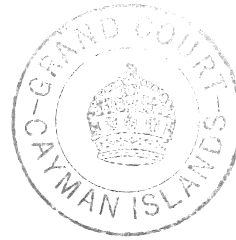


IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 104 OF 2005



BETWEEN TRITTON DEVELOPMENT FUND LTD. PLAINTIFF

AND 1. FORTIS BANK (CAYMAN) LIMITED  
(FORMERLY MEESPIERSON  
(CAYMAN) LIMITED)

2. MEESPIERSON MANAGEMENT  
(CAYMAN) LIMITED

3. MEESPIERSON NOMINEES  
(CAYMAN) LIMITED

DEFENDANTS

IN CHAMBERS

BEFORE THE HON. CHIEF JUSTICE

THE 22<sup>nd</sup> DAY OF SEPTEMBER, 2005

Appearances: Mr. Kenneth Farrow of Quin & Hampson and Mr. Daniel Lightman for the plaintiff.

Mr. David Railton Q.C., instructed by Mr. Andrew Bolton of Appleby Spurling Hunter for the defendants

**RULING**

1. This is the defendants' application that certain amendments made on 28<sup>th</sup> July 2005 to the plaintiff's Statement of Claim, be disallowed and struck out. The basis is that the amendments were made outside of the statutory limitation periods, that they plead a new cause or new causes of action and that they do not arise from the same or substantially the same factual circumstances originally relied upon in support of the Statement of Claim.

2. The plaintiff does not accept that the disputed amendments plead new causes of action but argues that if they are so found and would thus otherwise be statute barred, they can and should be allowed as they arise from the same or substantially the same factual circumstances as those originally pleaded in the Statement of Claim. It is acknowledged that even if so found to arise from the same or substantially the same facts, as a matter of judicial discretion, they might still nonetheless be disallowed.
3. The foregoing summary of the arguments also identifies the legal propositions which apply to these amendments of pleadings as expressed in Grand Court Rules Order 20 Rule 5(2)(5) in the following terms:

**“(2) Where an application to the court for leave to make the amendment [(which adds or substitutes a new cause of action)] is made after any relevant period of limitation current at the date of issue of the Writ has expired, the court may nevertheless grant such leave in the circumstances mentioned [in paragraph 5 below] if it thinks it just to do so.**

....

**(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises**

**out of the same or substantially the same facts as  
a cause of action in respect of which relief has  
already been claimed in the action by the party  
applying for leave to make the amendment.”**

4. These Rules are made pursuant to section 41 (4) and (5) of the Limitation Law (1996 Revision) (“The Law”) and sub-rule (5) adopts and mirrors the wording of that latter subsection of the Law.
5. At the outset, it will be readily understood, given the foregoing cited principles, that an analysis of the factual basis of the pleadings both as originally framed and as amended, must be undertaken. First it will be necessary to decide whether the amendments do indeed introduce a new cause or new causes of action and this will depend upon a comparison of the original with the amended pleadings to determine three things:
  - (a) whether a different duty is pleaded;
  - (b) whether the breaches pleaded differ substantially, and where appropriate;
  - (c) the nature and extent of the damage of which complaint is made.

As to those three factors being determinative of whether a new cause of action has been pleaded, see *Darlington Building Society v O’Rourke* [1999] 1 Lloyd’s Rep. PN 33 at 36, per Iain Glidewell; cited by Collett JA with approval in *Omni Securities Ltd. v Deloitte and Touche* [2000] CILR 102.

6. Arising as they do out of a series of interconnected and sometimes of countervailing transactions, the circumstances of the case are of some complexity.

To aid in their understanding, graphical depictions of them are attached as schedules to this ruling. The essentials can be summarised as follows:

7. Tritton, the plaintiff, was incorporated in the Cayman Islands as an investment vehicle to undertake Czech investments. It entered into a series of agreements with the three defendants by which the latter were respectively to provide investment advisory, management and directorship services.
8. The allegations raised by Tritton involve breaches of duty in the delivery of those services. These breaches are pleaded in contract, tort and equity.
9. Investicni a Postovni Banka A.S. (IPB) is a Czech bank whose shares were listed on the Prague Exchange until it was put into administration by the Czech authorities on the 16<sup>th</sup> June 2000. Along with the well-known Japanese banking and investment Nomura Group, IPB had agreed to promote an investment project in the Czech Republic. The venture, which included the acquisition of the indebtedness of Czech entities conveniently together called the Czech Beer Sellers (“CBS”) in March 1998, was restructured in early June 1999 in a venture called “Project Leo”. As investment vehicles for Project Leo, two companies, Torkmain Investment Limited and Levitan Investments Limited (“T and L” respectively), were incorporated in the Cayman Islands. It is at the heart of the allegations of breach of duty raised by Tritton, that in undertaking also to provide investment, management and directorship services to T and L; the defendants acted in conflict of interest and to the detriment of Tritton in advising it to participate in Project Leo, and in particular, to accept promissory notes issued by

T and L in return for other valuable securities in the following series of transactions.

10. IPB (in conjunction with Nomura) had acquired from the CBS, a series of 93 promissory notes securing loans at the hugely valuable sum of CZK 7.14 billion (then approximately USD 220 million). These notes, which were issued on 12<sup>th</sup> March 1998, were due on 31<sup>st</sup> December 1999.
11. The CBS notes were assigned by IPB to T and L in exchange for notes issued to IPB by T and L and thus giving to T and L that very large capital value. Instead of being retained by T and L, the CBS notes were, however as part of the Project Leo transactions, exchanged for notes issued by Pembridge Investments B.V., a company incorporated in The Netherlands and a member of the Nomura Group ("Pembridge").
12. It was determined that IPB should take participating (as distinct from voting) shares in Tritton and that these should be paid for by the release of the T and L notes issued to IPB and by the issuance in turn of T and L notes to Tritton. It is also of pivotal importance to this action that the T and L notes which Tritton thus acquired, are expressed to be limited to the value of T and L's assets.
13. At the time of the exchange of the T and L notes for the shares in Tritton, T and L no longer owned as its main assets the CBS notes but owned instead the liability owed by Pembridge to it under those notes which Pembridge had issued in exchange for the CBS notes.
14. As matters had developed, Pembridge had already also owned shares in IPB, acquired by dint of its parent's, the Nomura Group's 46% interest in IPB. By

virtue of an agreement entered into with T and L, Pembridge was enabled to redeem its notes issued to T and L either by a put option in respect of its shares in IPB being put to be acquired by T and L or by payment of cash.

15. On 2<sup>nd</sup> June 1999, in furtherance of the Project Leo objectives, Pembridge became entitled to exercise its put option requiring T and L to acquire the IPB shares, at a certain deemed price. It is alleged by Tritton as the ultimate holder of the T and L notes (limited in value as explained to the value of the IPB shares acquired by T and L as their only asset), that that deemed price was significantly higher than the open market or quoted price on the Prague Exchange for the IPB shares at that point in time.
16. As Tritton's net asset value came to depend upon the value of the T and L notes which were themselves limited in value to the assets held by T and L, the difference between the deemed price and the quoted price of the IPB shares on 2<sup>nd</sup> June 1999, is one of the bases for measuring the damages which Tritton claims.
17. The allegation ultimately underlying the action as I understand it, must be that as the result of this transaction, the assets of T and L ended up being very significantly lower in value than the value of the shares in Tritton which IPB acquired.
18. As the shares in Tritton were not finally issued to IPB until 17<sup>th</sup> December 1999 and as it is alleged that IPB's shares after being put into administration in June 2000 became virtually worthless so too, it is said, the T and L notes given for the pledge of the Tritton shares to IPB became virtually worthless.

## THE ORIGINAL PLEADINGS

19. The original pleadings all pivoted around the nature of the contractual and fiduciary relationships: the first defendant, MP Cayman, was Tritton's investment manager, the second defendant, MP Management and the third defendant, MP Nominees, were at all material times the only directors of Tritton. MP Management and MP Nominees were however, also the only directors of T and L at material times.
20. Tritton makes its claims in respect of Project Leo (i.e.: the May/June 1999 transactions) at section D of the Statement of Claim. In relation to the December 1999 transactions – where the put option granted to Pembridge was extended and the number of shares to be subscribed by IPB in Tritton increased from 250 to 300 and ultimately issued – Tritton makes its claim in Section E. At the time of this application, the relevant limitation period had not yet expired in respect of the December 1999 transaction and so the objections raised by the defendants go to the amendments relating to the events surrounding Project Leo.
21. In the original pleadings in this respect Tritton alleged that:
  - (a) MP Cayman, as investment manager advised and MP Management and MP Nominees, as directors, decided that Tritton should participate in Project Leo. This was based on the averment in paragraph 9 of the Statement of Claim that Tritton and MP Cayman had entered into an Investment Management Agreement on 2<sup>nd</sup> June 1999 (“the IM Agreement”). The duties owed were therefore alleged to be contractual on the part of MP Cayman and contractual/fiduciary on the part of MP

Management and MP Nominees as the directors who decided that Tritton should participate in Project Leo.

- (b) In paragraphs 19 and 21 of the Statement of Claim; that MP Cayman acted in breach of the IM Agreement, and MP Management and MP Nominees acted negligently, because they failed to take into account that:
  - (i) T and L's only assets were the Pembridge Notes which could be settled with IPB shares;
  - (ii) the strike price of the IPB shares for the purpose of the Put Options was significantly higher than the quoted price of IPB shares on the Prague Stock Exchange in June 1999;
  - (iii) accordingly, T and L might have net assets "significantly lower in value" as compared with the value of the shares in Tritton issued to IPB.
- (c) The defendants acted in breach of fiduciary duty, principally by not acting in the interests of Tritton and for acting when they had a conflict of interest.
- (d) By paragraphs 23(3) and (4) that, by agreeing to release T and L from their obligations under the T and L notes, Tritton removed any incentive for T and L seeking better terms from Pembridge in respect of the Put Options. That T and L thereby lost the chance of obtaining full payment or improved payment of the Pembridge Notes and Tritton in turn lost the chance of obtaining full or improved payment of the T and L Notes.

22. It will thus be apparent from the foregoing that as originally pleaded, Tritton's case as against MP Cayman was in contract based on the IM Agreement and against MP Management and MP Nominees in contract and as a matter of the legal/fiduciary duties owed to Tritton as its managers and directors.
23. However, it having been averred in the defence to paragraph 11 of the Statement of Claim, that the IM Agreement could not have become effectual before 18<sup>th</sup> June 1999 for the reasons there explained, it became doubtful whether Tritton's claim against MP Cayman in contract as to breach of duties on or before 2<sup>nd</sup> June 1999 (when Pembridge became entitled to exercise the Put Option by putting the IPB shares to T and L) was sustainable.
24. The Statement of Claim was subsequently amended on 28 July 2005.

**THE AMENDED PLEADINGS: NEW CAUSES OF ACTION?**

25. By the amendments introduced in paragraphs 11A and 11B, Tritton now pleads that MP Cayman was a "de facto" investment manager and administrator of Tritton between 2<sup>nd</sup> June 1999 and 18<sup>th</sup> June 1999, and that on that basis MP Cayman should have offered Tritton advice about Project Leo. In that way, the fact that the IM Agreement had not been executed until 18<sup>th</sup> June 1999 is sought to be overcome.
26. It is apparent, as the defendants argue, and as Tritton acknowledges; that the case has been thus transformed from the original case pleaded in contract that MP Cayman gave bad advice in breach of the IM Agreement to the new case, that MP Cayman should have but failed to offer advice as a "de facto" administrator and investment manager.

27. In paragraph 19 of the original unamended Statement of Claim, it was alleged that MP Cayman acted “in breach of contract and/or negligently” but since no duty of care was pleaded, this, as the defendants argue and as I accept, must be taken as a characterisation of the nature of the breach of contract then alleged, rather than as a separate claim in tort.

28. The new case that MP Cayman failed to offer advice is clearly based entirely in tort. The averment in the amended paragraph 11A that MP Cayman was acting as “de facto” administrator and investment manager of Tritton is based on the following extract from the minutes of the boards of directors of T and L, which were approved by the sole voting shareholder in T and L, MP Cayman, and which record meetings of both companies held at the offices of MP Cayman on 2<sup>nd</sup> June 1999, under the heading “**Declaration of Interests**”:

**“Martin Bryne and David Richardson each gave notice that [MP Management] and [MP Nominees] are affiliates of [MP Cayman] which is acting as administrator and investment manager of Tritton.”**

(Emphasis supplied)

29. It is to be noted here however, that in paragraph 16 of the original pleadings, reference was made to and reliance placed upon the same minutes of 2<sup>nd</sup> June 1999. For primarily that reason, Mr. Farrow submitted that the claim in tort as raised in paragraph 11A, even if found to give rise to a new cause of action, arises from substantially the same facts as the purported contractual cause of

action originally pleaded. The new paragraph 11B in respect of which the same is said, goes on to plead that:

**“In carrying out its said role as de facto administrator and investment manager to Tritton, MP Cayman owed Tritton a duty to exercise all reasonable care, skill and diligence to the standard pleaded in paragraph 10 hereof, alternatively that pleaded in paragraph 11 hereof;”** that is: by the exercise of all reasonable skill care and diligence particularly to the standard to be expected of an international bank, trust company and mutual fund administrator of the specialist type which MP Cayman purported to be.

30. Further, by the amendment to paragraph 20A, that:

**“To the extent that MP Cayman did not offer any advice to Tritton prior to Tritton participating in Project Leo and/or entering into the [Project Leo] transactions, then MP Cayman breached its tortious duty of care to Tritton.”**

31. The amendments also seek to introduce a new allegation of breach of duty against MP Management and MP Nominees; namely that to the extent they failed to seek advice from MP Cayman prior to causing Tritton to participate in Project Leo (see paragraph 18B of the amended Statement of Claim) they acted in breach of their duties owed to Tritton. These are said to arise from substantially the same

circumstances involving the allegation that MP Cayman had become, de facto, Tritton's investment advisor.

32. That, as a simple matter of first impressions, may be a sustainable argument: while Tritton's amended case will require, in this regard, an inquiry into what MP Cayman actually did during May and June 1999 by way of "de facto" investment management or administration or to justify the allegation of "de facto" manager, one may anticipate such an inquiry involving the same actions or omissions implicated in the original pleadings where a contractual relationship was positively pleaded.
33. However, it is in respect of the amendments to paragraph 19 that real difficulty arises. As originally pleaded, the alleged breach was, in gist, that MP Cayman acted deliberately and wilfully in breach of contract and negligently in advising Tritton to participate in the (Project Leo) transactions in that it took no account or failed properly to take account of the fact that T and L had no assets other than the Pembridge notes which could be settled by the IPB shares being put to T and L by Pembridge. Further, that MP Cayman failed properly to consider the implications for Tritton arising from the fact that the deemed or "strike price" for the IPB shares was significantly higher than the quoted price of the IPB shares.
34. The plain implication arising from those original pleadings would have been that MP Cayman failed to obtain the appropriate consideration for the Tritton shares in its failure to avoid the implications and consequences of taking the IPB shares in the circumstances that it did. The nature of the loss or damage claimed focused

upon what better terms could have been exacted by T & L from Pembridge and thus for the ultimate benefit of Tritton.

35. Part of the defendants' concerns about allowing the amendment to paragraph 19 in particular, is that by their pleaded defence to the original pleadings they have pointed out that, as a matter of law, Tritton could not suffer a loss by reason of the issue of its own shares for valuable consideration, and cannot claim damages or equitable compensation in that respect. As authority for that proposition in support of the present application they cite *Pilmer v The Duke Group Limited* [2001] 2 BCLC 773. Further, in paragraph 29 of the defence, they plead that Tritton's participating shareholders in fact suffered no loss by reason of Tritton's participation in Project Leo. This is because IPB contributed the entirety of Tritton's initial assets and became the sole participating shareholder and that no other party other than IPB held or had any right to hold participating shares in Tritton at any material time. At all material times, the value to IPB of its participating shareholding was necessarily therefore equal to the value of the assets contributed by IPB in consideration.
36. It is worth noting here that, if MP Cayman is correct in the foregoing propositions of law going to the root of Tritton's case, it is difficult to see how, by the amended pleadings seeking to show that further steps could have been taken to secure that Tritton obtained more valuable consideration for its shares issued to IPB, Tritton could improve its case. The same legal objection based upon the *Pilmer* case above, would necessarily arise. I note also in passing, that it has not

been explained who has the ultimate beneficial interest in the claims brought by Tritton in this action.

37. Nonetheless what the amendment to paragraph 19 would seek to do in 19(1) is pleaded as follows:

**“MP Cayman took no account of the fact...that  
Torkmain and Levitan as at 2<sup>nd</sup> June 1999 held valuable  
rights in the form of the Czech Beer Seller Notes. Such  
Notes were of substantial value for the following, among  
other reasons:**

- (a) The Czech Beer Sellers held the benefit of promissory notes issued by Pembridge in the principal sum of CZK 7,147,214,800 plus accrued interest thereon;**
- (b) Although a put option agreement had been entered into between Pembridge and the Czech Beer Sellers on 19<sup>th</sup> June 1998 which purported to allow Pembridge to discharge its obligations under the said promissory notes by transferring shares in IPB to the Czech Beer Sellers, such agreement was subject to Czech law and was either unenforceable or arguably, unenforceable as a matter of Czech law;**

(c) **The Czech Beer Sellers had further assets which may have been of significant value.”**

38. It is Mr. Farrow’s argument on behalf of Tritton that while these amendments involve new allegations of breach of duty as against MP Cayman, they involve a new cause of action only to the extent that they are relied upon in support of the new tort claim in paragraphs 11A and 11B.
39. However, while 11A and 11B may be permissible for the reasons already discussed referencing substantially the same facts as already pleaded in relation to the minutes of 2<sup>nd</sup> June 1999; different concerns arise when all the amendments including paragraph 19 are taken together.
40. First of all, it must be definitively stated that the amended pleadings when taken together do give rise to new causes of action. And this is notwithstanding that the original pleadings in paragraph 17 did make some reference to Project Leo and the part played by the CBS Notes in it. There is now definitively a claim separately in tort where there was no such claim before.
41. Moreover, as Mr. Railton QC submitted, the amended case in paragraph 19 raises significant new allegations of breaches of duty, such as to give rise to a new cause of action when taken with the newly pleaded duties in paragraphs 11A and 11B and the newly pleaded losses in paragraph 23 as amended.
42. In order to appreciate the effect which the amended pleadings would carry, it has to be borne in mind that T and L themselves had no assets by which to have acquired the CBS Notes in the first place, but instead were indebted to IPB for their acquisition by assignment. It therefore cannot be overlooked that the shares

issued to IPB by Tritton were in return for the release of the notes which T and L had issued to IPB as consideration for the assignment of the CBS Notes to T and L. Thus, it is said by the defendants, that it was T and L's role to replace the CBS in the pre-existing arrangements and that, from the plaintiff's point of view, has not been controverted.

43. Against that background, it would be an entirely new and far-reaching undertaking to enquire, as Tritton would need to do, into whether T and L could have halted Project Leo half way through by refusing to exchange the CBS Notes for the notes in Pembridge and by which Pembridge was given the now impugned option to put the IPB shares to T and L in satisfaction of the Pembridge Notes. Project Leo was a restructuring of pre-existing arrangements involving Nomura and IPB and thus would arise a fundamental factual issue, not raised in the original pleadings, as to whether those parties would have consented to T and L participating only in that way.
44. Moreover, in this regard and as Tritton accepts in its amended paragraph 19(1)(b); the CBS had themselves entered into earlier put option agreements with Pembridge by which Pembridge could settle the Pembridge/CBS Notes with IPB shares. Thus, on the face of it, Pembridge would, in any event, have been entitled to settle its liability for the CBS notes with IPB shares and the value of T and L's rights against the CBS would have been no less dependent on the value of the IPB shares than the value of their rights against Pembridge, had T and L retained the CBS Notes.

45. Further, having regard to the new paragraph 19(1)(b) and (c); in order to prove that the CBS Notes were more valuable than the IPB shares, Tritton has pleaded and would need to establish two new facts:

- (i) That the put options between Pembridge and the Czech Beer Sellers were unenforceable as a matter of Czech law (the law which governed those put options);
- (ii) that the Czech Beer Sellers had other assets of significant value with which to settle their liability under the CBS Notes.

These are substantive new matters of fact which would require extensive investigation.

46. A further necessary aspect of proof of the amended pleadings would be that T and L would in fact have been better off by retaining the CBS Notes, rather than selling them to Pembridge in exchange for the IPB shares eventually put by Pembridge.

47. This is as essential to Tritton's new case on breach of tortious duty as it is to its new case on causation of loss. It is an allegation that would involve delving into the factual questions not raised before, as to the financial status of the CBS and their underlying interests as at the date of the entering into of the agreement between Pembridge and T and L; not only as to that state of affairs vis-à-vis the value of the IPB shares in December 1999 and at the end of June 2000 – the latter being, respectively, the dates when IPB finally acquired the Tritton shares and when IPB was put into administration.

48. Finally, as to the factual implications of the amended paragraph 19, Tritton would need to enquire into and establish that the directing minds of T and L would in fact have decided to retain the CBS Notes and that they would have been permitted to do so by Nomura, as the 46% holder of IPB, and by IPB itself, to which T and L were indebted in respect of the acquisition of the CBS Notes.
49. The foregoing are all factual issues necessarily arising, which clearly demonstrate that the amendments in paragraph 19 in particular, are based on new factual situations. Factually different breaches of contract and breaches of duty are alleged.
50. Consequently, a factually different case on causation and loss is plainly now alleged in paragraph 23. It has been entirely amended by the substitution of the former case, which was essentially one of loss of opportunity to Tritton for obtaining a higher return or better terms of payment for the debt due to it under the T and L Notes, with a new case essentially that, had the defendant directors of Tritton entirely refused to enter into the limited recourse arrangement with T and L, T and L would have been obliged to retain their rights under the CBS Notes or would have sought "proper consideration" not just IPB shares, for their surrender, release or assignment. Thus, that T and L would have been able to provide "proper consideration" for their debt owed to Tritton in respect of the shares issued to IPB.
51. It seems to me, from all the foregoing, that Tritton seeks to rely on new causes of action, not only because of its newly pleaded case in tort alleging the "de facto" investment advisor relationship with MP Cayman, but also because of the new

nature and extent of the breaches relied upon, as well as the new nature and extent of the alleged damage (these elements amounting to what are in fact new causes of action). In addition to the dictum of Sir Iain Glidewell cited from Darlington B.S. v O'Rourke (above), see the following dictum from Lord Justice May in Steamship Mutual Underwriting v Trollope and Colls (above at 98):

**“I do not think one can look only to the duty of a party, but one must look also to the nature and extent of the breach relied on, as well as to the nature and extent of the damages complained of in deciding whether, as a matter of degree, a new cause of action is sought to be relied upon.”**

52. I should also note that I have reached the foregoing conclusion being mindful also that the process of analysis must be honed to ensure that inappropriate weight is not given to matters which although newly arising from the amendments, may not be material to the issues to be proved on the amended pleadings. In this regard in particular, Mr. Farrow referred to the judgment of Millet LJ in Paragon Finance PLC v D B Thakerar & Co [1999] 1 ALL E.R. 400. There in referring to the definition of a new cause of action this was said at 405f:

***“However it is formulated, only those facts material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction.”***

53. Further, as was said in Omni Securities Limited v DeLoitte and Touche (above at p 108), and as the foregoing analysis illustrates - whether an amendment introduces a new cause of action is a mixed question of law and fact.

54. Finally, as to the guiding principles; in deciding whether an amendment pleads a new cause of action it has been permissible to consider whether, questions of limitation apart, the plaintiff would be met by a successful plea of *res judicata* if, after the original claim has been disposed of, he commences a fresh action raising the new claim: see *Steamship Mutual v Trollope and Colls* (1986) 33 BLR 77 (per Lloyd LJ at 101).

**The same or substantially the same facts**

55. Subject to the question of whether these new causes of action are barred by statutory limitation to be considered below; I have to further specifically consider whether it can be properly found that they arise (in the words of sub-rule 5(5)) from “the same or substantially the same facts” as those originally pleaded.

56. This exercise is, as has been said, a matter also of degree seeking to see whether there is sufficient overlap between the old and the newly pleaded facts: *Steamship Mutual* (above) per May LJ at p 99. In borderline cases this will often be a matter of impression. In other cases the issues may be so discrete or discernable as to lend themselves to analysis. I consider this case to be one such for the reason of the foregoing analysis of the law and the facts, going to the question of whether new causes of action have been pleaded, as well as the following analysis.

57. Here it seems that it is permissible to ask the question whether the newly pleaded facts are such as to be likely to arise *in any event* from the issues to be litigated between the parties. If so, then they should be able to rely upon any cause of action which substantially arises from those facts. See, for example, *Lloyds Bank PLC v Rogers and another, The Times 24 March 1997*.

58. A very recent, and to my mind, apposite restatement of the test, is that of Colman

J in *P & O Nedlloyd v Arab Metals Co.* [2005] EWHC 1276 at paragraph 42:

**“The concept involved in “substantially the same” in [(The English equivalent of GCR O 20 Rule 5)] must in my judgment, involve something going no further than minor differences likely to be the subject of enquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success.”**

59. To my mind, the overall effect of the principles is that ultimately, the fact that the new cause of action might arise from the same general factual background as the existing claim, or that there is some common factual theme by itself is not enough. If, properly analysed, the new cause of action arises from facts which are strictly not the same or substantially the same as those already pleaded, then the court has no jurisdiction to allow an amendment so as to admit a cause of action which would otherwise be statute barred.

60. Here too, in addition to the new factual implications already discussed, there are the further practical implications pointed out by Mr. Railton Q.C.

(i) First, as the enforceability of the put options between Pembridge and the CBS would now be in issue and is a matter of Czech law, that would be treated as a question of fact in the present action. No Czech law issues were raised in the original Statement of Claim. If the amendments were allowed it would be necessary for both parties to adduce expert evidence of Czech law.

(ii) Second, no issue as to the financial position or assets of the CBS was raised in the original Statement of Claim. Given the nature of the

amended pleadings in 19(1) and (4) in particular, extensive enquiries in the Czech Republic, possibly involving forensic accountancy, would be required in order to ascertain whether the CBS would, as at 2 June 1999, have been able to satisfy the CBS Notes out of assets other than the proceeds of the Pembridge/CBS Notes.

- (iii) Third, in the original Statement of Claim (paragraphs 23(3), and 23(4)), Tritton raised the issue of whether Pembridge or Nomura would have agreed more favourable terms in respect of the Put Options, but it did not suggest that IPB and Nomura would have been prepared to allow T and L to retain the CBS Notes. That would have significantly altered the effect of Project Leo, because Pembridge would not then have been in a position to use the notes issued by the CBS to discharge the Pembridge/CBS Notes. Tritton's new case opens a potentially far-reaching and difficult inquiry into the intentions and motives of IPB and Nomura in wishing to remove the CBS from the arrangements they had made in 1998. In other words, bringing into the enquiry the very reasons in the first place, for the formation of T and L as the vehicles for Project Leo.
- (iv) Fourth, whether the boards of T and L (had it been open to them) would have decided to retain the CBS Notes requires an investigation into the conduct and potential personal liability of MP Management and MP Nominees not only qua directors of Tritton but also qua directors of T and L; as that is the reason alleged in the amended pleadings in paragraph

23(4) as likely to have prevented them from allowing T and L to relinquish the CBS Notes.

61. While these several issues may all be said to derive from the series of transactions preceding and involving Project Leo as well as related subsequent events, those raised by the amendments to paragraphs 18A, 18D, 19, 20A and 23 in particular, are so diverse and complex and would be requiring of such hitherto unrequired areas of investigation, that they may not properly, to my mind, be described as arising from the same or substantially the same factual circumstances as those originally pleaded. Different conclusions can be reached in relation to the newly pleaded duties in tort in paragraphs 11A and 11B for the reasons already explained. However, as the newly pleaded breaches of duty in paragraph 19 are related to the newly pleaded duties in paragraph 11A and 11B as they are to the other pleaded duties, they do indeed, as Mr. Farrow acknowledged, stand or fall together.
62. Those being my conclusions, I do not have the jurisdiction contemplated by Rule 5(2) to allow these amendments insofar as they would raise new causes of action in tort, as they would be statute barred for the following reasons.
63. Tritton's case on loss as stated in amended paragraph 23(1) is that it suffered loss, by virtue of T and L - companies in which it had invested – agreeing to the substitution of the promissory notes issued by Pembridge and the rights under the Put Option for the CBS Notes, without any significant consideration for the same.
64. These transactions were completed on 3 June 1999 by T and L agreeing on that date to the substitution of the CBS Notes by the Pembridge Notes, Tritton having

already on 2 June 1999 entered into the Subscription Agreement with IPB in respect of its shares. It follows that if Tritton suffered any loss arising from breach of tortious duty in respect of that transaction, the loss would have been suffered no later than 3 June 1999 (although the shares were not ultimately issued until 17 December 1999) and the limitation period of 6 years, this being a claim in tort, expiring on 3 June 2005. See Section 4 of the Law. Similarly, in respect of the limitation period for any new cause of action in contract (said to arise against MP Cayman for negligent advice). Such a breach could, on analysis, have arisen no later than 3 June 1999 and so the limitation period expired six years later on 3 June 2005. See Section 7 of the Law.

65. All the foregoing limitation issues apply however, only to the new claim in tort. No limitation period is directly prescribed by Cayman statute for an action in equity for breach of fiduciary duty, and this is a matter which now requires separate consideration.

66. Section 42(1) of the Law provides as follows:

“The following time limits under this Law

a) the time limit under section 4(1) for actions founded  
in tort....;

c) the time limit under section 7 for actions founded  
on simple contract...

shall not apply to any claim for...equitable relief,  
except insofar as any such time limit may be  
applied by the Court by analogy in like manner as

any corresponding time limit under the repealed  
Limitation of Actions Law or the repealed  
Limitation Act, 1623 of the United Kingdom was  
applied before the 15<sup>th</sup> August 1991.”

67. August 15<sup>th</sup> 1991 was the date on which the Law came into effect in its earliest iteration as Law 12 of 1991. It was held in *Prospect Properties Ltd. v McNeil* 1990-91 CILR 171 that there was no statutory bar in the Cayman Islands to an action against fiduciaries such as directors or constructive trustees for breach of fiduciary duty under the then applicable section 46 of the Limitation of Actions Law (Chap. 86) which applied the Limitation Act 1623 (U.K.) and which had in turn prescribed no bar in such circumstances.
68. From my own research, I have been unable to find any other cases in Cayman law dealing directly with the subject of statutory limitation periods applicable to claims based on breach of fiduciary duty.
69. Against that background of the brief summary of the legal history and on the basis of the wording of section 42(1) of the Law, I was unable to conclude that the amendments, insofar as they plead new causes of action based on breach of fiduciary duty as distinct from breach of duty in contract or tort, are statute barred.
70. Further submissions, invited by the Court after the release of this judgment in draft on 7<sup>th</sup> February 2006 have however, been taken and considered. I have instead concluded as follows:
71. There being no statutory limitation period directly applicable to claims for equitable relief, section 42(1)(c) of the Law in terms requires a consideration of

the question whether, “any such time limit may be applied by the Court by analogy in like manner as any corresponding time limit” which may have been applicable before the Law was originally passed.

72. I accept the submission on behalf of the defendants that I should look to the settled practice of Courts exercising an equitable jurisdiction. In this regard the Courts historically refused to allow pleadings:

- (a) where the plaintiff was guilty of laches; or
- (b) if the equitable remedy corresponded to a remedy at law, by application by analogy of any statutory limitation period applicable to the correspondent remedy.

73. Here the claim in equity is said by the defendants to correspond to the remedies sought in tort and in contract as sounding potentially only in damages.

74. There is no claim by the plaintiff here for the restoration of property received by the defendants as its fiduciaries or any other form of equitable proprietary claim. Such claims are expressly exempted from the prescription of statutory limitation periods by Section 27 (1) of the Law which provides:

*“No period of limitation prescribed by this law applies to an action by a beneficiary under a trust, being an action –*

*(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*

*(b) to recover from the trustee trust property, or the proceeds of trust property in the possession of the trustee or previously received by him and converted to his use.”*

75. The plaintiff, through its attorneys, now seeks, after “mature reflection”, to articulate a claim for fraudulent breach of trust which was not put before; thus seeking to rely upon Section 27(1)(a). I will return to this below.
76. It is to be noted here that no claim is raised as could be spared under Section 27(1)(b).
77. This is submitted to be a fundamental point of distinction between this case and *Prospect Properties* (above); where the remedies claimed included the restoration of property received by fiduciaries in breach of trust, a remedy which has no direct analogy in law and against which, therefore, no limitation period by analogy, could have been applied in that case. It is a point of distinction which is even more valid since the introduction of Section 27 of the Law, and one which I accept as valid for present purposes.
78. That then brings me, before dealing with the newly asserted claim based on fraud, to consider the application of statutory limitation periods by analogy. The principle was summarized by Lord Westbury in *Knox v Gye (1872) LRS HL 656* at 674:

*“For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitation, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in Equity corresponds with an action at Law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure.”*

79. The principle is further explained in *Spry on Equitable Remedies, Fifth Edition* p 419; where it is also explained that fraud is the only ground upon which a court of equity refuses to apply the statutory limitations barring legal rights:

*“Fraud appears to be the only ground on which a court of equity refuses to apply a statute of limitations barring legal rights that it is sought to enforce within its auxiliary or concurrent jurisdictions, and hence it is not sufficient, in order to prevent the court from acting in obedience, that a mistake by the plaintiff as to his rights, or some other consideration, is able to be established.*

*...a statute of limitations may be raised by analogy in defence to a claim that is brought in the exclusive jurisdiction of a court of equity, such as in proceedings for the enforcement of a trust, .... it must be seen first whether there is a special statutory provision that affects directly, whether expressly or by implication, the particular equitable right that is in question. But if there is no such provision, the Court may decide that the material equitable right is so similar to legal rights to which a limitation period is applicable that that limitation period should be applied to it also. In this latter case the limitation period is said to be applied by analogy, and the principles that govern cases of this kind are that if there is a sufficiently close similarity between the exclusive right in question and legal rights to which the statutory provision applies a court of equity will ordinarily act upon it by analogy but it will so act only if there is nothing in the particular circumstances of the case that renders it unjust to do so. What is regarded by courts of equity as a sufficiently close similarity for this purpose involves a question of degree, and reference must be made to the relevant authorities. The basis of these principles is that, in the absence of special circumstances rendering this position unjust, the relevant equitable rules should accord with comparable legal rules.”*

80. Section 42 (1) of the Law corresponds in terms with section 36(1) of the English Limitation Act 1980 and in *Gwembe Valley Development Co. Ltd. (in receivership) and another v Koshy (No. 3) [2004] BCLC 131*, Mummery LJ said

(at page 154) in terms which must be regarded therefore as equally applicable to section 42(1) that *“the effect of section 36 is to preserve, except as indicated, the cases in which a court of equity would have applied the statutory limitation periods by analogy, as explained in Knox v Gye (per Lord Westbury, above)”*.

81. The applicability of the principle has been expressed in more than just discretionary terms by the English Court of Appeal in Companhia de Seguros Imperio v Heath REBX Ltd [2000] Lloyd's Rep PN 795.
82. In that case, an underwriter alleged that his underwriting agent had acted carelessly and/or without authority and/or without regard to his principal's interests, and claimed, inter alia, equitable compensation for breach of fiduciary duty. The Court of Appeal held that a six year limitation period applied by analogy to that claim, referencing Section 36(1) of the English Limitation Act. Clarke LJ explained the rationale (at p 803) in these terms (notwithstanding misgivings expressed by the Court generally about having to rely upon a principle which may be inherently uncertain for having depended upon what the Courts of equity may have variously decided in the past):

*“I would certainly have expected a court of equity to apply the common law time limits by analogy on the facts of this case. As Walker LJ has pointed out, and as the judge demonstrated by a detailed analysis of the points of claim, the essential nature of the pleaded case is the same whether it is put as damages for breach of contract, damages for breach of duty or damages (or compensation) for breach of fiduciary duty. The only additional element is the defendant's alleged intention, which on the facts here adds nothing of substance to the claim for damages. Indeed, it would be quite unnecessary*

*to include this claim if it were not thought necessary to do so in order to advance the time bar argument.*

*...If the claims for damages for breach of contract and duty are time barred, as it is agreed that they are, no rational system of law should permit the plaintiff to proceed with a claim for damages which is essentially based on the same facts, merely because it is strictly a claim for compensation in equity.”*

83. Having concluded that the proposed amendments here would rely upon new facts and new causes of action in contract and tort, to the extent that essentially the same facts would be relied upon to plead the new action based upon breach of fiduciary duties, I can see no basis for concluding that they should not be barred by analogy, having regard to the foregoing discussion of the principles.

84. Section 27(3) of the Law also figured in the submissions, with the plaintiff arguing that the action here for breach of fiduciary duty is akin to one based on breach of trust:

*“Subject to subsection (1) and (2), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which another period of limitation is prescribed by any provision of this Law, shall not be brought after the expiration of six years from the date on which the right of action accrued....”*  
**(emphasis supplied)**

85. Accordingly, even viewed as an action based on breach of trust rather than more generally for equitable compensation for breach of fiduciary duty; the claim would be statute barred unless coming within Section 27(1)(a), it being conceded that this is not a proprietary action and so subsection 27(1)(b) does not apply.

**Fraud and concealment of fraudulent breaches of fiduciary duty**

86. The plaintiff would now wish to plead further particulars which would describe the breaches of fiduciary duties as fraudulent. If that is allowed, the pleadings would then require to be considered by virtue of Section 27(1)(a) of the Law, as exempt from the limitation periods otherwise applicable either by analogy with the earlier statutory or common law principles pursuant to Section 42(1) of the Law or pursuant to Section 27(3), both as explained above.
87. Without this further pleading, the allegations being essentially the same as those considered above alleging breaches of fiduciary duties and thus based on new facts and giving rise to a new cause of action, would be impermissible.
88. Similar concerns arise in relation to the argument that the breaches were not discovered by the plaintiff until August 2000, and that this was contributed to by the deliberate concealment of their own fraudulent breaches of duty by the defendants. Those are factors which by virtue of the respective operation of sections 37(1)(a) and 37(2) of the Law would operate to postpone the limitation period to run from the date when the plaintiff discovered or could with reasonable diligence have discovered, the fraud or concealment.
89. Given the view I take of these as all being allegations based on new facts giving rise to new causes of action, the issue whether or not they are statute barred must be at least arguable. This view of them could not at this stage be any different simply because of the addition of the description of the breaches as being fraudulent.

90. That being so, leave to amend may not be given, for once allowed the defendants may no longer raise their limitation defence and would be to that extent prejudiced: *Welsh Development Agency v Redpath Dorman Long Ltd.* [1994] 1 WLR 1409 at 1425 per Glidewell LJ at letter H.

91. If indeed there is a case to be made out for fraudulent breach of fiduciary duty (although not before specifically raised in the pleadings) the plaintiff, on the other hand, would not be prejudiced by being required to raise it as a separate cause of action, because no limitation period would be applicable. Similar views were expressed in *Paragon Finance v Thakerar* [1999] 1 All E.R. 400.

92. That was a case in which, as here, the claims originally alleged negligent breaches of fiduciary duty but subsequently after any applicable limitation period had expired, the plaintiffs sought to amend their pleadings to allege fraud, fraudulent breach of duty and international breach of fiduciary duty.

93. At page 404 Millett LJ, citing *Welsh Development Agency v Redpath Dorman Long Ltd.* (above) said; in terms equally applicable here:

*“The court also held that leave to amend by adding a new cause of action should not be given unless the plaintiff can show that the defendant does not have a reasonably arguable case in limitation which will be prejudiced by the new claim or that the new cause of action arises out of the same or substantially the same facts as a cause of action in respect of which he has already claimed relief.*

*By this means, the injustice to the defendant of depriving him of an arguable limitation defence is avoided without denying the plaintiff the right to bring a fresh action to which, if he is correct, there is no limitation defence.”*

94. For all the foregoing reasons, I conclude as follows:

- (i) Paragraphs 11A, 11B, 18B, 20A, and 23 seek to introduce what are claims in respect of new duties, new breaches and new losses and as such new causes of action.
- (ii) The amendments to paragraph 19 of the Statement of Claim aver new factual particulars in support of those new claims which are not the same or substantially the same as those originally pleaded.
- (iii) The new causes of action in tort (or to the extent they newly arise in contract also) are statute barred.
- (iv) There is therefore, no jurisdiction to allow those amendments insofar as they would seek to introduce such new causes of action.
- (v) In paragraph 20 as amended, the Statement of Claim expressly relies upon the averment in the amendments to paragraph 19 in support of the alleged breaches of fiduciary duty which are alleged by paragraph 12 to be owed by MP Cayman.

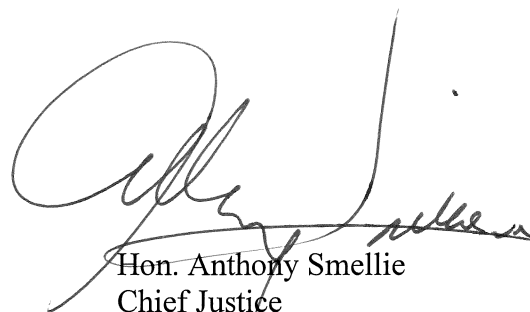
Further, in paragraphs 21 and 22 the matters set out in paragraph 19 are also relied upon in support of the claim against MP Management and MP Nominees for breach of the fiduciary duties alleged in paragraphs 7 and 8.

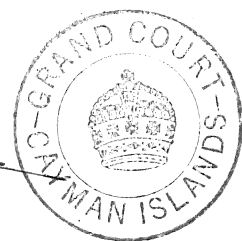
- (vi) So too the new causes of action for breach of fiduciary duty are implicated in the amended pleadings in paragraph 23 where the particulars of loss said to arise from the Project Leo transaction are pleaded.

95. In light of the foregoing examination of the meaning of Section 42(1) and notwithstanding the provisions of Section 27(1) of the Law, the claims for breaches of fiduciary duty are barred by virtue of the time limits which are

properly, in the circumstances of the case, to be applied by analogy as those prescribed by the Law. Alternatively, viewed as an action in respect of breach of trust as barred, by virtue of Section 27(3) of the Law.

96. If there are in fact proper claims to be brought based on allegations of fraudulent breach of trust or fiduciary duties, such claims, to which no limitation period applies, should be raised in a separate action. Any arguable limitation defence to such claims would be prejudiced if they are allowed in any amendment to the pleadings in this action.

  
Hon. Anthony Smellie  
Chief Justice

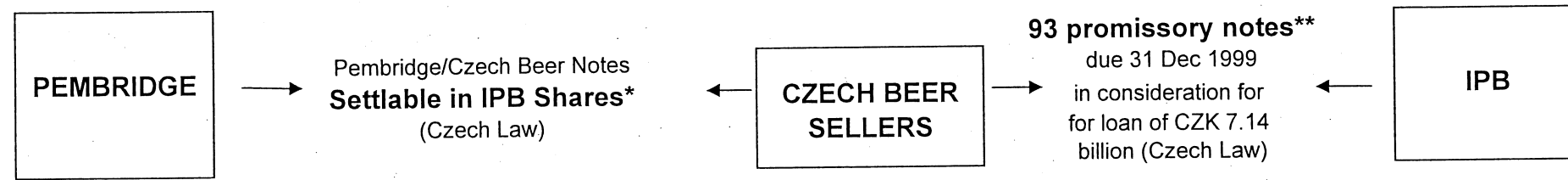


July 17 2006

**(Ruling released in draft on 7<sup>th</sup> February 2006  
Defendants' Supplemental Submissions received on 20<sup>th</sup> February 2006  
Plaintiff's Supplemental Submission in response dated 8<sup>th</sup> March 2006  
Defendant's Reply Skeleton Argument dated 23<sup>rd</sup> March 2006  
Plaintiff's Rejoinder Skeleton Argument dated 18<sup>th</sup> April 2006 )**

SCHEDULE 1

BEFORE 2 JUNE 1999: PRE-PROJECT LEO

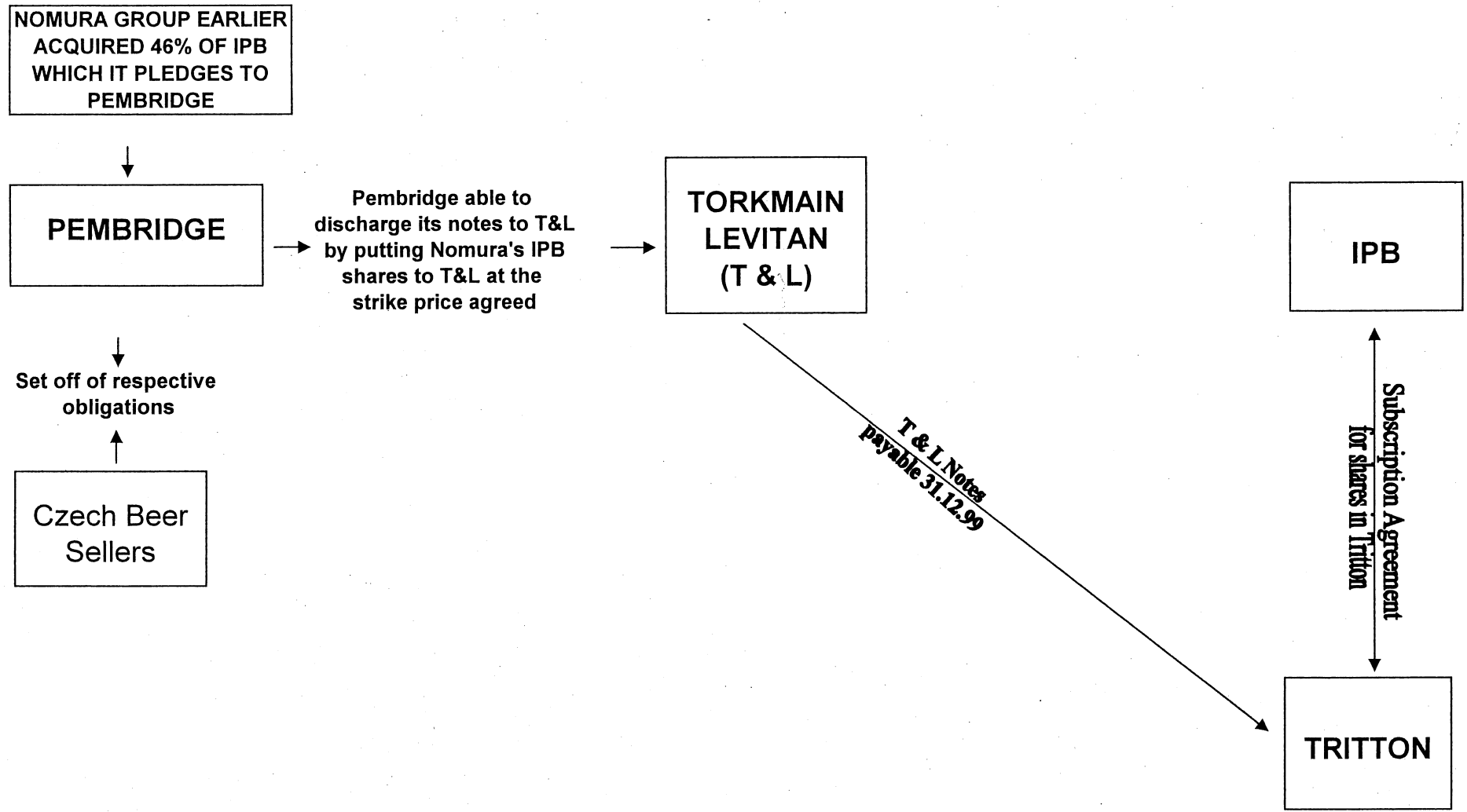


\*At strike price that related to the price at which Nomura previously acquired the shares

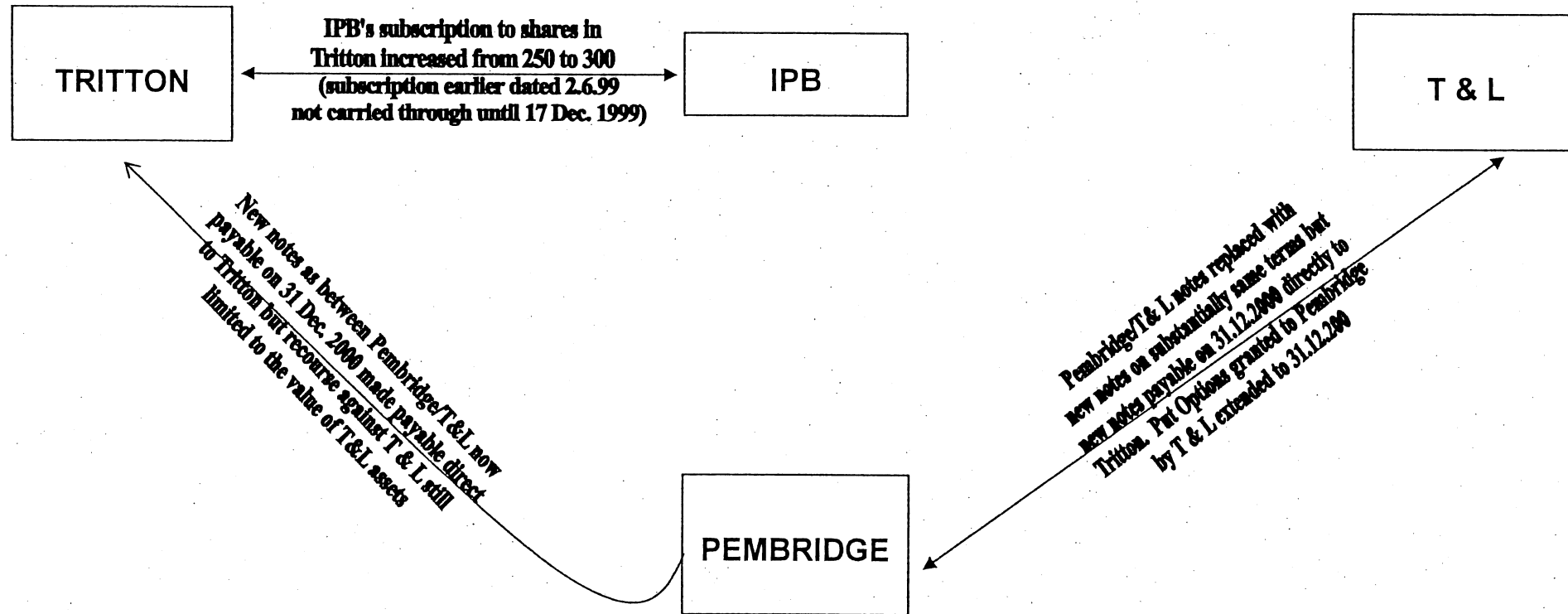
\*\*Amounts broadly equivalent to the amount of the notes issued by IPB  
- broad difference for present purposes is that Pembridge had ability to settle notes they had issued by IPB shares, but the Czech Beer Sellers did not.

SCHEDULE 2

JUNE 1999: PROJECT LEO



17 DECEMBER 1999 TRANSACTION  
PROJECT LEO MODIFICATION



**NOTES:**  
On 16 June 2000 IPB put into conservatorship, a form of compulsory administration under Czech law. Tritton alleges that IPB shares became worthless by 31 December 2000. In effect it is being alleged by implication in paragraph 29 of the Statement of Claim that T & L have recovered nothing under the Pembridge notes and that Tritton has recovered nothing under the T & L notes. Presumably the real complaint therefore is that IPB has acquired shares in Tritton which are valuable in return for nothing.

It is alleged by the defendants and not refuted by Tritton, that no other party other than IPB held or had any right to hold participating shares in Tritton at any material time. That at all times, the value to IPB of its participating shareholding was necessarily equal to the value of the assets contributed by IPB as consideration for the Tritton shares.