JUDGMENT : Mr Justin Fenwick QC (Sitting as a Deputy High Court Judge) Ch. Div : 12th May 2003

Introduction

1. This is a claim by Beta Investment S.A. for payment of the balance of sums due under a promissory note entered into on 9 February 2001 by the defendant, Transmedia Europe Inc.

2. The claimant is a St Vincent/Grenadines company whilst the defendant is a Delaware corporation.

3. The claimant claims US$ 987,837.24 plus interest from 30 November 2001. The defendant, Transmedia Europe Inc., accepts the validity of the promissory note but relies on the terms of a document signed by representatives of each of the parties on 1 October 2001 which, the defendant asserts, amounted to a valid and legally binding compromise of the claims under the promissory note. In their pleading the defendant also counter claims for breach of contract in respect of that alleged agreement and misrepresentation.

4. In fact, the misrepresentation is based on an allegation that there was a representation as to the effect of the document signed on 1 October, so that the real issue between the parties is whether the terms of the document of 1 October 2001 and the subsequent events give rise to a defence to Beta Investments' claim.

5. At trial Transmedia Europe Inc was not represented by lawyers, but Mr Paul Harrison, a director of the defendant, sought permission to appear on behalf of the company and in the absence of any objection from the claimant I allowed him to do so. I should say at the outset that throughout these proceedings Mr Harrison conducted the case for the defendant not only with unfailing patience and courtesy, but also with great clarity and considerable skill. I am indebted to him for the careful and measured way in which he presented the defendant's case and for the considerable efforts he went to to provide me with written material in good time.

Background events

6. Although the real dispute centres around the interpretation of the agreement signed on 1 October 2001, it is necessary to set out some of the background which gave rise to that document.

7. During the first part of 2000, there were discussions between various individuals associated with both the claimant and the defendant in relation to a joint venture. That joint venture eventually came to nothing and no agreement was concluded and I do not need to decide on the various issues between the parties as to the precise nature of the negotiations.

8. What is clear is that as a result of various discussions about the defendant's business, the claimant lent the sum of US$ 1 million to the defendant on 14 August 2000 against a promissory note payable by the defendant with interest at a rate of 5% per annum. When that note fell due on 9 February 2001, it was not repaid but instead the parties entered into a fresh promissory note in the sum of US$ 1,025,000 (thus rolling up the accrued interest under the first promissory note) which was to be repayable on 9 May 2001 together with interest at 5% per annum.

9. As security for the payment of the sums due under that promissory note, the parties also entered into a Stock Pledge Agreement. The relevant terms of that Stock Pledge Agreement, so far as the matters that I have to decide are concerned, were that under the agreement Transmedia pledged as collateral all the outstanding shares of Taste Card Plc and agreed to provide the relevant stock certificates and duly executed transfers to Beta. The agreement was to be governed by and construed and interpreted in accordance with the laws of the state of Delaware.

10. Clause 8 of that agreement provided as follows:-- *"**Voting rights: rights of secured party***
So long as there exists no default by Pledgor under the Promissory Note, Pledgor shall be entitled to exercise any and all voting rights pertaining to the Collateral for any purpose not inconsistent with the terms of this Stock Pledge Agreement. If, however, Pledgor has defaulted, under the terms of the Promissory Note, then the secured party shall have the right, at its sole option, to recover any or all of the Collateral then in the secured party's possession and to exercise all rights of ownership in such Collateral to the extent necessary in order to satisfy Pledgor's obligations to secured party, including without limitation the power to complete the instrument of transfer or assignment described in paragraph 4 hereof."

11. By 9 May 2001 the loan had still not been repaid but the parties entered into a further agreement to extend the period for repayment until 25 May 2001, with the parties agreeing to conduct negotiations during that period for the sale to Beta of the entire issued share capital of Taste Card Plc in accordance with what was described as a "term sheet" attached to that letter. I note that the proposed purchase price was US$ 500,000 plus forgiveness of the existing debt secured by the promissory note and Sock Pledge Agreement.

12. The matter had still not resolved itself by 25 May 2001 and a further extension was entered into by a document headed "extension letter" so as to expire on 18 June 2001, with the parties continuing to negotiate in the meanwhile.

13. Unfortunately those negotiations were not fruitful and on 18 June 2001 Beta gave notice that if the debt was not paid by 21 June 2001 it would proceed to commence proceedings for the recovery of the sums and would enforce the security.

14. Transmedia replied by letter of 21 June, in which they asserted that Beta had been in breach of a confidentiality agreement but nevertheless suggested further meetings "to review alternative ways forward". It is important to note that in that letter Mr Grant White, the Chief Executive Officer of the defendant, confirmed that "our obligation to repay the principal of the capital [loan note] together with accrued interest, is not in question".

15. There were some further negotiations between the parties but when these did not result in an agreement the claimant took steps to effect the sale of the shares in Taste Card plc by public auction. The auction was to take place on 16 August 2001 and the appropriate notices were duly given and advertised.

16. It is necessary to say a little about that auction because a large part of the defendant's case is based on its strongly held view that that auction was not conducted properly and that the price achieved did not represent a fair value for the company.

17. Messrs Grant Thornton were instructed to and did prepare a business information document for provision to those who were interested in the purchase which set out some details of the company and the arrangements for the auction. That information included the accounts of Taste Card Plc as at 30 September 2000 which showed total shareholders funds in the sum of £336,474 with profits for the year of £42,910.

18. Grant Thornton were also instructed to prepare an indicative valuation of the company for the claimant's own purposes since it was considering bidding for the shares. For those purposes, Grant Thornton were provided with management accounts for the period of six months to 31 March 2001. Grant Thornton concluded that an appropriate valuation of the company was between £ 140,000 and £195,000.

19 Transmedia attempted to avoid the auction taking place and asserted that Beta Investments had no power to conduct the sale. That was dismissed by Grant Thornton in a letter of 3 August 2001 which set out the terms of the Stock Pledge Agreement and referred to the Uniform Commercial Code in force in the state of Delaware.

20. In the end, despite some further abortive negotiations, the auction took place as planned. I heard evidence as to what occurred including evidence from Mr Nicholas Wood of Grant Thornton and Mr Sushant Gupta who attended the auction as Beta's representative.

21. In short, there were no other bidders and no representative of Transmedia attended and Mr Gupta acquired the shares with a bid of £195,000, being the upper end of the Grant Thornton valuation.

22. In the end, there was no real issue between the parties as to the provisions of the law of the state of Delaware, which was helpfully set out in a witness statement of Mr John F Horstmann which I received as evidence in written form without objection from the defendant.

23. Although Mr Wood and Mr Gupta were vigorously but fairly cross examined by Mr Harrison, the defendant did not dispute, by the end of the trial, that the auction had been carried out correctly

under Delaware law and did not seek to challenge, at least in these proceedings, the validity of the sale.

24. It is, however, relevant to note that the thrust of Mr Harrison's cross examination was to the effect that Grant Thornton had not had proper information as to the activities of the company and its potential and had not sought proper financial information.

25. Although I do not have to decide the true value of Taste Card Plc or issues as to the validity of that auction, I should however, note two matters. Firstly, the management accounts provided to Grant Thornton showed that stockholders equity had reduced to £208,000, which goes some way to explaining the valuation put on the company by Grant Thornton. Secondly, during the trial I was provided with a further set of management accounts as at March 2001, which had been discovered by Beta when they eventually took over control of the company, which showed stockholders equity of only £77,000.

26. I was also provided at the trial with copies of the accounts for the year ending 30 September 2001 which showed negative shareholders equity of just over £75,000.

27. When Mr Wood was questioned about the figures, it became clear that if he had been provided with the further set of management accounts, which appear more consistent with the actual end of year results, his valuation would probably have been substantially lower and certainly would have been no higher.

28. Following the auction, a board meeting of Taste Card Plc was held on 21 August 2001. The draft minutes of the meeting recited the transfer of shares and resignation of the existing directors and appointment of replacements. However, the defendants were unhappy with the conduct of that meeting as Mr Harrison told me in evidence. He felt that they had been press ganged into ratifying the various changes and they wrote on 24 August 2001 protesting at the conduct of Beta and its advisers.

29. The net result of this was that although the shares had apparently been transferred and new directors appointed, they were unable to exercise any real control over the company. This was in part because Taste Card's offices were in the same premises as Transmedia's and, indeed, much of the personnel, computer equipment and other facilities were shared.

30. By September it was clear that the position was wholly unsatisfactory, with Beta's representatives nominally in charge of Taste Card and yet unable to manage he company and with Transmedia considering that it had been unfairly deprived of the company and facing a claim for an outstanding debt of just under US$ 1 million.

31. In those circumstances, and in my judgement very sensibly, the parties appointed representatives to try to reach some form of agreement. Mr James Fyfe was appointed to act on behalf of Transmedia and Mr Christopher Richardson was appointed on behalf of Beta Investments. I heard evidence from both of them. I was impressed by each of them. They were plainly very experienced businessmen and negotiators and plainly made real efforts over a period of a number of days, to sort out the unsatisfactory situation in which the parties found themselves.

32. The result of their discussions was a document headed *"Heads of Agreement -- subject to more complete documentation"* which became the document signed on behalf of the parties on 1 October 2001. Mr Fyfe's evidence was that that succeeded an earlier draft prepared by him which was headed "*Settlement Agreement -- subject to contract and without prejudice*".

33. I will have to consider the details of the Agreement later in this judgment. For present purposes it is sufficient to note that it provided for a 90 day period during which the parties were to exchange information, particularly about certain Australian subsidiaries or associated companies of Transmedia with a view to entering into a final agreement for the transfer of those companies, in addition to Taste Card, to Beta in full and final settlement of any outstanding liability. As part of the agreement, the transfer of shareholdings and change of directors of Taste Card, carried out at the board meeting on 21 August 2001, were ratified.

34. Unfortunately, although at one stage it appeared that the transaction was likely to proceed to a successful conclusion, as evidenced by a letter of 14 November 2001 from Mr Richardson to Mr Fyfe suggesting a meeting to finalise the arrangements, the negotiations collapsed. I was told by Mr Richardson and accept that this was as a result of their scrutiny of the Australian operations and the conclusion that they were not businesses that Beta wished to acquire.

35. In the end, on 27 November 2001, Beta sent a letter of demand for payment of all outstanding sums, thus bringing the attempts of the parties to reach a compromise to an end. In due course, in July 2002, these proceedings were issued.

The agreement

36. It is now necessary to set out in some detail the key provisions of the Heads of Agreement which, as I have set out above, was stated to be "subject to more complete documentation". The relevant terms are as follows:--

*"**WHEREAS**, notwithstanding any reservations Transmedia may have regarding the Sale, Transmedia and Beta now wish to resolve all matters relating to the Note, the Stock Pledge Agreement and the Sale and to execute a settlement agreement (the "Settlement Agreement") as soon as practical after the date hereof.*

Agreed Terms:

1. Transmedia Group and Beta will use their best endeavours to negotiate and agree a Settlement Agreement upon the terms and conditions hereinafter set forth as soon as practical after the date hereof.

2. The Settlement Agreement will provide for the transfer of legal and beneficial ownership of Taste Card to Beta, including all its current assets and liabilities except as set out hereinafter, and will cause and give effect to the transfer of all the issued shares of Taste Card to Beta and its nominee on the first day of October 2001 (the "Effective Date").

13. Transmedia Group will provide Beta, upon the execution of this agreement, with due diligence material relating to Transmedia Australia Holdings Pty Limited, Transmedia Australia Pty Limited, Taste Card Pty Limited and Transmedia Australasia Limited (all Australian incorporated companies and collectively the "Australian Operations").

14. Transmedia Group will afford Beta the opportunity to conduct a due diligence evaluation of the Australian Operations, within a period of 45 days from the date hereof.

15. The Settlement Agreement will provide for the transfer of legal and beneficial ownership of the Australian Operations to Beta on the 1st of November 2001 or such other settlement as may be agreed.

16. If Beta elects to acquire legal and beneficial ownership of the Australian Operations the transfer shall occur and the actions, understandings and agreements set forth in the TRANSFER OF THE AUSTRALIAN OPERATIONS section below shall apply.

Agreement Re Taste Card from the Date hereof

In order to effectuate the mutual understandings and intent of the AGREED TERMS set forth above Transmedia and Beta agree the following with regard to Taste Card from the date hereof:

1. The resignations of Grant White and Paul Harrison as directors of Taste Card will be effective 1st October 2001 and will have no claim against Beta or Taste Card for loss of office or otherwise, not withstanding any actions prior to the date hereof.

2. The resignation of Paul Harrison as secretary of Taste Card will be effective 1st October 2001 and will have no claim against Beta or Taste Card for loss of office or otherwise, not withstanding any actions prior to the date hereof.

3. The appointment of nominees of Beta to the board of directors of Taste Card and the appointment of a nominee of Beta to act as secretary of Taste Card will be effective 1st October 2001 not withstanding any actions prior to the date hereof.

4. Transmedia will without delay give Beta representatives custodianship of all receivables, stock, fixed assets intellectual property, computer software and books and records of Taste Card.

5. Transmedia and its subsidiaries will continue to provide all such computing capacity, computer software and administrative and accounting support services to Taste Card as they provided prior to the Effective Date free of charge for a period not exceeding 90 days from the date hereof.

6. Representatives of Transmedia and Beta will conduct a joint meeting with National Westminster Bank to effectuate a smooth transfer of signatory control over the Taste Card bank accounts maintained by National Westminster Bank from the 1st of October 2001.

7. Transmedia and Beta will work together in a co-operative spirit to achieve the intent of this agreement from the date hereof.

8. Transmedia will make speedy and effective arrangements to relocate Taste Card in accordance with Agreed Terms 8 above.

Transfer of the Australian Operations

If Beta elects the transfer of the Australian Operations from Transmedia Group to Beta the parties agree as follows:

1. The transfer of the Australian Operations shall be completed at a location and time and date to be agreed.

Other

1. ***Survival of agreement after completion***

This agreement shall, so far as it has been or remains to be performed or is capable of having effect following execution of the Settlement Agreement, remain in full force and effect notwithstanding execution of the Settlement Agreement.

3. Entire Agreement

This agreement sets forth the entire agreement between the parties in connection with the full and final settlement of their respective liabilities to each other and supersedes all previous agreements and understandings relevant to settlement of the subject matters. No term or provision of this agreement shall be varied or modified by any prior statement, conduct or act of any party except that the parties may amend this agreement only by execution of the Settlement Agreement or by written instrument signed by or on behalf of the parties. Any failure to enforce any provision of the agreement by either party shall not constitute a waiver thereof or of any other provision or right.

6. ***Term and Law***

This agreement shall be governed by and construed under English law and each of the parties agrees to submit to the jurisdiction of the English courts as regards any claim or matter arising under this agreement. This agreement shall remain in full force and effect until the earlier of execution of the Settlement Agreement or the expiry of 90 days from the date hereof except that it may be terminated by mutual agreement in which case neither party shall have any claim against the other in respect of actions performed or undertakings made in accordance with the provisions of this agreement. Notwithstanding the above this agreement shall be rendered null and void in respect of all its provisions save only those relating to the transfer of ownership of Taste Card, the warranties pertaining thereto and the release of Transmedia from any liability to Beta under the Note and Stock Pledge Agreement in the event of either party failing to take immediate steps to rectify any breach of the provisions of this agreement notified to it in writing by the other party or either party being declared insolvent."

37. The issue between the parties is as to whether this document has any binding legal effect and if so, what that effect is. Mr Harrison for the defendant asserts that the Heads of Agreement were intended to be a binding agreement and, in summary, that the agreement obliged the parties to reach some form of agreement. He relied on clause 15 of the agreed terms which I have set out above, and the fact that the settlement agreement was to provide for the transfer of legal and beneficial ownership of the Australian operations *"or such other settlement as may be agreed"*. He argued that that meant that the parties were under an obligation to reach a settlement. However, the essence of his argument was that this was not a mere subject to contract document but a binding agreement on which the parties acted and which should be enforced. He relied on the evidence of Mr Fyfe that he regarded this as a binding agreement which paved the way for a final settlement.

38. By contrast, Mr Moeron for the claimant argued that these were either terms "*subject to contract*" and thus, on the authorities, of no contractual effect, or amounted merely to "*an agreement to agree*" which could not be enforced. He relied on the evidence of Mr Richardson that this document was simply a statement of general intent.

39. Although I heard a significant amount of evidence in relation to the parties' negotiations, those and the subjective intent of those entering into the agreement are not material to the construction of the agreement. As helpfully explained by Lord Hoffman in the House of Lords decision of the **Investors Compensation Scheme Ltd v. West Bromwich Building Society** [1998] 1WLR896 at pp 912-913, negotiations are excluded but the matrix of fact of background falls to be considered when interpreting a document. As Lord Hoffman said:-- *"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The background was famously referred to by Lord Wilberforce as the matrix of fact, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next [i.e. negotiations] it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man ... the meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax ... the rule that words should be given their natural and ordinary meaning reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particular in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."*

40. I deal first with the argument of Mr Moeron that the heading "*subject to more complete documentation"* is the same as the standard phrase of "*subject to contract*" or the longer form referred to in the case of **Winn v. Bull (**1877) 7 Ch. D. 29 and later cases of "*subject to the preparation and approval of a formal contract"*.

41. I agree with Mr Moeron that on its face the language is capable of excluding a contractual intent. That would be consistent with the various terms relating to negotiation and in particular Agreed Term 1 providing for the parties using their best endeavours to negotiate an agreement.

42. On the other hand, I consider that Mr Harrison was quite correct to rely on the terms of the agreement about Taste Card which provided for certain actions which were not conditional but were to be and indeed were implemented. He also relied on the survival of agreement clause, the entire agreement clause and the "*Term and Law*" clause, all of which are inconsistent with this being a mere subject to contract letter of intent.

43. The conclusion that I have reached is that the mere use of the words "subject to more complete documentation" does not in this case prevent the agreement having binding effect if on the overall agreement, it is clear that it is intended to have some contractual force. I am fortified in this by the fact that it is plain that the parties were aware of the phrase "*subject to contract and without prejudice*" because this was used in the settlement agreement which, it is agreed, had come into existence by this time.

44. I therefore turn to consider the further argument of Mr Moeron that taking the agreement as a whole, there is too much uncertainty for it to be a binding agreement and that it is in effect an agreement to negotiate.

45. The first of the agreed terms refers to the parties "*using their best endeavours to negotiate and agree a settlement agreement"*. In my judgement Mr Moeron is correct to categorise that as at best an agreement to agree. The use of best endeavours may itself be a contractual obligation but it does not commit a party to reach a specific outcome or indeed any outcome at all.

46. Paragraphs 13 to 16 of the agreed terms provide for the provision of information to Beta and concludes at 16 with Beta having a choice or election as to whether to acquire legal and beneficial

ownership of the Australian operations. By necessary implication, they also have a choice to elect not to acquire them. The provisions under the transfer of the Australian operations which I have not recited above make a number of administrative provisions all subject to the initial opening words of *"If Beta elects the transfer of the Australian operations from Transmedia Group to Beta"*.

47. I have reached the clear conclusion that this agreement does not oblige Beta to enter into an agreement to acquire the Australian operations. I think that Mr Harrison accepted that but he argued that paragraph 15 of the terms resolved that difficulty because it referred to "such other settlement as may be agreed". His argument was that that meant that because the parties realised that Beta would not accept Taste Card Plc on its own in full satisfaction of the debt, some additional benefit would have to be provided. That much is indeed common ground. However, Mr Harrison went on to assert that that meant that because this was a binding agreement the parties had no alternative but to reach some form of agreement.

48. Apart from the provisions of clause 6 (Term and Law) which I will consider later in this judgment, I have reached the conclusion that Mr Harrison's contentions on this aspect fail. Although there was plainly an aspiration to reach an agreement as set out in the third recital (which I have quoted above) and although all the agreed terms were specifically said to be agreed in full and final satisfaction, on any sensible reading of the agreed terms, the parties were to use their best endeavours to negotiate and agree a settlement agreement. If they did not, despite the use of such best endeavours, succeed in reaching a deal which could be put into a settlement agreement, then the fact that the draft may have included some other form of settlement is irrelevant.

49. I am fortified in my conclusion by the fact that the evidence before me was that that clause had been subject to considerable discussion with Mr Richardson wishing to add a reference to financial consideration and Mr Fyfe being reluctant to include any mention of money because his instructions were that no money was available. Now those negotiations are irrelevant when it comes to construing the document, but the fact that both parties were discussing some form of additional benefit to Beta but that there was no agreement as to whether it should be financial, is relevant in considering whether Mr Harrison's argument that the agreement should somehow be construed as an obligation to find such an alternative settlement, is consistent with the factual matrix. In my judgement, such a construction is not only inconsistent with the wording of the document but is also inconsistent with the factual matrix.

50. Mr Moeron also relies upon the fact that under clause 6, the agreement remains in full force and effect until the earlier of execution of the settlement agreement or the expiry of 90 days unless terminated by mutual agreement. He argues that implicit in this is the conclusion that at the end of 90 days if the parties have not reached agreement, then the settlement falls away.

51. On the other hand, Mr Harrison relies on the provision that the agreement remains in full force and effect notwithstanding execution of the settlement agreement as evidence of the fact that it must have some individual legal force. He also relies on the entire agreement clause which would be unnecessary and irrelevant if this was simply an agreement to agree or a non-binding agreement.

52. In my view there is much force in those submissions but Mr Harrison also relied, in my view correctly, on the provisions in relation to Taste Card. Although clause 2 of the agreed terms provided that the settlement agreement would include provisions for the transfer of ownership of Taste Card to Beta with its assets, the eight clauses in relation to the transfer of Taste Card which I have set out above are all intended, on their plain wording, to take effect immediately and irrespective of the remainder of the negotiations. To that extent, the agreement envisaged that the specific actions set out would be taken with immediate effect notwithstanding the progress of other negotiations. Further, it is important to note that the final sentence of clause 6 provided that even if the agreement was rendered null and void by an unrectified breach of the provisions of the agreement or by insolvency, the provisions relating to the transfer of ownership of Taste Card and warranties pertaining thereto were expressly preserved.

53. Mr Moeron argued that this was of no real significance for two reasons. Firstly, he argued, there had been a perfectly valid transfer of the company and its assets pursuant to the auction and the subsequent general meeting. Secondly, he said that under the terms of the Stock Pledge Agreement, Beta were entitled to all these steps in any event.

54. In my judgement those submissions miss the fundamental point that at the end of September the legal position was under challenge because Transmedia did not accept that the auction and transfer of shares and replacement of directors were valid and enforceable and Beta were unable to take actual control of the company. Indeed it was to solve this very problem that Mr Richardson and Mr Fyfe had been appointed.

55. In considering whether in the light of all these matters the agreement of 1st October 2001 was a binding and enforceable agreement, I have been referred to a large number of authorities by the parties, including **Walford v Miles** [1992] 2 AC 128, **Alpenstow Ltd v Regalian Properties Ltd** [1985] 1 WLR 721 and **Courtney & Fairbairn Ltd v Tolaini Bros [Hotels] Ltd** [1975 1 WLR 297 all of which I have taken into account but it does not appear to me that they are in conflict in any way with the clear conclusions that I have reached on the facts of this case and it is therefore not necessary to refer to them in any detail for the purposes of this Judgement.

56. In my judgement, the parties did indeed intend that this agreement would have contractual effect. It was an agreement which in effect, provided for the transfer of Taste Card to be accepted by all parties and implemented so that the business of that company could continue without interruption and without damage to its trade. In exchange for that which was of real benefit and value to Beta, Beta agreed that they would enter into a period of bona fide negotiations with Transmedia in order to try and find some formula, preferably the transfer of the Australian operations or failing that some other formula acceptable to both parties, which would enable the debt due under the promissory note to be discharged in full.

57. However, I do not consider that the binding nature of the agreement extended to an obligation to enter into some specific form or indeed any form of actual agreement. The obligation was limited to the exercise of best endeavours to agree a solution together with a 90 day standstill period. If at the end of that period no agreement was reached, the parties would each be left with their respective rights. That is to say, Beta could pursue its remedies under the promissory note, to the extent that these had not been satisfied by the sale of the company under the Stock Pledge Agreement and Transmedia could pursue any arguments that it may have as to the validity of the auction or otherwise.

58. However, it is in my judgement necessary also to consider the provisions of the final section of the agreement namely clause 6 the "Term and Law" clause. That provided that in the event of either party failing to take immediate steps to rectify any breach of the provisions of this agreement notified to it in writing by the other party than the agreement would be rendered null and void in respect of all its provisions *"save only those relating to the transfer of ownership of Taste Card, the warranties pertaining thereto and the release of Transmedia from any liability to Beta under the note and Stock Pledge Agreement ..."*.

59. The agreement required, as I find, that the parties should negotiate for the period of 90 days stipulated in the agreement. Since Beta served notice on 27 November effectively bringing the negotiations to an end and demanding repayment, they did so within 58 days of the date of the agreement and thus within the 90 day period. In that respect they are in breach of the agreement. Mr Harrison argues that as a result the effect of clause 6 is that all liability of Transmedia under the note and Stock Pledge Agreement is extinguished. Mr Moeron on the other hand argues that the clause cannot have been intended to have that effect and that no loss has been suffered by Transmedia since Beta could, and it should be assumed, would have brought the agreement to an end in any event at the end of the 90 day period so that Transmedia has in effect lost nothing apart from an opportunity for further negotiations which would have failed.

60. So far as Mr Moeron's submissions as to loss are concerned, in my judgement he is correct in that it is quite clear that if the full negotiation period had continued, the end result would have been the same

since Beta had reached a clear conclusion that neither Taste Card nor the Australian operations were worth anything like the amount outstanding under the promissory note. Therefore, Transmedia has lost nothing of substance.

61. However, the apparent wording of clause 6 does suggest that their liability should be released.

62. In my judgement it is appropriate in this case to take account of the passage from Lord Hoffman's speech in Investors Compensation Scheme Ltd which I have referred to above. On any sensible view, it cannot have been intended that a breach by either party, however, trivial, would extinguish any liability of Transmedia to Beta in circumstances where it was quite plain that both parties recognised that a substantial amount was still outstanding and would need to be covered by some form of benefit.

63. In my judgement the only sensible and reasonable construction of this clause in the context of the overall agreement as I have found it to exist, is that it relates to keeping intact the arrangements made in respect of Taste Card. That is to say, despite the coming to an end of the agreement, the arrangements made about Taste Card would remain in place. The shareholding would remain with Beta and the new directors would remain in place. They would remain in charge of the company. On the other hand, Transmedia would be entitled to take advantage of the reduction in the promissory note arising from the sale of Taste Card and the consequences of the other provisions. There were two such relevant provisions. Firstly, Transmedia was providing support services to Taste Card for a period not exceeding 90 days under paragraph 5. That was valued at £83,790 by Mr Richardson in his letter of 27 November 2001 or shortly thereafter as shown by the document at page 523a. In my judgement that is an appropriate amount by which to discount the claim.

64. Secondly, as part of the separation of Taste Card and its business from Transmedia, there was a release of various inter-company debts, which had a net effect of reducing the liabilities of Taste Card by US$ 188,690.

65. In my judgement that amount also should be deducted as part of the provisions relating to the transfer of ownership of Taste Card and warranties pertaining thereto. Mr Moeron did not seriously seek to argue that such a deduction should not be made.

66. In my judgement, therefore, Beta is entitled to recover the sum of US $ 973,698.60 less those two amounts which I have identified above.

67. There remains the question of interest which I hope can be calculated to the date of judgment. At this stage it is in my view appropriate to take account of the claim by Transmedia for breach of the agreement which I have found to be valid but to have resulted in no substantial loss. In my judgement this is a case in which it would be appropriate to consider reducing the interest recoverable by Beta in respect of the entirety of the period of 90 days from 1st October 2001. I will, however, allow the parties to make submissions on that point.

68. The remainder of the counterclaim in respect of misrepresentation was not seriously pursued and in my judgement was in any event bound to fail.