Case No: 2011 Folio 1407

Neutral Citation Number: [2015] EWHC 912 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2015

Before :

MR JUSTICE BURTON

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Between :

	(1) SYMRISE AG **(2) SYMRISE S.r.l de C.V**	**Claimants**
	- and -	
	(1) BAKER & MCKENZIE (a Firm) **(2) BAKER & MCKENZIE LLP**	**Defendants**

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William Godwin and Helen Pugh (instructed by **Holman Fenwick Willan LLP**) for the **Claimants**
Lawrence Cohen QC, Sebastian Allen and Jessica Elliott (instructed by **Triton Global t/a Robin Simon**) for the **Defendants**

Hearing dates: 11, 12, 16, 17, 18, 19, 23, 24, 25, 26 February and 2, 3, 9 and 10 March 2015

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Judgment**Mr Justice Burton :**

1.This claim was brought by Symrise AG ("Symrise") and, in the alternative, Symrise S.r.l ("Symrise Mexico"), its Mexican sub-subsidiary, against Baker & McKenzie LLP and its predecessor firm ("BMcK" or "the Defendant"), arising from legal services provided by the Defendant to a predecessor in title of Symrise, Dragoco Gerberding & Co AG ("Dragoco"), in connection with steps taken following the acquisition in 2002 of Haarmann & Reimer GmbH ("H&R") and its subsidiaries. H&R and Dragoco were the German parents of two groups of companies operating worldwide in the production of flavours and fragrances. The claim is for breach by BMcK of its duty as solicitors to Dragoco, which Symrise has claimed the entitlement to enforce. Mr William Godwin and Ms Helen Pugh have appeared for Symrise and Mr Lawrence Cohen QC, Mr

Sebastian Allen and Ms Jessica Elliott have appeared for the Defendant.

2. Symrise was formed in 2003 following the merger of Dragoco and H&R, which effectively took the form of the acquisition of H&R by Dragoco through a German vehicle owned by the majority shareholder in Dragoco, Mr Gerberding, and a private equity firm called EQT Northern Europe Private Equity Funds ("EQT"). The driving force behind the structure of the merger was Dr Martin Wolf, who became CFO of Dragoco in 2002.

3. The structure of the merger was complicated and was intended, with legal and accountancy advice, to achieve the most tax efficient methodology. The cash to be paid at closing would be obtained by means of term loan facilities granted by a syndicate of banks. It was a highly leveraged acquisition with a purchase price of approximately €1,500,000,000, of which just over €1,000,000,000 was debt: such borrowing was primarily not by the purchasing vehicle, but by the target companies being acquired. Owing to the lack of tax capacity in the German subsidiaries of H&R and Dragoco, a key part of the tax planning for the transaction was the '*pushdown*' of debt to subsidiaries in other jurisdictions, in which they could obtain the tax relief available on interest payments in those jurisdictions. It is admitted that this was an aggressive tax mitigation strategy. One such jurisdiction was Mexico.

4. The Defendant was initially retained in July 2002 by EQT to advise on the acquisitions, and part of its role was to advise on various post-acquisition restructuring plans, including *pushdown* in several countries, Mexico among them. In Mexico, this resulted in a total of €124,990,000 being *pushed down* into the Mexican business, which sum represented the entirety of the valuation, as carried out by Ernst & Young, of the equity value in that Mexican business. In its global advice ("*Tax Memorandum: International Structure*") dated 30 September 2002, the Defendant set out the steps required to achieve the *pushdown*, which would culminate in a single surviving Mexican entity which was to bear the debt and claim tax relief on the interest payments.

5. Following the closure of the acquisition of H&R on 1 October 2002, the Defendant was retained by Dragoco, on the terms of engagement letters dated 5 and 12 November 2002, to provide legal services in relation to the post-closure integration of the Dragoco and H&R groups apart from Germany: part of the proposed closure integration was the debt *pushdown* scheme. The legal services included carrying out a substantial global tax due diligence exercise in 15 different jurisdictions, using local advisers from both within and, in the case of South Africa, outside the BMcK global network, where appropriate, in close co-operation with the other advisers at the time, including Ernst & Young, Deloitte & Touche and Poellath & Partners, a German law firm.

6. In Mexico, a key step in the series of transactions by which the surviving Mexican entity would acquire the debt to be *pushed down* was execution of an Intercompany Loan Agreement ("ICLA"). This was entered into on 20 June 2003 as part of the

implementation of the *pushdown*. Advice had been sought by the Defendant from the local BMcK office, a Mexican civil law partnership ("BMcK Mexico") in September 2002, and again, by reference to the draft ICLA in its final form, in June 2003, and the relevant tax lawyers in that office gave their approval to it prior to its execution. There were the following material terms of the ICLA, which was, by clause 11, to be governed by English law (I underline the parts significant to this judgment):

"(i) *3. Repayment*

The amount drawn and outstanding under the Loan, together with all interest and other sums payable in respect of the Loan will be due from Mexico Holdco to the Initial Lender 7 years from the date of this Agreement or at any other time as otherwise agreed between Mexico Holdeo and the Initial Lender or on the Initial Lender's demand.

(ii) By clause 12.1, which referred to the Intercreditor Deed as defined in the ICLA (being dated 26 September 2002 ("the ICD")

12.1 The Loan is a Non HY Intra-Group Liability (as defined in the [ICD]*) for the purposes of the* [ICD] *and* [the parties] *recognise that this Agreement and the Loan and any amounts payable or action which may be taken in connection with this Agreement are subject to the provisions of the* [ICD] *and in the event of any conflict, the provisions of the* [ICD] *shall prevail*".

7. The debt *pushdown* in Mexico was completed in January 2004 with the formation of Symrise Mexico. As referred to above, the amount that was *pushed down* into the entities that became Symrise Mexico was approximately 100% of their equity value, which meant that they were burdened with debt equal to that of their pre-*pushdown* value, resulting in an inevitable equity value for the entity post-*pushdown* of zero. There was in the event little disagreement that this had the following effect on the Mexican business:

(i) Whereas the position pre-merger on 30 September 2003 was that the net worth of the entities comprising Symrise Mexico was 432,778,323 Mexican pesos ("MXN$"), being 201% of its liabilities of MXN $214,992,618, post-merger on 30 November 2003 the net worth had decreased to a negative value of MXN $221,929,697, with liabilities of MXN $2,003,487,589:

(ii) By comparison of the financial position before the merger on 30 September

2003 and after the merger on 30 November 2003, the liabilities of Symrise Mexico had increased by 832%, while its net worth had decreased by 151%:

(iii) By comparison of the earnings of the business pre-merger (1 January-31 October 2003) and of the period 1 January-31 November 2003, the pre-tax profits/losses had reduced from a pre-tax profit of MXN $81,037,783 to a pre-tax loss of MXN 985,393.

This was however in the event only the start, because, notwithstanding an optimistic profit forecast for the future of the merged Mexican business, there was a dramatic fall in its performance, caused by a combination of (i) radical deterioration of the value of the MXN$, with the result that not only was there an exchange loss requiring to be recognised and charged against the profit and loss, but the amount of euros required for interest payments represented a greater number of MXN$, and (ii) a substantial fall off in the performance of the business, so that the debt was not sustainable as a result of the poor income level that the business was capable of generating. Thus a previously profitable (and tax-paying) business was turned into a business that was not profit-making (and thus paying no tax at all). By 11 November 2008, Mr Wolf Henning-Berners, the new Head of Corporate Accounts at Symrise, was speaking of a possible bankruptcy of Symrise Mexico and apparently canvassing with Mr Markus Sattler, the Corporate Vice-President of Symrise, an asset-strip of Symrise Mexico. In his oral evidence before me Mr Sattler accepted that the performance of the Mexican business was poor, and he agreed that it fell "*wildly short of the expectations*" at the time of the acquisition (Transcript Day 4/99), while Mr Gerberding, the former Chairman of Dragoco, who became Chairman of the Management Board of Symrise, agreed in evidence (Transcript Day 8/75) that the Mexican company was a disaster post-merger, and that it was a "*very sad and disastrous performance*".

8. In March 2005 the Mexican Tax Authorities ("MTA") commenced enquiries into the tax treatment of Symrise Mexico's interest payments with regard to the 2003 tax year, even before they had seen the terms of the ICLA; clearly this was the result of the fact that the amount of interest off-set more than eliminated any profit, and hence any tax payment. The MTA subsequently began investigations into the 2004 tax year (on 28 September 2006) and the 2005 tax year (in June 2008). As a result of these investigations, the MTA issued demands on Symrise Mexico for the tax years 2003 (MXN $25,921,525) and 2004 (MXN $101,998,130). They regarded the interest payments made by Symrise Mexico as in reality dividends, and therefore not eligible for the tax relief available to interest payments.

9. The MTA in the event challenged the *pushdown* on three different grounds:

(i) By reference to Article 92(1) of the Mexican Income Tax Law ("ITL"), which

provides that:

> "*In cases of interest deriving from credits granted to entities or to permanent establishments in this country of persons resident abroad, by entities residing in Mexico or abroad who are parties related to the person paying the credit, the taxpayers shall consider for purposes hereof that the interest deriving from such credits shall be treated as dividends for tax purposes in the following cases:*
>
> *The debtor executed a written unconditional promise of payment of part or the full amount of the credit received on a date determinable at any time by the creditor*".

The MTA asserted that this entitled them to re-characterise the interest payments made under the ICLA as dividends.

(ii) The second ground was that the loan was not strictly necessary for the business purposes of Symrise Mexico, by reference to Article 31 of the ITL, so that the interest was not a deductible expense.

(iii) The third ground was that the loan was used to acquire shares, said not to be a deductible expense under Article 29 of the ITL.

The complaint made by the Claimants in these proceedings relates only to the first of these grounds, and concerns the Mexican tax law advice given by BMcK Mexico as to whether the drafting of the ICLA was appropriate, or whether it arguably engaged Article 92(1) so as to prevent the interest payments being deductible in accordance with the *pushdown* strategy.

10. Symrise Mexico paid the demands made for 2003 and 2004 between December 2006 and October 2008, but on 2 January 2007 and 10 October 2008 respectively, on the advice of BMcK Mexico, they issued proceedings in the Mexican Federal Tax Court ("the Mexican Court") to challenge the MTA's determinations, by way of nullity petitions.

11. In support of their case that the terms of the ICLA (set out in paragraph 6 above), which was, as set out above, governed by English law, did not contravene Article 92(1), Symrise Mexico in the nullity proceedings lodged a letter of advice dated 1 May 2007 by a Nicholas Tostivin, an English solicitor and partner in BMcK, explaining that at English law, by virtue of its being subjected, by clause 12, to the effect of the ICD, the terms of the ICLA did not have the effect of there being an "*unconditional promise of*

payment . . . on a date determinable at any time by the crediter". This statement was admitted in evidence by the Mexican Court on 21 May 2007 so far as the 2003 Nullity Petition was concerned. There was an appeal by the MTA against such admission, which led to various interlocutory rulings, but in the event the same statement was admitted by the Mexican Court in the 2004 nullity proceedings on 21 January 2009, and the two proceedings were consolidated on 5 September 2009, so that the statement was admissible in both proceedings; and a further appeal by the MTA against such admission in January 2010 was dismissed by the Sixth Metropolitan Regional Chamber of the Federal Court for Tax and Administrative Justice, in a reasoned decision, confirming the "*ruling dated 21 January 2009 admitting the expert technical legal evidence with respect to the scope of the application and interpretation of English law as offered by the plaintiff*", on 20 September 2010. It is now common ground that this had the result both that the evidence of Mr Tostivin was thus admitted, but that it would be unchallenged, because the MTA had not taken its opportunity to put in any evidence in response.

12. On 16 October 2009, the MTA issued preliminary findings to the same effect as those for 2003 and 2004 in relation to the 2005 tax year. These findings estimated a tax deficiency of MXN $120m for that year.

13. Symrise decided to instruct a further local legal firm specialising in tax matters, Tron Abogados S.C. ("Tron") in November 2008, and, after considering matters with them, decided in July 2009 to settle its tax liabilities in respect of the 2003-2005 tax years. Before implementing that decision, Symrise obtained memoranda of advice from Tron, culminating, after various earlier drafts, in a draft of 4 November 2009.

14. Pursuant to that decision, Symrise Mexico paid on 8 April 2010 an additional sum of MXN $59,010,442 in respect of its outstanding liabilities for the 2003-2005 tax years , and formally withdrew, on 22 October 2010, the nullity proceedings in respect of 2003 and 2004. The total sum paid to the MTA in respect of the three years 2003, 2004 and 2005 was MXN $186,930,087. As part of the arrangement, Symrise Mexico obtained from the MTA what it knew, and was advised by Tron, was a non-binding promise or understanding that the MTA would not initiate audits for the tax years 2006 and 2007, not recorded anywhere in writing.

15. Subsequently the MTA did not honour that undertaking, and did initiate audits for those years, on 25 January 2012 and 27 March 2013 respectively. They did so on the basis that the interest payments made under the ICLA in 2006 and the first half of 2007 were also to be properly treated as dividends under Article 92(1) of the ITL. The reason why the authorities were prepared to treat payments made after the first half of 2007 as interest payments was by reference to their approach towards a Clarification Agreement executed on 1 July 2007 between the parties to the ICLA. This had been entered into, following advice to Symrise from KPMG, to 'clarify' to the authorities that the parties true intention in entering into the ICLA was that clause 3 should be read as if the words "*or on the Initial Lender's demand*" (which were removed) were replaced by the words

"*or under the terms and conditions set forth by the* [ICD]". This was a strategy taken for two reasons: first because at Mexican law the courts were entitled to look to matters subsequent to the ICLA to determine the parties' intentions at the time, so that it might support the arguments being put forward in the nullity petitions, as to the intention of the parties at the time of the ICLA, but secondly in order that (as indeed eventuated) it should be made quite clear that, at least after the execution of the Clarification Agreement itself in July 2007, even if it did not support the argument for the past, the MTA could then accept for the future that Article 92(1) was not applicable. Symrise Mexico paid on 30 May 2013 an additional MXN $65,064,342 in settlement of the liabilities in respect of the 2006 and 2007 tax years.

16. Symrise, alternatively Symrise Mexico, claimed the total amount of the tax payments made as above, together with what it called mitigation costs, in respect of legal fees for advice and assistance, totalling €162,492.88 and US$170,241.60. In the event the sums claimed were, as a result of further developments and discussions during the hearing reduced as follows:

(i) Withholding Tax. The result of the treatment of the interest paid as dividends was that Symrise Luxembourg S.A.R.L would be entitled to claim credit for withholding tax which had been deducted on the basis that the payments were payments of interest, and it was agreed by Mr Godwin during the hearing that credit for that sum should be given to the Defendant, in respect of the sums claimed in these proceedings by Symrise.

(ii) 10.5m surcharge. It was also agreed during the hearing by Mr Godwin that credit for the MXN $10,500,000 surcharge which could have been avoided by Symrise Mexico had they paid it timeously by 30 October 2009, should also be given to the Defendant in these proceedings.

(iii) Mitigation costs. This issue was left rather undeveloped by Mr Godwin, who did not call any specific evidence, over and above the general evidence of Mr Sattler as to invoices, notwithstanding being put to proof by Mr Cohen, who raised the matter, on several occasions during the trial, as to the apparently obvious fact that much of the work invoiced, whether by BMcK Mexico or Tron, and sought to be recovered in the action, either related to extraneous matters or did not immediately or necessarily relate to the claims being made in respect of Article 92(1). Mr Godwin left it until after the close of the hearing to seek to set out a case. In part he then sought, belatedly, to claim costs by reference to, or by analogy with, the case as to diminution in the value of the shareholding of Symrise Mexico, with which I deal further in relation to Issue 7 below. But he abandoned this argument in the light of the unanswerable submission in response by Mr Cohen that such case was not pleaded, not dealt with by the experts and, if ever justifiable, now too late. In these post-trial submissions he sought in the alternative to reduce his pleaded

claim in respect of the invoices, claimed by Symrise AG itself and as the successor in title to Symrise KG, by making various concessions and allowances, to €191,855.

The issues

17. During the course of the hearing, by virtue of the sensible response by both parties to the forceful arguments put forward by the other, agreements and concessions were made which in the event substantially reduced the area of dispute between the parties. I shall set out the original issues, indicating where many of them have fallen away for that reason:

(1) Issue 1: Title to sue. Substantial issue was raised by the Defendant, including consideration of a number of authorities, including **National Bank of Greece & Athens v Metliss** [1958] AC 509, **Adams v National Bank of Greece** [1961] AC 255, **The Kommunar (No 2)** [1997] 1 Lloyd's Rep 8 and **Eurosteel Ltd v Stinnes AG** [2000] 1 All ER (Comm) 964, as to whether Symrise AG was, as a result of the operation of the German Transformation Act a continuation of, and thus successor in title to, Dragoco, so as to have the right to sue the Defendant on the Dragoco retainer. This issue was conceded by Mr Cohen during the course of the proceedings.

(2) Issue 2: Scope of the Dragoco retainer/duty of care owed by the Defendant. The issue whether the Defendant is contractually responsible to Dragoco for the quality of the Mexican law tax advice with regard to the ICLA was also conceded by Mr Cohen during the course of the hearing. The issue at the outset was whether the Defendant was simply responsible for due diligence oversight, and thus of selecting and instructing BMcK Mexico to give such advice (in which case there would in any event have been a challenge to Symrise as to BMcK's performance of such duty) or whether it was, by virtue of the terms of the retainer letters, the responsibility of the Defendant itself that care should be taken in the giving of the advice by the local firm. This issue, like the first, was, as I have said, conceded by Mr Cohen, before closing submissions.

(3) Issue 3: Symrise Mexico. There were issues raised as to whether, particularly if Symrise were to fail on the title to sue issue (Issue 1), Symrise Mexico was entitled to assert a duty of care owed to it. If so, there were further consequential issues as to (a) whether any asserted entitlement of Symrise Mexico was statute barred: Symrise itself was protected by a standstill agreement (b) whether, if there was a duty owed to Symrise Mexico, that created for Symrise itself, as its 'grandparent' (Symrise owned, through a 100% subsidiary Busiris, the shares in Symrise Mexico), a problem in relation

to the recovery of any damages, by reference to the concept of reflective, or, as I prefer to call it, derivative, loss. In the light of the concession on Issue 1, Mr Godwin did not pursue a claim by Symrise Mexico, and the issue of limitation fell away. So far as derivative loss is concerned, it is common ground (as to which see further under Issue 7 below) that, in the absence of any available alternative claim by Symrise Mexico, Symrise is entitled to seek its loss (if any) by way of diminution in the value of its (indirect) shareholding in Symrise Mexico, arising out of the payments which Symrise Mexico made, said to be caused by the negligent tax advice.

(4) Issue 4: Breach of retainer/negligence. Was the Defendant in breach of its retainer and/or negligent with regard to its tax advice in relation to the ICLA? This had two elements. The first was whether the advice that the ICLA did not contravene or lead to a contravention of Article 92(1) was incorrect. The second, alternative, case is whether the failure to give a warning that it might so contravene Article 92(1), and thus of a risk of challenge by the MTA on that ground, should have been given. As to the first case, this was run by Symrise, supported by the expert evidence of Mr Eduardo Revilla, as well as the alternative case, with the consequential argument that Symrise Mexico's nullity petition would have failed on that ground. It became quite clear during the course of the hearing that, even if the Mexican Court had applied, contrary to the terms of the ICLA, Mexican law to the interpretation of the ICLA (and its subjection, by virtue of clause 12, to the terms of the ICD, which I do not now need to set out, but through which Mr Cohen carefully took me), the ICLA (whether at English or at Mexican law) did not contravene Article 92(1). This came out most clearly from the persuasive evidence of the Defendant's expert Mr Alejandro Calderon, but even the evidence, called for the Claimants, of Mr Manuel Tron, the lead partner of Tron, did not support the proposition. Mr Godwin conceded the issue prior to closing submissions. Accordingly the only remaining issue was the alternative case, as to lack of warning by BMcK Mexico.

(5) Issue 5: Causation. This to a large extent runs together with the next issue, Issue 6, but it was run as a separate point by Mr Cohen. His case is that the MTA would have pursued its challenge irrespective of Article 92(1), by reference to the substantial, and (in the light of the figures) inevitably aggravating, effect of the *pushdown*, and by reference to Articles 29 and 31, although both experts now agree (with a caveat by Mr Calderon to which I shall refer) that a challenge by the MTA on the basis of either of those Articles would in the event have failed. Against this, however, Mr Godwin submits that:

(i) had the warning been given (Issue 4 above) clause 3 should and would have been amended (rather in the same way as occurred in the subsequent Clarification Agreement), and that its very presence created

a hook or peg upon which it made it the more likely that the MTA challenge would have been pursued, but in any event

(ii) by reference to the authorities on concomitant causes, and in particular **County Ltd -v- Girozentrale** [1996] 3 All ER 834 and **British Racing Drivers' Club Ltd v Hextall Erskine & Co** [1996] BCC 727 (Ch), Symrise is entitled to rely on negligent failure by the Defendant in relation to the ICLA as a cause of the MTA challenge, irrespective of other causes.

(6) Issue 6: The settlement with MTA. This issue is now coloured by the acceptance by Symrise, by reference to Issue 4, that had they continued with the nullity petitions they would have succeeded, but that is not the answer to the question. In opening, Mr Godwin relied heavily on the principles of reasonable settlement enunciated in **Biggin v Permanite** [1951] 2 KB 314. In that case Devlin J had at first instance, [1951] 1 KB 422, ruled that a settlement by the plaintiffs of a claim by a third party, which they were seeking to claim over against the defendants, was irrelevant, and that they had to prove the loss strictly, irrespective of the settlement. The Court of Appeal (especially per Somerville LJ at 321) made it clear that the law "*encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter*". What might be called the *Biggin* principle both eschews the strict approach of Devlin J and encourages compromise. Mr Cohen's submission was that this arrangement with the MTA was not a compromise at all, but effectively was what he called a "*capitulation*", namely, subject to the obtaining of the non-enforceable understanding referred to in paragraph 14 above, and some other matters (to which I make further reference below), in effect payment in full of the MTAs claims. Mr Godwin submitted that the *Biggin* principle applied to any *settlement*, which he defined as being any kind of disposal of a claim short of determination in legal proceedings. In the event, during the course of closing submissions, it became apparent that the parties reached common ground. It was finally accepted between them that, at any rate in this case, there was no call for operation of the *Biggin* principle, but that the issue should be seen simply as one of mitigation. Mr Godwin was prepared to accept the proposition to be derived from the judgment of Ramsey J in **Siemens v Supershield** [2009] 2 All ER (Comm) 900, which the Judge in that case was articulating in reference to a *settlement* - but without prejudice to whether what happened here can be described as a *settlement* or not - namely whether it was (at 918) "*in all the circumstances within the range of settlements which reasonable people in the position of the settling party might have made. Such circumstances will generally include: (a) the strength of the claim; (b) whether the settlement was the result of legal advice; (c) the uncertainties and expenses of litigation; (d) the benefits of settling the case rather than disputing it*". Whether or not this was a *settlement,* both counsel accepted from me a phraseology in fact drawn

from the world of unfair dismissal, namely whether the steps taken by Symrise were "*within the range of reasonable responses*", taking all the circumstances, including those articulated by Ramsey J, into account. This really made this case no different from the ordinary question of mitigation, premised upon the context of reasonableness: see also Goff LJ in **Comyn Ching v Oriental Tube** [1979] 17 BLR 56 at 89, as considered by Ramsey J at paragraph 73. Mr Godwin did not support the applicability of the dicta of Colman J in **General Feeds Inc Panama v Slobodna Plovidba Yugoslavia** [1999] 1 Lloyd's Rep 688 at 692, as interpreted by HH Judge Coulson in **Hunt v ASHE [2008]** 1 AER 180 at paragraph 61, that the claim would "*usually have to be so weak as to be obviously hopeless before it could be said that the settlement of the claim was unreasonable*". There is no such (or any) restriction upon the reasonableness test. The consequences are not only that it is not therefore necessary to address as a matter of principle whether this was a *settlement* or a *capitulation*, but that the ordinary principles of mitigation apply, including the well-established principle that, in relation to the question of whether the Claimant has mitigated his loss, the onus of proof of establishing that the steps taken were not reasonable mitigation is upon the Defendant. Insofar therefore as it is part of the *Biggin* principle that (per Singleton LJ at 325) "*the plaintiffs must establish a prima facie case that the settlement was a reasonable one*", both parties accept that this does not apply in this case. Hence the issue is whether the Defendant can show that the steps taken by Symrise, taking into account all the circumstances, were not within the reasonable range of responses.

(7) Issue 7: Loss. It was on the face of it common ground (once the issue about derivative loss disappeared) that the way in which Symrise's loss resulting from the Defendant's negligence/breach of retainer, if established, is to be addressed is by reference to the diminution in value of its shareholding in Symrise Mexico (or more strictly the diminution in value of its shareholding in Busiris as a result of the diminution in value of Busiris's shareholding in Symrise Mexico). Nevertheless, as will be seen, Symrise asserted, by reference to the opinion of its expert Mr Michael Bukowski, that this was simply to be arrived at as the total amount of the tax payments, as and when they were paid by Symrise Mexico. The Defendant's expert Mr Tim Giles however carried out a valuation of the shareholding, and reached the conclusion that the loss, by virtue of the very considerable excess of liabilities over assets in Symrise Mexico was nil, alternatively by virtue of valuing by reference to a hope or expectation of future dividends, a sum, (calculated in euros) of €3,437,000.

Thus Issues 4 (in part), 5, 6 and 7 above remain for decision.

Witnesses

18. There was a number of significant absent witnesses. So far as Symrise is concerned, the absence of Dr Wolf, who played a very considerable role, as referred to above, in the strategy of the *pushdown*, became much less significant in the light of the subsequent concession of Issue 2. As it is, it would have been helpful to have heard from Mr Henning-Berners from the Claimant and Mr Elias Adam Bitar ("Mr Adam"), the Senior Associate at Tron, who in fact carried out most of the work, and seems to have been the Tron representative who reached the unenforceable understanding referred to above, while, so far as the Defendant is concerned, it would have been helpful to have had a witness from BMcK Mexico. As for the factual witnesses who were called: I did not accept all the evidence given by Mr Sattler, particularly in so far as he asserted, contrary, in my judgment, to the likelihood, that he received oral evidence as to the merits from Tron over and above, or indeed inconsistently with, that which appears in the documents, to which I shall refer below: neither Mr Gerberding nor Mr Tron added much if anything to the evidence otherwise apparent from the documents, and I was surprised at how little Mr Gerberding knew even at the time, given his seemingly important role as Chairman and majority shareholder of Dragoco at the time of the acquisition and thereafter successively Chairman of the Management Board, Vice-Chairman of the Advisory Board and member of the Supervisory Board of Symrise. With regard to the Defendant, Mr Hawks too had little to add to what was in any event apparent from the documents, and insofar as he spoke to the retainer, this issue was in any event later conceded, as discussed above.

19. As for the experts, the rival opinions as to German law led to an agreement between the experts resulting in their not needing to be called, and in any event Issue 1 was, as set out above, conceded. With regard to the experts who were called, I was unimpressed by Mr Revilla, the expert on Mexican tax law called by the Claimant, and remained wholly unpersuaded by the position he took as to the likelihood of Symrise Mexico's succeeding in establishing that the interest payments ought to have been treated as tax deductible, (he actually described the MTA's case as "*strong*") an issue which, as set out in paragraph 17(4) above, Symrise conceded after his evidence was given. He gave unexplained evidence as to the inapplicability of English law to the ICLA; purportedly relied (notwithstanding the decision of the Mexican Court, based upon its own citation of Mexican authority, as to the admissibility of Mr Tostivin's statement) upon Mexican precedents to the contrary, which he never produced; and he accepted in the end that, even if Mexican law were applied (which he had not addressed), the result so far as the supremacy of the ICD was concerned would be the same as in English law. He also unpersuasively went back on an agreement reached with Mr Calderon as to correction of errors by the MCA which, as discussed in paragraph 50(iv) below, was plainly correct. I found the Defendant's expert, Mr Calderon, both impressive and convincing. As for the valuation experts, as referred to in paragraph 17(7) above, Mr Bukowski's opinion was predicated upon a basis which I found unsupportable as further referred to at paragraphs 88 to 90 below, and the expert evidence of Mr Giles was in my judgment entirely

persuasive.

The relevant facts

20. As will appear, the issues as to breach of retainer (Issue 4) and causation (Issue 5) do not require much consideration of the factual background, so I limit myself to a summary of the significant facts which underlie my resolution of the one real outstanding issue in the case, that of mitigation, Issue 6, commencing after Symrise's instruction of Tron, against the background of the then pending nullity petitions, described in paragraph 13 above.

21. Prior to the instruction of Tron, Symrise were obtaining advice from BMcK Mexico, to which I shall return below, but also from lawyers at KPMG, who advised in April 2007 that "*it is more likely than not* [that] *Symrise's case may expect with certainty a positive final resolution*". They advised similarly in May 2007, although in July they indicated that they were not allowed to provide an opinion as to percentages of chance, repeating in answer to a request from Mr Berners that he wanted a statement "*if it is more likely or not*" that such was the case. Mr Sattler said (Transcript Day 4 page 75) in cross-examination that they brought in Tron (a year later) "*because we felt that the advice given by* [BMcK] *may not be free of any conflict of interest, and in the light of the opinion of KPMG that a clarification agreement is necessary* [introduced in the circumstances and for the reason set out in paragraph 15 above] *we interpreted that KPMG was not of the opinion that we will get a positive ruling*".

22. Shortly after firm advice by BMcK Mexico on August 31 2008 that "*the loan agreement and related documentation cannot be interpreted, as suggested by the Treasury Department, to conclude that it contained an unconditional promise of payment by Symrise and therefore interest payments cannot be characterised as dividends*", with similar firm advice in relation to Articles 29 and 31, Tron were instructed. Mr Berners wrote in an intercompany email of 4 November 2008 that "*I do need a regional CFO more than ever. The scenario in Mexico is frightening*" and "*even if our chances to win are 80%, we will suffer major hits on our net profit as soon as we pay additional taxes and charges*".

23. In an email of 11 November 2008, copied to Mr Sattler, who had global responsibility for all of the Group's legal and compliance issues, Mr Berners asked about a settlement, about whether they could ask the Judge for a preliminary ruling "*which stops the current tax investigation until the law suit has been finally ruled*", and as to whether, if Symrise Mexico were stripped fully by transferring its assets to a new company, that would help to avoid paying the tax liability, and what would be the implication of such a strategy. Mr Cohen was very critical of Mr Sattler in cross-examination, given his responsibilities, for not immediately chiding Mr Berners for such a suggestion, which Mr Sattler said he did not take seriously.

24. But in any event neither of the two latter courses seem to have been taken. Instead, Mr Berners in a subsequent email of 14 November notified Mr Sattler that he had had a talk with "*the lawyer in Mexico* [which must have been Tron] *and he knows strategies which enable us to reduce the damage significantly. A settlement is difficult because of anti-corruption rules*". I shall return to this below, because it is common ground that, at the very least, such *anti-corruption rules* prevented there being any kind of binding agreement with the MTA not to pursue an audit for the payment of tax in the later years.

25. The purpose of Mr Tron's engagement is made quite clear by Mr Berners in his intercompany email of 5 February 2009: "*we engaged Tron . . . to negotiate a settlement with the Mexican authorities*". This is reflected in Tron's letter of retainer of 5 December 2008. At his first meeting on 4 December, at which representatives of BMcK Mexico were present, Mr Tron said he was "*in agreement with the strategy and the defence arguments and understands that although the contract has a language that the* [MTA] *used as a pretext, the effectiveness of the clause is conditioned and subject to other documents*. [There was no challenge by Mr Tron (or Mr Sattler) that the word *pretext* was so used, and was recorded]. *He really did not provide different arguments. Rather, he recommended that we should approach the* [MTA] *to try to "negotiate" or at least to request that future audits should be put on hold until the first law suit is decided"* [Mr Berners's suggestion above, never seemingly attempted].

26. Mr Tron immediately launched into action with a meeting with his contact at the MTA, Mr Libreros, and it seems clear that he did not seek to argue the merits of the case at all, but at this meeting of 12 December 2008 he was immediately angling for a settlement of the 2003, 2004 and 2005 liabilities as claimed in full, but in return for the "*unofficial statement*" from Mr Libreros that, provided that Symrise satisfied him they had reduced the intercompany debt (which they had done by way of a recapitalisation in 2007), he would not open audits for 2006 and 2007: this became the subsequent *unenforceable understanding*. By 23 December 2008, Mr Adam of Tron was noting that he had not seen a copy of the ICD or of Mr Tostivin's legal opinion.

27. On 27 April 2009 there was the first of a number of memoranda provided by Tron to Mr Berners and Mr Sattler, setting out what they had been seeking to negotiate with the MTA. It makes no reference at all to the merits of Symrise's case in the nullity proceedings.

28. The options in the 27 April memo were repeated in Tron's second memo of 29 May 2009 (which again did not address the merits), namely maintaining the nullity proceedings or, with slight variations, withdrawing them and paying up along the lines of the discussions with the MTA. Mr Berners, by email of 11 June 2009, said that he would opt for the second alternative as, he believed, was also the view of Mr Sattler, but before bringing the case to the Symrise Board he would like Tron's recommendations. In a follow up email of 19 June he looked for further reassurance in presentation for a Board decision about the 2006 and 2007 accounts: while recognising that they would not "*get any*

assurance that the interest deduction in 2006 and 2007 won't be challenged anymore", he asked whether the MTA could be persuaded to issue assessments for 2006 and 2007 which became definite, so that those periods were no longer subject to audit – "*you have to find a solution for this, before we approach the Board. That* [is] *the reason why we engaged you*". It is obvious that this latter suggestion was not feasible, and Tron's third memorandum of 30 June 2009 simply repeated the previous options.

29. Mr Tron made clear in an email to Mr Berners of 3 July that though Tron were "*positive that this* [an audit of 2006 and 2007] *is not going to happen*", Symrise must (and this passage is in capital letters) accept as "*unavoidable . . . the risk of trusting the non-binding commitment of the authorities*", and Mr Adam confirmed on 8 July that "*they cannot issue any written or formal guaranty about not opening or not assessing deficiencies for years 06 and 07, however he insisted in the unofficial position to settle the cases without going any further with the reviews*".

30. Mr Berners wrote to Mr Adam an email dated 29 July 2009, which stated:

> "*I spoke with . . . Dominique Yates* [Symrise's CFO] *and Markus Sattler the other day and we agreed to settle the case according to scenario (c)* [withdrawal], *even though we won't get a settlement in writing.*
>
> *I understand from your latest email that we have to withdraw the appeals and pay additional MXN $109.5m for 2005. On the other hand we get MXN $36.9m (Symrise Mexico)* [correction of errors, to which I will refer below] *and MXN $14.3m (Symrise Luxembourg)* [the withholding tax referred to in paragraph 16(i) above] *refunded. After that, we can close the chapter*".

This was confirmed by Mr Berners's email of 14 August, namely that he accepted the result for 2005 and would not file an appeal against it.

31. A fourth memo was sent to Mr Berners by Tron dated 25 August confirming that "*it is important to note that the 2005 tax audit shall be concluded on 16 October 2009, thus, it is of the utmost importance to define the actions and strategy to be followed regarding the settlement of these cases by 30 September 2009*".

32. At that stage Mr Berners turns his mind towards BMcK Mexico, and they respond on 26 August that they are not prepared to contribute to any settlement, referring to the uncertainty of any reliance upon the word of Mr Libreros, who by then had ceased to be the formal Head of the International Auditing Section of MTA, and emphasising:

> "*Finally, as expressed in several occasions, we are of the view that the claims by the* [MTA] *are groundless and it is more likely*

than not that the legal actions filed by Symrise Mexico would prevail".

33. Mr Berners now tells Tron on 27 August, after previously discussing the issue with Symrise's British lawyers, who had in mind that "*we have to mitigate damage in order to maintain the chance to sue Baker successfully*", that he needs a legal opinion from Tron "*as to the legitimacy and strength of the tax authorities' case and what the likelihood was that the tax authorities would win. At the end, we would like to get a recommendation that it was in Symrise's best interest to settle. Finally your conclusion and recommendation to settle*". He continues "*considering the chances to win the pending law suits, which in our view are not better than 50/50, and the total exposure, we believe a settlement has a very strong commercial rationale, all the more as we do not lose the possibility to chase Baker. Maybe you share this view and provide your recommendation accordingly. Can you provide your opinion in draft, so that we can collectively review and discuss it before we get the final one*".

34. Mr Berners discusses with Mr Yates by an email of the same date the fact that a settlement in Mexico (together with favourable positions in Germany and Singapore) could lead to a reduction of the Symrise Group tax rate "*from Q3 onwards to, say, 27%*" (and this eventuated, as is clear from the minutes of a meeting of the Executive Board of Symrise, recently disclosed, dated 22 September 2009).

35. Meanwhile there was a significant internal email sent by a junior associate at Tron to Mr Adam, dated 1 September 2009, which followed from a telephone conference which Tron had had with Mr Berners and Mr Jeremy Hill of Symrise's English lawyers, which Mr Berners had suggested should take place in an email to Tron of 28 August namely "*before you get stuck somewhere, let's discuss your problem with Jeremy Hill to help you out*". The email reads (in material part):

> "*Basically, what they asked us to do was to issue an opinion with emphasis on three matters:*
>
> *1) That the source of the tax credits that they have paid and will have to pay is associated with the debt pushdown implemented by the company, at Baker's recommendations.*
>
> *2) That the case made by the tax authorities against the company is not a frivolous one and is supported by a reasonable argument, although without us making any comment on the possibilities of success in the litigation.*
>
> *3) From a legal standpoint, the option of self-correction chosen by the company is a reasonable business decision in view of the consequences and the different scenarios it is now facing.*

. . .

As regards the second point . . . [Tron] *is unable to give any opinion on the probabilities of success in litigation that has commenced and is being conducted by another Office, since apart from this being a litigation matter, we do not have access to the files dealing with the pleas for nullity. Our opinion on this point was that both parties have grounds to support their position to a certain degree, and we do not have any additional elements that could tip the balance beyond 50-50. In principle they accepted that we support this point, stating that the parties' arguments are reasonable and not frivolous.*

Lastly, we agreed to draw up a document with detailed background information on the case, which we will review with both the English lawyer and the company.

We also agreed to suggest an analysis outline, including the following (i) a detailed description of the legal options that the company currently has, as well as their financial consequences; (ii) supporting, solely in view of those consequences, the reasonability of Symrise opting for the solution it chose to resolve the matter; and (iii) the reasonability of the arguments submitted by both parties to the court. This outline will be examined by the English adviser in order to establish whether the scope of our opinion covers their needs (so as not to work uselessly).

. . ."

36. The fifth Tron memo dated 30 September 2009 headed "Draft for discussion" is the result. For the first time it refers to the ICLA, though there is no assessment in that regard of Symrise's case in relation to Article 92(1). Tron's Opinion is set out for the first time at paragraph 3, namely:

"*3.2 The* [MTA's] *arguments under which the interest paid . . . were reclassified as dividends are not frivolous. Such arguments are to some extent reasonable, since from the terms of the* [ICLA] *and according with a literal interpretation of that contract it may be concluded that the repayment clause contained in the agreement grants to the crediter the power to obtain the payment of the loan at any time . . . Despite the arguments that maybe sustained against the* [MTA] *position, the ones used by them to support the assessment and preliminary findings at hand are reasonable arguments, even if we do not agree with them, since they are to some extent applicable to the background of the case and reference to statutory provisions entitling them to reach the*

> *conclusions they express in the assessments, and may be confirmed by the court.*"

There was a footnote which read: "*The arguments of the [MTA] may not prevail in litigation. However they are sustained by a reasonable judicial argument*".

37. There is no addressing of whether Mexican law or English law applies to the construction of the ICLA, nor any assessment by reference to either legal system as to whether, by virtue of clause 12, the provisions of the ICD override the wording of clause 3. It seems from a gap left in the draft of the earlier paragraph, 1.2.4, that Tron had not yet even looked at the ICD.

38. The draft fifth memo continued:

> "*3.4 Considering our conclusions stated in 3.1* [a recital of the tax liabilities determined by the MTA resulting from the interest payments] *and 3.2 above, it would be to our best opinion that the (i) economic benefit (possibility of offsetting the favourable amounts) and (ii) the legal certainty (no litigation involved) that such alternative would provide to the Company (in comparison with all other alternatives available) makes it an advisable position to take before the* [MTA] *in order to solve the discussed matters.*
>
> . . .
>
> *4.2 Therefore despite the arguments that may be sustained against the* [MTA] *position, the ones used by them to support the assessments and preliminary findings at hand are reasonable arguments (even if we do not share them) since they are to some extent applicable to the background of the case and referenced to statutory provisions entitling them to reach the conclusions they express in the assessments.*"

39. Mr Tron confirmed in evidence that he still does not *share* the MTA arguments, and considers that, as was subsequently conceded at the hearing, as set out in paragraph 17(4) above, the arguments that Article 92(1) do not apply are in fact right (indeed as Tron had said when first instructed in December 2008).

40. This fifth draft memorandum included the statement, at paragraph 4.3.3, that Symrise should note that "*both the withdrawal of the complaints filed against the 2003 and 2004 tax assessments and the correction of the Company's situation for the year 2005 will deprive the Company from any further legal action against the* [MTA] *decisions, since this will imply that the Company has accepted the existence of the tax deficiencies and*

voluntarily chosen to correct its tax situation".

41. Mr Hill was not satisfied with the fifth draft, and in a detailed critique dated 7 October 2009 he set out "*the items that we would like to see clarified or expanded in your draft letter of advice for Symrise*". In particular in the context of "*the consideration of claims that Symrise wishes to preserve against*" BMcK, a number of points are made including the following:

> "*2. Relative strengths and merits of the case:*
>
> *Symrise will need to take into account the relative merits and strengths of any legal case which the* [MTA] *might have when Symrise considers which course of action to follow. Although at paragraph 3.2 of your draft letter you say that the arguments put forward by the* [MTA] *"are not frivolous" and that "the said arguments are to some extent reasonable" this does not really assist Symrise in its own decision-making process.*
>
> *Symrise needs clear and reasoned advice from yourselves as to the relative merits, strengths and weaknesses of the case put forward by the* [MTA]. *It is also important to ascertain whether, in your professional opinion, the* [MTA] *will prevail in their arguments or whether there are sufficiently compelling reasons that can be advanced on behalf of Symrise to suggest that, on the balance of probabilities, Symrise will succeed in challenging the tax assessments in Court. In saying this, we, and Symrise, fully appreciate that Tron Abogados are only giving their professional view and without guaranteeing the outcome of this matter or predicting how any legal case will finally be decided. What Symrise needs, however, is a firm recommendation from you as to which course of action you think should be followed and the reasons why you recommend such course of action based on your understanding of Mexican tax laws and your experience in dealing with the* [MTA]".

42. Mr Adam responded to Mr Hill (with copies to, among others, Mr Berners and Mr Sattler) by an email dated 9 October including the following:

> ". . .
>
> *2. We will be more than happy to include within the new draft the content of . . . our email sent on October 7th, regarding the terms of the settlement and the authorities that we have discussed it with, however, as mentioned in the memo, there is no guaranty or possibility for enforce the agreement (regarding their*

commitment for not auditing the years 2006 and 2007) since that was agreed on an informal and non binding basis.

3. Under current Mexican practice, our advise must be limited to explaining the alternatives or scenarios at hand and stating the legal and tax consequences of each on of them, but to determine which of those alternatives comes to be the best or issue a recommendation to enter into a specific course of action remains a business decision we are not entitled to make.

4. However, we will be more than happy to state the actual merits of the interpretation held by the tax authorities (even when we might not share them), and consider them as well as: (i) the current tendency of the Mexican administrative courts, (ii) the current economical situation and the pressure it has imposed on the Federal Budget (and therefore in the revenue affairs), and (iii) the complexity of the background and the structure it self; in order to issue a recommendation to avoid litigation and suggest the settlement of the cases."

43. Mr Hill comments in response to a further email of 13 October 2009 from Mr Adam:

"*I am unable to understand why Tron . . . is not willing to give Symrise its own assessment as to which of the alternatives is viewed by Tron as being the best route to follow – Clients expect their lawyers to be able to express their own views, based on their knowledge and experience, and that is rather a large part of the value-added which lawyers bring, certainly in every other jurisdiction I have ever encountered.*

The fact that Baker & McKenzie feels able to express a very firm view in this matter is exactly why Symrise needs Tron's views as a counterbalance.

Please can you circulate the revised draft as soon as possible."

44. The sixth Tron draft incorporates for the first time some, though inadequate, reference to the ICD in clause 1.2.4, where there was previously a blank. At paragraph 3.2 the words set out in the previous report at paragraph 4.2 (quoted in paragraph 38 above), by reference to the MTA arguments "*even if we do not share them*", is replaced by the even franker words "*even if we do not agree with them*". There is then a new insertion by reference to what Mr Adam had said he would be prepared to say in his email of 9 October 2009 referred to in paragraph 42 above:

"*Therefore, considering i) the complexity of the background of the cases discussed with the Mexican Tax Authorities and the formal*

> *arguments that said authorities might advance to sustain their decisions: ii) the current tendency of the Mexican administrative courts to confirm the decisions ruled by the Tax Authorities: iii) the current economical situation of Mexico which has imposed pressure as to the decisions of the Mexican government regarding measures to increase the country's revenue, it is to our best opinion that it is more likely than not that the outcome of the complaints filed by the Company against the 2003 and 2004 tax assessments, will be against the interests of Symrise Mexico.*"

This is repeated word for word in paragraph 4.2, prefaced by the words "*Even though we are not in the position to anticipate as to the outcome of the legal proceeding initiated by Symrise Mexico (nor to provide any guarantee that the* [MTA] *will honour its informal commitment regarding the settlement of the cases*)" – though such *anticipation* is exactly what they then do in the quoted passage by reference to the three reasons they give – and the paragraph concludes "*based on the above mentioned reasons, our recommendation is to avoid further litigation*".

45. Although this was described in a covering email of 27 October 2009 as the "*final draft of our opinion*", a further, and seventh. Tron memo was produced dated 4 November 2009, which was in the event the last memo, although it remained headed "*draft for discussion*", and the only copy before the Court is, on each page, stamped Draft. No material changes or additions in that regard were relied upon by either side before me.

46. Although there is no documentary evidence, it is said by Symrise that the decision to go ahead with the strategy, which had already been agreed by those that mattered, Messrs Berners, Yates and Sattler, in July/August 2009 as set out in paragraph 30 above was made in November 2009, although, as set out in paragraph 14 above, the payment of the sums outstanding to the MTA was not made until April 2010, and the nullity proceedings were only withdrawn on 22 October 2010, after, and taking no account of, the favourable appellate decision of the court (referred to in paragraph 11 above) confirming by reference to Mexican precedents the admissibility of the statement of Mr Tostivin, and thus confirming that there was at the very least a good arguable case that English law was to be used for the construction of the ICLA and if so that MTA would not be in a position to challenge the statement of Mr Tostivin, having not sought to adduce any counter-evidence of their own. It remains unclear whether Mr Tron even saw the statement of Mr Tostivin, but certainly no mention is made of it, and Mr Tron confirmed that he did not consider the questions of English or Mexican law in relation to the construction of the ICLA.

47. In the event, as set out in paragraph 15 above, Mr Tron was unable to persuade the MTA not to open an audit of the 2006/2007 years. The MTA confirmed to Mr Adam in April 2012 that "*as a matter of internal rules they are compelled to review the years following those that derived in a deficiency by an ongoing strategy for tax payer*", and although he

had said to Symrise in 2010 and 2011 that he would "*insist*" on the issue, the best that in the event Mr Adam was able to suggest in November 2012 was of pursuing Mr Rizo, who had been Mr Libreros's superior, and who was said in Mr Adam's email of 30 November 2012 to have been "*aware back then*" of the understanding, to try to reach "*an understanding that honours it*". However as Mr Adam made clear in that email and a subsequent email of 26 December 2012 the MTA were not prepared to honour such understanding, which might "*arise an administrative liability for them*" if they did.

48. Finally I should address what was, by the end of the hearing, an agreed, or all but agreed, comparison of (i) the terms of what Mr Godwin calls the *settlement* and what Mr Cohen calls the *capitulation*, and which I shall call the *deal* with the MTA in 2009/2010 ("the Terms of the Deal"), (ii) what would have occurred in each case had Symrise continued with the nullity proceedings and lost ("Worst Case") and (iii) the position if Symrise had pursued the nullity proceedings and won ("Best Case").

49. Before doing so I should explain and address what is again an agreed position as to the assumed progress of the nullity proceedings had they been continued. As Mr Calderon explained, the evidence in the nullity proceedings was now closed after the appellate decision to admit Mr Tostivin's statement (although it would have been possible, though unlikely, for there to be a further appeal against the admissibility decision), and that, although further submissions on both sides could be put in, there would not be any hearing, and the Mexican Court would decide the nullity proceedings on the basis of the court file. The agreed estimates are a maximum of 6 months before such outcome, with the possibility (indeed near certainty, given the agreement of the experts that the MTA tend to appeal everything) of an appeal to the Circuit Court, for which a further 6 months should be allowed: an appeal from there to the Supreme Court would be on constitutional grounds only, which appears wholly unlikely, but in that event a further 12 months would be required. It is common ground that, so far as costs are concerned, a further US$25,000 should be anticipated up to the first instance decision in the Mexican Court, and costs of US$85,000 for subsequent appeal or appeals.

50. I now deal with each aspect of the deal as above:

(i) 2003 and 2004 tax payments. In respect of both the Terms of the Deal and the Worst Case, the MXN $127,919,645 already paid would not be reimbursed. In the event of the Best Case, such total amount (equivalent to €6,951,135) would have been reimbursed to Symrise.

(ii) 2005 tax. Full tax of approximately MXN $120m was payable on conclusion of the assessment (as set out in paragraph 16(ii) above, Symrise could have avoided, but did not avoid, 10.5m by timeous payment) by the Terms of the Deal. This sum would also have been payable in the event of the Worst Case scenario. On the Best Case, this sum would first have had to be paid, but

would have been reimbursed in full (equivalent to €7,335,480).

(iii) Fines for 2005. By virtue of the self-correction, the result of the deal, there was a 30% fine, but a 90% reduction in it, resulting in a fine of MXN $932,764 (€50,693) by the Terms of the Deal: on the Worst Case of loss of the nullity proceedings, there would have been a greater fine, namely a 50% fine, but with a reduction of 20% for payment within 45 days of final assessment, namely MXN $12,436,848 (€675,915). In the event of the Best Case, there would have been no fines.

(iv) It was part of the Terms of the Deal that the MTA agreed to refund to Symrise Mexico by way of set-off, errors made by the MTA in their 2003 and 2004 calculations, totalling MXN $36,946,279.80. I am however entirely persuaded by the evidence of Mr Calderon (rejecting that of Mr Revilla) that those sums would have been set-off/credited in any event, being errors by the MTA . Hence they would have recovered the same sums in the Worst Case. So far as the Best Case is concerned, as the entirety of the sums paid for 2003 and 2004 would have been repaid, the errors were irrelevant.

(v) Refund of withholding tax to Symrise Luxembourg. As part of the Terms of the Deal (see paragraph 16(i) above) a refund was to be made, insofar as any such claims were not statute barred (as set out in paragraph 1.5.2 of Tron's memo of 27 October 2009). It is common ground that the same entitlement would have been available in the Worst Case. As for the Best Case, no refund of withholding tax would have arisen, because the interest would have been accepted to have been correctly treated, and all tax paid would have been refunded.

(vi) Surcharges. Again it is as I understand it common ground that no issue arises in this regard. In both the case of the Terms of the Deal and of the Worst Case surcharges are deductible in the year that they are paid (totalling in this case MXN $13,815,026 (€750,817), and in the Best Case there would have been a refund of all surcharges paid.

(vii) The unenforceable understanding of no challenge to the 2006 and (first half of) 2007 year. As set out above, Symrise knew that this was unenforceable, and also knew that the man who had given the oral assurance had moved on, but were reassured by Tron that, judging from their experience, the MTA would stand by it. That gave them a chance, as part of the Terms of the Deal, of avoiding payment of what could be, and in the event was, MXN $270,000,000 (some €15 million). Apart from the chance of the MTA standing by its undertaking, it was half-heartedly argued before me that, if the MTA did not, Symrise might have been able nevertheless, despite their

concession in relation to the 2003, 2004 and 2005 years, to defend the position on 2006 and 2007 because there would not have been a formal finding in nullity proceedings against them. I am satisfied that this was never a possibility, as they were advised (see e.g. paragraph 40 above), whether as a result of the setting of a precedent, as Mr Sattler accepted, or because (as Mr Revilla and Mr Tron accepted) if there was to be a hope of surviving an audit there would have to be a self-correction to bring the accounts into accord with the earlier years: and of course that is exactly what did occur once it did become apparent that the MTA were not complying with the unenforceable understanding. In the Worst Case, of losing the nullity proceedings, of course there would be no basis for challenge to the MXN $270m. In the Best Case, of winning the nullity petitions, then it would be inevitable that there could be no challenge by the MTA to the 2006 and 2007 accounts, enabling Symrise to avoid the liability for MXN $270m (€15m) and, if Mr Calderon be right, they would have been entitled to claim further taxable benefits for 2006 and 2007 totalling MXN $52,071,799 (€2,829,989).

(viii) With regard to costs, there would be as an inevitable part of the Terms of the Deal no further legal costs incurred in relation to the nullity proceedings, those incurred to date being wasted; but there would still be, as has eventuated, Symrise's costs of unsuccessfully pursuing the MTA for recovery (in two separate sets of proceedings, one for each year) of that part of the withholding costs which were statute barred: and the substantial costs of pursuing BMcK in these proceedings, which it was always intended (see e.g. paragraph 41 above) would follow the deal. In the Worst Case there would be the same expenditure of costs with regard to withholding tax and the costs of these proceedings, but in addition, assuming appeals, the US$110,000 to which I have referred in paragraph 49 above. In the Best Case, there would be the same costs of taking the matter to finality, including assumed appeals, of $110k, but the costs of both the proceedings pursuing refund of withholding tax and in particular the costs of these proceedings would have been avoided.

51. I shall return to a consideration of these financial consequences, and consider also what was put forward by Mr Godwin as non-pecuniary advantages of the *deal* when I consider the rival contentions with regard to Issue 6 (Mitigation) below.

52. I turn now to deal with the issues which survive for my decision, as discussed in paragraph 17 above, namely issue 4 breach of retainer/negligence, issue 5 causation, issue 6 mitigation and issue 7 quantum.

Issue 4: Breach of retainer/negligence

53. It is now common ground that I do not need to consider whether BMcK was negligent

itself by virtue of inadequate instruction of BMcK Mexico. It could be said that when Mr Hawks instructed BMcK Mexico to consider whether the ICLA created any tax problems in Mexico he should have supplied the ICD, to which reference is made in clause 12 of the ICLA. But Mr Hawks's response carries some force, namely that he had no idea that clause 3 was likely to cause any problem, not having any knowledge of Mexican tax law, and he would have supplied anything, including the ICD, for which he was asked, but he was not. The reality is that BMcK Mexico saw clause 3, but did not know what was in the ICD, so that they were in no position to be able to reach a conclusion (such as is now conceded) that by reference to its terms, and the subjection of clause 3 to it by clause 12, clause 3 did not offend against Article 92(1); and yet without any reservation they approved the ICLA.

54. In my judgment the case for Symrise is sufficiently proved as to the negligence/breach of retainer of BMcK Mexico, for which it is now conceded that BMcK itself is responsible, by two pieces of clear evidence:

(i) Mr Calderon, BMcK's own persuasive expert witness, accepted that he, as a reasonable Mexican tax lawyer, would have advised the client that, although the on demand wording is not "*satanic*", there was a risk that the wording would be challenged by reference to Article 92(1). BMcK Mexico should have done so.

(ii) Mr Hawks accepts that, had he been advised by BMcK Mexico that there was such a risk, he would have advised the client, and that he can see no reason why the on demand wording could not have been removed, as not being a crucial part of the ICLA. It was absent from the ICLA for Symrise Brazil, and it was also absent in relation to a similar agreement with Busiris relating to the shares of a Swiss subsidiary. That it was not in any way fundamental to the structure is indeed made clear by the fact that it was subsequently removed without any difficulty by the Clarification Agreement, as referred to in paragraph 15 above.

55. I am satisfied that the Claimant succeeds on Issue 4.

Issue 5: Causation

56. The MTA commenced their investigation into the tax affairs of Symrise Mexico before they saw the ICLA (as set out in paragraph 8 above). Even though I am satisfied, and it is conceded, that in the event the ICLA did not engage Article 92(1), the wording of clause 3 plainly on its face, unless and until there was adequate study of the ICD, suggested that there was a breach of Article 92(1): and even though the MTA had already decided to investigate and were relying, and continued to rely, on Article 29 (which

neither expert considers to have been arguable) and Article 31 which plainly required some careful consideration of the transactions, Article 92(1) was a good hook or peg. The Article 92(1) argument made it more likely that the investigation would continue, irrespective of whether Article 31 was or remained a live issue (as Mr Calderon considers that it would have been if some evidence had been available to the MTA, such as the statement given in evidence to me by Mr Gerberding that, although he was not himself involved, there was not to his knowledge any other purpose in a Mexican holding company buying the shares and borrowing the money than to set off the tax to get a tax benefit in Mexico).

57. It may well be that, as Mr Tron accepted, when authorities find aggressive tax structures they attack them, and that, as even he accepted, it seems that too much debt was *pushed down* - even if such was indeed, as Mr Hawks described, not BMcK's responsibility but that of Dr Wolf and Ernst & Young. However that does not in my judgment in any way preclude the conclusion that, in the very context of the disappearance of Symrise's tax and profits (described in paragraph 7 above), clause 3 of the ICLA would have caused and did cause the MTA to pursue Article 92(1), as well as Article 31. Even if in those circumstances the MTA would have pursued Symrise Mexico by reference to Article 31, they were in my judgment rendered more likely to pursue them once they had sight of the arguable infringement of Article 92(1), which they would in any event have run with, as they did.

58. However in any case, there are in my judgment at the very least 2 parallel causes of the investigation, and of the consequent risk of tax liability (which Symrise submit that they reasonably mitigated). Mr Godwin rightly in my view relied upon the authorities to which I have referred in paragraph 17(5) above. I find the passage in Chitty (31st Ed) at 26-067 to be entirely apt, namely:

> "*Two causes. If a breach of contract is one of two causes, both co-operating and both of equal efficacy in causing loss to the claimant, the party responsible for the breach is liable to the claimant for that loss. The contract-breaker is liable so long as his breach was "an" effective cause of his loss: the court need not choose which cause was the more effective.*"

I am satisfied that BMcK's breach of retainer/negligence was an effective and concurrent cause of the MTA's investigation which led to the *deal*.

Issue 6: Mitigation

59. I turn to consider this issue against the background of paragraphs 20 to 47 above. I shall address whether the *deal* was "*in all the circumstances*" within the range of reasonable responses, and in particular Ramsey J's 4 factors. I shall deal first with (*d) the benefits of 'settling' the cases rather than disputing them* and *(c) the uncertainties and expenses of litigation*.

60. The background is that, as described above, this was never a question of entering into a compromise, in which there was something given on both sides, but of taking the best/ only deal that was available. It was plain immediately from the first arrival of Tron (to which I shall refer further below) that the only deal which could be done, if Symrise were to exit from the nullity proceedings and the disputes, was one in which Symrise paid up the tax claimed in full for all 3 years, 2003, 2004 and 2005, paid a reduced fine, took the offset of those sums in respect of withholding tax which were not statute barred and in respect of the corrections for the previous errors, and accepted the informal unenforceable understanding. This is not therefore a case in which there can be any consideration as to whether Symrise could have done 'better', as might be the case in other circumstances.

61. As for the unenforceable understanding, this was plainly from the documents arrived at with Mr Libreros, who had left the relevant department by the time the decision was made in August 2009, and I am not satisfied (particularly in the absence of Mr Adam) that such understanding was ever made with Mr Libreros's superior, Mr Rizo, although Mr Tron said in evidence that he had mentioned it to him at a seminar and over dinner, probably in the following year. I note that Mr Adam himself, in October 2010 and in April, November and December 2012, was referring to the agreement as having been with the "*former Chief*" and their "*predecessor in office*", not with Mr Rizo, who remained in office. However I accept that Symrise were led to believe that there was such an understanding, and that it survived the departure of Mr Libreros, and that Mr Sattler and Mr Berners accepted what Mr Tron told them in that regard.

62. However it is clear that, as Mr Sattler confirmed in his evidence, he was always told that such understanding was unenforceable, even though (on what basis is still unclear to me) Tron felt able to tell Symrise that they had no experience of such an understanding not being complied with, and that Symrise were plainly warned of the risk. So far as Symrise's attitude to it is concerned, Mr Godwin described it in his closing submissions as "*somewhere between a hope and an expectation*". Symrise, and in particular Mr Sattler, who was, as set out in paragraph 21 above, both a lawyer and responsible for compliance, at no stage probed precisely what was involved in the *anti-corruption measures* which were referred to, or how such measures, if preventing an agreement, could allow for an informal unenforceable understanding.

63. The concomitant risk, which Mr Sattler also recognised, as he accepted in evidence (Transcript Day 5/26/11) was that if the MTA did not stand by the understanding, there was very likely, indeed in my judgment (and in the opinion of Mr Calderon) inevitably,

the consequence that the tax position, the applicability of Article 92(1), having been accepted in respect of the 2003, 2004 and 2005 years, the same would apply in respect of the 2006 and 2007 years (subject to the future protection of the Clarification Agreement). Symrise again did not probe what was involved in or meant by the alleged understanding. It cannot surely have been thought to amount to a promise that in no circumstances would the MTA challenge any accounts that were put in for the 2006 and 2007 year: all that was apparently being understood was that the MTA would not open an audit in respect of those years. As Mr Tron himself said in evidence (Transcript Day 7/84), once an audit was opened, the issue would be "*moot*" - i.e. the accounts would have to be considered on the same basis as the corrected accounts for the previous years.

64. If anyone on Symrise's part had considered for a moment what was involved in the informal unenforceable understanding, I cannot conceive that they would have thought that there was a 50% chance of any benefit being obtained from it, and probably a very considerably lesser percentage chance of their being able to avoid paying for 2006 and 2007 on an equivalent basis for the 2003-5 years, which in the event, as set out in paragraph 50(vii) above, amounted to MXN $270m.

65. The first question is then to compare what was obtained from the deal rather than from carrying on with the nullity proceedings and losing them. The course of carrying on was one supported by Mr Yates in his email to Messrs Berners and Sattler, referred to in paragraph 81 below, and recommended by Ms Villarreal of Symrise Mexico in her email to Mr Berners of 4 May 2009 (dubious as she there expressed herself to be of there being a "*legal way*" in which there could be any guarantee about the treatment of the accounts for 2006 and following). Had they adopted such course, then, as discussed in paragraph 50 above, would they have been worse off? Not much, is the answer, and they would have lost the chance of success. They would, as in the *deal*, not have recovered the sums paid for 2003-2005, but would still have obtained the credits in respect of the withholding tax (insofar as not statute barred) and the previous years' errors. They would of course not have had the (less than 50%) chance that the unenforceable understanding would work. They would have had to have paid (as appears in paragraph 50(iii) above) an additional €625,222 in fines, and they would have had the additional legal costs of running the nullity proceedings (after the successful admission of Mr Tostivin's evidence) up to the first instance decision and the possibility of appeals thereafter: the agreed estimate for that is US$ 110k.

66. There is then the comparison to be carried out with what would have happened if Symrise had continued the nullity proceedings and won. I deal below with the strength of the claim and the chances of success, but at this stage simply address what Ramsey J referred to as the benefits of continuing the proceedings, and succeeding. In that case, as discussed in paragraph 50 above, there would have been a recovery of all taxes and surcharges paid in respect of 2003, 2004 and 2005, approximately MXN $247m (€14,286,615). In addition there would be the inevitability of success in respect of the 2006 and 2007 years, because the MTA would have lost the principle of Article 92(1),

namely a total of MXN $270m (€15m) or MXN $322m (€17.8m) (paragraph 50(vii) above), rather than the less than 50% chance of avoiding it to which I have referred. Although Symrise would not receive the credits, they would have no need of them (as explained in paragraph 50(iv) and (v) above). The agreed extra $110k in costs would need to be incurred, in the event of there being an appeal, but to set against that there would be the saving of any legal costs in respect of the two sets of proceedings which were in fact subsequently instituted (and were unsuccessful) in respect of the statute barred withholding tax, any costs of challenging (as in the event they sought to do) the 2006-2007 years, and of course, materially, the substantial costs incurred of these proceedings against BMcK, which would not have been necessary if Symrise were successful against the MTA.

67. Apart from these financial matters, Mr Godwin has raised two more general matters, which he refers to as benefits from not proceeding with the nullity petitions:

(i) The saving of management time and resources in relation to the nullity proceedings. This seems obviously immaterial given (a) that the nullity proceedings were nearly at an end, requiring nothing more than waiting for the outcome of the decision, and any appeal and (b) very much more such time and resources were likely to be expended in relation to the other proceedings referred to, which have in fact ensued.

(ii) Preservation, or restitution, of a working relationship with the MTA. As Mr Cohen points out, this was plainly not in the mind of Symrise, or at any rate important to them, in the light of what subsequently occurred. Quite apart from the fact that Symrise shortly afterwards launched two sets of proceedings against the MTA in respect of the challenged withholding tax concessions (which they lost), they did not shrink from taking a very robust position in relation to the 2006 accounts, once it became apparent that the unenforceable understanding was not to be complied with: Mr Sattler in an email of 18 February 2013 discussed putting before the tax authorities very strong language – "*not insisting to be rude that . . . but there is no reason anymore to shy away because of pure tactics*", and Tron in the actual submissions complain that "*no serious business could be substituted with such erratic and contradicting behaviour by the tax authorities.*"

68. As is clear from the history that I set out in paragraphs 26 to 45 above, these assessments, namely comparing that which would be achieved by the *deal* with what would result if the proceedings were simply taken forward and lost, and in particular comparing it with the very substantial pot which would be recovered (in respect of 2003-2005) and with certainty avoided (in respect of 2006-2007), were not addressed by Symrise (or Tron).

69. I now address, together, Ramsey J's *(a) strength of the claim* and *(b) whether the 'settlement' was the result of legal advice*.

70. The advice which Symrise received prior to the instruction of Tron was uniformly favourable to their chances. As to BMcK Mexico's advice, Mr Sattler in his witness statement (paragraph 16) says that in 2006 Mr Berners instructed them to advise whether or not Symrise had a greater than 50% chance of succeeding with its tax challenge. They gave that opinion to Symrise. It was consistent with the advice given by Symrise's other legal advisers, KPMG, to whose favourable advice I have referred in paragraph 21 above. Mr Sattler described KPMG's written advices as "*fuzzy*", but I do not share his view. Ernst & Young carried out a tax audit for the year 2003, and both confirmed the propriety of the statements for tax purposes and treated the (subsequently impugned) loans as long term liabilities (rather than on demand loans).

71. As for BMcK Mexico, on 12 December 2006 they are recorded as advising the Symrise team led by Mr Berners that "*the chances to obtain a favourable decision exceed 50%*". I have already recited in paragraph 22 above their firm written advice of 31 August 2008. In an email of 26 August 2009 BMcK confirmed that "*it is more likely than not that the legal actions filed by Symrise Mexico would prevail*" and stated "*as expressed in several occasions we are of the view that the claims by the* [MTA] *are groundless*". This was sent to Mr Berners and Mr Sattler, and not only was there no challenge to the fact that this had been said on several occasions, but Mr Sattler confirmed in his oral evidence (Transcript Day 5/74) that BMcK had on many occasions expressed the view that the MTA claims were groundless. They said this again in their letter of 11 November 2009, and although in relation to that letter it was sought to be inferred by Mr Godwin that this approach was coloured by the fact that by that time they were being asked to make a contribution to the *deal*, again no challenge was then made to the fact that they had described the claim as groundless on many previous occasions, as Mr Sattler has confirmed.

72. It is perhaps necessary to interpose that in the course of this trial Symrise abandoned its case that MTA would have succeeded, and accepted that MTA would not have succeeded. In this context it is worth noting that Mr Sattler, who is a lawyer, accepted in the course of the hearing that he knew that Mr Tostivin's opinion was the only English law opinion available to the Mexican Tax Court, that under Mexican laws of interpretation one must look at the full terms of the contract and the intentions of the parties, and that the intentions of the parties were always that the loan was not on demand.

73. Two significant emails from Mr Berners, unexplained because he was not called, must now be addressed:

(i) The first is immediately before the instruction of Tron quoted in paragraph 22

above. Mr Berners says "*even if our chances to win are 80%, we will suffer major hits on our net profit as soon as we pay additional taxes and charges before we get a positive ruling*". This indicates that Mr Berners was positing at least the possibility, if not probability (in light of the advice he had received), of an 80% chance of success, but he sets against that other reasons, to which I shall return below.

(ii) In the email to Tron, copied to Mr Yates and Mr Sattler of 27 August 2009, by which time the decision to do the deal had been reached, in the circumstances referred to in paragraphs 29 and 30 above, and Tron's written opinion was being sought, quoted at paragraph 33 above, he stated:-

> "*Considering the chances to win the pending law suits, which in our view are not better than 50-50 and the total exposure, we believe that a settlement has a very strong commercial rational, all the more as we do not lose the possibility to chase Baker. Maybe you share this view and provide your recommendation accordingly.*"

Quite apart from the nature of the hope or expectation that Tron would "*share this view*", there is no sign at all of where the sudden view of the client, Symrise, has come that the chances are "*not better than 50-50*": certainly not from BMcK Mexico or from KPMG.

74. Against the background of the advice on the merits which Symrise did receive <u>prior to</u> the instruction of Tron, I turn to Tron, in the context of the reliance placed by Symrise upon them as being the providers of *independent legal advice* for the purposes of Ramsey J's factor (b).

75. It is clear that Tron were brought in in order to negotiate: this is what Mr Berners expressly said in his email to Mr Yates of 5 February 2009, and he says it again in terms at the end of his email to Tron (copied to Mr Sattler) of 19 June 2009:

> "*You have to find a solution for this, before we approach the board. That's the reason why we engaged you*".

There is no secret of this in the very first meeting which Mr Tron had with BMcK Mexico on 4 December 2008, the note of which I have set out in paragraph 25 above. His immediate recommendation was *"that we should approach the* [MTA] *to try to negotiate*". That is what occurred, as set out in paragraphs 26 above. The following is clear:

(i) He did not disagree with BMcK as to their opinion as to the merits. Indeed

Tron confirmed in the various memoranda cited above that they did not agree with or share the arguments of MTA, and Mr Tron confirmed in evidence at the hearing that the merits were with Symrise.

(ii) Indeed Tron made it clear that they were in no position to give any advice upon or consider the merits, in the email set out in paragraph 35 above of 1 September 2009, namely that they were "*unable to give any opinion on the probabilities of success in* [the] *litigation*" giving the reasons, first that it was a "*litigation matter*", and secondly they did not have "*access to the files dealing with the pleas for nullity*". There is no evidence that Tron ever saw the files, or certainly ever considered them, and although Mr Tron says he saw the ICLA, he does not believe that he saw the ICD, and he neither saw nor considered the Clarification Agreement, with its confirmation of the intention of the parties, and in particular never saw, or until very recently knew about, the Tostivin statement and its admission into the nullity proceedings as the only admissible evidence of English law. Certainly Tron do not mention the Tostivin statement in any of their memoranda, or address in any way the question as to whether English law or Mexican law governs the interpretation of the ICLA and whether there would be any difference even if Mexican rather than English law governed. Mr Tron confirmed in cross-examination (Transcript Day 7/123) that in the memoranda "*we briefly describe some of that that you were mentioning in the arguments because it is in a description note, because we have seen a few of those documents that you mention, not all of them. But yes, we were not discussing the technical merits or the arguments one versus the other, no*".

(iii) His first step immediately after the meeting on 4 December 2008 was to fix up the planned meeting with Mr Libreros on the basis of the proposed deal which would concede all Symrise's arguments, on 12 December 2008. The decision was made in July/August 2009, as appears from the email set out in paragraph 30 above, by Mr Berners, after discussion with Mr Yates and Mr Sattler, without any legal advice from Tron on the merits being received at all. Although Mr Sattler did assert that at some stage (unspecified) Mr Tron gave some oral advice in addition to that which has been before me in writing (and set out at length above), he was unable to say when or in what terms, and both by reference to the contemporaneous documents and indeed to the evidence of Mr Tron himself, I reject that evidence.

76. Against that background I come to the advice which Tron did give:

(i) I have referred in paragraph 33 above to the email of 27 August 2009. It is apparent that once that decision was made, it was thought necessary by Symrise's British lawyers, in order to maintain their chance to sue BMcK successfully, at English law, for Symrise to obtain a legal opinion. It is

obviously not a good start, as discussed above, that they asked Tron whether they shared Symrise's alleged view that the chances are "*not better than 50-50*". It is apparent that from then on Symrise are seeking to persuade Tron to take a more pessimistic view, and without success: in Tron's internal memo of 1 September 2009, referred to at paragraph 35 above, the Junior Associate says "*our opinion . . . was that both parties have grounds to support their position to a certain degree, and we do not have any additional elements that could tip the balance beyond 50-50*": Mr Tron accepted in evidence that Tron were thus being invited to push the MTA's chances above, and Symrise's chances below, 50-50. As set out in paragraph 43 above, Mr Hill of the British lawyers endeavours to cause Tron to amend their view because "*the fact that* [BMcK] *feels able to express a very firm view in this matter* [this is further confirmation of the advice having been given by BMcK that MTA's position was *groundless*] *is exactly why Symrise needs Tron's views as a counterbalance*" (my underlining).

77. When Mr Cohen in cross-examination put to Mr Sattler that there were other reasons for Symrise entering into the *deal*, (to which I shall refer below) Mr Sattler insisted (Transcript Day 4/64): "*no. I disagree with that, because it is, I am of the opinion that we had to learn that we had no proper chance to win the appeals filed by us*". They did not learn from Tron that they had no *proper chance to win* by reference to the merits of the case, as to which Tron continued to remain unwilling to differ from the views of BMcK Mexico. What occurred as a result of the pressure being put upon Tron was the sending of the email of 9 October 2009 set out at paragraph 42 above, which I repeat here for convenience:

> "*However, we will be more than happy to state the actual merits of the interpretation held by the tax authorities (even when we might not share them), and consider them as well as: (i) the current tendency of the Mexican administrative courts, (ii) the current economical situation and the pressure it has imposed on the Federal Budget (and therefore in the revenue affairs), and (iii) the complexity of the background and the structure itself; in order to issue a recommendation to avoid litigation and suggest the settlement of the cases.*"

This new position was, as set out in paragraph 44 above, subsequently incorporated for the first time in Tron's sixth memorandum. Whatever those statements actually mean - and at no stage were they probed by Symrise who no doubt gratefully accepted them for what they were - they are not on their face all of obvious significance. Certainly, it was accepted in cross-examination by both Mr Sattler and Mr Tron that the *complex* part of the tax dispute related to whether Article 31 applied after careful consideration of the transactions: the attraction of the Article 92(1) point from the MTA point of view was its apparent simplicity, if only clause 3 was considered. Mr Sattler agreed in cross-examination that no one had ever said to him or advised him that the Mexican Tax Court

did anything but reach the right conclusion on the merits. However this new line was used as the basis, as set out in paragraph 44 above, for the advice in Tron's sixth memo, based upon it, and not upon the merits of the case, that "*it is to our best opinion that it is more likely than not that the outcome of the complaints . . . will be against the interests of Symrise Mexico*".

78. As to this, the following can be said, and is submitted by Mr Cohen:

(i) The suggestion that the Mexican Tax Courts will decide decisions otherwise than upon the merits is not sustainable. Mr Cohen points to statistics which have been published on the MTA website proudly announcing in 2011 that "[MTA's] *results in the court have improved significantly in recent years, as it has won 55% of the trails obtaining final judgments. In 2000 it won less than 10%*", giving the details. This does not support a case of wholesale favouritism of the MTA by the Mexican Court. No examples are given by Mr Tron or by Mr Revilla of unfair or biased decisions. In any event, the very decision in this case by the Tax Court and on appeal, admitting the evidence of Mr Tostivin contrary to the arguments of the MTA, and therefore rendering it far more likely that, had there been a final decision, the arguments of Symrise Mexico would have been accepted that the ICLA fell to be construed at English law, and if so that it was not a loan on demand, is evidence of the independence of the court.

(ii) I accept the evidence to the contrary of Mr Calderon, whom, as I have said above, I found a persuasive and convincing witness.

(iii) Although it is said that the Tax Court itself is in some way an administrative court, and therefore within the ambit of the Executive, albeit staffed by legal Judges, there is the opportunity for not one but two appeals from that court, and there was no suggestion that the appellate court fell to be similarly criticised.

(iv) I find it compelling that this argument was only raised so late, at a time when it was apparent that Tron were unable or unwilling to advise that Symrise were likely to lose on the merits, and under pressure to do so by Symrise and their lawyers. If this really was the situation in Mexico, Tron would have so advised right from the beginning, i.e. 'whatever your arguments, you are bound to fail'. This belated advice, which ignored the merits, and was only introduced after the intervention of the English lawyers should, in my judgment, have caused concern.

79. The only basis upon which Symrise can be said to have relied upon independent legal

advice is by reference to Tron's belated suggestion, if such it be, that they would lose in any event. The advice in any case did not analyse the advantages and disadvantages, as I have set them out above, and in particular did not point up, particularly while emphasising the unenforceability of the undertaking, the very substantial amount of money that stood to be gained if Symrise were to take the nullity petitions, all ready for decision as they were, to that decision.

80. The fact that there were commercial reasons for settlement does not mean that Symrise is not entitled to rely upon the settlement in order to recover over against BMcK. It is very often in cases of mitigation that a victim of a tort or breach of contract can say that it was put into a difficult position by the tortfeasor or contract breaker, and thus, often in the agony of the moment, had to get out as best it could. Thus for example a party made impecunious by a tortfeasor or contract breaker may have to dispose of its assets at an undervalue: may for pressing reasons have to give up, as here, the wonderful prospect of reclaiming from the MXN $250m that it had paid out and of avoiding payment of the MXN $270m in respect of the following years. But such is not this case. Symrise was not impecunious (even though Symrise Mexico was, as a result of the *pushdown* put into substantial debt) and there was no time pressure, except that created by the collateral needs of the group, to which I shall refer below. The only time pressure that there could be said to have been was to pay the MXN $120m which it was conceding for the 2005 year by 31 October 2009, in order to avoid an extra surcharge of MXN $10.5m, which in the event it failed to do, and has accepted in these proceedings that it must be treated as if it had done.

81. It would also not be reasonable for a victim, particularly one not in the agony of the moment, to be swayed by the expectation of recovery against the tortfeasor into taking a step influenced by that fact alone. In his email of 30 July 2009 to Messrs Berners and Sattler, Mr Yates actually expressed himself as in support of pursuing the nullity proceedings and then suing BMcK if they were unsuccessful (an entirely sensible course), and further stated his view in an email of 29 July 2009 that "*any settlement would, as I understand it, significantly diminish our ability to claim any damages from* [BMcK] *via the legal route*". Whether or not he was right about that, it is quite apparent that what I have referred to above as the pressure on Tron after the decision had already been taken in July/August 2009 to follow the *settlement route*, to come up with what Mr Godwin himself in closing colourfully called "*something more meaty*", was influenced by the desire that Tron should amend their opinion in order to render it more likely that recovery could be made against BMcK.

82. I have stated above that the existence of commercial reasons for settlement may not render it unreasonable for the victim to take the steps it does, and Mr Godwin reminded me of my own decision in that regard in **Tullow Uganda Ltd v Heritage Oil & Gas Ltd** [2013] EWHC 1656 (Comm), where the claimant was under considerable pressure from the Government of Uganda, to which it succumbed. But there is no such outside pressure here, where the decision was effectively taken in July/August 2009 subject to

getting an opinion from Tron for the purposes of claiming over against BMcK. The most striking statement is that which I have set out in paragraphs 22 and 73(i) above, namely: "*even if our chances to win are 80%, we will suffer major hits . . .*". This makes it clear that the case was settled without any real reference to the merits of it or to the sums which were being lost, at least until it became necessary to obtain Tron's opinion. In an email of the same date (4 November 2008) to his colleagues he noted that they had actually taken 85% of the loan out at the end of 2007 (by recapitalising Symrise Mexico), and he was assuming "*that the risk respectively the likelihood has reduced since 2005 significantly . . . given that the likelihood to lose the lawsuits for 2003 and 2004 is below 50%, I would expect that the likelihood has dropped in 2005 and 2006 to 30% and to less than 10% from 2007 onwards*". Nevertheless he was concerned that the scenario could "*ruin the Mexican company*", and yet there would be the very substantial recovery if those lawsuits were successful, even though he considers (very pessimistically) that they might take another 3 to 5 years.

83. Mr Cohen submitted that there were collateral reasons for the doing of the *deal*. It had always been known that the debt *pushdown* could be problematic and was aggressive, and there had been legal battles not only in Mexico but also in Germany and Singapore.

84. The onus to prove that the steps taken by Symrise were not reasonable, or rather not within a reasonable range of responses, is upon BMcK. That does not mean that they have to identify the reason or reasons which Symrise did in fact have for taking the course they did. Indeed within the confine of a trial in which only Mr Sattler had close knowledge of the situation (it becoming clear quite quickly, as set out above, that Mr Gerberding had very little knowledge of the circumstances, and in the absence of Mr Berners and Mr Yates), at best Mr Cohen has sought to draw inferences as to what the reasons were. There are some limited passages of cross-examination which were to some degree enlightening, and upon which he relies:

(i) Mr Sattler agreed that it was necessary in 2003 and afterwards to ensure the success of the *pushdown* and to ensure that the structures were not challenged, but the suggestion was made, which Mr Sattler denied, that by 2008 the structure was not needed, the recapitalisation was completed and a dispute with the Tax Authorities was not necessary.

(ii) Mr Sattler accepted that by November 2008 Mr Berners was concerned with "*options to get out*".

(iii) At Transcript Day 4/162 Mr Sattler said that the reason for the settlement of the case was "*to get the company out of trouble because it was – because it was occupying resources, it was an ongoing costly exercise, and it was not giving the company anything. So it was for us, and it is – I am still absolutely convinced that it was in the best interests of the company, not to rely on the*

uncertainty of tax litigation in Mexico, but to solve this thing out or this thing out for the future". He did not accept that by 2008, with the Group no longer weighed down by debt, the commercial driver was to "*clean up the past and get on with life*", but to that his answer was: "*No, I say that what has driven us was that our view under the advice given by Baker has changed*", an answer which plainly cannot be accepted in the light of what I have set out above.

(iv) Mr Sattler accepted, as is set out in paragraph 34 above, that in August 2009 Mr Yates and Mr Berners aimed to reduce the Group tax rate on the basis of the settlement in Mexico which, it is made clear at the subsequent Executive Board meeting of Symrise on 22 September 2009 was welcome because "*the reduced tax risk which is being realised in Mexico and the tax risk in Singapore which would probably not be realised at all were leading to an excessive provision for tax risks . . . From the third quarter of 2009 Symrise's tax rate will reduce to 27%*".

(v) Mr Gerberding agreed that by 2008/2009, as the debt came down, the debt *pushdowns* had progressively become unimportant to Symrise, that what Symrise was trying to do was to present its financial performance in the most attractive way to the market, that what makes the earning stream more or less attractive to the market is the amount of tax which falls to be paid by the Group on a group-wide basis on its earnings, and that in 2009 desiring to get rid of tax risks which still fell to be paid was a very desirable thing from the Group's point of view, including closing down the risks of the past, allowing the Group tax rate to be reduced.

Whatever precisely was in the mind of Symrise's senior management, the one thing that is clear is that on 29 July 2009, without having had any advice as to the merits of the nullity proceedings, save for the firm optimistic advice of BMcK Mexico (supported by KPMG), Messrs Berners, Yates and Sattler agreed to withdraw the appeals and pay up (as set out in paragraph 30 above) and "*After that, we can close the chapter*".

85. Mr Godwin summarises why, on his case, the *deal* was reasonable, by reference to five factors:

(i) the unenforceable undertaking,

(ii) the advice from Tron that the nullity proceedings were not likely to succeed;

(iii) the avoidance of protracted litigation;

(iv) "*showing good face*" to the MTA; and

(v) the need to dig the company out of a hole.

86. I conclude that the onus of proof that the steps taken were not within the reasonable range of responses is satisfied by the Defendant:

(i) Mr Cohen described the decision to abandon the nullity proceedings and throw away the very substantial sums which would be recovered and avoided in the event of success as "stark staring mad". On any sensible analysis it was inevitably right to proceed, for very little more money by way of costs, for very little downside if they went ahead and lost (as indeed Mr Yates and Ms Villarreal recommended) and with a very substantial sum to recover, which can only have been regarded as not substantial if it was set in the balance against other bigger advantages to the Group. Against all this, the unenforceable undertaking was at best worth a percentage chance, but could and should have been analysed as of little worth, had not the eyes of those at Symrise who wanted to do the deal been closed. They knew, in particular the lawyer Mr Sattler, but so too Mr Berners (ever since November 2008 – paragraph 24 above), that a "*settlement is difficult because of anti-corruption rules*".

(ii) There was in effect no advice on the merits given by Tron, and certainly none before Symrise made the effective decision in July/August 2009. When Symrise did obtain advice from Tron it was to the same effect as BMcK – which would have meant a very good chance of recovering a very substantial sum. It was only after pressure that Tron introduced a completely new argument that the Mexican Court would not reach a fair decision, and which again would and should have been disregarded, or at any rate addressed with considerable scepticism given the lateness of its arrival on the scene, but for the 'closed eyes'.

(iii) The not very protracted litigation of finishing off the nullity proceedings was exchanged for what has in fact been very protracted litigation.

(iv) No *good face* was turned towards the MTA.

(v) If the senior management of Symrise wanted out for their own Group reasons, all well and good, but not by dint of making an unreasonable decision, and not at the expense of BMcK.

87. I am entirely satisfied for all those reasons, and those that appear from my summary above, that BMcK have established that the steps taken by Symrise were not in reasonable mitigation. In the event, as is now conceded, Article 92(1) is not applicable, whether Mexican or English law was applied, and thus, had they proceeded with the nullity petitions they would have succeeded, at any rate in relation to Article 92(1), for which alone complaint is made against BMcK in these proceedings. In my judgment Symrise acted unreasonably in abandoning the proceedings which they had a very good chance of winning (and in the event would have won), and giving up the very good prospect of a recovery which would have avoided the tax losses. The Claimant's tax recovery claim therefore fails.

Quantum

88. I turn to address the issue of quantum in any event, since I have heard the evidence and argument. Both valuation experts purported to approach the question of loss on the same basis, namely, as Mr Godwin put it in his opening skeleton, "*on the basis that the payments made resulted, on normal accounting principles, in an equivalent reduction in the value of* [Symrise's] *investment in Symrise Mexico*". However in fact the Claimant did not approach such loss on such *normal accounting principles*. Mr Bukowski did not even look at copies of the financial statements of Symrise Mexico, Busiris or Symrise when preparing his report. He simply totted up the tax payments, set out when they were each paid and totalled them up.

89. Mr Giles however did value the diminution in value of the shareholding of Symrise Mexico in the hands of its ultimate parent Symrise, which is the only basis upon which such loss can be valued, as Mr Godwin's own skeleton recognised. Since, for reasons canvassed with Mr Sattler and very substantially nothing to do with BMcK or the tax (see paragraph 7 above), the liabilities of Symrise Mexico massively exceeded its assets at all material times, the value of that shareholding was prima facie nil. This is how Symrise Mexico was valued in the offering circular on the 2006 IPO of Symrise. Mr Sattler accepted in evidence that, prior to the recapitalisation of Symrise Mexico (and the write off of its losses) in November 2007, the value of Symrise Mexico's shares was zero. There is an alternative value which Mr Giles puts forward, and to which I shall return.

90. Mr Bukowski seeks to justify his £1 for £1 approach in 3 ways:

(i) He says that if the consolidated accounts of the Symrise Group are looked at, then by virtue of the payments out by Symrise Mexico there is a diminution in value of the consolidated balance sheet. That is no doubt right, but is irrelevant. The claim is not that of the Group, but of Symrise. The corporate entity Symrise is not the same as the Group. It has its own corporate and legal identity, and it cannot simply access the assets of other companies in the

Group, even its own subsidiary, or, in the case of Symrise Mexico, sub-subsidiary. The only way in which a parent can access monies in its subsidiary is through dividends, and if the subsidiary or sub-subsidiary is unable to pay a dividend, then the parent company cannot access that money. It is common ground, and was again confirmed by Mr Sattler, that Symrise Mexico was not in a position to pay a dividend until after the recapitalisation in November 2007. Its liabilities far exceeded its assets. The existence of more liabilities or fewer liabilities in a sub-subsidiary which cannot pay a dividend makes no difference to the valuation of its shareholding from the point of view of its parent or grandparent. Mr Giles, whose evidence, as I said in paragraph 19 above, I found persuasive and convincing, and is an extremely experienced valuer, said that he had never come across a valuation of a subsidiary carried out by reference to a consolidated balance sheet.

(ii) Mr Bukowski's next proposition was seemingly aimed at avoiding the consequence, which he accepted, that if at any material time Symrise Mexico with its massive excess of liabilities over assets had been liquidated, its value would have been nil. He postulates that if a third party purchaser were to seek to purchase the shareholding in Symrise Mexico, with such excess of liabilities over assets, it might pay more for the company if the liabilities were slightly less. This is in my judgment wholly fanciful. There is no third party purchaser, and such a one would be wholly unlikely to purchase a company with its massive excess of liabilities over assets, and if it did it would be wholly unlikely to pay £1 for £1 more for a company with slightly less massive liabilities.

(iii) Mr Bukowski's third suggestion was that the value of the shareholding is not zero but –x, such that its value, if the liabilities were MXN$100m less, would be –(x-100m). This too, I accept from Mr Giles, and seems obvious, is not the way in which shares or shareholdings are valued. If the liabilities massively exceed the assets, by however so much more or less, the value is still zero. Mr Bukowski's attempt to evade the unsurprising statement (which Mr Giles supplied and supported) in **Investment Valuation (Damodaran: Second Edition)** that: "*the protection of limited liabilities should ensure that no stock will sell for less than zero. The price of such a stock can never be negative*", by suggesting a distinction between a *stock* and a *share* was, to say the least, unpersuasive.

91. It was Mr Giles himself, not Mr Bukowski putting forward some alternative case, who postulated an alternative case by reference to the facts before me. Having explained that a company which could not pay a dividend was not liquid and had no value, he identified a situation in which it could be said that the liquidity was delayed. Particularly in a case where the company is a subsidiary within a Group, there may lie within it, and within the Group, the prospect that something might occur to enable it to pay a dividend,

particularly if, as here, the only reason whereby it is continuing in existence rather than being liquidated is by virtue of the support of the Group. In this case it can be said that Symrise Mexico carried within itself a value, namely the value by reference to a potentiality of paying a dividend. Rather than speculate as to what might have been the chances as at 2003, it is possible to identify the claim less speculatively in this case by looking to see what did happen; and by virtue of the actions of one or more members of the Group (it is not clear which) there was a recapitalisation and a writing off of losses which after November 2007 enabled it to begin to pay a dividend.

92. Mr Giles has therefore calculated (and Mr Bukowski has agreed) what sums could thus have been paid by way of dividend and when, and this method of valuation became known as Giles 2 (as compared with Giles 1 which, as has been seen, led to no loss at all). Mr Giles himself said that he was not sure which of Giles 1 and Giles 2 he preferred, but it seems to me clear that there was some un-accessed value in the shareholding which was capable of being unlocked.

93. Mr Cohen makes two submissions. First he submits that what occurred by way of the recapitalisation and the writing off of the losses is *res inter alios acta*, and that I should ignore it. It seems to me that, consistent with the Giles 2 approach, the delayed liquidity in this company was related to its position as a subsidiary in a group, and that it was always possible for one or more members of the Group to unlock that liquidity. What is therefore being valued is not what has happened subsequently by way of *res inter alios acta* (although that is helpfully being used as a method of valuation) but the value (provided that it is suitably discounted as a future value) inherent in the subsidiary. Alternatively, Mr Cohen submitted that, in order to unlock the dividends, money had to be paid out in respect of the recapitalisation/write off, and at the very least credit should be given in valuing the future dividends by reference to the monies so requiring to be laid out. This is not a matter as to which Mr Giles gave a view, either in his report or in his evidence, or on which Mr Bukowski has had any opportunity to comment, and I concluded that, when it was raised by Mr Cohen in closing submissions, it was too late to address the point.

94. Provided I can be satisfied that there is a proper valuation of the shareholding by reference to Giles 2 by reference to discounting for the future, I prefer Giles 2, as reflecting some loss in the value of the shareholding. There were 3 issues between the parties as to how to arrive at that valuation:

(i) The valuation date. Although there was some dispute between the experts, I was entirely clear that Mr Giles was right to say that the valuation date must be the date when the loss occurred, i.e. in this case the date of execution of the ICLA 20 June 2003. In the event Mr Godwin did not resist that decision in closing.

(ii) There was then a dispute between the experts as to the conversion date in relation to the notional dividends by reference to exchange rates. Again I was entirely clear that Mr Giles's evidence that this had to be the notional date of payment of the lost dividend was right, and again Mr Godwin did not in closing pursue his opposition in this regard either.

(iii) The third issue related to the discount rate. It is common ground that in valuing the loss by reference to the non-payment of notional future dividends, there must be a discount rate per annum applied. Mr Giles argues for 14.83% per annum as a discount factor and Mr Bukowski proposed 3.83% per annum. It is common ground between the experts that 3.83% is an appropriate risk-free rate. However Mr Giles explained persuasively in his second expert's report why it was necessary, and indeed standard practice, to add a country risk premium specific to Mexico. As he explains, the adjustment for country risk would reflect any risks over and above those that would be faced in a developed economy, due to the economic and political circumstances of the particular market country. It is particularly important to allow for the riskiness of the capital structure in the discount rate because of the level of debt with which Symrise Mexico was burdened: the substantial size of the debt could have led to the collapse of the business, without intervention by related parties. In his third expert opinion in response, Mr Bukowski accepted that for a normal valuation of such a Mexican company with uncertain cashflows Mr Giles's approach and figure would be appropriate, but in this case he concluded that account had to be taken of the effect of a "*loss which is certain, that is the additional tax payments*".

95. In evidence he effectively made 2 points in response to Mr Giles:

(i) Consistent with his approach, which I have rejected, that he was not addressing Symrise Mexico but the consolidated Group accounts, he was not addressing the enormous debt burden of Symrise Mexico and the fact that its liabilities hugely exceeded its assets, nor did he accept that it was appropriate to use Symrise Mexico's cost of equity, which he otherwise accepted as 14.83%, agreeing (Transcript Day 12/67) that "*if I have the task to value . . . Symrise Mexico, this procedure Mr Giles did is OK*".

(ii) Secondly he argued from the fact that, by virtue of the hindsight approach, it was to be assumed that dividends were being paid as from December 2009 onwards, that such payments were 'certain' such that a risk-free valuation of the discount was appropriate.

96. So far as this latter argument is concerned, Mr Giles addressed this persuasively in his

third expert's opinion:

> "*3.13 Mr Bukowski is essentially failing to engage in the instructed exercise. In order to value loss to Symrise AG as of the date of breach, we must put ourselves in the position of Symrise AG as of June 2003. We rely on the expected tax payments, which differ per our instructions, and tax payment dates. However, simply because with hindsight we know with certainty what payments were made, we cannot assume away all risk looking forward from June 2003 to the tax payment or potential dividend payment dates.*
>
> *3.14 But for the tax payments, Symrise Mexico would have had additional cash on hand as of the tax payment dates. When it was able, given the financial constraints of Syrnrise Mexico, the company could have paid that additional cash as dividends through the parent companies to Symrise AG. There is necessarily risk incurred between June 2003 and 30 May 2013, the last tax payment date. For example, there was the risk that Symrise Mexico could have gone bankrupt during that time, which has been noted in many of Symrise Mexico's financial statements. That risk must be accounted for in an appropriate discount rate, such as the cost of equity.*
>
> *3.15 By way of analogy, corporate bonds often include a schedule of expected or promised payments and payment dates on which interest and principal will be paid to the bondholders. Although we can identify those future payments, when valuing the bond we still must account for the risk inherent in future payments. One would never value a corporate bond using only the risk free role simply because the future interest payments were identifiable.*"

He explained further in evidence (Transcript Day 12/143-145) that what the experts were to do was value in 2003. That did not mean assuming in hindsight that there was no risk as at 2003. But for the adoption of hindsight he (and I) would have valued the shareholding as nil because there was no conceivable basis upon which a dividend could be paid. The chance or prospect of such a dividend being paid at some stage in the future is what is being valued and "*we are trying retrospectively to find out what the valuation was in 2003*". Indeed he criticises Mr Bukowski for moving away from "*the agreed approach . . . that the correct discount rate is the cost of equity as in June 2003, which he makes plain is Symrise Mexico's cost of equity*".

97. I have preferred the expert opinion of Mr Giles on all matters (and indeed in relation to the valuation date and conversion rate Mr Godwin has conceded that Mr Giles's opinion is correct), and I prefer it on this aspect too, for the reasons he gave.

98. I turn to the question of Mitigation costs, reduced, as set out in paragraph 16(iii) above, in post-trial written submissions by Mr Godwin to €90,124 paid by Symrise AG and €101,731 paid by Symrise GmbH, after various reductions and allowances, mainly of a broad-brush kind, sought to be explained in those submissions.

99. The difficulty arises out of more than the onus of proof being upon the Claimant. It is best defined by the exchange I had with Mr Godwin in closing (Transcript Day 13/40). I asked him whether (given the concession that Symrise would have won if they had continued with the nullity petitions) if Symrise were to establish negligence but fail on mitigation/settlement (which has in fact eventuated), in that he had not called anybody to disentangle the calculations and be cross-examined, he would be seeking to recover against BMcK the irrecoverable costs. He made it quite clear that Symrise were not pursuing a case on that basis. There were two reasons which he gave why he was not running a case on the basis of recovery of such irrecoverable costs. His first was that it was wholly inconsistent with Symrise's case. His second was that it was not a realistic task for him to perform to identify such costs. Such irrecoverable costs claim in the event of failure on Issue 6 is thus not being pursued. But on the basis that I am now, in this part of my judgment, considering what Symrise could have recovered had they succeeded on Issue 6, I must inevitably be influenced by that reaction, even though he sought to pursue some kind of 'disentanglement' in his post-hearing submissions, to which in any event Mr Cohen objected. I would simply say that, had I decided Issue 6 in favour of Symrise, I would have likely been persuaded to take a stab at something less than the €191k claimed, as Mr Godwin effectively asked me to do in his post-hearing submissions, but I have not now done so.

Conclusions

100. I have found for the Defendant on Issue 6, and no sums are due in respect of any of the payments to the MTA. I accordingly give judgment for the Defendant. If I had found for Symrise, I would have adopted the Giles 2 valuation, with his choice of valuation date, conversion rate and discount factor, such that the figure would have been €3,276,000.