Neutral Citation [2021] EWHC 2581 (Ch)

Claim No: E30BM407

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROBATE TRUSTS AND PROPERTY LIST (ChD)

Sitting remotely at:
Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham B4 6DS

Date: 28 September 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) MR AMARJIT BHAUR
(2) MRS JOGINDER BHAUR
(3) MRMANDEEP BHAUR
(4) MR BALDEEP BHAUR
(5) SAFE INVESTMENTS MANAGEMENT UK

Claimants

-and-

(1) EQUITY FIRST TRUSTEES (NEVIS) LIMITED
(2) STRATTON INVESTMENT MANAGEMENT (SEVENTEEN) LIMITED
(3) MR JAMES O'TOOLE
(4) NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN
(5) IVM PCC (in respect of Cell 020)

Defendants

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Mr Mark Anderson, QC and **Mr David Mitchell** (instructed by **Kangs Solicitors**) appeared for the Claimants

Mr Michael Ashe, QC and **Mr Julian Hickey** (instructed by **Levy & Levy Solicitors**) appeared for the Fifth Defendants in the Part 8 Claim and the Applicants in the Declaration Application

Hearing dates: 26 to 30 April and 17 June 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The parties

1. The First Claimant, Mr Amarjit Bhaur is the husband of the Second Claimant, Mrs Joginder Bhaur. They are the parents of two sons, respectively the Third and Fourth Claimants, Mr Mandeep Bhaur and Mr Baldeep Bhaur. I shall refer to the First to Fourth Claimants as the **Bhaur Family**.[1] As will become clear, the Bhaur Family referred to themselves in this way, and the description very much reflects a close-knit, trusting and engaged family unit. Where it is necessary to differentiate between members of the Bhaur Family, I shall refer to the First Claimant as **Mr Bhaur**, to his wife, the Second Claimant, as **Mrs Bhaur** and (without intending any disrespect, but for clarity and concision) to the Third and Fourth Claimants as **Mandeep** and **Baldeep**. When describing states of mind, in particular, I shall refer more or less interchangeably to Mr Bhaur and/or the Bhaur Family. That reflects the fact that Mr Bhaur operated in the context of a close-knit family unit and it is neither necessary nor pointful to seek to differentiate Mr Bhaur's state of mind from that of his family. Mrs Bhaur appears to have played little or no role in the administration of the family business.

2. The Fifth Claimant (Safe Investments Management UK) – **Safe Investments UK** – is a company set up by the Bhaur Family in circumstances that it will be necessary to describe in some detail. For the present, it is sufficient to note that Safe Investments UK was part of a broader scheme (the **Scheme**), contemplated and initially implemented by the Bhaur Family in 2006/2007, but refined and developed by them (by which I mean not only by themselves, but by "advisors", agents and/or other third parties directly or, increasingly, indirectly retained by the Bhaur Family) over a number of years, ending in 2017/2018.

3. I shall only refer to the **Claimants** when I intend to refer to the Bhaur Family and Safe Investments UK.

4. The **Defendants** named in the title to these proceedings are all, to a greater or lesser extent, involved in the Scheme, and I will describe their nature and role when the Scheme is described in detail in Section B below.

(2) The reason for the commencement of the Scheme

5. It is important that I not say too much, at this stage, about the Bhaur Family's thinking in setting up and continuing the Scheme, for such matters are best considered after the Scheme has been described in detail. But some background is necessary.

6. Mr Bhaur was born in 1948 in India. He moved to the United Kingdom in 1968, when he was about 20. He has been married to Mrs Bhaur for some 45 years and (as I have noted) has two sons, Mandeep and Baldeep, as well as three grandchildren. As will be seen, it is the interests of later generations of the Bhaur Family that loom large over the genesis of the Scheme, and I should say at the outset that I accept that Mr Bhaur wanted

[1] The terms and abbreviations used in this Judgment are listed in Annex 1 hereto, which also sets out the paragraph of the Judgment were each term/abbreviation is first used.

to provide for future generations and to pass on to them the fruits of his and his wife's labours.

7. Mr Bhaur began work in the United Kingdom as a bus conductor and then a bus driver. He carried on as a bus driver until 1976, when he moved into the retail clothing business, called "Tony's Fashion".[2] The venture proved successful, and Mr and Mrs Bhaur opened a number of retail units under this brand. The profits from the venture were such that Mr and Mrs Bhaur were able invest in a number of properties, which were developed and then either sold or retained to rent out. This side of the business also proved to be successful and, by 1989, Mr and Mrs Bhaur had established a considerable property portfolio. They ran this side of the business as a partnership (there was no incorporation, but also no formal partnership deed). The legal and equitable interests in the property portfolio vested in them.

8. By 1992, the property side of Mr and Mrs Bhaur's business was so successful that Mr Bhaur took steps to close down "Tony's Fashion", so as to concentrate on the property business. As I have said, this business was conducted as a partnership between Mr and Mrs Bhaur, which was known as Safe Investment Management, but which I shall refer to as the **Original Partnership**. It is fair to say that little thought was given by the Bhaur Family as to how – in legal terms – they conducted their business. There was, for example, no written partnership agreement. The partnership involved the buying and selling of properties, but also their maintenance and renovation. As Mr Bhaur describes in his second witness statement (**Bhaur 2**):[3]

> "In addition to the purchasing of the properties, I was maintaining and renovating them. My skills expanded to the point that I was undertaking a similar role to a Quantity Surveyor (albeit I never achieved the formal qualification). From time to time, I would also take on the responsibility of managing other people's properties (against which I would receive a commission)."

9. The Original Partnership, at least in its mature state, tended to acquire property, rather than sell it. Generally speaking, property would only be sold if it was unprofitable or otherwise more trouble than it was worth. Generally speaking, therefore, the property portfolio expanded.

10. Mr Bhaur says this about the development of the business up to his retirement in 2012:[4]

> "I continued developing the property portfolio right up until my retirement in 2012. Although my sons have their own respective full-time careers, they assist with the running and management of the properties. Although [Safe Investments UK] is effectively a family business, Mandeep and Baldeep never assisted in buying and/or selling properties (on the rare occasion that properties were sold) nor did they assist in the day-to-day running of the management of the properties. They have their own lives and careers and I didn't want them to forgo those careers to assist me with the business. What they did do, as may be expected, is provide support, help and guidance whenever I needed it."

11. Mr Bhaur had two strokes in 1996 (when he was about 48) and 2006 (when he was about 58). The latter stroke caused Mr Bhaur to recognise his own mortality and, in particular,

[2] Mr Bhaur is, at times, referred to in the documentation as "Tony".

[3] Bhaur 2/§7.

[4] Bhaur 2/§8.

the inheritance tax implications in the event both he and Mrs Bhaur passed away.[5] It was because of these inheritance tax implications that the Bhaur Family (but specifically, Mr and Mrs Bhaur, as the partners in the Original Partnership) entered into the Scheme.

(3) This litigation

12. By a Part 8 Claim issued on 9 October 2018 under Claim No E30BM407, the Claimants commenced proceedings against the Defendants. In essence, the Claimants seek an order declaring or confirming that the Scheme[6] entered into by the Bhaur Family be set aside on the ground that it was not fit for its purpose and that any and all assets paid into or transferred into the Scheme be restored to the Bhaur Family.

13. The precise matters at issue have been very fully pleaded, and turn on questions of mistake induced by misrepresentation and fraud. Those questions cannot be resolved – indeed, I do not consider that they can be clearly articulated – without an understanding of the Scheme itself.

(4) Structure of this Judgment

14. This Judgment deals with the following matters in the following order:

(1) Section B describes the Scheme. It does so on the following basis:

(a) First, the Scheme is described generally without reference to what the Bhaur Family and the other actors thought or said they were doing. Such matters are obviously relevant to the resolution of the issues before me, but (for the purposes of Section B) I confine my consideration to the transactional documents that have been produced on disclosure in these proceedings and I seek simply to describe their effect.

(b) Secondly, the Scheme is obviously based upon the documents that have been disclosed in these proceedings. Section B makes clear where there are gaps in the documentary record and explains precisely what inferences have been drawn where such gaps exist. The reason for such gaps is considered later on in the Judgment.

(2) Section C describes the manner in which the trial was conducted before me, the witnesses I saw, and a number of *sui generis* issues that affected the conduct of proceedings.

(3) Section D sets out, in a little greater detail, the Claimants' pleaded case on mistake. Section E sets out the relevant law on the question of mistake. Section F sets out the facts that I consider to be relevant to the question of mistake. Section F does not seek to provide any analysis or conclusion on the question. Its purpose is to identify the facts material to my consideration of this question. Inevitably, in a fact-heavy case such as this, I have paid more regard to the facts that are material to my

[5] Bhaur 2/§10.

[6] This is not the word used in the Claim Form, which refers to "Trusts". Whilst I entirely accept that a variety of trusts and other structures were used, the term "Scheme" is sufficiently general and generic to capture the various, very complex, steps that were undertaken on behalf of the Bhaur Family or purportedly on behalf of the Bhaur Family.

consideration of mistake than to facts that I consider to be immaterial. I have, however, and to be clear, considered the whole of the record before me. Section G considers and determines the question of mistake.

(4) Finally, Section H considers the Claimants' alternative case, which was predicated on my rejection of their primary case on mistake.

B. THE SCHEME

(1) Incorporation of the Original Partnership

15. The Original Partnership was incorporated. The process by way of which this was achieved was as follows:

(1) Safe Investments UK – that is, the Fifth Claimant – was incorporated as a private limited company at Companies House on 14 February 2007 under Company No 6105264. Safe Investments UK had a share capital of £1,000 divided into 1,000 ordinary shares of £1 each. Mr Bhaur and Mrs Bhaur each subscribed for 500 shares in the Fifth Claimant.

(2) At a shareholders and directors meeting on 17 February 2007, Mr and Mrs Bhaur confirmed their appointments as directors of Safe Investments UK, pursuant to a written resolution that they signed as shareholders. Mr Bhaur was also appointed as chairman of the company and Mrs Bhaur as secretary. It was resolved that the company and Mr and Mrs Bhaur would enter into employment contracts with respect to their positions. Contracts of employment were entered into on 17 February 2007.

(3) According to board meeting minutes signed by Mr Bhaur in his capacity as chairman, a board meeting took place later that morning. At that meeting, Mr and Mrs Bhaur (in their capacity as directors) approved the transfer of the assets associated with the Original Partnership to Safe Investments UK. This was in exchange for newly issued shares in the company referenced in paragraph 15(1) above. There is a formal resolution which provides:

"IT WAS RESOLVED AS FOLLOWS:

1. The Company would accept the transfer of all the assets and liabilities of a business carrying on the business of property purchase, management, repair, advertising, letting and sales in exchange for the issue of shares in the Company to the two contributors of assets pro rata reflecting the value of the assets contributed by each.

2. The businesses were transferred to the Company wholly in consideration for the issue of such shares and there was no other consideration.

3. The businesses were to be transferred to the Company in a manner which ensured that full deferral relief was available to the transferors of the business assets under section 162 [of the Taxation of Chargable Gains Act 1992].

4. In particular, there would be transferred to the Company in exchange for the issue of all the shares in the Company the equitable interests in all those properties listed in the attached schedule (the "Schedule").

5. In addition to the above mentioned items, there would also be transferred to the Company:

- Any cash at bank;
- The benefit of any leases over the properties listed in the Schedule;
- The benefit of any contracts in relation to the assets and liabilities of the unincorporated business;
- Any trade/book debts; and
- Any other right or thing contemplated as evidencing a valid transfer of a business to a company under section 162 [of the Taxation of Chargable Gains Act 1992]."

The resolution was signed on 17 February 2007 by Mr and Mrs Bhaur.

(4) Pausing there, some points need to be noted:

(a) The transfer was intended to be tax neutral. The resolution stated that the business was to be transferred to the company in a manner that allowed Mr and Mrs Bhaur to avail themselves of full deferral relief under section 162 of the Taxation of Chargeable Gains Act 1992.

(b) At the time of the resolution, the Original Partnership held about 35 properties. According to the resolution, only the equitable interest in those properties was to transfer to the company, the legal title remaining vested in Mr and/or Mrs Bhaur (as the case might be).

In comments made on the draft judgment when circulated, the Claimants' counsel told me that all properties were held jointly by Mr and Mrs Bhaur. I am sure this is right, but it is not a matter on which I was particularly addressed, for entirely understandable reasons. I am reluctant to go out of my way to make findings that I do not have to make, so I will refer to properties being held by Mr "and/or" Mrs Bhaur, but nothing more should be read into this equivocation.

The schedule to the resolution is blank, and no properties are listed. However, I am satisfied that the equitable interest in those properties owned by Mr and Mrs Bhaur at that time was transferred to the company, and that Mr and Mrs Bhaur therefore became the trustees of those beneficial interests in those properties. The Claimants did not contend to the contrary.

(c) In fact, the trust was expressed in a declaration of trust of Mr and Mrs Bhaur, also dated 17 February 2007. By a deed of covenant, also dated 17 February 2007, Mr and Mrs Bhaur agreed to repay the mortgages on the transferred properties (which continued to be legally owned by them) and, in the event that any properties were sold, to make good any sums deducted from the sale proceeds used to discharge any mortgages.

16. There are other documents relevant to the transfer of the business of the Original Partnership to Safe Investments UK. There is, thus, a detailed business sale agreement (dated 24 February 2007) and a deed of assignment of goodwill.

17. Although I appreciate that there were other assets transferred from the Original Partnership (more accurately: Mr and Mrs Bhaur, the Original Partnership being unincorporated), the assets that I am primarily concerned with are the properties, the equitable interest in which was transferred to Safe Investments UK. For the sake of clarity, I am going to refer to this equitable or beneficial interest as the **Estate**. Specifically:

(1) The legal interest under which the Estate existed was held on trust by the registered owner of the properties in question, which I shall take to be Mr and/or Mrs Bhaur.

(2) The Estate was held (as an equitable interest under a trust) by Safe Investments UK.

It is, however, important to note that the proprietary subject-matter of the Estate was ambulatory, in that it was added to by further acquisitions of the Bhaur Family and at times reduced by sales of property by the Bhaur Family. The manner in which such dispositions were achieved became – as the Scheme developed – increasingly legally complex and – as will be seen – generative of some friction. More to the point, the Estate did not remain with Safe Investments UK but transferred as the Scheme developed. My intention is to use the term Estate to refer to the interests held on trust as they varied from time to time. It is not a necessary part of this Judgment to determine the precise composition of the Estate at any given time, and I expressly do not do so.

(2) Establishment of a Staff Remuneration Trust

(a) Safe Investments UK's resolution to establish a Staff Remuneration Trust

18. On 24 February 2007, Mr and Mrs Bhaur, together with Mandeep and Baldeep, signed a board resolution of Safe Investments UK, making provision for Safe Investments UK to establish what was referred to in the resolution as "the staff incentive remuneration trust". The resolution stated as follows:

> "1. The staff incentive remuneration trust ("RT") established by the Company should be funded by the transfer of assets therein rather than the transfer of cash.
>
> 2. The assets which would be transferred into the RT in lieu of available cash reserves would be the entire equitable interest in the assets (in which the Company was the beneficial owner of the entire equitable interest) listed in the attached Schedule.
>
> 3. The transfer of the equitable interest in the above assets into the RT would be effected by means of a declaration of trust which had been drawn up by the Company's solicitors in conjunction with Queen's Counsel.
>
> 4. The declaration of trust had been drafted so as to transfer only the equitable ownership therein."

19. Baldeep and Mandeep both appear to have been appointed as directors of the company shortly after it was incorporated and signed this resolution in that capacity.

20. The schedule before me was – once again – blank. In my judgment, the property intended to be the subject matter of the staff incentive remuneration trust was the same property as was transferred to the company, that is, the Estate, as described above. Again, the

contrary was not contended by the Claimants. What is significant is that only a matter of days after the assets of the Original Partnership were transferred to Safe Investments UK, those assets were themselves resolved to be held on a staff incentive remuneration trust, to be established.

21. I shall refer to the staff incentive remuneration trust that the company resolved to establish as the **First Staff Remuneration Trust**. As I shall describe, this came to be replaced by a second, broadly similar, trust. I should, at this stage, say something about the findings that I make in this Judgment about the precise effect of the various elements of the Scheme, including the First Staff Remuneration Trust and the trusts that succeeded it. Inevitably, in order to understand and resolve the issues regarding state of mind that underlie any question of mistake, I need to understand what it is that was set up for and on behalf of the Bhaur Family. If I am persuaded that there was a mistake and the Scheme must be set aside, my factual findings are unlikely to be of any further significance. However, it does not seem to me that the contrary is right:

(1) If the Claimants' case fails, then the Scheme will remain in place. There will, no doubt, be many live questions as to the precise effect of the Scheme if that is the outcome.

(2) It may well be that, on this eventuality, a number of the live questions are resolved by the Judgment. However, I wish to be as clear as I can be that I am not, in this Judgment, deciding precise points of construction or tax effect of the Scheme. I was not addressed on such points, and they are not relevant to the questions before me.

(3) Accordingly, it seems to me that I should make clear that provided nothing inconsistent with this Judgment is argued in other jurisdictions by persons bound by this Judgment, such persons should be free to make such contentions as they are advised in relation to the meaning and effect of the Scheme.

(4) In such a case, there will be a difficult line to be drawn between what this Judgment decides in relation to the Scheme, and what it does not. I have sought to limit myself to what is necessary to determine the issues before me.

(b) The retention of Appleby

22. Although I propose to consider separately the persons advising or purporting to advise the Claimants, some mention of these persons in this Section is unavoidable. One of the persons was Aston Court Chambers LLP. Aston Court Chambers LLP had various emanations, but it is both unnecessary and probably not possible to disentangle them. I shall refer to them generally as **Aston Court**. It is evident that Aston Court sought advice and/or services from Appleby Hunter Bailhache, a firm based (in amongst other places) the British Virgin Islands. As I understand it – and nothing turns on this – the firm has various emanations, all of which I shall refer to as **Appleby**.

23. On 5 March 2007, Appleby sent a letter to Aston Court regarding the provision of advice on British Virgin Island-specific matters, including assisting with the incorporation of a BVI Business Company and the establishment of a trust under the Virgin Islands Special Trust Act 2003 (**VISTA**). The letter included engagement terms and was signed by Mr and Mrs Bhaur on behalf of the Safe Investments UK.

24. The Bhaur Family – through the offices of Aston Court and Appleby – then effected the transactions described in the following paragraphs.

(c) Establishment of Gooch Investment

25. On 8 March 2007, Appleby caused a BVI company known as Safe Investment Management Limited to be incorporated under the BVI Business Companies Act 2004. Mr Bhaur and Mrs Bhaur were appointed as directors and the company's share capital was allotted to Safe Investments UK.

26. Safe Investment Management Limited was renamed Gooch Investment Management Limited on 13 March 2008. I shall refer to this company as **Gooch Investment**.

27. Gooch Investment entered into a corporate administrative services agreement with Appleby. A written resolution of the directors of Gooch Investment dated 9 March 2007 noted the incorporation of the company, the appointment of directors, the allotment of shares, the appointment of Appleby and the appointment of First Caribbean International Bank as the company's bankers.

(d) Establishment of the First Staff Remuneration Trust

28. The precise manner in which the First Staff Remuneration Trust came to be established is not easy to determine. That is in part due to the (intentionally) untransparent way in which the structure was intended to work and in part due to the fact that not all of the relevant documents were before me. It is, therefore, necessary to tread carefully:

(1) The intention appears to have been for the Estate to be transferred to Gooch Investment by Safe Investments UK, in return for 100% of the shares in Gooch. On this basis, Mr and Mrs Bhaur held the Estate on trust for Gooch Investment. The Staff Remuneration Trust comprised the shares – held by Safe Investments UK – in Gooch Investment. These shares – the **Gooch Shares** – were to be settled by Safe Investments UK on a trustee, **Equity Trust (BVI) Limited**.

(2) This intention (and I want to be clear that I am, at present, attributing no intention at all to the Bhaur Family: I am simply trying to ascertain what happened) is best discerned from an agreement, dated 6 March 2007, between Safe Investments UK (acting by Mr and Mrs Bhaur) and Equity Trust (BVI) Limited for trustee services. As part of this agreement, Equity Trust (BVI) Limited required information about the structure that Safe Investments UK intended to establish and the advantages and benefits afforded by it, as well as information about the number and size of the transactions that were expected to pass through the proposed structure on an annual basis. In the documentation completed by Safe Investments UK, the following handwritten explanations were provided:

(a) First:

> "Employee Remuneration Trust (VISTA) for Safe Investment Management UK Limited. Only asset it will own is shares in a BVI Company. The Company will own several properties. Clients are excluded from benefit, however it will benefit their business"

(b) Secondly:

"Distribution to Employees per year £100,000"

(3) The First Staff Remuneration Trust was constituted by a settlement dated 10 March 2007 between Safe Investments UK (as settlor) and Equity Trust (BVI) Limited (as trustee). As to this:

(a) The second recital in the settlement (Recital (B)) provides:

> "[Safe Investments UK] has transferred or intends to transfer 50,000 US$1 shares in [Gooch Investment] (the "Initial Trust Fund") to or on behalf of [Equity Trust (BVI) Limited] to be held upon the trusts hereinafter expressed."

(b) The Initial Trust Fund could be supplemented. It was formally settled by clause 2 of the settlement. The "Trust Period" was expressed to be from the date of settlement until "Vesting Day", which was defined as:

> "…the last day of the period expiring 100 years from the date hereof or (if earlier) such day as the Trustee may at its discretion appoint by Deed which period shall be the applicable perpetuity period."

(c) The Trustee would, during the Trust Period, hold the income of the Initial Trust Fund (as supplemented, the "Trust Fund") on trust for the "Beneficiaries". Beneficiaries were defined as:

> "…any Employee, any former Employee, any spouse of any Employee or former Employee, any child or grandchild (including any adopted child) of an Employee or former Employee and any Person who is considered by the Trustee in its absolute discretion to be a dependent of an Employee and all such categories shall include any Person who is already born or who is born hereafter but prior to the Vesting Day…"

"Persons" are widely defined as "any individual, firm, body corporate, unincorporated association or partnership, government, state or agency of a state or joint venture". More importantly, "Employee" means:

> "…any Person for the time being employed by the Settlor [i.e., Safe Investments UK] (or any 75% or more subsidiary company of the Settlor and any company resulting from the amalgamation or reconstruction of the Settlor) under a full or part time contract of service."

(d) On the face of it, this would appear to be wide enough to embrace all of the employees of Safe Investments UK who, as I have noted, included Mr and Mrs Bhaur. However, clause 15(1) of the settlement made clear that persons who participated in the settlement and persons connected to them (which would include children) could not have any part of the Trust Fund or the income thereof applied to or for their benefit, save that clause 15(3) made provision for the potential for payment of income to such persons.[7]

[7] Clause 15(3) said that when determining whether property could be applied as mentioned in clause 15(1), "no account shall be taken of any power to make a payment which is the income of any Person for any of the purposes of income tax".

(4) On a date in May 2007 that was unspecified, Safe Investments UK transferred the share capital in Gooch Investment (i.e., the Gooch Shares) to Equity Trust (BVI) Limited pursuant to a standard transfer form signed by Mr and Mrs Bhaur. This, of course, is consistent with Recital (B) referred to above.

(5) So far, the documentation is all consistent with the intention described in paragraphs 28(1) and (2) above. There are, however, a number of documents that are not consistent with this intention.[8] Thus:

(a) Safe Investments UK executed a letter of wishes in relation to the Staff Remuneration Trust which appears to refer to the Estate as constituting the trust property, rather than the Gooch Shares. Again, the schedule of properties is missing, but the document seems to me clear on its face. I consider that the reference to the Estate, as opposed to the Gooch Shares, is quite possibly an understandable mistake.

(b) The letter of wishes – signed by Mr and Mrs Bhaur for Safe Investments UK – and addressed to Equity Trust (BVI) Limited as trustee states:

> "We currently envisage approaching the trustees once in every twelve month period with our suggestions (if any) as to which employees (if any) should benefit from this trust and roughly in what amounts and in what format. The regularity of such communications may change in future as the company grows. Such wishes will be communicated and as such are certainly not to be construed as imposing any binding obligation upon the trustees who must of course exercise their discretion in such matters.
>
> The trustees may take this as a current statement of our wishes in relation to this trust at present."

(c) On 17 March 2007, Safe Investments UK signed a declaration of trust in favour of Equity Trust (BVI) Limited in which it agreed to hold the Estate on trust for Equity Trust (BVI) Limited as trustee. Clearly, this document is not consistent with the settlement that I have described. The Claimants suggested that this was another error in documenting the Staff Remuneration Trust, and I agree that this is an entirely possible explanation.

(d) Finally, Safe Investments UK board minutes of 17 March 2007 record a board meeting taking place on that date, attended by Mr and Mrs Bhaur. The minutes noted the establishment of the Staff Remuneration Trust, and state as follows:

> "The Chairman reported that notice of the meeting had been given to all those persons entitled to receive the same and a quorum being present declared the meeting open:

[8] In addition to the documents referenced in the following sub-paragraphs, additional properties were put into the trust estate reflecting the same error. I have not specifically referenced these documents, although the same points arise.

1. It was noted that the staff remuneration trust deed constituting the Safe Investment Management UK Limited Staff Remuneration Trust ("RT") had been executed by the trustees and was now ready for use.

2. It was noted the shareholders and directors all agreed it was a commercial need of the Company to employ the correct calibre of staff; it was further noted that the Company looked likely to expand in forthcoming years and would therefore need such staff.

3. It was noted that it was the desire of the current shareholders to attract, retain and properly incentivise past, present and future high performing employees of the Company and their dependents, to ensure they gave of their best to the Company and contribute as much as possible to the Company.

4. It was noted that the establishment and funding of a commercially focussed remuneration trust, which specifically excluded anyone holding 5% or more of the share capital of the Company (i.e., non *bona fide* employees) from benefitting, would assist the Company in achieving points 2 and 3 above (i.e., would act as a genuine commercial incentive for *bona fide* employees).

5. It was noted that the written resolution of the Company dated [the date is not inserted, but must be a reference to the resolution referred to above] expressed some uncertainty as to the best method of funding the RT so as to maximise the incentive effect on the staff of the Company. Having given the matter further consideration, the Company decided that the best method of funding the RT (given an absence of available liquid funds) would be to transfer assets into the RT instead. It was further noted that the Company considered, in detail, which assets were available to use in this manner. Given the nature of the business of the Company, the main assets which it could use to reward employees was the value of the buildings belonging to the Company. It was noted that the Company wished to use these assets to incentivise and reward the staff and that these would be the assets to transfer into the RT.

6. It was noted that the assets to be so dealt with were those listed in the attached Schedule."

Pausing there, in this case, the Schedule <u>does</u> appear to be attached, and it lists the 35 properties then comprising the Estate. Continuing:

"7. The meeting then adjourned to allow the declaration of trust in respect of the assets listed above to be executed and, when reconvened, it was noted that the declaration of trust had been so executed by the Company and would accordingly be forwarded to Equity Trust for counter signing."

It will, thus, readily be appreciated that these minutes repeat what I have tentatively identified as an error in the letter of wishes[9] and in the declaration of trust.[10]

[9] See paragraph 28(5)(a)-(b) above.

[10] See paragraph 28(5)(c) above.

29. In this Section, I am seeking to state with precision what dispositions of their property were made by the Bhaur Family, without consideration of the allegations of mistake, misrepresentation and fraud that are advanced in support of the contention, fundamental to the claim that the Scheme must be unwound. It is obviously important to be clear as to how the First Staff Remuneration Trust was to be constituted in order to address this question. My conclusion is that the Staff Remuneration Trust was constituted as I have described in paragraph 28(1)-(4) above. The documents that are inconsistent with this conclusion can be explained either:

    (1) As mistakes; or

    (2) As deliberate fabrications intended for display – should the need arise – to the authorities, in particular those in the United Kingdom. In this regard, I am conscious that there would have been an advantage in leaving Gooch Investments and the Gooch Shares altogether out of account, and simply presenting the First Staff Remuneration Trust as being a trust over the Estate.

30. It is unnecessary, for present purposes, to decide which of these two explanations is the correct one, although this is a matter I shall revert to. For present purposes, whichever is the case, I find that the Staff Remuneration Trust was a trust over the Gooch Shares, Gooch Investments itself holding the Estate.

(e) Re-registration of Safe Investments UK as an unlimited company

31. On 4 March 2008, Mr and Mrs Bhaur signed the paperwork needed to re-register Safe Investments UK as an unlimited company, and to increase its share capital to £1,002. At about the same (and as requested by Aston Court in a letter dated 26 March 2008) various documents recording this change (as well as the acquisition of additional properties) were executed. Specifically, these were:

    (1) The minutes of a directors' meeting recording the authorisation of the increase in the share capital, the issuing of the additional shares to Mr and Mrs Bhaur and the transfer of the two additional properties to Safe Investments UK;

    (2) A resolution giving effect to these events; and

    (3) An increase in nominal capital Form 123.

32. It seems likely that these documents were backdated to 4 March 2008 by Aston Court, as Mr and Mrs Bhaur were asked that these documents be left undated.

(3) First recap and synthesis

33. By the end of March 2008, Mr and Mrs Bhaur had incorporated the Original Partnership into a corporate entity referred to herein as Safe Investments UK. They were both shareholders in that company, and – together with Mandeep and Baldeep – directors. Although the business of the Original Partnership was fairly comprehensively transferred to Safe Investments UK, the legal title to the real assets of the Original Partnership – the properties – was in each case retained by Mr and/or Mrs Bhaur. Only the equitable interest – what I am referring to as the Estate – was transferred to Safe Investments UK.

34. Safe Investments UK then resolved to establish the Staff Remuneration Trust. The trustee of that trust was Equity Trust (BVI) Limited. The trust property settled by Safe Investments UK on the Staff Remuneration Trust was not the Estate. Safe Investments UK "swapped" the Estate for the Gooch Shares, Gooch Investment being a BVI company specifically established for this purpose, and subjected the Gooch Shares to the Staff Remuneration Trust.

35. There are two points – which will form "themes" coursing throughout the Scheme – that I should make now:

(1) The business of the Original Partnership was planned (by Mr Bhaur at least) to continue, albeit under a corporate persona, and it did so between 2007 and 2012. That business involved the acquisition and (occasionally) divesting of property. It will be no surprise that the convoluted way in which the Estate was held – even though the legal owners remained for the most part Mr and/or Mrs Bhaur and/or Safe Investments UK itself (again, I am trying not to drawn into making unnecessary findings of fact) – presented difficulties in enabling Safe Investments UK to conduct its business.

(2) The instrument governing the operation of the Staff Remuneration Trust was the settlement described in paragraph 28(3) above. There are a number of points arising out of this settlement for further consideration, but for present purposes the existence and role of a "Protector" of the trust must be noted:

(a) The "Protector" is defined as "the Person or Persons appointed Protector in accordance with the provisions hereof more particularly described in the First Schedule hereto".

(b) The First Schedule identified Corporate Factoring Services Limited as the Protector. Judging by the signatures acting for this entity as they appear on the settlement, they appear to be those of Mr James Rutherford and Mr James O'Toole (**Mr Rutherford** and **Mr James O'Toole**[11]), who are both persons associated with Aston Court.

(c) The settlement gives significant powers to the Protector, who cannot be removed under the terms of the settlement.

Again, one of the matters that should be noted is the persistence of the involvement of the persons themselves involved in Aston Court in the Scheme.

(4) The Second Staff Remuneration Trust: the move to Nevis

36. On 5 June 2008, Aston Court Chambers International SA, a Swiss affiliate of Aston Court Chambers LLP, which I shall also refer to as "Aston Court", was appointed as a director of Gooch Investment. Baldeep and Mandeep were appointed as directors on 24 November 2008.

[11] I shall refer to Mr James O'Toole, the Third Defendant, by his given and his surname, because there is another Mr O'Toole – Mr Martin O'Toole – who also features in the history.

37. Between November 2008 and November 2009, Mr and Mrs Bhaur sought to buy further properties, as part of the on-going business of Safe Investments UK. The precise details do not – again for present purposes – matter, but it must be noted that the process was not straightforward.

38. On 28 January 2010, there was a meeting of the Gooch Investment board. The minutes record as present a **Mr Martin O'Toole** of Aston Court, Mandeep and Baldeep. The minutes record at point 8:

> "[Mr Martin O'Toole] raised the issue of [Equity Trust (BVI) Limited's] ongoing poor service and administration in their role as both registered agent of [Gooch Investment] and trustees of the [Staff Remuneration Trust]. [Mr Martin O'Toole] suggested using Equity First Trustees (Nevis) Limited as both registered agent of [Gooch Investment] and trustee of the [Staff Remuneration Trust]. It was agreed that [Gooch Investment] would seek the assistance of [Aston Court Chambers International SA] in moving service provider from [Equity Trust (BVI) Limited] to Equity First Trustees (Nevis) as soon as practicable."

39. This appears to have involved really only a change of the jurisdiction of the trust, from the British Virgin Islands to Nevis, and I am frankly sceptical about the service and administrative advantages of such a move. Quite why it was encouraged by Aston Court I do not know.

40. The move to Nevis was effected in the following way:

(1) On 4 February 2010, Gooch Investment Management Limited, a Nevis International Business Corporation was incorporated. In due course – and in circumstances that I shall describe – this company changed its name to Stratton Investment Management (Seventeen) Limited (**Stratton 17**). Stratton 17 is the Second Defendant in these proceedings. I propose to use the name Stratton 17 for all purposes in this narrative.

(2) All four members of the Bhaur Family were appointed as directors, along with Aston Court.

(3) Stratton 17's share capital was assigned to Aston Court.

(4) On 5 February 2010, the Bhaur Family completed a trust services application pack for trustee services to be provided by Equity First Trustees (Nevis) Limited, which I shall refer to as **Equity First** and which is the First Defendant in these proceedings. The trust structure to be set up was described as a "trust with underlying Nevis company", and the source of the assets to be held on trust were described as emanating from Safe Investments UK.

(5) On 8 February 2011, a board meeting of Gooch Investment took place. The minutes record the presence of Mr Rutherford, Mr Bhaur and Mrs Bhaur. The minutes noted the manner in which Gooch Investment's shares were held – that is by Equity Trust (BVI) Limited on trust for the First Staff Remuneration Trust. The minutes noted a degree of dissatisfaction with Equity Trust (BVI) Limited and noted that Nevis was an alternative and "more flexible" jurisdiction than the BVI, and that the fees in operating the trust would be lower. The minutes record:

> "6. The proposal before the Board was to decide if the Company has the power to establish a structure which is identical in all material respects to the Trust but is subject to the laws of Nevis (the "Replacement Structure"), and whether it has power to transfer the trust fund held by the Company to the Replacement Structure, and if so whether it would be a good idea to do so having regard to the terms of the Trust and the constitution and business of the Company.
>
> 7. It was noted that the Company has power to do this under the terms of the Trust and its Memorandum and Articles.
>
> 8. It was noted that Nevis offers a more flexible and secure regime than the BVI's and the Company would obtain more detailed advice about how they could benefit from the jurisdiction of Nevis.
>
> 9. After due consideration, the Board decided that the Replacement Structure should be established and the entire fund should be transferred to it.
>
> 10. A list of the assets belonging to the Company and correctly forming the trust fund is set out in the Schedule.
>
> 11. The meeting then adjourned to allow the necessary documentation for the new trust to be settled and the transfer to the Replacement Structure to take place."

It is evident that what was contemplated was the transfer of the Estate from Gooch Investment to Stratton 17. This is clear from the Schedule referred to in the minutes, which lists the various assets held by Gooch Investment, which comprised the equitable interest in some 40 real properties in Leicester.

(6) What the minutes refer to as the Replacement Structure appears to have been achieved by a deed of trust (and associated documents) dated 8 February 2011. As to this:

(a) The parties were Gooch Investment, Equity First and Aston Court.

(b) Recital (C) records that the parties intend to establish a new staff remuneration trust – which I shall refer to as the **Second Staff Remuneration Trust** – to replace the First Staff Remuneration Trust. The terms of the trust are set out in the deed of trust and are broadly speaking similar[12] to those of the First Staff Remuneration Trust, in particular as regards the employees entitled to benefit. The manner in which the trust was to be constituted involved assigning the Estate from Gooch Investment to Stratton 17. Recitals (C), (E), (F) and (G) – there is no Recital (D) – provide as follows:

> "(C) For the reasons set out in the Written Resolutions dated 8 February 2011…and in pursuance of the best interests of the beneficiaries of the [Staff Remuneration Trust] and with the consent of the Original Settlor…[Gooch Investment] has resolved to settle a new trust in a

[12] On 27 November 2010, Mr and Mrs Bhaur signed a letter on behalf of Safe Investments UK, consenting to the transfer of First Staff Remuneration Trust in its entirety to "a structure which is identical to [the First Staff Remuneration Trust] in all material aspects except that it is based in Nevis rather than the British Virgin Islands."

different jurisdiction on terms which are identical to the terms of the first [Staff Remuneration Trust] in all material aspects and to transfer the Trust Fund to this new trust which will be called [the Second Staff Remuneration Trust] which will incorporate a Nevis registered limited company called [Stratton 17]…to perform the same function as [Gooch Investment];

(E) It is the intention of [Gooch Investment] that this Trust qualifies as an "Employee Trust" (in respect of the Employees as defined below) within the meaning of section 239 of the Taxation of Chargable Gains Act 1992 of the United Kingdom (as amended) and sections 13 and 86 [of the Inheritance Tax Act 1984]…;

(F) With this intention, [Gooch Investment] has caused to be transferred to the [Second Staff Remuneration Trust] 100 shares of [Stratton 17]…to be held by the New Trustees upon the Trusts and with and subject to the powers and provisions hereinafter contained and to be subject to the Rules;

(G) [Gooch Investment] will transfer the Trust Fund to [Stratton 17] by way of deed of assignment and a declaration of trust…or physical transfer of the assets…"

(c) Thus, the intention was to transfer the estate from Gooch Investment to Stratton 17. This was effected by a deed of assignment of 8 February 2011.[13] The New Trustee was Equity First, and Equity First was trustee of the shares in Stratton 17.[14] Thus, the First Staff Remuneration Trust was effectively "hollowed out" but not ended and Equity Trust (BVI) Limited effectively left as trustee of the empty shell that were the shares in Gooch Investment. The Original Settlor – whose consent was referred to in Recital (C) was presumably Safe Investments UK, but the documents before me do not make this completely clear and certainly provide no material evidencing the company's consent.

(7) As in the case of the First Staff Remuneration Trust, Mr Bhaur provided to Equity First a letter of wishes, in very similar terms to the letter of wishes provided first time round.[15]

(5) Second recap and synthesis

41. In my judgment, the objectives articulated in relation to the Second Staff Remuneration Trust were achieved. The Estate was transferred from Gooch Investment to Stratton 17, and a different trustee was made trustee over the shares in Stratton 17. That trustee was Equity First. The nature of the trust – an employee remuneration trust – was substantially on the same terms as the previous trust, and I will come to any differences in due course.

42. What is important to note are the persons concerned with the due operation of the Second Staff Remuneration Trust. In addition to the trustee, Equity First, these were:

[13] There was a parallel declaration of trust, which appears to have been for the avoidance of doubt.

[14] There is a fiduciary agreement between Equity First and Stratton 17 setting out the services being provided by the former to the latter. The shares in Stratton 17 were transferred by Aston Court Chambers International SA to Equity First on 8 February 2011.

[15] See paragraph 28(5)(b) above.

(1) Aston Court Chambers International SA as "Protector". The Protector has the powers set out in clause 14.[16] Aston Court Chambers International SA was substequently replaced as Protector by Equity First.

(2) An "Enforcer". The Enforcer is appointed by the Protector pursuant to clause 15(3). As is clear from this provision, the Enforcer is delegated powers by the Protector, and does not exist unless powers are so delegated.[17]

(3) "Appointed Enquirers", being persons with power to request information concerning the Second Staff Remuneration Trust. These Appointed Enquirers are defined in paragraph 2 of schedule 7 to the trust deed as the Bhaur Family plus the Protector. Paragraph 1 of the same schedule provides:

> "[Equity First] are obliged to comply with the requests of the Appointed Enquirer(s) for information and accounts relating to the Trust unless in the opinion of [Equity First] the provision of such information may expose the Trust to unwarranted scrutiny from government bodies of countries other than Nevis to which those bodies are not entitled."

(6) Events subsequent to the creation of the Second Staff Remuneration Trust

43. The Bhaur Family continued to seek to carry on the property business of Safe Investments UK, and issues continued to arise rendering this less straightforward than it might otherwise have been. The replacement of the First Staff Remuneration Trust by the Second Staff Remuneration Trust does not appear to have resolved these difficulties, which seem to have been used (at least by Aston Court) to justify the change that lead to the promulgation of the Second Staff Remuneration Trust.

44. On 20 April 2011, Equity First was appointed as a director of Stratton 17 and Aston Court was removed as a director.

(7) Changes arising because of new legislation

45. In an email dated 13 June 2011, Aston Court sent to the Bhaur Family what was described as an "RT Exit Note", "RT" presumably meaning "remuneration trust". The email raised the question of problems arising out of the Finance Act 2011 and stated:

> "I would like to book you a conference call to talk with James O'Toole to discuss this further."

46. The paper attached to this email – the details are immaterial – suggested that the Second Staff Remuneration Trust was adversely affected by recent changes in tax legislation, and recommended placing the value in the Second Staff Remuneration Trust "in a structure which is not affected by the change in legislation". The paper stated:

> "There are several different solutions available depending upon precisely which type of RT your business has in place and your Affected Structure. We will advise which solution is appropriate for your business on an individual basis.

[16] Clause 1(x) of the trust deed defines the Protector as Aston Court Chambers International SA, and the Protector's powers are described in clause 14.

[17] The Enforcer is defined in clause 1(k) as the person appointed pursuant to clause 14. This is presumably intended to be a reference to clause 15.

Features of the solution

Whichever variant is appropriate for your business the solutions will have the following common features and benefits:

1. The entire value will be removed from your Affected Structure and placed in a structure which is not affected by the change in legislation (the "New Structure").

2. You will be able to access the value in the New Structure via commercial loans as before. In practice, the terms of such lending will need, however, to be more commercial and more closely monitored.

3. The New Structure will be in a tax neutral environment.

4. The New Structure will be outside of your estate for inheritance tax purposes and will not be available for any creditor claims.

5. You will be an investment manager to the New Structure.

6. Where the Affected Structure contained assets rather than cash, these can be transferred to the New Structure without issue.

7. Succession planning issues in relation to the New Structure can be dealt with in a similar way as with the Affected Structure.

8. The New Structure will not be defined by reference to employee benefits. As such, there will be no on-going need to continue to benefit employees or their dependents.

9. The New Structure will continue to be administered by our Trust & Corporate Services Team ("TCS") as before for the same cost.

10. There may be an opportunity to deal with historic outstanding loans on the transfer to the New Structure (on a case by case basis).

11. Banking for the New Structure will be arranged with HSBC in the UK. There will be no requirement to borrow against cash from the banking partner as is the case with existing Swiss banking partners. There will, however, be two sets of signatories on the account for the New Structure. The investment manager will be one and Aston Court Chambers International SA will be the other. These accounts will be covered by our commercial internet banking arrangement with HSBC ("HSBC Net"). The investment manager will have internet access and any transactions will require agreement from both signatories. The investment manager will therefore have a negative power of veto over the account."

47. The paper raises more questions than it answers. In the first place, it is obviously generic, in that it is intended to address many Affected Structures, and appears to be considering issues that did not necessarily arise in the case of the Bhaur Family. In particular, the Bhaur Family's objective was to accumulate wealth in the Second Staff Remuneration Trust (as was the case with the First Staff Remuneration Trust). To the extent that there was borrowing, this was by way of mortgage to enable the purchase of real property, the equity in which would be added to the Estate. So the references to "borrowing against cash" do not pertain in this case.

48. Secondly, and perhaps more fundamentally, the nature of the "New Structure" is completely opaque. What is entirely unclear is how the New Structure could escape the

fetters of a trust for staff remuneration that was a defining feature of both the First Staff Remuneration Trust and the Second Staff Remuneration Trust.

(8) The "New Structure"

49. On behalf of the Bhaur Family, Mr Anderson, QC frankly asserted that the "New Structure" put in place was a "sham" (the **New Structure**). In this, his submissions as regards the "New Structure" were markedly different to his submissions in relation to the First Staff Remuneration Trust and the Second Staff Remuneration Trust. It is important to be clear as to the nature of this difference:

(1) As I have noted, the essence of the Bhaur Family's claim is that the entire Scheme, as I am describing it, should be set aside. I am, to be absolutely clear, not considering that contention at this stage. It seems to me, for the reasons I have given, not possible fairly to consider that point without laying out the nature of the Scheme, end to end.

(2) Assuming no vitiating mistake or other factor, it was Mr Anderson, QC's position that the First Staff Remuneration Trust and the Second Staff Remuneration Trust were properly constituted. I have considered all of the relevant documents, and – subject to the very significant *caveat* or assumption represented by the underlined words at the beginning of this sub-paragraph – have concluded that that submission is correct.

(3) Mr Anderson, QC's point as regards the New Structure was that even given the *caveat* or assumption I have articulated, the New Structure was nevertheless a "sham". It is on that basis, and with that point well in mind, that I approach the New Structure.

50. Before turning to the transactional documents, it is worth considering how Aston Court themselves presented the New Structure. A *Structure Review and Wealth Preservation Report for the Bhaur Family* was prepared by Aston Court Chambers International SA dated 21 September 2012. I do not propose, at this stage, to describe the content of this report (the **September 2012 Report**), but it is helpful to refer to a diagram that appears at Appendix 1 to the September 2012 Report. This sets out in diagrammatic form the structures of the First Staff Remuneration Trust and the Second Staff Remuneration Trust. I am not satisfied that these structural diagrams set out with complete accuracy the nature of these trusts, and to be clear I am not accepting the description in preference to the findings that I have made regarding these two structures. However, Appendix 1 is helpful in setting out how Aston Court intended the New Structure to work:

(1) Under the Second Staff Remuneration Trust, it will be recalled that the Estate was held by Stratton 17. In fact, and as I have described above, Stratton 17 (or, rather, Stratton Investment Management (Seventeen) Limited) was the name ultimately assumed by the Nevis entity originally known as Gooch Investment Management Limited. The change of name was envisaged as part of the New Structure – but plainly can only have been of presentational effect.

(2) More substantively, it was envisaged that all of the Estate held by Stratton 17 – as well as the shares in Stratton 17 presently held by First Equity – would be transferred to an "employee" of Safe Investments UK.

(3) That employee would then purchase an "annuity" from an offshore insurance company referred to as "Stratton Insurance Ltd". The consideration for that annuity would be the Estate and the shares in Stratton 17.

(4) "Stratton Insurance Ltd" would then transfer the assets received by it (except, presumably, the shares in Stratton 17, which the company could obviously not hold itself) back to Stratton 17.

(5) A new trust, based in Nevis, and referred to as "Stratton Commercial Protection Purpose Trust", would be established, having an option to purchase Stratton 17.

(6) The Bhaur Family would be appointed as "investment advisors" to Stratton 17.

51. Clearly this is no more than an overview of what was contemplated, but the transfer of the Estate out of the Second Staff Remuneration Trust – whilst being effectively retained by Stratton 17 – via the annuity seems, on the face of it, questionable and deserving of great scrutiny if ever put into effect.

52. A description of the putting into effect of the New Scheme is rendered more difficult by the fact that not all of the relevant documents were before the Court. Doing the best that I can with the material before me:

(1) Although it is unclear precisely what it was directed to, in an email dated 18 October 2011, Aston Court wrote to the Bhaur Family regarding the salary of a "Nevis employee". It was stressed that these payments had to be made by Safe Investments UK. In an email exchange in November 2011, the Bhaur Family raised a series of questions regarding the New Structure. These questions are not material for present purposes, but they do demonstrate progress towards what I infer to be the New Structure.

(2) On 5 December 2011, the Bhaur Family resigned as directors of Stratton 17 (as it then was now known). On 7 December 2011, the company changed its name from Gooch Investment Management Limited to Stratton Investment Management (Seventeen) Limited.

(3) On that same date, 7 December 2011, Stratton Insurance Limited and Equity First entered into an agreement for the settlement of Stratton Commercial Protection Purpose Trust (Number Seventeen). The trust deed appears to have been executed on 7 December 2011, but is present only in incomplete form before me. Mr Anderson, QC explained that these limited pages were the only pages disclosed in these proceedings. It is evident from the limited pages before me that there were other documents – possibly executed – some of which I have also not seen.[18]

(4) The Bhaur Family were appointed "investment advisors" to Stratton 17. Whilst I have little doubt that this was related to the New Structure, these appointments can (as it seems to me) stand independently of the New Structure itself.

[18] Although there is before me an option agreement between Equity First and Stratton Insurance Limited dated 7 December 2011.

53. Whilst, clearly, steps were taken to put in place the New Structure, I am satisfied that the manner in which the Estate was proposed to move from Stratton 17 to Stratton Insurance Limited, via an employee purchasing an annuity, and then back to Stratton 17 from Stratton Insurance Limited is either a sham or else a movement of money that can have had no effect on the terms on which the Estate was held – namely, as the Second Staff Remuneration Trust. The transactions that I have described in these paragraphs are therefore either:

(1) Void and of no effect.

(2) Circular, in that they occurred, and are valid, but of no ultimate substantive effect: Stratton 17 continues to hold the Estate as a trustee, the terms of that trust being those of the Second Staff Remuneration Trust.

54. I am satisfied that "fringe" parts of the New Structure – the appointment of the Bhaur Family as investment advisors can stand. But that is, in essence, because they operate in a manner that is not dependent upon the New Structure being in place.

(9) Aston Court PCC, IVM PCC and the creation of a purpose trust

55. On 11 September 2012, Aston Court PCC, a private company limited by shares and a protected cell company under the laws of Mauritius, was incorporated. Appleby were involved in the establishment of this company.

56. In Mauritius, protected cell companies are formed pursuant to the Protected Cell Companies Act 1999 (as amended). The aim of the legislation is to segregate the assets of a company into different cells with the object of protecting each cells from the liabilities of the other cells. Each cell is, thus, "ring-fenced". However, a protected cell company is a single legal person, and each cell is not a legal entity separate from the company. However, the company may create, in respect of any of its cells, a cell share capital on which dividends may be paid. This share capital is also independent of the company and so also "ring-fenced". As occurred in this case with the Fifth Defendant, a receivership order may be made with regard to any particular cell, without putting the whole company into receivership.

57. Aston Court PCC changed its name to **IVM PCC** on 28 September 2012, and is the Fifth Defendant in these proceedings.

58. The voting shares in IVM PCC appear to have been owned by a master trust called The Professional & Fiduciary Services Trading Trust, which may have been managed by Equity First, the First Defendant.

59. On 21 March 2013, a cell within IVM PCC under the name IVM 020 (**Cell 020**) was created. James Rutherford was registered as the owner of one participative share on the same date. It is this cell in relation to which ICM PCC has been joined in these proceedings.

60. On 18 November 2013, a successor protector in relation to the Second Staff Remuneration Trust was appointed. It will be recalled that the protector originally appointed was Aston Court Chambers International SA. The incoming protector, replacing Aston Court Chambers International SA, was Equity First.

61. On 3 December 2013, the directors of IVM PCC passed a resolution extending the business activities that Cell 020 could engage in, so that it included making and managing investments in land, property and quoted and unquoted securities in the UK and European countries, engaging financial consultants in the UK and Switzerland and issuing bonds and/or loans.

62. On 24 February 2014, a declaration of trust in respect of **The Bhaur Purpose Trust** was made by Appleby Trust (Mauritius) Limited – which I treat as part of Appleby, and will refer to as such – as the original trustee. As to this trust:

(1) This was a purpose trust, and as such an unusual creature under English law. By clause 2.2, the proper law of the trust was the law of Mauritius, and the courts of Mauritius were to be the forum for the administration of the trust.[19]

(2) The purpose of the trust is described in clause 3:

> "This Trust is established for the purposes of holding the shares and other securities issued by the Company and to deal therewith in all respects as if beneficially entitled thereto."

The "Company" is IVM PCC with respect to Cell 020.

(3) The Trust Fund is defined – by clause 1.3 – as meaning:

> "(a) the Initial Property;
>
> (b) all property hereafter paid, transferred to or otherwise placed under the control of and accepted by the Trustees as additions to the Trust Fund and in respect of which a memorandum signed by the Trustees shall be conclusive evidence;
>
> (c) all income which shall be accumulated by the Trustees and added to the capital of the Trust Fund;
>
> (d) the money and investments and other property from time to time representing the Initial Property and the said additions and accumulations."

The Initial Property was £10. It will obviously be important to ascertain how additions to the Trust Fund were made.

(4) The trustee was Appleby. Provision was made for an "Enforcer" of the trust.[20] The Bhaur family were appointed as Enforcers. Pursuant to clauses 11.3 and 11.4, the Enforcers had the power to require any trustee to resign and to appoint new or additional trustees.

(5) The trust deed also provided (at clause 5.1) that Appleby as trustee would transfer any value remaining in the trust to the Bhaur family as Enforcers if capital or income had not been disposed by the termination date. The Enforcers also had wide powers to change the proper law of the trust (clause 13), amend and vary the deed (clause 14) and terminate the deed (clause 15).

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[19] By clause 13, the proper law and forum of the trust may be changed by the Enforcer.

[20] Clause 12.

63. On or around the same date, 24 February 2014, a number of other agreements were entered into:

(1) IVM PCC and Appleby entered into a share subscription agreement, whereby Appleby (as trustee of The Bhaur Purpose Trust) purchased a non-voting participative share issued by IVM PCC for US$1.

(2) IVM PCC entered into an investment advisory agreement with each of the Bhaur Family. The agreements were for an initial term of five years. The Bhaur Family were entitled to a fee of 2.5% of net profits generated by IVM PCC in exchange for the provision of investment advisory services in respect of funds and assets held by IVM PCC (but only with respect to Cell 020).

(3) A company called ANS Limited entered into a variety of agreements with Appleby (acting in its capacity as trustee). It is unnecessary to consider these further.

(4) Mr Rutherford transferred his participative share in IVM PCC to The Bhaur Purpose Trust, such that he ceased to be a member on that date. Of course, transfer to The Bhaur Purpose Trust is meaningless: the trust is not a person capable of holding property. The transfer must be read as a transfer to Appleby as the trustee of the Bhaur Purpose Trust.

64. Appleby, as trustee of The Bhaur Purpose Trust, thus held at least two shares in IVM PCC, which I assume gave Appleby a degree of control over Cell 020. That, in turn, enabled The Bhaur Purpose Trust to fulfil its purpose (as defined in paragraph 62(2) above) and it is clear that these shares in IVM PCC must constitute additional property to the Trust Fund (see paragraph 62(3) above).

65. On 10 June 2014, there was a deed of transfer which appears on its face to have caused the Estate to transfer from the Second Staff Remuneration Trust (where it was held on trust by Equity First) to The Bhaur Family Trust. As to this:

(1) The parties were Stratton 17, IVM PCC with respect to Cell 020 and Equity First. However, the persons actually signing the deed were Stratton 17, IVM PCC and Stratton Insurance Limited. The first question, therefore, is how this deed of transfer could be effective without the participation of Equity First. The description, in the deed, of Equity First is as a party is illuminating (emphasis supplied):

> "Equity First (Trustees) Nevis Limited, a regulated trust company incorporated in the Federation of St Christopher and Nevis with company number 03/2009 and having its registered office at Hunkins Plaza, Main Street, Charlestown, Nevis, West Indies, acting solely in its capacity as trustee of The Stratton Commercial Protection Purpose Trust (Number Seventeen)(the "Trustee")."

(2) The Stratton Commercial Protection Purpose Trust would appear to be a part of the New Structure that I considered above, and concluded was either ineffective or sham. I do not understand how Stratton Insurance Limited could have the authority to act for the trustee, on the material before me, and it seems to me that I must treat the deed of transfer as one made without the sanction or authorisation of Equity First.

(3) The question is whether the deed of transfer is capable of transferring the Estate – which was held by Stratton 17 – notwithstanding the absence of any consent from the Trustee of the Second Staff Remuneration Trust. In my judgment, it is, for the following reasons:

(a) Equity First is, of course, the trustee of the Second Staff Remuneration Trust, but that is a trust of the shares in Stratton 17 (which holds the Estate) and not of the Estate itself.

(b) It seems to me that Stratton 17 can, properly, "swap" the Estate for something else. Here, there is no "swap" as such, merely a purported transfer to IVM PCC. Clause 2.2 provides:

> "The Transferee [i.e., IVM PCC] acknowledges that it shall hold the Assets on behalf of the Company in a fiduciary and representative capacity."

Assets – as is clear from Recital (A) and the schedule to the deed – comprise (at least in part) the Estate. The Company is a term not defined in the deed, although Stratton Insurance Limited signs as "Company". I do not consider that this use of the word designated Stratton Insurance Limited as the "Company". IVM PCC is the subject of The Bhaur Purpose Trust. It seems to me that "Company" is actually intended to be a reference to IVM PCC, although I fully recognise that it is odd to use "Transferee" and "Company" to refer to the same entity. Nevertheless, that is my conclusion.

(c) I do not consider that – on a gratuitous transfer, which this is – it is possible for the transferee (here: IVM PCC) to take free of the limits on the transferor's (here: Stratton 17) title. In other words, the equitable interest transferred is <u>not</u> the Estate, but the Estate <u>subject to the Second Staff Remuneration Trust</u>. Whether that is a transfer or a sub-trust does not, for present purposes at least, matter. What matters is that although the Estate has transferred, it is imprinted with the terms of the Second Staff Remuneration Trust, and IVM PCC cannot (or cannot properly) deal with the Estate save in a manner consistent with the Second Staff Remuneration Trust.

66. On 24 September 2014, Appleby made a declaration of trust in respect of the IVM 020 Purpose Trust. I find this document puzzling, in that it is largely repetitive of the deed concerning The Bhaur Purpose Trust described above, save that:

(1) The name of the trust is different. Whereas the earlier trust is named The Bhaur Purpose Trust, this trust is called the **IVM 020 Purpose Trust**.

(2) The purpose of the trust is more widely stated. The trust deed states (at clause 3.1) that the purpose of the trust is to hold "shares and other securities issued by [IVM PCC] and to deal therewith in all respects as if beneficially entitled thereto", which is the same as in The Bhaur Purpose Trust. But there is also a second purpose articulated in clause 3.2, which is to enter "into the Option Agreement pursuant to which the Trust may hold the shares of the [IVM 020] as described in the Option Agreement, after the exercise of the option, and to deal therewith in all respects as if beneficially entitled thereto."

67. Mr Anderson, QC suggested that the purpose of this further trust deed was to rename the trust and add the additional purpose described above. On that basis, this was a disguised variation. Because I am conscious that the full story is not before me, I treat this trust deed with a measure of caution. Certainly, if the option in the Option Agreement were relevant – which it does not appear to be on the facts of the present case – I would be disinclined to attach legal force to this trust deed without establishing with some confidence that it was a properly sanctioned variation of The Bhaur Purpose Trust described above. As it is, the point does not appear to matter, and I consider it no further.

(10) Further recap

68. My conclusions at this stage are as follows:

(1) The Second Staff Remuneration Trust remained in being, as I have described.

(2) The New Structure – as I have called it – was in essential terms ineffective to change the basis or terms of the Second Staff Remuneration Trust. The New Structure was – as I have described – either void or of no substantive effect.

(3) Whilst it seems pretty clear that The Bhaur Purpose Trust was a further iteration or development of the New Scheme, I have concluded that it was effective, but only as a sub-trust to the Second Staff Remuneration Trust. I have no idea what the subjective intentions of the relevant parties were, but that (as I have concluded) was the effect.

(4) The Bhaur Purpose Trust was, evidently, intended to be replaced by the IVM 020 Purpose Trust. I am prepared to proceed on the basis that the Bhaur Purpose Trust was so replaced, and shall refer, in this Judgment, to the IVM 020 Purpose Trust. But, for the reasons I have given, if they are material, I intend to consider very carefully the validity of any of the changes wrought by this replacement, as I consider the process entirely untransparent and the documentation incomplete.

(11) Estera and the Estera Purpose Trust

69. At some date in 2016, part of Appleby was acquired by Estera, and became Estera Trust (Mauritius) Limited (**Estera**). I understand there was a "management buy-out" of a part of Appleby's business, and that this business was carried on by Estera.

70. It is no doubt for this reason that, on 2 November 2016, Estera entered into a Declaration of Trust on identical terms to the IVM 020 Purpose Trust. Estera was named as the Original Trustee and the Bhaur Family were named as Enforcers of the trust and accepted this nomination. There were other documents also executed in the context of this change of trustee.[21]

71. Estera also appears to have intended to notify the Mauritian Financial Services Commission that the participative share issued by IVM PCC had been transferred from Appleby in its capacity as trustee of the IVM 020 Purpose Trust to Estera in its capacity as trustee of the new purpose trust – which I shall refer to as the **Estera Purpose Trust**.

[21] Estera and ANS Limited also entered in a deed of novation in respect of the nominee and option agreements dated 24 February 2014.

(12) Removal of Estera and a *volte face*

72. On 9 November 2016, Estera was removed as the management company of IVM PCC. On 18 November 2016, Estera informed the Bhaur Family that the management and administration of IVM PCC had been transferred to another management company. On 12 January 2017, Estera wrote to the Bhaur Family, informing them that Estera would cease to provide trustee services and trust administration services from 12 February 2017 in respect of the Bhaur Family trusts Estera was involved in.

73. Estera effectively left the scene, and communications regarding the Scheme were, from hereon, written by Messrs Rutherford and James O'Toole on behalf of Equity First, which came back into prominence. Equity First was, of course, the trustee under the Second Staff Remuneration Trust, with Equity First (at this point in time) as Protector. The substance of these communications was that the Second Staff Remuneration Trust had not been operating in accordance with its terms, and that it was imperative that the trust operate in a lawful manner according to its terms. Thus – purely by way of example of the tenor of these communications – on 11 March 2018, Mr James O'Toole sent an email to a Ms Leanne Hathaway. **Ms Hathaway** is someone whose involvement in these matters I shall have to return to. At the time of this communication, she was employed by a firm of solicitors known as Edward Hands & Lewis. For present purposes, all that needs to be known is that Ms Hathaway was in this instance, and had in other instances been, retained to advise and/or act for the Bhaur Family. The email sent by Mr James O'Toole read as follows:

> "Dear Ms Hathaway
>
> THE SAFE INVESTMENT MANAGEMENT EMPLOYEE BENEFIT TRUST
>
> I write further to your exchange of correspondence with Mr James Rutherford in this matter one year ago.
>
> I have been appointed a director of this trust company whilst Mr Rutherford takes an extended leave of absence and am ensuring that all its trusts are compliant with applicable laws and HMRC policies. My main priority is to collect in all assets of trusts such as this one and to apply all trust value for the benefit of employees in accordance with the terms of the trust deed. I would point out that this does not necessarily need to be an adversarial process and I very much hope I can count of the co-operation of your clients in ensuring this employee trust is used within the letter and spirit of the law under which it was created.
>
> It is of concern to me that no benefits have been paid to junior employees in the ten years since this trust was created. As I was involved in the provision of the taxation advice for Aston Court Chambers LLP in the creation of this structure, I have documents signed by your clients clearly stating that they knew value had to be applied for employees and that the value within the trust was not theirs and ought not to be treated as such. Having read the exchange of correspondence between yourself and Mr Rutherford last year it seems fair to say your clients appear reluctant to allow any of the value within the trust to be paid to junior employees. This is in complete contradiction to the tax advice provided and agreed to. This reluctance is a cause of serious concern to me since taxation reliefs were claimed and tax benefits obtained by your clients. These benefits evidently came with conditions (of which your clients were made aware). Failure to satisfy the conditions of the relevant statute…constitutes an abuse of the statute. Refusal to satisfy the terms of the statute constitutes something much more serious, I suspect. I respectfully suggest you make your clients aware of this and the potential consequences whilst discussing this email with them.

74. In effect, what Equity First/Aston Court were doing, from early 2017, was (at least according to their lights) administering the Second Staff Remuneration Trust in accordance with its terms. That involved, at the very least, ensuring that the Estate (including any income derived) was properly accounted for and distributing those assets for those person entitled in accordance with the terms of the Second Staff Remuneration Trust. In both of these regards, the terms of the Second Staff Remuneration Trust had not been paid regard to previously.

75. In a letter dated 6 January 2017, Equity First proposed making payments to the Bhaur Family, out of income, not capital, which Equity First considered was permissible under the terms of the trust:

> "So long as [Safe Investments UK] is a valid ongoing commercial concern, it is sensible not to dissipate so much of the capital of the trust as to remove its value to the Company going forward. Our internal approach is to preserve the capital but payout the growth on trust investments unless/until the business comes to an end or there are other extenuating circumstances. This usually equates to employee payments of between 2-3% per year approximately. Given the length of time which has elapsed since we took over the management of this trust and the fact that no benefits have been made payable to any employee as yet, we are considering allocating 10% of the trust capital immediately to eligible employees. This can take the form of capital payments to reward third party employees and monthly income payments to employees connected to the shareholders.
>
> According to the information we have on file, the following people are connected employees/directors:
>
> - Mr Amarjit Bhaur
> - Mrs Joginder Bhaur
> - Mr Mandeep Bhaur
> - Mr Baldeep Bhaur
>
> We hold no information on unconnected employees.
>
> Unless there is information of which we are unaware (and subject to your responses to this letter) we will shortly pass a trust resolution to make payments as follows:
>
> - £120,000 to Mr Amarjit Bhaur
> - £120,000 to Mrs Joginder Bhaur
> - £120,000 to Mr Mandeep Bhaur
> - £120,000 to Mr Baldeep Bhaur
>
> These payments constitute income benefits because they are designed to cover all years since 2007 when income benefits were not paid. They will be clearly referenced to be made as a reward for services rendered to the Company in the relevant trading year. As Trustees, we think a monthly repayment to each senior employee of £1,000 pcm is appropriate historically. Multiplied by 12 months each year and broadly 10 years since the creation of the trust, these are the figures that result (before pro rating). In addition, these payments will be ongoing. Moving forward however, they will be increased to take account of inflation since 2007. Each connected employee will be paid the inflation adjusted equivalent of £1,000 per month.
>
> These awards taking account third-party employees we'll also make provision for once we receive their details from you.

The provision of these rules may well require liquidation of some trust assets. We will keep you appraised of this."

76. The response – from Edward Hands & Lewis – was a firm disagreement with what was being proposed:

"Our client would note that they do not have recollection of being advised by Aston Court Chambers LLP at the point of creation that benefits "must be paid to employees" in the context referred. Our clients are well aware that any benefits provided by the Trust must be permitted by the Trust Deed and, therefore, would be to employees or beneficiaries as defined by reference to them. However, there was never an intention that the Trust Funds be paid out in the short term. The Trust was intended to be a long term structure.

…

Our clients agree with your view that it is not sensible to erode the capital value of the Trust so as to remove value going forwards.

They not the proposal that investment growth be distributed. However, in the circumstances, this would effectively erode the Trust capital. The proposal is to allocate £480,000 of Trust Capital to be distributed to 4 named beneficiaries. This will require the sale of property in order to realise the funds required. Our clients, who are knowledgable with regards to the Trust property, consider this to be a poor investment decision.

…

By making the proposed distributions, a substantial proportion will be payable to HMRC as tax and national insurance. The beneficiaries currently have other sources of income which utilise their tax allowances and lower tax rate bands. A distribution at this stage would therefore erode the Trust capital and provide little benefit to the beneficiaries. They have no need or desire for the proposed distributions and strongly object to the proposals.

…

The Employee Benefit Trust was established to provide a long term structure to provide for future benefits for Employees. The Company considered other options at the time of its creation and the reasoning behind the Trust would be that it could provide a long term structure, with future rewards being made when the employees were no longer rewarded directly by the Company. There is no requirement for that at this stage.

The proposal to allocate £120,000 to key individuals is counter-productive as they would then be demotivated to work for direct remuneration. This is contrary to the commercial purpose of the Trust."

77. By a resolution dated 30 January 2017, Mr Rutherford, acting for Equity First, resolved, amongst other things:

(1) To make the distributions to the Bhaur Family identified above.

(2) To make various distributions to "unconnected employees".

(3) To offer "any and all assistance to HMRC in providing information concerning the Trust and (if necessary) realizing Trust assets to settle the Part 7A tax charges".

(4) To dissolve the investment management company/vehicle IVM PCC and to take all assets of the company directly into the Trust.

(5) To approach the Protector regarding alteration of the Trust Deed to appoint a UK charitable beneficiary that could benefit at any time from the Trust.

78. The Bhaur Family continued to assert concerns and disagreement about these steps; and refused to accept the benefits that the Trust wanted to confer on them. In order to bring the Scheme to an end, Equity First caused the Trust to vest and come to an end and appointed the Fourth Defendant – the **NSPCC** – as the recipient of all funds in the Estate not being paid to employees. It is fair to say that, as in so many other instances, the documentation with regard to this appointment out is unsatisfactory and incomplete.

(13) Final recap

79. I should be clear that nothing in this Section is intended to anticipate the thinking of anyone – and in particular, the Bhaur Family – as regards the Scheme. Nor is there any intention to anticipate questions of validity as regards the final acts of Equity First as just described. Mr Anderson, QC made quite clear that the appointment out to the NSPCC was challenged as invalid, and I will consider that question in due course.

80. The purpose of this Section has simply been to describe the Scheme and how it was set up, so as to put in place a framework by way of which the Bhaur Family's contentions can be considered. Accordingly, the only points to note are:

(1) The "re-emergence" of Equity First and the Second Staff Remuneration Trust to prominence, having previously subsided from view.

(2) The dismantling of the Estera Purpose Trust and the departure of Estera. It is clear from the documents that Estera was seeking to resist this, but ultimately failed to do so.

Both points confirm the "sub-trust" analysis set out above.

C. THE TRIAL

(1) The parties before the Court

81. As I have described, this was a claim brought by the Bhaur Family and Safe Investments UK for the effective unwinding of the Scheme. The claim was brought against five defendants:

(1) The Fourth Defendant – the NSPCC – is the beneficiary of the appointment out of the Second Staff Remuneration Trust. Entirely unsurprisingly, even if the Scheme were to be found by me to stand, the Bhaur Family contend that this appointment out is, and always was, invalid. The NSPCC, of course, knew nothing of the Scheme, and the appointment out to it will have come out of nowhere. Entirely appropriately, the NSPCC has remained a party to these proceedings, but has indicated that it intends to play no part in these proceedings, and will be bound by the result. As the description of events in Section B makes clear, the NSPCC can have had no disclosure to provide, and it has behaved entirely responsibly

throughout this litigation, rightly recognising that it cannot assist, but that it must be bound by any result that I reach.

(2) Equity First, the First Defendant, was, as I have described, the trustee of the Second Staff Remuneration Trust. Since, as I have found, and contrary to appearances, the Second Staff Remuneration Trust remains in being, it is entirely right and appropriate that Equity First be a party. Although regularly joined, Equity First has played no substantive role in these proceedings.

(3) Stratton 17, the Second Defendant, held the Estate under the Second Staff Remuneration Trust. Again, the reason for the joinder of Stratton 17 is evident. Stratton 17 also played no substantive role in these proceedings.

(4) The Third Defendant is Mr O'Toole. As such, he is one of the brains behind the Scheme. Mr O'Toole has played a minimal role in these proceedings, but has (so I was told by Mr Anderson, QC) selectively disclosed documents through the offices of the Fifth Defendant, IVM PCC.

(5) IVM PCC, the Fifth Defendant, is – at least so far as Cell 020 is concerned – the subject of The Bhaur Purpose Trust, which then became the IVM 020 Purpose Trust and then the Estera Purpose Trust. It is the present holder of the Estate, although I have found it holds under a sub-trust which is subordinate to the Second Staff Remuneration Trust. IVM PCC went into receivership in Mauritius by a notice dated 6 August 2018, and is under the control and operation of the Mauritian **Official Receivcr**, Mr Vasoodayven Virasami. Mr Virasami has given two witness statements in the proceedings – **Virasami 1** and **Virasami 2** – but was not called to give evidence before me. IVM PCC was represented before me by a team lead by Mr Michael Ashe, QC.

(2) Representation

82. There were, thus, only two parties represented before me at the trial – the Bhaur Family, represented by a team lead by Mr Anderson, QC; and IVM PCC, represented by Mr Ashe, QC and his team. It will be apparent – and Mr Ashe, QC readily accepted this – that IVM PCC is very much a "bit-part player" in the Scheme that I have described, with little involvement in its main transactional stages. I would at this stage wish to place on record my gratitude to Mr Ashe, QC, and his team for the careful way in which they have conducted these proceedings on behalf of IVM PCC, particularly in light of the additional burdens that I came to impose on Mr Ashe, QC, which I shall come to describe.

83. Mr Anderson, QC, for his part, was acutely conscious that the absence of opposition to his clients' claims was in no way an advantage. Indeed, given that a court does not accept without more a person's assertion of mistake, the absence of anyone to test the Claimants' case was – as Mr Anderson, QC recognised – a real disadvantage.

84. Of course, it might be said that Mr Ashe, QC and IVM PCC might be able to fulfil the role of an opponent to the Claimants' case. There were three problems with this:

(1) Mr Ashe, QC – quite properly representing his client only – was understandably reluctant to assume such a role. The Official Receiver's position was that he was indifferent to much of the Claimants' case and was only concerned that any trust

monies were properly treated and accounted for. At paragraph 5 of Virasami 1, the Official Receiver said this:

> "…The Official Receiver is concerned to ensure that any lawfully constituted trust is protected and not set aside unless there is a valid basis under the applicable governing law. By making this statement and providing available documents…the Official Receiver acts to assist this Honourable Court in its deliberations by ensuring that relevant information in the Receiver's possession is made available."

I am very grateful to the Official Receiver for this assistance; but, as Mr Virasami's statement makes very clear, it is assistance that is – inevitably, given IVM PCC's limited role – tightly constrained.

(2) Mr Anderson, QC, was concerned that those persons party to the proceedings (like Mr O'Toole, the Third Defendant) but not participating might use the offices of IVM PCC to distort the litigation process before me, in particular by making limited and partial (in both senses of the word) disclosure. To some extent, therefore, there was a concern on the Claimants' part that IVM PCC might be used as the unwitting tool of persons who ought to be – but were not – before the Court. To an extent, there is force in this. Mr O'Toole has undoubtedly disclosed documents through IVM PCC, and that disclosure has (as I have found) been less than comprehensive. It is difficult to see what IVM PCC or Mr Ashe, QC could have done about this. Certainly, they cannot, of themselves, make up any difficiencies in the documentation and could only pass that material on.

(3) Mr Anderson, QC's concerns were shared by His Honour Judge Cooke, who articulated them in a judgment handed down on 22 October 2020. That judgment chiefly concerned the role of the Official Receiver. Judge Cooke said this:

> "2. My view is that the Fifth Defendant here has a proper role which is, essentially, only to act as a neutral party, to put matters before the court which are within its knowledge and may be relevant to the court's decision. That is a position that, it seems to me, the Fifth Defendant was adopting for previous hearings I have had and, certainly, at the last case management conference.
>
> 3. The documents that I have seen subsequent to that, I have to say, seems to me to be adopting a radically different position. They seem to me to give the clear impression that the Fifth Defendant is seeking to argue for a position, and that the position that it is seeking to argue for is, in effect, that of the Third Defendant, Mr O'Toole and his other entities. As I have said, the length and the tenor of the pleading is not at all, in my view, consistent with the professed neutrality of the Official Receiver, it is very much more indicative, it seems to me, of a positive case being put forward, which is that which Mr O'Toole might, presumably, be minded to produce.
>
> 4. I am also very concerned by the fact that it is completely apparent, it seems to me, from the documents that have been filed, that the Official Receiver is in very close contact through his advisor, Mr Levy, with Mr O'Toole, Mr Levy having previously been Mr O'Toole's advisor, such that the documents that are being provided are those that are, in effect, volunteered by Mr O'Toole through Mr Levy to the Official Receiver. Instead of simply producing those, the Official Receiver is then, it seems to me, taking on the task of arguing for the position represented

by those documents and the characterisation of them put forward by, presumably, Mr O'Toole.

5. That, in my view, goes beyond the legitimate role of the Official Receiver. I accept, of course, that insofar as the fifth defendant holds assets in a fiduciary capacity, it requires to know what to do with them, and it requires the court to come to a conclusion that, in effect, tells it what to do with them. It has a role, it seems to me, to put information before the court insofar as it is able to do so, to enable the court to reach that conclusion and, as we canvassed in submissions, if it is aware of any other potentially interested parties, to flag that up so that the court may consider joining them so that a conclusion is reached.

6. I think the nature of its position is, as Mr Ashe said in his submissions, that if the court's decision does not produce a clear outcome, the Official Receiver or the fifth defendant would need to ask the court for directions. If it did that, it would be doing so in a neutral capacity, providing what information it could and asking the court to make a ruling that gave a direction as to what to do. That, in my view, is what it should, in effect, be doing at present and it is, as far as I can see, I am afraid, not doing that.

7. I am disturbed by what I can see from the way in which these matters have unfolded, and I think there is a very real risk that Mr Anderson may be right when he suggests that Mr O'Toole is, in effect, using the Fifth Defendant, through the offices of the Official Receiver, as his own front for presenting the case that he might wish to do. That, I think, would be wholly inappropriate and if that is what is happening, I wish to record that, in my view, that is an inappropriate proceeding by the Official Receiver, and it is not something the court ought to countenance."

(3) Evidence

85. This was how the case presented to me at the pre-trial review. At the pre-trial review, I was concerned:

(1) First, to ensure that the Claimants' case – which was clearly factually very complex – was fully and properly presented to me, so that I was in a position to evaluate the extent to which the Bhaur Family had been mistaken and/or deceived in their entry into and participation in the Scheme;

(2) Secondly, to ensure that the Fifth Defendant's role was a proper one, and that the Fifth Defendant did not "overstep the mark" in the manner Judge Cooke had articulated.

86. At the pre-trial review, I directed that evidence be given in a relatively unusual way. Because it would not be appropriate for Mr Ashe, QC to cross-examine the Bhaur Family (even if he were instructed to do so – which he was not), I directed that Mr Anderson, QC open the case very fully on the documents, but with the relevant witnesses in the witness box whilst he was doing so. In that way, Mr Anderson, QC (or I) would be able to elicite evidence from the witnesses as and when appropriate, in light of the documents being opened. This process took most of five days, between 26 and 30 April 2021. I gave Mr Ashe, QC a limited ability to cross-examine during this process. At the end of the process (on 30 April 2021) Mr Ashe, QC cross-examined the witnesses – that is Mr Bhaur, Mandeep and Baldeep, Mrs Bhaur having no relevant evidence to give – on topics or bullet points that I identified. In this way, it was possible to test the evidence of the

witnesses in a manner that Mr Anderson, QC, could not. Because it was quite clear that the Bhaur Family was a close-knit one, in which Mr Bhaur, Mandeep and Baldeep took decsions to a degree collectively, although Mr Bhaur was, throughout, accorded great respect by his sons and was very much in charge, I permitted Mr Bhaur, Mandeep and Baldeep to give evidence together, at the same time, and they were cross-examined on this basis by Mr Ashe, QC.

87. I should place on record my very great indebtedness to both Mr Anderson, QC and Mr Ashe, QC for the very capable way in which they assisted the Court during this unusual process. I also wish to say that whilst I entirely understand Judge Cooke's concerns about the role of the Fifth Defendant, I regard the manner in which the Fifth Defendant has conducted itself before me as exemplary.

88. As I have said, I saw Mr Bhaur, Mandeep and Baldeep give evidence over the course of five days, although for much of this time they (like me) were listening to Mr Anderson, QC, explain the documentary history. Nevertheless, I was greatly assisted by their evidence, which was honestly given and with a clear desire to assist the Court. I should, briefly, take this opportunity to identify the witness evidence that was before the Court:

(1) Mr Bhaur's evidence was principally contained in his second witness statement, Bhaur 2, which I have already referred to. Mr Bhaur's first witness statement (**Bhaur 1**) was essentially superseded by Bhaur 2, and tended not to be referred to.

(2) Mandeep and Baldeep each gave a single witness statement, **Mandeep 1** and **Baldeep 1**.

(3) Mr Virasami, as I have described, gave two witness statements (Virasami 1 and 2), but did not give evidence. His evidence was very much confined to an "after the event" description of the relevant matters, and I accept it in that light.

(4) Phase 2 of the trial

89. The trial was adjourned part heard to 20 and 21 June 2021. Between the April phase and this later phase, a number of steps were taken:

(1) After the first part of the trial, in April, I circulated to the parties a preliminary draft version of what is now Section B of this Judgment. I did so because it seemed to me important that the questions of mistake and misrepresentation be addressed by the parties in the context of a clear understanding of my thinking in relation to the Scheme. It also enabled the parties to identify and make submissions in relation to errors in my analysis before formally handing down judgment. Naturally, nothing in this process is intended to limit the parties' rights of appeal. It is simply that – given the volume of documentation and the gaps in that documentation – it seemed to me appropriate that my initial thinking be disclosed to the parties.

(2) In advance of the second phase of the trial, I also considered it appropriate to at least draw these proceedings to the attention of Her Majesty's Revenue and Customs (**HMRC**). I directed the Claimants to do this, and HMRC indicated that they did not wish to participate.

(3) The NSPCC reiterated their disinclination to participate in the trial, but recorded their interest in seeing any draft judgment circulated by me. Accordingly, I ensured that the preliminary draft was circulated to the NSPCC, and this Judgement was circulated to the NSPCC (as well as the other active participants in the trial) in draft before it was handed down.

90. In the event, final submissions were concluded within a day, on 20 June 2021. The draft judgment was circulated to the parties on 29 July 2021.

D. THE PLEADED CASE ON MISTAKE

91. As I have described, the Claimants contend that the Scheme – as I have termed it – should be avoided by reason of the Claimants' fundamental mistake, induced by the fraudulent misrepresentations of Mr James O'Toole and the others that were involved in promoting the Scheme.

92. Although the term "Scheme" is mine, and although the Particulars of Claim set out the evolution of the Scheme in great detail, the Claimants' case is that the Scheme was unlawful from the first and that it was dishonestly promoted by Mr James O'Toole – and no doubt others – to Mr Bhaur, who was induced to participate in it thinking that it was an honest and suitable scheme for him and his family. It will be necessary to consider the development of the Scheme throughout, but really only in order to understand the Bhaur Family's statement of mind at the outset. As Mr Anderson, QC stressed, there is no plea that the Scheme, having been entered into by the Bhaur Family under, as it were, false pretences, was subsequently affirmed by the Bhaur Family. It seems to me that I must consider the Claimants' claim as pleaded, and that plea is, as I have indicated, something of an "all or nothing". The Scheme was entered into from the outset under a fundamental mistake, and that mistake remained and remained effective on the minds of the Bhaur Family throughout the duration of the Scheme until matters came to the unfortunate end that I have described.

93. More specifically, the Particulars of Claim plead as follows:

(1) First, it is said that the Scheme, whilst capable of being lawful, was promoted by Mr James O'Toole for a purpose that was not lawful. The Particulars of Claim plead:

> "8. Aston Court…operated a scheme known as the Asset Liberation Solution (the Solution). This scheme involved setting up and employee benefit trust (EBT) for the purpose of incentivising and remunerating employees. If operated lawfully for that purpose, the Solution was capable of sheltering assets placed into the trust from capital gains and inheritance tax.
>
> 9. However, the solution could not lawfully be used to shelter assets from such taxes by putting them offshore for the benefit of their original owners, under the guise of incentivising and remunerating employees."

(2) In effect, the Scheme was <u>capable</u> of being promulgated for lawful purposes, but it was an unlawful (tax evasive) scheme if not used for those purposes. The Scheme was, however, represented as suitable for the Claimants and Aston Court was

represented as being expert in making a representation of that kind.[22] These statements were neither correct nor true,[23] and were made dishonestly.[24] "Aston Court persuaded the Claimants to enter into the Solution without caring whether it was appropriate for them but motivated rather by their own interests in earning fees."[25]

(3) One of the particulars of Aston Court's dishonesty is paragraph 16(c), which pleads as follows:

> "Aston Court…subsequently provided false explanations of the Claimants' motives for entering into the Solution without having any basis for believing those explanations to be true. The persons who wrote these communications knew that the Claimants' purpose was inheritance tax planning, since that was the only purpose which the Claimants' ever communicated to Aston Court. It is to be inferred that they wrote these communications with [the Third Defendant's] knowledge, encouragement or assent because he wished to provide a written record of fake purposes (staff incentivisation)…"

In various sub-sub-paragraphs, these "false explanations" are then set out. They are considered further below. In a sense, this sub-paragraph provides the crux for the entire case for avoiding the Scheme. It is perfectly possible that these were, indeed, false explanations and that Aston Court were indeed dishonest in making them. But it does not follow from this that the Claimants' motives were falsely described. It is quite possible that the Claimants:

(a) Wanted to shelter their money from inheritance tax; and

(b) Were prepared to sign up to false statements in order to achieve that end.

That, of course, in no way diminishes the dishonesty of Aston Court: however, it presents the Claimants' case of fundamental mistake in a very different light. As I say, this is the crux of the Claimants' case, and a matter which I will need to consider with great care.

(4) Paragraphs 17 and 18 of the Particulars of Claim plead that the Solution (as the Particulars of Claim call it) or the Scheme (as I call it) was unsuitable for the Claimants; that it was promulgated and administered by dishonest people; and that the Claimants were thereby innocently exposed to or mixed up in a fraudulent and dishonest scheme. For these reasons, they entered into the Scheme under a fundamental mistake (which, if it matters, was fraudulently induced).

(5) That state of affairs effectively subsisted throughout the pendency of the Scheme.

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[22] See paragraph 11 of the Particulars of Claim.

[23] See paragraph 14 of the Particulars of Claim.

[24] See paragraph 16 of the Particulars of Claim.

[25] Paragraph 16 of the Particulars of Claim.

E. THE LAW

(1) Introduction

94. I was not addressed at any great length on the law. That is because the parties – and the Claimants in particular – quite rightly focussed on the facts. Nor was the law particularly contentious. The following paragraphs contain a far more thorough articulation of the law than appeared in the parties' submissions. I include it because the case-law assists not so much in articulating what the law is but how it has been applied in other cases. It is, therefore, a helpful exercise in calibration. At the end of the day, whether there is a mistake or not is a question of fact, but – for the reason I have given – a reasonably detailed exposition of the case-law is called for.

(2) *Pitt v. Holt*

95. The leading case on the law regarding the setting aside of voluntary dispositions is the Supreme Court's decision in *Pitt v Holt*.[26] The judgment of Lord Walker, delivered on behalf of the Supreme Court, comprehensively considered the development of the jurisprudence on equitable mistake, and concluded that first instance decisions demonstrated the uncertain state of the law. Lord Walker simplified the test for equitable mistake, finding that the court's equitable jurisdiction to set aside a voluntary disposition on grounds of mistake was exercisable whenever there was a causative mistake of sufficient gravity, which it would be unconscionable to leave uncorrected.

96. Lord Walker made clear (at [104] – [105]) that mere ignorance, mere inadvertence or misprediction did not constitute causative mistakes. However, forgetfulness, inadvertence or ignorance could lead to a false conscious belief or tacit assumption, which the law would recognise as a relevant mistake and (at [108]), Lord Walker stated that the court must not shrink from drawing the inference of mistaken conscious belief or tacit assumption, where the evidence supported this conclusion. Lord Walker drew a distinction (at [109]) between a misprediction that relates to some possible future event and legally significant mistake, which would normally relate to some past or present matter of law or fact, though he accepted there may be cases where the boundary between misprediction and mistake is unclear. He also said (at [114]) that the court could find that a relevant mistake had resulted due to the carelessness of a person making a voluntary disposition, unless the person had deliberately run the risk, or must be taken to have run the risk, of being mistaken.

97. At [122], Lord Walker expressed the view that a causative mistake of sufficient gravity "will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction." In coming to this conclusion, Lord Walker approved the approach of the Court of Appeal in *Ogilvie v. Littleboy*,[27] a judgment handed down in 1897, which was endorsed on appeal by the House of Lords in *Ogilvie v Allen*.[28] In the Court of Appeal, Lindley LJ stated that where there was no fraud, undue influence or mistake induced by those who derive benefit from a gift, a voluntary disposition could only be set aside if the donor "was under some mistake of so serious a character as to render it unjust on the part

[26] [2013] 2 AC 108.
[27] (1897) 13 TLR 399.
[28] (1899) 15 TLR 294.

of the donee to retain the property given to him."[29] Lord Walker agreed that the court was required to consider both the seriousness of the mistake and whether it would be unjust for the court to refuse a remedy, when assessing whether it should exercise its jurisdiction to set aside a transaction.

98. Guidance on how the courts should carry out these assessments was provided at [125-128] of Lord Walker's judgment. At [126], Lord Walker provided guidance on assessing the gravity of the mistake and unconscionability:

> "The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other finding of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion...The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus...on the facts of the particular case."

99. On the question of unconscionability, Lord Walker explained further (at [128]) that the court must carry out an objective evaluative judgment of the mistake and whether it would be unconscionable or unjust to leave it uncorrected, considering "in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences." Lord Walker also emphasised that the court was obliged (as was often the case with equitable relief) to "form a judgment about the justice of the case."

100. Lord Walker also specifically addressed whether a mistake as to tax consequences of a transaction alone could be a "causative mistake of sufficient gravity", and concluded that there was no basis for treating a mistake as to tax differently from any other mistake. He held that a grave mistake could arise from a conscious belief or tacit assumption that a transaction would have no adverse tax consequences, and that the Appellant in *Pitt v Holt* had made a sufficiently grave mistake when settling a trust that did not comply with legislative requirements that would have avoided a tax liability arising. Lord Walker found in particular that the trust could have complied with those requirements without any artificiality or abuse of the tax relief granted by the legislation. As such, the test for rescission had been satisfied, and the Supreme Court was willing to set aside the trust on grounds of mistake.

101. However, Lord Walker did indicate (at [135]) that the court may not grant relief where a claimant seeks to avoid transactions that were entered into as part of an artificial tax avoidance scheme:

> "...In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy. Since the seminal decision of the House of Lords in *WT Ramsay Ltd v. Inland Revenue Comrs*, [1982] AC 300 there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures. But it is unnecessary to consider that further on these appeals."

[29] At 400.

(3) Subsequent cases

102. A number of first instance decisions have considered and applied the test for equitable mistake set out by Lord Walker in *Pitt v Holt*. In *Kennedy v Kennedy*,[30] Etherton C summarised the key principles to be taken from *Pitt v Holt* at [36] of his judgment as follows:

> "(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.
>
> (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
>
> (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.
>
> (4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."

103. These principles have been endorsed in a number of subsequent cases, such as in *Freedman v. Freedman*,[31] *Rogge v. Rogge*[32] and *Mackay v. Wesley*.[33]

104. Morgan J also summarised the principles from *Pitt v Holt* that he considered he was required to apply when determining whether to exercise the court's jurisdiction to set aside a voluntary disposition on grounds of mistake, at [25] of his judgment in *Van der Merwe v. Goldman*:[34]

> "(1) A donor can rescind a gift by showing that he acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the gift: [101], quoting *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400;

[30] [2014] EWHC 4129 (Ch).
[31] [2015] EWHC 1457 (Ch).
[32] [2019] EWHC 1949 (Ch).
[33] [2020] EWHC 1215 (Ch).
[34] [2016] EWHC 790 (Ch) at [25].

(2) A mistake is to be distinguished from mere inadvertence or misprediction: [104];

(3) Forgetfulness, inadvertence or ignorance are not, as such, a mistake but can lead to a false belief or assumption which the law will recognise as a mistake: [105];

(4) It does not matter that the mistake was due to carelessness on the part of the person making the voluntary disposition unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong: [114];

(5) Equity requires the gravity of the mistake to be assessed in terms of injustice or unconscionability: [124];

(6) The evaluation of unconscionability is objective: [125];

(7) The gravity of the mistake must be assessed by a close examination of the facts which include the circumstances of the mistake and its consequences for the party making the mistaken disposition: [126];

(8) The court needs to focus intensely on the facts of the particular case: [126];

(9) A mistake about the tax consequences of a transaction can be a relevant mistake: [129] – [132];

(10) Where the relevant mistake is a mistake about the tax consequences of a transaction, then: "in some cases of artificial tax avoidance, the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy": [135];

(11) It is not pointless, nor is it acting in vain, to set aside a transaction and to remove a liability to pay tax, even where that is the principal, or the only, effect of the settling aside: [136] – [141]."

105. These principles were endorsed by the court in *Smith v. Stanley*[35] and *Clarke v. Allen*.[36]

(4) Other relevant considerations articulated in the case law

106. There are a number of other relevant considerations that have been developed in the first-instance case law, which are worth emphasising.

(a) Even in unopposed cases, the court must be satisfied there is a mistake

107. Even where the claimant's application to set aside a transaction is essentially unopposed, the court must still be satisfied that the claimant has proved the facts necessary to establish that the court has the jurisdiction to set aside the impugned transactions and that it is appropriate for the court to grant relief. See for example, Norris J's observations in *Wright v. National Westminster Bank plc*;[37] and Judge Hodge, QC's comments in *Hartogs v. Sequent (Schweiz) AG*.[38]

[35] [2019] EWHC 2168 (Ch).
[36] [2019] EWHC 1193 (Ch).
[37] [2014] EWHC 3158 (Ch) at [10].
[38] [2019] EWHC 1915 (Ch) at [4].

(b) The relevant mindset is that at the time of the disposition

108. The claimant must have been operating under a distinct mistake at the time that claimant made the voluntary disposition it is now sought to rescind. As such, the court is required to inquire into the mindset of the claimant at the moment he or she entered into the transaction being avoided, though evidence of the claimant's mindset at some subsequent time may allow the court to form a view as to whether the claimant was operating under a mistake at the relevant time. In *Wright v National Westminster Bank plc*,[39] for example, Norris J considered the evidence provided by an independent financial adviser as to the claimant's state of mind two months after he had entered into the transaction he sought to set aside as indicative of the claimant's state of mind at the time he entered into the transaction. In that case, the independent financial adviser's evidence that the claimant clearly thought his wife could benefit from the trust he had settled supported the claimant's own evidence that he had mistakenly considered this to be the case at the time he settled the trust. Similarly in *Rogge v Rogge*,[40] the court was willing to set aside a number of voluntary transfers to a trust made between 2009 to 2015, as the court formed the view that the claimants were still labouring under the same relevant mistakes throughout that period. However, once the claimants became aware that the circumstances were not as they had previously thought them to be, any further payments could not have been said to have been made under the original operative mistakes.

(c) The need for causation

109. The mistake in question has to be causative. Where the courts have found that a claimant was operating under a causative mistake, they have often made explicit findings that the claimant would not have entered into the transaction in the form he or she did, had he or she been aware of the mistake. In *Kennedy v Kennedy*,[41] for example, Etherton C held that the trustees would not have executed a deed of appointment, if they had been aware that the deed made provision for the transfer of shares, in circumstances where the claimant had intended to retain the shares in the trust in order to avoid a capital gains tax liability. Similarly, in *Van der Merwe v Goldman*,[42] Morgan J formed the view that the claimants would not have pursued the idea of settling their property in the way they had on 24 and 27 March 2006, if they had been aware of legal changes that took effect on 22 March 2006, which meant that the transactions caused a substantial tax liability. The purpose of the transactions had been to avail of certain tax advantages which the claimants thought they could benefit from in advance of their being deemed domiciled in the United Kingdom for inheritance tax purposes on 6 April 2006. The authors of *Lewin* consider that the requirements of causative mistake will be met where there is evidence that the voluntary disposition would not have been made on the terms in which it was made but for the mistake, and that it is not necessary to show that the voluntary disposition was not made at all.[43]

110. The test for causative mistake in equity was considered in *Goff & Jones* in the context of restitution. The law of unjust enrichment will relieve a mistake, but the test for causation

[39] [2014] EWHC 3158 (Ch).

[40] [2019] EWHC 1949 (Ch).

[41] [2014] EWHC 4129 (Ch).

[42] [2016] EWHC 790 (Ch).

[43] Tucker *et al, Lewin on Trusts*, 20th ed (2020) at [5-074].

that is applied depends on whether the mistake was induced or not.[44] The authors have suggested that where an equitable mistake is concerned, a "but for" causation test may be necessary, where the claimant's mistake is spontaneous; but that a looser "contributor cause" test may apply where the mistake was induced by a misrepresentation for which the defendant was responsible.[45] The authors also note that the English authorities on rescission for voluntary dispositions have been predominately concerned with whether a mistake is serious and/or of some sort of quality, rather than being focused on whether any specific causation test is met.[46]

111. In this case, Mr Anderson, QC, on behalf of the Bhaur Family stressed that it was his clients' case that the mistake had been induced by fraud on the part of a trusted third party – Aston Court. The case law does not appear to consider whether fraud has any particular effect on causation (nor, post *Pitt v. Holt*, other aspects of mistake), but plainly that must be a relevant factor. It is one that I will be bearing particularly in mind, given Mr Anderson's submissions.

(d) Distinguishing mistake from other states of mind

112. The case law has provided some guidance on how the court should draw the line between mere inadvertence and ignorance and a relevant causative mistake. In *Van der Merwe v. Goldman*,[47] Morgan J made clear that the claimants were not just operating under "mere ignorance", because their ignorance had "led them to a false belief or assumption that the creation of the settlement did not involve a chargeable transfer so that no inheritance tax would be payable as a result." Similarly in *Payne v Tyler*,[48] the Master concluded that the trustees had exercised their discretion to appoint the life estate to Mrs Alston on a mistaken basis, and that it was not accurate to suggest that they were acting under ignorance or inadvertence. On the facts, the trustees had asked their legal advisers the correct question about the inheritance tax implications of entering into the transaction, but received incorrect advice, which it had then relied on.

113. In *Rogge v. Rogge*,[49] the Deputy Master considered that the claimants were operating under two fundamental mistakes about the terms of the trust and the operation of the Gift with Reservation of Benefit Rules, which were causative. However, the Deputy Master expressed the view that other alleged mistakes which the claimants had pleaded regarding their misunderstanding of the inheritance tax and capital gains tax positions were not mistakes within the rule of *Pitt v. Holt*. The Deputy Master examined the statements made by the claimants in relation to these alleged mistakes, and considered that the statements demonstrated "mere ignorance" of the relevant tax positions, rather than ignorance giving rise to a conscious belief or tacit assumption as to a particular state of affairs. The fact that the statements were phrased as negative beliefs (such as that the

[44] Mitchell *et al*, *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at [9-100].

[45] At [9-62].

[46] There are a number of other cases on point, notably *Lobler v. HMRC*, [2015] UKUT 0152 (TCC); *Smith v. Stanley*, [2019] EWHC 2168 (Ch); *Payne v. Taylor*, [2019] EWHC 2347 (Ch).

[47] [2016] EWHC 790 (Ch) at [41].

[48] [2019] EWHC 2347 (Ch).

[49] [2019] EWHC 1949 (Ch).

claimant "did not understand that this charge would apply"), rather than positive beliefs, led the deputy master to this conclusion.[50]

114. In *Mackay v. Wesley*,[51] the Deputy Master held that the claimant's decision to execute a deed appointing herself as trustee had been made due to causative ignorance, rather than a mistaken tacit assumption. The claimant's evidence was that she had signed the deed because she would not have expected her father, the defendant, to ask her to sign a document that would put her in danger of liability for a large tax bill. The Deputy Master accepted the claimant's evidence. However, he did not think that such an assumption was a distinct mistake within the meaning of the equitable principles in *Pitt v. Holt.* While accepting that the claimant was mistaken about the effects of the deed, the Deputy Master found (at [145]) that the tacit assumption that her father would not ask her to sign a damaging document was too wide and vague to be a relevant mistake. The Deputy Master expressed the view that the claimant was essentially submitting that she did not think the deed would have any bad effects, and that this was "always going to be the case when a document has unanticipated effects." The Deputy Master held that this was not a "distinct" mistake that was capable of triggering the equitable principles.

115. The Deputy Master went on (at [154]) to conclude "that it is insufficient for an applicant under the equitable principle to have a general conscious belief or to have had a tacit assumption that generally the transaction being entered into would not have any adverse effects. The belief or assumption has to be more distinct and specific than that". The Deputy Master described *Pitt v. Holt* and *Freedman* as cases that were "very close to the line between what is sufficiently distinct or specific on the one hand and what, on the other, is not".

(e) The relevance of tax implications

116. The fact that significant and unexpected tax liabilities have arisen from transactions has been taken into consideration by courts in concluding that a claimant had made a sufficiently grave mistake of so serious a character as to render it unjust not to grant a remedy. In *Lobler v. HMRC*,[52] the Upper Tribunal considered the tax implications of the transactions to be "devastating", particularly because they had effectively led to the claimant's bankruptcy, and as such his mistake was of a sufficiently serious nature as to warrant relief. Similarly, in *Van der Merwe v. Goldman*,[53] Morgan J found that the amount of tax and interest payable made the mistake sufficiently grave, and that it was of so serious a character as to render it unjust for any beneficiaries to resist rescission.

117. However, a large tax liability on its own will not generally be sufficient for the court to determine that the mistake is sufficiently serious so as to require a remedy. In *Freedman v. Freedman*,[54] Proudman J suggested that if the only consequence of the mistake made by the claimant had been the payment of inheritance tax, this may not have been sufficiently serious. However, on the facts, it was clear that the purpose of the transactions had been to protect the properties that were in the claimant's name, while

[50] At [92].
[51] [2020] EWHC 1215 (Ch).
[52] [2015] UKUT 0152 (TCC) at [69].
[53] [2016] EWHC 790 (Ch)
[54] [2015] EWHC 1457 (Ch) at [41].

also facilitating the repayment of a loan to the claimant's father. The extent of the inheritance tax liability was such that the claimant would not be able to repay the loan, and as such, it was a sufficiently serious mistake.

(f) Tax avoidance or evasion

118. The courts have frequently acknowledged the statement made by Lord Walker at [135] of *Pitt v. Holt* regarding the possibility of the court refusing relief where a claimant has been involved in an artificial tax avoidance scheme. In a number of cases, the courts have explicitly stated that the arrangements they were setting aside were part of the claimant's legitimate tax planning efforts, rather than being part of an artificial tax avoidance scheme: see, for example, *Kennedy v. Kennedy*,[55] *Smith v. Stanley*,[56] and *Hartogs v. Sequent (Schweiz) AG*.[57]

119. In *Van der Merwe v. Goldman*,[58] Morgan J noted that he had received written submissions from the parties as to whether the case before him was a case of artificial tax avoidance, such that the court ought to withhold relief on grounds of public policy, as mentioned by Lord Walker at [135] of *Pitt v Holt*. However, HMRC conceded in closing submissions that Morgan J could not be asked on the facts of the case to give effect to Lord Walker's suggested possibility on the facts of this case, as a judge at first-instance. In any case, Morgan J felt that it would not be appropriate to withhold a remedy on grounds of public policy in the case before him. During the consequentials hearing, the HMRC sought permission to apply to the Supreme Court for leave to appeal directly to it, in order to explore [135] of Lord Walker's judgment. Morgan J refused to grant permission (at [9] – [10]) of his consequentials judgment, given his provisional view that the facts of the case in *Van der Merwe v. Goldman* were not within the ambit of the wrongdoing referred to by Lord Walker.[59]

(g) Mistakes and mispredictions

120. The post-*Pitt v. Holt* case law has provided little further guidance on how the courts should distinguish between a mistake and a misprediction, and so the decision of Lewison J in *Re Griffiths*,[60] discussed by Lord Walker in his judgment in *Pitt v. Holt* at [110] – [113] is the most appropriate starting point.

121. In that case, Mr Griffiths had completed settlement of shares worth over £2.6m in February 2004, relying on professional advice received that the settlement would avoid inheritance tax entirely if Mr Griffiths survived for seven years after the settlement. Mr Griffiths had been advised to take out seven-year term insurance to cover the risk that he died prematurely, but Mr Griffiths declined to do this. Mr Griffiths was subsequently diagnosed with cancer in October 2004 and died in April 2005. The executor of his estate sought to set aside the settlement by arguing that Mr Griffiths had mistakenly believed that there was a real chance that he would survive for seven years after making the

[55] [2014] EWHC 4129 (Ch) at [35].
[56] [2019] EWHC 2168 (Ch) at [69].
[57] [2019] EWHC 1915 (Ch) at [25].
[58] [2016] EWHC 790 (Ch).
[59] See his judgment on consequential matters [2016] EWHC 926 (Ch) at [9] – [10].
[60] [2009] Ch 162.

settlement, when in reality his state of health meant that he had no real chance of surviving that long. The court found on balance that Mr Griffiths' cancer had been present in February 2004, when he completed the settlement, and for this reason he could be said to have been operating under a mistake, rather than a misprediction. Had he known that he was suffering from cancer in February 2004, which reduced his life expectancy, Lewinson J found that Mr Griffiths would not have completed the settlement. However, the Court of Appeal (at [198]) in *Pitt v. Holt* expressed the view that it was strongly arguable that Mr Griffiths ought to have been considered to be running the risk that he would survive seven-years, given that he had declined to avail of the term insurance that was recommended to him. It is apparent that Lord Walker had sympathy with the Court of Appeal's statement in this regard.

122. In *Elston v. King*,[61] the differences between a mistake and misprediction were considered. This was a case where a party sought to set aside a compromise agreement on grounds of a common mistake on the basis that the compromise was based on a view of the law that was later overturned. It was noted in that judgment that the differences between mistake and misprediction had been previously explored in the context of unjust enrichment cases and that the differences "can be extremely difficult and is, no doubt, very fact-sensitive."

123. Two points were noted in *Elston v. King* that are also worth referencing for present purposes:[62]

> "(i) Mistakes must be distinguished from mispredictions. A misprediction is a present belief or assumption about a future state of affairs, which is subsequently falsified; whereas a mistake involves the vitiation of the claimant's judgment at the time the enrichment is conferred. Put another way, a mistake operates only as regards the present or the past, whereas a prediction, by definition, involves the future. Whereas mistake constitutes a ground for restitution, misprediction does not.
>
> (ii) Mistakes can co-exist with an element of doubt. By "doubt" is meant the claimant's conscious appreciation that the facts or law may not be as he or she believes them to be...For example, a claimant may (wrongly) believe that he or she is legally obliged to make a payment, whilst at the same time appreciating that there is an argument that he or she is not in fact obliged to make the payment at all. Such doubts are not inconsistent with mistake, provided the doubt does not overwhelm the mistake…"

(h) Mistakes and the acceptance of risk

124. The post-*Pitt v. Holt* case law has also not considered in any detail whether a claimant could have been deemed to have run the risk of being mistaken. In *Van der Merwe v. Goldman*,[63] Morgan J made clear that the parties could not have been considered to have been running the risk that a change in law would lead them to incur a large tax liability, because the parties had believed on the facts that there was no question of any tax charge being incurred by the transaction they entered into.

125. In *Rogge v. Rogge*, the Deputy Master considered briefly (at [89]) whether he ought to find that the claimants were not mistaken, but rather that they knew or ought to have

[61] [2020] EWHC 55 (Ch).

[62] At [26], quoting from *Jazztel plc v. Revenue and Customs Commissioners*, [2017] EWHC 677 (Ch).

[63] [2016] EWHC 790 (Ch).

known that their legal advisers had misunderstood the claimants' intentions and were advising on a set of assumptions that were incorrect, and that the claimant had therefore taken "a risk as to the tax consequences of the arrangements, because they knew or should have known that the advice on which their beliefs as to the tax consequences was based was itself based on a false premise as to the intended use of the property and hence was unreliable." However, he was ultimately satisfied on the evidence that there had been a misunderstanding between the claimants and the legal advisers, and that the claimants were not precluded from relying on this misunderstanding to found their mistake claim.

126. In Lord Walker's judgment in *Pitt v. Holt* (at [114]), Lord Hoffmann's judgment in the earlier *Deutsche Morgan Grenfell Group plc v. Inland Revenue Commissioners*[64] is described as an "illuminating discussion" of whether a claimant had run the risk of being mistaken. In those paragraphs, Lord Hoffmann suggested that whether a person who made a payment took a risk in doing so should be assessed by considering the objective circumstances surrounding the payment as they could reasonably have been known to the parties. Where a compromise agreement was concerned, the extent to which the law was known to be in doubt was to be taken into consideration when deciding whether the person had run a risk.

F. THE FACTS GOING TO THE QUESTION OF MISTAKE

(1) Introduction

127. This Section seeks to set out the material facts on which my assessment of mistake depends. It necessarily builds upon the description of the Scheme in Section B above. That description sought – so far as possible – to describe the Scheme objectively, without venturing into what the Bhaur Family may, or may not, have thought or intended. This Section deals with the facts going to those thoughts and that intention, insofar as they are relevant to the question of mistake.

128. My approach is as follows:

(1) First, in Section F(2), I set out the detail of the Bhaur Family's approach to Aston Court, and manner in which the Scheme came into being. Clearly, given the nature of the mistake pleaded – that is, a mistake at the inception of the Scheme, that continued – the circumstances in which the Scheme came into being is of utmost importance.[65]

(2) Of course, that does not mean that events subsequent to the Scheme's inception and commencement are irrelevant. They are relevant to the extent that they shed light on this initial state of mind. I approach these subsequent events in two ways:

(a) In Section F(3), I consider the significance of the revisions to the Scheme over time. These revisions, of course, are fully described in Section B: the focus in Section F(3) is on the Bhaur Family's state of mind. As is apparent from Section F(3), there is little to be derived from the history of this

[64] [2007] 1 AC 558 at [24] – [30].

[65] See the law set out in paragraph 108 above.

subsequent (post-inception) narrative, but the facts that I have found to be material are set out in this Section.

(b) In Section F(4), I consider certain aspects of the conduct of the Bhaur Family which troubled me during the course of the trial as being inconsistent with mistake, and which I therefore raised with Mr Anderson, QC, so that he might be able to deal with them. I called these aspects "red flags" – which, with hindsight, is probably not the right term – but the label has stuck. These points, to the extent they remain material, are considered in Section F(4).

(2) Narrative: inception of the Scheme

(a) Initial contact

129. By 2006, Mr and Mrs Bhaur were wealthy people, and Mr Bhaur's stroke, in that year, caused him to want to consider estate and tax planning.[66] Mr Bhaur described his initial contact with Aston Court in the following terms in Bhaur 2:

> "12 It follows that by late 2006, I and my wife were considering seeking specialist tax and estate planning advice in order to minimise the liabilities our family may face in the event that I (or my wife) passed away and given my ill health, this was very much a factor for the steps we were looking to undertake.
>
> 13. I recall that I was a subscriber to a mailing list (www.netrent.co.uk), which was a company who operated with the private rental sector and one specific 'newsletter' had referenced the ability to utilise a legal method of reducing the burden to our children (in respect of Inheritance Tax) and to prevent a portfolio of properties from being split up in the event of death and/or marital dissolution.
>
> 14. As this interested me, insofar as I can accurately recall, I took the steps to make initial enquiries with Net Rent about this scheme. I recall that I spoke with Hazel Headley who confirmed that it was a product being marketed by a separate company, but that she would take my details and passed them on.
>
> 15. On 6 November 2006, I was contacted, by telephone, by David Breeze who introduced himself as a Partner in Aston Court Chambers ("ACC") and he told me that ACC was a Solicitor's practice. This was, perhaps, to offer me some comfort as to the authenticity of what he was saying to me. Mr Breeze confirmed that his partners were experts in estate planning."

130. Ms Headley's email or newsletter is entitled *Tax Strategies for Landlords*, and it refers to potential savings in relation to capital gains tax, inheritance tax, income or corporation tax and stamp duty land tax.

131. The first documented approach to the Bhaur Family from Aston Court is a personalised *Wealth Management Report* addressed to Mr and Mrs Bhaur. The document is dated December 2006, and states as follows:

[66] See paragraphs 6 to 11 above.

> "1.1 Aston Court Chambers Solicitors and Aston Court Chambers LLP ([Aston Court]) are specialist boutiques providing innovative legal and commercial solutions to the challenges faced by businesses and business people in today's world.
>
> 1.2 The purpose of this report is to set out for your consideration our initial proposals for the commercial solutions that [Aston Court] would recommend based on the information that you provided at our recent meeting.
>
> 1.3 The report will also set out summary information on how these solutions work, the benefits that they bring and the fees associated with their implementation.
>
> 1.4 Fees come in two parts:
>
> 1.4.1 Arrangement Fees which are based on the type of transaction being considered and are used almost entirely to cover the costs (including 3rd party costs) of implementation. The Arrangement Fee is expressed as a fixed monetary amount.
>
> 1.4.2 Success Fees which may either be fixed or based on the size or effectiveness of the transaction and which contribute to [Aston Court's] profitability.
>
> ...
>
> 1.6 Importantly, the proposals are based on the information that you provided to us and, consequently, our proposals may be subject to amendment if this information is inaccurate. The information upon which these proposals are based is, therefore, set out in the next section and you should check this first to ensure that we have accurately understood and recorded your position."

Pausing there, paragraph 1.6 is an example of what Mr Anderson, QC would characterise (although he did not use these words) as a form of "papering the file" by Aston Court, whereby Aston Court would lay a paper trail intended to make people believe that the Bhaur Family had genuinely "bought into" the Scheme and that Aston were doing no more than implementing the Scheme in line with the Bhaur Family's representations as to their business and tax needs.[67] I shall consider the merits of this point when the factual history has been fully set out, but it is worth noting an essential fragility to the point:

(1) The contention is that such a paper trail was laid in order that Aston Court could assert as against the Bhaur Family that Aston Court was doing no more than implementing the Bhaur Family's will, based upon information provided by the Bhaur Family, which Aston Court believed to be true (but the Bhaur Family knew to be false), whereas the true position was that Aston Court was pulling the strings and inserting false statements in which the Bhaur Family merely acquiesced out of ignorance, believing in the respectability and good standing of Aston Court.

(2) Whilst this contention is possible, as possible – if not more so – is the suggestion that these statements were intended for the attention and misdirection of third parties – like HMRC – were they to scrutinise the Scheme. On this basis, the statements were certainly intended to lay a paper trial, but that the trail was being laid jointly by Aston Court and the Bhaur Family in order to lend the Scheme a patina of respectability and tax rationality if ever it was scrutinised.

[67] I describe the point, which I see as an important one, in paragraph 92(3) above.

(3) Either way, whatever the purpose of these statements, it required the Bhaur Family to acquiesce in statements that *(i)* suggested that they had considered and underwritten the factual statements regarding their position, which rendered the Scheme a legitimate one, which *(ii)* (as we shall see) were simply untenable and false. That is a difficult contention, given the attention that the Bhaur Family gave to the documents they were presented with.[68]

Returning to the *Wealth Management Report*:

"1.7 The solutions offered by [Aston Court] are based upon our understanding of current UK law and practice which may be subject to amendment at the discretion of the government or, indeed, Her Majesty's Revenue and Customs (HMRC). We are unable to take responsibility for any such changes nor indeed for any expenses that you may incur as a result of such changes.

1.8 Notwthstanding the above paragraph, if a solution proposed by [Aston Court] fails to meet the specific objectives for which it was implemented then [Aston Court] will not charge (or will reimburse) the Success Fees."

132. The *Wealth Management Report* then listed the properties then held by Mr and Mrs Bhaur, before setting out the "essence" of Aston Court's "commercial solutions":

"3.1 The various solutions developed by [Aston Court] are designed primarily to protect from potential future creditors (1) the private or commercial wealth that you have built up over time or (2) the income that you are generating.

3.2 A secondary, but important, aspect of these solutions is the personal control that you either retain or, indeed, in some cases, the personal control that you actually obtain in relation to these funds.

3.3 These objectives are achieved by transferring the targeted wealth or income from your private or commercial hands into specific types of Trust from which you and your family can continue to benefit. You will control these funds but, importantly, you will no longer be the legal owner of the funds. It is the removal of the legal ownership from your hands that provides you with the protection that you are seeking.

3.4 There are a wide variety of trusts that are available and a number of these can meet the stated objectives above. However, because of the specific expertise that we have in Aston Court Chambers, the trusts that we set up are always based in offshore jurisdictions, which means that they can also carry additional tax benefits that are not available through the alternatives."

133. The *Wealth Management Report* then went into a little greater detail about the transfer of assets from Mr and Mrs Bhaur to a company ("New Co UK Ltd") and from the company to an offshore "Remuneration Trust" managed by a management company of which Mr and Mrs Bhaur would be directors. It is fair to say that the details are vague, but the following points are stressed:

"4.2.7 The management company now controls the assets and has unrestricted investment choices under the control of the directorship.

[68] This important point is expanded upon and considered further in paragraph 144 below.

4.2.8 Cash can be accessed in a tax efficient manner.

4.2.9 Access to the assets held within the Trust can be passed down the generations without triggering a charge to Inheritance Tax. Since the Trust has a life span of 100 years, this can normally benefit 3 or 4 generations.

4.3 We have obtained formal QC's opinion on the statutory reliefs that enable the transfers to take place at the assets' acquisition prices (thus avoiding any triggering of a tax charge at the point of transfer) from John Tallon QC of Pump Court Tax Chambers...

4.4 The transacting solicitor for the above steps is James O'Toole, whose practising certificate is included as an appendix to this report."

134. Mr Bhaur explained in his evidence to me that he placed great reliance on the fact that Mr O'Toole was a solicitor, and I accept that. No doubt, also, Mr Bhaur derived comfort from the reference to a QC's opinion, although it must be stressed that that opinion was *(i)* clearly not specific to the Bhaur Family's case; and *(ii)* was never disclosed to the Bhaur Family. I have not seen it, and have no idea whether it even exists.

135. It is also clear that the scheme being proposed met Mr Bhaur's dual objectives of avoiding the incidence of Inheritance Tax for generations, whilst maintaining his (and his family's) control over the assets transferred into the trust.

136. I doubt very much whether Mr Bhaur would have appreciated the significance of the references, in the *Wealth Management Report*, to avoiding tax on the transfers of property from himself and his wife to *(i)* New Co UK Ltd and then *(ii)* to the offshore trust. It is necessary to be clear about the law in relation to this, because this is an important part of Mr Bhaur's misapprehension regarding the Scheme. Also, it is important, now, to set out in broad-brush terms the nature of the trust that Aston Court was putting forward for Mr and Mrs Bhaur's attention.

(b) Some tax law

137. Broadly speaking, the position is as follows:

(1) Generally speaking, a transfer of property – even as a gift or gratuitously – will be a transfer of value and attract a charge to capital gains tax. However, a transfer of assets by an individual (here: Mr and Mrs Bhaur) to a company (here: Safe Investments UK) in return for shares in the company is tax neutral. The company takes on the assets at the price at which the assets were acquired by the transferor (here: Mr and Mrs Bhaur).

(2) Transfer to a trust without more will attract charges to tax. There are, however, various tax concessions which avoid those charges, one of which is the establishment of an employee benefit trust. The First Staff Remuneration Trust (and, indeed, the Second Staff Remuneration Trust) purported to be an employee benefit trusts; and that appears to have been the nature of the proposal in the *Wealth Management Report*, although I accept that the description "Remuneration Trust"[69] is not very specific.

[69] See paragraph 133 above.

(3) Adopting the helpful general description of Asplin LJ in *Barker v. Baxendale Walker*,[70] an employee benefit trust is "a trust for the benefit of employees of a company or body which attracts generous tax concessions. The trustees of the [employee benefit trust] must hold more than 50% of the shares in the company in question and the settled property must not be applied otherwise than for the benefit of employees of the company and their families and dependants and the class of beneficiaries must include all or most of the persons employed or holding office with the company".

(4) Entirely unsurprisingly, the requirements that have to be met when establishing an employee benefit trust – whether the settlor is an individual or a company[71] – are strict and are intended to ensure that the settlor cannot use the trust to benefit him- or herself or those close to him- or herself. In paragraph 20 of IVM PCC's written closing submissions these limits (stated in section 13 of the Inheritance Tax Act 1984) were expressed as follows:

> "The favourable tax treatment did not apply, subject to exceptions, if the trust permitted the trust property to be applied for the benefit of four groups of persons:
>
> (a) A person who is a participator in the company making the disposition;
>
> (b) Any other person who is a participator in any close company that has made a disposition whereby property became comprised in the same settlement, being a disposition which, but for section 13, would have been a transfer of value;
>
> (c) Any other person who has been a participator in any such company in paragraph (a) or (b) above at any time after, or during the ten years before, the disposition made by that company;
>
> (d) Any person who is connected to any person within (a), (b) or (c)."

(5) It is unnecessary – indeed, undesirable – to explain the tax regime in any greater detail. What is clear – and was common ground between the parties – was that:

(a) Mr and Mrs Bhaur were participators in Safe Investments UK as they each owned 50% of its issued share capital.

(b) Mandeep and Baldeep were connected with Mr and Mrs Bhaur, being their sons.

Accordingly, the Bhaur Family were excluded from benefit, save that the legislation permitted a power to "make a payment which is the income of any person for any of the purposes of income tax, or would be the income for any of those purposes of a person not resident in the United Kingdom if he were so resident".[72]

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[70] [2017] EWCA Civ 2056 at [8].

[71] The relevant provisions in the Inheritance Tax Act 1984 are different, but nothing turns on this. Section 28 applies to individuals and section 13 applies to companies.

[72] Section 13(4)(a).

(6) At the time when the First Staff Remuneration Trust was established, there was a view that once the participators had died, those who had been connected to those participators when alive, would no longer be connected persons and could benefit under the trust. In other words, on the death of Mr and Mrs Bhaur, Mandeep and Baldeep would no longer be excluded from benefit. This view, although once perhaps tenable, now no longer is. *Barker v. Baxendale Walker* was a professional negligence action concerning the advice that should have been given by a solicitor advising a client in relation to an employee benefit scheme. In order to ascertain whether the advice was or was not negligent, Roth J[73] and the Court of Appeal[74] had to consider the true construction of section 28 of the Inheritance Tax Act 1984, which contains similar (although not identical wording) to section 13 (which is the relevant provision for these purposes). At first instance, Roth J held that a person who was connected with a participator during the participator's life would not be connected after the participator's death and would, therefore, not be prevented from benefit after that death.[75] This construction was rejected on appeal, so that once a person had been connected to a participator, they could not at any time benefit from the trust. As Asplin LJ noted in the Court of Appeal, Roth J's construction is not particularly plausible:[76]

> "It also avoids attributing to Parliament the implausible intention that an employee benefit trust could be used for dynastic estate planning and enable the family of the owner of a major shareholding in a company to benefit from the proceeds of sale of that holding entirely tax free after the owner's death."

However, given that a Judge as experienced and eminent as Roth J had accepted this construction of section 28, I consider that this view was one that could reasonably be held by a competent tax professional prior to the decision of the Court of Appeal.

138. I should say that I accept that none of this was known to Mr Bhaur. The Wealth Management Report only tangentially mentioned the use of a "Remuneration Trust" and the nature of the trust being established only became clear later, as I shall describe.

139. It is, however, important to understand at the outset the ambit of the employee benefit trust tax concession. It is also important to appreciate – at least in general terms – that the tax consequences of setting up a trust that does not fall within the ambit of this concession can be extremely tax inefficient. It is not a necessary part of this Judgment to determine the tax implications of the Scheme on the Bhaur Family, assuming it is not set aside by my Judgment. It seems to me that I should say nothing about these implications, beyond noting their existence. That is because the detail may become a matter of issue between the Bhaur Family and HMRC, and I should not seek to say anything about these undoubtedly complex, and quite possibly contentious, matters. However, it is right to note – as Mr Anderson, QC contended – that the outcome for the Bhaur Family – assuming the Scheme is not set aside by me – is not just likely to be bad, but disastrous. Applying a back-of-the envelope assessment, I anticipate that the Bhaur Family would (if they can recover anything at all, given the appointment out to the NSPCC, which I

[73] [2016] EWHC 664 (Ch).

[74] [2017] EWCA Civ 2056.

[75] [2016] EWHC 664 (Ch) at [152] – [157].

[76] [2017] EWCA Civ 2056 at [47]. See also Henderson LJ at [75] – [76].

will come to) recover no more than 10% - 20% of the value of the property they transferred into the Scheme. That underlines both the importance of this case to the Bhaur Family and – more importantly for present purposes – is a relevant factor in considering the question of mistake.[77]

140. I find that neither Mr Bhaur nor the Bhaur Family gave particular thought to what would happen if the Scheme failed when embarking upon it. Certainly, they were not aware of the potential dire consequences I have described in the preceding paragraph. Mr Bhaur was conscious that the Scheme might not work – paragraphs 1.6 to 1.8 of the *Wealth Management Report* make this clear – but Mr Bhaur considered that the promise expressed in paragraph 1.8 – reimbursement of Success Fees – sufficiently protected his downside if the Scheme were to fail.

(c) Engagement of Aston Court

141. Mr Bhaur decided to proceed with Aston Court, and paid them not inconsiderable sums of money. The Arrangement Fee was expressed to be £35,000 and the Success Fee £350,000. Although these fees were negotiated down (the detail of this is immaterial), the Bhaur Family paid over £300,000 to Aston Court at the outset of the Scheme – fees continued to be charged throughout the operation of the Scheme, which it is unnecessary specifically to note further, beyond noting their existence.

142. What I derive from this payment is that Aston Court were "reassuringly expensive". Mr Bhaur would have thought that he was getting a particular expertise from a peculiarly competent and knowledgable organisation in order to obtain the (not inconsiderable) tax benefits he wanted.

143. Mr Bhaur signed a letter of engagement on 2 February 2007. The letter of engagement attached "Standard Terms of Engagement" (which I have not seen) and a *Record of Instructions*, which Mr Bhaur recalls looking at. The *Record of Instructions* records:

"**Your instructions**

You have instructed us to:

- Incorporate your current business
- Transfer the goodwill from the old business to your new company
- Consider the staff incentive needs of the company
- Draft a Remuneration Trust (RT) into which company proceeds can be paid for the benefit of current, past and present employees of group companies
- Consider the various methods by which the RT can benefit your staff and advise thereon
- Advise generally with regard to the commercial and staff incentive uses such trusts can be used for
- Advise generally in relation to all relevant side effect and consequences of our staff incentive advice
- Advise generally in relation to business succession and estate planning

This advice will be relayed to you in both written and oral form during the course of our engagement.

[77] See my consideration of the principles regarding mistake below.

Communication

We understand that our prime contract will be [Mr Bhaur], although there may be other individuals (as instructed by you) who will instruct and work with us during the course of this engagement.

We usually conduct much of our communication by fax and email. Email is not fully secure and may be intercepted by third parties. If you do not wish us to use email or fax, please let us know."

144. The *Record of Instructions* is the first concrete example of a document which – to use the words in paragraph 67 of the Bhaur Family's written closing submissions – "dressed the scheme up as something different from reality". The extent to which this is significant in terms of mistake is something that I will consider below, but it is important that I set out my findings as to the approach of the Bhaur Family in general, and Mr Bhaur in particular, with regard to the documents presented to him. The position is by no means straightforward:

(1) The transactional documents setting up the Scheme in its various forms were both complex and voluminous. Mr Bhaur was not a lawyer, and I accept that there is a great deal that he may have looked at quite cursorily, himself not being a lawyer and trusting Aston Court (to which he was paying a lot of money).

(2) It is also the case that Aston Court was very protective of its documentation. Mr Bhaur's evidence – which I accept – was that often "bibles" of documents would be presented at a meeting by an Aston Court representative for his signature, but that he would not be allowed to retain this "bible" for his own records. That, obviously, would have precluded further, after the event, review, whether by Mr Bhaur or by a third party. Aston Court was very concerned that the Scheme should avoid scrutiny. The letter of engagement says this:

> "Under the principle of legal professional privilege, communications between clients and their lawyers may enjoy special protection from later disclosure in litigation or in other circumstances. A necessary element of privilege is confidentiality. Legal professional privilege can therefore be lost if advice is circulated beyond the original recipient. This is a complex area but our general advice is that you and anyone else involved in this matter should treat all information and communications relating to it as confidential and avoid circulating them more widely than necessary."

To the lawyer, this reads very suspiciously. Obviously, the general point regarding privilege is right, but the transactional documents – and most other communications – cannot possibly have been privileged. In my judgment, this emphasis on confidentiality on the part of Aston Court was intended to ensure that as little material as possible was in circulation, so as to prevent or minimise the risk of HMRC scrutiny. However, I do not consider that this would have been Mr Bhaur's view at this point time. Mr Bhaur explained the sensitivity of Aston Court regarding its documents as being related to the proprietary nature of their "solution", which Aston Court were concerned (for their own business purposes) to keep as much under wraps as possible. In any event, I accept that even if he saw documents – and signed them – Mr Bhaur (and the other members of the Bhaur Family) were, in relation to very significant documents, deprived of the ability to consider them at their leisure.

(3) I am also conscious that not all of the documents that I have seen were shown (at the time they were produced) to the Bhaur Family. No doubt pursuant to their desire to keep things under wraps, Aston Court did not, as a matter of course, ensure that the Bhaur Family saw all of the documentation concerning the Scheme.

(4) For these three reasons in paragraphs 144(1), (2) and (3), I consider that I must tread very carefully when considering the documents in this case, and when determining what the Bhaur Family generally, and Mr Bhaur in particular, understood from those documents. That said, the Bhaur Family generally, and Mr Bhaur in particular, did read and sign multiple documents, and – as Mr Anderson conceded – I must pay close attention to these.[78]

(5) What is clear as regards those documents which they were presented with and/or retained is that the Bhaur Family considered matters with great care and conscientiousness. That would particularly have been the case as regards non-technical documents – such as the *Record of Instructions*. As I have described,[79] whilst Mr Bhaur played the lead role as head of the family, he did consult carefully with his sons Mandeep and Baldeep, and they clearly considered business matters such as the Scheme very carefully. This is evidenced by some of the emails written by the Bhaur Family over time. Although chronologically out of place, it is appropriate that I set out a couple of examples, which serve to demonstrate the extent to which the Bhaur Family probed and queried Aston Court:

(a) In an email dated 4 August 2009, Baldeep wrote to Mandeep in the following terms:

> "No worries. What happened to Saturday when I thought we arranged to meet up, I pooed over to Avebury Avenue twice and spoke with Dad, and rang the house in the evening. We need to be a bit firmer on dates/times agreed.
>
> 1) AGM telephonic meeting was promised, basically got to say that this was mentioned in an email dated XX/XX/2009 from Martin O'Toole **[Dad: can you get the exact email and date on this one]**. Adding properties, etc, will come from this meeting so let's not raise it at this stage.
>
> 2) Need to be a bit more specific on the landlord exemption certificate, as we had an email from [Aston Court] suggesting an alternative rental agency structure at particular %. Dad also did some digging on the withholding tax confusion that we thought we were getting from this exemption certificate and it turned out it wasn't everything it cracked up to be. **[Worth getting up to speed on reading these emails in the Safe Investments account before we meet up to save time when we write the email to them.]** I called Lawrence Tate asking him to provide me with a simple worked example of what we were promised in the original set up of the trust, and this new option that was being presented to us. He tried to explain but accepted he was not around for this history, so suggested to call Matthew. I tried to call Matthew a couple of times in June and he never got back to my messages I left on his voicemail.
>
> 3) Another important one is the engagement of Ritchie Cooper accountants for Safe Investments now for our next year end. I spent a lot of time sorting out what

[78] See paragraph 67 of the Bhaur Family's written closing submissions.

[79] See paragraph 86 above.

was essentially our crap accountants being muppets and getting them to talk to each other (nothing technical was ever the issue) but we also agreed a fixed fee in principle with them which is a similar amount to what we ended up paying in Leicester, (But I reckon we can get them to come here.) If we do go to York as a last resort then let's combine it with this too."

(b) In an email dated 20 April 2011, Baldeep wrote to persons at Aston Court in the following terms:

"Dear Laura,

Definitely think it will be worth a chat to discuss this and I will try and call you tomorrow to discuss but if you are not around then I can try next week at a pre-arranged time. Please see my comments below in **red**.[80]

If it is ok with [you] we would like to keep Amanda in all email correspondence until both parties agree mutually our client manager going forward. As you may be aware, Amanda was pivotal in our decision to remain with [Aston Court] last year and there are many outstanding issues that are yet to be resolved."

The email with Baldeep's comments interposed in **bold** was as follows:

"Dear Baldeep

Thank you for your email dated 15 April 2011, attached below.

When the trust was created, it was fit for the following purposes, for which it was designed:

To incentivise and reward the employees of Safe Investment Management; and

To hold assets (which were previously owned by Safe Investment Management) outside of the scope of UK taxation.

In this respect the trust continues to be fit for purpose.

In achieving the first point, the trust will need to have regard to the "disguised remuneration" provisions. However, the purpose itself is not incapable of being fulfilled and the normal business activities of Safe Investment Management are not affected by either the trust or the new "disguised remuneration" legislation.

In terms of the provisions themselves, [Aston Court] cannot be held responsible for any changes in legislation. **Would like a chat about this in a telephone call.**

It is true that the opportunities for tax-free investments have been reduced as a result of the "disguised remuneration" legislation. This simply means that more care needs to be taken when Gooch IML makes investments to avoid any tax charges. **It was made clear from the outset that our business model was simply the purchasing, selling and renting of properties as its primary objectives, hence property being a tax free investment is extremely important to us.**

In this situation, you are saying that more care may be required in the purchase of investments. <u>We only purchase property</u>, so struggling to see how

[80] I have bolded the red comments.

> **our business objectives can be achieved if tax charges do arise, which was not the case when we embarked on this trust structure. The rental income belongs to Gooch, which is generated by assets (property) that it owns. If it cannot purchase more assets with these monies without a tax charge then this puts the value placed on our product into question.**
>
> However, once again, it is clear that this does not prevent the normal business activities of Safe Investment Management from being carried out.
>
> I hope this is clear…"

These emails show a carefulness and a maturity of understanding that I find was entirely reflective of the Bhaur Family's approach generally. In short, the Bhaur Family was not slow in coming forward with points and queries when it was in the family's interest to raise them, and I find that where a document was clearly before the Bhaur Family, and there were no questions and no probing, the general inference must be that they understood what was being said, and agreed. That, of course, is no more than my general approach, having considered very carefully both the documents in the case and the oral evidence of Mr Bhaur, Mandeep and Baldeep.

145. With these general points in mind, I turn again to the *Record of Instructions*, which were appended to the letter of engagement. The letter – but not the Record of Instructions – was signed by Mr Bhaur. Mr Bhaur confirmed in evidence that he recalled seeing the Record of Instructions, and it seems to me entirely unsurprising that he did so. The *Record of Instructions* is not in "legalese", but is readily comprehensible to the layman. In these circumstances, Mr Bhaur knew that what was intended was a trust "for the benefit of current, past and present employees of group companies". That sits very ill with the very basic legal structure – an informal partnership – by which Mr and Mrs Bhaur then held their properties. But it would appear that Mr Bhaur asked no questions, and simply signed the letter.

(d) Timetable for implementing the Scheme

146. Shortly after this – in a letter dated 5 February 2007 – Aston Court sent Mr Bhaur a letter entitled *Incorporation of your business and staff incentive structure*. I find that Mr Bhaur would have seen this letter, and again he appears not to have directed any questions regarding the "staff incentive structure" to Aston Court.

147. The letter set out in some detail the timetable for implementing the Scheme, describing the incorporation of what was to become Safe Investments UK, the transfer of Mr and Mrs Bhaur's assets to this company, and then – in Weeks 3 and 4 – this:

> "**Week three**
>
> This is when we can begin work on the staff incentive structure we discussed. During this week, we will draft the trust and all the board minutes, etc required for the company to formally establish the trust. These documents will be sent to you in order for you to hold another board meeting and execute the trust. The trust will then be sent to the trustees for them to execute the document also.
>
> **Week four**

> Discussion will take place within the company as to how the company wishes to fund the trust. We have discussed using assets belonging to the business to do this. Assuming the trust is funded through the contribution of assets we will need to draw up the documentation to effect this. A further board meeting will need to be held to execute these documents.
>
> …
>
> **Week 7**
>
> The "bible" of documents will be sent to you for your records along with contact numbers for the various lawyers and trustees should you need to contact them."

148. It may very well be that Aston Court intended this document to give a sense to third parties that this was a regular employee remuneration trust. But the fact is that precisely the same impression would be given to the Bhaur Family. Mr Bhaur told me that although the letter refers to a "bible" of documents, and that such a bible was produced for him to sign the relevant documents in it, he was never given a "bible" for his own records, despite request. I accept that evidence. But the fact is that Mr Bhaur signed the relevant transactional documents setting up Safe Investments UK, transferring his and his wife's property to the company and establishing the Staff Remuneration Scheme. The documents did what the letters of 2 and 5 February 2007 said they would do. There is no mismatch between what Aston Court said would happen, and what in fact did happen. Since Mr Bhaur and the Bhaur Family saw these letters, and (as I find) considered them, it is difficult to see why they were doing anything other than acceding to the course that Aston Court had articulated.

149. I should stress again that in signing these transactional documents, Mr Bhaur and the Bhaur Family did not retain them, and did not necessarily see all of them. For instance, the document that I have described at paragraph 28(2) above – which contains a reference to a distribution of £100,000 to employees per year – is a document which Mr Bhaur accepts he signed, but where he was adamant that the writing I have set out in paragraph 28(2) (which is that of a Mr James Rutherford of Aston Court) was not on the document when he signed it. Mr Bhaur had – as I find – a good recollection (despite the passage of time) of what he saw and what he did not see over time. He denied seeing the Rutherford insertions, and may well have signed the form in blank. Certainly, the document states that Mr Bhaur signed on 6 March 2007, and Mr Rutherford signed on 7 March 2007. So I accept Mr Bhaur's evidence in this regard, not least because he did not adopt a position of blanket ignorance in relation to the documentation, which renders his evidence extremely credible. He accepted that he saw and/or kept a number of documents relating to the Scheme, including the letters I have referred to.

(e) The First Staff Remuneration Trust

150. I do not propose to say very much more about the transactional documents that resulted in the creation of the First Staff Remuneration Trust. These have been fully described already, and I have already noted Mr Bhaur's (and the Bhaur Family's) limited ability to glean anything from technical legal documents. They signed the relevant documents; they knew that (broadly speaking) these documents were intended to do what Aston Court had described in the communications I have set out; but it would be entirely wrong to say that the transactional documents were read in any detail by Mr Bhaur, or indeed properly understood by him.

151. That being said, a little more needs to be said about how Aston Court may have regarded the First Staff Remuneration Trust. The deed of settlement dated 10 March 2007, which constituted the First Staff Remuneration Trust was described in paragraph 28(3) above, but it is worth reiterating a couple of points:

(1) First, in order to derive the benefit of the employee remuneration trust tax concession, the settlement incorporated the exclusions of persons required by section 13 of the Inheritance Tax Act 1984. On its face, the settlement was consistent with the Act, and a reader of the settlement (and other documentation) together with the communications to Mr Bhaur would certainly be left with the impression that a genuine staff remuneration trust was intended.

(2) That, of course, was not the case. But Aston Court may well have considered that Mr Bhaur's objectives (of avoiding Inheritance Tax, and not particularly being concerned about payment of income, but rather the accumulation of capital) could well be achieved through the Roth J construction of section 13.[81] That is to say that Mandeep and Baldeep would not be able to benefit whilst Mr and Mrs Bhaur lived, but could do so after they died.

(3) Clearly, the risks of this very aggressive approach to tax management were never explained to Mr and Mrs Bhaur, and in failing to do so, Aston Court were either grossly negligence or (as I find) dishonest. But Aston Court may not have been dishonest in considering that there was the possibility that this evasive Scheme might actually deliver the tax benefits they had promised, provided HMRC did not look too closely at the nature of the company setting up the trust.

152. However, the mismatch between the business of the Bhaur Family and the First Staff Remuneration Scheme is one that needs to be specifically considered.

(f) Details of employees and benefits to them

153. Safe Investments UK was a small company – self-evidently so, given that it took over from the informal partnership between Mr and Mrs Bhaur. Quite clearly, the business (whether viewed as a partnership or as a company) did not have the size of employee pool that the Scheme implied. It is unnecessary to list them, but the company really only ever employed (at most) 2 – 3 people at any one time who were capable of benefiting from the First Staff Remuneration Scheme; and, to be clear, Mr Bhaur had no intention of benefitting them. Yet, as we have seen, that was the explicit purpose of the Scheme as articulated in the documents that I have described.

154. In an email dated 2 May 2007, Aston Court asked Mr Bhaur about a few "loose ends". As was the practice of the Bhaur Family, Mr Bhaur's answers were inserted into the text of this email. Although it is sometimes difficult to differentiate between questions and answers, I have sought to do so by setting out what I find to be Mr Bhaur's answers in **bold** in the text below:

"Dear Tony [i.e., Mr Bhaur]

[81] See paragraph 137 above.

I am in the process of closing your file and attending to a few loose ends.

Please oblige me with the following:

1. A short description of the company activities (UK company that is)

Managing and developing properties

2. The number of employees of the company currently (and how many you intend to have in the foreseeable future)?

1 employee at the moment. Foreseeable future, this could increase to 3.

3. Expected level of payments from the trust to employees, i.e. once a year, once every month, etc. Will you use the trust to supplement wages, pay bonuses, pay for Christmas parties, or sales related prizes, etc?

Once every month and no plan to use the trust to supplement wages, bonuses, and parties, etc

155. I find this communication to be very revealing. Mr Anderson, QC relied upon it to show that the Staff Remuneration Trust was self-evidently not suitable for the Bhaur Family and that Aston Court would have known this. I agree. Indeed, it is quite clear from the description of the identification of employees benefiting from the trust as a "loose end" that Aston Court knew very well that the Scheme was, on the facts of this case, basically a sham.[82]

156. But that is not the point. The crucial question is what Mr Bhaur (and the Bhaur Family) made of these questions. I accept, entirely, that Mr Bhaur answered the questions put to him honestly. But he appears to have disregarded entirely the significance of why they were being asked. It seems to me that Mr Bhaur's failure to push back on question 3 far harder than simply say "no plan to use the trust to supplement wages, bonuses and parties, etc" and instead to say that "if you are asking me these questions, then this product is not what I want" is significant.

157. The same point arises in relation to other documents. I refer to a letter written by Aston Court to Safe Investment UK on 10 July 2017. The letter reads as follows:

"**TAXATION ADVICE: FEE GUARANTEE**

[Aston Court] has advised Safe Investment Management UK Ltd (the "Company") on the incidental taxation side effect of the transfer of an asset from the Company to a remuneration trust for commercial reasons.

Your instruction to your solicitors to build your staff incentive vehicle was not motivated by tax concerns but purely by a desire to build a staff incentive vehicle.

[82] If further clarity were needed, it is quite clear from the email exchange between Aston Court and Mr Bhaur on 21/22 May 2007, that the number of employees was being tailored to fit the scheme, and were not inherent to the Bhaur Family's business: "I confirm that we would prefer you had two employees of the UK company who are wholly unconnected with you or any family member please. Both these employees will have to be on the PAYE scheme that you administer".

> **Part of the advice given is that, upon any sale by the Company of the assets, the gain will accrue to the trustees of the remuneration trust. As the trustees are non-UK resident, they will not be chargeable to UK capital gains tax.**
>
> In the event that [Aston Court] is incorrect in this advice and the Company is assessed and pays corporation tax on the gain in relation to the asset, any fees retained by [Aston Court] will be refunded to the Company.
>
> [Aston Court] does however reserve the right to litigate with HMRC at its own cost to prove the validity of our advice."

I find that Mr Bhaur saw this letter. When giving evidence, Mr Bhaur could not explain the passages I have highlighted in **bold**, save to say that he regarded Aston Court as his trusted advisors. I accept this, but it does not anwer the point. The point is that Mr Bhaur's trusted advisors were telling him that the Scheme was not motivated by tax concerns (which was plainly wrong) and that the objective was to build a staff incentive vehicle (which was not Mr Bhaur's intention).

158. I have absolutely no doubt that this letter was written by Aston Court with a view to *(i)* covering themselves if something went wrong and *(ii)* having on file something to show HMRC in order to persuade HMRC that this was indeed an employee remuneration trust. It seems to me that Mr Bhaur's failure to push back on the entirely and obviously incorrect statements in this letter justifies an inference that his intentions were aligned with those of Aston Court. In other words, he was perfectly content for Aston Court to describe the Scheme as an employee remuneration trust entered into for that purpose and not because of the tax concessions that such trusts benefited from.

159. The fact is that Mr Bhaur:

(1) Transferred substantially all of the Bhaur Family's personal wealth (at least, insofar as it consisted of real property) to a company incorporated for the purpose of receiving it.

(2) Then caused that company – which in reality had no employees to speak of[83] – to place these assets into a staff remuneration trust where there were no proper

[83] See the email dated 6 May 2011 (bolded words being the Bhaur Family's response to Aston Court's queries):

"HMRC have asked for details of employees of Safe Investment Management UK Limited as at the date of establishment of RT in March 2007. My understanding, based on the list you provided to us in November last year is that Miss Taranjeet Bimbrah was the only employee at that time in addition to the directors, but we will be grateful if this could be confirmed. **Confirmed.**

Could you also please let me know if Miss Bimbrah was related in any way to any of the shareholders in the company at the time of her employment, as HMRC have requested details of any "connected persons" who have been employed? **Taranjeet Bimbrah is the wife of Mandeep Bhaur and this was made known to James and [Aston Court] prior to forming the trust. We discussed this with James in our meeting last year when the responses were sent to HMRC.**

If my understanding on the above matter is incorrect, would you please let me have details of any other employees of the company at the time that the RT was established and their relationship (if any) to the participators (shareholders) in the company please? **As per our above response, all other employees were subcontractors. (No other PAYE employees.)**"

beneficiaries to speak of, and where (even if there had been beneficiaries) Mr Bhaur did not want to benefit them.

(3) It was in these circumstances that Mr and Mrs Bhaur signed letters of wishes[84] stating an intention to approach the trustees "once in every twelve month period with our suggestions (if any) as to which employees (if any) should benefit from this trust and roughly in what amounts and in what format". If Mr Bhaur drew comfort from the words "if any" which would entitle no payments to be made, he was not entitled to do so. The point is that these letters of wishes were describing the outward essential purpose of the trust.

160. Whilst I have no doubt that Aston Court failed to tell Mr Bhaur that the First Staff Remuneration Trust was an unworkable arrangement – an abuse of a legitimate tax concession – the fact is that Mr Bhaur himself failed to follow up on the clear statements addressed to him that this was an employee remuneration trust. The question – which I will consider later – is the nature of the inferences that I can draw from transactions that were – when considered on their face - economically indefensible from both the company's and the Bhaur Family's point of view; and with explicit objectives that were way out line with what Mr Bhaur and the Bhaur Family actually wanted.

(3) Narrative: revisions to the Scheme over time

161. As I have described in Section B above, the Scheme evolved considerably from the First Staff Remuneration Trust. Mr Bhaur, and the Bhaur Family, continued to be involved and continued – where they were needed – to execute transactional documents. However, it is fair to say that, as the Scheme evolved, so it became: more complex; less transparent; and with the control and interest of the Bhaur Family becoming ever more remote and attenuated. I think it is fair to say that neither Mr Bhaur nor anyone else in the Bhaur Family would have been able to describe (or, at least, describe accurately) the true nature of the manner in which their interests (if I may use that term loosely) were held.

162. For these reasons, it is unnecessary to go into any great detail regarding these evolutions to the Scheme. The limited points of significance are set out below.

163. I described the New Structure – which Mr Anderson, QC, asserted was (even absent any mistake on the part of the Bhaur Family) a sham – at paragraph 50 above. For the reasons given in paragraph 53 above, I have substantially accepted that submission.

164. In doing so, I wish to be clear that I am in no way prepared to find that Mr Bhaur or the Bhaur Family were aware of this. It seems to me that, given the technical nature of the structure of the Scheme, it would have been very difficult for them to reach any informed view of the proposal that Aston Court was advancing.

165. Nevertheless, without prejudice to the point made in the preceding paragraph, the Bhaur Family was told something about the New Structure. In paragraph 50 above, I noted that a document – *Structure Review and Wealth Preservation Report for the Bhaur Family* –

[84] In relation to the First Staff Remuneration Trust, the letter of wishes is set out at paragraph 28(5) above.

dated 21 September 2012, was prepared by Aston Court for the Bhaur Family. This document:

(1) Noted that Aston Court was "continuously reviewing the delivery of the services provided to existing clients and measuring the efficacy of the structures against legislative changes in the years since the original assignment was completed".

(2) Set out three options for Aston Court's clients, as follows:

> "1. **Wind up your structure.** This would occur where you feel that the structure has served its purpose and now really only acts as an overhead.
>
> 2. **Retain your structure as it is but transfer this to alternative Trustees and service providers.** This would occur where you were not happy to make the suggested changes and wanted to keep your structure as is. Since this is against our advice we will not be able to continue as your trustee and service provider but will assist you in finding a suitable replacement.
>
> 3. **Remain with Aston Court and make the appropriate changes.** This is naturally our preferred option."

It will readily be appreciated that these are not really three options at all, but one: a recommendation to move to the New Structure.

(3) The *Structure Review* sought to explain why the old structure was no longer appropriate. However, without setting it out, the language is opaque and untransparent, and I do not consider that the Bhaur Family would have derived anything from it beyond the fact that their advisor was advising a change.

(4) Equally, the New Structure proposed was described in singularly untransparent terms. What <u>was</u> transparent was the £15,000 fee that Aston Court wanted to charge.

166. In short, the *Structure Review* is not a document that particularly takes matters forward so far as an insight into the Bhaur Family's state of mind is concerned. What may be important is <u>why</u> this New Structure was introduced by Aston Court at this stage.

167. Shortly before the *Structure Review*, Aston Court was very much at the losing end of correspondence with HMRC regarding the Scheme. HMRC had been investigating the Scheme for some time, and the Bhaur Family had left it to Aston Court to deal with HMRC's investigation. As I say, it is quite clear from the correspondence that Aston Court were finding it impossible to defend the Scheme, although they certainly made no such concession in the correspondence.

168. By an email dated 7 September 2012, a Mr Nick Fernyhough (**Mr Fernyhough**) of Aston Court emailed Baldeep in the following terms:

> "Further to our exchange of messages earlier in the year, James [O'Toole] has asked me to update you on developments.
>
> HMRC have replied to our letter in April meantime and regrettably their specialist Trusts and Estates office are continuing to refuse to accept our approach to the interpretation of section 86(3) [Inheritance Tax Act 1984] which we rely on to relieve [Inheritance Tax] in regard to the transfers

into the trust. We await to see how HMRC will go forward with this, but it does look at though we are moving towards a contentious situation.

..."

169. On 11 September 2012, Mr Fernyhough telephoned Mr Bhaur. Mr Fernyhough made a handwritten attendance note which states as follows:

"[Mr Fernyhough] telephoned [Mr Bhaur]...at approximately 2:00pm, as requested to discuss the position as referred to in his email dated 7 September.[85]

[Mr Fernyhough] opened by explaining that he was a Tax Consultant employed by [Aston Court] and had been assisting James O'Toole with correspondence relating to the HMRC enquiry. [Mr Bhaur] said that the situation that [Mr Fernyhough] had reported was obviously of concern and he wanted to explore the ramifications for the company. [Mr Fernyhough] said that the position was the [Aston Court] had drafted the EBT at the relevant time to rely on provisions in the Inheritance Tax Act which provide for relief on transfers into trusts for the benefit of employees. [Mr Fernyhough] explained that a good deal of correspondence had passed with HMRC over the months but that they were not accepting [Aston Court's] interpretation of the relevant provisions in sections 13 and 86 IHTA 1984. [Mr Fernyhough] explained that HMRC in effect say that the trusts fall outside the relieving provisions because at relevant times the Participants (who were excluded from benefit under the trust – properly in order to ensure that the arrangements did not infringe section 13) outnumbered other employees. [Aston Court's] view is that the to ignore the provisions of the trust deed was wrong and that [Aston Court's] understanding of the legislation is that the trust qualifies if the provisions are drafted in such a way that they allow all or most of the employees to benefit as a class. In essence, there was a difference of opinion about the way in which the legislation should be interpreted, there was no dispute about the facts as [Mr Fernyhough] understood matters.

[Mr Fernyhough] explained that he anticipated that HMRC may well now move to make a determination which would lead to IHT becoming chargeable under the Inheritance Tax Act provisions. [Mr Fernyhough] said that if that happened, although he could not pre-empt [James O'Toole's] views and future discussions, he assumed that [Aston Court] would advise Safe Investments to pursue the appeal and to test the issue under the relevant dispute resolution procedures.

...

[Mr Bhaur] said that the arrangements were set up on the express assurance from [Aston Court] that the transfer into the Trust wold escape and IHT charge. That was the only reason for effecting the arrangements. [Mr Bhaur] said, after more further discussion, that he would appreciate a note from [James O'Toole] advising on the position at the moment and what [Aston Court's] advice would be if HMRC did decide to make an assessment.

[Mr Bhaur] said that [Safe Investments] would wish to have [Aston Court's] clarification and guidance on the course of action as to how they would advise dealing with the situation if the IHT relief is not available. Is there a Plan B?

[Mr Fernyhough] said, without wishing to pre-empt discussions, that [James O'Toole] would almost certainly wish to test any legal issue arising on the notice of determination. However, he would discuss this with [James O'Toole] in his next update meeting with him in the next week or two and then a response would be sent. [Mr Fernyhough] thanked [Mr Bhaur] for his help."

[85] So far as material, set out in paragraph 168 above.

170. On 14 September 2012, Mr Bhaur emailed as follows:[86]

"Dear Mr Fernyhough,[87]

Thank you, for ring me yesterday afternoon and explaining the situation with HMRC regarding the inheritance Tax relief. Just to recap what we discussed my understanding is as follows:

- According to yourself there is very little chance that HMRC will grant us the inheritance Tax relief on the properties transferred to trust In 2007 and 2008.
- There is no merit to make further appeals.
- Explaining in simple term trust will be liable for inheritance tax
- Obviously we are deeply concerned about it, and requested you to pass our urgent message to Mr James O'Toole to explain what is proposed moving forward, as this trust was solely set up when I wanted to retire and safeguard the future for childen and their children and we were given written guarantees that the trust will not be liable for inheritance tax.
- You assured me that you will pass the message and we will have response within few days."

171. Mr Fernyhough came back on the same day, rejecting quite so black a view:

"...this still leaves open the existing argument in favour of you and the companies that the transfers into the trust are covered by the legislative concession in sections 13 and 86 IHTA where dispositions are made by certain companies for their employees. As I have explained HMRC do not accept our interpretation of the legislation on this point, which disagreement I believe is now likely to lead to the department issuing Notices of Determination to tax under the Inheritance Tax legislation. In the event of such a determination, the next steps will be to consider whether to pursue and appeal against this. With respect, I trust I did not suggest that we would advise you not to appeal on this argument, conversely my note of our conversation is that I said that [Aston Court] would probably advise you to test this legal issue."

172. I will obviously be making findings about Mr Bhaur and the Bhaur Family's statement of mind at the inception of the Scheme in 2007 in Section G below. Here, we are concerned with exchanges taking place much later, in September 2012. Mr Bhaur's knowledge at this time is thus only inferentially relevant to his state of mind in 2007. That being said, it is important to articulate what Mr Bhaur and the Bhaur Family must have appreciated at this point in time (September 2012):

(1) Mr Bhaur was clearly aware that, in order to be tax efficient, the trust that Safe Investments UK had to set up could not be "any old trust": the trust had to meet certain essential criteria that would constitute it an employee remuneration trust. Of course, Mr Bhaur may not have used that term; and he may not have been (indeed, almost certainly was not) conscious of the specific nature of the essential criteria for such a trust. But he was aware of the general position.

(2) Mr Bhaur had been told, in terms, that HMRC considered the Scheme ineffective from an Inheritance Tax Act point of view, albeit that Aston Court's view differed.

[86] Generally, I have corrected minor errors and typos in the documents I quote, because these corrections are immaterial and make the material easier to read. In this case, because Mr Bhaur's state of mind is important, I have refrained from doing so.

[87] Mr James O'Toole and Mr Rutherford were both copied in.

(3) Mr Bhaur had been told that he could seek to fight this out in the courts, and that that was likely to be Aston Court's approach.

173. Neither Aston Court nor Mr Bhaur actually challenged the view of HMRC in the courts. Rather, the reaction of Aston Court to the concerns raised by HMRC seems to have been the New Structure and the proposals in the *Structure Review* that was sent by Aston Court to Mr Bhaur at about this time: the *Structure Review* is dated 21 September 2012.

174. It seems to me obvious, and I so find, that the New Structure was a reaction to HMRC's probing. Quite how Aston Court intended to head off HMRC's inquiry into the Scheme as originally framed is unknown, but interestingly (from the limited papers I have seen) there seems to have been something of a hiatus in communications with HMRC between 2012 and 2015, when there was a communication from lawyers instructed by Mr James O'Toole on behalf of Safe Investment UK regarding HMRC's failure to issue a notice of determination.

175. In any eveny, by an email dated 29 October 2012, the Bhaur Family indicated that "[w]e would like to proceed with option 3: Remain with Aston Court and make the appropriate changes". In short, there was a decision to subscribe to the New Structure. There were, however, a number of conditions articulated, the first of which was as follows:

> "Confirmation that the trust structure set up by Aston Court is not impacted by the inheritance tax implications cited in the email correspondence from Nick Fernyhough dated 14 September and 10 September. (Naturally, this has caused us grave concern.) James O'Toole showed us the page within the deed and accepted the action of challenging the HMRC on this point. In the very rare event that this is unsuccessfully challenged and IHT had to be paid the Bhaur Family will be entitled to a full refund of fees paid."

176. Thereafter, the Scheme developed in the manner I have described in Section B above and – as I have found – a sub-trust came into being.[88] It seems that one of the effects of this sub-trust structure was that Aston Court and the Bhaur Family began to operate on the basis that the shackles of the employee remuneration trust, which had previously caused the Bhaur Family considerable difficulty in running their business, no longer pertained, and the Bhaur Family began dealing with the trust property as if it was their own, albeit that they nominally were acting as consultants to IVM PCC, advising on investment proposals for the trust. They were, however, effectively advising in relation to what they considered was their own money.[89]

(4) "Red flags"

(a) Meaning

177. As I have described in paragraph 128(2(b) above, there were certain aspects of the conduct of the Bhaur Family which seemed to me, on their face, inconsistent with mistake. I called these aspects "red flags". Mr Anderson, QC met these "red flags" squarely in his closing submissions, the substance of his contention being that the "red flags" were consistent (or at least not inconsistent) with mistake.

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[88] See paragraph 68 above.

[89] See paragraphs 52 to 54 above.

178. In this Section, I propose to do no more than articulate the evidence in relation to these "red flags". I will consider – when I come to consider mistake in the round in Section G below – their significance.

(b) Control

Articulation of what is meant by control

179. Mr Anderson, QC emphasised the importance of control of their assets to the Bhaur Family. His written closing submissions made the following points:

> "11. [The First Staff Remuneration Trust] resulted in a disastrous tax position discussed below.
>
> 12. However, the trust (if it is not rescinded) involved much more than a disastrous liability to tax. It involved transfer of control of the claimants' family wealth to a discretionary trust with beneficiaries including strangers and charities, controlled by [Aston Court], who were personally dishonest and professionally disloyal. This was a complete mismatch to the claimants' intentions and expectations."

180. There is much in these paragraphs with which I agree. Paragraph 11 I accept in its entirety, and paragraph 12 I largely agree with. The Bhaur Family wanted the best of all worlds – a reduction in exposure to tax, whilst retaining control – and it is entirely right to say that Aston Court said that this could be achieved. I accept that in saying this, Aston Court behaved dishonestly; whether – given their dishonesty – they were "professionally disloyal" is a more difficult question, which pre-supposes mistake on the part of the Bhaur Family. I accept that Aston Court behaved unprofessionally.

181. However, it seems to me that what is significant is not so much Aston Court's conduct as the reaction of the Bhaur Family to the undoubted loss of control that did occur at certain times. We have already seen that the Bhaur Family was told in terms that their assets would be transferred to an offshore trust – but with control remaining with the family through their position as directors of the offshore management company that managed the trust.[90]

182. In an email dated 6 May 2007, Mr O'Toole explained to Mr Bhaur "the procedure we would like you to follow upon sale of any of the properties with which we have dealt". Mr O'Toole's message was that it was, essentially, "business as usual" for the Bhaur Family, but he did say this at point 7:

> "Any residue of sale proceeds i.e. profit does not belong to you or [Mrs Bhaur] any more and nor does it belong to Safe Investment Management UK Limited. Such monies belong to the remuneration trust or, more properly, the company the trust has incorporated to hold such funds on its behalf. Furthermore, there is an obligation on you and [Mrs Bhaur] to ensure these sales proceeds are paid to the trust as soon as possible after the sale. You simply have to instruct your lawyer to send these monies direct to the BVI company bank account. They will ask you for a written instruction to do this and they may ask us to explain why the monies have to be remitted to the BVIs. If they do, we will write to them to ensure they understand why they need to send the monies to the BVIs."

[90] See, for instance, the Wealth Management Report described in paragraph 132 above.

183. This makes very clear that beneficially speaking, the Bhaur's property was no longer theirs, but belonged to the trust they had established. Of course, I appreciate that the Bhaur Family considered that the trust existed for their benefit, but that sits uneasily with the explanations that this was an employee benefit trust.

184. Loss of control really refers to two things, which need to be differentiated:

(1) The loss of formal control, in the sense that the powers that the Bhaur Family had over "their" property became ever more attenuated as the structure of the Scheme became ever more baroque and untransparent.

(2) The loss of practical, day-to-day, control over the conduct of their business.

I shall consider these in reverse order.

Loss of practical day-to-day control

185. Although the details do not matter, it is quite clear from the documents that the trust structure prevented the Bhaur Family from dealing with "their" assets in the manner that they wished. There are numerous emails evidencing difficulties in buying, selling and financing the purchase of properties, which difficulties are directly related to structure on the holding of assets created by the Scheme. These, as I have described, were ameliorated by way of the New Scheme.

186. It is entirely fair to say that the Bhaur Family evinced considerable dissatisfaction with these side-effects of the Scheme, expressing irritation, puzzlement and determination – in more or less equal measure – in relation to these problems and in overcoming them.

187. The one thing that the Bhaur Family did not do is ask why these restrictions operated. Equally, when they were ameliorated, the Bhaur Family did not ask why this was the case either.

Loss of formal control

188. I find that the Bhaur Family knew of this from the outset, and consented to it. They knew – because they were told in terms – that the ownership of the Estate would not remain with them. They accepted this without demur. Mr Bhaur (and – to the extent necessary – other members of the Bhaur Family) signed the relevant transactional documents that enabled and formalised this loss of control.

189. By way of example in addition to the instances above, the Bhaur Family readily accepted lesser roles of control – like that of "Appointed Enquirer".[91] I do not consider that they can have been under any kind of misapprehension that they were ceasing to be beneficial owners of the Estate, which was passing – in beneficial terms at least – into a trust.

190. Whether the Bhaur Family had an understanding of the implications of this loss of control is a very different matter, and it is appropriate, at this point, to describe what happened at the end of this story, and how this dispute came into being:[92]

[91] See paragraph 42 above.

[92] See also paragraphs 72 to 78 above.

(1) Throughout 2015, the sub-trust seems to have worked – at the practical level – extremely well. The Bhaur Family gave "investment advisory services", which services involved the purchase of further properties. One example – from 9 September 2015, signed by Mandeep – will suffice:

> "**Investment Proposal for IVM PCC with respect to IVM 020 (the Entity)**
>
> I, the undersigned, being the Consultant of the above-mentioned Entity, duly appointed on 4 February 2014 to provide investment advisory services, hereby provide the following recommendations in accordance with Section 3.1(d) of the Investment Advisory Agreement entered between IVM PCC with respect to IVM 020 and myself for approval of the Board of directors:
>
> a) Purchasing a property known as 10 Rockley Road, Leicester, LE4 0GJ for £130,000
>
> b) Purchasing a property known as 27 Gwencole Crescent, Leicester, LE3 2FJ for £134,000
>
> I believe that the above recommendations are in the best interests of the Entity and remain at the disposition of the Board of directors for any clarification and additional information that may be required."

(2) In late 2016, the dispute regarding the management of IVM PCC reared its head. Shortly thereafter, the letter that I have described at paragraph 73 above was written, which indicated an intention to enforce the Second Employee Benefit Trust according to its literal terms: see paragraph 74 above.

(3) It is an excellent question why Aston Court so violently changed direction. Whilst a Pauline conversion to the benefits of honesty in the arranging of tax affairs is not impossible, much more likely – and I find – is that HMRC were so close on the trail of Aston Court itself that Mr O'Toole and the other persons in Aston Court active in promoting evasive schemes decided it was in their best interests to completely change tack. This is clear – for example – from the decision of the Divisional Court (Treacy LJ and Supperstone J) in *R (O'Toole) v. HMRC*, where Mr O'Toole sought to resist and set aside certain disclosure orders made in respect of this very Scheme.[93]

(4) This change of tack came – as I find – as a most unpleasant surprise to the Bhaur Family – who, as I have described (paragraph 76) objected in the strongest of terms. In the event, the disagreement could not be resolved, the Bhaur Family refused the benefits the trust wanted to confer, and the appointment out to the NSPCC was made.

(5) The rank hypocrisy of Aston Court does astonish, until one appreciates that it was a form of mitigation in relation to potentially very serious criminal misconduct on the part of certain persons within Aston Court. The fact that this mitigation came at the expense of others, and not Aston Court, will not have troubled Aston Court. The point of this effective conclusion to the Scheme as a viable tax evasion scheme

[93] [2016] EWHC 138 (Admin).

is that it demonstrated, in very real and extremely unpleasant terms, precisely the extent to which the Bhaur Family had ceded control over their assets.

(c) Advisors apart from Aston Court

191. The Bhaur Family, as I have described, were careful about their affairs. Apart from Aston Court, they used – or at least retained – other professional advisers. Thus, they retained a firm of accountants, Mulligan Williams. There was occasionally friction between the Scheme and the finalisation of accounts. Thus, for example, on 27 February 2009, Mr Luke Mulligan of Mulligan Williams wrote to Mr Bhaur (copying in Aston Court) in the following terms:

> "I have spoken to most of you during the last week or so with regard to the final limited company accounts. I'd like to use this email to set out the current state of play.
>
> The first draft accounts did not reflect the transfer of the property into the limited company and then the subsequent transfer out. Unfortunately, we were't aware of this structure and had simply assumed that the property when straight to the trust. I have spoken to Ritchie, who provided us with some disclosures and notes that we didn't need to "journal" the entries into the account, i.e. show the property coming in and the corresponding entries in the share premium account.
>
> As with any significant or new work, we put the accounts to a consultancy that provides hot reviews for us and they have concerns about not effecting the property journals. Admittedly, they have not seen all the trust documentation so, frustratingly, they have not given a specific guidance on what they recommend we would do. Ritchie – apologies for not coming back to you on this before this email. I only found out yesterday and I thought it would be better to send a general email to all as I know we all want to get the accounts finalised.
>
> In summary, we're in a position where we can't sign off the accounts because our consultants are expressing some different opinions over the disclosure (which may be completely unfounded due to lack of documentation). We don't have the knowledge or expertise in trusts so we are relying on yourselves or our consultants to guide us through – particularly, as we weren't originally aware of the section 162 and section 239 transactions. To finalise the accounts, I either need specific instruction from you as to the specific journals and disclosures, or you take the accounts (and files) from us as they stand and complete the final disclosures from your practice. My personal opinion is that the latter option would be quicker as we would still need to go through the hot review again and they may require full documentation or certainly the rationale of disclosures and journals.
>
> I apologise if we appear to be stalling the process, but I'm sure you can understand our position."

192. In the end, accounts were filed. The process by which this was achieved is unimportant. What is more important is the extent to which Mulligan Williams flagged a degree of professional discomfort about the accounts during this process (including "...we don't think we will be able to get comfortable with the accounts disclosures or entries..."), which the Bhaur Family did not in any way seek to bottom out, although they were themselves involved in the process of finalising the accounts.

193. At times, the Bhaur Family were unhappy with the conduct of Aston Court. Usually, this was because of the control issues that I have described elsewhere in this Judgment. These issues tended to vanish and – as has been seen – Aston Court remained involved in the (to a greater or lesser extent) in the Scheme throughout. Nevertheless, at times during these low points in their relationship, the Bhaur Family gave consideration to obtaining

different advice and different services from others. Thus, Ms Hathaway (at that time with a firm called Powrie Appleby) emailed the Bhaur Family in the following terms on 29 November 2010:

"We spoke last week about your recent meeting with [Aston Court], which you felt was a positive step forward...

On a separate matter, you were advised that [Aston Court] are asking their clients to appoint existing trust funds on broadly similar terms. On the assumption that the original trust is of the type we believe it to be (namely that it meets the conditions for certain tax reliefs) then an appointment to a new trust on the same terms should not be too controversial. This point is made with the clear understanding that we have not had sight of the trust deeds to be able to advise on whether either meets those conditions or not...

...You mentioned that it is possible to select an alternative to [Aston Court] to stand as Protector. We discussed that the Protector role is intended to provide some measure of safeguard against the Trustees acting inappropriately and, as such, it makes sense for this to be a third party. I mentioned that many of our clients ask a longstanding adviser to take this role, or a family friend. I have not yet had an opportunity to confirm with the Partners here whether Powrie Appleby could stand as Protector (or whether there are any regulatory reasons why we could not) but we are looking into this and I will let you know as soon as I have found out!

...

Finally, you asked me to confirm that Powrie Appleby would be able to assist in dealing with the ongoing administration of the Trust and we discussed that this may involve acting as a coodinator with [Aston Court], the Trustees and the Protector (yet to be identified). I can confirm that this is fine and, as we briefly discussed, would be charged at our usual hourly rates."

194. A number of points can be drawn from this:

(1) First, the Bhaur Family were not so wedded to Aston Court as to refuse to contemplate alternatives. They were quite capable of obtaining – and did obtain – independent advice.

(2) Secondly, the strong suggestion from this letter is that the Bhaur Family knew what was going on with the Scheme, and knew that their "control" was attenuated.

(3) Thirdly, Ms Hathway was obviously aware that this was a remuneration trust. Yet she said nothing about the appropriateness of this to the Bhaur Family's circumstances. That may have been because she was incompetent, or was (like Aston Court) the purveyor of evasive schemes. Either is possible – but I consider neither to be the case. It seems to me much the more likely that Ms Hathaway was not put in the position by the Bhaur Family to give an opinion on this question.

195. Again, the significance of this does not fall to be considered now. I am simply noting the facts. The third point just made gains additional force when Powrie Applby submitted a report dated 15 June 2011 entitled *Safe Investments – Report on the structure established via Aston Court Chambers*. The opening words of the report demonstrate that Ms Hathway knew exactly what was going on:

"The terms of the enagagement were to incorporate a property business, and then to onward settle properties into a Remuneration Trust set up for the benefit of employees. There has been a great

deal of confusion surrounding how to deal with the properties themselves, and we have not had sight of the Trust Deed and implementation documents themselves..."

196. A "concern" that is noted is that:

"The initial advice on setting up the trust says that the family is excluded from benefit; the position now is that the family is being told that they are permitted to receive income distributions. The tax implications of this difference are exposure to section 86 TCGA which seeks to attribute gains of offshore trusts back to the UK settlor. This does not apply where the settlor and their family are excluded from benefit from the trust."

197. Although Appendix 4 of the document goes through the legal advice provided by Aston Court, nothing is said about the appropriateness of an employee remuneration trust for the Bhaur Family. Again, the three alternatives articulated in paragraph 194(3) pertain.

(d) HMRC investigations

198. On 20 January 2010, HMRC wrote to Mrs Bhaur – the company secretary of Safe Investments UK – in the following terms:

"Every year we check a number of returns to make sure that they are correct and that our customers are paying the right amount of tax. We would now like to check the company's return for the period ending 31 July 2008. This check will be made under paragraph 24(1), Schedule 18 of the Finance Act 1998. I have written to your tax advisers, Mulligan Williams, to ask for the information I need. I enclose a copy of the letter I sent them."

199. Of course, I appreciate that HMRC approaches many taxpayers to review their returns. In this case, the inquiry was passed over from the Bhaur Family and Mulligan Williams to Aston Court, who conducted the (on-going) response to HMRC. Aston Court did not do a very good job, because on 6 July 2010, HMRC wrote:

"I refer to my letter dated 25 May 2010 to which I have not received a reply. I have now issued a formal notice to your client as indicated in my last letter. A copy of the notice is attached for your file."

200. Such a notice triggers a statutory obligation to respond. The Bhaur Family had no recollection of receiving any formal notice. In the event the correspondence between HMRC and Aston Court, and HMRC's investigation, continued. It was this investigation that triggered the exchanges and events that I have described in Section F(3) above.

G. MISTAKE

(1) Introduction

201. I turn, then, to the question of whether the Scheme can be set aside on the ground of mistake. On one level, this question is extremely shortly stated: did Mr Bhaur make a causative mistake in entering into the Scheme that is sufficiently grave as to make it unconscionable on the part of the donee to retain the property,[94] this question being considered by reference to Mr Bhaur's state of mind when entering into the Scheme.[95]

[94] See paragraphs 95 to 105 above.

[95] See paragraph 108 above.

202. Of course, as I have already noted, this does not mean that later events are irrelevant and cannot be material to this question. Mr Anderson, QC, took me through the history partly to show me how the Scheme operated (so as to illustrate, he said, the divergence between the Bhaur Family's state of mind and reality) and party to illustrate (by reference to reactions to subsequent events) what the Bhaur Family's contemporaneous state of mind was. That, as it seems to me, is absolutely the right approach, although of course it is necessary always to keep the fundamental question in mind, namely that it is the state of mind at inception of the Scheme that matters. This is not a case where there is any plea of subsequent affirmation or such-like, and I am simply not going to entertain such questions, which have never been articulated against the Bhaur Family.

203. As Mr Anderson, QC, recognised, the absence of proper opposition to the Bhaur Family's claim was a real problem for them: they were, as witnesses, and he as counsel, "tilting at windmills". I did my best to enable the Bhaur Family's evidence to be tested, and to enable them to answer the real issues arising. It is to the Bhaur Family's very great credit that they sought to participate in the process honestly and carefully – as I have found their evidence before me on all occasions to have been.

204. I propose to consider the question of mistake in the following way:

(1) I begin with a consideration of Aston Court and the relevance of Aston Court's conduct. That is because Mr Anderson, QC made no bones about his assertion of dishonesty on the part of (certain persons within) Aston Court, and his contention that the Bhaur Family was mislead. This, of course, is not only directly relevant to the question of mistake, but also affects the causative test applicable.[96]

(2) I then move to consider the Bhaur Family's state of mind at the inception of the Scheme. That, as it seems to me, is the central question on the point of mistake, and it turns on nice – and very difficult – questions of state of mind.

(2) Aston Court

(a) Introduction

205. This is not a case where an unscrupulous person uses a tax scheme to dupe an innocent person so as to cause that innocent person to part with his or her hard-earned money. Although Mr Anderson, QC, sought to make much of the progressive detachment of the Bhaur Family from the Estate, there was never any suggestion of misappropriation of the Bhaur Family's money in the sense of theft or abstraction by Aston Court.

206. Even towards the end of the Scheme, when Aston Court was seeking to make appointments out of the trust fund, in particular to the NSPCC, Aston Court was not actually seeking to deprive the Bhaur Family, but rather was seeking to operate the fund in strict compliance with HMRC's views as to the law. That was in order – as I have found – to mitigate Aston Court's own potentially criminal conduct, but I do not consider that Aston Court were stealing from the Bhaur Family in the sense of expropriating them.

[96] See paragraphs 109 to 111 above.

207. I find that Aston Court's approach, over the course of the Scheme, can be broken down into three phases.

(b) The marketing phase

208. In a "marketing phase", Aston Court sold a tax scheme to the Bhaur Family, that could have been used legitimately, for a manifestly inappropriate use, thereby rendering the purpose inappropriate, illegitimate, evasive and illegal. There is, to my mind, no doubt that Aston Court knew that they were peddling an evasive scheme to the Bhaur Family. In saying this, I take fully into account the fact that – at the technical level – it is possible that the Scheme might have delivered tax benefits for Mandeep and Baldeep after the deaths of Mr and Mrs Bhaur.[97]

209. That, as it seems to me, makes no difference to the evasive nature of the scheme – even if Aston Court had been aware of this possibility.[98] The fact is that this was never a proper employee remuneration trust and there was never any intention – whether on the part of the Bhaur Family or Aston Court – to benefit employees of Safe Investments UK. There were, in reality, no such employees, and (had there been) Mr Bhaur's intention would not have been to benefit them. Had Aston Court and the Bhaur Family pulled off the essential lie, and persuaded HMRC that this was a genuine employee remuneration trust, then there might have been a way for Mandeep and Baldeep to benefit from the Scheme on the demise of Mr and Mrs Bhaur. But that is irrelevant to the essentially evasive nature of the Scheme.

210. It is clear that Aston Court oversold the scheme. The *Wealth Management Report* and the other documents that I have described above make statements and fail to disclose risks in a manner that is indefensible. These statements and failure of disclosure were not just negligently or incompetently made, but were knowingly done or omitted to be done by Aston Court, and so were (as I find) dishonest. The critical question – to which I return below – is against whom that dishonesty was directed. Was it to dupe the Bhaur Family? Or to dupe HMRC? Or both?

(c) The implementation phase

211. Secondly, in what I shall term the "implementation phase", Aston Court put the Scheme into place, and sought to ensure that it avoided the scrutiny of HMRC. I consider that the development of the Scheme – as I have described it – was actuated not by a desire to misappropriate the monies of the Bhaur Family, but to make the Scheme work, by providing the tax and other benefits that they (Aston Court) had promised. Since these benefits were impossible to provide legitimately, they were provided by rendering the (illegitimate) Scheme untransparent and difficult for the tax authorities to review. It seems to me that the sub-trust structure that was adopted with precisely these aims in mind, and that the responses to HMRC that Aston Court orchestrated also had this objective.

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[97] See paragraph 137(6) above.

[98] As to which I have little or no evidence. I am quite prepared to assume that this was a matter Aston Court had in mind, for it makes no difference to my assessment of Aston Court's overall dishonesty.

212. There is relatively little that I derive from this phase in terms of insight into the Bhaur Family's state of mind. That is partly because this phase is "after the event", but mainly because the work done was highly technical and untransparent.

(d) Poacher-turned gamekeeper phase

213. Thirdly, in what I shall call the "poacher-turned-gamekeeper" phase, Aston Court abruptly reversed course and began to behave as if the Scheme had always been intended to be deployed as a *bona fide* employee benefit scheme. It is important to understand the reasons behind this abrupt *volte face* to understand the (as I find) essentially hypocritical and disingenuous nature of the communications sent by Aston Court to the Bhaur Family (and no doubt others). As I say, Aston Court was not actuated in any sense by the interests of the Bhaur Family; but was seeking to head off or at least distract HMRC's inquiry into Aston Court's own conduct. In doing so, Aston Court was, clearly, not actuated in any way by the interests of the Bhaur Family, but I do not consider that this phase sheds any great light on the Bhaur Family's past state of mind.

(e) A note of caution

214. In reaching the findings that I have in relation to Aston Court, I am very conscious that I do so without having seen all of the documents, and without the material participation of those involved in Aston Court. That said, Mr O'Toole, Equity First and Stratton 17 have had every opportunity of participating in these proceedings, and I consider that it is very necessary understand and make findings in relation to Aston Court's approach and state of mind before moving on to that of the Bhaur Family. The findings I make have been limited to those I consider I need to make, and I have made these findings bearing in mind the partial documentary record and the fact that I have not heard substantively from Aston Court.

(3) The Bhaur Family's state of mind: evidence as at the inception of the Scheme

215. It seems to me that it is necessary that I begin with my evaluation of the Bhaur Family generally – and Mr Bhaur, Mandeep and Baldeep in particular. As I have noted, their evidence was honestly given, with a clear desire to assist the Court. It seems to me that their assertions – made in the pleadings underlying these proceedings and in their evidence, both written and oral – that they were mistaken in entering into the Scheme is entitled to great weight, particularly given the (as I have found it) dishonest conduct of Aston Court. The suggestion that they were mistaken in entering into the Scheme is one that has to be taken extremely seriously. My starting point is that the Bhaur Family were innocent victims of a rogue undertaking in the form of Aston Court.

216. Nevertheless, giving their subjective statements as to their state of mind as much weight as I do, I am firmly of the conclusion that the Bhaur Family in general, and Mr Bhaur in particular, were not mistaken at the time they signed up to the Scheme. This is my conclusion considering solely the facts and matters relevant as at the time the Scheme was entered into. I shall consider whether this conclusion is supported or not supported by after-the-event "backbearings" separately.

217. I have reached this conclusion for the following reasons:

(1) It seems to me that I must discount altogether the effect of hindsight and the (very natural) regret of the Bhaur Family that matters have turned out as they have. Of course, knowing what they do now – given the expense of the Scheme, the involvement of HMRC inquiring into their affairs, the fact that the tax benefits they were sold did not properly exist and the fact that their assets are now held beneficially (as I have found) by an off-shore trust – the Bhaur Family would never have dreamed of approaching Aston Court, and would never have contemplated participating in the Scheme. But hindsight is not the same as mistake. Whilst the fact that expectations at the relevant time were not met is relevant to the question of mistake (although to be differentiated from misprediction) the fact that things could and should have been done differently is not the stuff of mistake at all.[99]

(2) The critical question, I consider, is that articulated in paragraphs 92(3), 131 and 210 above. In documentation that the Bhaur Family saw and considers, Aston Court made various statements as to the nature of the Scheme that Aston Court were inviting the Bhaur Family to subscribe to. Those statements – which I have set out in Section F(3) above – cannot be explained away by Mr Anderson's contention that Aston Court were "papering the file" for deployment in precisely this case and in order to dupe the Bhaur Family. The point is unsustainable because these communications were made to the Bhaur Family, and considered by them. It seems to me that whilst these statements (and the other transactional documents) were undoubtedly "window dressing", this was "window dressing" done in order to dupe HMRC and with the Bhaur Family's tacit assent. With great regret, and taking fully into account Aston Court's dishonesty, that is my conclusion on this critical point. It is appropriate that I expand a little further:

(a) Mr Bhaur and his sons were careful and painstaking in their approach to the family business. Documents were read; points considered; issues evaluated. We are talking about prudent, careful individuals, who would have considered Aston Court's proposals with attention and diligence. That is all the more the case given the very large fees Aston Court were charging. The Bhaur Family would have wanted to know what they were getting, and would have probed accordingly.

(b) I accept that the Bhaur Family would have considered Aston Court both "expert" and "respectable" and would have placed weight on the fact that Mr O'Toole was a solicitor. There would have been a considerable element of trust in Aston Court, but that cuts both ways. Of course, if Aston Court stated to the Bhaur Family that something was the case, then I consider that the Bhaur Family did and was entitled to believe Aston Court. But, conversely, if Aston Court said (as they did) that they (Aston Court) were relying on the Bhaur Family for information, then that is something that the Bhaur Family would (and should) have taken seriously. Equally, where Aston Court made what now appears to be an error regarding the Bhaur Family's intentions (e.g., as regards any desire to benefit employees) the Bhaur would have pushed back to correct such errors if they had not wanted the Scheme to proceed as it did.

[99] See paragraphs 112 amd 120-123 above.

(c) The "papering the file" comments of Aston Court are significant precisely because they were made to the Bhaur Family. Matters would be very different if the communications I am going to refer to have been made behind the Bhaur Family's back, but that was not (as I have found) the case. Thus:

(i) In the original *Wealth Management Report*, Aston Court stressed that their proposals were based on information provided by the Bhaur Family.[100] I accept that the *Wealth Management Report* was extremely sketchy about the nature of the Scheme, referring only to a "Remuneration Trust".[101] But it would have been clear to Mr Bhaur that direct control of the family's assets was being removed, and that the control of the Bhaur Family over their assets was, from the outset, was going to be exercised indirectly, through a trust controlled by a management company. At the end of the day, that is exactly what Aston Court delivered, and I can see no mistake on the part of the Bhaur Family so far as "control" is concerned. The Bhaur Family was told, from the get-go, what was going to happen. What they were told would happen, did happen.

(ii) In later communications, the Bhaur Family was told in terms that the trust would be a remuneration trust,[102] "for the benefit of current, past and present employees". Whilst I fully appreciate, and accept, that Mr Bhaur had no idea about the tax law I have sought to summarise in paragraphs 137 to 140 above, the fact is that he (Mr Bhaur) was told, in terms, who the beneficiaries of the trust would be. Those beneficiaries obviously did not align with Mr Bhaur's intended beneficiaries of his (and his wife's) money. The mismatch between what Mr Bhaur was told and what he wanted to do is palpable. None of Mr Bhaur, Mandeep or Baldeep could explain this mismatch, save through a reference to "trust" in Aston Court. But that is, I am afraid, no explanation. Either the Bhaur Family trusted Aston Court to set up a scheme legitimately in accordance with their needs – in which case these errors were obvious and had to be corrected. Or the trust of the Bhaur Family was that Aston Court would set up a Scheme that said one thing, but did another. Whilst I have no doubt that – even at the time – Mr Bhaur, Mandeep and Baldeep would have reacted with dismay and denial to the suggestion that they were participating – albeit perhaps as silent partners – in an evasive and illegitimate scheme, that is, I find, precisely what they did. Their dishonesty or otherwise is not something I need consider: what is important for the purposes of this case is that they were not mistaken in the essential tax evasiveness of the Scheme. The Scheme was an employee remuneration trust in form only, and the Bhaur Family knew and endorsed this approach.

[100] Paragraph 131 above.

[101] Paragraph 133 above.

[102] E.g. paragraph 142 above.

(iii) Mr Bhaur and the Bhaur Family would have appreciated that the bulk of their property – the Estate – was not only being transferred into a trust, but into a trust for employees that their newly incorporated company did not have.[103] The essential absurdity of transferring considerable wealth into a company remuneration trust for employees the company did not have – and did not propose to have – cannot have escaped Mr Bhaur. He would have known it was a fiction. The reference, by Aston Court, to "loose ends" to my mind conveys how both the Bhaur Family and Aston Court saw the transaction. It was, in essence, a sham, where the very beneficiaries of the trust (the employees) who would and should have been front-and-centre in any legitimate trust were relegated to the status of "loose ends". "Window-dressing" would be a better term – and that, I find, is what the Bhaur Family intended.

(d) I accept that Mr Bhaur and the Bhaur Family miscalculated in terms of the consequences to them if the Scheme went "wrong", i.e. if the tax authorities became involved. Their thinking, as I find, was that the Scheme could simply be reversed and that they could opt back into the tax regime that they had sought to evade. The only downside, to their way of thinking, was the fees that they had paid to Aston Court; and that explains why they repeatedly stressed the importance of the fee refund offered by Aston Court and accepted by them. This was undoubtedly wrong, but it was not a mistake. It was a misprediction. The Bhaur Family assumed – and, in the event, were entirely wrong in this assumption – that the downside to them if the Scheme went wrong was containable and confined to the fees paid over. They gave no thought to the point that the transactions they freely entered into were not things writ in water and reversible at will, but proper transfers of their property that could only be reversed if certain conditions were met. That, in my judgment, is not a mistake.

(e) It is no part of my thinking that the Bhaur Family ought to be punished or should face a different test in law because the Scheme was an evasive one.[104] Whilst it seems to me that there may be policy questions to explore in this regard, that is not a matter for me, and I leave it entirely out of account.

(f) I do take account of the fact that the decision that the Bhaur Family made in 2007 is one that has had – and will continue to have – devastating consequences.[105] But this is not a case of a minor decision – ill-considered and quickly made – and so, perhaps, more easily to be regarded as a mistake. Entry into the Scheme was understood by the Bhaur Family to be a decision of considerable moment at the time it was made. That much is clear from the volume of transactional documents seen and executed by the Bhaur Family and the amount of Aston Court's fees. The Bhaur Family knew that

[103] Paragraphs 152*ff*.

[104] See paragraphs 118 to 119 above.

[105] See paragraphs 116 to 117 above.

this was a significant step and – whilst I know the consequences of their decision were and are enormous – they do not arise out of a mistake.

(4) Subsequent after-the-event "backbearings"

218. I consider that my conclusion in relation to the Bhaur Family's state of mind at the time the Scheme incepted is supported by the events that took place subsequently. I stress that I am in no way suggesting that the Bhaur Family affirmed an earlier mistake. I regard these subsequent events as being consistent with, and confirmatory of, my conclusion that there was no mistake. More specifically:

(1) As I have stated,[106] I place little weight on most of the transactional documents executed by the Bhaur Family after inception of the Scheme. They were technical, confusing and it seems to me that the Bhaur Family would have derived nothing from them. However, the circumstances in which what I have termed the New Structure (described in Section B and paragraphs 160*ff* above) came into being are, I consider, illuminating. I have concluded that the New Structure, as I have termed it, was a direct response to HMRC's investigations, although I cannot say precisely how Aston Court thought the Scheme could evade HMRC's consideration. What is important is that the communications between the Bhaur Family and Mr Fernyhough made clear the essential reason why the Scheme would fail – namely, because this was an employee remuneration trust intended not to benefit employees. Mr Bhaur's response was not to say that an employee remuneration trust was never intended and not his desire, but to explore (in light of the view that this structure did not work) other ways in which to deliver the tax benefits that Mr Bhaur wanted. It seems to me that if there had been a mistake in 2007, then it was fully revealed in 2012, and Mr Bhaur would (if there had been a mistake) have caused the mistake to be remedied. Instead, Mr Bhaur went – with Aston Court – into a new version of the Scheme. I consider that Mr Bhaur was actually indifferent as to what, transactionally, was done on his behalf provided he got the tax benefits he wanted. Put another way, Mr Bhaur did again, in 2012, exactly what he had done in 2007. It was a very dangeous game of double-or-quits, and it was consciously played. In my judgment, the events of 2012 strongly suggest that there was no mistake in 2007.

(2) I turn to what I have called the "red flags". The first of these is the question of control – or the loss of it – on which Mr Anderson, QC placed a great deal of emphasis. As I have noted,[107] loss of control might to refer to two things:

(a) First, a loss of practical, day-to-day control. This, as I have found, was a real source of friction in the Bhaur Family's relationship with Aston Court and the Scheme, which was ameliorated when the New Scheme came into being. But the fact that the Bhaur Family put up with this tension is, to my mind, an indicator that they knew there was an element of things not being what they seemed. The point was that the Bhaur Family were treating an employee remuneration trust as if it were not. That was the source of the friction – and it was a price that the Bhaur Family considered worth paying,

[106] Paragraph 160 above.

[107] Paragraph 182 above.

albeit that they complained about it. The fact is, they stayed with Aston Court and the Scheme.

(b) Secondly, a loss of formal control. I accept that that was an inevitable consequence of the Scheme: but that was explained to Mr Bhaur (and the Bhaur Family) on multiple occasions, including at the very inception of the Scheme. This loss of control was no mistake. The Bhaur Family chose – for tax reasons – to substitute direct ownership and control (easily taxable) for indirect control and no beneficial ownership (not so easily taxable).

(3) I can deal with the other two red flags more quickly. For the reasons I have given above, I find that the Bhaur Family reaction to HMRC's investigation and the manner in which the Bhaur Family retained other advisers indicative of and consistent with no mistake, rather than a mistake. Although I place relatively little weight on both these points, they do serve to confirm the conclusion that I have reached:

(a) In the case of the advisers retained by the Bhaur Family, there seems to have been a disinclination to heed warning signs from the accountants,[108] and Ms Hathway, who was instructed to report of Aston Court's scheme, seems to have been instructed on the basis that an employee remuneration trust was what the Bhaur Family wanted, the only question being whether the structure could be improved.[109] Ms Hathway was not provided, I find, with the necessary information to reach the conclusion that the Scheme was flawed for the fundamental reason that it was never intended to operate as an employee remuneration trust.

(b) In the case of the HMRC inquiry, it is noteworthy that this was initially directed to Mrs Bhaur and the accountants.[110] Yet the Bhaur Family diverted the point of contact to Aston Court. Of course, that is indicative of the trust that the Bhaur Family had in Aston Court. But what was the nature of that trust? What were the Bhaur Family expecting Aston Court to do? My conclusion is that they were expecting Aston Court to do their best to defend the indefensible structure that had been put in place with the Bhaur Family's consent, and – viewed in that way – obviously the accountants were the wrong people to act for the Bhaur Family. In short, the Bhaur Family's reliance on Aston Court is really only comprehensible when viewed through the prism of "no mistake", rather than there being a mistake potentially causative of the Scheme.

(5) Conclusion

219. For all these reasons, I conclude that there was no mistake on the part of the Claimants and that the Scheme cannot, whether in whole or in part, be set aside on the grounds of mistake. Accordingly, I am minded to make the following orders and declarations, namely that:

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[108] Paragraphs 189-190 above.

[109] Paragraphs 191-195 above

[110] Paragraphs 196-199 above.

(1) The Estate is held on the terms of the Second Staff Remuneration Trust described in paragraphs 41 to 42 above. The Estate is held by Stratton 17, with Equity First as trustee. Equity First is the Protector and there appears to be no Enforcer that I can identify. The Bhaur Family and the Protector are Appointed Enquirers.

(2) The domicile of the trust is Nevis.

(3) The sub-trust – as I have described it – is precisely that. It is controlled by and subordinate to the Second Staff Remuneration Trust. In other words, if and to the extent that there is any question of priority between jurisdictions, it is Nevis that has precedence over Mauritius. In short, and I say this for the benefit of the Official Receiver, it is necessary for him to account for property held on trust in Mauritius to the trust in Nevis.

220. Clearly, I must hear from the parties as to precisely what sort of orders and declarations I should make pursuant to paragraph 219 above. In light of the findings that I have made, I am satisfied that I have jurisdiction to make, and should make, orders and declarations along these lines. The question is, given the conclusions that I have reached, how much further can I properly or permissibly go in dealing with a trust that I have found to be properly constituted under the law of another jurisdiction and which is not vitiated by mistake.

221. It is to that question that I now turn.

H. EXERCISE OF JURISDICTION OVER A FOREIGN TRUST

222. Stratton 17 was served with the claim form in these proceedings out of the jurisdiction in Nevis by order of His Honour Judge David Cooke dated 1 February 2019. Equity First was similarly served.[111] No response was received and, as I have indicated, neither party has participated further in these proceedings.

223. The amended claim form, which was served in accordance with the order of His Honour Judge David Cooke, described the claim being advanced in the following terms:

> "An order or, alternatively, a declaration confirming that the trusts entered into by the Claimants be set aside on the ground that the trust [*sic*] was not fit for purpose and any and all assets be restored to the Claimants."

224. This claim is obviously wide enough to embrace the plea of mistake that I have considered and rejected. It does not, on the face of it, seem to me to be wide enough to embrace a challenge to the appointment out of the trust to the NSPCC – nor indeed any aspect concerning the administration of a trust that I have found to be properly constituted.

225. Clause 16 of the deed of trust – referred to in paragraph 46(6) above – provides for the proper law of the Second Staff Remuneration Trust. Clause 16 provides as follows:

[111] See, respectively paragraphs 6(a) and 6(b) of the order.

> "(1) Subject to the following provisions of this clause, this Trust is established under the laws of Nevis pursuant to the Ordinance and shall be governed and construed and regulated by such."

Pausing there, the "Ordinance" is defined as the Nevis International Exempt Trust Ordinance 1994 as amended. Resuming with clause 16:

> (2) Subject to the following provisions of this clause, the Courts of the Federation of St Christopher and Nevis shall be the forum for the administration of this Trust.
>
> (3) The New Trustees" – that is, Equity First – "shall upon the written instruction of the Protector" – that is, Aston Court – "at any time and from time to time declare by deed that the Trusts powers construction and effect of this Trust shall from the date of such declaration take effect in accordance with the law of any other jurisdiction in any part of the world and as from the date of such declaration the law of the jurisdiction named therein shall be the Proper Law governing this Trust and the Courts in that jurisdiction shall be the forum for the administration of this Trust...
>
> ...
>
> (5) The New Trustees may at any time with the written consent of the Protector declare by deed (other than in relation to the trusts created under this deed with respect to Designated Shares) that from the date of such declaration the forum for the administration of this Trust shall be the court of any jurisdiction in the world whether or not such courts are of the jurisdiction which is for the time being the Proper Law of this Trust."

226. So far as I am aware, none of the powers under clause 16 altering the proper law of the trust or the competent jurisdiction in relation to its administration have been exercised. It therefore seems to me that I must proceed on the basis that the proper law of the trust is the law of Nevis pursuant to the Ordinance, and that the proper forum is the courts of the Federation of St Christopher and St Nevis.

227. Although I appreciate that the Particulars of Claim in this case seek – by way of alternative case – orders in relation to the administration of the various trusts here in issue in the event that the primary case on mistake fails,[112] it is not at the moment evident to me the basis upon which I have jurisdiction to make such orders; and – to be clear – even if I had jurisdiction, I would be most cautious in exercising it, given that this is quite clearly a matter where the courts of the Federation of St Christopher and St Nevis are the designated jurisdiction and where I am less than satisfied that I have all of the material before me properly to deal with the continued operation and – if appropriate and/or possible – unwinding of the Second Staff Remuneration Trust.

228. On the other hand, for the reasons I have given, I would be most reluctant to permit this trust to continue – without check – under the day-to-day control of anyone or anything associated with Aston Court. It seems to me that I can – and, if I can, should – enjoin on an interlocutory basis Equity First, Mr O'Toole and Stratton 17 from doing anything in relation to this trust. That would enable the appropriate court – the courts of the Federation of St Christopher and St Nevis – to properly seise themselves of this trust.

[112] See, for example, paragraphs 56*ff*.

229. This is a difficult point of jurisdiction that arose on the last day of this trial, when I indicated a degree of misgiving regarding any exercise of jurisdiction in relation to the administration of the trusts (as opposed to setting aside the Scheme for mistake). It seems to me that I should go no further than I have gone so far, and to invite further submissions from any interested parties as to how to proceed.

230. Accordingly, apart from dismissing the claim to set aside the Scheme on grounds of mistake, I say nothing more about the manner in which these proceedings should be disposed of until I have further heard from the parties.

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(Judgment, paragraph 1, footnote 1)

TERM/ABBREVIATION	FIRST USE IN THE JUDGMENT
Appleby	§22
Aston Court	§22
Baldeep	§1
Baldeep 1	§88(2)
Bhaur Family	§1
Bhaur 1	§88(1)
Bhaur 2	§8
Cell 020	§59
Claimants	§3
Defendants	§4
Equity First	§40(4)
Equity Trust (BVI) Limited	§28(1)
Estate	§17
Estera	§69
Estera Purpose Trust	§71
First Staff Remuneration Trust	§21
Gooch Investment	§26
Gooch Shares	§28(1)
HMRC	§89(2)
IVM PCC	§57
IVM 020 Purpose Trust	§66(1)

Mandeep	§1
Mandeep 1	§88(2)
Mr Bhaur	§1
Mr Fernyhough	§168
Mr James O'Toole	§35(2)(b)
Mr Martin O'Toole	§38
Mr Rutherford	§35(2)(b)
Mrs Bhaur	§1
Ms Hathaway	§73
New Structure	§49
NSPCC	§78
Official Receiver	§81(5)
Original Partnership	§8
Safe Investments UK	§2
Scheme	§2
Second Staff Remuneration Trust	§40(6)(b)
September 2012 Report	§50
Stratton 17	§40(1)
The Bhaur Purpose Trust	§62
Virasami 1	§81(5)
Virasami 2	§81(5)
VISTA	§23

ORDER

Before Mr Justice Marcus Smith on 28 September 2021

UPON the handing down of Judgment following the trial

AND UPON hearing Leading Counsel, Mark Anderson QC, for the Claimants and Leading Counsel, Michael Ashe QC for the Fifth Defendant, and the other parties not attending

AND UPON the Fifth Defendant undertaking not to deal with the Trust properties (as defined in the Points of Claim) until the conclusion of this litigation (including any Appeal) subject to any further Order by the Court

IT IS ORDERED that:

1. The matter be listed on the first available date before Marcus Smith J. (on a date which is convenient for Counsel) with a time estimate of 1 day for the Court to:

    (a) Determine the wording of the Orders and Declarations to made consequential upon the Judgment (as more particularly referenced at paragraphs 219 and 220 of the Judgment);

    (b) Decide whether the Court should determine, and if so determine, the Claimants' challenge to the appointment out to the Fourth Defendant (and, if necessary, the Claimants' Application to amend the Claim Form to match the Prayer in the Points of Claim in this regard);

    (c) Hear submissions of any party on the question of whether the Court should make

any further Orders concerning the Administration of the Trusts (in accordance with paragraph 229 of the Judgment);

(d) Hear any application for permission to Appeal; and

(e) Costs.

2. The time for appealing the Judgment is extended to 21 days following the conclusion of the hearing provided for at paragraph 1 above;

3. Costs reserved.

DATED 28 September 2021