IN THE ROYAL COURT OF JERSEY
(SAMEDI DIVISION)

File No: 2009/127

17th January 2013

Before: Howard Page QC, Commissioner

Between	(1) The Federal Republic of Brazil (2) The Municipality of Sao Paulo	Plaintiffs
And	(1) Durant International Corporation (2) Kildare Finance Limited	Defendants
And	(1) Deutsche Bank International Limited (2) Deutsche International Custodial Services Limited (3) Deutsche International Corporate Services Limited (4) Deutsche International Trustee Services (CI) Limited	Parties Cited

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JUDGMENT
Re: Interest and Costs

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1. This judgment concerns the appropriate orders to be made as regards (i) interest on the principal sum for which the defendants have been found liable and (ii) the costs of the action, following the handing down of judgment on 16th November 2012. By agreement of the parties concerned (the plaintiffs and the defendants) the matter of interest as well as costs has been left to me alone, sitting without Jurats, to determine.

Interest

2. Three points are in contention: (i) Whether interest can and should be awarded on a compound basis as the plaintiffs submit or whether, as the defendants argue, the only course open to the Court is to award simple interest. (ii) The point in time from which any award of interest should run. (iii) The appropriate rate.

3. The extent of the power of courts in this jurisdiction to award compound interest in cases such as the present has been little explored. Since 1996 the position as regards claims for the recovery of a debt of damages has been regulated by the Interest on Debt and Damages (Jersey) Law 1996 which provides only for the payment of simple interest. Any jurisdiction to award compound interest in respect of claims of other kinds must therefore derive from some other source.

4. The point arose for consideration in an interlocutory context in *United Capital Corporation v. Bender & Ors.* [2006] JRC034A on the occasion of an application by the defendants to discharge an interim asset freezing injunction the hearing of which involved the court in making an assessment, among other things, of the total potential value of the plaintiffs' claim inclusive of interest. Addressing the matter of interest, Birt, Deputy Bailiff, said this:-

> "The defendants argue that compound interest may only be awarded in cases of breach of an express trust such as in *Cutner v Green* [1980] JJ 269. Mr Speck submits that the equitable remedy applied by the court in *Cutner* is now reflected in Article 30(2) of the Trusts (Jersey) Law 1984 ("the 1984 Law") which provides that a trustee in breach of trust is liable for any profit which would have accrued to the trust property if there had been no such breach. He accepts that this clearly allows for an award of compound interest where the circumstances so require. Conversely, submits Mr Speck, compound interest may not be awarded in cases of dishonest assistance or knowing receipt. Although such persons are commonly referred to as being constructive trustees, they are not in fact trustees in the strict sense so as to fall within Article 30(2). He referred to the comments of Millett L J in *Paragon Finance Plc v D B Thakary & Co* [1999] 1 All ER 400 at 408:-
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> > "Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, although not expressly appointed as

> trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff. …… The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally although I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief' ……."

53. Mr Speck further submits that the position of a constructive trustee is governed solely by Article 33 of the 1984 Law which provides as follows:-

> "(1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be trustee of that profit, gain or advantage.
> ……
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> (3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it.
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> (4) This article shall not be construed as excluding any other circumstances in which a person may be or become a constructive trustee."

He submits that a constructive trustee is not liable to account for the profit which would have been made in the absence of the breach of trust (as per Article 30(2)); he is only liable to account for any profit which he has actually made. In my judgment it is strongly arguable that this is far too restrictive a reading of Article 33. It is clear from Article 33(4) that this is not meant to be a codification of the

> position of a constructive trustee and, as Millett L J makes clear, the expression is one which is used to cover a wide variety of different circumstances. Indeed in *Paragon* itself, Millett L J makes it clear that a constructive trustee in the second category is liable to account as if he were a trustee which, in my judgment, makes it clearly arguable that he is liable to account to the same extent as a conventional trustee. Furthermore, in *Wallersteiner v Moir* [1975] 1 QB 374 the English Court of Appeal made it clear that there is a general equitable jurisdiction to award compound interest whenever money is misused by someone in a fiduciary position (in that case a director of a company). That is exactly the allegation here. Mr Speck was unable to point me to any authority which states that compound interest may not be awarded under the Court's equitable jurisdiction in cases of dishonest assistance or knowing receipt and in the circumstances I consider that the plaintiff has an arguable case that it is entitled to compound interest if it succeeds in its main claim."

5. Given the context, it was, of course, unnecessary for the learned Deputy Bailiff in that case to do more than satisfy himself that there was a good arguable case for the award of compound interest in cases of dishonest assistance or knowing receipt. But Advocate Jordan, who appeared on behalf of the plaintiffs, submitted that his observations were entirely well founded as regards both the provisions of Article 33 of the Trusts (Jersey) Law 1984 ("the 1984 Law") and what he referred to as the equitable jurisdiction.

6. As the Deputy Bailiff noted, the purpose and effect of Article 33 of the 1984 law is, quite plainly, to render a constructive trustee liable for any profit, gain or advantage derived from a breach of trust as if he were an express trustee; and there appears to be little doubt that a defaulting express trustee can be ordered to pay interest on a compound basis where circumstances so require. Nor does Advocate Steenson, on behalf of the defendants, suggest otherwise. What he does suggest is that because the plaintiffs have not adduced any evidence that the defendants have in fact made a profit, gain or advantage from holding the moneys in question, the court is bound to conduct "a thorough review of transactions involving the defendants to see the actual amount of interest that has accrued". But it is difficult to take such a submission seriously. The idea that illicit possession of funds of the order of US$10.5 million since early 1998 has not resulted in any benefit to the defendants is plainly fanciful; compound interest was expressly claimed by the plaintiffs from the outset of the proceedings (paragraph 34 of the Order of Justice) and it was for the defendants, if they wanted to contend that their actual profit, gain or advantage should be measured by reference to some other basis of assessment to articulate that case and adduce evidence accordingly; in the absence of such evidence, it would be wholly unreasonable at this stage of proceedings to require the plaintiffs to engage in a further detailed and expensive inquiry of the kind proposed and entirely reasonable to take an award of compound interest as a fair measure of the benefit accrued to the defendants.

7. As regards the alternative, equitable jurisdiction discussed in *United Capital Corporation v. Bender*, Mr. Steenson accepts that the court has such a jurisdiction but

contends that it is not available to the plaintiffs in the present case. The basis of this submission is succinctly set out in his skeleton argument as follows:-

> "3. It is now settled law that the court does have an equitable jurisdiction to award compound interest in certain cases. The Defendants do not challenge this. The question for the court is as to the scope of that equitable jurisdiction.
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> 4. The leading English case on the scope of the equitable jurisdiction to award compound interest is the decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v lslington Borough Council* [19961 AC 669.
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> 5. In *Westdeutsche*, the claimant bank sought recovery of sums paid under an ultra vires interest rate swap agreement along with compound interest on those sums. The House of Lords decided by a majority of three to two that the equitable jurisdiction to award compound interest did not extend to an award of compound interest in that case.
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> 6. The leading speech for the majority was given by Lord Browne-Wilkinson. At page 701C-D of the report, he held that
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> > "in the absence of fraud, courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. The award of compound interest was restricted to cases where the award was in lieu of an account of profits improperly made by the trustee. We were not referred to any case where compound interest had been awarded in the absence of fiduciary accountability for a profit." [Underlining added for the purpose of this present judgment.]
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> This point is repeated again at page 702D-E. Lord Slynn and Lord Lloyd agreed with Lord Browne-Wilkinson (at pages 718E-F and 741F respectively).
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> 7. The decision of the House of Lords in *Westdeutsche* is not surprising. Their Lordships in that case merely restated the orthodox English law position on the equitable jurisdiction to award interest. This much is evident from the English Law Commission's 1978 Report on Interest. That report stated:
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> > "Interest may be awarded as ancillary relief in respect of equitable remedies such as specific performance, rescission or the taking of an account. Furthermore the payment of interest may be ordered where money has been obtained and retained by fraud, or where it has been withheld or misapplied by an executor or a trustee or anyone else in a fiduciary position."
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> The Law Commission's 2004 report on interest re-emphasised that this was the law on the equitable jurisdiction to award interest, and supported this analysis by reference to the *Westdeutsche* case.

> 8.The upshot of the *Westdeutsche* case is that the equitable jurisdiction to award compound interest is only triggered if (a) the Defendant has been involved in fraud or (b) the Defendant has been found to breach a fiduciary duty to the Plaintiff.
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> 9. The *Westdeutsche* case has been followed at English Court of Appeal level in the case of *Black and others v Davies* [2005] EWCA Civ 531(see, in particular, paragraphs 78 - 90 of the judgment of Waller LJ). In that case, the Court of Appeal held that if compound interest is to be awarded on the basis of fraud, then funds must have been both obtained and retained by fraud (see paragraph 87 of the judgment).
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> 10. The scope of the equitable jurisdiction to award interest was not considered in any depth in the case of *El Ajou v Dollar Land Holdings* [1995] 2 All ER 213. The proper approach of the English courts is described in the later House of Lords case of *Westdeutsche*. To the extent that the judgment of Robert Walker J in *El Ajou* is inconsistent with the House of Lords' later decision in *Westdeutsche*, it ought to be considered as either overruled or wrongly decided."

8. The critical condition, as expressed by Waller LJ in *Black and others v Davies* – that the only circumstances in which an award of compound interest other than where a breach of fiduciary duty is involved is where the funds in question "have been both obtained and retained by fraud" – is derived from a passage in the speech of Lord Brandon of Oakbrook in *President of India v. La Pintada Compania Navigacion SA* [1995] AC 104 (HL) at 116 in which, having observed that Chancery courts have regularly awarded simple interest as ancillary relief in respect of equitable remedies, he continued: "Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest when they thought that justice so demanded, that is to say in cases [(1)] where money had been obtained and retained by fraud, or [(2)] where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position". It was this passage in particular that led the court in *Black and others v Davies* to conclude that, when some eleven years after *La Pintada* Lord Browne-Wilkinson in *Westdeutsche* used the words "in the absence of fraud", he could not have intended to go beyond the type of case referred to by Lord Brandon, "that is to say a case where money has been obtained and retained by fraud; in other words, where the fraudster had had in hand a fund which he has, or is deemed to have, made use of for his own benefit" (per Waller LJ at para. 87).

9. Taking this as his starting point Mr. Steenson argues that there is no power to award compound interest in the present case because the defendants themselves, as opposed to Paulo Maluf, (i) were not in any fiduciary relationship with the Municipality (which is correct) and (ii) were not involved in the fraudulent misappropriation of the Muncipality's funds (which again is correct). But what this line of reasoning omits to take account of is that in the present case the defendants were the recipients of funds which they knew perfectly well from the word go were the proceeds of fraud. Mr.

Steenson originally asserted that there was no finding to this effect, but as Miss Jordan rightly pointed out (and Mr. Steenson then acknowledged) paragraph 229 (v) of the Court's judgment contains a specific finding "that the knowledge of Paulo Maluf and Flavio Maluf that such payments were the proceeds of a fraud on the plaintiffs is attributable to each of the defendants and such payments were, therefore, received by each of Durant and Kildare with knowledge of their source".

10. Notwithstanding this, Mr. Steenson contends that the circumstances of the present case still do not fall within the ambit of the fraud exception adumbrated in *Black and others v Davies* because, although the funds may have been dishonestly "retained" by the defendants in question (which was plainly the case), they were not "obtained" by any fraud on their part. Implicit in this submission is an assumption that, for the acknowledged fraud exception to apply, one and the same party must have been responsible for the "obtaining" and the "retaining" of the funds in question. But, while the analysis of the English authorities contained in the extract from the defendants' skeleton argument set out above may be sound as far as it goes, there appears to me to be no justification for making any such assumption when there is nothing to suggest that any of the courts in the cases referred to had in mind a situation – as here – in which funds obtained by one person by fraud have been received by another but with full knowledge of their source, let alone circumstances in which the original fraudster was not only a fiduciary but was also the architect and ultimate principal beneficiary of the structures that received and retained the funds in question. Nor, to my mind, could any such assumption be justified on any point of principle. On the contrary, Mr. Steenson candidly accepted that he saw the force of the proposition that it would, in principle, be startling if a recipient of fraudulently obtained funds, knowing of their source, were not potentially liable to an award of compound interest in the same way as the fraudster himself.

11. Far from precluding an award of compound interest in the present case, it appears to me therefore, first, that to the extent that it is right for this Court to look to English authorities for guidance the case law is apt to cover the circumstances with which the Court has been concerned here; and secondly, that considerations of justice require, in any event, that Jersey courts should recognise the existence of a general jurisdiction to award compound interest in the cases of knowing assistance where a defendant has received and retained funds knowing full well that they are the proceeds of fraud. As Miss Jordan submitted, the touchstone is and should be the simple one of dishonesty on the part of the defendants – a proposition, I suspect, with which Lord Browne-Wilkinson would have readily agreed.

12. For these reasons I unhesitatingly hold that the Court has power to make an award of compound interest against the defendants and that it would be right to do so.

13. As to the point in time from which interest should run, Mr. Steenson sought to argue that the plaintiffs were dilatory in starting proceedings and that interest should only run from service of the Order of Justice in March 2009. Considerations of this kind are not infrequently treated as relevant in cases where elementary considerations of fairness dictate that a defendant should not be saddled with the risk of an adverse award interest

until he knows that a claim is going to be made against him. But they can have no part to play where, as here, the defendants knew from the start that the funds received by them were the proceeds of fraud and they had no need of anyone to tell them that they had no right whatever to retain them. Interest will accordingly run, as claimed by the plaintiffs, from February 1998.

14. That leaves the matter of the appropriate rate (that interest, if compounded, should be calculated on the basis of monthly rests was not contested by the defendants). The debate here falls within a limited compass. The parties are agreed that LIBOR, discredited as it now is, should not be used and that LIBID, although used by the court in *United Capital Corporation Ltd. v. Bender,* is either impracticable (because the plaintiffs say they have been unable to find historical dollar rates for LIBID) or inappropriate in principal (according to the defendants). Both parties favour taking the US Prime Rate as at least the starting point, the only question being whether the rate to be applied should be (i) Prime Rate, without more, as the defendants contend, or (ii) Prime Rate plus 2%, or failing that 1%, as the plaintiffs contend. Because of the period of time involved, the resulting aggregate amounts vary very considerably according to the rate used.

15. Miss Jordan rightly submits that the conventional rate applied by English courts in the case of US dollar awards in commercial cases is the US Prime Rate, as illustrated by the decisions of Langley J. in *Kuwait Airways Corp. v. Kuwait Insurance Co. S.A.K.* [2000] 1 Lloyds Rep. IR 678 at 692-3, David Steel J.in *Kinetics Technology v. Cross Seas Shipping ("The Mosconoci")* [2001] 2 Lloyds Rep.313, 316, and Beatson J. in *Gater Assets v. Maftogaz* [2008] EWHC 1108 (Comm) at paragraph 29. The rationale for this is that the normal rate in the case of sterling awards is Base Rate plus 1% and the nearest equivalent in the context of US dollars is Prime Rate.

16. It has, however, long been the practice of courts in this jurisdiction to award interest at higher rates than English courts. In *UCC v. Bender* the Deputy Bailiff, in calculating the potential award of interest, reasoned that courts in this jurisdiction regularly award interest at the court rate, which is fixed by Practice Direction at 2% over base rate. This he observed is only simple interest, "but it shows that a rate is regularly taken which is not reflective of the amount which would, be earned on deposit" (paragraph 54). The evidence on behalf of the defendants being that LIBID was an appropriate measurement by which to calculate deposit rates in dollars, the Deputy Bailiff decided that "given the circumstances of this case" it was arguable that the plaintiffs would be entitled to interest at 2% over LIBID compounded on a monthly basis, adding that he regarded a rate of 10% as proposed by the plaintiffs as not seriously arguable. The same basis of award was adopted by the Royal Court (the Deputy Bailiff again) in *Willow Millennium Holdings Ltd v. Haden-Taylor* [2006] JRC 141.

17. On this basis Miss Jordan contends that in a Jersey context a rate somewhat higher than Prime Rate is appropriate, and in my view this is right. However, an add-on rate of 2% is too much. It is not the purpose of interest to penalise a defendant. US Prime Rate plus 1% in the case of a judgment in US Dollars appears to me to come as close as is practicable to being the equivalent of 2% over Base Rate in the case of a judgment in sterling and to accord with the justice of the present case. It is true that for a period

between mid-1999 and April 2001 this results in interest rates approaching or just over 10%, a figure that was regarded by the Deputy Bailiff in *UCC v. Bender* as untenable. But the average rate on this basis over the full period is very much lower than that and for the last three years has been no more than 4.25%.

18. For these reasons, there will be an order in favour of the plaintiffs of compound interest on the principal sum of US$10,500,055.35 payable from February 1998 until 16th November 2012 (the date on which judgment was handed down) calculated on the basis of monthly rests at a rate of 1% over US Prime Rate. This amounts in total to interest of US$17,844,398.49 and makes a total judgment figure of US$28,344,453.84.

Costs

19. Miss Jordan seeks an order for costs on the indemnity basis, firstly having regard to the nature of the claim and the resounding vindication of the plaintiff's pursuit of the defendants, and secondly because of the manner of the defendants' resistance of that claim.

20. Mr. Steenson accepts that his clients must pay the costs but resists an award of indemnity costs on what boils down to two main grounds. First, he says the fact that proceedings have been "hard fought" is not, of itself, a reason for awarding indemnity costs against the loser. As an abstract proposition this is correct. But as a summary characterisation of the proceedings here, "hard fought" conveys the impression of a finely balanced or debatable claim not unreasonably put to the test by the defendants: an impression which is, of course, entirely false. The truth of the matter is that the action has been one in which a public body has been obliged to expend huge resources of time, money and man-power in order to recover funds of which it was defrauded, from defendants who had received and retained those funds knowing perfectly well of their source and whose resolute resistance of the plaintiffs' claim was always devoid of the slightest scintilla of merit. Secondly, Mr. Steenson suggests that in a number of respects the plaintiffs pursued the action in ways that resulted in unnecessary complications and expense. This submission is equally unmeritorious. For the most part it revolves around the well-worne theme, long-since rejected by this Court, that the action should have been brought in Brazil rather than in this jurisdiction; and, for the rest, while the plaintiffs may on occasion have erred in course of the proceedings, it was the defendants' obstructive approach to the conduct of the litigation – with disregard for the observations of the Court of Appeal in *In re Esteem Settlement* 2000, JLR N-41, of Bailhache, Bailiff in *Sinel v. Goldstein*, 2003 JLR N [20] and of this Court in its interlocutory judgments of 25th February and 25th April 2011 - that was, right up to the very end one of the dominant features of the proceedings.

21. The grounds on which it is appropriate to make an award of indemnity costs have been the subject of exposition in a series of decisions of the Court of Appeal, three of them in the past two years. However, it is now unnecessary to look beyond the most recent of those decisions, *Leeds United Football Club Limited v. Weston and Levi* [2012] JCA088 (Steel, Jones and McNeill JJ.A.) as handed down on 3rd May last year, which

draws together the essential points of the earlier decisions. In that case Jones J.A., giving the judgment of the Court, summarised the position as follows:

> " (4) The circumstances in which it may be appropriate to award costs on the indemnity basis have been considered on a number of occasions by this court. In Dixon v. Jefferson Seal Ltd. [1998] JLR 47, Collins J.A., with whom Harman and Southwell JJ.A. agreed, concluded that there had to be "some special or unusual feature in the case" to justify such an award. (Page 59) In Marett v. Marett [2008] JLR 384, Pleming J.A., Sumption and Nutting JJ.A. concurring, said this:-
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> > "A court may make an indemnity costs order only where there has been some culpability, some abuse of process such as deceit, underhanded or unreasonable behaviour, abuse of court procedures, or the submission of voluminous and unnecessary evidence. There are many examples in decided cases of the application of these broad principles (see Dixon v. Jefferson Steel Ltd. (6) (1998 JLR at 52-53); Maçon v. Quérée (née Colligny) (20); and Jones (née Ludlow) v Jones (No.2) (11), noting the reference to "some special or unusual feature" to justify the award of indemnity costs). There are also examples of cases where the court has made an indemnity order, even in the absence of culpability or abuse … … relying on the court's general discretion, in England and Wales, under the CPR, r.44.3." (Paragraph 73)

(5) In Leeds United Association Football Club Limited and Another v. The Phone-In Trading Post Limited t/a Admatch [2011] JCA 110, at paragraph 11, this court pointed out that the limitation placed on the exercise of the court's discretion by the use of the word "only" in the first sentence of the foregoing passage must be regarded as an error.

(6) In C v. P-S [2010] JLR 645, the court rejected a submission that an indemnity costs order should only be considered where the actions of the paying party are malicious or vexatious. Beloff J.A., who delivered the judgment of the court, said this:-

> "We do not accept that it is appropriate to impose such a restrictive approach on the discretion of the court to make an award of costs on the indemnity basis. The question will always be—is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognizing that there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct". (Paragraph 11.)

(7) In making an award of indemnity costs on the ground of unreasonableness, the court is seeking "to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances." (Pell Frischmann Engineering Limited v. Bow Valley Iran Limited and Others [2007] JLR 479, paragraph 25, cited with approval in C v. P-S at paragraph 7)".

22. Applying these principles, it is difficult to think of a case in which an award in favour of costs on an indemnity basis could be more fully justified. There will be an order accordingly in favour of the plaintiffs.

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