In a case such as the present, in which in my view the object cannot be thought otherwise than beneficial to the community and of general public utility, I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the Statute: and I think the answer to that is here in the negative."

The Attorney-General contends that this presumption in favour of a beneficial purpose being charitable ought to be applied in the present case so as to provide a presumption that the institutions "operating for the public good" should be restricted to such organisations as are operating in a charitable manner. Although, in the judgment of their Lordships, Russell L.J.'s approach has much to commend it in deciding whether or not a purpose specified by the donor falls within the spirit and intendment of the preamble to the Statute of Elizabeth I, it has no application at all to the quite different problem which is raised in the present case, viz. are general words to be artificially restricted to purposes which are within the spirit and

intendment of the Statute and thereby rendered charitable. The principle has no application to such a case nor was it ever intended to.

Finally, the Attorney-General submitted that the words in the second group of purposes were to be construed as being *ejusdem generis* with those in the first group, i.e. institutions "operating for the public good" were to be restricted to such institutions as were operating for the public good by charitable means. It is said that the word "charitable" in the first group refers only to eleemosinary charities for the relief of poverty. Then it is said that it cannot be mere chance that the draftsman in stating the purposes of the Continental Foundation reflects the same four categories as those commonly known as the four heads of charity mentioned in *Pemsel's* case – the advancement of religion, the advancement of education, the relief of poverty and other public purposes. Therefore, it is said, the second group of objects must be construed as being of the same nature as those in the first group, i.e. objects which are in law charitable and as being limited to those purposes which fall within the fourth head in *Pemsel's* case. This argument has only subtlety to recommend it. Their Lordships can see no reason to give this artificially limited construction to the second group of objects which are entirely general. On the contrary there are clear indications that no such implied limitation was intended. The first recital demonstrates that the purpose of the Trust was, amongst other things, to benefit "worthy" individuals, a purpose which is plainly not charitable: see *In re Atkinson's Will Trusts* [1978] 1 W.L.R. 586. Moreover, even clause 3 itself states that the intention is "to endeavour to act for the good or for the benefit of mankind in general". This demonstrates a much wider intention than to benefit those objects which are strictly charitable. Their Lordships are of the view that the memorandum of agreement clearly manifests an intention to establish general welfare trusts without confining those trusts to purposes which are in law charitable.

For these reasons (which are substantially the same as those of the Court of Appeal) their Lordships will humbly advise Her Majesty that the appeal should be dismissed. By an oversight the order of the Court of Appeal did not discharge an order made by Harre C.J. on 20th January

1997 which declared that the assets held by the trustees of the Aall Foundation were held on the trusts of the memorandum of agreement of 7th October 1982. The order of the Court of Appeal of 28th November 1997 will therefore be affirmed but subject to correcting it so as to revoke the order of 20th January 1997. The Attorney-General must pay the respondent's costs before their Lordships' Board.

L.S.

AT THE COURT AT BUCKINGHAM PALACE

The 12th day of July 2000

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 26th day of June 2000 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from The Court of Appeal of the Cayman Islands between (1) Bridge Trust Co. Ltd. (2) Robert N. Slatter (3) The Attorney General of the Cayman Islands (4) Compass Trust Co. Ltd. (5) to (56) Fraser Matthews Fell and 49 Others Appellants and Even Wahr-Hansen Respondent (Privy Council Appeal No. 37 of 1998) and likewise the humble Petition of the Appellants setting forth that on 1st September 1994 an Originating Summons was issued by the 1st and 2nd Appellants in the Grand Court of the Cayman Islands against (1) the 3rd Appellant (2) the 4th Appellant (as administrator of the Estate of one Thorleif Monsen) and (3) the Respondent (as personal representative of the Estate of one Anders Jahre) seeking declarations as to (a) the validity of certain trusts declared and regulated by Memoranda of Agreement dated 20th July 1976 and 7th October 1982 respectively and (b) on what trusts the 1st and 2nd Appellants held the assets vested in them: that by Order dated 11th April 1995 the Grand Court ordered that the proper construction of the said Memoranda of Agreement be tried as a preliminary issue and that the persons named in the Schedule to the Order be given leave to join the proceedings in relation to the preliminary issue: that on 11th May 1995 the 1st and 2nd Appellants issued an amended Originating Summons naming the persons listed in the said Schedule and effectively joining them to the Cayman Islands proceedings: that by Judgment dated 30th April 1996 the Grand Court of the Cayman Islands determined the preliminary issue by declaring that the Trusts declared in the Memoranda of Agreement dated 20th July 1976 and 7th

October 1982 were valid: that the Respondent appealed against the declaration of the Grand Court relating to the Memorandum of Agreement dated 20th July 1976 and by Judgment dated 28th November 1997 the Court of Appeal allowed the Appeal: that by Orders of the Court of Appeal dated 17th April 1998 and 24th April 1998 the 3rd 4th and 5th to 54th Appellants and the 55th and 56th Appellants respectively were granted final leave to appeal to Your Majesty in Council: And humbly praying Your Majesty in Council to take this Appeal into consideration and that the Judgment of the Court of Appeal dated 28th November 1997 may be reversed altered or varied and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be dismissed and the Judgment and Order of the Court of Appeal of the Cayman Islands dated 28th November 1997 affirmed but subject to the Order being corrected so as to revoke the Order made by Chief Justice Harre on 20th January 1997 which declared that the assets held by the trustees of the Aall Foundation were held on the trusts of the Memorandum of Agreement dated 7th October 1982:

"AND in case Your Majesty should be pleased to approve of this Report then Their Lordships do direct that there be paid by the Attorney General to the Respondent his costs of this Appeal incurred in the said Court of Appeal and his costs thereof incurred in England the same to be hereafter taxed and certified if not agreed."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor or Officer administering the Government of the Cayman Islands for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

A. K. Galloway.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C 296/94

BETWEEN:	BRIDGE TRUST CO. LTD. and ROBERT N. SLATTER	PLAINTIFFS
AND:	THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS EVEN WAHR-HANSON and others	DEFENDANTS
AND:	ANDERS JAHRE HUMANITAERE STIFTELSE	PROPOSED INTERVENOR

APPEARANCES:

Hubert Picarda, Q.C. Counsel for the Proposed Intervenor.
Angus Foster, Esq., Counsel for Trustees of The Aall Foundation.
Christopher Nugee, Q.C. Counsel for Even Wahr-Hansen.
Tom Lowe, Esq., Counsel for Eikland AS.
Nigel Clifford, Esq., Counsel for Compass Trust.

DATES OF HEARING: November 22 and 23, 2000

REASONS FOR JUDGMENT

This is an application by a Norwegian humanitarian foundation for its joinder as a Defendant in the proceedings.

Although the litigation has been in progress for more than six years, and has already been the subject of judgments of this Court, the Court of Appeal and Privy Council, many of

the facts of the case have yet to be determined. With respect to the questions raised by the present application, some background can be found in the reasons for judgment of Chief Justice Harre of this Court dated April 30, 1996, the decision of the Court of Appeal for the Cayman Islands dated November 28, 1997, and the decision of the Judicial Committee of the Privy Council delivered June 26, 2000.

The following is a summary of some salient points. By an agreement of July 20, 1976, one Thorleif Monsen, either as nominee of Anders Jahre, a Norwegian shipowner of substantial means, or for himself, or perhaps in some other capacity, settled many millions of United States dollars in a trust to be named The Continental Foundation. It seems to be accepted that the trust was originally subject to the laws of the Bahamas. The terms of the trust deed permitted the trustees to move its situs and administration to another jurisdiction, and also to transfer part or all of its assets to some other trust. Five months later, on December 22, 1976, the parties to the original agreement together with an added trustee resolved by further agreement that the Continental foundation should henceforth have its situs in, and be subject to the laws of, the Cayman Islands. On October 8, 1982, shortly after the death of Mr. Jahre, Mr. Monsen established a new entity to be called The Aall Foundation, also located in and subject to the laws of the Cayman Islands, and the trustees of the Continental foundation transferred all of the trust assets to this new foundation.

Both foundations were authorized by their trust deeds to distribute funds for the benefit of mankind, but their objects were expressed differently in respects which were to become of crucial importance in these proceedings.

Despite the fact that the litigation has been in progress for six years, no findings have yet been made as to who was the true owner of the assets assigned to this itinerant international trust, the true purpose of the original settlement, the motives of the trustees in transferring the assets to Monsen's foundation on the death of Jahre, or dispositions made of trust monies. Some of these matters have, however, been the subject of allegations of irregular and even dishonest conduct.

A purpose of the proceedings decided by the Privy Council was to determine whether the original settlement of July 20, 1976, creating the Continental foundation was void under the rule against perpetuities, as in force at the relevant time. The Judicial Committee found the objects of the foundation too broad to constitute a charity, and thus escape the rule. It confirmed in this regard the decision of the Court of Appeal for the Cayman Islands which had reversed a decision of the Chief Justice upholding the validity of both foundations as charitable institutions. Insofar as the Chief Justice upheld the validity of the Aall foundation his decision was not challenged. The Privy Council also vacated a decision of the Chief Justice declaring that the funds held by the Aall foundation trustees were held by them for the purposes stated in its founding deed. Thus the proceedings brought to a conclusion by the decision of the Privy Council addressed the validity of the two foundations and the terms on which the funds involved were held by the Aall

foundation. The funds were found never to have been effectively vested by the Continental foundation in the Aall foundation, because the former had no legal capacity to deal with the them. Thus the Aall foundation, while charitable in law, did not hold the funds for its charitable purposes.

It seems that if the settlement of July 20, 1976, which created the Continental foundation was void, as found by the Court of Appeal and the Judicial Committee, and if the funds held by that foundation therefore never vested in its trustees, and so could not validly have been passed by them to the Aall foundation, and could not therefore be held by the Aall foundation on the trusts described in its founding deed, then they must be held by the Aall foundation on resulting trusts for the settlor of the Continental foundation, whoever that might be. The following is the relevant passage of the decision of the Judicial Committee in this regard:

> There was no appeal to the Court of Appeal against the decision [*of Chief Justice Harre at trial*] that the trusts of the Aall Foundation were valid: if, as the Court of Appeal held, the trusts of the Continental Foundation were void the purported vesting of the funds subject to the Continental Foundation in the Aall Foundation would be invalid and those funds would at all times have been held on resulting trusts for the settlor of the Continental foundation.

A point was mentioned by Chief Justice Harre but not raised before the Court of Appeal or the Judicial Committee which, if accepted, would have led to a different conclusion. The Chief Justice said that because of his findings of validity with respect to both foundations he did not have to decide it. He said (at p. 44):

> Had my decision gone the other way, another issue would have arisen for decision. It is a pure question of law – whether, notwithstanding the invalidity of the dispositive provisions of the trust, until the death or incapacity of the settlor or the settlor called for the property to be vested in him the trustees [*of The Continental Foundation*] continued to have a power or mandate to apply the trust property and operate the provisions [*of The Continental Foundation*] (including the shifting law clause) in accordance with the purposes set out in the trust instrument.

The Chief Justice said of this point that it was one on which in the circumstances any observations he might have made "would of necessity be *obiter*", and thus unlikely to be helpful "in the event of the matter being taken elsewhere."

It might seem from the decision of the three courts that a question which counsel raised at the trial level but chose to take no further – one which did not have to be answered at the trial level, because the Chief Justice found both trusts to be charitable – was whether the rule against perpetuities might be avoided by reason of the fact that the transfer to the Aall foundation, whose charitable status is accepted by the parties, occurred during the settlor's lifetime. This was a question which could, it seems, be raised only in relation to Mr. Monsen, because the parties agree that Mr. Jahre's death occurred prior to the transfer of the funds to the Aall foundation.

Even though all three questions posed in the Originating Summons appear to have been dealt with by the Chief Justice - - including determination of the purpose for which the Aall trustees held the funds - - I am told that the above argument described by the Chief Justice was not in fact made before him, and that he erred if he believed it had been. That

submission was uncontradicted before me. Counsel seemed agreed that the matter is not *res judicata*, as might at first appear to be the case.

The present applicant, Anders Jahre Humanitaere Stiftelse, a Norwegian humanitarian institution established by Mr. Jahre, seeks to take up that argument, and also to argue in the alternative for rectification of the agreement establishing the Continental foundation, and to raise certain equitable points.

It seeks to establish that the funds were, after all, held by the Aall foundation for the purposes of its trust deed - - in effect that the declaration of Chief Justice Harre in those terms, which has been vacated by order of the Privy Council, was in law correct after all, and should be re-instated. It seeks to be joined for these purposes after the Attorney General, who had previously carried the burden of asserting the validity of the trusts, recently announced his withdrawal from active participation in the litigation. In a statement filed in the action on September 1, 2000, the Attorney General said he felt he had taken the matter on behalf of the charities "as far as possible". He noted that the assets in issue "are, on one view, alleged to be the proceeds of tax evasion or at least tax avoidance", that the Norwegian government is supporting the claim of the Jahre Estate in order to recover lost revenues, and that the Governor-in-Council has decided on policy grounds that he should take no further steps in the action. The Attorney General states that he would, however, assist the Court as an *amicus curiae*, if requested.

The withdrawal of the Attorney General thus comes at a point when it is asserted for the applicant that several arguments favouring the interest of charity have not been decided and are still available to be litigated.

If, indeed, these points are shown to have substance and remain open, then the interests of justice may require that they be properly resolved. To the extent that they are of substance and open, it seems desirable that there be a party present before the court able to raise the points concerned "in order that all matters in dispute in the cause may be effectually and completely adjudicated upon", to use the words of Order 15 rule 6 (2) (b) (i) under which joinder is sought. If there were no other party in a position to argue them one might, indeed, be inclined to grant the application notwithstanding that the applicant does not appear to me to have what has been held in the cases decided to date to constitute a sufficient "interest" for that purpose.

Without having regard to the expert foreign law evidence - - and the applicant says I should not do so - - I am of the view that the applicant's objects, which include those of a "social" nature, are too broad to constitute a charity for the purposes of Cayman or English law. It appears that Mr. Jabre did at one time consider the applicant a possible beneficiary of funds now held by the Aall foundation trustees, and obviously it is a reasonable possibility that the funds belonged to Mr. Jabre, but the trust deeds make no mention of this entity, and there is no evidence that the trustees of either Continental or Aall foundations ever, in fact, made any donation to it. The settlor left the distribution,

without any stated preference, to the discretion of the trustees, as necessarily limited by whatever law might be chosen to govern the trust.

As I understand the applicant's position, the points it wishes to raise are these: (a) that the funds in question are held by the trustees of the Aall foundation for the purposes of its trust deed - - a proposition originally accepted by Chief Justice Harre but rejected on appeal - - either (i) because Mr. Monsen was alive at the time of re-settlement of the funds from the Continental foundation, the argument which Chief Justice found it unnecessary to decide, or (ii) because the deed creating the Continental foundation ought to be rectified so as to achieve its intended legal effect; (b) that the Court ought to institute a "scheme", the nature of which was not explained and which I did not entirely understand, having the effect of rendering a charitable arrangement workable; and (c) that principles of equity, including estoppel and the "unclean hands" doctrine, in any event prevent the Court from giving effect to the resulting trust as contemplated by the decision of the Privy Council in favour of the appropriate settlor, whoever that might be, or his estate or personal representatives.

Its counsel was frank in conceding that the applicant does not seek to advance these points merely to obtain judgment reserving the funds for charitable purposes. The applicant wishes to have in the meantime a "seat at the table" in negotiations for settlement, so as to stipulate a price for its concurrence in any compromise resolution and be an active participant in that process.

For the reasons stated below, I have concluded that I ought not to go beyond the scope of the present authorities regarding admission of new parties under the sub-rule on which the applicant relies. Lord Denning cast its scope broadly in *Gurtner v. Circuit*, [1968] 2QB 587, when he said (at p. 595):

> It enables all matters in dispute to be effectually and completely determined and adjudicated upon between all those directly concerned in the outcome.

It seems impossible to characterize the applicant as an entity "concerned in the outcome" --- certainly it cannot be described as "*directly* concerned in the outcome." It cannot in my view, be said even to have the status of a "discretionary beneficiary". Not being in Cayman law a charity, the applicant cannot be a beneficiary. Were it to seek to carry out specified charitable work under contract to the Aall foundation, and were it possible for the Aall foundation to employ agents to bestow benefits in this way, those benefited, and not the applicant, would, of course, be the beneficiaries.

With respect to the points which the applicant seeks to make, I am of the following view. As to point (a)(i), as I have designated it, the "re-settlement" point, this is not in my view open to the applicant on the present application since it assumes that Monsen was the settlor, and the applicant's claim to status as a defendant is based, of course, on the settlor having been Jahre. As to point (a)(ii), the claim for rectification, counsel for some defendants take the position that this is barred by the doctrine of *res judicata*, since it could have been raised in the proceedings already concluded (a view which I had tentatively formed with respect also to the first point, but which counsel present

disclaimed in that context). On the rectification point, I have not been persuaded by the applicant that the argument remains open. With respect to point (b) the "scheme" advocated for the applicant was not sufficiently described to constitute a ground for the funds to be vested in the Aall foundation for the purposes of its founding deed rather than held in a resulting trust for the settlor, the purpose of the applicant's proposed involvement. As to point (c), nothing was said of any specific conduct which might result in equitable principles being invoked so as to prevent what seems to be the intent of the decision of the Judicial Committee being carried into effect. I make no finding, of course, on the merits of any of these points. My only conclusion is that they have not *on this application* been shown to justify an unusual exercise of the discretion of the court in favour of the joinder of the applicant as an additional defendant. The present parties are, of course, free to seek to raise in the action any matter argued on this application, notwithstanding my decision.

With respect to the status of the applicant, I am for the reasons already stated of the view that it has no such interest in the outcome of the litigation as would bring it within the scope of rule 6(2)(b), as it has so far been defined, and I have concluded that there are no such special circumstances in this case as would justify an extension of the scope of the rule in order to admit the applicant.

It seems that there is, indeed, need in these proceedings for protection of the process of the Court in at least two respects. Firstly, matters which *were or could have been* raised in the proceedings conducted over the past six years, leading to the decision this year of

the Judicial Committee, ought not to be the subject of further litigation. Secondly, no part of the assets at stake should be allowed by the Court to pass to those whose claim is barred by wrongdoing, including the doctrine of "unclean hands", if that result can properly be prevented. It may be that there are other matters which need to be taken up in the interest of charity and which could not previously have been raised. In some or all of these respects it may be that the Court will require the assistance of the trustees, or of the Attorney General or some other party in the capacity of *amicus curiae*, so as to ensure that all appropriate arguments are advanced. After some hesitation, I have concluded that I need not seek the assistance of an *amicus curiae* at this stage, that is to say in order to decide the present application.

I am not persuaded that the applicant falls within the scope of the rule regarding joinder as defined by the established authorities, nor that its joinder is essential in this case in order for all appropriate arguments to be placed before the court.

The application must therefore be dismissed with costs.

Mr. Justice M.R. Taylor

December 7th, 2000

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 277 OF 1994

IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 20TH JULY, 1976 (KNOWN AS THE CONTINENTAL FOUNDATION)

AND IN THE MATTER OF A MEMEORANDUM OF AGREEMENT DATED 7TH OCTOBER 1982 (KNOWN AS THE AALL FOUNDATION)

AND IN THE MATTER OF THE TRUST LAW (REVISED)

BETWEEN:	(1) BRIDGE TRUST CO. LTD (2) ROBERT N. SLATTER	PLAINTIFF
AND:	(1) THE ATTORNEY GENERAL OF CAYMAN ISLANDS (2) EVEN WAHR-HANSEN (3) COMPASS TRUST CO. LTD	DEFENDANTS

Appearances:
Mr. Terence Etherton Q.C. instructed by Mr. Angus Foster of Walkers for the plaintiff trustees.
Mr. Christopher Nugee Q.C. instructed by Mr. Graham Ritchie for Mr. Wahr Hansen.
Mr. Geoffrey Vos Q.C. instructed by Mr. Nigel Clifford for the 3rd defendant Compass.
Mr. Thomas Lowe and Miss Cherry Bridges for the 4th defendant Eikland A.S.

RULING

Before me is the Trustees' summons seeking directions as to what steps they might appropriately take in the next stage of this rather involved and difficult matter. In particular they seek directions which would allow them to continue to press the claim of Charity to the assets which they hold and allowing their costs to be incurred in so doing, to be paid from those assets.

These proceedings were commenced by the Trustees, as trustees of the Continental and Aall Foundation, in August 1994 against the background of an action (now discontinued) in England ("the English action") brought by the second defendant, Mr. Wahr-Hansen. Mr. Wahr- Hansen acts as the representative of the estate of the late Anders Jahre, a wealthy Norwegian who died in February 1982.

Mr. Wahr-Hansen joined as defendants some 84 defendants in the English action, including the Trustees.

The aggregate of his claim was some USD250 million which he averred included assets settled upon the Continental Foundation and the Aall Foundation (the "CF" and "AF") which were established respectively in 1976 and 1982 - and, upon the trusts of which, the Trustees successively regarded themselves as holding the assets for the benefit of Charity. The CF was originally established under the laws of the Bahamas in 1976 but later that year by virtue of powers expressed in its trust deed, its situs was changed and it became subject to the laws of the Cayman Islands. The assets of the CF were purportedly transferred in late October 1982 - eight months after the death of Mr. Jahre - to the AF, another Cayman Islands trust foundation. Reference hereinafter will be to those assets as "the Assets". When initially settled upon the CF, they were shares, in bearer form, in a Panamanian shipholding company called Pankos SA; later renamed Continental Trust Company.

Mr. Wahr-Hansen's claim in the English action was to the effect that the Assets belonged to Anders Jahre and were in fact held upon resulting trust for the benefit of his estate. This claim was to have been advanced on the basis of the further allegation that the trusts of the CF and AF were void, that the initial transfer of the Assets to the trustees of the CF

was ineffective and that there had been numerous breaches of trust. Specifically, and most directly relevant to the present dispute, Mr. Wahr-Hansen alleged in that action as he does now; that the Assets - worth at the time of settlement in 1976 some USD60 million - did not belong to the person who ostensibly settled them, Mr. Thorlief Monsen. Instead that they belonged to Anders Jahre, for whom Monsen held them as a mere nominee.

Mr. Wahr-Hansen, although an appointee of the Norwegian Court as administrator of the Jahre estate, is in fact acting in the interest of the Norwegian Government which maintains a claim against the Jahre estate for the large sums mentioned, by way of unpaid taxes. There may however, be other claimants against the Jahre estate.

It is said that in June 1976, it came to light that the business affairs of Mr. Jahre were the subject of an investigation by the Norwegian central bank and revenue authorities and that the CF was set up with assets primarily provided by Mr. Jahre to evade or avoid that investigation. That the shares in Pankos SA which formed the bulk of the Assets, were later settled upon the CF by Mr. Monsen who was an acknowledged business associate of Mr. Jahre; but only ostensibly, as Mr. Monsen acted on behalf of Mr. Jahre. Thus it is alleged that the true settlor was Mr. Jahre.

Faced with that threat to their trust, the Trustees sought the directions of this Court as to how to respond.

By Order of 26th August 1994 made in these proceedings, this Court authorised the Trustees to bring an action in this Court seeking a determination of the validity of the trusts of the CF and AF and a determination of the trusts upon which the Assets were in fact held ("the main action"). Among the various ancillary Orders then also made, the

Trustees were allowed an indemnity for their costs of the main action to be paid out of the Assets.

The main action was commenced in Cause 296 of 1994. In it the Trustees joined as defendants the Attorney General (in his perceived role as Protector of Charity), Mr. Wahr-Hansen and Compass Trust Co. ("Compass") - the latter as administrator of the estate of Thorlief Monsen.

In these proceedings and in the main action, several administrative or interlocutory applications were taken, including most notably; a successful application for a declaration that Cayman was the proper forum instead of England. That order allowed matters to proceed here despite the then extant English action.

Eventually this Court ordered in the main action, the trial as a preliminary issue of the question of the validity of the two Foundations.

Shortly before the trial of that preliminary issue, Mr. Wahr-Hansen conceded the validity of the AF but not, it appears, that the assets of the CF had been validly transferred to and held by it.

In his judgment dated 30 April 1996, the then Chief Justice Harre declared that both Foundations were valid. He also subsequently declared that the Assets then purportedly held upon the trusts of the AF (having been transferred to it from the CF) were validly held upon the trusts of the AF.

Mr. Wahr-Hansen appealed against the declaration of validity of the CF and against the transfer of the Assets into the trusts of the AF and, on 28 November 1997, the Court of Appeal allowed his appeals.

No appeal was taken against the declaration of validity of the AF and its validity as a duly constituted charitable trust under Cayman Islands law must now be regarded as conceded.

Following the decision of the Court of Appeal, the Trustees applied in these proceedings for further directions. Mr. Wahr-Hansen and Compass were joined as defendants and the Trustees were authorised:

(1) to continue to administer the Assets in the manner previously authorised (except that charitable donations could only be made if agreed by Mr. Wahr-Hansen or with leave of the Court);

(2) to continue to reimburse themselves for and pay specified costs and expenses out of the Assets;

(3) to continue to pay themselves out of the Assets, remuneration at previously authorised rates and

(4) to pay out of the Assets the Attorney General's costs of appealing the Judgment of the Court of Appeal to the Privy Council.

The Attorney General, as the then deemed Protector of Charity, was seen as the suitable appellant and, in order to save costs, the Trustees agreed to defer to his role for the purposes of the further Appeal to the Privy Council.

The Attorney General's appeal to the Privy Council was unsuccessful and the opinion of the Privy Council was delivered on 26th June 2000. Its formal order affirmed the Court of Appeal's decision that the CF was not a validly constituted charitable trust and revoked the declaration of this Court to the effect that the Assets held by the Trustees of the AF

were held upon the trusts of the Memorandum of Agreement of the 7th October 1982 by which that Foundation was established.

The Privy Council further declared that the Assets are held upon a resulting trust for the benefit of the true settlor of the CF.

The fundamental question that now remains therefore is this: upon what trusts and for whose benefit, do the Trustees hold the Assets?

As matters presently stand, there appear to be four likely contenders to the beneficial ownership of the Assets.

Mr. Wahr-Hansen will argue that it is the estate of Anders Jahre on the basis that Mr. Jahre was the true beneficial owner of the subject-matter of the CF which was transferred to the AF as the Assets.

Compass will argue that the Monsen estate is the true beneficiary on the basis that the Assets were really Mr. Monsen's. Compass will also be raising certain equitable defences to the effect that Jahre's estate is estopped from claiming the Assets. These defences may be met with allegations of "unclean hands" - that Monsen or others involved with him acted fraudulently in relation to the dissipation of some of the Assets.

Eikland the 4th defendant, - having been joined in these proceeding and in the main action in July 2000 upon its own application - will argue that it is the true beneficiary.

Eikland AS contends that the principal assets transferred to the CF in 1976 - the share holding in Pankos SA - were assets which belonged to Kosmos AS, a Norwegian company. Kosmos AS has since then been purchased by Eikland and has merged with it.

Fourthly, we come to the Trustees of the AF, who would seek to argue for Charity as the ultimate beneficiary of the resulting trust declared upon the invalidity of the CF.

There are two positive arguments which the Trustees would seek to put forward in support of the case that they hold the Assets upon the trusts of the AF for Charity. There are also a number of "defences" - (largely the same as those identified by Compass) - which they would raise variously to the claims of the other contenders, in particular to the claim of the Jahre Estate.

I will come necessarily to consider these arguments and defences below in considering the directions which are appropriately to be given to the Trustees upon their present summons.

The Trustees' position is that they are now obliged to seek directions to advance these arguments and defences because the Attorney General has declined to take any further part in those proceedings or in the main action. If they are not allowed, that there will be no one arguing for Charity. The trustees say that as the costs of so doing would be reasonably and properly incurred in fulfilment of their duties as trustees, their costs should be indemnified from the trust fund.

Counsel on behalf of Mr. Wahr-Hansen and counsel on behalf of Eikland AS, opposed the Trustees' application for the pre-emptive order for costs. While they accept that in the light of the Attorney General's withdrawal, the Trustees could properly seek to represent Charity; they object to the costs of doing so, which could be considerable, being paid from the trust fund.

Counsel for Compass supported the Trustees' application.

Before turning to the arguments in light of Mr. Wahr Hansen's and Eikland's objection, I must also briefly consider the Attorney General's stated position.

It is part of the objectors' argument that Charity has had its day in Court, with its interests fully represented all the way to the Privy Council by the Attorney General. That, as he is the protector and voice of Charity and acting on advice, has determined not to press for Charity any further, the Trustees should not be allowed to do so at the expense of a fund which they, the objectors, respectively assert belongs to them. It is, indeed, a fundamental concern that if the Trustees fail in the claim for Charity, the true beneficiary would have been unjustly prejudiced in having, in effect, to meet the Trustees' costs. Doubtless, therefore, an important circumstance to be considered is the position taken by the Attorney General. In this regard, I should be clear that I do not propose to pass in any way upon the merits of his position. My concern is to decide whether it should be regarded as being conclusive or restrictive of the rights of Charity as a subject of these proceedings.

In a statement filed with the Court on 1st September 2000 in response to its concerns to ascertain his position, the Attorney General said that he had concluded that in having taken the matter to the Privy Council, "he had taken the matter on behalf of Charities as far as possible through the Courts". That whilst further legal issues may now arise between the trustees of the AF (as the successor to the CF) and claimants on the assets of the AF, he proposes to take no position in relation to such claims. He stated that the assets in issue "are, on one view, alleged to be the proceeds of tax evasion or at least tax avoidance" and in respect of which the Norwegian Government assert an interest and that the Governor-in-Council has instructed him on policy grounds not to, and he has decided, to take no further steps in the action.

This the Attorney General states, is all against the background of advice he has taken, with which he concurs - that the role of "Protector of Charity" in the Cayman Islands falls upon the Governor acting upon the advice of Executive Council. And that on the basis of that advice, the Attorney General has no separate legal obligation to represent the interests of Charity, as he is not the Protector of Charity.

Finally, the Attorney General states that he is, however, available to assist the Court as an amicus curiae, if so requested.

First, it is appropriate to note that the position now taken by the present Attorney General is different from that earlier taken by his predecessor in these proceedings and in the main action.

As already noted, the earlier position was that the Attorney General in the Cayman Islands, like the Attorney General in England, was legally and constitutionally under a clear duty, as the representative of the Crown, to uphold the interests of Charity. This duty is described as to be ordinarily undertaken without deference to any competing personal interests or policy considerations.

A succinct statement of the duty as it has always applied in England, (and it seems as earlier assumed by the Attorney General here) can be found in The Law and Practice Relating to Charities by Hubert Picarda 3rd Edition, Butterworths Chapter 41 pages 551-552 (citing the venerable old Blackstones commentaries):

> "Blackstone observed that "the King as parens patriae has the general superintendence of all charities which he now exercises by the keeper of his conscience the Chancellor; and, therefore, whenever it is necessary the Attorney General, at the relation of some informant who is actually called relator, files ex

officio an information in the Court of Chancery to have the charity properly established." It is the duty of the Crown as parens patriae to protect property devoted to charitable uses, and that duty is executed by the officer who represents the Crown for all forensic purposes; and on that foundation vested the right of the Attorney General in such cases to obtain by information the interposition of a court of equity. Lord Redesdale said in Ludlow Corp. v Greenhouse: "that the ground stated in all the books is this that the King is to be considered as the parens patriae; that he is the protector of every part of his subjects; and that, therefore, it is the duty of his officer, the Attorney General to see that justice is done to every part of those subjects;" (1827) 1 Bli. NS 17 at 48".

The nature of the duty must be regarded as recognising that Charity serves public and not merely private interests. From the English case law, the only check upon its exercise seems to be where, to advance the interests of Charity would be detrimental to another proper interest of some other subject of the Crown. Picarda cites examples (at page 695 op.cit.) of cases where the Courts have held that the Attorney General is a necessary party:

"where there is a question whether a gift is a valid or invalid charitable gift or where it is necessary to enforce the execution of a charitable purpose, or to remedy an abuse of misapplication of Charity funds, or to administer a Charity."

The remaining important question for determination in this main action– whether Charity as one of four competing claimants, is to be regarded as the true beneficiary of the

resulting trust upon which the Trustees hold the Assets - would appear to be, on the basis of the line of English authorities, par excellence one requiring of the Attorney General's participation on behalf of Charity.

Mr. Etherton's submissions to that effect and his further submissions that the Attorney General's costs for so doing would have been allowed from the Assets, were supported by Mr. Vos. They were not, so far as I can recall from the record, refuted either by Mr. Nugee or Mr. Lowe.

As already indicated, I intend to make no pronouncement now upon the correctness or appropriateness of the stated position. The Attorney General has not been present to explain or support it and the Court was not provided with sight of the advice upon which it stands.

It is against that background, however, that I must now consider the position of the Trustees as trustees for Charity.

The upshot is that the Governor-in-Council has had regard to advice and to factors quite distinct from the interests of Charity in seeking to advance any proper remaining claim Charity might have to the Assets.

Certainly, an important factor is the Privy Council decision that the CF was not a valid charitable trust. From this the Attorney General takes the position that he has presented the legal arguments in favour of charity as far as is possible through the Courts.

Another factor is the policy decision of the Governor– in– Council, by which the Attorney General was instructed to make no further representations in the main action, in deference, it seems, to the allegations of the Norwegian Government as to the Assets being the subject of a tax evasion or avoidance scheme.

This policy decision can of course in no way be regarded as a view upon the merits of the Norwegian Government's claim as it might be advanced through the Jahre estate. The merits of that claim must remain a matter for this Court to decide in the main action in ascertaining the identity of the true beneficiary.

The final observation I make on the Attorney General's position paper is that it properly recognises, notwithstanding his own refusal upon instructions to act further for Charity, that further legal issues may now arise between the Trustees of the AF and other claimants on the assets of AF. These are more accurately to be regarded as claims upon the Assets as held by the Trustees upon the resulting trust declared by the Privy Council; as trustees of that resulting trust.

Thus, this Court is presented with the rather exceptional circumstance of a validly constituted Charity (as the AF must be regarded) having to fend for itself in advancing any claim it might have to disputed assets.

Because of this circumstance, I am invited by Mr. Etherton supported by Mr. Vos, to hold that if Charity's voice is to be heard, only the Trustees are left to speak on its behalf and that, on the basis of the case law, their costs should be allowed. I must therefore consider the case law.

The costs principles.

Exceptional though the present circumstances may be, before turning finally to decide whether to allow the pre-emptive order for an indemnity for Charity's costs from the Assets, I must consider the nature of the Trustees' arguments to be put.

This it seems to me is as much a matter of common sense in the exercise of the discretion recognised by the case law, as it is a matter of legal principle.

The starting point must always be to emphasise that in the context of hostile trust litigation such as we have here - where there are competing claims to the Assets of the trust – it is only in exceptional circumstances that the Court might exercise its discretionary jurisdiction to make an order for pre-emptive costs in favour of any side: In re Buckton [1907] 2 Ch 406 at 415; McDonald v Horn [1995] 1 All. E.R 961 at 970 - 971 per Hoffmann LJ and Alsop Wilkinson v Neary [1996] 1 W.L.R 1220 at 1226 f - i. In that latter case, the strength of the hostile claimants' claim to the trust fund, precluded the order allowing the trustee's pre-emptive costs of defending the trust. The obverse was the case in In Re Hall 1995 CILR 456 - a case before this Court -, where the prima facie strength of the case was in favour of allowing the trustee to defend his trust.

The passage cited above from Alsop Williamson v Neary per Lightman J; very neatly encapsulates the factors to be considered:

> "The court has an exceptional jurisdiction in hostile litigation to make an order at an early stage in the proceedings regarding the ultimate incidence in costs. For the purpose of this application, all parties are agreed that the relevant principles are sufficiently set out in - -
> In re Biddencare Ltd. [1994] 2 B.C.L.C. 160 and that the four relevant considerations for this purpose are
> (1) the strength of the party's case:
> (2) the likely order as to costs at the trial:
> (3) the justice of the application: and

(4) any special circumstances. I would only add that since the decision of the *Court of Appeal in McDonald v Horn* [(supra)] the second requirement has been tightened up and (save the presently recognised exceptions namely derivative actions and actions relating to pension funds [(where the claimants are contributors to the assets and not mere volunteers)], it must appear that the judge at the trial could properly exercise his discretion only by ordering that the applicants costs be paid out of the trust estate."

The last factor as stipulated in McDonald v Horn I think must be regarded as giving rise to difficulty of application unless it is taken as a restatement of the factor or test which requires the applicant to show a strong prima facie case. There can be no other basis for attempting to anticipate what the trial judge would be likely to do; as costs usually follow the event.

Taken in light of those principles, the objection here as I understand it, is not that I have no power to make the pre-emptive costs order in favour of the Trustees; it is that as a matter of the exercise of discretion, it is wrong to do so where, as here, the contest is a hostile one between competing claimants to the beneficial entitlement in the Assets. Mr. Nugee and Mr. Lowe say that the duty of a Trustee where there is such a contest, is to remain neutral. As a basic statement of principle that must be recognised to be correct. See In re Buckton (supra) at 415; Alsop Wilkinson v Neary (supra) at 1225 t 1226; McDonald v Horn (supra) 970 - 971 and Underhill and Hayton: The Law Relating to Trusts and Trustees 5th Edition p.792.

What it really comes down to then is whether there are circumstances in this case which justify a departure from that basic rule as a matter of the exercise of discretion. The consequences of the position taken by the Attorney General are, in my view, not sufficient by itself to weight the balance one way or the other. While it is exceptional that Charity is not to be afforded the protection of the Crown, that, in the circumstances of this case can only be a factor which militates towards a duty in the Trustees to act. The Attorney General's decision appears not to have been guided by the legal merits of Charity's claim as matters stand.

I must therefore also consider whether Charity's claim here is shown to be cogent enough to justify an order in its favour and whether there are any countervailing factors against such an order.

In so holding, I am agreeing with the submissions of Mr. Nugee and Mr. Lowe in this regard – to justify departing from the normal rule in hostile trust litigation as part of the exceptional circumstances to be found, the strength of the claim to be funded must be seen to be clearly present.

In considering this I may not, however, embark upon a "mini-trial".

As Mr. Etherton submitted, the Court should not undertake a close examination of the merits of the dispute, but should limit itself to considering whether the applicants for a protective costs order have shown a sufficient case - varying according to the circumstances of the case - for further investigation or prosecution. In this context, it is necessary, nonetheless, that the Trustees make full disclosure of the strengths and weaknesses of their case. This duty, which was held by the English Court of Appeal to be applicable in the context of the trustees' role in defending a pension trust fund where

the interested beneficiaries were contributors; must be at least equally applicable in the present context of a voluntary settlement. See McDonald v Horn supra, at p970 letter g and 974 letter j; per Hoffman LJ.

Mr. Etherton also observed the further cautionary words of Hoffman LJ in that case (ibid.): These are that once the judge is satisfied that there are matters which justify and need investigation (or presentation), caution should take the form of choosing the most economical way of proceeding. This will therefore not necessarily involve authorising a full investigation or trial and necessary limitations may be placed upon the extent or costs of further investigatory steps to be taken.

In this limited context I have had arguments from all sides touching upon the merits of the two positive arguments to be advanced by the Trustees: Rectification and Resettlement.

I have also in this context,had the benefit of considering the joint opinion of Queen's Counsel provided to the Trustees on the merits of the various equitable "defences". This was during a private session - to the exclusion of the other parties - appropriately, in my view, following the practice established in In Re Moritz [1960] 1 Ch 251. and in Re Eaton [19(4] 1 WLR 1269; a practice followed on occasions in the past in this Court. See for example In Re Ojjeh Trust 1992-93 CILR 348 at 359 and Lloyds Bank International (Cayman) Ltd. v Byleven Corp. [1995] CILR 519.

In approaching the question of whether the Trustees should be allowed a protective costs order, I must also bear in mind that the Assets are held upon resulting trust for a beneficiary or beneficiaries not yet identified. As matters stand, there are no assets upon the trusts of the AF from which the costs of Charity may be met.

To that extent then, this case is not entirely like those cited by Mr. Etherton - Re Spurling's will trusts [1966] 1 WLR 920 930 - 932, Re Beddoe [1893 1 Ch. 547, 558, 562 and Re Dalloway [1982] 1 WLR 756 - and which state the basic principle that trustees are entitled to an indemnity out of the trust fund for expenses reasonably (and properly) incurred, including costs incurred in defending their trust fund.

The basic distinction of course, is that the Trustees at this point in time assert that they seek to defend the trust fund in the Assets qua trustees for Charity from outside attack; but without being able to assert that they hold the Assets in that capacity.

The question is thus whether they should nonetheless be regarded as acting reasonably and properly in seeking to protect the interests of one of four potential beneficiaries - Charity - which would otherwise be without direct representation. I am urged to make the order by analogy by reliance upon the dictum from In Re Evans [1986] 1 WLR 101. This recognises that exceptionally, protection may be afforded for a competing beneficiary in hostile trust litigation where such a beneficiary is not an adult and sui juris, without funds of its own and so cannot make up its own mind as to whether the claim should be resisted or not (per Nourse LJ at p107 f).

Given the exceptional position in which Charity finds itself following on the policy decision of the Governor-in-Council; I am urged to recognise that the Court has a heightened responsibility to ensure that justice is done. This is one of the four primary factors recognised in Alsop Williamson v Neary (supra). While I accept that duty, I consider myself as obliged, nonetheless, to ensure that no undue advantage or disadvantage is created. To this end, I find that I must require to be satisfied that on the legal merits there is such a chance of success as to render it desirable in the interests of

justice that the proposed considerable expenditure should be allowed. This is in my view an appropriate adaptation of the further test that I must be satisfied that the judge at the trial could properly exercise his discretion only by ordering the applicant's costs to be paid out of the fund. This case, after all is said and done, is still to be recognised for what it is - hostile litigation in which costs would ordinarily follow the event. See McDonald v Horn (supra) at 971 j - 972 a.

Charity, as matters stand, has no more proven a right to the beneficial entitlement in the Assets than any other claimant. Its chances of success must therefore be demonstrably clear.

Rectification

Now that the Privy Council, in upholding the decision of the Court of Appeal, has finally declared that the CF is invalid as being, on its proper construction, not limited to objects which are strictly charitable under Cayman law; the Trustees would seek to argue that the CF could be rectified in keeping with the true intentions of the settlor.

Citing In Re Butlin's Settlement [1976] 1 Ch 521, Mr. Etherton would seek to argue that the Court has power to rectify a settlement notwithstanding that it is a voluntary settlement and not the result of a bargain. That, in such a case, rectification may be sought by proving that the settlement does not express the true intention of the settlor, it not being essential also to prove that the settlement also fails to express the true intention of the trustees or other parties to the settlement. He accepted however, that the Court in its discretion, may decline to rectify a settlement against any such other party who objects to rectification.

Re Butlin , as followed and applied by this Court in the past- (Briggs v Intergitas Trust. Management (Cayman) Limited [1989] CILR 456) - provides that rectification may be available not only where particular words have been added, omitted or wrongly written as a result of careless copying or the like; but also where the words of the document were purposely used but it was mistakenly thought that they bore a different meaning from their correct meaning as a matter true construction.

Mr. Etherton would argue that notwithstanding its invalid provisions, there is evidence that Anders Jahre (were he the true settlor of the C F) intended that the CF should be charitable under the laws of England (where Lazards, the trust banking advisors were based) and the Bahamas (being the situs of the CF upon its creation).

In support, he referred to certain exhibits to the affidavit of Michael Lee filed in the main action on 7th July 2000 and to the deposition of John Worsley (another of the advisors upon the establishment of the CF, at the time an employee of Lazard's) filed as Exhibit 57 to the 15th affidavit of Michael Austin in these proceedings.

His purpose would be to seek to show that Anders Jahre's true intention was indeed to establish a valid charitable trust, divesting himself of any beneficial interest in or control over the assets which had been transferred into the CF.

This evidence says Mr. Etherton, bears further investigation. Not being conclusive in and of itself of a clear showing of that intention, it points to a probable basis for the case for rectification.

What is immediately striking about this argument however, is that, contrary to the assertion all along that Thorlief Monsen was the true settlor of the CF, it would seek and indeed need to show, that Anders Jahre was, and that his firm intention was to benefit Charity by means of a valid purpose trust in accordance with the relevant law.

Indeed the evidence cited, while it does include documented references to Thorlief Monsen in the role of settlor, does also reveal that the directing mind - that of the person whose true intentions those involved were concerned to ascertain - was that of Anders Jahre, in his capacity as president of the Continental Trust Company (the successor to Pankos SA) - the shares of which were purportedly settled upon the CF.

What this evidence also shows, therefore, is that if Anders Jahre was the true settlor of the CF, he saw the need to conceal his ownership of the assets he intended to settle upon the CF, behind Thorlief Monsen.

As Monsen was then the only person - of the several advisors involved with the setting up of the CF - resident in the Bahamas, the reasonable inference would be that there was to be some advantage gained from having Monsen appear to be the settlor. Given the tax - free status of that jurisdiction, one must be mindful of Mr. Wahr-Hansen's allegations that the true objective, the true intention of the settlor, was tax driven.

That is the background against which I must consider the likely outcome of the investigation which the Trustees propose for the purpose of obtaining conclusive evidence in support of the rectification claim.

Mr. Etherton acknowledges, and indeed stresses, the need for that investigation, (albeit to be limited as to time and expense) given the inconclusiveness of the existing evidence.

I am however firmly of the view, that expenditure of the Assets for those purposes would be wrong in principle.

There is not the showing of the likelihood of success which the case law requires.

I can hardly imagine that from the rather byzantine circumstances described above could emerge the clear and true intention which the Trustees would wish to find.

Anders Jahre's estate, his only remaining earthly legal manifestation, would certainly not be in favour of the proposition. On the contrary, the estate will be pointing to an intention in him to retain access to, if not control over, the Assets; as the ultimate objective of the alleged tax evasion/avoidance scheme. Already, in the disposition of John Worsley, there are put suggestions (albeit denied by him) that Anders Jahre had made an arrangement with Lazard's and with its representative, Lord Kindersley, to secretly keep control of the Assets for his benefit.

The case law is clear that strong and convincing evidence is required to prove a settlor's intentions as being contrary to his Deed under Seal. See Briggs (supra) at p.466.

Moreover, and all tendentious motives for the moment aside, the evidence so far available is, if anything, confirmatory of an intention in Anders Jahre to benefit objects which were in effect general welfare trusts and hence too wide to conform with the strict requirements of Cayman law, as it relates to public charitable trusts.

It appears that his intention may likely have been to benefit his favoured Norwegian foundations whose objects have been conceded and held to be too wide to qualify as charitable objects under Cayman law. This concession was made, I am told, by Mr. Hubert Picarda QC on behalf of one of those Norwegian foundations in the course of its application to be joined as a defendant to the main action. And in his ruling upon that application Taylor J. expressly so found:

> " I am of the view that the applicant's objects which include those of a "social" nature, are too broad to constitute a charity for the purpose of Cayman or English law" - (at page 7 of his reasons for judgment delivered upon the application in Cause 296/94 on 7th December 2000).

There is yet a further difficulty the Trustees must face with the rectification claim. It is that it is entirely inconsistent with the strong observations made by the Privy Council that the true intentions of the settlor (whoever he was) could have been other than expressed in the Deed of Settlement. Those observations reflected upon the impermissible breadth of the second group of the objects of the CF which, by virtue of their generality, were not capable of being regarded as objects which are in law charitable - (from page 8 of the transcript of judgment):

> " --it is said, the second group of objects must be construed as being limited to those purposes which fall within the fourth head in Pemsel's case (ie: for "other public purposes"). This argument has only subtlety to commend it. Their Lordships can see no reason to give this artificially limited construction to the second group of objects which are entirely general.

On the contrary there are clear indications that no such implied limitation was intended. The first recital demonstrates that the purpose of the Trust was, amongst other things, to benefit "worthy" individuals, a purpose which is plainly not charitable: see In re Atkinson's Will Trusts [1978] 1 WLR 586. Moreover, even Clause 3 of itself states that the intention is "to endeavour to act for the good or the benefit of mankind in general". This demonstrates a much wider intention than to benefit those objects which are strictly charitable. *Their Lordships are of the view that the memorandum of agreement clearly manifests an intention to establish general welfare trusts without confining those trusts to purposes which are in law charitable".*

In my view, the words in emphasis are to be taken to convey a specific finding upon the true intention of the parties to the memorandum of agreement of the CF. It was that expressed intention, impermissibly wide, which resulted in invalidity.

A narrower intention is what the Trustees would seek to establish in order to claim rectification.

Such a claim would seem therefore to be precluded by the doctrine of issue estoppel per rem judicatam as the issue of the true intention appears to have been implicated in the finding of invalidity of the CF. However, I need not here make a conclusive finding in that regard. That was not pressed as an argument by Mr. Nugee or Mr. Lowe. At the very least, however, the factual conclusions of the Privy Council give life to Mr. Nugee's expressed concerns when he submitted that rectification is only available if the words used do not mean what the parties intended. That it is not available if the words used do

mean what the parties intended but the parties had failed to appreciate what the legal results would be. What is required is a failure in the words used to represent the agreement of the parties. See Snells Equity 35th Edition page 696.

Mr. Nugee also specifically argues nonetheless for preclusion of the claim for rectification by virtue of the doctrine of res judicata in the wider sense, as pronounced by the Privy Council in Yat Tung Co. v Dao Heng Bank [1975] A.C. 581. This is that it would be an abuse of the process of the Court to raise now for the first time, matters which could have and should have been raised before. There has been more than six years of litigation in these proceedings and in the main action culminating with the Privy Council's declaration of the invalidity of the CF.

That was the view taken by Taylor J. of a similar argument raised before him by the Anders Jahre Humanitarian Foundation in the joinder application as to be advanced in the main action and it is a view with which I respectfully agree. See his written ruling delivered on 7.12.2000 in Cause 296/94.

No explanation has been offered why the claim was not raised before.

While I am not called upon now to pronounce upon the merits of the claim for rectification; for those various reasons I conclude that it would be contrary to the principles of the case law already identified as governing costs orders, to allow the Trustees' costs on the pre-emptive indemnity basis to investigate or to argue it.

Resettlement

The resettlement claim depends first upon the Court's determination of the identity of the true beneficial owner of the Assets at the time immediately before they were purportedly settled upon the CF in 1976.

As the claim stands to be argued, it seems there are three possibilities: Anders Jahre, Thorlief Monsen or Eikland SA.

The next thing that will have to be determined was whether anything subsequently happened to divest the beneficial owner of title.

The CF having been declared to be invalid; I must proceed on the basis of the Privy Council decision prima facie at least, that that thing was not the purported settlement upon the AF in October 1982. Thus the Assets remained beneficially owned as before.

If they remained vested in Anders Jahre, the argument for his estate will be that nothing happened which could have divested him of it before his death. It will be asserted that no transaction involving him as a party, can be shown to have taken place between July 1976 (the date of the void settlement upon the CF) and February 1982 (the date of his death). It would follow that his estate's entitlement could not have been affected by events after his death which was when the purported resettlement upon the AF took place.

Mr. Vos, while acknowledging the general force of that argument - if one assumes that it proceeds upon an accurate description of events - pointed to a possible exception by which a valid resettlement could nonetheless have taken place, even if Anders Jahre was then the beneficial owner.

This is that Mr. Monsen was not just a nominee holding the Assets for Jahre's benefit, but that Monsen held them upon instructions from Jahre on trust to benefit Charity in keeping with Jahre's intentions to establish a valid charitable foundation. In that event,

when Monsen resettled the Assets upon the trusts of the AF in 1982, he would have done so in fulfilment of his trust and the Assets would have been validly settled for the benefit of Charity. This has been described as a form of "Quistclose" trust: see Barclays Bank v Quistclose Investment [1970] AC 567.

The other possibility which Mr. Vos has been instructed primarily to contend for, is that the Assets were all along beneficially Mr. Monsen's, until resettled by him upon the AF. In either of those two scenarios, the Monsen estate through Compass would likely contend that the Assets should remain upon the trusts of the AF for the benefit of Charity; as it has been conceded that the AF is a validly constituted charitable trust.

Before either of those two possibilities could be advanced, Mr. Vos and Mr. Etherton both recognised that they would need to persuade the trial judge in the main action to regard as obiter dicta, the pronouncements of the Privy Council where, in declaring the Assets to be held upon a resulting trust the Judicial Committee said:

> "There was no appeal to the Court of Appeal against the decision that the trusts of the Aall Foundation were valid since it is immaterial whether or not they are valid: if, as the Court of Appeal held, the trusts of the Continental Foundation were void, the purported vesting of the funds subject to the Continental Foundation in the trustees of the Aall Foundation would be invalid and those funds would at all times have been held on resulting trusts for the settlor of the Continental Foundation".

Their basic argument would be first of all that the question whether there might have been a valid resettlement upon the AF was not the question for determination before the

Privy Council. Moreover, it will be said that the assumption upon which its dictum is based, is not necessarily correct, as the variabilities discussed above would show.

I note in passing here, that plausible though these arguments might be, it is not essential that Charity itself must put them forward.

It is clear that the contest would be, in that context, primarily between the Jahre estate and the Monsen estate.

If either succeeds, Eikland's claim would be necessarily excluded.

While it is true as Mr. Etherton submitted, that these are matters of fact and that their full elucidation will depend upon discovery and interrogatories yet to come; a concern I must address is whether Charity's case might not be adequately represented in any event by the Monsen estate upon which it depends. Then there will be the able presence of Mr. Vos and those instructing him.

A difficulty the Monsen estate - and by extension Charity - must face is that the deed of settlement of the AF, is not expressed to be a declaration of trust by Mr. Monsen, but rather a resettlement, by the trustees of CF, pursuant to their powers as trustees of CF with Mr. Monsen's approval as trust advisor. This might not, however, undermine a valid resettlement if in fact Mr. Monsen had power to resettle the Assets.

The "defences"

There are various defences or pleas in bar which, on advice, Charity might arguably raise to the claim of the Jahre estate.

I do not see the need now to do more than identify what these may be.

They were the subject of the Re Moritz proceeding, when Mr. Etherton on behalf of the trustee, provided me with sight of the careful and analytical advices which have been provided to the Trustees.

(i) Estoppel

To be asserted here is the doctrine which says that when parties have acted in a transaction upon an agreed assumption that a given state of facts is to be accepted as true, then as regards that transaction, each will be estopped from questioning the truth of the assumed facts.

Anders Jahre had repeatedly denied that he was the owner of the shares in Continental Trust Corporation and never represented himself to the trustees of the CF as the owner of those shares.

Accordingly, it is to be argued that the trustees of the CF, Thorlief Monsen and Anders Jahre (even if it is shown that he was the legal owner) all acted in the settlement of the shares on the agreed assumption that Monsen was the owner of the shares.

If this argument is to succeed, it will also become important to establish as a factual matter, the basis upon which the Trustees accepted the shares upon the subsequent transfer to the AF.

Thus, the Trustees may become witnesses of fact in the presentation of the defence of estoppel.

Subject to the concern raised in the arguments both by Mr. Vos and Mr. Etherton – that there are allegations of "unclean hands" the Monsen estate, it would also seek to rely upon this and the other equitable defences.

(ii) Laches

The trustees would be advised to argue that equitable relief should be refused to the Jahre estate on grounds of delay in taking proceedings in circumstances where the estate's delay has made it unjust to grant relief to it.

As an example of the prejudice which may have been caused by the delay, the Trustees would point to the difficulties which may now exist, 24 years after the establishment of the CF, in proving who was the true owner or what was the true nature of the relationship between Anders Jahre and Thorlief Monsen in relation to the Assets. This difficulty has been further compounded since Monsen's death in 1992.

Loss of evidence is said to be a cause of prejudice well recognised in the case law in support of a plea of laches. See Watts v Asset Co. Ltd. [1905] A.C. 317 at 329.

This would be a defence at least as much available as against Eikland's claim, as against the Jahre estate.

(iii) Non-enforcement of foreign revenue laws

The principle to be relied upon here is that the courts of one country will not accept actions for the direct or indirect enforcement of the revenue laws of another country: Government of India Taylor [1955] A.C. 491.

While as yet Mr. Wahr-Hansen has brought no claim as plaintiff in the main action (he is joined in only as defendant), that is to be seen as a matter of form rather than substance and it may become appropriate for the trial judge in the main action to require him to assert a positive claim in order that the main action might properly be heard.

(iv) Breach of Cayman Islands law

There are allegations that Mr. Wahr-Hansen obtained confidential information about the affairs of the trusts of the CF and AF from a Dr. Henry McKinnell in breach of Cayman Islands law.

On public policy grounds it would be argued that the Jahre estate should be allowed to gain no benefit by advancing a claim to the Assets by reliance upon that information.

(v) Champerty and maintenance

The Trustees (and the Monsen estate) say that it has come to light that there exists an argument between Mr. Wahr-Hansen and Dr. McKinnell that the latter (or others to benefit through him) should receive a substantial portion of any recoveries achieved by the Jahre estate in the main action by reliance upon the alleged illegally obtained evidence mentioned above.

The Trustees Compass would seek to argue therefore that Mr. Wahr-Hansen's case on behalf of the Jahre estate is champertous and should be stayed. Alternatively, that it should be stayed as a claim based upon and thus maintained by illegally obtained evidence.

An important test will be whether the champertous arrangement has so infected the claim of the Jahre estate as to have raised a real risk of perjury or the perversion of justice.

The Attorney General as amicus

The three defences of illegality, champerty and maintenance and the non-enforcement of foreign revenue laws all involve important public policy considerations. I note in this context the Attorney General's offer to appear as amicus curiae and regard it as important

that he should do so upon the trial of those issues in the main action. The directions to be given to the Trustees will include that the trial judge be asked to extend that invitation to the Attorney General for his submissions to be taken on those important matters.

Having regard to the many various and complex factors for and countervailing against the grant of a pre-emptive costs order for Charity; in arriving at my decision the following I regards as crucial:

(i) the claim for rectification is not to be pursued at the expense of the Assets. This will help to confine the possible expenditure, although it will no doubt still be significant.

(ii) So confined, the overall impact of those costs upon the Assets (which at USD 70 million are large) will not operate to the great detriment of the ultimate beneficiary, if that turns out not to be Charity.

Furthermore, the Trustees will take advice as to precisely what steps they might now take procedurally and substantively to advance Charity's claim in the main action. They will return for further directions before going to trial.

(iii) Without an order for the Trustee's costs,Charity could not be effectively represented upon its case for re-settlement or upon the defences or pleas in bar to the case for the Jahre estate.

While the resettlement claim in particular will primarily succeed or fail through the claim of the Monsen estate, there is the alternative basis outline above - based upon Mr. Monsen have fulfilled Mr. Jahre's trust in resettling the assets upon the valid trusts of the AF for Charity.

While the Monsen estate through Compass could perhaps present both alternatives, it is only fair that Charity's voice should be heard upon them as well. Mr. Vos has frankly stated that while Compass has said it wants the assets to vest upon the trusts of the Aall Foundation, it cannot bind itself to that position now, as it is itself a trustee. I suppose what this means is that Compass will have to consider its position depending on the outcome and the basis for the final decision in the case.

Mr. Vos is undoubtedly right in his submission that any expression of a view as to whether the Privy Council dictum was only obiter, should be reserved to the trial in the main action.

The clear understanding must be that as very substantial sums have already been paid out in fees over the years, every effort must be made to curtail further expenditure.

(iv) Although the result of the Privy Council decision is that the Assets are held upon resulting trust for the true settlor, prima facie that person was Thorlief Monsen and the trustees of his estate strongly argue in favour of the costs order for Charity.

(v) Charity's case (for resettlement and upon the defences or pleas in bar) is arguable and I am satisfied – from the limited evidence available - is at least as prima facie tenable as that to be put for the Jahre estate in opposition.

On one view of the entire matter, the fact that there is some chance of success in Charity's claim might be seen to be reflected in the negotiations

for settlement now underway - in which offers and counter offers have been put - and which were described to me by Mr. Etherton, both in the presence of the other parties and in the context of the Re Moritz proceedings.

(vi) While the Crown must be primarily regarded as the guardian of the public interest in Charity (whether at common law or in the position taken by the Governor in Council) the Court has an overriding duty to see that justice is done. As is shown from the case law discussed above, this duty, in exceptional circumstances, would require and permit the Court to make the order sought even in the context of hostile trust litigation.

For the foregoing reasons and upon the basis described, I grant the order allowing the Trustees to proceed in the main action and their costs for so doing to be met from the Assets; ie: to that extent, in terms of paragraphs 2 and 3 of the Trustee's summons for directions of 14th June 2000. It follows that the Trustees' costs to be reasonably and properly incurred in continuing the negotiations for a settlement (if that be the case) are also to be allowed.

I also grant the order in terms of paragraph 5 of that summons allowing the Trustees' (and that of Mr. Slatter, a former trustee) costs of representation upon the Letters of Request of 21 May 1999 to this Court from the Drammen City Court, Norway. These are costs already incurred and the Trustees having in my view, acted properly throughout in that matter, are entitled to this order now.

The Trustees are also to be at liberty to execute the deed of indemnity pursuant to paragraph 6 of the summons, which deed of indemnity relates to the retirement of Mr. Slatter as a trustee.

The Trustees are also to have the costs of this application from the Assets.

I make no order now in respect of those aspects of the summons which remain outstanding and will hear the parties further on them.

Anthony Smellie
Chief Justice

Dated this 23rd day of March 2001

THIS DEED OF AGREEMENT is made

BETWEEN

1. Bridge Trust Company Limited ("Bridge").

2. The Estate of Anders Jahre Estate No 7/1982 Sandefjord Court ("the Estate").

3. Even Wahr-Hansen (the "Personal Representative" which expression shall except where the context requires include the successors in title of Even Wahr-Hansen as Personal Representative).

4. Robert Slatter ("Robert Slatter")

WHEREAS

(A) The Estate is a legal entity and makes this Agreement on its own behalf and on behalf of its creditors (whether preferential, approved or unapproved) and beneficiaries.

(B) The Personal Representative is the personal representative of the Estate and makes this Agreement in that capacity and on behalf of the Estate and his successors in title.

(C) Bridge is the present trustee of the Aall Foundation (as defined below) and makes this Agreement in that capacity and as the person representing in the Cayman Proceedings (as defined below) the interests of the charitable objects of the Aall Foundation.

(D) Robert Slatter was formerly a trustee of both Aall Foundation and Continental Foundation.

(E) Bridge is presently holding assets in its capacity as trustee of the Aall Foundation. Bridge supported by Compass (defined below) claims that the assets are held on the trusts of the Aall Foundation. The Estate and the Personal Representative claim that they are held on trust for the Estate. Eikland (defined below) claims that they are held on trust for it.

(F) Bridge the Personal Representative and the Estate wish to settle their respective claims to the assets and co-operate to defeat the claims of Eikland as set out below

Now the parties agree as follows:

1. Definitions

In this Agreement:

1.1 The "Aall Foundation" shall mean the settlement established by a memorandum dated 7 October 1982.

1.2 The "Breach of Trust Claims " means any claims for or in relation to or connected with breach of trust or any other breach of duty or liability to account, deliver up or return money or other property or pay equitable compensation or damages against the Monsen and Aall Parties (which without prejudice to the

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generality of the foregoing shall include claims for knowing receipt of trust property, dishonest assistance in breach of trust, procuring breach of trust, liabilities as constructive trustee, claims to trace trust property, liability to account on the basis of wilful default, breach of fiduciary duty, tortious conspiracy to commit any of the foregoing and/or to defraud or to harm, the claims made or arising from allegations set out or referred to in Cause No 275 of 1995, Cause No 543 of 1995, the English Proceedings and Cause No 41 of 2000) against the Monsen and Aall Parties currently vested in Bridge as the Trustee whether these claims arise in relation to Aall Foundation or the assets held at any time by Aall Foundation or Continental Foundation and the assets held or purportedly held by the Continental Foundation at any time.

1.3 "CARD" shall mean the firm of Charles, Adams Ritchie and Duckworth of PO Box709, Zephyr House, Mary Street, Georgetown, Grand Cayman

1.4 The "Cayman Court" means the Grand Court of the Cayman Islands.

1.5 The "Cayman Proceedings" means the proceedings in the Grand Court of the Cayman Islands between, inter alia, the Trustee, the Personal Representative and the Monsen and Aall Parties, the short reference to the record whereof is Bridge Trust Co Ltd & Others v. The Attorney General of The Cayman Islands & Others, cause no 296 of 1994.

1.6 "Continental Foundation" shall mean the settlement purportedly established by a memorandum dated 20 July 1976.

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1.7 The "Effective Date" means the date upon which both the conditions precedent in Paragraph 2.1 below are first satisfied and if the Sandefjord Probate Judge accepts this settlement, the date that the condition specified in clause 2.1(b) is satisfied shall be the date that the Estate produces written evidence to the Trustee of the court's acceptance.

1.8 The "Excluded Persons" means (1) any descendant, spouse, former spouse or cohabitant (which shall mean a person living with another as man and wife) of Frithjof Bettum, Thorleif Monsen, Otto Grieg Tidemand; (2) Lord Kindersley, Per H Hansson, Terje Braut, Martin Jennings, Michael Lee, Herbjorn Hansson and any present and former board members of the A J Humanitarian Foundation or any descendent, spouse, former spouse or cohabitant of any of them; and (3) any persons (not being individuals) owned whether directly or indirectly by them or any of them or through another person or persons (including a chain of persons) or party directly and partly through a person or persons (including a chain of persons) (4) any of the Monsen and Aall Parties.

1.9 "Eikland" means Eikland AS.

1.10 The "English Proceedings" means the discontinued proceedings in England in the High Court of Justice between, inter alia, the Trustee, the Personal Representative and the Monsen and Aall Parties, the short reference to the record whereof was Even Wahr-Hansen & Others v Aall Trust & Banking Corporation Ltd & Others, CH 1994 W No 2574.

1.11 "Claim" shall include claims, demands, liabilities, losses, costs and expenses of whatever nature wherever arising.

1.12 "CTC" means Continental Trust Company Incorporated

1.13 "Lazard" shall include: (1) Lazard Bank Limited, (2) Lazard LLC and each of its subsidiaries, controlling, associated and affiliated undertakings as of the date of this Agreement or prior thereto, (3) The Right Honourable Robert Hugh Molesworth Baron Kindersley.

1.14 The "Monsen and Aall parties" shall mean Aall Trust & Banking Corporation Limited, Mads Erik Monsen, Thomas John Monsen, Tove Brown, Hurford Holdings, Compass Trust Co Limited ("Compass") as executor of the late Thorleif Monsen, The Right Honourable Anthony George Merrik Baron Tyros of Durnford, Forrester Holdings Limited, Chester Portfolio Limited, Aall Group Inc, Aall & Co Limited Inc, Aall Investment Management (Cayman) Limited, Meriken Nominees Limited, Guri McKinnell, Anchor Trust Co Limited, Oriental Maritime Corporation Limited and Forrester Maritime Corporation Limited or any subsidiaries or nominees of any of the said companies or any company owned beneficially or controlled by any of the aforementioned persons or companies.

1.15 The "Norwegian Proceedings" means the action brought on behalf of the Estate against Lazard, Lord Kindersley and Bjørn Bettum in Norway as Drammen City Court's case 97-00586A (96377A at Sandefjord City Court

1.18 "Trust Entity" shall mean persons owned or controlled in whole or in part and whether directly or indirectly by the Trustee in its capacity as such and persons holding assets on behalf of the Trustee in its capacity as such.

1.19 The date that the Cayman Proceedings are finally disposed of shall mean the earliest date by which the proceedings in the action including any proceedings on or in consequence of an appeal have been determined and any time for appealing or further appealing has expired except that if the proceedings are withdrawn or any appeal abandoned the date of withdrawal or abandonment shall be treated as the relevant date and otherwise shall have the same meaning mutatis mutandis as the phrase "the date that the application is finally disposed of" in the Landlord and Tenant Act 1954.

2. Conditions Precedent

2.1 The provisions of this Agreement are (subject to the proviso to clause 3 below) conditional upon the following events ("the Conditions Precedent"):

(a) the Cayman Court making an order authorising the Trustee to proceed in accordance with this Agreement whereupon the Trustee shall immediately deliver a certified copy of the order of the court to the Estate.

(b) the Sandefjord Probate Judge accepting this settlement on behalf of the Estate whereupon the Estate shall immediately notify the Trustee of the decision

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2.2 The Estate agrees that it will use its best endeavours to assist the Trustee in obtaining such approval

3. If the Conditions Precedent are not satisfied within 28 days of the execution of this Agreement then it shall cease to be of any effect unless an extension of time is agreed in writing between Bridge and the Personal Representative PROVIDED THAT clause 2.2 above and clauses 23 to 31 below shall apply until such event.

4. Bridge and the Estate agree (subject as provided below):

a. That as from the Effective Date all the assets held by Bridge in its capacity as trustee of the Aall Foundation shall be held by Bridge on the trusts of the Aall Foundation subject to an obligation to pay US$37.5 Million ("the Settlement Consideration") and interest to the Estate as set out below.

b. That they will continue to prosecute their respective claims in the Cayman Proceedings to the best of their ability to the extent required (and no further) to obtain in those proceedings a declaration or other order or decision binding upon all of the parties to those proceedings that enables the Trustee to administer as from the Effective Date those assets on the basis that they are so held subject to the obligation to the Estate referred to in Clause 4a above ("a Permissive Order").

c. It is agreed for the avoidance of doubt and without prejudice to the generality of the foregoing that a declaration in the terms sought by Bridge in the Statement of Claim or by the Estate in its Counterclaim would constitute a Permissive

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11 Court Makes a Permissive Order

6. In the event that a Permissive Order is made and is not appealed or is appealed unsuccessfully the provisions in clauses 7 to 20 below shall apply.

7 (1) The Trustee will transfer the Settlement Consideration less US$8 million plus interest as specified below to the Estate in Norway by telegraphic transfer as soon as practicably possible after the date that the Cayman Proceedings are finally disposed of

(2) US$8 million shall on the same date as that transfer be paid by the Trustee to CARD to be held in accordance with the provisions of clause 16 below provided that such payment shall be conditional on CARD giving the undertaking in clause 16 i below.

(3) Clause 21 below makes provision in certain events for the said transfer and payment to be made earlier

8. The parties will not seek costs orders against each other in the Cayman Proceedings and if costs orders are made in those proceedings against either Bridge or the Estate in favour of any party thereto they each agree that they will not seek to recover the amount that any one of them may be ordered to pay from the other.

9. (1) There shall be added to the Settlement Consideration interest on the said sum of $37.5 Million from the Effective Date until payment such interest accruing from day to day on that sum at a rate equivalent to 1% above the 3 month US dollar LIBOR rate

The Estate will for a period of 7 years from the Effective Date indemnify the Trustee up to US$3 Million against claims in relation to or connected with the transfer of the Settlement Consideration (and all costs and expenses and other liabilities associated with such claims) from any persons who have not so far made any claims to the assets presently held by Bridge as trustee of the Aall Foundation.

15. The Estate and the Personal Representative each warrant that as far as they are aware Lazard does not intend to make any claim against the Trustee or Mr Slatter or against the assets held by Bridge as trustee of the Aall Foundation.

16. i. As security for the Estate's indemnity obligations under this agreement the sum of US$8million referred to in clause 7 above will be kept by CARD in a designated account in the Cayman Islands the name, location and number of which will be provided within 48 hours of execution of this agreement and CARD shall undertake to the Trustee to pay to it from time to time such sums from that account as may be required to indemnify it in accordance with the provisions of this agreement.

ii. If sums are paid to the Trustee out of such account the Estate shall restore the balance of the account to at least US$8million within 14 days of such payment.

iii. The said arrangements shall continue for at least seven years from the Effective Date and thereafter for so long as there is a possibility of claims for an indemnity under clause 12 above.

iv. Provided that:(1) if the State of Norway grants a valid and effective guarantee (or series of guarantees) in favour of the Trustee of the Estate's indemnity obligations for at least US$ 5 million then during the currency of such guarantee

or guarantees the references above to US$8 million shall be read as US$3million and US$ 5 million may be released by CARD from the said designated account to the Estate (2) the first such guarantee shall be for a period of at least 7 years from the Effective Date(3) if after a reduction in such amount and within the period mentioned in clause 16iii above there should cease to be such a guarantee the Estate shall increase the amount in the account mentioned above to US$8 million within 7 days of such cessation (4) the State guarantees mentioned above shall be governed by Norwegian law with the courts of Norway having exclusive jurisdiction in relation thereto and as to whether such a guarantee is effective.

v. If during the said period of 7 years there is no possibility of claims for an indemnity under clause 12 above, then the provisions in 16i and ii above shall apply as if the references to US$8 million were replaced with US$3million and after the expiry of three years from the Effective Date the arrangements in those sub-clauses may be replaced by a valid and effective guarantee (expiring on or after the expiry of the said period of 7 years) from the State of Norway in favour of the Trustee of the Estate's indemnity obligations for at least US$ 3 million and clause 16iv(4) above shall apply to that guarantee.

Documents, Evidence and Information

17. The Trustee will as far as it is able supply the Estate as soon as reasonably practicable with a copy of the memorandum prepared by Robert Slatter in or around 1993 on the

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history of Continental Foundation and Asll Foundation together with all annexures, and the parties hereto consent to Bridge supplying such document.

18. The Trustee will so far as it may lawfully do so:

a. give to the Estate all documents and other information and provide whatever assistance in relation to the Breach of Trust Claims as the Estate reasonably requires in conducting such claims and as the Trustee can provide including giving evidence in legal proceedings if required to do so PROVIDED THAT such obligation shall not extend to documents and information over which the Trustee could in legal proceedings in the Cayman Islands assert privilege but this exception shall not apply to evidence and material gathered in relation to the Breach of Trusts Claims unless it contains or records or evidences communications to or from legal advisers for the purpose of obtaining or giving legal advice provided also that the Estate shall pay the Trustee's reasonable costs and expenses incurred pursuant to such obligation (including reasonable remuneration for time spent by directors of the Trustee or other individuals employed by the Trustee at the specific request of the Estate.

b. permit persons acting on behalf of the Estate in relation to the Cayman Proceedings to inspect all documents in its possession custody or power PROVIDED THAT such obligation shall not extend to documents and information over which the Trustee could in legal proceedings in the Cayman Islands assert privilege but this exception shall not apply to evidence and material gathered in relation to the Breach of Trusts Claims unless it contains or

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records or evidences communications to or from legal advisers for the purpose of obtaining or giving legal advice PROVIDED FURTHER THAT

i. if in the course of such inspection such persons come upon material over which the Trustee could assert or might reasonably argue that it was entitled to assert privilege in accordance with the above or was not able lawfully to permit the Estate to inspect, the Estate shall immediately inform the Trustee and identify the relevant material and shall not use such documents or material in any way whatsoever and shall keep their contents confidential pending determination of the question whether the material is such over which the Trustee could assert privilege in proceedings in the Cayman Islands or which it is able lawfully to allow the Estate to inspect;

ii. by giving such inspection the Trustee shall not be taken to waive privilege over or any duty owed to others in relation to any document or material (or information revealed thereby) and shall remain entitled to prevent use by the Estate in any way whatsoever of any document or material (or information revealed thereby) over which the Trustee could assert privilege in proceedings in the Cayman Islands or in respect of which the Trustee is not able to permit such use and such documents material or information shall remain confidential;

iii. the Trustee may require that its advisers inspect the material obtained pursuant to such inspection by the Estate and used or intended to be used by the Estate and the Estate shall pay the reasonable costs thereby incurred by the Trustee

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(including reasonable remuneration for time spent by directors of the Trustee or other individuals employed by the Trustee)

before providing documents or complying with its other obligations set out in sub-clauses i. and ii. above the Trustee shall be entitled to require the Estate to enter into arrangements whether with the Trustee or direct with the Trustee's advisers reasonably satisfactory to the Trustee for payment of the above mentioned costs and expenses.

Robert Slatter

15. Robert Slatter agrees to assist the Estate as set out below as soon as reasonably practicable after the Effective Date by:

(a) providing so far as he is able the Estate with copies of all documents in his possession relating to facts or matters arising out of or connected with the Cayman Proceedings, the Norwegian Proceedings or the English Proceedings PROVIDED THAT such obligation shall not extend to documents and information over which he could in legal proceedings in the Cayman Islands assert privilege but this exception shall not apply to evidence and material gathered in relation to the Breach of Trusts Claims unless it contains or records or evidences communications to or from legal advisers for the purpose of obtaining or giving legal advice

(b) consenting in writing to the Estate's use as it sees fit of the memorandum prepared by him together with all annexures in or around 1993 on the history of the Continental Foundation and Aall Foundation.

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(c) meeting with representatives of the Estate for such time as the Estate reasonably requires in the Cayman Islands and answering truthfully all questions that he is asked regarding the affairs of the Continental and Aall Foundations provided that the Estate shall meet his reasonable costs of doing so PROVIDED THAT such obligation shall not extend to giving answers and information in respect of which he could in legal proceedings in the Cayman Islands assert privilege but this exception shall not apply to evidence and material gathered in relation to the Breach of Trusts Claims unless it contains or records or evidences communications to or from legal advisers for the purpose of obtaining or giving legal advice

20. Bridge agrees to grant so far as it is able any necessary consents, waivers or permissions under the Cayman Confidential Relationships Law (CRPL) or otherwise so as to allow Robert Slatter to comply with the above.

21. (1) If a Permissive Order is made by the trial judge and the Estate complies with the conditions set out below, then clause 7 above shall take effect as if the reference in clause 7(1) to "the date that the Cayman Proceedings are finally disposed of" was replaced with "the date that the trial judge makes the Permissive Order".

(2) The conditions mentioned above are that the Estate:

i agrees that in the event that the Permissive Order is set aside, it will repay the said sum together with interest from the date of such transfer until repayment such

interest accruing from day to day at a rate equivalent to 1% above the 3 month US dollar LIBOR rate from time to time quoted by the Financial Times; and

ii procures a valid and effective guarantee in a form approved by the Trustee from a first class bank resident in the Cayman Islands approved by the Trustee (such approvals not to be unreasonably withheld) of its said liability to repay the said sum with interest.

Full and Final Settlement

22. (1) Bridge, the Estate and the Personal Representative agree that (except to the extent that claims are made in order to obtain a Permissive Order) this Agreement shall operate as a full and final settlement of (and each of them will (a) waive and not bring in future against any of them or its legal advisers or against Lazard;(b) (where appropriate) withdraw and (c) will not seek costs orders against each other in the Cayman Proceedings and if costs orders are made in those proceedings against either Bridge or the Estate they each agree that they will not seek to recover the amount that any one of them may be ordered to pay from the other) all causes of action, claims (including proprietary claims) whether pleaded or otherwise, demands, liabilities, damages, costs, charges and expenses which any of them has, has had or might have in the future against any of them, whether acting in their own or in any other capacity, in respect of or arising out of or connected with the claims made between Bridge, the Estate and the Personal Representative or issues raised directly or indirectly in the Cayman Proceedings, the English Proceedings and the Norwegian Proceedings and the facts and matters alleged therein or any of them.

The Estate and the Personal Representative covenant not to sue Slatter in respect of all causes of action, claims (including proprietary claims), demands, liabilities, damages, costs, charges and expenses which they may have, have had or might have in the future against Slatter, whether acting in their own or in any other capacity, in respect of or arising out of or connected with the claims made between the parties to this Agreement or issues raised directly or indirectly in the Cayman Proceedings, the English Proceedings and the Norwegian Proceedings and the facts and matters alleged therein or any of them.

Warranties

23. The Estate and the Personal Representative hereby warrant that save as mentioned below they know of no person other than themselves, Eikland and Bridge who are or might be now making or who have made or would or may be entitled to make a claim that the assets now or previously vested in the Trustee as the trustee of the Aall Foundation were not or are not (whether at the date hereof or hereafter) held by the Trustee on the trusts of the Aall Foundation. Compass have not made a claim but have a position in the Cayman Proceedings known to Bridge and no warranty is given in relation to them or any other person whose claims are already known to Bridge.

24. The persons signing this Agreement warrant that they have authority (subject only to the above-mentioned conditions) to do so on behalf of the parties on whose behalf they purport to do so.

Third Parties

25. Insofar as the Trustee and the Trust Entities enter into this Agreement and take releases and indemnities they do so for the benefit of themselves and others included in the above definitions of "Trustee" and "Trust Entity" except for the excluded persons with the intention that they may enforce on behalf of any of them any release or indemnity given to it on such other's behalf.

26. This Agreement is executed by the parties without prejudice to their respective claims as to the ownership in the period prior to this Agreement of the assets now held by Bridge or the assets at any time purportedly held on the trusts of Aall Foundation or the assets purportedly held on the trusts (since held to be void) of the Continental Foundation.

27. It is hereby acknowledged and declared that this Agreement is not intended to and does not compromise, limit, restrict, inhibit, discharge, release or diminish in any way whatsoever any claims which the Estate has or may wish to pursue against any persons except Bridge in relation to any other matter whatsoever and without prejudice to the generality of the foregoing, is not intended to do so in respect of claims concerning or arising out of or relating to CTC which include the ownership of its assets or the affairs of Anders and Bess Jahre or Anders Jahre Rederi AS and so far as necessary to achieve the intentions expressed in this clause any provision of this Agreement which may be construed as a release shall take effect and be construed as a covenant not to sue.

28. Bridge and the Estate will keep confidential this Agreement until the processes for obtaining the approval of the Cayman Court and the acceptance of the Sandefjord

Probate Judge respectively properly commence unless they each agree in writing to the release of such information.

Waiver of rights to set aside this Agreement

29. All parties hereto acknowledge and agree that:

a. evidence unknown to some or all of the parties may shed new light on the events which have given rise to the existing litigation, and that such evidence may be in favour or one or more of the parties; and

b. they have taken into account the possibility of such new evidence coming to light and in all events intend that this Agreement shall operate as a full and final settlement as set out in clause 22 of this Agreement;

c. by entering into this Agreement the Trustee does not warrant or represent that it holds the assets presently vested in it as trustee of the Aall Foundation on the trusts of the Aall Foundation or that there are any Breach of Trust Claims or Protective Rights vested in it or the Attorney General of the Cayman Islands or as to the validity or effect of any assignments made or to be made pursuant hereto and that in entering this Agreement the parties hereto other than the Trustee have not relied on and shall not be entitled to rely on any representation or indication to that effect previously made by or on behalf of the Trustee

30. Governing Law and Jurisdiction

Subject as provided in clause 16 iv above, this Agreement shall be governed by and construed in accordance with Cayman law. The courts of the Cayman Islands shall have exclusive jurisdiction to determine any dispute which may arise out of or in connection with this Agreement.

31. Entire Agreement

Each of the parties to this Agreement confirms that, save as disclosed in writing between them upon execution, this Agreement represents the entire understanding between the parties, and constitutes the whole agreement between them, in relation to its subject matter and supersedes any previous agreement between the parties with respect thereto and, without prejudice to the generality of the foregoing, excludes any warranty, condition or other undertaking implied at law or by customs.

Signed and delivered as a Deed on this the 16th day of November 2003

.....

For and on behalf of Bridge Trust Company Limited

Witnessed by:

..... Occupation Legal Secretary

of Walkers Attorneys

Signed and delivered as a Deed this 17 day of November 2003

.....

For and on behalf of the Estate of Anders Jahre

Witnessed by:

..... Occupation LAWYER

STRANDEN 1 0117 OSLO, NORWAY

Signed and delivered as a deed this 17 day of November

Even Wahr-Hansen

Witnessed by:

CHRISTIAN LUND Occupation LAWYER

STRANDEN 1 0117 OSLO, NORWAY

Signed and delivered as a deed this 19TH day of NOVEMBER, 2003

Robert Slatter

Witnessed by:

Occupation ATTORNEY

of UNKNOWN

Signed this 19th day of November 2003

THIS AGREEMENT is made

BETWEEN

1. Bridge Trust Company Limited ("**Bridge**").

2. The Estate of Anders Jahre Estate No 7/1982 Sandefjord Probate Court ("**the Estate**").

3. Even Wahr-Hansen (the "**Personal Representative**" which expression shall except where the context requires include the successors in title of Even Wahr-Hansen as Personal Representative).

SUPPLEMENTAL TO a deed of agreement ("the Main Agreement") made between the parties hereto and Robert Slatter and dated 17 November 2003

WHEREAS

(A) The Estate is a legal entity and makes this Agreement on its own behalf and on behalf of its creditors (whether preferential, approved or unapproved) and beneficiaries.

(B) The Personal Representative is the personal representative of the Estate and makes this Agreement in that capacity and on behalf of the Estate and his successors in title

(C) Bridge is the present trustee of the Anti Foundation (as defined below) and makes this Agreement in that capacity.

Now the parties agree as follows:

1 Definitions

The expressions defined in the Main Agreement and dated 17 November 2003 shall (where the context admits and save as hereafter appears) have the same meaning in this agreement.

2. Conditions Precedent

2.1 The provisions of this Agreement are conditional upon:

(a) the Grand Court of the Cayman Islands making an order authorising the Trustee to proceed in accordance with this Agreement whereupon the Trustee shall immediately deliver a certified copy of the order of the court to the Estate

(b) CARD undertaking to the Trustee that the US$2 million payment mentioned below will be paid

(c) Eikland entering into an agreement ("the Eikland Agreement") in the form set out in schedule 1 hereto and the Cayman Court authorising the Trustee to proceed with that agreement

3.2 If the above conditions are not satisfied within 28 days of the date of this agreement then this agreement shall cease to be of any effect other than in relation to amendments to the Main Agreement

3. Assignment of Claims

3.1 Bridge shall in exchange for the US$2 million payment mentioned below forthwith assign to the Estate the claims, rights, title and interests assigned to Bridge under the Eikland Agreement and in particular clause 3 thereof (without any warranty as to those rights or that assignment).

3.2 The Personal Representative agrees to pay Bridge US$2 million upon Bridge making the above mentioned assignment

3.3 The Estate and the Personal Representative agree that neither they nor anyone claiming under or through them will make any claim against the Trustee (but this shall not affect a claim against Tove Brown other than in her capacity as a director of Bridge)) or a Trust Entity relying on or by virtue of the claims and rights so assigned (other than to obtain a Permissive Order).

3.4 The parties hereto shall not seek any costs (including copying charges as may remain unpaid) or other relief against Eikland in the Cayman Proceedings apart from a Permissive Order and the provisions of the Main Agreement are accordingly modified.

3 The Trustee shall (so far as it is reasonably able to do so) take such further steps and execute such further documentation as may be necessary or appropriate to give full effect to the matters contemplated by Clause 10(1) of the Main Agreement to enable the Estate to obtain the benefit of the Breach of Trust Claims and the Protective Rights provided that the Trustee may require as a condition of doing so to be fully and effectively indemnified for all costs and Claims of and arising from such steps or documentation (including adequate security for such indemnity and reasonable remuneration for directors or employees of the Trustee).

Indemnity

4 The Estate agrees that it will indemnify the Trustee against any Claims made against the Trustee by the Monsen and Aall Parties that arise from any proceedings or claim by the Estate or the Personal Representative (other than in the Cayman Proceedings) against the Monsen and Aall Parties on the ground that Thorleif Monsen purportedly settled assets belonging to the Estate (being 80% of the shares in CTC) on the Continental Foundation or settled assets belonging to the Estate on the Aall Foundation. For the avoidance of doubt this indemnity does not include any claim by the Estate in relation to the 20% of the shares of CTC that were not settled on Continental Foundation nor any claim in relation to the Contingency Fund (being the assets alleged by the Estate to have been set aside by CTC for the ostensible purpose of reimbursing Jahre for those two payments of NOK10 million which he (through AJ Rederi) had made on CTC's behalf).

5. Clause 4a of the Main Agreement shall be modified so that it provides that:

"a. That as from the Effective Date all the assets held by Bridge in its capacity as trustee of the Aall Foundation shall be held by Bridge on the trusts of the Aall Foundation subject to an obligation to raise and pay out of such assets the sum of US$37.5 Million ("the Settlement Consideration") and interest to the Estate as set out below which represents with the assignment set out in Clause 10(1) below the transfer of property in settlement of the Estate's alleged proprietary interest in or claim to the assets including choses in action held by the Aall Foundation."

6. (1) Clause 4 c of the Main Agreement shall be amended to add the words "("And a declaration sought by Eikland in its Counterclaim" before the words "would constitute a Permissive Order"

(2) Clause 12(1) of the Main Agreement shall be read as if "Bridge" were replaced with "the Trustee" (and that clause shall apply in relation to Tove Brown only in her capacity as a director of Bridge and does not apply to Slatter).

7. If a Permissive Order is made and is either not appealed or appealed unsuccessfully then the assignment mentioned in Clause 10(1) of the Main Agreement shall (if earlier than the date specified in clause 10(1)) take place within 7 days of the date that the application for such order is finally disposed of (and for these purposes the provisions of clause 1.19 of the Main Agreement shall apply mutatis mutandis as if the reference to "the Cayman Proceedings" were a reference to such application.

8 Clauses 24, 25, 29, 30 and 31 of the Main Agreement shall apply hereto mutatis mutandis as if set out in this agreement

9. Bridge agrees that it will enforce for the benefit of the Estate all promises and obligations of Elkland for the benefit of the Estate in the Elkland Agreement and without prejudice to the generality of the foregoing Clauses 4 and 5 thereof.

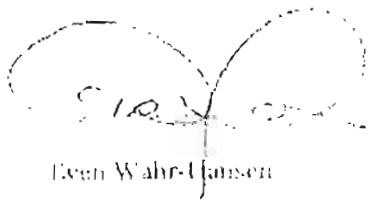
10 Each of Estate and Bridge agrees that they will use their best endeavours to obtain as soon as possible a declaration that Bridge holds the assets of the Aall Foundation in the manner set out in Clause 4a of the Main Agreement as amended in preference to any other form of a Peremissive Order

11 The parties will keep this agreement confidential until application for approval by the Cayman Court has commenced

Signed November 2003

For and on behalf of Bridge Trust Company Limited

For and on behalf of the estate of Anders Jahre



Even Wahr-Hansen

VEDLEGG 213

IN THE GRAND COURT OF THE CAYMAN ISLANDS CAUSE NO. 277 OF 1994

IN THE MATTER of a Memorandum of Agreement dated 7th October, 1982 known as the Aall Foundation

BETWEEN:

(1) BRIDGE TRUST CO. LTD. PLAINTIFF

AND:

(1) THE ATTORNEY GENERAL

(2) EVAN WAHR-HANSEN
(as the personal representative of the Estate of Anders Jahre (deceased))

(3) COMPASS TRUST CO. LTD.

(4) EIKLAND AS DEFENDANTS

Before the Honourable Chief Justice in Chambers

GRAND COURT CAYMAN ISLANDS

ORDER

UPON HEARING Counsel for the Plaintiff and Counsel for the Second, Third and Fourth Defendants

AND UPON READING the Eighteenth Affidavit of Mr. Michael Austin and the First Affidavit of Ms. Sara Collins-Francis

AND ON THE COURT declaring that neither Clause 4 (d) nor any other provision of the agreements is capable of operating so as to prevent the Trustee through its Counsel from fairly and objectively representing to the Court their views on any matter which may arise for the contemplation of the Court upon an application by the Third Defendant to amend to plead a counterclaim against the Estate.

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Plaintiff is hereby authorised to proceed in accordance with the following agreements and carry them into effect:
   (a) a Deed of Agreement dated 17 November 2003 and made between the Plaintiff (1), the Estate of Anders Jahre (2), the Second Defendant (3) and Robert Slatter (4);

(b) a Supplemental Agreement dated 24 November 2003 and made between the Plaintiff (1), the Estate of Anders Jahre (2) and the Second Defendant (3); and

(c) an Agreement dated 24 November 2003 and made between Eikland AS (1) and the Plaintiff (2);

2. If a Permissive Order (as defined for the purposes of the above mentioned Deed of Agreement) is made in Cause Number 296 of 1994, the Plaintiff need not appear in any proceedings in that action after such order other than in relation to Third Defendant's present application to amend and in respect of such application paragraph 2 of the Order made herein on 22 July 2003 shall apply.

3. The Plaintiff's costs of and incidental to its applications by summonses dated 17 and 24 November 2003 be raised and paid out of the funds and other property held by it as trustee of the above mentioned Aall Foundation.

4. Liberty to apply.

ORDER made this 25th day of November 2003
ORDER filed this 27th day of November 2003

The Honourable Chief Justice
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS

Agreed as to form and content

Charles Adams Ritchie & Duckworth
Attorneys-at-Law for the 2nd Defendant

Hunter & Hunter
Attorneys-at-Law for the 3rd Defendant

Ritch & Conolly
Attorneys-at-Law for the 4th Defendant

Legal Department

This Order was filed by Walkers, Attorneys-at-Law for the Plaintiff, whose address for service is care of its said Attorneys, Walker House, PO Box 265GT, George Town, Grand Cayman.

VEDLEGG 214

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No: 296/94

IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 20 JULY 1976 (KNOWN AS THE CONTINENTAL FOUNDATION)

AND IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 7 OCTOBER 1982 (KNOWN AS THE AALL FOUNDATION)

BETWEEN:	BRIDGE TRUST CO. LTD	PLAINTIFF
AND:	(1) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS	1ST DEFENDANT
	(2) EVEN WAHR-HANSEN	2ND DEFENDANT
	(3) COMPASS TRUST CO. LTD	3RD DEFENDANT
	(4) TRANSWORLD TRUST COMPANY	4TH DEFENDANT
	(5-73) AALL TRUST & BANKING CORPORATION LTD. AND OTHERS	5TH TO 73RD DEFENDANTS
	(74) EIKLAND AS	74TH DEFENDANT

APPEARANCES:

GRAND COURT CAYMAN ISLANDS

Plaintiff – Bridge Trust Company Limited

Counsel	Mr. Ali Malek, Q.C. Mr. Christopher Tidmarsh, Q.C.
Instructed by	Ms. Sara Collins-Francis of Walkers

2nd Defendant – Even Wahr-Hansen

Counsel	Mr. Jules Scher, Q.C. Mr. Philip Brook-Smith, Q.C.
Instructed by	Mr. Graham Ritchie of CARD

3rd Defendant – Compass Trust Company Limited

Counsel	Mr. Geoffrey Vos, Q.C.
Instructed by	Mr. Nigel Clifford of Hunter & Hunter

74th Defendant – Eikland

Counsel	Mr. Tom Lowe
Instructed by	Ms. Cherry Bridges of Ritch & Conolly

Before: Hon. Justice Henderson

Heard: November 26, 2003

RULING

The third defendant, Compass Trust Company Limited ("Compass"), has applied for leave to amend its Re-amended Defence to the Counterclaim of the second defendant, Even Wahr-Hansen, the Administrator of the estate of Anders Jahre ("the Estate").

This action was commenced by the plaintiff, Bridge Trust Co. Ltd. ("Bridge Trust") by Originating Summons in 1994. By its Summons, it sought to resolve questions that had arisen concerning the validity of the trusts of the Continental Foundation ("CF") declared in 1976; the validity of the trusts of the Aall Foundation ("AF") declared in 1982; and "whether the assets vested or purportedly vested in the plaintiff as trustee of the [AF] are held upon the trusts declared therein (if valid) or on some other trusts and if so what trusts." Bridge Trust is the trustee of the AF.

Although Compass has been given and exercised a right to standing in this trial, its pleadings to date have not included any prayer for relief. Compass has not, and still does not wish to, advance any affirmative claim to the assets in issue. It represents the estate of Thorleif Monsen, the ostensible transferor of 8,000 shares in Continental Trust Corporation Inc. ("CTC") to Robert Slatter, trustee of the CF. The assets derived from these shares were settled by the CF upon the AF in 1982; Compass accepts that the latter was a valid settlement. Since Mr. Monsen executed that settlement in 1982 as an Advisor to the CF, Compass does not assert a claim to any financial interest in the outcome of the present litigation.

The requested amendment is:

AND THE THIRD DEFENDANT Counterclaims for the following Declarations that:

1. Thorleif Monsen was the legal and beneficial owner of 10,000 shares in CTC (the "CTC Shares") on or before 9 November 1976 when 8,000 of such shares (the "Trust Shares") were transferred to Mr. Robert Slatter as trustee of the Continental Foundation.

2. The assets deriving from the Trust Shares were validly settled on the trust of the Aall Foundation on or about 8 October 1982.

3. In any event, the Estate of Mr. Anders Jahre (the "Estate") is not entitled to make any claim to the CTC Shares or to the assets derived therefrom because:

   a. The Estate has to rely upon its own illegal acts in relation to the CTC Shares in order to make good such a claim.

   b. The Estate's claim is an abuse of the process of the Court as a result of the manner in which it obtained and used documents obtained from Dr. Hank McKinnell in breach of the Confidential Relationships (Preservation) Law (1995 Revision).

   c. Any claim would be an indirect claim to recover tax by the Norwegian revenue authorities;

   d. The Estate is estopped from asserting such a claim and/or its claim is barred by laches.

FACTUAL BACKGROUND

The first two questions posed by the Originating Summons have now been resolved. The Privy Council has determined conclusively that the trusts of the CF declared in 1976 are void and this Court, in a decision from which no appeal was taken, has determined that the trusts of the AF declared in 1982 are valid. This trial has been devoted only to answering the third question.

CTC was incorporated in Panama in 1989 as Pankos Operating Company S.A.. For most of its corporate life, Mr. Jahre was its President and controlled its affairs. He repeatedly denied owning any of its shares, which were in bearer form. The Estate says that he was, at all material times, the true owner of the beneficial interest in those shares. When Mr. Monsen transferred the 8,000 shares to the CF in 1976 he did so, it is argued, as a nominee or agent for Mr. Jahre. By the time of the transfer, the 8,000 shares represented 80% of those that had been issued.

The other 20% were redeemed by CTC and the proceeds were transferred to Harmon Corporation, a company controlled by Mr. Monsen. The intention, until Mr. Jahre's death, was to settle these proceeds of the 20% block upon New World Trust, a trust established in 1979 with objects wide enough to benefit Mr. & Mrs. Jahre. However, within a few months of Mr. Jahre's death, Mr. Monsen instructed that the shares of Harmon Corporation be held to the order of Forrester Holdings Ltd., a company controlled by Monsen. Thus, it is alleged that Mr. Monsen misappropriated the 20% shareholding.

Because of the invalidity of the trusts of the CF, the Court was asked to determine (in answer to the third item in Bridge Trust's prayer for relief) that the assets derived from the 80% shareholding are now held upon resulting trust for the true owner of the beneficial interest in them at the time of transfer to the CF. The Estate says that a consideration of the circumstantial evidence it has marshaled will lead to the inference that the beneficial owner was Mr. Jahre.

The case advanced by Bridge Trust (which, by agreement, represented the interests of charity as well as those of the trustee in this proceeding) is that Mr. Monsen was the beneficial owner. He acquired the beneficial ownership, likely by gift, from Mr. Jahre at some time prior to the transfer to CF. Since the supposed transfer from Jahre to Monsen was (insofar as the evidence reveals) without consideration, a presumption arises that Mr. Monsen held the shares on resulting trust for the benefit of Mr. Jahre. This, however, is a presumption which can be rebutted by evidence that the transferor intended to divest himself of the beneficial interest and that, says Bridge Trust, is the proper inference to be drawn from the evidence.

One of the circumstances which the Estate points to as demonstrating that Mr. Jahre retained the beneficial interest in the 80% block of shares is his apparent intention concerning the other 20%. The Estate says that, while Jahre clearly intended to place 80% of the shares at the disposal of charity, he intended the remaining 20% to provide for a "short term solution", primarily the support of his much younger wife after his death. Since Mr. Monsen was also made to appear as the transferor of the 20% shareholding, the Estate argues that it is unlikely, given Mr. Jahre's intended use for that asset, that he intended to transfer beneficial ownership to Mr. Monsen without consideration. Given the further

likelihood that all 10,000 shares were placed at Monsen's disposal at the same time, the Estate says this is powerful evidence supporting its case on the 80% question. This position was pleaded and advanced by the Estate in opening argument.

Compass was given standing in this proceeding. It elected to play an active role. Compass has alleged in its Amended Defence that Mr. Jahre transferred all 10,000 shares to Mr. Monsen with the intention that the latter should take the beneficial ownership. It has not, until the present application, made any prayer for relief, contenting itself with saying (in paragraph 6.2 of its Amended Defence) that Bridge Trust is entitled to a declaration that it holds the 8,000 shares on the trusts of the AF. An order of this Court on July 23, 2001 directed that any party who has not served a pleading asserting a claim to the assets by a certain date "will be deemed to have abandoned" any such claim.

After several days of trial, Bridge Trust and the Estate succeeded in reaching a settlement. One of the terms of that settlement agreement is an assignment from Bridge Trust to the Estate of any claims the Estate might have against Compass or other parties for breach of trust. Although a final decision has not been made, Mr. Sher says that the Estate will likely commence a breach of trust action against a number of parties relating to the fate of the 20% shareholding after it was placed at the disposal of Mr. Monsen. In argument, Mr. Sher promised to commence this fresh action, if he does so at all, in this Court by around the end of April, 2004.

Shortly after the compromise, the Estate and Bridge Trust concluded a settlement with the 74th defendant, Eikland AS, the only party not yet mentioned which took an active role in the proceedings. Since the only three parties who have asked for relief (in the form of declarations) from this Court have now compromised their claim, this trial would, in ordinary circumstances, be at an end.

When Compass learned, after the settlement between Bridge Trust and the Estate but before the Eikland compromise, of what was in the wind, it put the other parties on notice that it would seek leave to amend so as to assert, for the first time, its entitlement to a declaration. The requested declaration is not

confined to the issue of beneficial ownership of the 8,000 shares; it would require the Court, and the parties, to address the separate but related issue of the fate of the proceeds of the 2,000 shares.

APPLICABLE LAW

The principles governing amendments are well established and not in issue.

The overriding principle is that an amendment ought to be made "for the purpose of determining the real question in controversy between the parties": per Jenkins L.J. in *G.L. Baker Ltd. vs. Medway Building and Supplies Ltd.* [1958] 1WLR 1216 at 1231; [1958] 3 ALL ER 540 at 546; and see *Grand Court Rules, 1995* (revised), O.20, R.8(1). The only limiting factor is the question of prejudice; where the amendment would pose a serious risk of prejudice to another party which cannot be readily alleviated by an adjournment or other measures, it may be refused. Thus, as Lord Griffiths observed in *Ketteman vs. Hansel Properties Ltd.* [1987] AC 189 at 220, there is a distinction to be made between amendments which serve to clarify the issues already in dispute and those that advance a new claim or defence. Inevitably, the Court must decide the question of prejudice after considering all of the circumstances in which the parties find themselves at the time the request is made.

ANALYSIS

Compass says that the requested amendment will introduce no new issues. The Estate cannot complain that it is taken by surprise. Questions of fact concerning the beneficial ownership of the 20% block of shares have been pleaded by the Estate and referred to by it in some detail in its opening address. Beneficial ownership of the 80% block has always been an issue. The Estate's case on the latter question is fully ready to proceed. Beneficial ownership of the 20% block is so closely interrelated with the issue for which the Estate has already prepared that no prejudice will be caused by trying these two questions together. As far as the 80% shareholding is concerned, Compass reminds the Court that the requested declaration simply reiterates what other parties have placed in issue earlier.

This submission somewhat overstates the closeness of the two issues. It is true that Mr. Jahre likely disposed of all of the shares at the same time; it does not necessarily follow that his intent regarding beneficial ownership was the same in each case. The Estate's case on beneficial ownership is entirely circumstantial; I am not convinced that the evidence upon which it relies and the arguments it wishes to make regarding the 80% block are so thoroughly similar to what it would wish to advance concerning the 20% block that (as Compass argued) a one week adjournment would permit it to be ready. I accept Mr. Sher's argument that the Estate had a legitimate expectation that this trial would be focused upon beneficial ownership of the 8,000 shares. That expectation was shared, until now, by all other parties. To move the focus now to the 20% block would cause a subtle but substantial change in how the case should be approached. Given that the amendment request comes very late in the day, that suggests that the preferable course is a fresh proceeding.

By settling with Bridge Trust, the Estate has obtained access (provided for in the settlement agreement) to some additional documentary evidence and at least one witness of some significance – Mr. Robert Slatter, trustee of the CF and involved in many of the relevant events after Mr. Jahre's death. This new evidence may well assist the Estate in establishing its claim. It will take the Estate some time to marshal the evidence, consider its significance, and make any further disclosure that is necessary. I do not think it reasonable to assume that that could be accomplished in as little as one week. There is a suspicion, and I put it no higher than that, that Compass perceives a tactical advantage in pressing the present case forward before the Estate has had time to digest the new material.

Compass says that it has already joined issue with the Estate on the question of beneficial ownership of both the 80% and the 20% interests. It claims to be entitled to litigate that issue to a conclusion.

I agree with Mr. Sher that this misconceives the position. A party to civil litigation has no right to select a particular issue of fact from the pleadings and insist that it be decided. Factual allegations in pleadings are meaningful only insofar as they support a legal entitlement to the relief claimed. Until now, Compass

has not claimed any relief at all. If the trial were to proceed, the Court would decide such factual issues as are necessary to enable it to determine what, if any, relief should be granted. While it is very likely that I would have decided the question of beneficial ownership in relation to the 80% shareholding, it is far from certain that I would have come to any conclusion at all on beneficial ownership of the 20% block. The fact that both the Estate and Compass placed beneficial ownership of the 20% block in issue does not, by itself, mean that either party is "entitled" to a decision on that question. If Compass had wished to ensure a decision on the question of beneficial ownership of the 20% shareholding, it should have requested the amendment it now seeks several months earlier.

Mr. Vos has cited no authority for the proposition that a court is obliged to decide a particular question of fact over the objections of one party but at the insistence of another which has pleaded it. The proposition is without merit.

Compass has already alleged in its Defence that the Estate's claim is barred by laches and estoppel. It has also pleaded that the claim should fail because the Estate is forced, in pleading and proving its case, to rely upon illegal acts by Mr. Jahre. A final affirmative defence pleaded by Compass is that the claim by the Estate, in reality, is an attempt by the State of Norway to gather in taxes, penalties and interest owed to it by the Estate. In other words, it is a thinly disguised attempt to enforce a foreign revenue law in the Cayman Islands.

As long as the Estate carried the burden of showing that Mr. Jahre never divested himself of beneficial ownership, these affirmative defences would be considered in the usual manner when Bridge Trust and Compass presented their defences to the Estate's claim. If the amendment is granted, that position is reversed. Compass now claims a "negative declaration" to the effect that the Estate is precluded, by virtue of one or more of the affirmative defences, from advancing its claim. The Estate no longer seeks any declaration in the present proceeding. The burden of proof and persuasion would therefore fall upon Compass. It would have to present its case first. In addressing the affirmative defences, it would necessarily have to set out the Estate's case and then show how one or more of the defences stands as

a bar to success. That requires anticipating arguments that the Estate may choose not to make and evidence it may decide not to lead. In a case of this complexity, the potential for confusion and disorder is obvious.

I take the current state of the law to be well summarized by Lord Woolf, M.R., in *Messier-Dowty Ltd. and another vs. Sabena SA and others* [2000] 1 WLR 2040(CA) as follows:

> While negative declarations can perform a positive role, they are an unusual remedy insofar as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and vice versa. This can result in procedural complications and possible injustice to an unwilling "defendant." This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful to do so.

Also see *The Declaratory Judgment*, third edition, Woolf and Woolf, London, 2002 at page 193 ff.

Is it "useful to do so" here? I have already said that the Estate will require a greater period of preparation time for a recast trial than the one week offered by Mr. Vos. If Compass succeeds in obtaining a negative declaration, the relief is of no immediate use to them in this proceeding. It might, depending on its form, prevent the Estate from advancing the threatened breach of trust claims in a future proceeding. This is not a case where the unwilling defendant has threatened, in general terms, to sue Compass in some unnamed jurisdiction at some indeterminate point in the future. It has promised to bring its breach of trust claim in the Cayman Islands by approximately the end of April, 2004. Given that the Estate would be entitled to a substantial adjournment if the amendment is granted, I doubt that there would be a dramatic saving in time or costs.

On November 21, 2003, while the parties were concluding their settlement negotiations, the Court of Appeal in Norway issued a judgment which concludes that Mr. Jahre was the "actual" owner of the CTC shares at all material times. The Court of Appeal concluded that Mr. Jahre never transferred the beneficial ownership of those shares to Mr. Monsen. Compass was not a party to the Norwegian proceeding; Forrester Marine Limited, an entity alleged to be closely related to Compass, was.

Compass says that if the amendment is not allowed the Estate will derive a juridical advantage because it can, in a later proceeding, plead an issue estoppel on the question of beneficial ownership. That point would not be open to the Estate in the present action (Compass says) because the Norwegian proceeding was commenced after the present one.

The question of whether the Norwegian decision is capable of giving rise to an issue estoppel involves several subsidiary issues of some complexity which were not canvassed thoroughly on the present application. It is unclear whether the Estate can derive any juridical advantage from pleading an issue estoppel arising from litigation in Norway between different parties (who may or may not be the "privies" of the Estate and Compass) commenced after the present action. In any event, since Compass and its advisors were well aware of the Norwegian litigation, they must be taken to have shouldered an intentional risk that a settlement of the present action (which Compass, because it had asserted no claim, would be powerless to prevent) might give rise to an issue estoppel.

Much the same thing can be said about cost.

Compass complains that it will incur very substantial wasted costs if the action does not proceed. I am inclined to the view that a great deal (perhaps most) of the preparatory work done by Compass will prove to have been necessary in any event for the threatened breach of trust action. In the present action, Compass deliberately assumed a stance supportive of Bridge Trust; while wishing to advance some of its own evidence and arguments, it saw no need to claim any relief for itself. It must be taken to have foreseen that, if the other three active parties were to settle, the action would be at an end. That being so, Compass can be said to have assumed the risk that the trial would conclude in circumstances it could not control.

ORDER

For these reasons the application for leave to amend is dismissed.

I award to the Estate its costs of this application, to be paid by Compass.

Dated this 1st day of December 2003

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT CAYMAN ISLANDS

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 350 OF 2004

BETWEEN:

(1) EVEN WAHR-HANSEN
(2) ANDERS JAHRES REDERI A/S
(3) BRIDGE TRUST COMPANY LIMITED

Plaintiffs

- and -

(1) COMPASS TRUST CO. LIMITED
(2) MADS ERIK MONSEN
(3) AALL GROUP INC.
(4) AALL TRUST & BANKING CORPORATION LTD.
(5) AALL & COMPANY LIMITED INC.
(6) TOVE BROWN
(7) ANTHONY GEORGE MERRIK, BARON TRYON OF DURNFORD
(8) FORRESTER MARITIME LIMITED
(9) FORRESTER HOLDINGS LIMITED (IN VOLUNTARY LIQUIDATION)
(10) ~~HURFORD HOLDINGS LTD~~. CHESTER PORTFOLIO LIMITED
(11) ORNATE LTD.
(12) BANK OF BUTTERFIELD INTERNATIONAL (CAYMAN) LTD.
(13) ANCHOR TRUST CO. LTD.
(14) ROBERT N. SLATTER
(15) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Defendants

GRAND COURT - CAYMAN ISLANDS

Appearances:	**Stephen Rubin Q.C. and Justin Higgo instructed By Graham Ritchie Q.C. and Elaine Gray of Charles Adams, Ritchie and Duckworth for the Plaintiffs Geoffrey Vos Q.C. instructed by Carlos de Serpa Pimentel of Appleby Spurling Hunter with Roger Leese and Maxine Mossman all for the 1st to 13th Defendants**
Before:	**Hon. Justice Henderson**
Heard:	**20th, 21st and 23rd September, 2005**

RULING

The Defendants ask the Court to determine certain issues in a preliminary hearing before commencement of the trial proper. They say that one possible, or even likely, result is that no trial will be necessary.

These sorts of applications are fraught with risk: the risk that the orderly progress of litigation will be compromised by delay, additional cost, duplication of evidence and the possibility of inconsistent findings. Trial of a preliminary issue is a useful tool for case management, but it must be used sparingly and judiciously. Too often the process complicates and lengthens that which it was supposed to simplify and shorten.

Most trial judges have no difficulty recalling cases where the process has proved beneficial to the parties and others, at least equally numerous, where it proved to be, in the words of Lord Scarman in *Tilling v. Whiteman [1980]* AC 1, "a treacherous shortcut". That decision has been applied by Harre, C.J. of this Court in *Basedow v. Stone 1988-98* CILR Note 4 and by Smellie, CJ *In the matter of the T Trust 2002* CILR Note 1.

Our Rules of Court place no real limit on the Court's jurisdiction to order a preliminary hearing. Order 33 rule 3 reads:

> "The Court may order any question or issue arising in a cause or matter, whether of fact or law, or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

The jurisdiction is entirely discretionary. Experience has shown that, to be suitable for preliminary determination, an issue or claim should be shown clearly to possess all of the following characteristics:

First, the issue or claim should be a discrete one which does not depend for its resolution on the view the Court might take on other non-preliminary questions.

Second, little if any evidence should be needed for its resolution.

Third, such evidence as is needed must be uncontroversial and capable of being rehearsed in brief affidavits.

Fourth, the issue or claim should be potentially determinative of the claims as a whole or, at the least, of a significant part of them.

Fifth, its resolution in a preliminary hearing must offer a reasonable prospect that the cost and length of the action will be reduced.

The burden of showing all of this is on the applicant.

One perennial concern is the delay caused by appeals from an adverse ruling. The predecessor action to this one provides a good example. Harre, CJ decided two questions of law on a preliminary basis in 1996. An appeal was taken, the trial was put on hold in the interim, and the preliminary issues were resolved with finality by the Privy Council in 2000. The Chief Justice had ordered the hearing of that preliminary issue to take place upon a motion made to him in 1995.

Mr. Vos, for the Applicants, has given an undertaking which nullifies my concern about delay caused by the appeal process. My note of it is:

> "If and to the extent that the Plaintiffs' claims as pleaded survive the Court's findings on the preliminary issues, the Defendants agree they will not appeal those findings until the findings of liability in the main trial unless the Plaintiffs appeal."

Mr. Rubin, for the Respondents, said the Plaintiffs themselves could be prejudiced by the delay which may result from their own desire to appeal an adverse finding on a preliminary issue. The obvious response to that is, if they choose to appeal, any resulting delay is not the fault of the Defendants and cannot be seen as prejudice to the Plaintiffs. The Defendants, after all, would (on this hypothesis) have in hand a ruling in their favour, a ruling which must be accepted as correct until reversed.

I turn now to the smorgasbord of issues offered for preliminary determination.

The question of whether Anders Jahre was the sole beneficial owner of the 10,000 CTC shares in 1976 or in 1982 is one which Mr. Vos says he can address by reference to a handful of documents. The Plaintiffs, however, have a very different case to put. They say that a consideration of a variety of transactions and events stretching over a considerable period of time, and including particularly the acts of the Defendants after Mr. Jahre's death, give rise to an inference that Mr. Jahre, despite his declarations to the contrary, retained beneficial ownership.

I consider that the Plaintiffs' case on this issue is likely to require a significant amount of oral and documentary evidence. Issues of admissibility are likely to arise. Much, if not most, of the narrative, a story which extends back to 1928, has potential relevance. This issue does not satisfy the criteria referred to above. It is not truly a discrete issue but inextricably intertwined with others. Its resolution promises to be lengthy, complex and expensive for the parties. It is not suitable for preliminary determination.

The assignment issue is dependant upon the ownership issue and it is therefore unsuited to the proposed course of action.

The issues of laches and estoppel are heavily dependent upon factual questions. Laches requires proof of unconscionability. Estoppel requires proof of reliance and consequent detriment. There are 15 Defendants and no good reason to assume that the elements of reliance and detriment can be assessed in the round. The position of each Defendant must be considered. These issues are not suited to a preliminary determination. I see no

reason for confidence that they could be resolved quickly without a detailed examination of a considerable body of evidence.

As for the illegality issue, the first question is whether these Plaintiffs are relying upon an illegal act of Anders Jahre, i.e., tax evasion in Norway, in the proof of their case. That question is not assessed solely by reference to the pleadings. At least equally important is the way in which the Plaintiffs choose to approach the trial. What evidence of Anders Jahre's motives will be adduced? What arguments concerning his motives will be advanced? The matter of public policy may, at least in the view of these Plaintiffs, also have a bearing. The issue is not well-suited for a preliminary resolution. I think the Court must have before it the entirety of the evidence and argument at trial before it comes to decide the illegality question.

The assertion by the Defendants that this action is really an attempt by the Norwegian authorities to collect income tax would, if successful, put an end to the entire case. Moreover, it is an entirely discrete issue which is primarily a question of law. The necessary evidence can be adduced in brief affidavits and, perhaps, in an examination of Mr. Wahr-Hansen. The Defendants, in light of their undertaking to refrain from appealing any adverse decision, are entitled to have this resolved as a preliminary issue. If they succeed, the savings in time and cost will be very substantial.

The limitation period questions are similar. As I see these, they are primarily questions of law and are independent issues of the sort often decided on a preliminary basis. If the

limitation defence succeeds, four of the Defendants will not have to participate in a lengthy trial in which their honesty is impugned. I think these Defendants must be given the opportunity to assert their limitation defences at a preliminary hearing.

For these reasons, I order that the Defendants are at liberty to list a preliminary hearing with respect to the foreign tax collection and limitation period issues.

Dated this 23rd day of September, 2005

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 350 OF 2004

BETWEEN:

(1) EVEN WAHR-HANSEN
(2) ANDERS JAHRE REDERI A/S
(3) BRIDGE TRUST COMPANY LIMITED

Plaintiffs

AND

(1) COMPASS TRUST CO. LIMITED
(2) MADS ERIK MONSEN
(3) AALL GROUP INC.
(4) AALL TRUST & BANKING CORPORATION LTD.
(5) AALL & COMPANY LIMITED INC.
(6) TOVE BROWN
(7) ANTHONY GEORGE MERRIK, BARON TRYON OF DURNFORD
(8) FORRESTER MARITIME LIMITED
(9) FORRESTER HOLDINGS LIMITED (IN VOLUNTARY LIQUIDATION)
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(13) ANCHOR TRUST CO. LTD.
(14) ROBERT N. SLATTER
(15) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Defendants

Appearances: Mr. Geoffrey Vos Q.C., Ms. Camilla Bingham, Mr. Roger Leese and Ms. Maxine Mossman with Mr. Carlos de Serpa Pimentel and Mr. Chris Easdon of Appleby Spurling Hunter (now Appleby Hunter Bailhache) for the first to thirteenth Defendants

Mr. Stephen Rubin Q.C., Mr. Justin Higgo with Mr. Graham Ritchie Q.C. and Mr. David Collier of Charles Adams, Ritchie & Duckworth for the first to 3rd Plaintiffs

The fourteenth and fifteenth Defendants did not appear

Before: **Hon. Justice Henderson**

Heard: **May 17, 18, 19, 22, 23, 24, 26, 29 & 30, 2006**

JUDGMENT

When and in what circumstances will this court refuse to entertain a claim on the ground that it amounts to an indirect attempt to collect tax on behalf of a foreign revenue authority? The rule that a court will ordinarily decline jurisdiction over such claims is well established. The factors which will lead a court to characterize a claim as an indirect attempt to collect foreign tax are more difficult to discern and can be gleaned only from a review of the authorities.

Background

The Plaintiff Even Wahr-Hansen is the administrator of the estate of Anders Jahre. Jahre died in 1982 in Norway while domiciled there. At the request of his widow, Bess Jahre, his estate was taken under public administration in 1982 by the Probate Court in Sandefjord, Norway. The original administrator, Dr. Per Brunsvig, was replaced by Mr. Wahr-Hansen in 1991. In the following year, letters of administration were granted to Mr. Wahr-Hansen by the High Court of Justice in England and resealed by this court.

The Plaintiff Anders Jahre Rederi A/S is an entity owned by the estate. The Plaintiff Bridge Trust Company Limited is the present trustee of the AALL Foundation ("the AF") in the Cayman Islands and an assignor of certain claims pleaded in the statement of claim.

In the broadest terms, the plaintiffs represent the estate of Anders Jahre. I will refer, as do the pleadings and the arguments on this application, to the estate and the plaintiffs interchangeably.

The estate's case is that Anders Jahre was, on (and prior to) November 9, 1976, the legal and beneficial owner of all of the 10,000 shares of a Panamanian company, Continental Trust Company Inc. ("CTC"). On that date, 8,000 of the10,000 CTC shares were purportedly settled on a trust known as the Continental Foundation ("the CF"). The validity of this settlement was attacked in a previous action in this court, cause 296 of 1994; the decision of the Privy Council on June 26, 2000 declared the settlement to be void. Consequently, the 8,000 CTC shares and the assets and income derived from them were held by the trustees of the CF on resulting trust for Anders Jahre and, after his death in 1982, for the estate. These assets were later transferred to another trust - the AF.

After November 9, 1976, the remaining 2,000 of the 10,000 CTC shares and the assets and income derived from them were, on the plaintiffs' case, beneficially owned by Anders Jahre and held in trust for him by Thorleif Monsen. (Alternative, but roughly equivalent, theories of ownership are advanced by the plaintiffs on the basis of the applicable Norwegian law.)

Essentially, the estate claims a dishonest misappropriation of estate assets by Thorleif Monsen, with the dishonest assistance of other defendants. One group of claims (found

in Part III of the pleading) alleges the estate's entitlement to trace the proceeds of and seek equitable compensation for the misappropriation of the 2,000 CTC shares retained after the 1976 settlement. Another group of claims (in Part IV) relates to the "Contingency Fund", a fund held by CTC in trust for Anders Jahre and/or the second plaintiff and allegedly misappropriated by Thorleif Monsen with the assistance of certain defendants. The Contingency Fund was originally intended to provide for the reimbursement of Jahre and the second plaintiff for expenses incurred by them on CTC's behalf. Part V of the statement of claim again makes allegations of misappropriation of assets – the assets vested in the CF, held by it on resulting trust for the estate, and transferred to the AF. This group of claims consists of allegations of misappropriation, breach of trust, dishonest assistance, breach of fiduciary duty, the right to trace and the right to receive equitable compensation. The final group of claims (described in Part VI) sets out the estate's entitlement to follow assets forming part of the estate of Thorleif Monsen, who died in 1992.

The first Defendant, Compass Trust Co. Limited, is the personal representative of Thorleif Monsen. The second and sixth defendants, Mads Erik Monsen and Tove Brown, are children and heirs of Thorleif Monsen. The other defendants (except the Attorney General) are alleged to have been complicit in some way in breaches of trust and misappropriation of assets.

Issue

One of a number of defences advanced in the amended defence (of the first to thirteenth defendants, at paragraphs 1035 to 1066) is the assertion that the estate's claims are an indirect attempt to enforce a foreign revenue law and therefore unenforceable. In my ruling of September 23rd, 2005, I granted leave to the defendants to set down the following question for preliminary determination:

> "Do the plaintiffs' claims fail as being in substance claims to collect tax by or on behalf of a foreign revenue authority (as per paragraphs 9.2 and 1035 to 1066 of the Defence)?"

Leave was also granted to proceed with a preliminary determination of a second question – one of limitation periods – but the parties have agreed not to proceed with that.

For the purpose of this application, I must assume that the plaintiffs' claims can and will be established at trial.

The first part of the enquiry requires resolution of a pure question of law: the nature, extent, and essential elements of a "tax gathering" defence in English law. Once the essential elements have been identified, questions – which are largely issues of fact – of whether the evidence before me establishes each of the essential elements of the defence on the balance of probabilities must be resolved. To that end, I have received in evidence a number of witness statements and observed two of the most important witnesses (Mr. Wahr-Hansen and Truls Leikvang) under cross-examination.

This court will decline to exercise its jurisdiction if it is asked to enforce a foreign penal or revenue law, directly or indirectly: see *Marada Global Corporation v. Marada Corporation et al 1994-95* CILR 546. The estate accepts the validity of this central proposition (Opening Submissions on Behalf of the Estate, paragraph 27, page 8).

Cases of direct enforcement are not common and present little difficulty. The present claims are said to be an effort at indirect enforcement. There is a dispute about the nature and scope of the prohibition on indirect enforcement and no agreement on the factual prerequisites which must ground such a finding.

The defendants say that a careful examination of the decided cases reveals that there are three, and only three, prerequisites. The court must be satisfied:

1) that there exists an unsatisfied tax claim; and

2) that the proceeds of the litigation will go to the foreign revenue authority; and

3) that the claim is in substance an attempt to collect foreign tax.

The first of these is uncontroversial; the plaintiffs agree that it is a necessary element and admit the existence of the unsatisfied tax claim. They also agree that the second and third prerequisites must be present, but argue that the evidence does not establish either element. While most of the proceeds would go to the Norwegian revenue authority, the plaintiffs say that there are other interested parties. They deny that the proceedings are in substance an attempt to collect foreign tax.

With respect to the third element, the plaintiffs say there are qualifications which prevent the rule from operating in the present case:

1) there must be a "connection" between the current claims and the foreign tax law; and

2) the indirect enforcement rule is not a defence available to anyone other than the taxpayer; and

3) "control" of the estate "by the tax authorities and/or the State of Norway" is a necessary requirement for application of the rule.

The defendants reject each of these supposed limitations, and say there is no support for them in the decided cases. In their submission, all that can be gleaned from the authorities is that a claim which "in substance" is an attempt to enforce indirectly a foreign revenue law must fail.

Facts

In 1941, a ship known as the Janko was seized as a prize in Curacao on the ground that it was suspected of being owned by Anders Jahre, a Norwegian national. The dispute dragged on until 1947. The State of Norway attempted to show Jahre to be the true owner of the Janko while he insisted that Gosta Dalman, a Swedish national, owned the vessel by virtue of his shareholding in Pankos Operating Company S.A., an entity incorporated in Panama. Eventually, the Janko was returned to Dalman because the State of Norway was unable to establish Jahre's ownership of the shares of Pankos (and thus his ownership, indirectly, of the Janko).

In the early 1950s, the State of Norway initiated enquiries into investments which it believed Jahre had placed in Panama, Sweden and elsewhere. Ultimately, there was a compromise involving the repatriation of certain ships to Norway.

In 1972, Jahre offered on behalf of CTC a contribution of forty million Norwegian kroner towards the building of a new town hall in his home town of Sandefjord. The second instalment of this gift was paid from a CTC bank account held in Sweden, a circumstance which triggered investigation by the Bank of Norway. Jahre repeatedly denied owning any beneficial interest in the shares of CTC. He refused to disclose the identity of CTC's shareholders, an act which provoked the Bank into saying it would issue no further currency transfer licences to CTC. In 1975, the Bank wrote to the Norwegian Director of Taxes explaining the circumstances and asking for further investigation.

In 1979, the head of the Vestfold County Tax Office initiated an audit of Jahre's corporate and personal financial affairs. The State of Norway obtained (in 1980) an order freezing a CTC bank account in Sweden, although the order was revoked later that year.

Two months after Jahre's death in 1982, his estate was placed under the public administration of the Sandefjord District Court. Dr. Per Brunsvig was appointed administrator of Jahre's estate at the instance of Jahre's widow and sole heir, Bess Jahre. Dr. Brunsvig had represented Jahre's interests earlier, in relation to the Government's investigations. Anders Jahre A/S and the Norwegian tax authorities were the estate's sole creditors.

On September 14, 1983, the Vestfold County Taxation Board made a retroactive assessment against the estate of Anders Jahre for tax payable in the years 1970 to 1982. This was done on the basis that Jahre was the owner of CTC over that period. The total amount of the assessment, including interest and penalties and as adjusted subsequently in 1990 and again in 1999, amounted to some U.S. $125 million.

In November, 1983, Dr. Brunsvig issued a writ in the Sandefjord City Court seeking to have the tax assessment declared invalid on the ground that Jahre was not the owner of CTC. This writ named Sandefjord Municipality as the Defendant but the State of Norway (acting through the Ministry of Finance) elected to step in and defend the proceedings in place of the Municipality.

In 1984, Dr. Brunsvig filed an appeal to the National Tax Committee.

Bess Jahre was anxious that the estate should not be made the subject of bankruptcy proceedings because of the adverse effect that would have on her husband's reputation. An understanding was reached between Bess Jahre and the State of Norway that the State would not initiate bankruptcy proceedings provided that it was given certain information about Jahre's income and assets.

In November, 1990, the National Tax Committee rejected the estate's appeal and upheld the tax assessment of the Vestfold County Taxation Board. After an attempt to pursue

the action which was commenced in the Sandefjord City Court challenging the assessment, those proceedings were eventually withdrawn in 1993.

Dr. Brunsvig suffered a stroke in February, 1990. In November of that year the Probate Court formally relieved him of his position as administrator of the estate.

Ten days later, the Attorney General of Norway, Bjorn Haug, wrote to the Probate Court. He said he had been requested by the Ministry of Finance to represent the State's interests in relation to the tax assessments. He asked for a meeting of creditors to determine "what steps should hereafter be taken to investigate whether there are any outstanding assets or other capital, in Norway or abroad, that must be assumed to belong to the decedent estate and which may be brought home to cover the claims of the estate." He also noted that it would be necessary to appoint a new administrator and said the appointment of Dr. Brunsvig had been "a mistake" because Dr. Brunsvig had acted "against the tax authorities, who are the real principal partner in the decedent estate and whose interests the estate must defend since the estate must be deemed to be insolvent." He added: "in my opinion, it should under no circumstances be considered to appoint as trustee anyone whose job it is to fight the creditors' claims in the estate." A creditors' meeting was scheduled for the following month.

The Attorney General turned his attention to the need for a new administrator. The Plaintiff, Even Wahr-Hansen, has been practicing law since 1970 and was well known to the Solicitor General. Mr. Wahr-Hansen's speciality is taxation law; he also has

experience in shipping and maritime law. He was involved in the administration of the bankrupt estate of another Norwegian ship owner and found himself engaged in tracing and recovering assets secreted abroad.

When the Attorney General asked Mr. Wahr-Hansen to undertake the administration of the Jahre estate, he accepted. On January 17, 1991, his appointment was approved at a meeting of the heirs and beneficiaries and recorded in the minutes of the Probate Court. His mandate was clear: "I was instructed by the Probate Court at the outset to trace any offshore funds that Jahre had established."

The Probate Court accepted, after the decision of the National Tax Board, that the Norwegian revenue was the principal creditor. Mr. Wahr-Hansen said that his "total focus" after appointment was to locate offshore funds owned beneficially by the estate and take control of them.

The investigation into Jahre's affairs made headline news in Norway on a regular basis. Alf Jacobsen, a journalist with a particular interest in the story, contacted Mr. Wahr-Hansen in January, 1992. He put him in touch with Dr. Hank McKinnell, who was in the midst of an acrimonious divorce from the daughter of Thorleif Monsen. McKinnell was in possession of documents which could assist the estate in proving that the shares of CTC, ostensibly owned by Thorleif Monsen, were beneficially owned by Jahre.

McKinnell asked for 15 to 20 percent of any amount recovered by the estate as his price for co-operation. The estate said that the proposal "presupposed the participation of the Norwegian Government, seeing that the tax claim is the only claim in the estate and that any surplus in the estate will in its entirety benefit the Norwegian tax authorities." (see Ex. D4/1336)

By June 14, 1992, the Attorney General had been briefed on the McKinnell proposal and provided a "positive" initial reaction. Mr. Wahr-Hansen supported the proposed McKinnell agreement fully. By November, 1992, it appeared likely that the Ministry of Finance would approve it. At this point, for the first time, Mr. Wahr-Hansen advised the Probate Court of the possibility of buying McKinnell's co-operation. The timing is significant, and will be examined below.

In January, 1993, the Norwegian Government approved of the McKinnell bargain and Mr. Wahr-Hansen applied to the Probate Court for authority to make the first payment of U.S. $270,000.00 to Dr. McKinnell. This was approved.

By May, 1994, Mr. Wahr-Hansen had had sight of the McKinnell documents for almost a year. He decided to initiate proceedings in England and in Norway against Lazard Brothers and Co. Limited and others. Under Norwegian law, the Probate Judge himself could be made liable for losses caused by the institution of the proceedings and required an indemnification agreement. That was provided by the State of Norway.

Other legal proceedings were under way as well, and financing was needed for this purpose. Mr. Wahr-Hansen asked the Ministry of Justice for funding. The application came before the Standing Committee on Justice and was then debated in Parliament. The application was approved. Funding in the approximate amount of U.S. $16.2 million was provided to the estate. From that point on, Mr. Wahr-Hansen sent quarterly reports to the State of Norway on his progress and the State advanced sums to him from time to time.

By 1996, about one third of the funding had been spent, but with little positive result. Political figures began to doubt the wisdom of continuing to find funding. More funding was provided, however, and further proceedings were launched.

As administrator, Mr. Wahr-Hansen had a duty of loyalty to the estate and to the Probate Court but not to any individual creditor. By November, 1996, the Probate Judge was beginning to question Mr. Wahr-Hansen's degree of independence from the Ministry of Finance. He was concerned about the nature and extent of Mr. Wahr-Hansen's communications with that creditor.

On October 3, 2001, Mr. Wahr-Hansen settled the Norwegian proceedings against Lazards for a payment to the estate of U.S. $41.5 million. It was a condition precedent to the settlement agreement that the State of Norway guarantee it would take no further action against Lazards.

At the subsequent Probate Court hearing for approval of the agreement, Mr. Wahr-Hansen and the State of Norway recommended approval but Bess Jahre and Anders Jahre A/S opposed it (arguing that a global settlement of all claims would be preferable). The Probate Court accepted the submission of the State of Norway and approved the agreement. The Court explained that while, in the case of a solvent estate, the views of the sole heir should prevail, in the present case it was "completely unrealistic that Bess Jahre would receive anything after the creditors have been paid" (see Ex. D8/2937). In those circumstances, it was only fair that the view of the Ministry of Finance should prevail.

The proceeds of the settlement were applied to repay advances to the estate made by the State of Norway. Since early 2002, the estate has been self supporting financially.

On November 19, 2001, Anders Jahre A/S initiated bankruptcy proceedings against the estate. Mr. Wahr-Hansen responded by recommending to the Probate Court that an "intervention payment" be made to Anders Jahre A/S to avert bankruptcy. He expressed the view at that time "that the position of the estate in the legal action in the Cayman Islands will be weakened if bankruptcy proceedings are opened" (see D8/3022). This was a reference to cause 296 of 1994 in this Court, the predecessor action dealing with the assets of the AF. The tax gathering defence was also pleaded in that action.

The opinion quoted mirrors an earlier one, recorded in the minutes of the working meeting of the estate in November, 1997, that administering the estate as an insolvent

estate would "make things simpler abroad." The distinction has to do with the question of control. Under Norwegian law, creditors have very limited powers in the administration of an insolvent estate but their opinions (as distinct from those of the beneficiaries) will dictate the outcome of disputed questions in a bankrupt estate. The expert evidence on Norweigan law establishes that:

> "In bankruptcy, the creditors in practice are in charge of the administration of the estate, while the creditors have very limited powers in an insolvent estate. The ultimate decision making organ of a bankrupt estate is the creditors meeting ...basically the weight of each creditor's vote depends on the proportionate size of his claim against the bankruptcy estate."

Bess Jahre supported the bankruptcy petition. However, the Attorney General of Norway, acting on Mr. Wahr-Hansen's advice, offered an intervention payment to Anders Jahre A/S on behalf of the State. The payment was accepted and, on December 18, 2001, the Probate Court ruled that Anders Jahre A/S no longer had standing to proceed with its bankruptcy petition. The estate remained an insolvent estate.

Cause 296 of 1994, the predecessor action to this one, was settled in November, 2003. These proceedings were initiated in July, 2004.

Bess Jahre passed away on June 9, 2006. Before her death, she assigned her interest in the Anders Jahre estate to charity.

Applicable Law

The modern line of authority on the tax gathering defence starts with *Huntington v. Attrill [1893]* AC 150, a case concerned not with taxes but with penal sanctions. Huntington

was a creditor of a New York company of which Attrill was a director. Huntington obtained a judgment for the debt against Attrill personally in New York under a State law imposing personal liability on directors. The judgment went unsatisfied, so Huntington sued Attrill where he resided – in Ontario. Attrill's only defence was his argument that the action should not be entertained at all because it was an attempt to enforce a penalty inflicted by the law of a foreign State.

The Judicial Committee of the Privy Council agreed that "no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country" (at page 156). The court quoted with approval from *Wisconsin v. Pelican Insurance Company* 127 U.S. (20 Davis) 265, an 1888 decision of the U.S. Supreme Court in which the American authorities are reviewed. As an example, their lordships postulated an action by "a member of the public in the character of a common informer" who, although apparently suing in his personal capacity, is regarded as acting in the public interest (page 158).

The importance of the decision lies in its recognition that substance, rather than form, must govern the characterization of the proceedings and in the assertion that an action will offend the rule even where its object "indirectly" aims at enforcement of a penalty. Since the penalty in question could not have been recovered at the instance of the State, Huntington was successful.

Apparently, the first reported instance of a tax gathering defence in England was *Municipal Council of Sydney v. Bull [1909]* 1 KB 7. This was an attempt at direct enforcement. The Municipal Council sued in England to recover a levy imposed by it for street improvements. In a brief judgment, the court said the issue was "not properly cognizable by these courts" (at page 13). The decision was applied in *Re Visser: The Queen of Holland v. Drukker & others [1928]* Ch 877, another case of an attempt at direct enforcement.

One rationale for the rule against tax gathering is set out with particular clarity by Learned Hand, J., in *Moore v. Mitchell (1929)* 30 F. (2d) 600. He said:

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

The decision in *Commissioner of Taxes, Federation of Rhodesia v. McFarland (1965)* 1 W.L.D. 470 contains a useful discussion of a different public policy foundation of the rule against tax gathering. This was a case of direct enforcement. The discussion starts with the observation that, "one would have thought that it is public policy that persons should pay their taxes and not evade such payment by escaping the country which imposed them" (at page 473). After examining a number of authorities, the court found the rule against tax gathering to be rooted in considerations of sovereignty:

> "In the well-known *Lotus case (1927)*, decided in the Permanent Court of International Justice, is to be found the following passage:
>
> > 'The first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another State. In this sense jurisdiction is territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or a convention.'
>
> The imposition of a tax creates a duty that is not to be likened to any other debt. The fiscal power is an attribute of sovereignty. Professor Edgar Allix says in the "*Receuil des Cours*" of the *Academie de Droit International, (1937)* 111 (61) at p. 559:
>
> > 'Le premier droit et le premier devoir de l'Etat est d'assurer son existence et son fonctionnement et, a cet effet, d'exiger de ceux qui vivent sans sa lois les moyens necessaries. Le fondement de l'impot est dans la souverainete de l'Etat laquelle implique l'autorite, dont le pouvoir fiscal est un des attributs.'
>
> As *Oppenheim* says:
>
> > 'to enforce revenue laws would in effect mean to assist States in the performance of acts of sovereignty in foreign countries in derogation of their territorial supremacy'. Pp. 329-30.
>
> Just as one State cannot send its police force into another State so also it cannot send its tax-gatherers.
>
> To allow a foreign State, whether directly or indirectly, to obtain a

> judgment for taxes imposed on all those who in its eyes share in the economic or social life of that State, in the courts of another country, would be a judicial intervention in direct derogation of that country's territorial supremacy. As the passage cited from the *Lotus* case indicates, such an inroad can only be justified by custom or by some special agreement. The latter is the function of the Executive power."

An early example of an indirect enforcement case is found in *Banco De Vizcaya v. Don Alfonso de Borbon y Austria [1935]* K.B. 140. The Defendant, the former King of Spain, had provided certain securities to the Plaintiff, a Spanish bank, with instructions that they should be held by the Westminster Bank in London to the order of the Plaintiff as the Defendant's agent. Subsequently, the Spanish Government decreed that all of the ex-King's property should be seized for the benefit of the State and that all Spanish banks should deliver such property to the Spanish Treasury. Both the Spanish bank and the ex-King sought to recover the securities; the Westminster Bank interpleaded.

Lawrence, J. applied *Huntington v. Attrill* and sought to determine the substance of the claim. The Spanish bank claimed to be entitled to the securities by virtue of its own contract with the Westminster Bank; it argued that the ex-King's rights were limited to a right of action against the Spanish bank itself. The court found that:

> "The plaintiffs are not asserting their contractual rights as they originally existed, but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but the rights of the Spanish Republic." (at page 144)

The claim by the Spanish bank failed because it was in substance an attempt to enforce indirectly the confiscatory decrees of the Spanish Government. The Spanish bank was not an agent or nominee of the Spanish Government. Its claim against the Westminster Bank was founded upon its own contract with that institution. However, as against the

other claimant (the ex-King), the Spanish bank was compelled to invoke the Spanish confiscatory legislation to establish its pre-eminent claim. Moreover, the Spanish bank's purpose in claiming the securities was to recover them for the benefit of the Republican Government.

The decision in *Peter Buchanan Ltd. & MacHarg v. McVey [1954]* IR 89 is now viewed as a seminal decision on an indirect enforcement claim. Peter Buchanan Ltd. was a company doing business in Scotland as a broker of wine and spirits. James McVey owned all of the shares of the company and was one of its two directors; the other was "for practical purposes the paid servant of" Mr. McVey. He had disposed of his interest in two other companies on very advantageous terms. Before doing so, he was advised by the Scottish Revenue that the transactions would not attract excess profits tax; later, the transactions were made liable to such tax retroactively and a tax assessment was made against McVey.

He determined to resist what he saw as an immoral tax. The company's assets at this time consisted of whisky stocks. McVey arranged to have a bank advance a sum approaching the value of the whisky, secured by whisky warrants and McVey's personal guarantee. The bank was put in the position of being able to sell the whisky for its own account, which it did. McVey caused the funds to be moved to bank accounts in Dublin in his name. He left enough behind in the company to meet the claims of all creditors other than the Revenue.

The Lord Advocate, acting for and on behalf of the Commissioners of Inland Revenue, obtained a default judgment against McVey in Scotland and brought a petition there to wind up the company compulsorily. The Scottish court made an order for winding up and appointed the Plaintiff, Andrew MacHarg, as liquidator. He was "chosen by the Revenue" and "worked in every respect hand in glove with the Revenue authorities in an effort to chase the tax" (page 95).

The action against McVey in Ireland was for an accounting and repayment of the monies taken by him. In effect, this was a claim against a director for breach of fiduciary duty. Although it does not appear from the report of the case, there were a few other creditors for small amounts. At some time in the course of the Irish proceedings, McVey paid off these creditors: *Anton, Private International Law, 1967*, pp. 584-5.

Kingsmill Moore, J. first concluded that the stripping of assets from the company by McVey was both *ultra vires* the company and dishonest. In doing so, he made reference to the principle that a British court "cannot take notice of the revenue laws of a foreign State" (per Abbott, C.J. in *James v. Catherwood* 3 Dow. & Ry. 190). Nevertheless, he gave consideration to the Scottish revenue law for the limited purpose of his conclusions about the nature of the transaction (at page 100).

After a very complete review of the authorities, Kingsmill Moore, J. held:

> "These decisions establish that the Courts of our country will not enforce the revenue claims of a foreign country in a suit brought for the purpose by a foreign public authority or the representative of such an authority; and that, even if a judgment for a foreign

> penalty or debt be obtained in the country in which it is incurred, it is not possible successfully to sue in this country on such judgment. They do not expressly go further, though some of the dicta suggest that there may be a principle that our Courts will not lend themselves indirectly to the collection of a foreign tax and will not entertain a suit which is brought for that object. Such a wide extension is also suggested by the authorities which establish that our Courts will not entertain an action for the enforcement of a penalty imposed by the laws of a foreign State, a principle which seems to have been the parent of the rule as to not enforcing foreign revenue claims."
>
> ...
>
> "Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaint that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand. There seems to me to be a reasonably close parallel between the position of the Banco de Vizcaya and the present plaintiff. In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the Courts of this country, relief cannot be given."

His Lordship referred to the rationale for the rule provided by Judge Learned Hand in *Moore v. Mitchell* (and quoted above), and then said:

> "Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance.
>
> If I am right in attributing such importance to the principle then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinised and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue, it must be rejected. Mr. Wilson has pressed upon me the difficulty of deciding such a question of fact and has relied on "*ratio ruentis acervi.*" For the purpose of this

> case it is sufficient to say that when it appears to the Court that the sole object of the suit is to collect tax for a foreign revenue and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction.
>
> If the strict application of the principle were in any way relaxed evasion would be easy and the Court would be faced with all the difficulties which the adoption of the rule was designed to avoid."

In the result, Kingsmill Moore, J. found:

> "I hold as a fact and indeed I understood it to be admitted that the sole object of the liquidation proceedings in Scotland was to collect a revenue debt. There is no evidence that any ordinary creditor would not have been paid in full out of the assets left in Scotland and as far as ordinary creditors are concerned the result of the liquidation proceedings in Scotland would be to deprive them of payment by reason of the priority in Scotland of a Revenue debt. I hold also that the sole object of the present proceedings before me is to collect a Scottish Revenue debt, and that if I were to decide for the plaintiffs the only result of those proceedings would be that every penny recovered, after paying certain costs and liquidator's remuneration could be claimed by the Scottish Revenue. That in my opinion is the substance of the suit - to collect the revenue claim of a foreign State. Being of this opinion, I reject the claim."

On appeal, the judgment was upheld in its entirety. The argument that Kingsmill Moore, J. should have focused solely on the legal effect of the proceedings and not the indirect result of them was rejected. The Court of Appeal said:

> "It is argued that while a company is in liquidation it is still a company and operates in Scotland by its liquidator. A foreign State it is said recognises the title given to a liquidator by the laws of his country. I agree that if the payment of a revenue claim was only incidental and had there been other claims to be met, it would be difficult for our Courts to refuse to lend assistance to bring assets of the Company under the control of the liquidator. But there is no question of that here. The position seems clearly to be as found by the trial Judge that these proceedings were started in Scotland with the purpose of collecting a tax and that apart from costs and the expenses

> of the liquidator any moneys recovered will inevitably pass to the Revenue."

Of particular note is that the Plaintiff liquidator, although nominated by the Lord Advocate on behalf of the Revenue, was appointed and supervised by the court: see remarks of Barrington, J. in *Larkins et al. v. National Union of Mineworkers [1994]* 3 I.R. 111. It seems likely that the litigation in Ireland was itself authorized by the Scottish Court or the Committee of Inspection. Neither the learned trial Judge nor the Court of Appeal saw this as a barrier to the tax gathering defence. The latter was content to rest its decision upon three essential findings (at page 117):

1) The proceedings were started in Scotland for the purpose of collecting tax; and

2) after payment of the costs and expenses of the liquidator, the amount recovered would inevitably be paid to the Revenue; and

3) there were no other creditor claims to be satisfied.

This decision has been cited with approval by many Commonwealth courts.

Any remaining doubts about the existence of a rule against direct enforcement of tax claims were put to rest in *Government of India v. Taylor [1955]* A.C. 491. The Government of India sought to prove in the voluntary liquidation in England of a company which owed income tax in India. The House of Lords held that the claim was rejected correctly. Viscount Simonds referred with approval to *In Re Visser* and *Municipal Council of Sydney v. Bull* and quoted the dictum of Abbott, C.J. in *James v. Catterwood.* These and other decisions amounted to "a formidable array of authority" (at page 505). All of the law lords agreed:

Lord Keith, who wrote separately, alone had had access to the then-unreported judgment in *Buchanan,* a judgment he described as "admirable." Lord Keith quoted the rationale for the rule found in *Moore v. Mitchell* but also provided another, separate explanation:

> "One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."

In *Rossanno v. Manufacturers' Life Insurance Company [1963]* 2 Q.B. 352, the Plaintiff sued on two insurance policies. The Defendant company argued that, as it had been served with two garnishee orders in Egypt resulting from tax owed by the Plaintiff to the Egyptian revenue authorities, it should not have to pay the sums claimed. This defence was rejected on the ground that to give effect to it would be to "recognize or enforce directly or indirectly a foreign revenue law or claim" (at page 376). The judgment quotes *Buchanan* and emphasizes that the claim must be scrutinized to determine its real substance.

In *United States of America v. Harden [1963]* S.C.R. 366, the Commissioner of Internal Revenue first obtained a judgment against the Defendant for back taxes in the United States. This was a consent judgment. An action was then brought on the judgment in British Columbia. The Supreme Court of Canada agreed with the lower courts that the claim remained in substance a claim for taxes, although the cause of action in British

Columbia was based on the earlier judgment and that judgment had been obtained with the agreement of the Defendant.

Re Reid (1970) 17 D.L.R. (3D) 199 was a case where a trustee was liable in England to pay certain estate duty. The trustee had offices in England and in British Columbia and was administering an estate with assets in both jurisdictions. The assets in England were insufficient to pay the duty, so the trustee was forced to make up the difference. He then asked to be reimbursed out of the assets in British Columbia, a proposal which a remainderman under the will resisted on the ground that acquiescence would involve the enforcement, directly or indirectly, of a foreign revenue law. That argument was rejected. Reliance was placed on the fact that the English Treasury would not be affected whether or not the trustee was indemnified; it was required to pay the tax in any event, and it had done so. The action was not in substance an effort to enforce a foreign tax; the foreign State had no interest in the outcome of the proceedings.

In *Ayres v. Evans* 3 ALR 129 the official assignee of an estate in bankruptcy in New Zealand sought to obtain control over property of the bankrupt in Australia. About fifty-six percent of the debts of the estate (see page 130) were due to the New Zealand revenue authorities. One of the grounds advanced in Australia against honouring the letters of request was the rule against indirect enforcement of a foreign revenue claim.

All three judges decided that the request should be honoured and assistance given. Fox, J. referred to the fact that "the farthest the cases have gone" is to deny a claim where the

entire amount sought to be recovered by a liquidator or official assignee in a foreign country will go to the revenue. He held that the rule does not apply where the property claimed will eventually benefit ordinary creditors as well as the foreign revenue authority (at page 131). His Lordship also said this (at page 130):

> "A liquidator, or an official receiver or assignee, does not act to enforce the revenue claim, but to obtain property which is to be dealt with in a due course of administration. In his own country he will doubtless meet revenue claims where these are payable out of the property coming to his hands, but in the foreign country he is simply seeking to get in property under a title recognized in that country. In *Peter Buchanan Ltd. v. McVey* it was obvious that the property in Ireland which was wanted by the Scots liquidator would go only to the Scottish revenue authority and the claim was rejected (see [1955] AC at 530). The court looked behind the representative character of the claimant. It is in some respects an anomalous case, although doubtless sensible in its result."

Northrop, J. agreed that the rule has no application where there are ordinary creditors as well as a debt owing to the Revenue, but his primary reasoning was based on the wording of the statute. McGregor, J. agreed with the result but confined his reasoning to statutory interpretation.

The decision thus stands as persuasive support for the proposition that the rule against indirect enforcement of foreign revenue claims can have no application if the result would be to disadvantage ordinary creditors. Fox, J.'s suggestion that the official capacity of a liquidator, and the nature of his mandate, serves to break the connection between the foreign revenue authority and the impugned proceedings (together with his view that *Peter Buchanan Ltd.* is "in some respects an anomalous case") was not taken up by the other two judges.

The judgment of Fox, J. in *Ayres v. Evans* were quoted with approval and applied by Elloff, J. in *Priestley v. Clegg* [1985] 3 SA 955. There, the trustee of an insolvent estate in England applied for an order in South Africa recognizing his appointment. About six percent of the claims against the insolvent estate were by ordinary creditors, the remainder being a claim by the Commissioner of Inland Revenue in England for taxes. The assertion by Fox, J. that "a liquidator, or an official receiver or assignee, does not act to enforce the revenue claim ..." was quoted with approval.

Another case involving more than one creditor is *Re Tucker (Isle of Man) [2000]* BPIR 859. An English trustee in bankruptcy applied for an examination of two witnesses in the Isle of Man. The application was made under section 122 of the Imperial Bankruptcy Act 1914; much of the reasoning in the judgment turns on the court's interpretation of that section. The major creditor in the bankruptcy was the U.K. Inland Revenue; there was one other creditor, for a relatively small amount.

The court was of the view that "where there is any creditor other than a foreign revenue authority" (at page 870 D), the rule against tax gathering will not apply. Moreover, the court was able to find that the request, coming as it did from an English court and invoking in the Isle of Man an Imperial statute, could not amount to an assertion of sovereignty by a foreign government. The bankruptcy proceedings were instigated by ordinary commercial creditors; the U.K. Inland Revenue proved in the bankruptcy at a later date: see page 860 E. The court discussed the decision in *Buchanan* and concluded that it was "decided on its unusual and particular facts"; whether that decision would be

followed in the Manx courts "if the identical facts ever arose for consideration" was left open.

Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] 1 A.C. 368 was a case involving Spanish confiscatory legislation. The facts (taken from the headnote) were as follows:

> "As a result of Spanish expropriatory decrees passed in 1983, the State of Spain became entitled to control directly the affairs of R.S.A. and the two banks and to control indirectly the affairs of W. & H. Ltd. and, by operation of the arrangements made in 1976, the shares in the Jersey company and with them the benefit of the trade marks became held in trust for M. and his family."

English courts are required to recognize foreign laws involving compulsory acquisition of property and acknowledge the resulting changes in ownership: see, for example, the speech of Lord Templeman (at page 428). The Spanish confiscatory decrees had been passed and put into effect; the change in ownership resulting from that had already taken place. As a consequence, all three levels of court held that the claim could not be described accurately as an attempt to enforce the Spanish Government decrees directly or indirectly; "so far as the decrees are concerned there is nothing left to enforce": per Fox, L.J., in the Court of Appeal (at page 396). That distinguishes the case from *Peter Buchanan Ltd.*

The importance of the decision for present purposes lies in the remarks about *Buchanan* contained in the speech of Lord MacKay (at pages 440 – 1):

> "From the decision in the *Buchanan* case [1955] A.C. 516 counsel for the appellants sought to derive a general principle that even when an action is raised at the instance of a legal person distinct from the foreign

government and even where the cause of action relied upon does not depend to any extent on the foreign law in question nevertheless if the action is brought at the instigation of the foreign government and the proceeds of the action would be applied by the foreign government for the purposes of a penal, revenue or other public law of the foreign State relief cannot be given. It has to be observed that in the *Buchanan* case the action was being pursued by a person whose title as liquidator of the company depended on his having been appointed by a petition to the court in Scotland on behalf of the Inland Revenue and that the ground of action was that the transactions being attacked in the proceedings in Dublin were *ultra vires* and dishonest because there existed at the time that they were effected in Scotland a claim by the Inland Revenue which the transactions were designed to defeat, and that if no such claim existed the defendant would have been entitled to retain the subject matter of the claim. Most important there was an outstanding revenue claim in Scotland against the company which the whole proceeds of the action apart from the expenses of the action and the liquidation would be used to meet. No other interest was involved. That this was regarded as of critical importance appears from what was said in the decision on appeal by Maguire C.J., at p. 533.

Having regard to the questions before this House in *Government of India v. Taylor [1955]* A.C. 491 I consider that it cannot be said that any approval was given by the House to the decision in the *Buchanan* case except to the extent that it held that there is a rule of law which precludes a state from suing in another state for taxes due under the law of the first state. No countenance was given in *Government of India v. Taylor*, in *Rossano's case [1963]* 2 Q.B. 352 nor in *Brokaw v. Seatrain U.K. Ltd. [1971]* 2 Q.B. 476 to the suggestion that an action in this country could be properly described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. The existence of such unsatisfied claim to the satisfaction of which the proceeds of the action will be applied appears to me to be an essential feature of the principle enunciated in the *Buchanan* case [1955] A.C. 516 for refusing to allow the action to succeed.

In the present case there is no allegation of any unsatisfied claim under the law of the Kingdom of Spain on which counsel for the appellants found. No provision of that law would provide a foundation for making any of the claims in question in the actions with which this appeal is concerned. The decision in the *Buchanan* case gives no basis for the substitution in place of such an unsatisfied claim, of a general desire on the part of the foreign state to secure a particular result, object or purpose from the enactment of the law."

Three of the other law lords agreed with Lord McKay.

Thus, the House of Lords has accepted that a claim of indirect enforcement cannot succeed unless there is an existing claim under the penal or revenue law of the foreign country which remains unsatisfied. An unsatisfied claim is an essential element. Three other salient features of *Buchanan* – the liquidator had been nominated by the Inland Revenue, the transactions were *ultra vires* and dishonest because they were designed to defeat an existing claim by the Inland Revenue, and the Defendant would have been entitled to retain the money but for the Inland Revenue's claim – were singled out as being of interest but not identified as essential elements of the rule.

Attorney-General (United Kingdom) v. Heinemann Publishers Australia Pty Ltd. & Anr 78 ALR 449 applied *Buchanan* and *Williams & Humbert* to a claim to enforce in Australia an obligation of confidentiality owed to the United Kingdom Government (with reference to the publication of "Spycatcher" by a former member of the British Security Service). It was argued that the claim was in substance one to enforce the governmental interests of a foreign State and was therefore unenforceable. The majority judgment of the High Court of Australia (6 of 7 judges) said:

> "For the purposes of the principle of unenforceability under consideration the action is to be characterised by reference to the substance of the interest sought to be enforced, rather than the form of the action: cf *Buchanan* (Ir R at 104, 107; AC at 527, 529); *Williams & Humbert Ltd. v. W & H Trade Marks (Jersey) Ltd.* at 439. Thus, to concentrate on the private law character of the causes of action or grounds for relief pleaded by the appellant is to overlook the appellant's central interest in bringing the action."

In *Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 A.C. 723 involved an application under the *Evidence (Proceedings in Other Jurisdictions) Act, 1975* to obtain evidence in England for use in Norway in the action by the Jahre estate in the Sandjeford City Court. Both the State of Norway and the estate itself supported the application; the witnesses in England opposed it. One of the arguments advanced in opposition to the application was the argument that English courts (following *Dicey & Morris, The Conflict of Laws, 11th edition,* 1987, page 100, rule 3) "have no jurisdiction to entertain an action ... for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state...".

Lord Goff, with whom the other four law lords agreed, began by saying that the rule does not operate so as to deprive an English court of jurisdiction; rather, the court simply declines to exercise its jurisdiction in such cases (at page 808). In so far as the request for assistance came from the estate itself (for the purpose of opposing the tax assessment), the question presented little difficulty as the estate was not seeking to enforce the foreign revenue law but to prevent its enforcement. With reference to the request by the State of Norway, Lord Goff said:

> "I return to the rule in *Government of India v. Taylor [1955]* A.C. 491. It is of importance to observe that that rule is limited to cases of direct or indirect enforcement in this country of the revenue laws of a foreign state. It is plain that the present case is not concerned with the direct enforcement of the revenue laws of the State of Norway. Is it concerned with their indirect enforcement? I do not think so. It is stated in *Dicey & Morris*, at p. 103, that indirect enforcement occurs (1) where the foreign state (or its nominee) in form seeks a remedy which in substance is designed to give the foreign law extraterritorial effect, or (2)

> where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state. I have been unable to discover any case of indirect enforcement which goes beyond these two propositions. Even so, since there is no authority directly in point to guide me, I have to consider whether a case such as the present should nevertheless be held to fall foul of the rule. For my part, I cannot see that it should. I cannot see any extraterritorial exercise of sovereign authority in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue law of Norway in Norway itself."

Clearly, the controlling factor in this decision was the fact that the evidence would be used in Norway itself; its purpose was to assist in the enforcement of the revenue laws of Norway, but only in that country.

Another instance of indirect enforcement is found in *Stringam v. Dubois (1992)* A.C.W.S.J. 669646. Dubois' aunt died while domiciled in Arizona. In her will she left a wheat farm in Alberta to her niece. The probate assets located in the United States were insufficient to pay the estate taxes owing there, so the U.S. executor looked to the equity in the wheat farm to make up the balance. The niece applied for an order requiring the conveyance of the wheat farm to her; this was opposed by the aunt's executor on the ground that the wheat farm should be used to satisfy the American tax debt. After referring to *United States of America v. Harden*, *Government of India v. Taylor*, and *Peter Buchanan Ltd.*, the Court of Appeal said that "an indirect attempt at enforcement is as offensive as a direct attempt" and that "one must look at the substance of the claim to determine its nature for the purposes of application of the rule" (at paragraph 25). The niece succeeded, because any other result would have amounted to an indirect enforcement of the estate tax laws of Arizona.

The Grand Court has held that the disgorgement provisions in two American statutes, the *Securities Act 1933* and the *Securities Exchange Act 1934*, are penal in nature (applying *Huntington v. Attrill*): *Stutts v. Premier Benefit Capital Trust 1992-93* CILR 605. As a consequence, the Grand Court refused to recognize an American receiver whose mandate included enforcing disgorgement provisions.

That decision was considered but distinguished in *Marada Global Corporation v. Marada Corporation & Others, supra*. An action was brought in the Grand Court to recover money had and received. The Plaintiff corporation was under the control of a U.S. receiver, appointed at the instance of the Securities and Exchange Commission on allegations that the Plaintiff company had violated U.S. federal securities legislation. The Defendant argued that the action should be struck because it amounted to an attempt to enforce a penal law, i.e., a disgorgement provision, of a foreign State. In this instance, however, the order of the U.S. District Court sanctioning the action in the Cayman Islands provided expressly that any money recovered was to go to the company's investors and creditors and not to the S.E.C. That was considered "an important distinction "(page 552); in *Stutts v. Premier Benefit Trust*, it was clear that the American receiver was seeking recognition in the Cayman Islands in order to give effect to the disgorgement provisions in the American legislation.

Kalley and others v. Manus and others (1999) CILR 560 is a case where Murphy, J. of this court was asked to characterize a certain action in the Grand Court as an attempt to

enforce the penal laws of a foreign country. The plaintiffs were suing on a judgment obtained in Florida in relation to illegal dealings in securities. The American causes of action were statutory and based upon violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 (as well as various Florida statutes and a claim for damages for common law fraud). The court had little difficulty in dismissing the assertion that this was an attempt to enforce the penal law of a foreign jurisdiction. In coming to that conclusion, the court said:

> "The basic question is whether enforcing the judgment at the suit of a private citizen would amount to the enforcement of a penal law contrary to Cayman public policy. I consider these fairly obvious criteria (based on *US v. Inkley*):
>
> (i) whether the claim sought to be enforced is one which involves the assertion of foreign sovereignty;
>
> (ii) the view of the remedy adopted by the foreign court; and
>
> (iii) the identity of the plaintiff or the person in whose favour the right is created.
>
> On these bases, it is clear that the plaintiff here is not seeking to have this court enforce a foreign penal statute. My view, based on the proceedings on their face, is buttressed by the uncontradicted expert evidence characterizing the nature of the US proceedings here as personal in nature. I regard this defence as vexatious and an abuse of process."

An important element in the court's decision was that the judgment recovered in the U.S. proceedings only benefited the plaintiffs as private individuals.

QRS 1 ApS & others v. Frandsen [1999] 1 WLR 2169 is a recent decision in which the Court of Appeal applied *Peter Buchanan Ltd.* and held that a claim by a liquidator was really an attempt at indirect enforcement of a foreign revenue law. The five plaintiffs were Danish companies in the process of compulsory liquidation. The companies, acting

through their liquidator, brought an action in the United Kingdom against the Defendant (a resident there) claiming damages for negligence or reckless default; reimbursement or compensation arising from an alleged breach of a statutory duty under Danish company law; and, alternatively, damages or compensation for breach of fiduciary duty (see page 2170 H).

The Defendant had owned the companies and controlled their affairs. He caused the companies to dispose of all of their assets for cash and, immediately afterwards, caused them to use the cash to acquire his shares in those companies. This asset stripping scheme provided the companies with a remedy under Danish company law against the perpetrator. Some one and a half years later, the companies were put into liquidation and the liquidator sought to assert that remedy. He had been "appointed" by the Danish revenue authority (see page 2172 E), who was funding the action against the Defendant. The Danish tax authorities had made a claim for back corporate taxes some eight months after the asset stripping; the companies were insolvent and the tax authority was the only creditor. The basis of the restitution claim was a provision in Danish company law prohibiting companies from providing financial assistance for the acquisition of their own shares.

On these facts, the Court of Appeal was unanimous in finding the case "indistinguishable" from the facts in *Peter Buchanan Ltd.* The Court of Appeal said:

> "There can be no distinction between the defendant's sale of the company's assets and his pocketing of the proceeds in the *Buchanan* case [1955] A.C. 516 and the defendant's sale of the companies' assets and use of the proceeds to fund their purchase of his own shares in the present case. It can, therefore,

> equally be said of the plaintiffs' claim here as was said of the liquidator's claim in the *Buchanan* case, "that the whole object of the suit is to collect tax for a foreign revenue, and this will be the sole result of a decision in favour of the plaintiff ..." (per Kingsmill Moore J. [1955] A.C. 516, 529.)"

As in *Buchanan*, the claim was a private law cause of action which existed in the companies irrespective of any claim against the companies for unpaid tax. Unlike *Buchanan*, there was no allegation that the motive for the asset stripping was evasion of Danish income tax. In each case, the liquidator was viewed as working solely on behalf of the revenue authorities; in *Buchanan*, the liquidator was appointed by the court while in *QRS*, he is described as having been "appointed" by the tax authorities. In each case, there was an unpaid tax debt and the whole reason for pursuing the claim was to satisfy that debt.

The reasoning in *Buchanan* and Judge Learned Hands' exposition of the public policy rationale in *Moore v. Mitchell* have been mentioned with approval by the Judicial Committee of the Privy Council recently (albeit in a case bearing little resemblance to the present one): *President of the State of Equitorial Guinea v. Royal Bank of Scotland International et al (Feb. 27, 2006)* Appeal No. 59 of 2005. Other Commonwealth decisions (not already mentioned) in which *Buchanan* has been cited and approved include:

(a) *Byrne v. Conroy 1998* 3 IR 24 (Supreme Court of Eire);

(b) *Lord Advocate (on behalf of the Commissioners of Inland Revenue) v. Tursi 1998* SLT 1035 (Scottish Court of Session);

(c) *Rothwells Ltd (liquidation) v. Connell* 119 ALR 538 (Queensland Court of Appeal);

Analysis

I return to the question of the constituent elements of a tax gathering defence. The defendants say they are three in number. The plaintiffs agree that the three prerequisites proposed by the defendants must be established, but concede only that the first of these is proved. There is an unsatisfied tax claim by the State of Norway. Clearly, most of the proceeds of this litigation will go to satisfy that tax debt but the plaintiffs say that is not sufficient - it must be plain that all of the proceeds will go to that purpose. The plaintiffs argue that there are other creditors whose claims must also be satisfied, and the residual claim of the estate's sole heir must be considered. This issue will be considered below. Finally, the defendants say the proceedings must be "in substance" an attempt to collect foreign tax; the plaintiff's agree that this is a prerequisite, but contend that the evidence does not show it to be the case. This, also, will be considered below.

The plaintiffs argue that there are three additional prerequisites which must be established. The first of these is a "connection" between the present claim and the foreign tax law. They say the common law rule concerns the extra-territorial enforcement of a foreign revenue law, directly or indirectly. The present claims are private law causes of action. They are pleaded, and can be proved, without any reference to the claim by the Norwegian revenue authority. Thus, the pursuit of these private law causes of action does not involve any attempt to give extra territorial effect to the Norwegian revenue law. According to the plaintiffs, in every previous decided case held to be an attempt at indirect enforcement, the private law claim arose "as a result of and

was parasitic upon the existence of liability to the foreign revenue authority and was commensurate with the value of the outstanding tax claim."

The authorities do show a preference for the improper assertion of sovereignty as a rationale for the existence of the rule. Do those authorities also demonstrate that the rule can be invoked only where the court is being asked to apply or consider a foreign revenue law in the local jurisdiction? The passage quoted earlier from Lord Mackay's judgement in *Williams and Humbert* appears (at page 440) to suggest this. The point did not arise there for decision; *Williams and Humbert* turned on the fact that there was no allegation of any unsatisfied claim under the law of Spain.

Such a connection is found in most of the authorities. In *Banco De Vizcaya v. Don Alfonso De Borbon Y Austria*, the Spanish bank found it necessary to refer to the Spanish confiscatory decrees to explain why its claim should be paramount to that of the ex-King, the bank's nominal principal. In *Peter Buchanan Ltd.*, the trial judge needed to take notice of the existence of the Scottish revenue claim in order to reach his conclusion that the stripping of assets from the company by McVey was *ultra vires* the company and dishonest. In *Rossano*, the court was asked to take some notice of the Egyptian tax debt because the two garnishing orders were based upon it. In *Stringam v. Dubois*, some notice had to be taken of the tax apportionment between the American and Canadian assets, which required reference to the American tax legislation.

In *QRS*, the claim advanced in England was twofold: a claim for restitution of the value of the company's assets, based upon a Danish company law provision prohibiting companies from providing financial assistance for the purchase of their own shares; and damages for negligence or reckless default arising from the Defendant (a director) allowing the companies to suffer loss as a result of the asset stripping scheme. Neither cause of action would have required any reference at all to the Danish tax claim, which arose from the disallowance of certain claims for depreciation on containers. The tax claim may have arisen from transactions which were part of the asset stripping scheme, but proving the Defendant's liability for asset stripping does not seem to have required reference to the tax consequences of what he was doing.

The Court of Appeal's view of the facts, and its conclusion, are explained in this passage from the judgment of Simon Brown, L.J. (at p. 2172):

> "The plaintiffs are all Danish companies in compulsory liquidation. The defendant is domiciled (within the meaning of the Convention) and resident in the U.K. Until 1992 he owned the companies either directly or indirectly. In November 1992 the entire assets of the companies were disposed of for cash which the following month was used to acquire the defendant's shares. In July 1994 the companies were put into liquidation on the ground that they had been engaged in asset-stripping. In March 1995 the Danish tax authorities claimed against them corporation taxes of some 30m. Danish kroner together with some 10m. Danish kroner interest, a total tax claim of some 40m. Danish kroner (nearly £4m.). The companies have no assets and the only creditors are the Danish tax authorities. It was those authorities who appointed the liquidator and who are funding this action by the companies against the defendant. Their claim against him is limited to the principal sum, together with interest claimed by the Danish tax authorities against them. The nature of the claim is summarised in the plaintiffs' evidence as follows:

> "The claim against the defendant arises out of his involvement in the stripping of the plaintiffs' assets. In essence, the plaintiffs submit that the purchase price for the defendant's shares in each of them was paid, at the defendant's instance from their own funds or using their assets. The plaintiffs' claims are for, in the first instance, restitution of the value of their assets which were disposed of in order to finance the purchase of the defendant's shares and, in the alternative, damages arising out of the defendant's negligence and/or reckless default in allowing the plaintiffs to suffer loss as a result of the asset-stripping in which he was involved."
>
> The basis of the restitution claim is a provision in Danish company law prohibiting companies from providing financial assistance for the acquisition of their own shares...These facts are in all material respects indistinguishable from those in *Peter Buchanan Ltd.* and *Macharg v. McVey* (Note) [1955] A.C. 516, the leading authority on this aspect of indirect enforcement."

The "core argument" advanced by the unsuccessful plaintiffs was that this is a private law claim not merely in form but in substance (at page 2180B; and see page 2174F). There is not a hint in *QRS* that the Court of Appeal considered it significant that the claims were indeed private law claims and could be advanced without any reference to Danish tax law or the tax debt. The important points, which made *QRS* indistinguishable from *Buchanan*, were: the existence of the tax debt, the lack of any other creditors, the appointment of the liquidator by the Danish tax authorities, the funding of the English action by those same authorities, and the fact that the amount claimed in England was equal to the Danish tax debt. In other words, the Court of Appeal found that the claim

was, in substance, an attempt to enforce the foreign revenue law indirectly. The fact that the claims were wholly private in nature made no difference.

Given that the need for a connection between the claim and the foreign revenue law is not identified as an essential prerequisite in any prior decision, and given its absence in *QRS*, the position advanced here by the plaintiffs is untenable. There is no need to prove any "connection" to the foreign revenue law once it is shown that the proceedings are in substance an attempt to enforce such a law.

The second qualification urged by the plaintiffs is that the indirect enforcement rule is not a defence available to anyone other than the taxpayer. They argue that the defence is not available to third parties and not available where the claim is for the vindication of proprietary rights. The typical case in which the rule arises is a dispute between a taxpayer and the foreign revenue. By contrast, in the present case the dispute is between a taxpayer (the estate) and third parties.

There is no express support in the authorities for the proposition that defence is available only to the taxpayer. The rule has been used by and against third parties. Although *Buchanan* and *QRS* were disputes between a taxpayer and a liquidator acting on behalf of the revenue, *Stringam v. Dubois* was not. In *Stringam v. Dubois*, the rule was invoked by a third party (the niece) in a successful attempt to defeat a claim by the executor of the estate that the farm should be sold to pay the American tax liability. In *Rosanno*, the successful Plaintiff was the taxpayer. He invoked the rule to defeat the defence advanced

by the insurer (a third party) which relied upon the garnishee orders from the Egyptian tax authority.

I am satisfied that the decided cases leave no room for a qualification that the rule can be invoked only in a dispute between a taxpayer and the taxing authority or its nominee.

The plaintiffs also say it is wrong in principle to apply the rule where a proprietary right is being asserted. Some support for this is found in a statement of principle by Denning, M.R. in *Brokaw v. Seatrain [1971]* 2 WLR 791, cited with approval in *Williams and Humbert* (at page 439-440):

> "The United States Government submit that that rule only applies to actions in the courts of law by which a foreign government is seeking to collect taxes, and that it does not apply to this procedure by notice of levy, which does not have recourse to the courts. I cannot accept this submission. If this notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, I think, have been enforced by these courts, because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law."

The plaintiffs put the argument this way. Suppose, they say, Jahre were still alive and had no other assets but owed the Norwegian revenue a sum for taxes equal to the value of the stolen assets. It would be unconscionable to allow the thief to plead the indirect enforcement rule to defeat such a proprietary claim by Jahre. If that is so, the death of Jahre should make no difference. The rule against indirect enforcement is not a rule which requires a court to prevent foreign taxpayers from paying tax in their own countries.

Again, there is little support in the decided cases for this argument. Lord Denning's comment in *Brokaw* was obiter, and the decision in *Williams and Humbert* turned not on the fact that a proprietary claim was being advanced, but on the fact that the Spanish confiscatory decrees were in effect and the resulting change of ownership had already taken place. More fundamentally, a claim by the taxpayer himself, as in the example put in argument, is less likely to be considered a claim which is in substance brought to collect foreign tax.

I am persuaded that the rule can be invoked in favour of a third party or to defeat a proprietary claim. It must be the case, though, that the characterization of the party invoking the defence (taxpayer or third party) and the nature of the claim (proprietary or otherwise) are important elements in the consideration of the defendant's third issue (i.e., are the proceedings in substance an attempt to collect foreign tax?).

The third and final qualification urged by the plaintiffs is that "control" of the estate by the taxing authority is a necessary prerequisite.

The question of control is an important one, but it is subsumed in the third element on the defendants' list – is the claim in substance an attempt to collect foreign tax? In *Buchanan*, the person nominally in control of the litigation was a court-appointed liquidator. In both *Buchanan* and *QRS*, the only existing creditor was the revenue authority itself. It was advancing money to the liquidator to meet his expenses. The liquidator was required to consider only the interests of the revenue authority. Although

each liquidation was proceeding under court supervision, the court would intervene only to decide matters in dispute; since there was just one creditor, disputes were highly unlikely. This is the degree of control which has resulted in a liquidator, notwithstanding court supervision, being described as a "nominee" or a "puppet" of the revenue. (The word "nominee" is used by Lord Keith in *Government of India v. Taylor*, by Lord Justice Simon Brown in *QRS*, and in *Dicey and Morris, 13th edition*, 5-023; the word "puppet" is found in *Ayres v. Evans* and *Re Tucker*.) This degree of control will support a finding that the action is in substance an attempt to collect foreign tax. It is unnecessary to treat control as a separate prerequisite.

Is the Norwegian revenue the sole creditor?

The defendants concede that, for the rule to operate, it must be shown that the proceeds of the litigation will go to the foreign revenue authority. Must it all go there?

Given that the predominant underlying rationale for the rule is that an attempt to advance a foreign revenue claim amounts to an assertion of sovereign authority by one state within the territory of another, the answer must be "yes." If the litigation is initiated for the purpose of satisfying the claims of ordinary creditors (as well as a tax debt), it can no longer be said, in the words of Lord Keith in *Government of India v. Taylor*, that the claim "is but an extension of the sovereign power which imposed the taxes." This was the conclusion reached in both *Ayres v. Evans* and *Priestley v. Clegg*. In the latter, the claims of ordinary creditors amounted to just six percent of the total claims.

I conclude that the defendants carry the burden of showing that the entirety of the proceeds will go to the foreign revenue authority.

The plaintiffs point to three claims on the estate which, they say, are not in substance part of an attempt to enforce a foreign tax debt: the claim of Dr. McKinnell under the agreement with him; the interest of the estate of Bess Jahre; and the amount owing to the Ministry of Justice because of the intervention payment made by it to Anders Jahre A/S.

The agreement with Dr. McKinnell was made solely for the purpose of obtaining evidence to be used in this proceeding and the predecessor action. This is no more than a cost of maintaining the litigation and cannot, for present purposes, be viewed as an ordinary debt to a creditor: see *Williams and Humbert*, page 440G, per Lord Mackay.

During argument, each party submitted a *pro forma* analysis intended to demonstrate that there would or would not be a surplus for the use of the estate of Bess Jahre. I need not engage in a similar exercise, because I am satisfied that the issue is resolved conclusively against the plaintiffs by the findings of the Probate Court and prior statements by Mr. Wahr-Hansen.

On November 13th, 2001, the Probate Court dismissed Bess Jahre's objections to the Lazard settlement and an application to inspect certain documents because it was "completely obvious that Bess Jahre will not receive any inheritance" from the estate and "completely unrealistic" to suppose "that Bess Jahre would receive anything after the