Neutral Citation Number: [2023] EWHC 1649 (Ch)

Claim No: PT-2020-000767

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 3rd July 2023

Before :

MR JUSTICE EDWIN JOHNSON

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Between:

(1) ALAN ADAMS **(2) THE FURTHER CLAIMANTS LISTED IN ANNEX 1 TO THE CLAIM FORM**	**Claimants**
- and -	
(1) FS CAPITAL LIMITED **(2) PINOTAGE TRUSTEES SARL** **(3) PNG SERVICES LIMITED**	**Defendants**

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- -

Hugh Miall and James Fennemore (instructed by **Morgan Rose Solicitors Limited**) for the Claimants
James Morgan KC and Josh Lewison (instructed by **Freeths LLP**) for the First Defendant
Marcus Flavin (instructed by **Burt Brill & Cardens Limited**) for the Second and Third Defendants

Hearing dates: 7th, 8th, 9th, 10th, 13th, 14th, 15th and 16th February 2023

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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on Monday 3rd July 2023 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

The structure of this judgment

1. The structure of this judgment is as follows:

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Introduction

2. This is my reserved judgment following the trial of this action. The action is concerned with the disputed sale to the First Defendant of debt assets held in three Jersey trusts (**“the Trusts”**). The Claimants, who number around 700 individuals, are some of the beneficiaries of the Trusts. The debt assets comprise the right to repayment of loans made to the beneficiaries by the settlors of the Trusts. The Claimants say that the sale of these debt assets (**“the Loan Assets”**) was effected for an improper purpose and in breach of trust and was thereby void or voidable (in which case the sale should be set aside), with the consequence that the First Defendant now holds the Loan Assets on constructive trust, to be returned to a newly appointed trustee of the Trusts.

3. The Defendants deny these claims. They contend that the sale was a perfectly legitimate transaction, which took place for sound commercial reasons and cannot be impeached. If the sale was for an improper purpose and in breach of trust, the First Defendant says that it did not have the requisite notice of any of these matters, and is not bound by any rights of the Claimants, as beneficiaries of the Trusts. Even if the First Defendant is so bound, it says that the sale is only voidable, not void, and should not be set aside. The First Defendant also counterclaims against the Claimants for repayment of the loans made to the Claimants by the settlors of the Trusts.

4. At the trial of the action the bulk of the Claimants were represented by Hugh Miall and James Fennemore, counsel. The First Defendant was represented by James Morgan KC and Josh Lewison, counsel. The Second and Third Defendants were represented by Marcus Flavin, counsel. I am grateful to all counsel, and those instructing them for their work in preparing the trial documents and in presenting their respective cases at the trial.

5. I refer to the bulk of the Claimants because there are ten Claimants who are no longer represented by the solicitors acting for the remaining Claimants. The ten Claimants in question have taken no active part in the action on their own account, and did not appear at or participate in any way in the trial. In this judgment it is convenient to refer to the Claimants as a whole, but these references should be read subject to the point that the ten Claimants have not taken part in the trial, and were not represented by the Claimants’ counsel. In practical terms the point is not significant, given that the position of these ten Claimants seems to me to be the same as the remainder of the Claimants, with the consequence that the decisions made in this judgment should apply equally, and do apply equally to all of the Claimants.

6. One further matter to record in this context is that in a small number of instances the relevant Claimant has died, so that the claim is brought by the personal representatives of the deceased Claimant or a person appointed to represent their estate pursuant to a representation order.

The conventions of this judgment

7. In this judgment references to the Loan Assets mean, as the context requires and unless otherwise indicated, the Loan Assets held in all three of the Trusts, or the Loan Assets held in a particular Trust. References to the Loan Assets also mean the Loan Assets as

they stood from time to time. During the period of time with which this judgment is concerned, some of the beneficiaries of the Trusts secured the release of their loan obligations, thereby reducing the Loan Assets. Finally, references to the Loan Assets mean, as the case may have been and unless it is necessary to be specific, the title held to the relevant Loan Assets, whether legal or beneficial or both.

8. Italics have been added to quotations in this judgment. Definitions used in this judgment are as established in the course of the judgment. Where I refer to particular evidence of a particular witness on a matter of fact, I am accepting that evidence, unless otherwise stated.

The Trusts

9. Each of the Trusts formed part of an Employer-Financed Retirement Benefit Scheme (**"EFRBS"**). EFRBSs are creations of the Income Tax (Earnings and Pensions) Act 2003, and are schemes for the provision of certain benefits to employees or former employees of employers which are not registered pension schemes. EFRBSs were used in some cases, including the present case, to facilitate loan schemes, whereby participants would receive remuneration from their employer by way of loans, which would not be subject to income tax. The employer would generally be an umbrella company which provided employment to a number of individuals. The umbrella company would then provide the services of those individuals to the third parties for whom the individuals were working, pursuant to contracts entered into between the umbrella company and the relevant third parties. Although my description uses the language of employment, those participating in such schemes included employees in the strict sense of the word, and contractors in the strict sense of the word.

10. Put more simply, the object of such schemes was tax avoidance, by treating income paid to employees or contractors as loans provided through the mechanism of the relevant loan scheme. Such loan schemes proliferated in the 2000s. This attracted the attention of HMRC (**"the Revenue"**), and the Government introduced a series of measures to prevent loan schemes operating as an effective way to avoid income tax. These measures culminated in the announcement in the March 2016 budget, by the then Chancellor of the Exchequer (George Osborne), of a measure known as the Loan Charge (**"the Loan Charge"**), which was introduced by the Finance (No. 2) Act 2017. The Loan Charge created a new, retrospective charge to income tax of 45% on all relevant loan payments made since 1999, to be payable in one tax year (2018-2019). The Loan Charge applied where loans were outstanding as at 5th April 2019. As the relevant legislation was initially enacted, the Loan Charge applied to loans made on or after 6th April 1999. Those facing the Loan Charge were given a choice of settling with the Revenue, paying off the loan balance, or paying the charge.

11. Not surprisingly, the Loan Charge was controversial, by reason of its effect on individuals who had signed up to loan schemes. The Government commissioned a review by Sir Amyas Morse in September 2019, which reported in December 2019 (**"the Morse Review"**). As a result of the Morse Review, there was some mitigation of the Loan Charge. For present purposes however the relevant point is that the introduction of the Loan Charge rendered ineffective, or confirmed the ineffectiveness of the loan schemes, including the loan schemes with which the present case is concerned. This in turn left large numbers of individuals, (i) as participants in loan

schemes which no longer achieved what they had been marketed as achieving, and (ii) facing substantial liabilities to the Revenue. These individuals included those beneficiaries who neither reached settlement with the Revenue on their outstanding tax liabilities nor repaid their loans.

12. In the present case the relevant loan schemes were implemented by the settlors of the Trusts, as employers, loaning sums to the individuals participating in the relevant loan schemes, as employees, by way of remuneration. The beneficial interests in the rights to repayment of the loans were then settled into the Trusts, on trust for the benefit of the participants. In the case of two of the Trusts, the legal interests in the rights to repayment of the loans were also subsequently settled into the Trusts. It is these rights of repayment to which I am referring as the Loan Assets. The rights to repayment of the loans (the Loan Assets) settled into the Trusts constituted, between the three of them, a substantial loan portfolio involving over 2,000 participants/beneficiaries. I will refer to these participants/beneficiaries, as they were constituted from time to time, as **"the Beneficiaries"**. It should be noted that the beneficial classes under the Trusts were more widely expressed than simply the participants under the scheme, but it is convenient to confine the Beneficiaries to the actual participants, to whom loans were made, as they were constituted from time to time. I should also make the point that, as I understand the position, the Beneficiaries were strictly contractors rather than employees. I assume that this did not affect the basic operation of the loan schemes, on the basis that the sums due to these contractors by the settlors were paid by way of loans.

13. The three Trusts, all of which are governed by Jersey law, were set up as follows:
    (1) The Anthony Doull Employer-Financed Retirement Benefit Scheme was established on 25th November 2011 (**"the 2011 Trust"**). The original settlor and Protector was Anthony Doull (trading as K2 Contractor Solutions). The original trustee was IFM Corporate Trustees Limited (**"IFM"**), a Jersey registered company. The 2011 Trust is sometimes referred to as the Prime contractor trust.
    (2) The K2 Contractor Solutions Employer-Financed Retirement Benefit Scheme 2012 was established on 14th May 2012 (**"the 2012 Trust"**). The original settlor and Protector was Lighthouse Trustees Limited (**"Lighthouse"**), a Jersey registered company. The original trustee was IFM. The 2012 Trust is sometimes referred to as the K2 contractor trust. The phrase K2 is also sometimes used to refer to the schemes underlying both the 2011 Trust and the 2012 Trust.
    (3) The Hyrax Resourcing Employer-Financed Retirement Benefit Scheme was established on 25th September 2014 (**"the 2014 Trust"**). The original settlor and Protector was Hyrax Resourcing Limited (**"HRL"**), an English registered company. The original trustee was HRL Trustees Limited (**"HRL Trustees"**), a Jersey registered company. The 2014 Trust is sometimes referred to as the Hyrax contractor trust.

14. IFM and HRL Trustees were companies within the Praxis IFM Group (**"Praxis"**), an international group of entities providing private wealth and corporate services. HRL Trustees was dissolved on 7th June 2019.

15. In terms of subsequent dealings with the Trusts, and starting with the 2011 Trust, the position, in outline, is as follows:

(1) On 5th April 2012 Church Street Trustees Limited (**"Church Street"**), a Jersey registered company, was appointed as Protector in place of Anthony Doull.
(2) On 14th May 2012 legal title to the Loan Assets was settled into the 2011 Trust.
(3) On 22nd January 2018 the Second Defendant was appointed as trustee, in place of IFM, and the Third Defendant was appointed as Protector in place of Church Street.
(4) On 25th June 2019 the Loan Assets were assigned by IFM to the Second Defendant.
(5) On 30th June 2019 a company called Pinotage (PTC) Limited, a BVI registered company incorporated on 21st June 2019 (**"Pinotage PTC"**), was appointed as trustee in place of the Second Defendant.
(6) On the same day the Loan Assets were assigned by the Second Defendant to Pinotage PTC.
(7) On 30th October 2019, pursuant to two sale purchase agreements entered into between Pinotage PTC and the First Defendant, the Loan Assets were, by two deeds of assignment, the subject of a purported assignment by Pinotage PTC to the First Defendant. I refer to the assignment as *"purported"* because it is this disposal of the Loan Assets which is challenged in this action, in relation to the 2011 Trust, on the grounds of improper purpose/breach of trust.

16. Turning to the 2012 Trust, the position in terms of subsequent dealings, in outline, is as follows:
(1) On 15th July 2012 the legal title to the Loan Assets was settled into the 2012 Trust.
(2) On 22nd January 2018 the Second Defendant was appointed as trustee, in place of IFM, and the Third Defendant was appointed as Protector in place of Lighthouse.
(3) On 25th June 2019 the Loan Assets were assigned by IFM to the Second Defendant.
(4) On 30th June 2019 Pinotage PTC was appointed as trustee in place of the Second Defendant.
(5) On the same day the Loan Assets were assigned by the Second Defendant to Pinotage PTC.
(6) On 30th October 2019, pursuant to two sale purchase agreements entered into between Pinotage PTC and the First Defendant, the Loan Assets were, by two deeds of assignment, the subject of a purported assignment by Pinotage PTC to the First Defendant. I again refer to the assignment as *"purported"* because it is this disposal of the Loan Assets which is challenged in this action, in relation to the 2012 Trust, on the grounds of improper purpose/breach of trust.

17. It will be noted that the Second Defendant was appointed as trustee of the 2011 Trust and the 2012 Trust on 22nd January 2018, but did not take an assignment of the Loan Assets until 25th June 2019. This appears to have been the result of a failure to arrange this assignment to coincide with the appointment of the Second Defendant as trustee of these two Trusts. In this context the relevant point to note is that Jersey trust law does not have the equivalent of Section 40(1) of the Trustee Act 1925. There is no provision in Jersey law for the automatic vesting of trust property in a trustee upon appointment, whether such trust property is held by way of legal or beneficial interest. There needs to be an actual vesting of the trust property in such a trustee.

18. Turning to the 2014 Trust the position in terms of subsequent dealings, in outline, is as follows:
    (1) On 22nd January 2018 the Second Defendant was appointed as trustee of the 2014 Trust in place of HRL Trustees. The validity of this appointment was in issue, but in closing submissions at the trial it was conceded by the Claimants that the appointment was valid.
    (2) On 30th June 2019 Pinotage PTC was purportedly appointed as trustee of the 2014 Trust, in place of the Second Defendant. It is common ground that the appointment of Pinotage PTC was not effective.
    (3) On 30th October 2019, by two sale purchase agreements entered into between Pinotage PTC and the First Defendant, the Loan Assets were the subject of a purported sale by Pinotage PTC to the First Defendant.
    (4) By a resolution made on 6th December 2019 the Second Defendant purported to ratify all acts previously done by Pinotage PTC as trustee de son tort, including the sale of the Loan Assets to the First Defendant. There is a dispute as to whether this ratification was sufficient to achieve an effective assignment of the Loan Assets to the First Defendant. If it was, then the disposal of the Loan Assets which would otherwise thereby have been achieved is challenged on the same basis as the challenge to the assignment of the Loan Assets in relation to the 2011 Trust and the 2012 Trust; that is to say on the basis of improper purpose/breach of trust.
    (5) It should also be noted, in relation to the 2014 Trust, that there were no deeds of assignment (effective or otherwise) executed between Pinotage PTC and the First Defendant. There were only the two sale purchase agreements.

19. In relation to all three Trusts the disposals/purported disposals (both sale purchase agreements and deeds of assignment) to which I have referred above, which took place on 30th October 2019, were followed by subsequent assignments of the residual assets in each of the Trusts. In each case the relevant assignment was made to a Delaware registered company called Hatstone LLC. In the case of the 2011 Trust and the 2012 Trust the assignor was Pinotage PTC. In the case of the 2014 Trust, the assignor was the Second Defendant. These assignments, which were made on 11th December 2019, appear to have been effected by agreements (described as sale and purchase agreements) by which it was declared that Pinotage PTC and (in the case of the 2014 Trust) the Second Defendant held any remaining assets of the relevant Trust upon trust for Hatstone LLC. The specific purpose of these assignments was described as mopping up any remaining assets in the Trusts. The Defendants' case is that these subsequent assignments divested the Trusts of any remaining assets, which had the effect of bringing the Trusts to an end. The Claimants' pleaded case does not include any challenge to these subsequent assignments. No point was taken at the trial that this in any way affected the ability of the Claimants to challenge the disposals/purported disposals which took place on 30th October 2019.

20. In terms of subsequent dealings, I should also mention that a deed of confirmation was executed between Pinotage PTC, the Second Defendant and the First Defendant on 30th January 2020. The principal purpose of this deed of confirmation (**"the Deed of Confirmation"**) was to replace, with corrected debt schedules, the debt schedules appended to the sale purchase agreements of 30th October 2019.

21. It will be noted that there is a difference, in terms of the history of dealings with the Loan Assets, as between the 2014 Trust and the other two Trusts. The consequence of this, in relation to the 2014 Trust, is that there are two areas of dispute:
    (1) The first area of dispute concerns the question, leaving aside the challenge on the basis of improper purpose/breach of trust, of whether the Loan Assets did, subject to that challenge, actually make their way, by otherwise effective assignments, from HRL Trustees to the First Defendant. The Loan Assets were not the subject of any separate instrument of assignment, either as between HRL Trustees and the Second Defendant, or as between the Second Defendant and Pinotage. The question of whether there was an actual assignment of the Loan Assets to the First Defendant engages two broad questions. It has now been conceded that the Second Defendant was validly appointed as trustee of the 2014 Trust, but there remains the question of whether the Loan Assets were the subject of an effective assignment by HRL Trustees to the Second Defendant as the new trustee of the 2014 Trust. Assuming that there was such an assignment, there is then the question of whether there was an effective assignment of the Loan Assets to the First Defendant, either by virtue of the sale and purchase agreements entered into between Pinotage PTC and the First Defendant on 30th October 2019 and the subsequent ratification by the Second Defendant, or by virtue of the provisions of the Deed of Confirmation, or by some other means.
    (2) If, by one means or another, the Loan Assets were the subject of an otherwise effective assignment from HRL Trustees to the First Defendant, the second area of dispute arises. This is the issue, common to all three Trusts, of whether the disposal of the Loan Assets to the First Defendant can be challenged on the basis of improper purpose/breach of trust.

22. In relation to the 2014 Trust there is one further matter which should be mentioned in relation to the settling of assets into the 2014 Trust. In or around March 2016 HRL ceased settling Loan Assets into the 2014 Trust. Instead, a series of transactions were entered into, as follows:
    (1) By a deed of covenant dated 31st March 2016 HRL agreed to pay £6 million to HRL Trustees on or before 31st March 2036. The right to be paid the £6 million was held by HRL Trustees as bare trustee for HRL, which settled its beneficial interest in that right into the 2014 Trust.
    (2) By a further deed of covenant dated 7th March 2017, HRL agreed to procure that leasehold interests in land in England and Wales valued at £16,534,245.51 would be granted to HRL Trustees on or before the thirtieth anniversary of the deed. The right to receive the leasehold interests was held by HRL Trustees as bare trustee for HRL, which settled its beneficial interest in that right into the 2014 Trust.
    (3) By a further deed of covenant dated 31st March 2017, HRL agreed to procure that leasehold interests in land in England and Wales valued at £2,072,231.29 would be granted to HRL Trustees on or before the thirtieth anniversary of the deed. The right to receive the leasehold interests was held by HRL Trustees as bare trustee for HRL, which settled its beneficial interest in that right into the 2014 Trust.
    (4) By various deeds executed on 7th March 2017 and 26th March 2019 HRL granted equitable charges to HRL Trustees and the Second Defendant (in its now admitted capacity as trustee of the 2014 Trust) over the rights of HRL to be repaid loans to its employees in sums equal to (i) the sums HRL had agreed to pay to HRL Trustees and (ii) the value of the leasehold land it had agreed to grant to HRL Trustees pursuant to the above deeds of covenant, as security for its

promises to grant those leasehold interests. The rights to repayment of the loans which were the subject of these arrangements were not themselves settled, as Loan Assets, into the 2014 Trust.

23. I will refer to the choses in action set out in my previous paragraph (ie. the benefit of the rights held pursuant to the various covenants) as **"the Covenant Assets"**. In relation to the 2014 Trusts the Covenant Assets were dealt with or purportedly dealt with, together with the Loan Assets, as part of the assets of the 2014 Trust.

24. Finally, it will also be noted in relation to the 2014 Trust that the legal title to the Loan Assets was never settled into the 2014 Trust. Only the beneficial interest in the Loan Assets was settled into the 2014 Trust. The legal title to the Loan Assets remained with the settlor and Protector; namely HRL.

25. It is convenient to use the omnibus expression **"the Disposal"** to refer collectively to the various disposals which were made or which purported to be made on 30th October 2019, by the various sale purchase agreements and assignments of that date, by way of implementation of the sale or purported sale of the Loan Assets to the First Defendant. In the case of the 2014 Trust the use of this expression also embraces the possibility of the assignment of the Loan Assets having been made by the Deed of Confirmation or by some other means. The expression is, and is intended to be a neutral expression, which I use without prejudice to the issues which I have to decide in this judgment, including the principal issue of whether the Disposal constituted an effective disposal of the Loan Assets to the First Defendant, either in whole or in part. Where the context requires, reference to the Disposal also means the various disposals or purported disposals on 30th October 2019 relating to a particular Trust or two of the Trusts. I will use the expressions **"the SPA"** and **"the SPAs"** to refer, individually and collectively, to the sale and purchase agreements entered into on 30th October 2019 or, as the context may require, to particular sets of sale and purchase agreements.

The powers and duties existing under the Trusts

26. There was no material dispute between the parties as to the powers of the trustees which existed under the Trusts. Nor was there any material dispute between the parties as to the scope of these powers; meaning the extent of the powers as opposed to the question, which is central in this action, of whether the powers were exercised for a proper or improper purpose in relation to the Disposal. In these circumstances I need mention only a few powers existing under the Trusts. The three Trust deeds are materially identical, so that I can simply refer to clauses which appear in each Trust deed.

27. The Defendants' case is that the Trusts have now been brought to an end, by virtue of the Disposal and the subsequent disposals of any residual assets remaining in the Trusts. The Claimants dispute this, on the basis of their case that the Disposal was rendered void because it was made for an improper purpose. It is convenient generally to use the past tense in discussing the powers which existed under the Trusts. This use is however entirely without prejudice to the questions as to whether the Trusts have been brought to an effective end and, if they have, as to whether the Trusts should now be reconstituted.

28. By paragraph VII(a) and (c) of Schedule 1 the Protector had the power to appoint trustees in place of or in addition to existing trustees. By paragraph (b), trustees were entitled to resign by giving notice to the Protector. By paragraph V-3(a) and (b) of Schedule 1 a trustee had the right to remuneration for its services in acting as trustee.

29. The trustees had the power to sell assets of the Trusts by virtue of various provisions in the Trust deeds. Such powers of sale can be found in clause 3(1), and in paragraphs II-1 (which gave the trustees all the powers of dealing with the Trust Fund of an absolute beneficial owner), II-2(f) and II-16 of Schedule 1.

30. It is not in dispute between the parties that the relevant powers of the trustees and the Protectors were fiduciary powers.

31. In terms of duties, paragraph 18 of the Re-Amended Particulars of Claim sets out various duties to which the Second Defendant and Pinotage PTC were subject, in their capacities as trustee of the Trusts. In the case of Pinotage PTC, and so far as the 2014 Trust is concerned, it is pleaded that Pinotage PTC owed the same duties as trustee de son tort. All of these duties are said to have arisen by reason of the relevant articles of the Trusts (Jersey) Law 1984 (**"the 1984 Law"**).

32. The duties in question, and the Articles of the 1984 Law from which they are said to derive are as follows:
    (1) A duty to act (i) with due diligence, (ii) as would a prudent person, (iii) to the best of their ability and skill (Article 21(1)(a));
    (2) A duty to observe the utmost good faith in the execution of the trustee's duties and in the exercise of the trustee's powers and discretions (Article 21(1)(b));
    (3) A duty to preserve and enhance the value of trust property as far as was reasonably possible (Article 21(3));
    (4) A duty not (save as permitted by the court or by the express terms of the relevant Trust) (i) to profit directly or indirectly from their trusteeship; (ii) to cause or permit any other person to profit directly or indirectly from such trusteeship; or (iii) on their own account enter into any transaction with the trustees or relating to the trust property which may result in such profit (Article 21(4));
    (5) A duty to keep accurate accounts and records of their trusteeship (Article 21(5)); and
    (6) A duty to exercise their powers only in the interests of the beneficiaries and in accordance with the terms of the Trusts (Article 24(2)).

33. These duties are admitted by the First Defendant (paragraph 21 of the Re-Amended Defence and Counterclaim of the First Defendant), subject to the following qualifications:
    (1) It is contended that the duty to preserve and enhance the value of trust property, so far as was reasonably possible, was subject to the terms of the relevant trust.
    (2) The First Defendant relies generally on all relevant matters of Jersey law.
    (3) It is contended that, once there is an insolvency or probable insolvency of a trust, the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors.

34. The Second and Third Defendants also admit these duties, subject to qualifications which are in similar, but not identical terms to the qualifications pleaded by the First Defendant.

35. The Claimants join issue generally with the Defendants in relation to this part of the Defendants' case. The Claimants also plead, at some length in their Replies to the Defences filed by the Defendants, the Claimants' case on the duties owed by a trustee in an insolvency situation. The essential case which the Claimants advance is that an insolvency situation does not necessarily mean that the relevant trustees should only have regard to the interests of the creditors. The interests of the beneficiaries can and should still be taken into account. For present purposes it is not necessary to do more than identify, in very brief and general terms, this particular issue. I will return to this issue, which is central to the dispute over whether the Disposal was effected for an improper purpose, later in this judgment.

36. There is one other relevant feature of the Trusts which it is convenient to mention, in the context of the powers and duties of the trustees. The assets within the Trusts were not such as to produce a regular income to meet the costs and expenses of administering the Trusts. As I understand the position the Beneficiaries paid an up front fee when they first joined the Trusts, but thereafter they were not required to pay towards the costs and expenses of administering the Trusts. So far as the loans were concerned, they were unsecured and interest free until they fell due for payment, which was on demand. The loans were not therefore income producing.

<u>The parties and the key individuals</u>

37. Before coming to the evidence adduced at the trial, and before setting out my narrative of the principal events which have given rise to this dispute, it is convenient to identify the key parties and individuals concerned with those events.

38. The First Defendant is a company registered in this jurisdiction. It was incorporated as an SPV (special purpose vehicle) on 16th May 2019. It is a wholly owned subsidiary of a company called Slap 8 Limited (**"Slap 8"**). Slap 8 is itself the corporate holding company within a group of entities of which the parent entity is Redbox Associates LLP **("RA"**). RA was the successor to Redbox Tax Associates LLP (**"RTA"**). I will use the expression **"the RTA Business"** to refer, as the context requires, to the business of RTA and, in succession, RA. In broad terms the business activity of the RTA Business was and is tax planning projects.

39. RTA was set up by Simon Emblin and Mark Reid. Starting with Mr Emblin, he trained with HMRC as an inspector of taxes, before working for major firms of accountants as a senior tax manager. In 1997 Mr Emblin left the last of these firms, Arthur Anderson, to set up a tax advisory business, FortyTwo (UK) Ltd. Turning to Mr Reid, he is a solicitor (qualified in 1993) and a former partner in Gateley Wareing Solicitors. In 2000 he left Gateley Wareing to set up his own legal practice (Reid & Co Solicitors), as a sole practitioner. Reid & Co incorporated on 1st September 2017 to become MMR Limited, trading as Reid & Co.

40. In 1996 Mr Emblin met Mr Reid, and the two of them started to work together on tax planning projects, at that time through their respective firms. In 2001 they started the first of a number of tax planning businesses which they ran together. In March 2010 they set up RTA and established the RTA Business which was subsequently taken over by RA. RTA and, in succession, RA were both owned and controlled by Mr Emblin and Mr Reid, and this remains the position in relation to RA. Mr Emblin was and remains a director of the First Defendant. Mr Reid was and remains a director of Slap 8.

41. The Second Defendant is a Swiss based trust company which provides professional trustee services to families and private clients from multiple jurisdictions. The Third Defendant is a BVI registered company which was incorporated to act as a protector to trusts. The Third Defendant no longer provides any services and has no assets.

42. Carl O'Shea was, at the times material to this case, a director of the Second Defendant. Mr O'Shea also held the shares in the Second Defendant on a trust (the Pino Trust), of which he was the sole trustee, for certain individuals. Mr O'Shea was also the sole director of the Third Defendant, and the owner of its shares, as nominee for the Second Defendant.

43. Mr O'Shea is a Jersey Advocate, an English qualified solicitor, and a BVI qualified solicitor, with over 20 years of legal experience. He specialises in non-contentious corporate and private client matters. Mr O'Shea is a Group Partner in Hatstone, a multi-jurisdictional group which provides legal investment fund administration and corporate services, with offices in a number of jurisdictions, including the BVI, Jersey and South Africa. I will use the expression **"Hatstone"** to refer generally to the group of entities which operates under this name. The structure of Hatstone appears to be a complicated one, with different entities in different jurisdictions. So far as Jersey is concerned, there is a Jersey general partnership, which is known as Hatstone Group Partnership, the sole function of which, by reference to the evidence of Mr O'Shea, appears to have been to permit the group partners therein to refer to themselves as group partners. There is also a second general partnership, known as Hatstone Lawyers Jersey which, as I understood Mr O'Shea's evidence, is the entity within Hatstone which provides actual legal services in Jersey (**"Hatstone Jersey"**). Mr O'Shea is one of the two current partners in Hatstone Jersey. Another individual within Hatstone Jersey who was also involved in the relevant events was Michael Shenkin. Two other individuals who were also involved in the relevant events were Hannes Botha and Mariana Botha-Schoeman, who worked within the South African legal arm of Hatstone. Finally, in the context of Hatstone I should also mention Hatstone LLC, the Delaware registered company mentioned in the previous section of this judgment, which was the assignee of the assignments, or purported assignments of the residual assets of the Trusts made on 11th December 2019.

44. There are some other individuals to whom I should make reference in this section of this judgment. The first is David Gill who, through various companies, was involved in the marketing and operation of loan schemes of which the Trusts were examples. In particular, Mr Gill introduced accountants to a company called EDF Tax Limited, which designed and promoted tax avoidance schemes. These accountants would then introduce their clients to the schemes. This network of accountants was known as the

Peak Performance Network. One of the individuals who worked for David Gill, through certain of these companies, was Joanne Macnamara. Ms Macnamara was the sole director of HRL and, together with a Mr Hopkins, dealt with the administration of the loan schemes. Mr Gill acted as an intermediary with the Beneficiaries in relation to the events which have given rise to this dispute. It is not necessary in this judgment to give a full account of the complex history of the involvement of Mr Gill and Ms Macnamara with the loan schemes. A full and invaluable account of this history can be found in the decision of the First-tier Tribunal (Tax Chamber) in *The Commissioners for Her Majesty's Revenue and Customs v Hyrax Resourcing Limited* [2022] UKFTT 218 (TC). Ms Macnamara's evidence was that she spoke to Mr Gill on a daily basis. One other individual whom Ms Macnamara consulted regularly in her work was Nicola Stone, who was a consultant at Reid & Co., and worked at, or with EDF Tax Limited.

<u>The evidence at the trial</u>

45. The witnesses who gave evidence at the trial were Ms Macnamara, called by the Claimants, Mr Emblin and Mr Reid, called by the First Defendant, and Mr O'Shea, called by the Second and Third Defendants. All these witnesses were cross examined, at some length in the case of Mr Emblin and Mr Reid, and at considerable length in the case of Mr O'Shea, whose cross examination, briefly by Mr Morgan and then at more length by Mr Miall, lasted for around one and a half days of the trial.

46. So far as the factual evidence was concerned, this was not a trial where any of the issues turned on a conflict of evidence between witnesses. The history of the events which have given rise to this dispute can be traced through the documentation disclosed in the action. As a result credibility was not a central issue in the trial. I will however briefly set out my assessment of the witnesses of fact.

47. Ms Macnamara was called to give evidence in relation to the issue of whether the Second Defendant was validly appointed as trustee of the 2014 Trust in place of HRL Trustees. The Claimants' argument was that HRL had the sole power to appoint a new trustee of the 2014 Trust, and that this power was not properly exercised by Ms Macnamara, as the sole director of HRL, on the basis that Ms Macnamara exercised no independent judgment or discretion in relation to the appointment of the Second Defendant as the new trustee of the 2014 Trust, but simply acted on the prompting of others. This case was supported by the evidence given by Ms Macnamara in her witness statement, but rapidly collapsed when Ms Macnamara was cross examined. It was quite clear from Ms Macnamara's oral evidence that she was not a mere cipher and that she was able to, and did exercise independent judgment in relation to matters such as the appointment of the Second Defendant. It was in the light of this oral evidence that the Claimants, sensibly and realistically, dropped their challenge to the validity of the Second Defendant's appointment as trustee of the 2014 Trust. In these circumstances it is not strictly necessary to make any assessment of Ms Macnamara's evidence. I should however say that I am satisfied that Ms Macnamara was, in her oral evidence, a truthful and reliable witness. It is unfortunate that her witness statement, which was short, was so at odds with her oral evidence. The discrepancy is not really explained, as it sometimes can be, as an enlargement or clarification of the evidence in the relevant witness statement, particularly where the relevant witness statement is a short one. I was left with the impression that the requirements of PD 57AC had not been properly observed in relation to this witness statement but, as I do not know where

responsibility lay for this situation and as Ms Macnamara's evidence has effectively ceased to be relevant, I say no more on this point.

48. Turning to Mr Emblin, he faced the difficulty, on various occasions, of dealing with documents which undermined the evidence in his two witness statements. As a general rule however, Mr Emblin did not to try to defend evidence which was clearly contradicted by the documents, and was also prepared to accept matters which were clearly contrary to the interests of the First Defendant. In overall terms I am satisfied that Mr Emblin was giving me answers to the questions put to him which reflected what he recalled and what he believed the position to be. Subject to the need to pay attention to the contemporaneous documents, and without necessarily accepting all that I was told by Mr Emblin, I am satisfied that Mr Emblin was generally honest in the evidence which he gave.

49. Mr Reid was less clear in his evidence than Mr Emblin and, at times, his evidence was difficult to follow. Mr Reid also faced the same difficulty of dealing with documents which undermined the evidence in his witness statement. In overall terms however my assessment of Mr Reid's evidence was much the same as my assessment of Mr Emblin's evidence. Mr Reid was also prepared to give ground where this was plainly required by the documents, and was prepared to make concessions contrary to the interests of the First Defendant. Subject, again, to the need to pay attention to the contemporaneous documents and, again, without necessarily accepting all that I was told by Mr Reid, I am satisfied that Mr Reid was generally honest in the evidence which he gave.

50. A cause for concern, in relation to the witness statements of Mr Emblin and Mr Reid is that parts of their witness statements were identical in their language. In cross examination Mr Reid explained that he had read Mr Emblin's first witness statement when writing his own witness statement, and had copied the relevant parts of Mr Emblen's first witness statement *"Because what he said chimed with my recollection of what occurred"*. It also came out that Mr Emblin was present on the video and telephone calls with solicitors, pursuant to which Mr Reid said that he had, with the assistance of the First Defendant's solicitors, prepared his witness statement. In his own evidence in cross examination Mr Emblin said that Mr Reid had written his witness statement after Mr Emblin had written his witness statement, which would be consistent with Mr Reid copying from Mr Emblin.

51. While I accept the evidence of Mr Emblin and Mr Reid as to how this copying came about, none of this was satisfactory. One witness should not be copying the evidence of another witness. Each witness should give their own account, regardless of whether or not their recollection is the same as other witnesses. Nor, without good reason (and I can see none in the present case), should one witness be involved in the preparation of the evidence of another witness statement. The key purpose of the provisions of PD 57AC is to ensure that the evidence of a witness is confined only to matters of fact of which that witness has personal knowledge and recollection. Quite apart from this, the confirmation of compliance on the witness statement signed by Mr Reid was not consistent with what came out in cross examination as to the preparation of the witness statement. Perhaps fortunately for the First Defendant, my assessment of the evidence of Mr Emblin and Mr Reid was not materially affected by these problems. In overall

terms my assessment of the evidence of Mr Emblin and Mr Reid was as set out above. As with Ms Macnamara's witness statement, the problems which I have just identified seemed to me to be another example of insufficient care being taken to ensure that witness statements observe both the spirit and the letter of PD 57AC. In a different case, where everything turned on who said what to whom at a critical meeting, these problems might have turned out to be more serious.

52. Prior to Mr Emblin and Mr Reid giving their evidence, Mr Miall made an application, or request that each witness should remain outside court while the other witness was giving evidence, with associated restrictions on the ability of each witness statement to view the transcript of the evidence. Given the problems which I have just identified, this was a perfectly legitimate application/request for Mr Miall to make. I was however not persuaded that this was an appropriate step to take. I set out my reasons for refusing the application/request in a short judgment, which I delivered after hearing argument on the application/request. Essentially, I was not persuaded that the factual issues in the case, such as they were, justified this step being taken. I do however reiterate that there was ample justification for Mr Miall to raise this matter with me.

53. Turning to Mr O'Shea, my assessment is not quite the same as my assessment of Mr Emblin and Mr Reid. Mr O'Shea was cross examined, as I have said, at considerable length, which is always stressful for a witness. Mr O'Shea however betrayed no signs of fatigue, and gave his answers accurately and with force at all times. Mr O'Shea struck me as an extremely astute person, both commercially and in legal terms. His experience and commercial ability in the business of multi-jurisdictional tax planning and commercial trust work was clear. In answering questions in cross examination Mr O'Shea had a tendency to try to anticipate the question or line of questions which he thought was coming, rather than concentrating on the question which he had been asked. This was unhelpful and detracted from his credibility but, in fairness to Mr O'Shea, when he was pulled up for this in cross examination, the relevant question did get an answer. Equally, and as with Mr Emblin and Mr Reid, Mr O'Shea was prepared to give ground where his evidence was undermined by the documents, and was prepared to acknowledge matters which were clearly adverse to the interests of the Second and Third Defendants.

54. Ultimately, I was satisfied that Mr O'Shea was giving me answers to the questions put to him which reflected what he recalled and what he believed the position to be. Those answers also reflected Mr O'Shea's considerable mastery of and expertise in his area of business. In saying this I do not mean to suggest that Mr Emblin and Mr Reid lacked expertise. My point is that Mr O'Shea's expertise was very obvious in his evidence. Indeed, it is fair to add that I found much of Mr O'Shea's evidence to be useful in explaining the operation of multi-jurisdictional tax planning and commercial trust work. In summary, and subject, again, to the need to pay attention to the contemporaneous documents and, again, without necessarily accepting all that I was told by Mr O'Shea, I am satisfied that Mr O'Shea was generally honest in the evidence which he gave.

55. As the Trusts are governed by Jersey law I also had the benefit of expert evidence on Jersey law from two Jersey Advocates. The Claimants called James Gleeson, an Advocate of the Royal Court of Jersey, a non-practising English qualified solicitor, and a founding partner in the firm of Dickinson Gleeson in Jersey. The Defendants called Oliver Passmore, an Advocate of the Royal Court of Jersey, a non-practising barrister

qualified in England and Wales and in New Zealand, and a partner in Ogier LLP in Jersey. Each Advocate produced an expert report, and the Advocates also produced a joint statement.

56. There was not a great deal in dispute between the two Advocates. It was also the case, as was inevitable given that the Advocates were dealing with questions of law in relation to a jurisdiction (Jersey) whose trust law closely resembles trust law in England and Wales, that the expert evidence on the law of Jersey sometimes crossed the line into matters of argument which belonged in submissions rather than expert evidence. This was particularly the case in cross examination. I did not however regard this as the fault of the Advocates or as a reason for criticising their evidence.

57. It is fair to say that Advocate Gleeson was required to give more ground in cross examination than Advocate Passmore, in those limited areas where the Advocates differed. This feature of the evidence was deployed by the First Defendant, in closing submissions, to launch an attack on the credibility of Advocate Gleeson. I do not accept the First Defendant's criticisms. To my mind, where Advocate Gleeson gave ground, he was doing so as a responsible expert witness, mindful of his duty to assist the court, and prepared to accept points calling for qualification of his evidence. In my judgment the situation was not one where Advocate Gleeson had produced a flawed report, or was trying to argue the Claimants' case, or was trying to defend an indefensible position. I am satisfied that both Advocates had considerable expertise in the relevant areas of Jersey law, and gave their evidence mindful of their duty to assist the court, and with the intention of assisting the court. I found the evidence of both Advocates helpful, although it is worth repeating the point that the similarities between the trust law of Jersey and the trust law of England and Wales resulted in a considerable narrowing down of the area in which identification of the law of Jersey was required, and a considerable expansion of the area in which the law became a matter more for submissions than expert evidence.

58. In addition to the written and oral evidence of these witnesses, there was an extensive trial bundle, which contained a substantial body of documentary evidence. In setting out the narrative of the principal events which have resulted in this dispute it is not necessary to make reference to all the documents which were the subject of express reference in the course of the trial, either in evidence or in submissions. All of the relevant documentary material has been taken into account in the preparation of this judgment, as has the evidence of the factual and expert witnesses, and the written and oral submissions of the parties.

<u>Narrative</u>

59. It is convenient to begin the narrative in March 2016 when, as I have explained above, the then Chancellor of the Exchequer, George Osborne, announced the Loan Charge. The Loan Charge applied to loans in the relevant loan schemes, which included the Trusts, which were outstanding as at 5th April 2019. This effectively started the clock ticking for all those persons (including the Beneficiaries) who were involved in such loan schemes to find a way to avoid or mitigate the Loan Charge.

60. Mr Emblin and Mr Reid saw a commercial opportunity in the introduction of the Loan Charge, in terms of developing and marketing a financial assistance package for those affected by the Loan Charge. In early 2017 Mr Emblin and Mr Reid began work on the development of this project with Mark Thomson, a shareholder and director in Thomson Independent Limited, trading as Falcon Investments. RTA had previously engaged Falcon Investments to provide regulation financial advice in relation to other tax planning arrangements.

61. Mr Emblin and Mr Reid had previously come into contact with Mr O'Shea, in late 2012, in relation to the financing of an earlier tax planning project known as Goldfinger. In early 2013 RTA commenced a business relationship with Mr O'Shea and Hatstone. In April 2017 Mr O'Shea contacted Mr Emblin and Mr Reid to arrange a catch up meeting to discuss their thoughts in relation to a financial assistance package for those affected by the Loan Charge. The general title of this project was Project Z. The general tenor of the discussions between these three individuals can be seen in an email which Mr O'Shea sent to Mr Emblin and Mr Reid on 19th April 2017, in which Mr O'Shea outlined the general structure of Project Z, and outlined the following services which Hatstone could provide:

"As discussed, we shall be happy to assist with the following:

1. *Provision of directors to the new company.*
2. *Consider entering into a JV arrangement so that since the company shall be connected with Hatstone (although not Hatstone labelled) it may be possible to use Hatstone's address removing the requirement for a trust company to provide registered office services and directors.*
3. *Prepare the legal documentation; and*
4. *Consider the provision of escrow services to assist with the lending arrangement; and*
5. *Make introductions to trust companies in Jersey and Switzerland who may be able to assist if the intention is for the EBTs to be moved to a new trustee.*

In addition, we have an English law firm (Hatstone Lawyers (UK) Limited which is regulated by the SRA in England, and a Jersey law firm, Hatstone Lawyers, and so can assist with English law and Jersey law aspects."

62. The general tenor of the discussions can also be seen from an email sent by Mr O'Shea to Mr Emblin and Mr Reid on 23rd May 2017. In that email Mr O'Shea made the following reference:

"With regard to Jersey trust companies with interesting EBT books, the main players are PraxisIFM, JTC, Elian (affiliated with Ogier law firm), Crestbridge (affiliated with Carey Olsen law firm), Vantage, Plectron and RBC. Vantage and Plectron I believe have been reducing their books and RBC, being a bank, may not be one of the better options. Overall, the most likely interested parties would appear to be PraxisIFM and JTC, from a Jersey perspective."

63. The specific scheme which was developed for the assistance of those affected by the Loan Charge came to be known as the Pyrrhus Scheme. In outline, the intended working of the Pyrrhus Scheme was as follows:

(1) Employees who had borrowed sums subject to the Loan Charge would borrow further money to repay the loans from a new company, Pyrrhus Capital Limited

(**“Pyrrhus”**), which was incorporated for this purpose, as an English registered company, on 23rd June 2017.

(2) The employees would pay an up-front fee, which would be used (in part) to subscribe for shares in Pyrrhus. The sums raised by those fees would then be loaned to a fraction of the participating employees so that they could repay the loans due to the trustee of the relevant trust.

(3) The trustee would then invest the money repaid by purchasing more shares in Pyrrhus, which would then re-loan the money received to a further fraction of the participating employees. This would be repeated until all of the participating employees had repaid their original loans.

(4) Pyrrhus would end up 99% owned by the trustees of participating trusts, which would at that point appoint their shares to the participating employees.

(5) Mr Emblin and Mr Reid would make money from the Pyrrhus Scheme through the fees paid by participants. It was also agreed that participating trustees would themselves, in their personal capacity, receive commission in respect of beneficiaries who signed up to the Pyrrhus Scheme.

64. In June 2017 Mr Emblin and Mr Reid had a meeting with John Medina, a director of Praxis. Mr O’Shea was also present at this meeting. The meeting came about because Praxis was interested in finding a solution to the Loan Charge for the beneficiaries of the trusts which it controlled, including the Trusts. As matters subsequently developed, the risk committee of Praxis were not willing to approve the participation of Praxis in the Pyrrhus Scheme in relation to the Trusts. Mr Medina did however suggest that the Trusts could be transferred to new trustees acceptable to Praxis. This was explained by Mr Emblin to Mr O’Shea in a telephone call on 26th September 2017. Mr O’Shea explained that he was a director of the Second Defendant, which was a Swiss regulated trust company. Mr O’Shea said that Hatstone acted as lawyers to Praxis, that he knew Mr Medina, and that he would discuss with him the possibility of the Second Defendant taking over as trustee of the Trusts. On 29th September 2017 Mr Emblin emailed Mr O’Shea asking whether he had anything he could send to Reid & Co. regarding *“the swiss trustee company that you mentioned”*. On the same day Mr O’Shea emailed Mr Emblin in reply (copied to Mr Reid, Nicola Stone and Mr O’Shea himself at an email address in his capacity as director of the Second Defendant) attaching information about the Second Defendant.

65. Mr O’Shea’s negotiations with Praxis were successful. On 3rd November 2017 Mr O’Shea emailed Ms Stone to confirm that the Second Defendant had been approved as new trustee of the Trusts by the risk committee of Praxis. The Second Defendant took over as trustee of the Trusts by deeds of retirement and appointment executed on 22nd January 2018. At the same time the Third Defendant was appointed as Protector of the 2011 Trust and the 2012 Trust. HRL remained as Protector of the 2014 Trust. Following the change of trustee IFM sent a circular to all Beneficiaries notifying them of the change of trustee to the Second Defendant. At the same time Mr O’Shea and Reid & Co. began preparation of a mail shot (or circular) from the Second Defendant to the Beneficiaries. The circular introduced the Second Defendant as the new trustee of the Trusts. The circular also sought what was described as client due diligence documentation from the Beneficiaries and current contact details. The client due documentation was identified as an original certified copy of a passport, bank statement or utility bill. I will refer to documentation confirming identity, of the kind which was sought by this circular, as **“KYC”** (know your client) documentation/information.

This circular was the first of a number of circulars sent out to the Beneficiaries by the Second Defendant. Mr O'Shea, Mr Reid and Mr Emblin worked together on the drafting of these circulars.

66. At this time Mr O'Shea, Mr Reid and Mr Emblin were also working together to market the Pyrrhus Scheme to the Beneficiaries and to other trusts with beneficiaries in a similar position, and to market the services of the Second Defendant as trustee. These efforts were not however successful. So far as the Trusts were concerned, there were 2,145 Beneficiaries at the point when the Second Defendant took over as trustee. Of these only 14 Beneficiaries participated in the Pyrrhus Scheme. As I understand the position, the total take up of the Pyrrhus Scheme was only 58 persons.

67. In its circulars to the Beneficiaries, the Second Defendant set out options available to the Beneficiaries. By way of example, a circular was sent out to the Beneficiaries on 22nd May 2018. The circular repeated the request for KYC information, and went on to make the following point in relation to the Loan Charge:

> *"In addition, we have been considering the impact of the April 2019 loan charge ("2019 Loan Charge"), which is now barely 10 months away. The 2019 Loan Charge will deem the full amount you owe to the trustees to be income on 5 April 2019. This will be subject to PAYE and NIC. Consequently, the trustees are required to consider what is in the best interests of the numerous beneficiaries of the EFRBS."*

68. The circular went on to set out four options, which were (i) settlement with the Revenue, (ii) repaying loans on or before 5th April 2019, (iii) payment of the Loan Charge, and (iv) personal insolvency. The circular went on to urge Beneficiaries to take advice on their position, and set out a good deal of further information for the assistance of the Beneficiaries. The option of settling with the Revenue could be coupled with outstanding loans being written off, in exchange for a flat fee of £950.

69. By the end of 2018 the disappointing response to the Pyrrhus Scheme, coupled with a situation where a large number of the Beneficiaries had failed to engage with the Second Defendant or provide KYC information, resulted in a reconsideration of the position. As Mr Reid put the matter in his witness statement, by the end of 2018 it was his view that the Second Defendant had little option but to call in the Beneficiaries' loans or sell the Loan Assets to a third party. Mr Reid identified such a sale as a possible commercial opportunity. In order to explore that commercial opportunity, from a regulatory perspective, Mr Reid obtained advice from a company called Complyport Limited. The advice was provided in a report dated 14th December 2018. The report concluded that the debts were not regulated, and could be purchased by an unregulated third party, which could administer the debts.

70. In April 2019 Mr Emblin and Mr Reid raised with Mr O'Shea the possibility of buying the Loan Assets. This is evidenced by an email which Mr O'Shea sent to Ms Stone on 11th April 2019. By that time 5th April 2019 had gone by and, save for those of the Beneficiaries who had reached a settlement with the Revenue, the Loan Charge had become payable. The context of this email was the preparation of a circular to go out to the Beneficiaries following the end of the tax year, which Ms Stone had, in accordance

with the established practice, sent to Mr O'Shea for his input. In the material parts of this email Mr O'Shea said as follows:

"Many thanks for your email with attachments.

I am currently travelling and will let you have my comments as soon as possible.

I was half expecting the communication to be a little stronger, but guess this will be the first communication following 5 April.

As we have discussed, now that 5 April is behind us we need to consider the options which are available to the trustee.

During a recent call, Mark mentioned that consideration is being given to purchasing the loans from the trustee.

Should we have a call early next week to have an initial run through the options."

71. On 2nd May 2019 Mr Reid emailed to Mr O'Shea a copy of the Complyport report, in preparation for a meeting they were to have the following week. The meeting itself took place on 7th May 2019, and was followed by discussions about agreeing the structure of a purchase price by which an SPV would acquire the Loan Assets. On the same day Mr O'Shea emailed Mariana Botha-Schoeman at Hatstone. The email was headed Project Z, and stated as follows:

"Could you please prepare an invoice (guess there are no tax consequences for this for Pinotage?) for the amount of the commission we are due for the above project.

The invoice should be addressed to Reid & Co from Pinotage, but with the account details for Hatstone office account provided.

The narrative should be

Payment in respect of the proposed purchase of the outstanding loans

They have asked for it be structured this way. Happy to discuss."

72. As is clear from the terms of this email, the proposed sale of the Loan Assets had met with the agreement of Mr O'Shea. It is also clear that the Second Defendant was to invoice for the commission due to it in respect of Project Z (Pyrrhus); that is to say for the introduction of parties to the Pyrrhus Scheme. The narrative on the invoice was however to be described as payment in respect of the proposed purchase of the Loan Assets. On 8th May 2019 Mr O'Shea emailed Mr Emblin and Mr Reid asking, on behalf of the Second Defendant, for advice on how best to bring the Trusts to an end.

73. On 9th May 2019 Mr O'Shea emailed the requested invoice to Mr Emblin and Mr Reid. The invoice was expressed to be from Hatstone Jersey and was addressed to Reid & Co. The invoiced sum was £102,015.89, which was described as *"Charge for facilitating with the purchase of the loan books held by Pinotage Trustees SARL as trustee in respect of three contractor solutions and various employment benefit trusts"*. The email of 9th May 2019, under cover of which the invoice was sent, described the invoice in the following terms:

"Further to our recent meetings, please now find attached an invoice in relation to the above.

This has been calculated from the information we hold and so I hope is correct.

We considered that the invoice needed to be issued by Hatstone since if issued by Pinotage, with the included narrative, then arguably the fee should be held by Pinotage as trustee of the various trusts, which does not work.

Happy to reconsider the narrative and to whom it is issued and from which entity. Please just let me know.
As discussed, it would be great if the invoice could be settled at your earliest convenience so we can arrange to reimburse both the former trustee and Pinotage who are chasing.
I look forward to hearing from you."

74. On 10th May 2019 Mr Emblin emailed a colleague within Reid & Co. to check the amount shown on the invoice sent by Mr O'Shea. The result of this check was a revised schedule which was sent to Mr O'Shea. The revised schedule showed a list of the individuals who had been introduced to the Pyrrhus Scheme by the Second Defendant, and showed the total sum due, by way of commission, as £106,687. On the same day Mr Emblin emailed Mr Reid to report that he had spoken to Mr O'Shea and updated him with the correct amount due. The email continued in the following terms:

    "2. We agreed that marrying up his and our requirements would mean that Hatstone would reissue the invoice to Reid & Co and the narrative would refer to Reid & Co's clients acquisition of the debt books. This would mean that Hatstone had received the funds on behalf of Pinotage and Hatstone would then bill Pinotage so that funds were with Hatstone. Carl is to check internally whether anyone objects to this.
    3. Hatstone has all the raw data on the debt books so it seemed sensible for Hatstone to draw up the deeds of assignment and we can get Richard to review on our behalf."

75. The reference to Richard was a reference to Richard Wrigley, a partner in Shakespeare Martineau, who were the English solicitors instructed to draw up the SPAs.

76. On 13th May 2019 Mr O'Shea sent an email to Mr Emblin and Mr Reid, headed *"Purchase of the book"*. The email was concerned with the question of how the sale of the Loan Assets was to be justified, and at what consideration. The email was also concerned with the continuing debate between the parties as to how to frame the invoice which Mr O'Shea had been asked to issue. I quote the email in full:

    "Apologies for the delay, I have just had a chance to discuss the matter with general legal counsel for Pinotage.
    It is suggested that the issues with regard to either Hatstone being seen as holding the funds on escrow for Pinotage or the funds being held as part of the trusts remain. In addition, £100k for a potential £300m to £400m loan book is hard to justify from a trustee perspective.
    Having discussed the matter, it is clear there shall be good reasons for the trustee to proceed down the path of selling the loan book, but the sale amount must be appropriate.
    We have therefore come up with an alternative approach which it is hoped achieves all parties objectives:
        1. Hatstone issues the invoice for £106k with the original narrative – facilitating the sale of the loan book. This way it is clear there is no escrow arrangement or funds forming part of trust property.

2. *Hatstone invoices Pinotage for all time incurred to date on this matter – that will total between £750k to £1m.*
3. *The trusts will therefore arguably be 'insolvent' being another key reason why Pinotage will wish to sell the loan book – to help it satisfying such professional fees.*
4. *Pinotage agrees to sell the loan book to the SPV on the basis the SPV agrees to pay Hatstone from any proceeds it recovers. Hatstone will agree to this. The value to be paid for the loan book can be agreed, but can be up to £1m, which can be a more realistic purchase price. Any balance can be written off by Hatstone. The SPV shall not be taking on the debt – it is just agreeing to pay Hatstone from any proceeds recovered (or there could be a side agreement where Hatstone agrees to replace this for a 50% interest etc).*

This way:

A. *Hatstone cleanly receives its £106k*
B. *The SPV does not need to pay anything upfront for the loan book*
C. *The trustee has a good additional reason to sell the loan book and the value will be potentially more reflective of the market etc*
D. *The proposed 50/50 split remains the same"*

77. The email of 13th May 2019 is important for several reasons. First, it is clear from the terms of this email that Mr O'Shea was alive to the problem of justifying the sale of the Loan Assets, with a potential value of £330m to £400m, for a figure in the order of £100K. Second, Mr O'Shea was alive to the possibility that, if the Trusts were insolvent, this would provide a reason to justify the sale of the Loan Assets. Third, and arising out of the matters which I have just identified, the email of 13th May 2019 essentially set the parameters for the consideration which was to be paid on the Disposal. That consideration was not set by reference to any valuation of the Loan Assets, but by reference, or at least ostensibly by reference to sums due to Hatstone Jersey for professional services provided to the Second Defendant. I say ostensibly by reference because it is quite clear from the documents, and I so find, that the sum of £100,000, which was be the advance payment for the Loan Assets, started life as the bulk of the sum due to the Second Defendant by way of commission for introducing parties to the Pyrrhus Scheme. I use this form of words because, moving out of the chronology for a moment, there is an invoice in the trial bundle, dated 17th June 2019 and addressed to Pyrrhus from the Second Defendant, in the sum of £100,000. The invoice is described as *"Commissions payable on the introduction of individuals seeking personal loans to Pyrrhus Capital Limited in circumstances where loans were made to one or more of such individuals by Pyrrhus Capital Limited for all periods up and including 5th April 2019."*. There is also an email from Mr O'Shea's personal assistant to Mr Reid, sent on 2nd July 2019, which is headed *"Re: Pinotage commission invoice"*. The email confirms receipt of the payment of £100,000 which must, it seems to me, be a reference to the £100,000 set out in the invoice of 17th June 2019. There is therefore evidence, which I accept, that a further sum of £100,000 was paid which was described as commission payable to the Second Defendant in respect of the Pyrrhus Scheme.

78. On 15th May 2019, and pursuant to the alternative approach identified in Mr O'Shea's email of 13th May 2019, Mr O'Shea emailed Mr Emblin and Mr Reid attaching an

invoice and a request for payment. Both documents were expressed to be from Hatstone Jersey to Reid & Co. The invoice was for the sum of £6,680, and was expressed to be *"Charge for facilitating with the purchase of the loan books held by Pinotage Trustees SARL as trustee of various trusts"*. The request for payment on account was for the sum of £100,000 and contained the following request:

> *"Please kindly arrange for a payment on account to be made in relation to the non-refundable part payment of the purchase price of the loan book being purchased by your client from our client Pinotage Trustees Sarl."*

79. On 16th May 2019 Mr Reid emailed in response confirming that the invoices, by which Mr Reid meant the invoice and the request for payment, were fine. The email explained that the First Defendant had been incorporated that day, and requested that the invoice and request for payment be re-issued to the First Defendant, c/o Reid & Co. This was duly done by Mr O'Shea the same day. On 17th May 2019 the sum of £100,000 was paid by Slap 8 to Hatstone Jersey. There is no document which I have seen which demonstrates this, but I was told by Mr Miall, in opening, that this was established by the statements of case.

80. On 22nd May 2019 Nicola Stone emailed a report to Mr O'Shea, which she described as *"Report re post April 2019 options for trustees of EBTS and EFRBS"*. The author was identified as *"Simon Emblin Reidco"*. The email and attached report were copied to Mr Emblin and Mr Reid. The introduction to this report was in the following terms:

> *"This report sets out the current position of Pinotage Trustees SARL ("Pinotage") in its capacity as trustee of a number of trusts which are Employee Benefit Trusts ("EBTs") and Employer Financed Retirement Benefit Schemes ("EFRBS"). Pinotage became trustee of a number of EBTs and EFRBS prior to 5 April 2019. In all cases, the beneficiaries of the trusts owed the trusts money as part of what HM Revenue & Customs consider to be disguised remuneration schemes, including contractor loan schemes. Pinotage now has significant liabilities, as trustees of these trusts, and needs to realise assets in order to fund the trust liabilities. The aim of this report is to set out for Hatstone the options it may wish to discuss with Pinotage with regard to the trusts with a view to bringing the trusts to a close in the short term. This is to minimise the exposure of the trustees to reporting obligations and the beneficiaries to changes in tax legislation."*

81. Six options were discussed in this report. The option which was identified as an acceptable option was the sale of the debt book (the Loan Assets), which was recommended in the following terms:

> *"In view of the problems engaging with beneficiaries, the trustees may consider it appropriate to sell the debt book. The proceeds (after settling the trustee liabilities) could then be appointed to beneficiaries, who would then have cash to pay any tax charge arising thereon. In addition, for those beneficiaries where having an outstanding debt would be a benefit (such as those contemplating an IVA for example) the debt would remain outstanding to an independent third party who would have a significant role in any proceedings, thus taking power away from HMRC which is likely to be the second biggest creditor. A sale would therefore be in the interests of such beneficiaries."*

82. In the meantime, the Second Defendant was becoming concerned as to its own position in relation to the Trusts. There is a file note of a telephone meeting on 12th March 2019 between Mr O'Shea, Hannes Botha and Mariana Botha-Schoeman. The purpose of the discussion was identified in the following terms in the file note:

> *"Pinotage is a member of ARIF* [the Swiss regulatory authority] *and has to comply with its directives. Non-compliance with the directives can result in monetary penalties and may lead to ARIF revoking Pinotage's membership.*
>
> *On review, the trusteeship of the following three trusts is putting Pinotage at risk of being non-compliant:*
>
> *The Prime Contractor Solutions Employer-Financed Retirement Benefit Scheme;*
>
> *The Contractor Solutions Employer-Financed Retirement Benefit Scheme 2012; and*
>
> *The Trustee Of The Hyrax Resourcing Employer-Financed Retirement Benefit Scheme,*
>
> *Together (the "Trusts")*
>
> *The purpose of this discussion is for Hannes, who is knowledgeable about both the ARIF directives and Pinotage's day to day operations, to advice on the risks that Pinotage is facing, and possible solutions."*

83. By reference to the file note, the possible solutions which were identified at that stage were as follows (the underlined sections are in italics in the file note, but the underlining itself is my addition):

> *"After Pinotage took on trusteeship of the Trusts, we sent out various emails to the many beneficiaries, requesting them to provide certified copies of their identity documents and an up to date proof of address.*
>
> *Many beneficiaries have failed to respond, and as Hannes pointed out, this non-compliance of the beneficiaries causes Pinotage to be in the unfortunate position of not being able to comply with the directives of ARIF from a regulatory and compliance perspective.*
>
> *It is clear that prompt and remedial action is necessary, and Hannes strongly recommends that Pinotage takes corrective action before 30 June 2019, <u>as this is the cut-off date for the 2019 ARIF audit</u>.*
>
> *<u>Hannes further suggested two possible remedial actions that Pinotage could take. This is to either transfer the Trusts to another trustee or terminate them. Both remedies will ensure that Pinotage is not penalized for being non-compliant, as the Trusts will remain in the Trustee Register of Trusts, but they will no longer be listed under the "active trust" section", and they will therefore not be scrutinized in the same stringent manner as if they were.</u>*
>
> *We have a fiduciary duty towards our other trusts and will consider Hannes's advice and act in a way that will best protect Pinotage's standing with its governing body.*
>
> *It was noted that it was unlikely, if not impossible, that another trust company would take on these trusts due to the apparent compliance issues. It is also not possible to terminate the trusts. A potential solution would be to set up a PTC to run the trusts. This would solve the upcoming Swiss audit and compliance issue and provide more time for hopefully obtaining the missing due diligence and dealing with the Trusts for those who are engaged.*
>
> *It was suggested that Carl look into this and, if possible, to arrange prior to 30 June 2019."*

84. On 23rd May 2019 Mr O'Shea emailed Mr Emblin, Mr Reid and Ms Stone, in the following terms:

> *"As discussed, Pinotage has been considering whether or not it shall be an issue to be trustee of the various contractor solutions at the time it is next audited by its regulator in Switzerland. The audit will happen in the coming months.*
> *On the basis many beneficiaries have failed to engage with the trustee and provide up to date client due diligence then it will have an issue. When taking on these trusts, Pinotage had a grace period to obtain the client due diligence, but that period has now passed.*
> *A solution we have been considering is establishing a private trust company for each contractor trust. Each PTC may bear the name 'Pinotage' in order to keep continuity for the purposes of the borrowers/clients and will be administered by Pinotage.*
> *This change would take the trusts outside the scope of the audit.*
> *It shall be possible to sell the shares of each PTC to a willing buyer.*
> *It* [will] *not be possible to repeat this for the EBTs.*
> *I look forward to your comments/thoughts and would be happy to discuss by phone."*

85. On 28th May 2019 Mr Emblin emailed Mr O'Shea reporting on a telephone conference which had been held that morning with David Gill. There is a note of this telephone conference, which discloses that the conference was a lengthy one. The note is dated 20th May 2019, but this is clearly an error for 28th May 2019. The conference was attended by Mr Reid, Mr Emblin, Stuart Drury of Reid & Co., David Gill and Gordon Berry, also of Peak Performance. In the course of the conference the overall position was reviewed in some detail. The note of the conference is too lengthy to quote in full, but the following extract from the file note discloses how Mr Emblin was viewing the position:

> *"DG mentioned that as far the beneficiaries were concerned, the original trustees had received "lifetime fees" in advance and as such, no further trustee fees were anticipated.*
> *DG acknowledged that the lack of interaction between the trustees and beneficiaries, despite the best efforts of Pinotage, resulted in a "zombie population" of beneficiaries who intentions were completely unknown.*
> *SRE proceeded to set the scene in respect of Pinotage's position and their intentions.*
> *In the pre-April 2019 environment, Pinotage were effectively a "white knight" coming in to take over the trusts with the belief that the beneficiaries would either settle with HMRC and look to write off the loans, in which case Pinotage would charge a modest fee, or repay their loans using the Pyrrhus financing option.*
> *It was anticipated that Pinotage would take over up to 1000 EBT/EFRBS, however progress with obtaining signed DORAs was slow and in the event, only around 100 trusts were transferred. Pinotage suffered a commercial cost in these transactions, as the retiring trustees required payment and Pinotage had their own internal compliance "take on" costs as well. The so-called "lifetime trustee fees" were never part of any commercial discussions - Pinotage were unaware of such fees and received nothing in respect of them.*
> *Following the Peak conferences and roadshow events, attended by Carl O'Shea of Pinotage ("CO"), the message changed and there was a divergence of views.*

The defence of the underlying schemes collapsed and there was little subsequent communication between the trustees and beneficiaries, despite a regular stream of email updates from Pinotage.
By 5 April 2019, it became apparent that very few beneficiaries had settled with HMRC or repaid their loans using the Pyrrhus facility, or any other method and it appears that the vast majority of beneficiaries did nothing at all.
Pinotage were therefore left with a large book of outstanding debt (creditor rights and loans) and a refusal by the beneficiaries to communicate with the trustees making a difficult situation worse.
Pinotage were left in a position where they needed to recoup their costs and therefore started looking at options. In addition, the external auditors are coming to visit Pinotage shortly and the trustees are faced with explaining the lack of KYC and engagement with the beneficiaries on three large schemes. Behind the scenes, the South African trustees are feeling very uncomfortable and want an exit.
CO approached SRE and MMR for assistance and it was decided that the best exit route for Pinotage was to remove the trusts from the balance sheet, to avoid the potentially serious regulatory issues.
SRE stated that there have been developments since he last spoke to DG and it is now the intention for the trusts to transfer to an entity connected to SRE and MMR, with the administration of the trusts to remain with Pinotage. The parties are well down the road to agreeing the terms for this transaction and it will be completed shortly. The new entity will therefore own the creditor rights/loan book."

86. The solution (to the Second Defendant's regulatory concerns) proposed in the email of 23rd May 2019 was implemented. I have already dealt with the taking over of the Trusts by Pinotage PTC. For ease of reference, I repeat the key events. On 21st June 2019 Pinotage PTC was incorporated in the BVI. On 25th June 2019 the Loan Assets in the 2011 Trust and the 2012 Trust were assigned by IFM to the Second Defendant. This assignment substantially postdated the appointment of the Second Defendant as trustee of these two Trusts. What appears to have happened is that a separate assignment of the assets of these Trusts was overlooked when the Second Defendant was appointed as trustee. In the case of the 2014 Trust there was no equivalent assignment of the Loan Assets to the Second Defendant on 25th June 2019. On 30th June 2019 Pinotage PTC was appointed as trustee of the 2011 Trust and the 2012 Trust in place of the Second Defendant. It is common ground that the equivalent appointment of Pinotage PTC as trustee of the 2014 Trust, in place of the Second Defendant, was ineffective. On the same day, 30th June 2019, the Loan Assets in respect of the 2011 Trust and the 2012 Trust were assigned by the Second Defendant to Pinotage PTC. Again, there was no equivalent assignment of the Loan Assets to Pinotage PTC in relation to the 2014 Trust.

87. On 17th July 2019 Shakespeare Martineau, the English firm of solicitors instructed for this purpose, emailed to Mr Shenkin and Mr O'Shea (copied to Mr Reid, Ms Stone and Mr Emblin) a first draft of the SPAs and accompanying deeds of assignment which were to be used to implement the Disposal. It was therefore at this point that drafts of the documents which would be used in the Disposal were first circulated.

88. The consideration payable for the Loan Assets was identified in the first draft of the SPAs as £100,000 cash paid up front, with a deferred consideration payable which would be based on a share of the profits of the First Defendant, capped at £1 million.

89. On 21st July 2019 Mr O'Shea emailed Mr Reid, copied to Mr Emblin and Mr Reid, on the subject of the value of the Loan Assets. Mr O'Shea said this:

> *"Hello Mark Sorry, just thinking – did we get a rough valuation of the loan book? I guess it may be helpful to have a rough idea what £1m of old and arguably bad debt is worth. It is the kind of information which may be good to include in the trustee resolution approving the sale."*

90. On 25th July 2019 Mr Reid emailed Mr O'Shea, in response to Mr O'Shea's email of 21st July 2019. In his email in response Mr Reid set out reasons for the trustees being entitled to sell the Loan Assets and for regarding the Loan Assets as having a notional value at best. The email was in the following terms:

> *"Following our conversation yesterday concerning the books of debt being purchased from Hyrax et al, the Trustees would appear to have ample reason to sell this debt at a level sufficient to recoup most of their their outlay and costs in respect of acting as trustees of the Trusts on the basis the Trustees have deemed, if not actual, knowledge that circa 99% of the debtors are insolvent.*
>
> *The Trustees reasoning is as follows:-*
>
> > *When Pinotage become Trustees, the April 2019 loan Charge, as set out in Schedule 11 of the Finance (No.2)) Act 2017, had not taken effect and the Trustees through a series of road shows in London, Birmingham, Manchester and Edinburgh sought to urge debtors either to settle with HMRC on or before 5th April 2019 and have their loans written off for a fixed fee, or repay their loans to Trustees on or before 5th April 2019;*
> >
> > *The Trustees are aware that none but a small handful of debtors either repaid their loans or entered into settlements with HMRC on or by 2019;*
> >
> > *Even if there are a number of debtors still in negotiation with HMRC, this number, to the best of the knowledge of the Trustees, is very small in comparison to the total number of debtors;*
> >
> > *More to the point, as the vast majority of debtors did not repay their loans on or by 5th April 2019, then not only has the April 2019 Loan Charge taken effect but debtors also remain liable for the underlying tax planning they entered into - a point emphasised by HMRC.*
>
> *In short, the Trustees, contrary to their expectations when they became trustees, consider that these books of debts have nothing but a notional value at best, that there are unacceptable regulatory and reputational issues concerned with continued associations with such Trusts and that the only reasonable course of action open to the Trustees to recoup their costs is to sell the book of debts as soon as practicable.*
>
> *I also had a long chat (they come in no other form) with David Gill today. He says people will want debts written off but wish to settle first. I said we would welcome dialogue with such persons as and when but must proceed with the purchase of the debts as previously advised."*

91. Stepping outside the chronology again, the sentiments expressed by Mr Reid as to the value of the Loan Assets, in this email of 25th July 2019, are seriously undermined by a later exchange of emails on 30th September 2019. On that date Mr Shenkin emailed to

Mr Wrigley (copied to Mr O'Shea, Mr Reid, Ms Stone and Mr Emblin) deeds of assignment for the 2011 Trust and the 2012 Trust, with accompanying schedules of debt, and a deed of retirement and appointment in relation to the 2014 Trust with an attached list of debts. Mr Shenkin went on to comment that some 800 contractors (Beneficiaries) had indicated that they planned to settle with the Revenue. Mr Shenkin said that they were currently updating the schedules to identify these people *"as it is not intended for these debts to be transferred at the present time"*. Mr Shenkin said that there needed to be provision in the SPA for these rights to be carved out of the sale. This drew an immediate response from Mr Reid, who said this in an email sent to Mr O'Shea (copied to Mr Emblin):

> *"A huge commercial opportunity is being lost if these 800 individuals referred to below, supposedly in the throes of settling with HMRC, are not transferred to FS Capital. We have been in dialogue with David Gill on this matter over recent weeks and our message to him now appears at variance with the position of Pinotage. David will seek to exploit any inconsistency for his own ends."*

92. On 31st July 2019 Mr O'Shea emailed to Mr Reid the draft SPA with tracked changes. Clause 3 of the SPA, which specified the purchase price, continued to show the initial advance payment, in clause 3.1, as £100,000. At clause 3.2, which showed the deferred consideration, capped at £1 million, Mr O'Shea added a note stating that *"This figure may have to increase – I am checking what are the current fees"*. On 25th August 2019 Mr O'Shea emailed a further revised draft of the SPA which showed the cap for the deferred consideration, in clause 3.2, as being £1,176,033.92.

93. In re-examination by Mr Flavin, Mr O'Shea explained the provenance of the figure of £1,176,033.92. Mr O'Shea explained that he contacted Hatstone Jersey accounts and asked what was the outstanding amount due on Project Z, in relation to the Trusts only. That generated a figure of around £900,000. Mr O'Shea then spoke to Hannes Botha and Mariana Botha Schoeman in relation to the Second Defendant. As Mr O'Shea recalled, his words of enquiry were *"Right, on the Pinotage side, I need to get the figures together as to what we think Pinotage is entitled to"*. This enquiry resulted in a figure which Mr O'Shea then added to the figure he had obtained from Hatstone Jersey accounts. The resulting figure (£1,176,033.92) then went into the SPAs.

94. The work in progress reports, from which was derived the figure said to be due to Hatstone Jersey for its work in relation to the Trusts, were available in the trial bundle. Mr Miall took Mr O'Shea through a few of these records and the accompanying invoices in cross examination. What was immediately apparent was that the work done by Hatstone Jersey, the charges for which formed the bulk of the sum of £1,176,033.92, included a good deal of work on Project Z which did not relate to the Trusts. Given the quantity of material Mr Miall necessarily had to conduct this part of his cross examination by reference to examples. It was however quite clear that the figure provided by Hatstone Jersey accounts for work said to have been done in relation to the Trusts included a good deal of work which should not have been charged to the Trusts. It was put to Mr O'Shea in cross examination that there were very, very frequent entries in the WIP reports which demonstrated that there were times included which should not have been charged to the Trusts. Mr O'Shea accepted that he could not disagree with this. Mr O'Shea suggested that if there had been funds available to pay the invoices of Hatstone Jersey at the times when they were produced, the WIP would have been reviewed and (I assume) the invoices corrected. I am not able to accept this evidence,

which struck me as speculation on the part of Mr O'Shea. If an invoice is issued by a firm of lawyers I would expect it to be accurate. It strikes me as implausible that Hatstone Jersey would have issued its invoices on a provisional basis, lumping all the work together on the basis that specific categories would be sorted out later. What strikes me as more likely, and what I find happened, was either that Mr O'Shea's request to Hatstone Jersey for details of outstanding fees was insufficiently precise or that the request was sufficiently precise but was not answered precisely, or that there was a combination of insufficient request and insufficient answer.

95. The inaccuracy in the figure provided by Hatstone Jersey was compounded by the fact that, if one went back to the original letter of engagement between Hatstone and the Second Defendant, dated 3rd February 2017, the specified hourly rates for Hatstone staff were specified as being between $150 and $500 (US dollars). Mr O'Shea's time, which was charged for his services as director of the Second Defendant, was at the top rate of $500. The letter of engagement stated however that Hatstone proposed to charge 50% of the standard hourly rates specified in the letter of engagement. The WIP reports show Mr O'Shea's time charged at £500 per hour. By reference to the letter of engagement, this figure was in the wrong currency (to the advantage of Hatstone) and had not been discounted by 50%. Mr O'Shea accepted in cross examination that there should have been an adjustment in the WIP reports for these factors. It was put to Mr O'Shea that to the extent that there was an indebtedness of the Second Defendant to Hatstone in relation to the Trusts, it was for quite a lot less than Mr O'Shea had suggested in his evidence. Mr O'Shea was only willing to accept that if one carried out *"a big analysis of the work on the invoices, you would see that there could have been a reduction"*. This seems to me to have been a substantial under-statement of the position. By reference to the material put to Mr O'Shea in cross examination it is quite clear, and I so find, that the true sum due to Hatstone/Hatstone Jersey from the Second Defendant, for work done in relation to the Trusts, was substantially less than the figure provided to Mr O'Shea by Hatstone Jersey accounts.

96. Mr Miall sought to carry out a similar exercise with Mr O'Shea in relation to the sum provided by Mr Botha and Ms Botha Schoeman as the sum due to the Second Defendant in respect of its services as professional trustee of the Trusts. In this respect however I was not convinced, on the basis of the evidence which I heard, that the relevant sum was either excessive or wrong. Mr O'Shea defended the relevant sum as a reasonable figure, in terms of charges made by professional trustees. I have already commented on Mr O'Shea's experience in this field and, in this respect, it seems to me that his evidence in defence of the sum charged by the Second Defendant was not undermined.

97. Resuming the narrative, and following the email from Mr O'Shea of 25th August 2019, work on the documents to implement the Disposal continued. There are only a couple of communications which require specific mention. On 9th October 2019 Mr O'Shea emailed Mr Reid with comments on *"the Prime draft"*, which I take to be a reference to draft of the principal SPA for the 2011 Trust. There are two points of particular note. First, Mr O'Shea suggested that the consideration be divided into three. Second, Mr O'Shea gave the following explanation, in relation to the consideration for the Loan Assets:

> *"The consideration here is calculated based on time engaged by Hatstone and Pinotage for dealing with the contractor structures – it has not been calculated to*

include time on the EBTs. In terms of the consideration for the EBTs, it is suggested that this can be on a wholly deferred basis or I can try to calculate an increased consideration now (but not sure how that works when the PTC is not the trustee). To try to explain a little more, from the trustee's perspective, the trustee of the trust calculates the 'consideration' by asking its creditors (the trustee and Hatstone) for their outstanding charges and approval to proceed with the disposal with the creditors agreeing to accept the deferred consideration in lieu of outstanding fees. This is the main way the trustee can justify the sale and the setting aside of the best interests of the beneficiaries, as the creditor rights arguably usurp those of the beneficiaries."

98. This email confirms that the consideration for the Disposal was to be confined to sums due to the creditors of the Trusts, who were identified as *"the trustee and Hatstone"*. The position was further confirmed by an email sent by Mr O'Shea on 11th October 2019, in which he responded to an email sent by Mr Reid on 11th October 2019. Mr O'Shea interpolated his comments into Mr Reid's email, in bold print. The relevant comment of Mr O'Shea, in bold print, was as follows:

"I will split the Initial and the Deferred Consideration equally between the Trusts albeit I thought you would divide the Consideration based on the quantum of debt being assigned by each Trust. I will also put the name of the Trust on the face of each SPA and Deed of Assignment. ***Thanks. Yes, the consideration is not linked to the value of the loans for the purposes of the trustee – it is calculated by reference to the amount owed to creditors****"*

99. On 30th October 2019 the Disposal was completed. I have already set out, in my description of the Trusts in a previous section of this Judgment, the instruments by which the Disposal was implemented, whether effectively or otherwise.

100. So far as the consideration for the Loan Assets was concerned, the SPAs provided as follows:
   (1) In the case of each Trust there were two SPAs and, in the case of the 2011 Trust and the 2012 Trust two deeds of assignment. In each case the consideration was identified in clause 3 of the first SPA.
   (2) By clause 3.1 the first part of the consideration, in the case of each Trust, comprised the sum of £33,333, receipt of which was acknowledged by Pinotage PTC, as the Seller. This was the sum of £100,000, divided (not quite exactly) into three, which comprised the upfront payment on the Disposal.
   (3) By clause 3.2 the Deferred Consideration was to be calculated and paid as provided in Schedule 1. In very brief summary Schedule 1 provided that the Deferred Consideration would amount to 50% of the profits realised by the First Defendant from the Loan Assets until 30 September 2022.
   (4) By clause 3.2 this 50% share of the profits from the Loan Assets was capped at £392,011.31, in the case of each Trust. Multiplied by 3, this figure comes to £1,176,033.93, which was the same figure (save for 1p added by the exercise of dividing that figure into three) identified by Mr O'Shea on his email of 25th August 2019 as the figure for the cap on the Deferred Consideration.

101. In terms of what actually constituted the payment of the sum of £100,000, as referred to in clause 3.1 of the relevant SPAs, it seems to me, and I so find, that the only available candidate for this payment is the sum of £100,000 paid by Slap 8 to Hatstone Jersey on

17th May 2019, which was paid in response to the request for payment of £100,000 which was re-issued to the First Defendant on 16th May 2019. I have already found that although this sum started life as the bulk of the commission due to the Second Defendant in respect of the introduction of parties to the Pyrrhus Scheme, the commission was actually settled by the payment of £100,000 in response to the invoice from the Second Defendant to Pyrrhus dated 17th June 2019.

102. So far as the Deferred Consideration was concerned it will be seen, if one goes back to the earlier email exchanges between Mr O'Shea, Mr Reid and Mr Emblin, that the capped figure for the Deferred Consideration (**"the Cap"**) had been calculated by reference to sums due, or said to be due to the creditors of the Trusts. The Cap was not based on the value of the Loan Assets.

103. The total book value of the Loan Assets which were the subject of the SPAs was £410,822,090.81. It will be recalled that the deed of confirmation executed by Pinotage PTC, the Second Defendant and the First Defendant made corrections to the debt schedules attached to the SPAs. The revised figure for the book value of the Loan Assets was £279,729,180. In terms of the number of Beneficiaries who were still indebted to the Trusts, the Disposal involved 1,392 Beneficiaries, out of a previous total of 2,145 Beneficiaries. The remaining Beneficiaries had either settled with the Revenue and arranged for their debts to the Trusts to be waived or, in 14 cases, had participated in the Pyrrhus Scheme.

104. As part of their disclosure in this action the First and Second Defendants both disclosed a document signed by Mr O'Shea and entitled *"Written Resolution of the Trustee of the Trusts"*. This resolution (**"the Disposal Resolution"**) was in the name of Pinotage PTC, and was headed with the names of the Trusts. After noting a series of matters, the Disposal Resolution stated the following resolution:

> ***"IT WAS RESOLVED** that:*
>
> *(i) the Trustee has the power to sell the Debts and thereby taking into account the above approves the sale of the loans to FS Capital;*
>
> *(ii) it is in the best interest of the creditors (and arguably the Beneficiaries too) to sell the Debts;*
>
> *(iii) the Trustee (acting in its capacity as such) shall conclude the Agreements; and*
>
> *(iv) any authorised signatory of the Trustee be authorised to sign the sale agreement."*

105. The Disposal Resolution is dated 30th October 2019, but the metadata for this document, disclosed by each of the First and Second Defendants, state that the document was created on 16th April 2020.

106. Following completion of the Disposal on 30th October 2019, there are only a few further events which require specific mention. On 6th December 2019 the Second Defendant purported, by a resolution of that date signed by Mr O'Shea, to ratify the actions of Pinotage PTC in relation to the 2014 Trust, as from 30th June 2019. The resolution noted that this ratification was required because there had been an error in the intended appointment of PTC as trustee of the 2014 Trust, on 30th June 2019, so that Pinotage PTC had been acting as trustee de son tort since that date. On 11th December 2019 the assignments of the remaining assets of the Trusts to Hatstone LLC was made

by Pinotage PTC. On 30th January 2020 the Deed of Confirmation was executed by Pinotage PTC, the Second Defendant and the First Defendant, revising the debt schedules which had been attached to the SPAs. Pinotage PTC itself went into voluntary liquidation on 29th December 2019, and was dissolved on 18th March 2020.

107. In May 2020 the First Defendant began to serve statutory demands on the Beneficiaries, in respect of their outstanding loans. It is not necessary to go into the pre-action correspondence, but this action was commenced by the Claimants on 1st October 2020.

108. I understand that no Deferred Consideration has yet been paid pursuant to the SPAs. As I understand the position, there have been no recoveries, or at least no net recoveries (after deduction of costs) in respect of the Loan Assets since the Disposal. The Defendants' case is that the right to receive the Deferred Consideration comprised part of the remaining assets of the Trusts which were assigned to Hatstone LLC by the sale and purchase agreements of 11th December 2019. In this context I should mention that the First Defendant gave an undertaking to the court, as part of an order made by Michael Green J on 10th November 2020, not to dispose of or otherwise deal with any assets assigned or otherwise transferred to it by Pinotage PTC relating to the debts and/or liabilities of the Claimants, until judgment or further order of the court. The Loan Assets have therefore been subject to this restriction since the date of this order.

109. The trial documents included a bundle of correspondence between Claimants and the trustee of the Trusts. I refer to *"the trustee"* in open terms because the correspondence spans 2018 and 2019. I understand that this bundle of correspondence was produced by the Claimants' solicitors. Its purpose, as described in the Claimants' skeleton argument for trial, was to rebut the Defendants' contention that the Claimants had failed to communicate with the trustee. The Claimants' case was that the bundle of correspondence demonstrated substantial communication with the trustee by the Claimants. This purpose was not however wholly achieved. The First Defendant produced a colour coded spreadsheet which recorded, by reference to the Claimants' bundle of correspondence, the degree of communication between each Claimant and the trustee. The colour coding was as follows:
   (1) Red indicated that the particular Claimant had not provided any KYC information.
   (2) White indicated that the particular Claimant had not communicated at all.
   (3) Amber indicated that it was uncertain, from the correspondence in the bundle, whether the particular Claimant had provided any KYC information.
   (4) Green indicated that KYC information had been provided by the particular Claimant.

110. It is apparent from a perusal of the First Defendant's colour coded spreadsheet that there are substantial quantities of red and white in the spreadsheet, which indicate substantial non-engagement or only limited engagement by a substantial number of Claimants. I accept that the colour coded spreadsheet is consistent with and supports the evidence of Mr O'Shea that there was substantial non-engagement by Claimants. My finding in relation to the bundle of correspondence between the Claimants and the trustee is that it evidences substantial non-engagement or minimal engagement with the trustee by a substantial proportion of the Claimants.

The metadata problem

111. I have already mentioned that the Disposal Resolution is dated 30th October 2019, while the metadata for this document, disclosed by each of the First and Second Defendants, state that the document was created on 16th April 2020. The same was true of the original letter of engagement between Hatstone and the Second Defendant, dated 3rd February 2017. The metadata for this document disclosed that it was created on 8th April 2020. The same was true of invoices expressed to be rendered by Hatstone to the Second Defendant and also of work in progress reports prepared by Hatstone. The metadata for a number of these documents stated that they had been created at a later date to the respective dates shown on the documents themselves. Mr O'Shea was asked, in cross examination, about this discrepancy between the dates shown on documents and the dates shown by the relevant metadata. As I understood Mr O'Shea's explanation, it was that the document management system at Hatstone allowed documents to be lifted out of the system, to be worked on, and then to go back into the system when the work on the document was complete. Mr O'Shea speculated that this would have changed the metadata for a document from the date of its original creation.

112. I am bound to say that this explanation did not make a lot of sense to me, probably because, as was clear from the cross examination, Mr O'Shea did not himself have the necessary knowledge, either of Hatstone's document management system or of the relevant IT processes, to explain the discrepancy between the documents and their metadata. I was left in a situation where I received, from the evidence at trial, no adequate explanation of the discrepancy between the metadata and the documents. In particular, it was striking that the Second Defendant, whose internal documents these were, had not thought it necessary to provide an explanation of this discrepancy or, assuming that the same existed, to disclose the metadata which demonstrated that the relevant documents had been produced on the dates shown on their face. I was driven to the conclusion that the Second Defendant had not properly complied with its disclosure obligations in this respect.

113. As with the preparation of the witness statements of Mr Emblin and Mr Reid, the Second Defendant (in this instance) may be said to have been fortunate that this was not a case in which the central issue was when particular documents were created. If the present case had been such a case, the consequences of what I am calling the metadata problem might have been serious for the Second Defendant. As it is, I confine myself to what I have said in this section of my judgment. I have not thought it right to allow the metadata problem to affect my consideration of the issues I have to decide in this judgment.

The claims and the counterclaim

114. The Claimants' case is pleaded in what are now Re-Amended Particulars of Claim. The Claimants' central case is that the Disposal constituted a fraud on a power or, putting the case in modern trust law terms, the Disposal was made for an improper purpose. The Disposal is also said to have been effected in breach of trust, but in the course of closing submissions it became apparent that the Claimants were not alleging that the Disposal was challenged on the basis of breaches of trust going beyond the alleged improper purpose. It is therefore sufficient to refer to the Claimant's central case as a claim that the Disposal was made for an improper purpose.

115. In paragraph 35 of the Re-Amended Particulars of Claim the fraud on the power/improper purpose is pleaded in the following terms (I have not troubled with showing the amendments in this quotation, only the unmarked text, as re-amended, is shown):

> *"The purported sale and assignment of the Loan Assets to FS Capital from the 2011 and 2012 Trusts by Pinotage PTC (acting by and through Mr O'Shea) was a fraud on the power, such sale and assignment being intended not for the benefit of the beneficiaries but instead to facilitate the Trusts being brought to an end in a manner which benefitted FS Capital, Pinotage Sarl, Pinotage PTC, and Hatstone Jersey at the exclusion of the beneficiaries and/or for a purpose otherwise foreign to the power."*

116. Hatstone Jersey in this quotation is the same firm of Jersey lawyers to which I am referring as Hatstone Jersey.

117. Pursuant to this claim the Claimants seek a variety of declaratory relief to the effect that the Disposal was made for an improper purpose and, as such, was void in equity, with the consequences that the First Defendant holds the Loan Assets as constructive trustee for the Beneficiaries. Further to such declaratory relief orders are sought for the setting aside of the Disposal, for the appointment of some fit and proper person as trustee of the Trusts, for the appointment of some fit and proper person to replace the Third Defendant as Protector of the 2011 Trust and the 2012 Trust, and for the reconstitution of the Trusts.

118. There is also a claim for damages and/or equitable compensation against each of the First and Second Defendants, if and insofar as reconstitution of the Trusts is no longer possible. In discussing these particular claims, in this section of this judgment, it is convenient to refer to equitable compensation as including both damages and equitable compensation, unless it is necessary to distinguish between damages and equitable compensation in the context of these claims.

119. So far as the Second Defendant is concerned, the claim for equitable compensation is made on the basis that the Second Defendant, when it retired as trustee of the 2011 Trust and the 2012 Trust was aware that it was intended that Pinotage PTC would make the Disposal. As such, so it is contended, the Second Defendant retired as trustee of these Trusts in order to facilitate the disposal of the Loan Assets for an improper purpose and is thereby liable to pay damages and/or equitable compensation. It is also contended that, in retiring in such circumstances, the Second Defendant breached the duties which it owed to these Trusts as their trustee, and is thereby liable to pay damages and/or equitable compensation. As I understand the Claimants' case at trial, the claim for equitable compensation in relation to the 2014 Trust is made on the basis that the Second Defendant acted for an improper purpose, and was in breach of its duties as trustee of the 2014 Trust in purporting to ratify the vesting of the Loan Assets, in relation to the 2014 Trust, in the First Defendant.

120. In relation to the First Defendant, the claim for equitable compensation is made on the basis that the First Defendant has a personal liability for knowing receipt of the property of the Trusts, namely the Loan Assets, if and in so far as that property cannot be recovered from the First Defendant as constructive trustee of the same.

121. In the case of the 2014 Trust the above claims are made subject to the logically prior claims relating to the effectiveness of the dealings with the 2014 Trust. As I have noted, these prior claims included a claim that the appointment of the Second Defendant as trustee of the 2014 Trust was ineffective, but this claim was abandoned at the trial. What are left are the claims, in respect of which declaratory relief is sought, that the Loan Assets were never the subject of a valid chain of assignments, from HRL Trustees to the First Defendant.

122. All of these claims are denied by the Defendants, for the reasons set out in their respective Re-Amended Defences. In the case of the First Defendant there is a counterclaim (**"the Counterclaim"**), by which the First Defendant seeks repayment of the amounts due under the loan agreements entered into by the Claimants. The amounts said to be due, together with contractual interest thereon, are set out in Schedule 2 attached to the Re-Amended Defence and Counterclaim of the First Defendant. By their Defence to the Counterclaim the Claimants accept their liability to pay the sums counterclaimed, subject to (i) some limited challenges to the figures shown in Schedule 2 to the Counterclaim, and (ii) the questions of whether the Loan Assets were validly assigned to the First Defendant and are enforceable by the First Defendant, in which respect the Claimants repeat their case, as pleaded in what were their Amended Particulars of Claim and (I take this to be a legitimate reading of the Defence to the Counterclaim) as pleaded in what are now their Re-Amended Particulars of Claim.

The issues

123. Leaving aside the question of relief, the issues to be determined in this trial divide broadly into three parts. First, there are the issues common to all three of the Trusts. Second there are the issues which relate only to the 2014 Trust. Third, there are the issues raised by the claims for equitable compensation.

124. So far as the common issues are concerned, they can be summarised as follow:
   (1) Was the Disposal effected for an improper purpose?
   (2) If the Disposal was effected for an improper purpose, is the First Defendant entitled to say that it is not bound by the rights of the Beneficiaries on the basis that it was a bona fide purchaser for value of the Loan Assets without notice of the breach of trust?
   (3) If the Disposal was effected for an improper purpose, or was otherwise made in breach of trust, and if the defence of bona fide purchaser for value without notice is not available to the First Defendant, was the Disposal thereby rendered void or voidable?
   (4) If the Disposal was rendered voidable, should the court exercise its equitable jurisdiction to set aside the Disposal and, if so, on what terms? One particular point which arises in this context, which is worth identifying at this stage, is whether and, if so, how the Claimants should be required to make counter-restitution to the First Defendant if the Disposal is voidable and falls to be set aside.

125. The issue of whether the defence of bona fide purchaser for value without notice is available to the First Defendant requires some further elaboration. This particular issue breaks down into the following sub-issues, or potential sub-issues:

(1) What was the form of notice which the First Defendant had to have of the improper purpose/breach of trust, such that it could not claim to be a bona fide purchaser for value without notice? Was it actual notice and, if so, what forms of notice are encompassed in the concept of actual notice? Alternatively, was any form of notice, whether actual or constructive, sufficient to put the First Defendant on notice?

(2) Did the First Defendant have the requisite form of notice of the breach of trust?

(3) In paragraph 36.1 of their Reply to the Amended Defence of the First Defendant the Claimants pleaded that the First Defendant was not a purchaser. The argument which was developed in support of this contention was that the First Defendant could not have been a bona fide purchaser because there remained, at the commencement of this action, a contingent liability to pay deferred consideration under the relevant SPAs (the first SPA in relation to each Trust). The First Defendant objected to argument being pursued, on the basis that it had not been pleaded. In response to this objection Mr Miall, in the course of closing submissions, made an application to amend the Claimants' Reply, which Mr Morgan resisted. The net result of this was that there are three issues to be resolved in this context. The first issue is whether this argument has been adequately pleaded in the Reply, so that no amendment is required. If amendment is required, the second issue is whether permission to amend should be granted. The third issue, depending upon the outcome of the first and second issues, is whether the argument itself is correct.

126. Turning to the issues specific to the 2014 Trust, they can be summarised as follows:

(1) The question of whether the Second Defendant was validly appointed as trustee of the 2014 Trust was in issue but, as explained above, it was accepted by the Claimants in closing submissions that this appointment was valid.

(2) Subject to the Claimants' principal case that the Disposal was ineffective on the basis of improper purpose, were the Loan Assets ever the subject of an actual assignment to the Second Defendant, or to Pinotage PTC, or to the First Defendant? As the arguments on this particular question developed at the trial, there are two issues to resolve in this context, as follows:

(i) Were the Loan Assets vested in the Second Defendant, upon the appointment (now admitted to be valid) of the Second Defendant as trustee of the 2014 Trust? This turns on the construction and effect of the deed of retirement, appointment and indemnity between HRL Trustees, the Second Defendant and HRL which was executed on 22nd January 2018.

(ii) Were the Loan Assets vested in the First Defendant as a consequence of the ratification, by the Second Defendant on 6th December 2019, of the entry by Pinotage PTC, on 30th October 2019, into the SPAs with the First Defendant in relation to the 2014 Trust? This turns on the construction and effect of the SPAs entered into between Pinotage PTC and the First Defendant in relation to the 2014 Trust. Beyond this, there is the question of whether the Deed of Confirmation (the subsequent deed of confirmation entered into on 30th January 2020) effected an assignment of the Loan Assets to the First Defendant, assuming that the SPAs were not effective to achieve this result.

Beyond this, there are certain arguments, advanced by Mr Flavin in his submissions, to the effect that some interest or right in the Loan Assets found its way to the First Defendant by some means, even if no assignment was effected by the SPAs or the Deed of Confirmation.

127. Turning to the claims for equitable compensation, the issues which arise are as follows:
   (1) Was the Second Defendant's retirement as trustee of the 2011 Trust and the 2012 Trust effected in order to facilitate the improper purpose alleged by the Claimants?
   (2) Was the Second Defendant's retirement as trustee of the 2012 Trust effected in breach of the Second Defendant's duties as trustee of the 2011 Trust and the 2012 Trust?
   (3) In relation to the 2014 Trust, did the Second Defendant act for an improper purpose and/or in breach of its duties as trustee of the 2014 Trust in purporting to ratify the vesting of the Loan Assets, in relation to the 2014 Trust, in the First Defendant?
   (4) If and to the extent that any of the above are established, what liability has the Second Defendant to pay equitable compensation to the Claimants?
   (5) Is the First Defendant liable to the Claimants for knowing receipt of trust property, namely the Loan Assets, and, if so, is the First Defendant liable to pay equitable compensation to the Claimants?

128. So far as the question of relief is concerned, the position can be summarised as follows:
   (1) The Claimants seek declaratory relief in relation to all three Trusts, giving effect to their claims that the Disposal was either void, or is voidable and should be set aside.
   (2) In relation to the 2014 Trust the Claimants seek declaratory relief, giving effect to their claims that, for the reasons identified above, the Loan Assets never vested in either the Second Defendant or Pinotage PTC, and were never assigned to the First Defendant.
   (3) If it is assumed that the Sale was either void or falls to be set aside as voidable, the Claimants seek relief which will restore the Loan Assets and all other assets to the Trusts, thereby re-constituting the Trusts, and will allow for the appointment of a new trustee of the Trusts. In relation to the 2014 Trust the same relief is claimed, so far as necessary, on the basis that the Loan Assets never vested in the Second Defendant or Pinotage PTC.
   (4) The Claimants seek equitable compensation from each of the First Defendant and the Second Defendant.

129. Finally, there is the Counterclaim. There is no specific issue to resolve in this respect. If the First Defendant acquired the Loan Assets free of the rights of the Beneficiaries, it is accepted that the First Defendant is entitled to judgment for repayment of the loans made to the Claimants, subject to some agreed adjustment of the figures for the amount of the debts set out in Schedule 2 to the Re-Amended Defence and Counterclaim of the First Defendant.

<u>Jersey law</u>

130. The Trusts are governed by Jersey law. Accordingly, it is Jersey law which I have to apply in resolving the substantive (as opposed to procedural) issues between the parties.

For this reason, it is convenient to set out some general points concerning Jersey law, which I derive from the expert evidence and which I did not understand to be controversial.

131. Jersey is a separate jurisdiction to England and Wales, with its own legislature and court system. Jersey forms part of the British Isles, but it is not part of the United Kingdom. English statutes do not automatically apply to Jersey, unless specifically extended to Jersey by Order in Council.

132. The following, very useful summary of the Jersey legal system can be found in the judgment of Judge Keyser KC, sitting as a judge of the High Court, in *Re: Level One Residential (Jersey) Ltd* [2017] EWHC 1105 (Ch), at [17]:

> *"17. The legal system of Jersey derives from Norman customary law but has developed under the influence of French civil law and, more recently, English common law. The principal sources of law are customary law, legislation and judicial decision. Where legislation makes no provision and there is an absence of Jersey judicial authority, the greatest weight is attached to writers on the law of Jersey, such as Poingdestre, Le Geyt and Le Gros. Other writers of distinction have been influential insofar as their writings on the law of Normandy or the law of France before the introduction of the Code Civil in 1804 provide useful guidance as to Norman customary law; among such writers Pothier is pre-eminent. Modern French law may be of assistance but is used with caution: unless it can be seen to rest on principles derived without great change from the old customary law, its significance will lie only in a comparative consideration of how another legal system has addressed common problems. (On this, see the observations of Birt DB in Re Esteem Settlement and the No. 52 Trust [2002] JLR 53 ("Esteem") at paras 167-168.) In more recent times, substantial areas of English law have been closely followed by legislation or by judicial decision; among these, and relevant to this case, are the laws relating to companies, trusts and torts. Other areas of law retain their distinctive character derived from Norman and French customary law: for example, land law, wills and succession, and contract."*

133. In terms of the court system, and precedent, Judge Keyser provided the following explanation, at [18] and [19]:

> *"18. The court of first instance in Jersey is the Royal Court, where a Judge (the Bailiff, the Deputy Bailiff, or a Commissioner) sits with two assessors of fact (Jurats). The Master of the Royal Court is a procedural and interlocutory judge, from whose decisions an appeal lies as of right to the Royal Court. Appeals from the Royal Court go to the Jersey Court of Appeal. The final court of appeal is the Judicial Committee of the Privy Council.*
>
> *19. Jersey courts are not bound by precedent in the same manner as are English courts, but the role of precedent has become increasingly important. The Royal Court is not bound by its own earlier decisions on points of law but will only depart from such a decision if satisfied that it was wrongly decided. The Royal Court will follow a decision of the Jersey Court of Appeal and a decision of the Privy Council sitting as an appeal court in a Jersey case; decisions of the Privy Council on appeal from other jurisdictions are persuasive only. The Jersey Court of Appeal is not bound by decisions of the Royal Court, though where such decisions have remained unchallenged for a period of time it will not depart from*

them unless persuaded that they were contrary to earlier authority or are the cause of practical injustice. Decisions of the courts of other jurisdictions may be persuasive but are never binding."

134. So far as statutory interpretation is concerned, it was common ground between the parties that the approach under Jersey law is the same as in this jurisdiction.

135. Moving specifically to trust law, the principal source of Jersey trust law is the Trusts (Jersey) Law 1984 which, it will be recalled, I am referring to as the 1984 Law. There is however a close relationship between Jersey trust law and English trust law. Lord Hodge explained the position in the following terms, in *Investec Trust (Guernsey) Limited v Glenalla* [2018] UKPC 7 [2019] AC 271, at [57]-[58]:

"57. Before addressing article 32, some preliminary observations need to be made. The TDT is a discretionary trust established under the law of Jersey. In their modern form, trusts are a creation of equity judges in England. There are of course concepts in other legal systems, notably in Roman law and in the civil law of France, which have some features in common with an English law trust. But they do not have the elaboration and detailed prescription which the existence of a large and coherent body of case law has given to the English trust law. The law of trusts in Jersey is a comparatively recent import from England. Its widespread use in the custody and management of wealth dates from the rise of a significant financial services industry in the 1960s. The international appeal of Jersey trusts is to a significant extent dependent on the certainty which it derives from the English case law. Naturally, English trust law must be modified where it conflicts with established principles of Jersey customary law, and it has also been modified by Jersey statutes. These general remarks apply equally to the trust law of Guernsey.

58. The TJL is the principal indigenous source of Jersey trust law. It is not a complete code of the law of trusts. But it gives statutory effect to some principles already well established in England and significantly modifies other principles. English trust law therefore serves as the background against which the provisions of the TJL fall to be construed."

136. In *Re The Esteem Settlement and the No. 52 Trust* 2002 JLR 53, Deputy Bailiff Birt (as he then was), sitting in the Royal Court of Jersey, explained the relationship between English trust law and the 1984 Law in the following terms, at [84]:

"However the 1984 Law is not a codification. Trusts were recognised and enforced by the Jersey courts well before the passing of the 1984 Law and, in doing so, they looked to English law for guidance on trust matters and, by and large, adopted English principles save where it was appropriate to differ. A Jersey trust is essentially the same animal as is found in English law, subject to certain local modifications."

137. Where I make reference to English case law in this judgment and where I make reference to decisions of the Privy Council (in non-Jersey cases) in this judgment I do so on the basis that it is common ground between the parties that I am entitled to take the relevant authority into account (subject to any dispute over the nature and extent of such taking into account), for the purposes of applying Jersey law to the substantive issues in this case.

The issues specific to the 2014 Trust – analysis

138. It is convenient to start with the issues specific to the 2014 Trust. If, in relation to the 2014 Trust, the Loan Assets failed to find their way to the First Defendant under the terms of the instruments relied upon for this purpose, questions of improper purpose do not arise. The Loan Assets remain either (i) vested in HRL Trustees, or more accurately wherever they will have vested following the dissolution of HRL Trustees on 7th June 2019, or (ii) vested in the Second Defendant, if the Loan Assets at least vested in the Second Defendant on the occasion of its appointment as trustee of the 2014 Trust.

139. The starting point is to note a couple of points of Jersey law, which were common ground between the Advocates.

(1) The mere appointment of a new trustee, without more, will not vest the assets of the relevant trust in the new trustee. As I have already noted, Jersey law has no equivalent to Section 40(1) of the Trustee Act 1925. There is no provision in Jersey law for the automatic vesting of trust property in a trustee upon appointment, whether such trust property is held by way of legal or beneficial interest. There needs to be an actual vesting of the trust property in such a trustee. Article 17(4) of the Trusts (Jersey) Law 1984 provides as follows:

> *"On the appointment of a new or additional trustee anything requisite for vesting the trust property in the trustees for the time being of the trust shall be done."*

(2) In the case of choses in action such as the Loan Assets, no particular formality is required for this vesting to take place. The basic requirements for an effective assignment of a chose in action are set out in Guest on the Law of Assignment (Fourth Edition), at [25]-[28]. No particular form of words is required. There must be an intention to assign which must be manifested in some way. The intention must be to make an immediate assignment. There must be certainty of subject matter. There must be an identified assignor, with the required title and capacity to make the assignment, and an identified assignee, capable of taking the assignment. There must also be some overt action on the part of the assignor showing that the assignor is transferring the chose in action to the assignee.

(3) Where a particular instrument is relied upon as having vested choses in action held by the relevant trust fund in the new trustee, it is a matter of construction of the relevant instrument as to whether it has had the required dispositive effect; see *BNP Paribas v Crociani* [2018] JCA 136A.

140. I start with the question of whether the Loan Assets made their way from HRL Trustees to the Second Defendant. The primary case of the Defendants was that this was achieved by the terms of the instrument of retirement, appointment and indemnity, entered into on 22nd January 2018, by which the Second Defendant was appointed as trustee of the 2014 Trust. It is convenient to use the expression **"the 2018 DORA"** to refer to this instrument. In closing submissions Mr Morgan directed me first to Recital (I), which is in the following terms:

> *"(I) It is intended that the property now in the Settlement and the Sub-Funds, whether comprised of income or capital as specified in the First Schedule herein (the "Trust Fund"), shall forthwith be transferred to, or placed under the control of, the New Trustee."*

141. Mr Morgan also referred me to clauses 5 and 10 of the 2018 DORA, which provide as follows:

> *"5. The New Trustee hereby consents to be and act as trustee of the Settlement and shall stand possessed of the Trust Fund with and subject to the trusts, powers and provisions declared and contained in the Settlement Instrument so far as the same are now subsisting and capable of taking effect."*
>
> *"10. Subject to the Retiring Trustee's right to retain reasonably security for liabilities (but without prejudice to the terms of clause 7 above) the Retiring Trustee hereby covenants at any time and from time to time to do all such acts and things and execute all such documents as may be necessary to vest all of the Trust Fund in the New Trustee."*

142. Mr Morgan's primary argument was that, putting these provisions together the DORA was clearly effective to vest the Loan Assets in the Second Defendant. He referred me to the *Crociani* decision as an example of a case where words in materially the same form had been considered sufficient to amount to an assignment of a chose in action. In this case the Jersey Court of Appeal had to consider the question of whether a chose in action, comprising the right to recover a debt evidenced by a promissory note, had been the subject of a valid assignment. This required consideration of the terms of a deed of retirement and appointment in 2012 by which a new trustee had been appointed of the relevant trust. It was claimed that the terms of that deed had been sufficient to assign the benefit of the chose in action to a new trustee. The relevant provisions were identified by the JCA in their decision at [145], and were in the following terms:

> *"145. It is accordingly necessary to consider the terms of the 2012 appointment. So far as material, they are as follows.*
>
> *(i) Recital (B):*
>
> *"Pursuant to the Twelfth Clause of the Trust the Trustees have power at any time or times and from time to time before the Distribution Date and without infringing the rule against perpetuities at the absolute discretion of the Trustees by any irrevocable deed or deeds to resign as Trustees and to appoint a New Trustee or New Trustees outside the jurisdiction at that time applicable to the Trusts thereunder as Trustees thereof and to declare that the Trusts thereof shall be read and have effect according to the laws of the country of the residence or incorporation of such New Trustee or Trustees and upon such appointment being made the then Trustees shall immediately stand possessed of the Trust Fund upon trust for the New Trustee or Trustees as soon as possible ...".*
>
> *(ii) Recital (G):*
>
> *"It is intended that the assets subject to the trusts of the Trust (the "Trust Fund") shall forthwith be transferred into the name of, or under the control of, the New Trustee ...".*
>
> *(iii) Clause 4:*
>
> *"The parties hereby declare that the property comprised in the Trust Fund shall upon execution hereof vest in the New Trustee and the Outgoing Trustees hereby covenant and undertake to execute all documents and take all such other action as is necessary for the vesting of the Trust Fund in the New Trustee, following which the New Trustee shall hold the Trust Fund upon the trusts and with and subject to the powers and provisions of the Trust so far as the same are now subsisting and capable of taking effect" (all emphasis added)."*

143. So far as the construction of these provisions was concerned, the JCA were in no doubt that they had been effective to make an immediate assignment of all trust property capable of assignment. As the JCA explained, at [146] (underlining also added):

> *"146. In our judgment, as a matter of construction the 2012 appointment constitutes an immediate assignment of such trust property as is capable of assignment. This is the effect of clause 4, which in terms speaks of the trust property vesting in Appleby Mauritius on execution of the 2012 appointment. That is consistent with recital (G), which expresses an intention that the trust property shall be forthwith transferred to Appleby Mauritius – as, so far as it is capable of assignment, it is by the effect of clause 4. The reference in the latter part of clause 4 to the execution of documents and the taking of action necessary to vest the trust fund in Appleby Mauritius applies only to assets that require some further action before title is transferred: for example, the registration of shares and the delivery of chattels. Thus title to the Promissory Note as a physical document would pass only upon delivery to Appleby Mauritius, and until then would be held on trust by BNP Jersey for Appleby Mauritius as contemplated by Recital (B); but title to the chose in action represented by the Promissory Note, which could be assigned by appointment of Appleby Mauritius as mandataire, passed on execution of the 2012 appointment by virtue of clause 4. In consequence, title to the right to recover the sums due under the Promissory Note passed to Appleby Mauritius forthwith on execution of the 2012 appointment; and, subject to notice being given to Croci BV, thereafter the only person entitled to receive those sums was Appleby Mauritius."*

144. If one compares what was recital (G) in the deed of appointment in *Crociani* to the 2018 Dora, it is in almost identical form to Recital (I) in the 2018 DORA. Moving on to clause 4 of the deed of appointment in *Crociani* it is notable that the relevant property was declared to vest *"upon execution"* of the deed of appointment. This was part of the reasoning of the JCA in the underlined passage in [146]. Given this wording, it is hard to see how the JCA could have reached any other decision as to the effect of clause 4. It was plainly intended to effect an immediate vesting.

145. Mr Miall contended that the relevant wording in the 2018 DORA is critically different to the wording of the deed of appointment in *Crociani*, and was not effective to work an immediate assignment. It is true that the wording of clause 5 of the DORA is not quite the same as clause 4 of the deed of appointment in *Crociani*. Clause 5 provides that the New Trustee *"shall stand possessed of the Trust Fund"*, but does not have a provision stating in terms that vesting will take place on the execution of the 2018 DORA. Is this distinction material? I do not think that it is. I say this for three reasons. First, Recital (I) in the 2018 Dora is in the same terms as Recital (G) in *Crociani*. Applying the reasoning of the JCA, this means that Recital (I) can be taken as demonstrating an intention that the assets referred to in the 2018 DORA should forthwith be transferred to the Second Defendant. The intention was not that there should be a later transfer. Second, clause 10 of the 2018 DORA seems to me to perform the equivalent function to the latter part of clause 4 in *Crociani*. The latter part of clause 4 of the deed of appointment was held to apply only to assets where some further action was required before title was transferred. Clause 10 of the 2018 DORA seems to me to be

performing the same function in relation to the assets of the 2014 Trust, from which it can be implied that the person drafting the 2018 DORA was proceeding on the assumption that the 2018 DORA itself had the effect of vesting the assets of the 2014 Trust in the new trustee, save insofar as such vesting required some further action to transfer a particular class of assets. Third, the wording of clause 5 of the 2018 DORA, with its reference to *"shall stand possessed"* seems to me to be apt to mean that, as from the date of the execution of the 2018 DORA, the new trustee is the owner of the assets of the 2014 Trust. The wording is not such as contemplates that a separate vesting of the assets will take place unless, as I have said, some further action is required from the outgoing trustee pursuant to clause 10. Nor do I think that there is any significance in the fact that clause 5 of the 2018 DORA uses the words *"stand possessed"*, as opposed to *"vest"*. This seems to me to be a distinction without a difference. Both expressions seem to me to be apt to refer to a transfer of title.

146. For these reasons I conclude that the 2018 DORA was effective to vest the Loan Assets in the Second Defendant.

147. This conclusion renders it unnecessary to consider the Defendants' alternative argument, in relation to the question of whether the Loan Assets were assigned by HRL Trustees to the Second Defendant. I will however deal with the alternative argument as briefly as I can. The alternative argument relies on the proposition of Jersey law that before there has been a formal vesting of assets in a new trustee, the question of whether the new trustee can effectively act in relation to an asset without the involvement of the old trustee will depend upon the circumstances; see *In the Matter of the Antares Trust, WTHK Ltd v UBS Trustees (Jersey) Ltd* [2016] (1) JLR 409, at [72], where Birt, Commissioner stated as follows:

> *"Whether, before there has been a formal vesting of assets, a new trustee can effectively act in relation to an asset without the involvement of the old trustee, in whom title is vested, will depend upon the circumstances. For example, where a contract has been entered into by the old trustee expressly as trustee of a trust, it may be that the counterparty to the agreement will accept the new trustee as having taken the place of the old trustee and become entitled to act in relation to the contract without the need for a formal assignment. This may well depend upon the proper law of contract."*

148. On the basis that the loans to the Beneficiaries are governed by English law the alternative argument relies upon the decision of Patten J (as he then was) in *Coulter v Chief Constable of Dorset Police* [2003] EWHC 3391 (Ch). This decision (upheld by the Court of Appeal) was relied upon by Mr Morgan to argue either that the wording of the 2018 DORA was sufficient to effect an assignment of the Loan Assets or that, because HRL Trustees held the Loan Assets on trust for the Second Defendant, the retirement of HRL Trustees as trustee, and the appointment of the Second Defendant as the new trustee was itself sufficient to effect an assignment in equity.

149. Although the submissions on this alternative argument were confined to the written submissions, and were not developed in the oral submissions, I do not think that the alternative argument works. I have my doubts that it is permissible to resort to English law in relation to this alternative argument, given that the 2014 Trust was governed by Jersey law. Assuming however that resort to English law is permissible for the reasons contended for by Mr Morgan, I do not think that *Coulter* is authority for the

propositions advanced in the alternative argument. *Coulter* involved a challenge to a statutory demand, which had been served by the Chief Constable of Dorset Police (Mrs Stitchbury) on the judgment debtor. The problem which arose was that the judgment had been obtained by her predecessor as Chief Constable, Mr Aldous. The argument of the judgment debtor was that the chose in action which existed by virtue of the judgment remained vested in Mr Aldous and had never been assigned to Mrs Stitchbury.

150. The critical finding of Patten J, at [14] in his judgment, was that Mr Aldous, by virtue of his office, had held the benefit of the judgment not just for himself, but for his successors as Chief Constable. This in turn justified the following findings by Patten J, at [15] and [16]:

> *"15.. So far as we know there was, as I have already indicated, no express assignment by him of the benefit of that judgment before September of this year. But the underlying principle in equity is, as one knows only too well, that equity treats as done, that which ought to be done. And where there is already in existence by operation of law, by virtue of the office, a fiduciary and equitable obligation to hold the benefit of the legal chose in action for the officer holder's successors in title, that seems to me to be a strong basis for an assumption that the intention was to effect an assignment in equity once that office holder comes to retire and his successor is appointed.*
> *16.. It was submitted to me, on behalf of Mr Coulter by Mr Stubbert, that there has to be some outward manifestation, or some transaction between assignor and assignee before that legal consequence can occur. But in my judgment, the only effect of a contract, for example, would be to give rise to an equitable obligation, enforceable by the courts, for the transfer of the property from assignor to assignee. If, for the reasons which I have given, an obligation to hold that property in trust and eventually to transfer it to the benefit of subsequent office holders already exists, then the conditions for an equitable assignment are already there. What, in my judgment, acts as the trigger, if trigger is needed, is the manifest event of the resignation or retirement of the existing office holder, and the assumption of office by his successor. That is, as I see it, a sufficient outward manifestation of an intention that the successor office holder should obtain the benefits of any property held on trust by a predecessor, for there to be an equitable assignment of the benefit of the judgment."*

151. In the present case it seems to me that the facts are different. Prior to the appointment of the Second Defendant in place of HRL Trustees there was no pre-existing relationship between HRL Trustees and the Second Defendant of the kind which existed between Mr Aldous and his successors in title as Chief Constable. HRL Trustees did not hold anything on trust for the Second Defendant, prior to the Second Defendant's appointment as the new trustee of the 2014 Trust. As such I find it difficult to see how the 2018 DORA can be treated as having triggered or constituted any assignment of the Loan Assets to the Second Defendant. Equally, I find it difficult to see how the fact of the retirement of HRL Trustees as trustee and the appointment of the Second Defendant as the new trustee can be treated as having triggered or constituted any assignment of the Loan Assets to the Second Defendant. The facts of the present case are not on all fours with those in *Coulter*. In these circumstances it seems to me that the alternative argument fails.

152. I have however already decided that the 2018 DORA was effective, on its own terms, to assign the Loan Assets to the Second Defendant, notwithstanding the failure of the alternative argument relied upon. This therefore leaves the question of whether the Loan Assets, following their vesting in the Second Defendant, were subject to any onward assignment to the First Defendant.

153. In this context the principal argument of the Defendants relies upon the resolution of 6th December 2019, by which the Second Defendant ratified the actions of Pinotage PTC, in its capacity as purported trustee of the 2014 Trust. The principal argument of the Defendants is that this resolution was sufficient to give effect to what is said to have been the assignment of the Loan Assets by Pinotage PTC to the First Defendant. The relevant resolution was expressed in the following terms:

> *"**IT IS RESOLVED THAT** all acts, deeds, documents, instruments, resolutions and any other things done by PTC in its purported capacity as trustee of the Trust be and are hereby approved, ratified and confirmed."*

154. The starting point is that it is now conceded that the Second Defendant was validly appointed as trustee of the 2014 Trust. The Second Defendant was also, as I have just decided, the owner of the Loan Assets (strictly the equitable title to the Loan Assets) as from the date of the 2018 DORA, in its capacity as trustee of the 2014 Trust. Clause III-4 of the 2014 Trust Deed gave the trustee very wide powers of delegation. I accept the submission of Mr Morgan that the Second Defendant had the power to ratify the actions of Pinotage PTC as purported trustee of the 2014 Trust, and exercised that power by the resolution of 6th December 2019. Provided therefore that Pinotage PTC entered into an instrument which would have been effective to assign the Loan Assets to the First Defendant, but for the fact that Pinotage PTC was not the trustee of the 2014 Trust, it seems to me that the resolution would have been sufficient to give effect to the relevant instrument.

155. This therefore brings the question down to the effect of the instruments which were entered into between Pinotage PTC and the First Defendant, in relation to the assignment of the Loan Assets. These instruments comprised the two SPAs which related to the 2014 Trust. It will be recalled that there were no separate deeds of assignment executed in relation to the 2014 Trust, as there were in relation to the 2011 Trust and the 2012 Trust. This leaves the SPAs. Mr Morgan contended that the SPAs contained ample language sufficient to effect an actual assignment of the Loan Assets. I do not agree. It is quite clear from the language of the two SPAs that each was intended to function, and did function as an agreement for the sale of the Loan Assets, which was to be completed by a separate assignment. In order to illustrate this, it is necessary only to make reference to the sale and purchase clauses in the two SPAs relating to the 2014 Trust. Clause 2 of the first of the SPAs provided as follows:

> *"At Completion the Seller shall sell and the Buyer shall buy all the Seller's rights, titles and interests in the Debt and the Loan Agreement (including without limitation all rights and claims against the Original Lender as trustee and/or any other legal owner of the Loan Agreements and/or Debt) free from all Encumbrances, together with all rights attached or accruing to them."*

156. Moving on to the second SPA clause 2 provided as follows:

> *"2.1 At Completion, the Seller shall sell and the Buyer shall buy all the Seller's rights, titles and interests in the Debt and the Loan Agreements (including*

without limitation all rights and claims against the Original Lender as trustee and/or any other legal owner of the Loan Agreements and/or Debt) and free from all Encumbrances, together with all rights attached or accruing to them.

2.2 In the period between the date of this agreement and the Completion Date the Seller may in its absolute discretion release any of the Borrowers (Released Borrowers) from that part of the Debt owed by them in which event:

2.2.1 The names of the Released Borrowers shall be deemed for all purposes of this agreement removed from the list set out in Schedule 2 and shall not form part of the sale and purchase contemplated by this agreement; and

2.2.2 The Seller may retain any consideration payable to the Seller by the Released Borrowers as consideration for such release."

157. It seems to me that language of each of these clauses was the language of contract. By this I mean that clause 2 in each of these SPAs contained a contract for the assignment of the Loan Assets, not the actual assignment of the Loan Assets. Each clause contemplated a separate assignment of the Loan Assets.

158. This seems to me to be confirmed by the reference to *"Completion"* in each clause. In the case of the first SPA the Completion Date was defined to mean the date of the SPA, but Completion itself was defined as *"completion of the sale and purchase of the Loan Agreements and the Debt in accordance with this agreement"*. It seems to me that this very clearly contemplated a separate completion of the first SPA, at which the Loan Assets would be assigned, and the first SPA completed. In the case of the second SPA the Completion Date was defined to mean 15th December 2019 (or such other date as might be agreed in writing by the Seller and the Buyer), while Completion itself was again defined to mean *"completion of the sale and purchase of the Loan Agreements and the Debt in accordance with this agreement"*. In the case of the second SPA it is therefore even clearer that there was to be a separate completion of the Second SPA, at which the Loan Assets (so far as the subject of the second SPA) would be assigned and the second SPA completed. There are a number of other clauses in each of these SPAs which are consistent with my analysis of the SPAs as contracts for the assignment of the Loan Assets, as opposed to actual assignments of the Loan Assets. As I have said however, it seems to me that it is only necessary to make express reference to clause 2 of each of the SPAs in order to illustrate my reasoning.

159. If my reasoning thus far is correct, it follows that the SPAs were, in and of themselves, insufficient to function as instruments of actual assignment of the Loan Assets to the First Defendant. This however is not necessarily the end of the argument. Mr Morgan also deployed two alternative arguments, in the event that he was wrong in contending that the SPAs were themselves sufficient to operate as the actual assignments of the Loan Assets.

160. The first of these alternative arguments relied upon clause 4.2 of the Deed of Confirmation. By way of reminder, that is the deed of confirmation entered into between Pinotage PTC, the Second Defendant, and the First Defendant on 30th January 2020. Clause 4.2 of the Deed of Confirmation provided as follows:

> *"4.2 To the extent that any Debts remain in the Trusts for whatever reason, the Trustees, and each of them (as the case may be), hereby confirm the transfer of all rights, title and interest in and to the Debts to the Buyer with effect from 15 December 2019."*

161. Mr Morgan and Mr Flavin both submitted that clause 4.2 was sufficient to effect an assignment of the Loan Assets to the First Defendant, assuming that there had either been no previous effective assignment to the First Defendant or an assignment to the First Defendant which had been only partially effective. This was so, they submitted, whether the Loan Assets were held by the Second Defendant or Pinotage PTC.

162. The second of these alternative arguments was that the SPAs entered into between Pinotage PTC and the First Defendant in relation to the 2014 Trust, if they were only contracts to assign the Loan Assets as opposed to actual assignments of the Loan Assets, were sufficient to vest at least an equitable interest in the Loan Assets (strictly an equitable sub-interest in the equitable interest in the Loan Assets settled into the 2014 Trust) in the First Defendant; see Guest at [25], where it is said that *"An intention to assign an existing chose in the future may be evidence of an agreement to assign, which may vest an equitable interest in the assignee"*.

163. The first of these alternative arguments seems to me to have merit. I do not say this by way of criticism, but in his closing oral submissions in reply Mr Miall did not appear to me to have a reply this argument. In fact, Mr Miall fairly conceded that that there might be rather more force in this point than the other arguments advanced by Mr Morgan in relation to the 2014 Trust. It seems to me that if one assumes, consistent with my reasoning thus far, that the Loan Assets were assigned to the Second Defendant by the 2018 DORA, but were not assigned to the First Defendant by the SPAs, so that they remained with the Second Defendant, it is difficult to see how clause 4.2 of the Deed of Confirmation was not effective to effect an assignment of the Loan Assets in respect of the 2014 Trust from the Second Defendant, or indeed from Pinotage PTC if they were with Pinotage PTC, to the First Defendant. The language of clause 4.2 was clearly apt to achieve this result. I therefore conclude that the Deed of Confirmation was effective to assign the Loan Assets, in relation to the 2014 Trust, to the First Defendant.

164. The need for the Deed of Confirmation would of course have been limited if the Defendants are right in the second of their arguments, namely that the SPAs in relation to the 2014 were at least effective to assign an equitable sub-interest in the Loan Assets to the First Defendant. In this context Mr Miall contended that while it was correct to say that an equity arose in favour of the First Defendant when the SPAs were entered into, it was not an equitable interest in the Loan Assets, but only the equity which arises when a party exchanges contracts for the purchase of a property. In such a case, so Mr Miall submitted, a party can call for specific performance of the contract, but not the beneficial interest in the property itself.

165. The nature of the trust which arises, as between vendor and purchaser, in relation to an uncompleted contract for sale is not straightforward, and depends upon the availability of the remedy of specific performance. I can see various issues which might arise in the context of what, if any interest in the Loan Assets the First Defendant could claim pursuant to the SPAs, given my conclusion that the SPAs were uncompleted contracts

for the sale of the Loan Assets. As none of these issues were properly argued out before me, I do not propose to go further into them. Instead, I rest my decision that the Loan Assets did pass the First Defendant on my conclusion that the Deed of Confirmation was effective to assign the Loan Assets, in relation to the 2014 Trust, to the First Defendant.

The issues specific to the 2014 Trust – conclusion

166. For the reasons which I have set out in the previous section of this judgment I conclude, in relation to the issues specific to the 2014 Trust, that the Loan Assets were the subject of an effective chain of assignments into the hands of the First Defendant, albeit by a different route, in relation to the assignment of the Loan Assets to the First Defendant itself, to that taken by the Loan Assets in relation to the 2011 Trust and the 2012 Trust. In the remainder of this judgment my references to the Disposal refer, in the case of the 2014 Trust, to the way in which I have decided that the assignment of the Loan Assets into the hands of the First Defendant was actually effected.

167. My reference to an effective chain of assignments is of course subject to the question of whether the Claimants can challenge the Disposal on the basis of improper purpose. My decision on the issues specific to the 2014 Trust means that the Claimants' challenge arises in relation to all three Trusts. I now turn to consider the question of whether the Disposal can be challenged on the basis of improper purpose.

Was the Disposal effected for an improper purpose? – the law

168. The law relating to improper purpose has been the subject of recent explanation by Lord Richards in the Privy Council decision in *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47. At [51] and [52], Lord Richards identified the following duties which apply to the exercise of fiduciary powers (underlining also added):

> *"51. It is not in dispute that the powers conferred on the GRT trustee under clause 8 of the GRT trust deed are fiduciary powers. As such, their exercise is subject to duties and restrictions imposed by equity. The issues raised by what are the most significant duties for the purposes of the present appeal were summarised by Clarke P in his judgment at para 168:*
>
> *"(a) Whether the way in which it has been exercised is not within, or contrary to, the express or implied terms of the power (the scope of the power rule);*
>
> *(b) Whether the trustee has given adequate deliberation as to whether and how he should exercise the power; and*
>
> *(c) Whether the use of the power by the GRT Trustee, although within its scope, was for an improper purpose i.e. a purpose other than the one for which it was conferred (the improper purpose rule)."*
>
> *52. This summary, based on a submission of Grand View, is derived from the judgment of Lord Walker in Pitt v Holt [2013] UKSC 26, [2013] 2 AC 108 at paras 60- 61. It is, in the view of the Board, a helpful and accurate summary of three major duties and restrictions applicable to the exercise of fiduciary powers, save only, as regards paragraph (c), that a power may have more than one proper purpose."*

169. In the present case, and for the purposes of the issue which I am currently considering, the first and second duties identified by Lord Richards at [51] are not directly in point. What is directly in point is the proper purpose rule (underlined in the above quotation), which Lord Richards distinguished from the scope of the power rule, at [54]:

"54. The first and third duties are directly in point on this appeal. The expression "the scope of the power rule", used to refer to the first duty, may lead to some misunderstanding, as it is used in some authorities to refer to the improper purpose rule. But, as Clarke P makes clear in paragraph (a), it is concerned with the express and implied terms of the provision conferring the power in question. It is largely a question of the construction of such provision.

170. Lord Richards then identified what he referred to as the proper purpose rule in the following terms, at [55]:

"55. By contrast, the proper purpose rule, which Clarke P called the improper purpose rule, involves identifying the purpose for which the power has been exercised and asking whether such purpose is a purpose for which the power has been given. While identification of the purpose of a power may well be relevant to the construction of the provision conferring it, the question raised by the proper purpose rule arises only once the scope of the power has been determined and once it has been determined that the exercise of the power was within the terms, or "scope", of the power. This was made clear by Lord Sumption in Eclairs Group Ltd v JKX Oil & Gas plc [2015] UKSC 71, [2015] Bus LR 1395 (Eclairs) at paras 15 and 30:

> *"15…The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason."*

171. In *Eclairs Group v JKX Oil & Gas plc* [2015] UKSC 71 [2016] 3 All ER 641 Lord Sumption explained the proper purpose rule in the following terms, at [15]:

"[15] The proper purpose rule has its origin in the equitable doctrine which is known, rather inappropriately, as the doctrine of 'fraud on a power'. For a number of purposes, the early Court of Chancery attached the consequences of fraud to acts which were honest and unexceptionable at common law but unconscionable according to equitable principles. In particular, it set aside dispositions under powers conferred by trust deeds if, although within the language conferring the power, they were outside the purpose for which it was conferred. So far as the reported cases show, the doctrine dates back to Lane v Page (1754) Amb 233, and Aleyn v Belchier (1758) 1 Eden 132 at 138, but it was clearly already familiar to equity lawyers by the time that those cases were decided. In Aleyn's case, Lord Northington could say in the emphatic way of 18th century judges that 'no point was better established'. In Duke of Portland v Topham (1864) 11 HL Cas 32 at 54 Lord Westbury LC stated the rule in these terms:

> *'that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.'*

The principle has nothing to do with fraud. As Lord Parker of Waddington observed in delivering the advice of the Privy Council in Vatcher v Paull [1915] AC 372 at 378, it—

> *'does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.'*

The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. 'Where the question is one of abuse of powers,' said Viscount Finlay in Hindle v John Cotton Ltd 1919 56 SLR 625 at 630, 'the state of mind of those who acted, and the motive on which they acted, are all important'."

172. So far as the application of the proper purpose rule is concerned, there are two questions to be answered; see Lord Richards in *Grand View* at [61] and [72]. The first question concerns the proper purpose or purposes of the relevant power. This is an objective question. The proper purpose or purposes of the power fall to be determined on an objective basis. The second question concerns the purpose or purposes for which the relevant power has in fact been exercised. Was this purpose outside the purpose or range of purposes for which the relevant power was conferred? This is a factual and subjective question, to be answered by determining the subjective purposes of the relevant decision maker in the exercise of the relevant power.

173. Where the decision maker has mixed motives for the exercise of the relevant power, equity will usually only intervene if the primary or dominant purpose was improper; see Lord Sumption in *Eclairs* at [17].

174. As a general rule, fiduciary powers must be exercised to further the purposes of the beneficiaries. In *Grand View* Lord Richards explained the position in the following terms, at [120]:

> *"120. In the Board's view, it is generally the case that fiduciary powers conferred on a trustee of a trust with identified beneficiaries must be exercised to further the interests of the beneficiaries. This is clearly the case with essentially administrative powers, such as the powers of investment. It should be noted that both Cowan v Scargill and Lord Nicholls' article were concerned with powers of investment."*

175. In the present case the bulk of the argument over whether the Disposal was effected for an improper purpose was concerned with the financial position of the Trusts, and the implications, in terms of what constituted improper purpose, of such financial position. It is convenient to discuss the issues which arose in relation to the financial position of the Trust in the next section of this judgment, before coming directly to the question of whether the Disposal was effected for an improper purpose.

<u>Was the Disposal effected for an improper purpose? – analysis of the issues concerning the financial position of the Trusts</u>

176. The experts were agreed that there is no such thing as an insolvent trust, because a trust has no legal personality. The experts were however also agreed that this term could be used as a shorthand label for a situation in which a trustee was unable to pay the liabilities reasonably incurred in the course of its trusteeship as such liabilities fell due from the assets held in the trust. In terms of types of insolvency, the experts were also agreed that such a situation was correctly characterised as cash-flow insolvency. This was in contrast to balance sheet insolvency, which required a comparison between (i) the assets held in the relevant trust, and (ii) the liabilities of the trustee incurred in the course of trusteeship. The experts were also agreed that the question of whether a trust which was continuing in existence was insolvent was to be determined by the cash-flow test, which was also referred to as the commercial test of insolvency. Put simply, the cash-flow test requires a determination of whether the relevant trust is able to pay its debts as they fall due.

177. It is clearly correct that reference to an insolvent trust is an acceptable form of shorthand. Sitting in the Royal Court of Jersey, Commissioner Clyde-Smith said as much in *Representation of the Z Trusts* [2015] JRC 196C, at [5]:

> *"5. The Z II and Z III Trusts are insolvent. To talk of an insolvent trust is, of course, a misnomer. A trust is not a separate legal entity and cannot, as a matter of law, be insolvent. The accounts of the trusts have been drawn up as if they were separate legal entities, but the assets and liabilities disclosed by those accounts are, in fact, the assets and liabilities of the trustees and it is to them that creditors will have recourse, unless security has been granted by the trustees over the trust assets. However, it is a useful form of shorthand, and we will continue to use it."*

178. At [28] and [29] in the same judgment the Commissioner stated that although the point had not been canvassed at the hearing, the test for insolvency, in the case of a trust, should be the cash-flow test. The Commissioner cited in this context *Del Amo v Viberts, Collas Crill and others* [2012] (1) JLR 180. I understood it to be common ground between the experts that the same test fell to be applied in the present case, so far as the financial position of the Trusts at the relevant time is concerned.

179. The Commissioner then continued, in the following terms, at [30] and [32]:

> *"30. As stated at paragraphs 24 and 28 of Del Amo, in relation to estates, insolvency brings about a shift towards the interests of the creditors analogous to that seen in company law and a trust that becomes insolvent should thereafter be administered on the basis that it is insolvent, treating the creditors, rather than the beneficiaries, as the persons with the economic interest in the trust. As a matter of logic and principle, it is difficult to see how else an insolvent trust should be administered by the trustee and supervised by the Court. We note that this approach accords with the advice of Elspeth Talbot-Rice QC given to Barclays on 10th May, 2013, in relation to the insolvency of the Z III Trust."*
>
> *"32. We conclude, therefore, that once there is an insolvency or probably insolvency of a trust, the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors. The trustee or fiduciary of such a trust would be wise therefore to exercise their powers either with the consent of all of the creditors or under directions given by the Court."*

180. If one takes what was said by the Commissioner at [30] and [32] at face value, it would seem that, where a trust is insolvent (which the experts agree is to be determined by reference to cash-flow insolvency test), the trustee can only exercise fiduciary powers in the interests of the creditors. The beneficiaries are no longer to be treated as the persons with the economic interest in the trust.

181. The experts were however agreed, as a matter of Jersey law, that some tempering of this statement was required. The reason for this was the recent decision of the Supreme Court in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 [2022] 3 WLR 709. In this case the Supreme Court was considering the question of whether the duty owed by the directors of a company to promote its success, pursuant to Section 172(3) of the Companies Act 2006, was breached by the payment of a dividend to the directors in a situation where, by reason of uncertain long-term contingent liabilities of the company, there was a real risk of insolvency in the future. This in turn engaged the question of the extent to which the directors should take into account the interests of the creditors, over the interests of the shareholders, in such a situation. In his judgment, at [81-82] Lord Reed PSC explained the exercise which was required in the following terms:

> *"81 Where the company is insolvent or bordering on insolvency but is not faced with an inevitable insolvent liquidation or administration, the directors' fiduciary duty to act in the company's interests has to reflect the fact that both the shareholders and the creditors have an interest in the company's affairs. In those circumstances, the directors should have regard to the interests of the company's general body of creditors, as well as to the interests of the general body of shareholders, and act accordingly. Where their interests are in conflict, a balancing exercise will be necessary. Consistently with what was said in Kinsela at p 733 (para 33 above), and with the reasoning in paras 48—59 above, it can I think be said as a general rule that the more parlous the state of the company, the more the interests of the creditors will predominate, and the greater the weight which should therefore be given to their interests as against those of the shareholders. That is most clearly the position where an insolvent liquidation or administration is inevitable, and the shareholders consequently cease to retain any valuable interest in the company.*
>
> *82 I agree with Lord Briggs JSC that there is much to be said for an approach to these issues which is sufficiently fact-specific to "take account of differences, according to particular circumstances, in what it may be reasonable and responsible for directors to do when they find that the company is in a sufficiently weak financial situation that a conflict of interest between its creditors and its shareholders appears to arise", as Lt Bailiff Hazel Marshall QC said in Carlyle Capital Corpn Ltd v Conway (Judgment 38/2017) (unreported) 4 September 2017 (Royal Court of Guernsey), para 456."*

182. Lord Briggs JSC explained the position in the following terms, at [176]:

> *"176 In my view, prior to the time when liquidation becomes inevitable and section 214 becomes engaged, the creditor duty is a duty to consider creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they may conflict. Circumstances may require the directors to treat shareholders' interests as subordinate to those of the creditors. This is implicit both in the recognition in section 172(3) that the general duty in section 172(1) is "subject to" the creditor duty, and in the recognition that, in some circumstances, the directors must "act in the interests of creditors". This is*

likely to be a fact sensitive question. Much will depend upon the brightness or otherwise of the light at the end of the tunnel; i e upon what the directors reasonably regard as the degree of likelihood that a proposed course of action will lead the company away from threatened insolvency, or back out of actual insolvency. It may well depend upon a realistic appreciation of who, as between creditors and shareholders, then have the most skin in the game: i e who risks the greatest damage if the proposed course of action does not succeed."

183. *Sequana* was concerned with duties owed in company law, and is an English case. The experts were however agreed that a Jersey court would take account of the decision in *Sequana*, and would regard the guidance given by the Supreme Court, so far as duties to creditors and shareholder were concerned, as relevant to the question of how a trustee of a trust should prioritise the interests of creditors and beneficiaries in a situation of insolvency or potential insolvency.

184. Although the difference between the experts was not a substantial one in this context, the experts were not quite as one in their views on how a trustee should balance the interests of creditors and beneficiaries in a situation of insolvency or potential insolvency. Addressing the hypothesis of a cash-flow insolvent trust, and trust assets having a potential value in excess of the value of the liabilities owed to creditors of the trust, Advocate Gleeson was of the view that the trustee should primarily exercise their fiduciary powers and duties in the interests of the creditors, but that the trustee should also consider the residuary interests of the beneficiaries. Advocate Passmore was also of the view that the trustee should primarily exercise their fiduciary powers and duties in the interests of creditors, but considered that the extent to which the trustee could properly ignore altogether the residuary interests of the beneficiaries when exercising their fiduciary powers would be a fact specific question.

185. It will be noted that the difference between the two experts is a small one. So far as there is a difference, I prefer the view of Advocate Passmore, but this is essentially because the view of Advocate Passmore seems to me acknowledge that this is an area where there is no hard and fast rule. The answer to the question of whose interests should be given priority in an insolvency situation is an acutely fact sensitive one. I summarise my findings as to Jersey law, in the context of the duties of a trustee in an insolvency situation, as follows:
    (1) The position is not as absolute as stated in *Z Trusts* at [32]. There is no absolute rule that, once there is an insolvency or probable insolvency of a trust, the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors. A Jersey court would take account of the decision of the Supreme Court in *Sequana*, and would adopt a more nuanced approach to this question.
    (2) In a situation of insolvency or probable insolvency a trustee should primarily exercise their fiduciary powers and duties in the interests of the creditors.
    (3) Whether and, if so, to what extent the residuary interests of the beneficiaries should be taken into account in the exercise by the trustee of their fiduciary powers and duties in a situation of insolvency is a fact sensitive question which depends upon the circumstances of the particular case.
    (4) In answering the question at (3) above, the court should adopt the approach set out by Lord Briggs in *Sequana*, at [176]; that is to say a balancing exercise. The extent to which the interests of the beneficiaries can and should be subordinated

to the interests of the creditors will depend upon all the circumstances of the case and, in particular, on the question of whether the situation is one where there is light at the end of the tunnel or one where the insolvency situation is irreversible.

186. The question of the extent to which trustees should prioritise the interests of creditors over beneficiaries also engages a separate point, which is the right of a trustee to look to the assets of the relevant trust to meet liabilities properly incurred by the trustee in the execution of the trust. This right of indemnity was the subject of extensive consideration by the Privy Council in *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36. In fact, the *Z Trusts* case was one of the cases which came before the Privy Council in *Equity Trust*. In their joint judgment Lord Richards JSC and Sir Nicholas Patten examined the nature of the right of indemnity at some length. They explained the basic nature of the right in the following terms, at [56]:

> *"56. The right of indemnity entitles a trustee both to be reimbursed for any liabilities properly incurred in the execution of the trust which it has paid from its own resources and to pay or seek payment of such liabilities from the trust assets without first making payment out of its own resources. These two aspects of the right of indemnity are commonly described as a right of reimbursement (or recoupment) and a right of exoneration."*

187. Lord Richards and Sir Nicholas Patten then explained why the right of indemnity is required, while also confirming that, while it is convenient to speak of an insolvent trust, the liability of a trustee is personal. There is no entity liable as the trust. As they explained, at [61]:

> *"61. Second, it follows from the first proposition that it is inaccurate to speak of an insolvent trust. Since a trust is not a legal person and all liabilities incurred by the trustee acting as such are personal liabilities of the trustee, it is only the trustee who can become insolvent, whether on account of trust liabilities or its personal liabilities or both. It is likewise inaccurate to speak of "trust creditors". An "insolvent trust" is nonetheless a convenient description of a situation where the trust assets are insufficient to meet the amount due under the trustee's right of indemnity, and "trust creditors" is a convenient description of the persons to whom the trustee has properly incurred liabilities in the course of acting as trustee. Whether the insolvency of the trust affects only the trustee or also affects the "trust creditors" will depend on whether the trustee's personal assets are sufficient to ensure that all its liabilities, including those to "trust creditors", are met in full."*

188. One other paragraph from the joint judgment in *Equity Trust* requires specific mention. At [102] Lord Richards and Sir Nicholas Patten explained the basis of the trustee's power of sale, in the following terms:

> *"102.Second, the lien or equitable charge conferred by the right of indemnity does not itself confer a power to sell any trust property: Hewett v Court (supra): Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq) [2018] FCA 40 (the Full Court of the Federal Court of Australia) at para 44 per Allsop CJ. If the trust assets include liquid assets, a trustee, or a former trustee still in possession of such liquid assets, can itself apply those liquid assets in exoneration or reimbursement. In respect of other assets, the trustee or former trustee must have a power of sale from some other source which it can use for this purpose. This will not usually*

present a problem for a trustee who is in office, who will normally be able to rely on powers conferred by the trust instrument or by statute. If, however, the trustee has ceased to hold office, it will no longer have those powers available to it, even though it remains in possession of, or the legal owner of, trust property. In those circumstances, the former trustee will have to apply to court for an order for sale or for the appointment of a receiver with a power of sale. For a discussion of these issues, see Apostolou v VA Corpn Aust Pty Ltd [2010] FCA 64 (Finkelstein J) at paras 38-48, Jones (Liquidator) v Matrix Partners Pty Ltd (supra) at paras 89-91."

189. There are two relevant points here. The first point is that in a case such as the present case, the trustee has a right of resort to the assets of the trust, in order to meet the liabilities properly incurred by the trustee in the execution of the relevant trust. These liabilities may include the trustee's own fees for their services as trustee in a case, such as the present case, where the trustee is a professional trustee and the trust deed includes a right of remuneration in relation to the trustee's services. The second point is that where, as in the case of the Trusts, a trustee has a power of sale, that power of sale can be exercised in relation to the assets of the trust *"in exoneration or reimbursement"* of liabilities properly incurred by the trustee in the execution of the relevant trust.

190. In the context of my discussion of the issues concerning the financial position of the Trusts, and specifically the trustee's right of indemnity, it is convenient to make reference to one further case which featured substantially in the submissions of the parties. The case in question is the decision of the Royal Court of Jersey in *Re Hawksford Trust* [2018] JRC 171. The case concerned a conventional discretionary trust governed by the law of Jersey. The trust had only one material asset, which was a property in London. There were no funds in the trust to pay for the maintenance and upkeep of the property, and various members of the family claimed to be owed money by the trust for amounts contributed to the upkeep of the property. The case of the corporate trustee of the trust was that the trust was cashflow insolvent. The trustee proposed a sale of the property, but this proposal gave rise to a substantial dispute among the beneficiaries. The trustee sought the approval of the court to a sale of the property.

191. The position of the trustee was summarised in the following terms in the judgment of Sir Michael Birt, Commissioner, at [21]:

"21. We have not been provided with any minutes setting out the Trustee's decision or the reasons for it. However, the affidavit of Ms Miller suggests that the main consideration is that the Trust is cash-flow insolvent and cannot pay its creditors, of which the Trustee itself is the largest because of outstanding fees. The Trustee acknowledges the desirability of retaining the Property where some of the beneficiaries wish to do so, but asserts that it has explored whether this is possible by way of the siblings buying out the elder son's interest and agreement has not proved possible; the siblings have not formulated any sufficiently concrete and workable proposal. In these circumstances, the Trustee considers that there is no alternative to a sale."

192. The court declined to approve the sale of the property, for four separate reasons. The second of these reasons concerned the tax consequences of a decision to sell. At [52] the Commissioner said this:

> *"52. Secondly, the Trustee did not consider the tax consequences of its decision at the time it made its decision. It has explained that it did not feel it could incur the costs of seeking tax advice because it had no liquid funds. In the circumstances of this case, we would reject that as a proper excuse. The Trust has a substantial asset in the form of the Property and there is no question but that the Trustee will at some stage be able to obtain reimbursement for its reasonable fees and expenses out of the trust property. This is not a case of an impoverished trustee who could not afford the outlay in obtaining advice or of a situation where there are no assets from which the outlay can eventually be recovered."*

193. Although this case featured substantially in the submissions of the parties, I regard its relevance as strictly limited. The case was relied upon by the Claimants in support of the proposition that, where a trust is cash-flow insolvent, but balance sheet solvent, the trustee may be required to dip into its own pocket in order to meet the continuing expenses of the trust. This seems to me to put matters rather too high, or at the least to be a proposition which falls to be treated with considerable care. What the court actually decided in *Hawksford*, in this context, was that one reason for not approving the sale of the property was the failure of the trustee to obtain tax advice. The court was not impressed with the trustee's excuse that it had no money to fund tax advice, because *"there is no question but that the Trustee will at some stage be able to obtain reimbursement for its reasonable fees and expenses out of the trust property."*. The case was not one of a trustee which was being required to use its own resources to obtain advice in a situation where there were no assets from which the outlay could eventually be recovered, or in a situation where the possibility of recovering such outlay out of the assets of the trust was uncertain.

194. As can be seen, the court in *Hawksford* was concerned with one item of professional expenditure, which was required in order to achieve the trustee's object of a sale and in respect of which the trustee could be certain that its expenditure could be reimbursed out of the eventual sale of the property. Given the nature of the expenditure, and given the certainty of eventual reimbursement, it seems to me that *Hawksford* is not authority for any wider statement of the duty of a trustee of a cash-flow insolvent trust to meet expenditure out of its own pocket. It seems to me that the question of whether a trustee should meet the expenses of a trust out of its own pocket is an acutely fact sensitive question, and requires facts such as those in *Hawksford* before it can be said to be reasonable that a trustee should take such action.

195. My discussion of the financial position of the Trusts has so far concentrated upon the law. I now turn to the facts of the present case, and the financial position of the Trusts at the times material to the claims in this action.

196. It seems quite clear to me, and I so find, that the Trusts were each cash-flow insolvent at the time of the Disposal. It seems to me, and I so find, that each of the Trusts was in this position at least from January 2018, when the Second Defendant was appointed as trustee of the Trusts. The reasons for this are straightforward. The assets in the Trusts were not income producing. The only fees which the Beneficiaries had been required

to pay were upfront fees, as was recorded in the file note of the telephone conference which was held on 28th May 2019. The Trusts however required professional administration and were administered by professional trustees who were entitled, under the terms of the Trusts, to charge for their services and for the services of other professionals whose advice was required. As the experience of the Second Defendant demonstrated, the only way to realise funds out of the Trusts, without calling in the loans or selling the entirety of the Loan Assets, was to levy a charge on the Beneficiaries for releasing their loans or to persuade Beneficiaries to sign up to a new scheme to deal with their loans in respect of which fees and commission could be charged.

197. So far as the first of these devices was concerned, a charge of £950 was raised for the release of a loan. It was suggested that this figure of £950 might be a guide as to the value of each loan but, on the evidence, it is clear to me, and I so find, that this was a charge levied as a fee in respect of the administration costs of releasing a loan. The charge was not related to the value of the loan, in respect of which the right of recovery was held upon trust for the relevant Beneficiary. In any event it is also clear that the levying of this charge did not raise sufficient to meet the expenses of the Trusts. So far as the second of these devices was concerned, the Pyrrhus Scheme proved to be a damp squib, attracting a total take up of only 58 persons, of whom 14 were Beneficiaries. So far as the expenses of the Trusts were concerned, the respective outstanding liabilities to the Second Defendant and Hatstone Jersey amounted to a figure of over £1 million. Even allowing for the fact that the figure for Hatstone Jersey's fees was clearly overstated, there was still a substantial sum due from the Trusts, with no obvious means of paying this sum, without either calling in the loans or selling the Loan Assets. In addition to this it is clear from the evidence, both in the documents and from the witnesses, that a substantial number of the Beneficiaries were not prepared to engage with the trustee of the Trusts. In this context I refer to my findings on the bundle of correspondence between the Claimants and the trustee of the Trusts, which shows substantial non-engagement or minimal engagement by a substantial proportion of the Claimants.

198. This leaves the question of whether the Trusts were balance sheet insolvent, either at the time of the Disposal or prior to that time. Determination of the balance sheet solvency of the Trusts requires a comparison between (i) the liabilities of the Trusts at the relevant time, and (ii) the capital value of the assets in the Trusts at the relevant time. In this context the parties, by their counsel, sought gallantly and assiduously to persuade me that the Loan Assets had substantial value (the Claimants) or little or no value (the Defendants). These efforts were in vain for the simple reason that no one, so far as I am aware, has ever commissioned a valuation of the Loan Assets, either prior to the commencement of this action or in this action. No valuation of the Loan Assets was obtained by the Second Defendant, or by Pinotage PTC, or by the First Defendant, or by any other party of whom I am aware, either in connection with the Disposal or at any other time relevant to this action. Equally there is no valuation evidence in this action speaking to the value of the Loan Assets.

199. I can of course join with counsel in speculating on what the Loan Assets might have been worth, or might now be worth. This would however be speculation on my part. I have no specialist expertise in the valuation of a loan book, and any value I sought to put on the Loan Assets would be no more than a partially educated guess. I assume that

the exercise of valuing the Loan Assets would require, and would have required the services of an accountant with expertise in this type of valuation. I can see that the valuation of the Loan Assets might not have been an easy task, given the uncertainties over the recoverability of the loans from the Beneficiaries; none of whom were likely to be co-operative, and many of whom may have lacked the resources to repay the loans. I can see that the figure which a professional valuer might produce for the value of the Loan Assets might be a figure lying within a fairly wide range of possible valuations. I doubt that valuation of the Loan Assets would be a precise science. These are however all reasons why the valuation of the Loan Assets would require, and would have required the services of an expert in this form of valuation.

200. In cross examination Advocate Gleeson referred to the concept of a dry trust, by which I understood him to mean a cash-flow insolvent trust with a substantial asset, of the kind which existed in *Hawksford*. Whether the Trusts fell into the same category is unknown. The only point which can be made in this context is that there seems to me to be a difference between an asset in the form of a London property, which one assumes would be relatively easy to value and to sell, and a loan book, which may be more difficult to value, and more difficult to sell.

201. At the conclusion of his cross examination Mr Emblin accepted that he knew that the Loan Assets had potential value and that the acquisition of the Loan Assets by the First Defendant represented a commercial opportunity. It was put to Mr Emblin that he had known all along that there could be substantial value in the Loan Assets and that this (the acquisition of the Loan Assets by the First Defendant) was a very big commercial opportunity for him. Mr Emblin's response was that there was a range of possibilities in relation to the value of the Loan Assets; *"from zero to a lot and I didn't know where in the spectrum it would be"*. Mr Emblin accepted that *"a lot"* could have meant well into the millions. I found this evidence entirely credible. It seems to me, and I so find, that the reality was, at the time of and prior to the Disposal, that none of Mr Emblin, Mr Reid and Mr O'Shea knew the true value of the Loan Assets, and that all three appreciated that the Loan Assets could have had substantial value.

202. Mr Reid's evidence in cross examination was to a similar effect. It was put to Mr Reid that the purchase of the Loan Assets by the First Defendant represented a huge commercial opportunity. Mr Reid's response was that it was a commercial opportunity, which he could not exactly delineate. Exact delineation may not have been possible, but Mr Reid plainly regarded the commercial opportunity as a valuable one. This is demonstrated by the email exchange of 30th September 2019 which I have recorded in the narrative section of this judgment, in which Mr Reid pointed out that *"a huge commercial opportunity"* would be lost if 800 individuals, who were said to be in settlement negotiations with the Revenue, were excluded from the sale of the Loan Assets. As I have already commented, it seems to me, and I so find, that this email represents the view which Mr Reid actually took as to the potential value of the Loan Assets, rather than the earlier email of 25th July 2019, in which Mr Reid set out to Mr O'Shea reasons for the trustees regarding the value of the Loan Assets as notional at best. At the end of his cross examination the point was put again to Mr Reid that he knew all along that there was likely to be substantial value in the Loan Assets and that the sale of the Loan Assets presented a huge commercial opportunity. Mr Reid responded that *"We"*, which expression I took to include Mr Reid, Mr Emblin and Mr O'Shea, *"did not know that there was substantial value in these assets at all"*. I accept

that Mr Reid did not know that there was substantial value in the Loan Assets. I find that he did know that there was, potentially, substantial value in the Loan Assets.

203. So far as Mr O'Shea was concerned, it is quite clear from the documents, and from Mr O'Shea's cross examination, that he calculated the consideration payable on the Disposal by reference to what he calculated as due to the creditors of the Trusts, being Hatstone Jersey and the Second Defendant; see in particular Mr O'Shea's email of 9th October 2019 (referenced in the narrative section of this judgment), which confirmed this approach. Mr O'Shea accepted in cross examination that there had been no attempt to explore what market there might be for the Loan Assets, or to market the Loan Assets, and that the consideration which was to be paid on the Disposal had not been calculated by reference to any valuation of the Loan Assets. Mr O'Shea also accepted in cross examination that, when the loans came to be called in, following the Disposal, he did not know how much the First Defendant was going to recover. He accepted that the true recoverable value could have been quite limited or could have been quite high. Mr O'Shea also accepted that it was always possible that the First Defendant would recover more than was set by the Cap as the limit on the Deferred Consideration.

204. Also important in this context is the email which Mr O'Shea sent on 21st July 2019 (also referenced in the narrative section of this judgment), in which he inquired of Mr Reid whether a rough valuation of the Loan Assets had been obtained. Mr Reid responded in the email of 25th July 2019, wherein he sought to justify the thesis that the Loan Assets had a notional value only. The obtaining of a valuation does not appear to have been pursued any further. I am satisfied that Mr O'Shea, who struck me, as I have said, as an extremely astute person in both commercial and legal terms, raised the topic of obtaining a valuation because he understood that the Loan Assets might have substantial value and that this, in turn, could cause problems down the road, in terms of justifying a sale of the Loan Assets for a price based solely upon what was calculated to be due to the creditors of the Trusts.

205. In cross examination Mr O'Shea claimed that he had carried out his own mental valuation process of the Loan Assets and valued the Loan Assets *"at probably next to zero"*. Mr O'Shea said that he did not conceive that the Loan Assets had any value. I cannot accept this evidence. I do not consider that Mr O'Shea was being dishonest in this part of his evidence. Rather it seems to me that Mr O'Shea had persuaded himself that this was his thinking at the relevant time. In my judgment Mr O'Shea was seeking to defend, on a retrospective basis, his orchestration of the consideration payable on the Disposal to a figure equalling the sums calculated as due to the Second Defendant and Hatstone Jersey, as creditors of the Trusts. The fact that Mr O'Shea appreciated that this might be problematic is demonstrated by his email of 21st July 2019, which I regard as a more reliable guide to what was in Mr O'Shea's mind at the relevant time. The same point is also demonstrated by the inclusion of the Cap in the SPAs (the limitation on the amount of the Deferred Consideration payable out of the profits realised by the First Defendant from the Loan Assets). As was pointed out to Mr O'Shea in cross examination, the Cap only made sense if there was a possibility of the Loan Assets turning out to have a value in excess of the Cap. Mr O'Shea described the Cap as something which might have been *"extra unnecessary terminology"*. I cannot accept this suggestion. It seems clear to me, and I so find, that the Cap was intended to limit the Deferred Consideration to what had been calculated as due to the Second Defendant and Hatstone Jersey, and was intended to guard against the possibility of the Loan

Assets turning out to have a higher value. I am satisfied that Mr O'Shea understood all this when the Cap was devised and put into the SPAs.

206. I have so far been considering the question of value by reference to the Loan Assets. There were, as I understand the position, some other miscellaneous assets in the Trusts, which were mopped up by the assignments to Hatstone LLC on 11th December 2019. I have no evidence on the basis of which I can form a view as to what these residual assets were worth. In particular there were, in the 2014 Trust, what I am referring to as the Covenant Assets. I have seen no valuation evidence in respect of the Covenant Assets. It was not suggested by the Claimants that the Covenant Assets had any material value, and the Claimants' case is concentrated on the Loan Assets.

207. In this context I should also mention a further point made by the Defendants, concerning the financial position of the Trusts and the Beneficiaries. In a helpful annex to their skeleton argument, the First Defendant's counsel provided an overview of the Inheritance Tax (IHT) position of the Trusts. Summarising the position very crudely, the essential point made in this annex is that the Trusts had incurred and would incur substantial charges to IHT, for which the settlors, trustees and Beneficiaries could all be made liable. I accept that the IHT position would have constituted an adverse financial factor, probably a substantial adverse financial factor in any valuation of the assets in the Trusts at the time of the Disposal. As it happened, the IHT position does not appear to have been a factor which was at the forefront of the minds of those involved in the Disposal, at the time of the Disposal. The overall impact of the IHT position on the value of the Loan Assets must however remain a matter of speculation. There was no valuation of the assets in the Trusts at the time of the Disposal and, so far as I am aware, there is still no valuation of the assets in the Trusts (and, in particular, of the Loan Assets) which is available, or at least there is no valuation available which I have seen.

208. In summary, and so far as the balance sheet solvency or insolvency of the Trusts was concerned, either at the time of the Disposal or prior to that time, I make no finding. The short answer to the question of whether the Trusts were balance sheet solvent or insolvent, at any particular time, is that I do not know. My conclusion, on the evidence before me in this trial, that there is no evidence which allows me to arrive at any reliable valuation of the assets in the Trusts, and in particular the Loan Assets, at any particular time.

<u>Was the Disposal effected for an improper purpose? - analysis</u>

209. I have spent some time in discussing the state of Jersey law, in relation to the duties of a trustee in an insolvency situation, and in discussing the financial position of the Trusts at and prior to the time of the Disposal because these matters seem to me to be central to the question of whether the Disposal was effected for an improper purpose.

210. It is not in dispute that Pinotage PTC had the power to sell the Loan Assets under the terms of the Trusts. The Disposal was therefore within the scope of the power of sale, which was a fiduciary power. The question is whether this power was exercised for a proper purpose. As explained in *Grand View*, there are two questions to be answered. The first question concerns the proper purpose or purposes of the power of sale. The second question concerns the purpose or purposes for which the power of sale was exercised. The second question may be said to divide into two questions. For what

purpose or purposes was the power of sale in fact exercised? Was that purpose or were those purposes outside the purpose or range of purposes for which the relevant power was conferred?

211. In the present case it is convenient to take the first part of the second question in *Grand View* first. For what purpose or purposes was the power of sale, by the Disposal, in fact exercised? I take this question first because it does not seem to me, in reality, that there is any material dispute in this respect.

212. In cross examination Mr Emblin accepted the following proposition:

> *"Q. Right. So Mr O'Shea had explained to you and Mr Reid exactly what the basis was for calculating the cap that was agreed, had he not?*
>
> *A. He had.*
>
> *Q. You knew that the very precise figure of £1,176,033.93 was selected by Mr O'Shea to correspond precisely to the sum said to be owing to the trustee.*
>
> *A. We did.*
>
> *Q. You knew, did you not, that the so called insolvency of the trusts was being used by him as a justification for setting aside the best interests of the beneficiaries of the trusts.*
>
> *A. Yes.*
>
> *Q. You knew that the whole purpose of the way that this transaction was structured was to raise funds to pay those creditors but then leave nothing by way of surplus for the beneficiaries, which would allow the trust to be terminated. Correct?*
>
> *A. Correct."*

213. Mr Reid accepted the same proposition on cross examination:

> *"Q. Yes. You knew, did you not, that the alleged insolvency of the trust was being used as a justification for setting aside the interests of the beneficiaries and acting in (inaudible), yes?*
>
> *A. Yes.*
>
> *Q. And you knew that the purpose of the way that this transaction was structured was to raise funds to pay the creditors up to that level maximum, but then leave nothing else in surplus to terminate the trust, yes?*
>
> *A. Yes."*

214. The same proposition was put to Mr O'Shea in cross examination. The relevant passage of cross examination is a lengthier one, and does not need to be set out in full. The first key passage was in the following terms:

> *"Q. The very precise figure of £1,176,033.93 was selected by you to correspond exactly with the sums said to be owing to the trustee and the trustee's creditors.*
>
> *A. Correct.*
>
> *Q. Yes? That meant that the insolvency of the trusts, as you saw in your email, could be used as a justification for setting aside the interests of the beneficiaries. Correct?*
>
> *A. Correct, the trusts insolvent.*
>
> *Q. So the whole purpose of the way this transaction was structured was to raise funds to pay the creditors but leave nothing for the beneficiaries and to be able to terminate the trusts, yes?*

A. Nothing would be left for the beneficiaries.

Q. Yes. So the purpose, the purpose of this structure, was to raise the funds to pay the creditors and then leave nothing left for the beneficiaries to terminate the trusts. That is correct.

A. It was not designed for the purpose that nothing would be left for the beneficiaries, but the result is there's nothing left for the beneficiaries."

215. It will be noted that, in this passage of cross examination, Mr O'Shea did not accept the purpose which was put to him, but confined himself to conceding that the exclusion of the Beneficiaries was the result of the way the Disposal was structured, as opposed to a purpose. Mr Miall pursued the point further however, and the ultimate answer of Mr O'Shea on the question of purpose was as follows:

"Q. Let us just quickly look at it. Sorry, I (inaudible) because everyone needs a break, but the amount of the deferred consideration corresponded exactly to the amounts owed to the creditors. The point of setting it at that level - it is very clear - is that, assume when you get to the full cap the creditors will have been paid off in full, yes?

A. Correct.

Q. There will then be nothing left beyond that, and therefore nothing for the beneficiaries and the trust will terminate for want of assets.

A. Correct.

Q. That was an intentional structure. Leaving aside, you know, whether you feel you are being criticised for taking that decision, that was the decision taken with that purpose in mind, was it not?

A. Yes, I thought that was the best approach."

216. In closing submissions the Claimants submitted that the purpose of exercising the power of sale was to terminate the Trusts without leaving any surplus assets to be held for the Beneficiaries, whilst at the same time benefiting the First and Second Defendants and Hatstone Jersey. This seems to me to be correct. Indeed, in the light of all the evidence at the trial and, in particular, in the light of what was conceded by Mr Emblin, Mr Reid and Mr O'Shea in cross examination the Claimants' identification of the purpose of the Disposal would appear to be correct.

217. I state this conclusion in provisional terms because it seems to me that the above analysis is not necessarily the end of the matter, so far as the answer to the first part of the second question in *Grand View* is concerned. It seems to me that there are two further points to consider in this context.

218. First, there is the question of whether it can be said that Mr O'Shea, as the effective decision maker for Pinotage PTC as the party making the Disposal, genuinely believed that the situation was one where it was legitimate to confine the consideration payable on the Disposal to what was owed to the creditors, and that there was nothing to be realised, or worth realising for the Beneficiaries. I should mention that, in referring to Mr O'Shea as the effective decision maker on behalf of Pinotage PTC, I include reference to Mr O'Shea's role as effective decision maker on behalf of the Second Defendant. I include reference to the Second Defendant because, in the case of the 2014 Trust and on the basis of my earlier decisions on the issues specific to the 2014 Trust, it was the Second Defendant which, by the Deed of Confirmation, actually effected the assignment of the Loan Assets to the First Defendant. If Mr O'Shea had

this genuine belief, it might be said to affect both parts of the second question in *Grand View*, on the basis that the purpose of the Disposal was not in fact to exclude the beneficiaries, because it was believed that there could be nothing for the Beneficiaries.

219. Second, there is the question of whether it can be said that the exclusion of the Beneficiaries from deriving any benefit from the Disposal was not the primary or dominant purpose for which the Disposal was made, but was a subsidiary purpose, insufficient to justify the intervention of equity to invalidate the Disposal. If this was the position, this may, again, be said to affect both parts of the second question in *Grand View*, because the primary or dominant purpose of the Disposal was not the exclusion of the Beneficiaries.

220. On the first of these points the argument was put by Mr Morgan, supported by Mr Flavin, that Mr O'Shea made a legitimate and reasonable decision that Pinotage PTC had ample grounds to sell the Loan Assets at a level which ensured that the creditors would be paid off. On the second of these points the argument was put by Mr Morgan, again supported by Mr Flavin, that the primary purpose of the Disposal was to pay off the creditors of the Trusts. This, so counsel argued, was a perfectly legitimate use of the power of sale. To this, Mr Flavin added the point that, so far as the purpose of Disposal was to liquidate the assets of the Trusts and bring the Trusts to an end, that also was a perfectly legitimate use of the power of sale.

221. On the second of these points, Mr Morgan also advanced the argument that, in considering what was the primary or dominant purpose of the Disposal, the question was more concerned with identifying the causative event, rather than simply looking for the dominant purpose.

222. So far as the decision making process was concerned, I am unable to accept that the thought process of Mr O'Shea was as characterised by counsel for the Defendants. In this context I refer to what Mr O'Shea said in the relevant part of his cross examination, which I have quoted above, as to his understanding of the purpose of the Disposal. I also refer to my earlier findings as to what Mr O'Shea knew at the relevant time. As Mr O'Shea admitted in cross examination, he knew that the intentional structure of the Disposal was to leave nothing for the Beneficiaries. As I have also found, Mr O'Shea knew that the value of the Loan Assets might be substantial. All this is confirmed by, amongst all the other evidence, the presence of the Cap in the SPAs. The Cap only made sense if there was the possibility of the share of what could be realised from the Loan Assets (the Deferred Consideration) going above the sums calculated to be due to the creditors.

223. In closing submissions, I was referred to the Disposal Resolution which, so it was submitted, demonstrated, by its references to the Beneficiaries, that the interests of the Beneficiaries were considered in relation to the Disposal. It was submitted that this document, together with the contemporaneous email communications, showed that a reasonable decision was made to proceed with the Disposal, in respect of which the interests of the Beneficiaries were the subject of adequate consideration. As I understood the relevant submission of Mr Morgan, Mr O'Shea was not required to reach some objective right answer, in terms of how the interests of the Beneficiaries should be dealt with in the Disposal. Rather, all that was required of Mr O'Shea, at most, was that he considered the interests of the Beneficiaries and made a decision as to

what part they should play in the Disposal, bearing in mind the overriding priority to pay off the creditors.

224. In principle, I can see the force of this argument. The problem with the argument seems to me to be that it founders on the facts of this case. I do not see that the Disposal Resolution or any of the contemporaneous documents upon which Mr Morgan sought to rely can alter the fact that it is quite clear that the Disposal was intentionally designed to leave nothing for the Beneficiaries so that, in turn, the creditors could be paid off, the Trusts could be terminated, and the First Defendant could acquire the Loan Assets free of the Trusts. I do not accept that there was any balancing or weighing up process, either as asserted or at all, so far as the interests of the Beneficiaries was concerned. This was simply not the way in which the Disposal was designed.

225. This point seemed to me to be brought out by a passage in Mr O'Shea's evidence in cross examination where he postulated a situation in which the Loan Assets had been sold for a consideration which generated a surplus of £100,000 for the Beneficiaries. Mr O'Shea's point was that this would have been more trouble than it was worth. The sum of £100,000 would not have been sufficient to fund the administration of the Trusts going forward. Nor would it have been possible, in terms of the administration costs, to appoint out this sum to around 2,000 Beneficiaries. The position would have been unworkable. The only viable course would have been to wind up the Trusts. I entirely follow the logic of this point. I can see that if the Loan Assets were only going to generate a small surplus for the Beneficiaries it would, or at least might have been reasonable for Pinotage PTC to take the view that the Disposal should go ahead as planned, because the anticipated surplus was likely to be insufficient to render any other course viable.

226. What however I cannot accept is that this was Mr O'Shea's thinking at the relevant time. I do not accept that Mr O'Shea went through any such thought process at the time when the Disposal was planned and effected. I have already explained why I cannot accept the evidence of Mr O'Shea that he did, at the time of the Disposal, either carry out his own mental valuation process in relation to the Loan Assets or value the Loan Assets *"at probably next to zero"*. In my judgment, and I so find, the reality was that Mr O'Shea made the decision to confine the consideration payable on the Disposal to what he calculated as being due to the Second Defendant and Hatstone Jersey, regardless of what the Loan Assets were worth, and with the intention that there should be no surplus for the Beneficiaries, whatever the Loan Assets were worth.

227. Turning to the question of primary or dominant purpose, I do not think that it is possible, on the evidence in this case, to separate out paying the creditors, or terminating the Trusts as the primary or dominant purpose, with the leaving of no possible surplus for the Beneficiaries as a secondary or subsidiary purpose. On the evidence it seems to me, and I so find, that it is impossible to divide up the Disposal in this way. The reality was that the Disposal comprised one enterprise or purpose, with various moving parts, all of which were essential for the Disposal to work. The limitation of the consideration, to what was calculated to be due to the creditors, and the consequential exclusion of the interests of the Beneficiaries, were an essential part of the Disposal. Without these elements the Disposal, as designed and intended by Mr O'Shea, Mr. Emblin and Mr Reid, would not have worked. To put the matter another way, the exclusion of any benefit to the Beneficiaries was part and parcel of the

payment of the creditors, and part and parcel of the termination of the Trusts, and vice versa.

228. I should also add that this seems to me to be so whether one considers the question of primary or dominant purpose simply as a question of purpose, or whether one considers the question by reference to a causative test of the kind identified by Mr Morgan. On both analyses it seems to me, on the evidence, that it is not possible to relegate the exclusion of the interests of the Beneficiaries to a subordinate purpose or to a lesser causative role or a non-causative role.

229. Drawing together all of the above discussion, and in answer to the first part of the second question in *Grand View*, I conclude, and find that the purpose or purposes for which the power of sale was, by the Disposal, exercised, was or were (i) to terminate the Trusts, (ii) to benefit the First Defendant by assignment of the Loan Assets to the First Defendant, free of the obligations of the Trusts, for a consideration limited by the Cap, (iii) to benefit the Second Defendant and Hatstone Jersey by paying off the sums calculated as being due to them, and (iv) to ensure that the consideration payable on the Disposal would leave no surplus for the benefit of the Beneficiaries. I will refer to this purpose or these purposes in the singular, for convenience, but it will be apparent that the purpose may more correctly be characterised as a set of purposes. I find that the situation was not one where Mr O'Shea considered that it was legitimate to exclude the interests of the Beneficiaries. I find that Mr O'Shea made the decision to confine the consideration payable on the Disposal to what he calculated as being due to the Second Defendant and Hatstone Jersey, regardless of what the Loan Assets were worth, and with the intention that there should be no surplus for the Beneficiaries, whatever the Loan Assets were worth. I find that the intention thus to exclude the Beneficiaries was a primary or dominant purpose and a primary or dominant cause of the Disposal. The intention to exclude the Beneficiaries was not a subordinate purpose or subordinate cause of the Disposal.

230. I turn therefore to the second part of the second question identified in *Grand View*, which also engages the first question identified in *Grand View*. Was the purpose for which the power of sale was exercised by the Disposal, as I have found that purpose to be, within the proper purpose or purposes of the power of sale contained in the Trusts? The answer to this question seems to me to come down to the question of whether Pinotage PTC was entitled to effect the Disposal on terms which concentrated on the interests of the creditors of the Trusts, and effectively excluded the interests of the Beneficiaries. This in turn seems to me to come down to whether the situation of the Trusts, as cash-flow insolvent trusts in all the circumstances as they existed at the time of the Disposal, justified such exclusion of the Beneficiaries or, putting the matter another way, justified departure from the general rule (see Lord Richards in *Grand View* at [120]), that fiduciary powers conferred on a trustee of a trust with identified beneficiaries must be exercised to further the interests of the beneficiaries.

231. In his closing submissions Mr Miall advanced the following four scenarios, for the purposes of considering the circumstances in which trustees could disregard the interests of beneficiaries.

(1) The first scenario assumes a trust with no solvency issues. In that situation, as I understood Mr Miall's submissions, a trustee should have regard to the interests of the beneficiaries, in accordance with the general rule.

(2) The second scenario assumes a trust which has substantial assets, but no liquid or very few liquid funds and, as a result, is cash-flow insolvent. In such a case, so Mr Miall submitted, the trustee cannot simply disregard the interests of the beneficiaries because of the cash-flow insolvency. The trustee cannot simply sell the entirety of the trust fund for the value of the liabilities of the trust. Mr Miall posited the example of a trust with debts of £20,000 and assets worth £1 million. If the trust fund could be sold for the value of the liabilities, the trustee could sell trust assets worth £1 million for £20,000.

(3) The third scenario assumes a trust which is hopelessly and obviously balance sheet insolvent and cash-flow insolvent. In that situation, Mr Miall submitted, where balance sheet insolvency is certain, it is inevitable that the beneficiaries no longer have an economic interest in the trust property, because there is no possibility of a surplus being left over after paying the creditors of the trust.

(4) The fourth scenario lies somewhere between the second and third scenarios, and assumes a situation where a trust fund has illiquid assets of an uncertain but potentially significant value, and also has significant liabilities, so that it is not clear whether the assets will be sufficient to meet the liabilities. The trust is therefore cash-flow insolvent, but it is not clear whether the trust is balance sheet insolvent. In that situation, so Mr Miall submitted, it is not inevitable that the beneficiaries no longer have an economic interest in the trust, because there might be something for them following the liquidation of the assets. In that situation, so Mr Miall submitted, the trustee cannot simply disregard the interests of the beneficiaries entirely, and cannot simply sell the assets of the trust for a sum equal to what is due to creditors. Assuming such a situation, so Mr Miall submitted, the trustee cannot decide to exercise its powers for the purpose of terminating the trust and leaving nothing for the beneficiaries. The trustee must continue to have regard to the interest of the beneficiaries and ensure that if there is surplus value, then that surplus value is preserved and maintained for the benefit of the Beneficiaries.

232. Mr Miall summarised the position in the following terms. The interests of the beneficiaries in a trust can only be said to have dropped away entirely when it is inevitable that they no longer have an economic interest in the trust. In the third scenario, so it was submitted, such inevitability existed, and the interests of the beneficiaries could be disregarded. In the second and fourth scenarios, so it was submitted, such inevitability did not exist, and the interests of the beneficiaries could not simply be disregarded.

233. It seems to me that Mr Miall's four scenarios provide a useful method for identifying, at least in general terms, the circumstances in which the interests of beneficiaries can be disregarded. The methodology also seems to me to be consistent with my own analysis of the law in this respect. Applying the *Sequana* approach, and subject to the point that the analysis is operating at a general level, it is only in the third scenario that the interests of the beneficiaries can be disregarded entirely.

234. The situation in the present case seems to me to have equated to Mr Miall's fourth scenario. The Trusts were cash-flow insolvent, but the Trusts held assets, namely the Loan Assets, which (i) were illiquid, but (ii) might have substantial value.

235. In these circumstances, and in answer to the first question identified in *Grand View*, I cannot see how it can be said that a proper purpose of the power of sale contained in the Trusts was a purpose which effectively involved the exclusion of the Beneficiaries. I refer to my analysis of the relevant law in the relevant previous section of this judgment. Applying the relevant law, the situation was not one where the interests of the Beneficiaries could simply be disregarded in favour of the creditors. This however was what occurred. The value of the Loan Assets was unknown. The principal actors in relation to the Disposal, namely Mr Emblin, Mr Reid and Mr O'Shea did not know the value of the Loan Assets, but did know that the value of the Loan Assets might be substantial. They also knew that the purpose of the Disposal was to pay the creditors without leaving any surplus for the Beneficiaries, so that the Trusts could be terminated. All this follows from the findings which I have already made. The interests of the Beneficiaries were disregarded in the Disposal or, putting the matter another way, the interests of the Beneficiaries were effectively excluded from the Disposal. This would have been justifiable, if there had been no light at the end of the tunnel, and it was clear that the value of the Loan Assets was not going to be adequate to do more than meet the sums owed to creditors. This was not however the position. No one knew what the Loan Assets were worth. What was known by the principal actors (Mr Emblin, Mr Reid and Mr O'Shea) was that the value of the Loan Assets might be substantial.

236. Pausing at this point in my analysis, I have reached the following conclusions. I have concluded, in my previous paragraph and in answer to the first question identified in *Grand View*, that a purpose which effectively involved the exclusion of the Beneficiaries was not a proper purpose of the power of sale contained in the Trusts. I have also concluded, in answer to the first part of the second question identified in *Grand View*, that the purpose or set of purposes for which the power of sale was, by the Disposal, exercised comprised or included the effective exclusion of the Beneficiaries as a primary or dominant purpose. This leaves the second part of the second question in *Grand View*, which is whether the purpose of the Disposal, as I have identified this purpose, fell outside the purpose or purposes for which the power of sale was conferred. Applying the conclusions which I have already reached, the answer to the second part of the second question in *Grand View* seems to me to follow inexorably from my answers to (i) the first question in *Grand View* and (ii) the first part of the second question in *Grand View*. The purpose of the Disposal, as I have identified the same, did fall outside the purposes for which the power of sale was conferred.

237. In summary therefore, and in answer to the first question identified in *Grand View*, and in answer to the second part of the second question identified in *Grand View* I conclude (i) that a disposal for a purpose which involved the exclusion of the interests of the Beneficiaries was not, in the circumstances as they existed at the time of the Disposal, a proper purpose of the power of sale contained in the Trusts, and (ii) that the Disposal, which was a disposal for a purpose which involved the exclusion of the interests of the Beneficiaries, was effected for a purpose which fell outside the permitted purposes of the power of sale contained in the Trusts.

<u>Was the Disposal effected for an improper purpose? - conclusion</u>

238. In summary, and for the reasons which I have set out in the relevant previous sections of this judgment, I reach the following conclusions, in relation to the question of whether the Disposal was effected for an improper purpose:

(1) In the circumstances which existed at the time of the Disposal the proper purposes of the power of sale did not include a disposal of the Loan Assets for a consideration which ensured that there would no surplus left for the benefit of the Beneficiaries. The circumstances were not such that the interests of the Beneficiaries could be disregarded, or excluded in this way.

(2) In effecting the Disposal the purposes of the principal actors, Mr Emblin, Mr Reid and Mr O'Shea (and in particular Mr O'Shea) were, in each case, to ensure that the consideration payable on the Disposal would leave no surplus for the Beneficiaries.

(3) This purpose was not a subsidiary purpose, but was central to the purpose of the Disposal, whether judged on the basis of purpose or on the basis of causation. The whole point of the Disposal was to confine the consideration to what was calculated as due to the creditors. If the consideration was not so confined, the purpose of the Disposal would been defeated. Confining the consideration in this way ensured, to the detriment of the Beneficiaries, (i) that the Trusts could be terminated, (ii) that the First Defendant would obtain the benefit of the Loan Assets, free of the obligations of the Trusts, at a price which might well turn out to be a substantial undervalue, (iii) that Hatstone Jersey and the Second Defendant would be paid what was calculated as due to them, and (iv) that the Beneficiaries would get nothing.

239. I therefore conclude that the Disposal was effected for an improper purpose.

<u>Was the First Defendant a bona fide purchaser for value of the Loan Assets without notice of the breach of trust?</u>

240. I have concluded that the Disposal was effected for an improper purpose. This means that the issues consequential upon this conclusion arise for decision. The first of these issues is whether the First Defendant can say that it was a bona fide purchaser for value of the Loan Assets without notice of the relevant breach of trust; namely that the Disposal was effected for an improper purpose.

241. I note at the outset that the burden is upon the First Defendant to establish that it was a bona fide purchaser for value of the Loan Assets without notice of the relevant breach of trust; namely that the Disposal was effected for an improper purpose; see Foxton J in *The Serious Fraud Office v Litigation Capital Limited* [2021] EWHC 1272 (Comm), at [149]-[150].

242. As I have already explained, there are three broad sub-issues to resolve in this context. The sub-issue which I will take first is the question of whether the First Defendant is able to say that it was a bona fide purchaser, within the concept of a bona fide purchaser for value without notice. The argument is that the First Defendant could not have been a purchaser (the argument does not appear to go to the question of whether the First Defendant was bona fide) because there remained, at the commencement of this action, a contingent liability to pay the Deferred Consideration under the relevant SPAs. It will be recalled that the First Defendant objected to this argument being raised because, so it was submitted, it had not been pleaded. I will refer to this argument as **"the Purchaser Argument"**.

243. The first question to deal with in this context is therefore whether the Purchaser Argument is actually pleaded. The relevant statement of case in this context is the

Claimants' Reply to the Amended Defence of the First Defendant. The relevant paragraph of this Reply is paragraph 36. It is sufficient, for present purposes, to concentrate upon the opening part of paragraph 36 and paragraph 36.1, which state as follows:

> *"36. In respect of paragraph 51(b) it is denied that FS Capital is able to rely on article 55 of the Trusts (Jersey) Law 1984 in defence of the Claimants' claim to recover the Loan Assets:*
>
> *36.1. In relation to the purported purchase of the Loan Assets, FS Capital (i) was not a bona fide purchaser, and (ii) had notice (actual or alternatively constructive) of the breaches of trust set out in the Amended Particulars of Claim. Paragraph 48 of the Amended Particulars of Claim is repeated."*

244. Mr Miall contended that this was sufficient to raise the issue that the First Defendant was not a purchaser. Paragraph 36.1 pleaded in terms that the First Defendant was not a bona fide purchaser, and the facts in support of this pleading were set out in the Reply. Without prejudice to this position, the proposed amendment to paragraph 36.1 (in case it was required), which Mr Miall produced in the course of his closing submissions, read as follows:

> *"36.1.In relation to the purported purchase of the Loan Assets, FS Capital (i) was not a bona fide purchaser because there remained at the commencement of these proceedings a contingent liability to pay deferred consideration under the First Sale Purchase Agreement as set out in paragraph 24I.2 of the Re-Amended Particulars of Claim, and (ii) had notice (actual or alternatively constructive) of the breaches of trust set out in the Amended Particulars of Claim. Paragraph 48 of the Amended Particulars of Claim is repeated."*

245. In my view the bald pleading, in paragraph 36.1 of the Reply, that the First Defendant was not a bona fide purchaser was insufficient properly to plead the argument (the Purchaser Argument) that the First Defendant was not a purchaser by reason of the fact that there remained a contingent liability to pay deferred consideration pursuant to the SPAs. What is currently pleaded in paragraph 36.1 gives no inkling that this is the specific argument relied upon by the Claimants in this context. Indeed, a natural reaction to this part of paragraph 36.1 is that it is taking the point that the First Defendant was not acting bona fide. The Purchaser Argument is not an obvious one, and raises some difficult issues. In my judgment the Purchaser Argument required, both as a matter of fairness to the First Defendant and as a matter of what is required in terms of the pleading of a statement of case, clear articulation in the Reply. There was no such clear articulation of the Purchaser Argument in the Reply. Indeed, it seems to me that the Purchaser Argument was not identified at all in the Reply.

246. This was illustrated by the fact that it was quite apparent that the First Defendant was unaware that the Purchaser Argument was being deployed until the trial itself. The First Defendant's skeleton argument for the trial did not deal with the Purchaser Argument. On the Claimants' side, and so far as I am aware, the Purchaser Argument first surfaced in the Claimants' skeleton argument for trial. So far as I could see, the First Defendant was taken by surprise by the Purchaser Argument. If that was the position of the First Defendant, and it appeared to me that it was, it was an understandable position. I have not seen anything, either in the Reply or elsewhere,

which would have alerted the First Defendant to the fact that the Purchaser Argument was on the way. It is also instructive to consider the terms of the proposed amendment of paragraph 36.1. The amendment is short, but articulates the argument. Paragraph 36.1 does not. In closing submissions Mr Miall argued that the facts on which the argument was based were pleaded in the Reply and that these facts, combined with the contention that the First Defendant was not a bona fide purchaser, were sufficient by way of pleading. In the context of this particular argument, I cannot accept that what was pleaded was sufficient. As Mr Morgan fairly submitted, pleadings are not supposed to be a guessing game. In my view paragraph 36.1 needed to plead the reason why the First Defendant was said not to have been a bona fide purchaser.

247. I therefore conclude that the Purchaser Argument required to be pleaded in the Reply, but was not pleaded in the Reply. As such, I also conclude that the Claimants can only pursue this argument if they can obtain permission to amend paragraph 36.1 of the Reply. I have already set out above the terms of the amendment to paragraph 36.1 for which permission is sought.

248. I have concluded that permission should not be granted for this amendment. I have come to this conclusion for what are, essentially, three reasons.

249. First, the application to amend is made very late. The application was made by Mr Miall at the conclusion of his closing submissions, at the end of the penultimate day of the trial. The application was made informally. I did not require a formal application notice to be issued, and I do not attach any importance, in the circumstances of this case, to the absence of a formal application notice, notwithstanding that I would normally have insisted upon the issue of such an application notice. The important point is that the application was made very late.

250. Second, the lateness of the application was unexplained. In this context it was particularly significant that the experts (Advocate Passmore and Advocate Gleeson) had not been asked to address the Purchaser Argument in their expert evidence. By contrast the experts were asked to address, and did address at some length the legal issues concerning what would have been required, by way of notice, for the First Defendant to be fixed with notice that the Disposal was being made in breach of trust. These notice issues also figured prominently in the cross examination of the experts. There was no cross examination of the experts on the Purchaser Argument. If the Claimants' view was that the Purchaser Argument had been adequately pleaded from the outset, and if the Claimants had always intended to run this argument, I find it odd that it was never identified as an argument for the experts to consider. In closing submissions Mr Morgan voiced the suspicion that the argument had only recently been thought of. I am in no position to know whether or not this suspicion is well-founded. The relevant point is that I have no explanation of why the Purchaser Argument does not appear to have been articulated to the Defendants at any time prior to the Claimants' trial skeleton argument.

251. Third, I think that there is some prejudice to the First Defendant, and to the court caused by the lateness of the application to amend. In opening submissions at the trial Mr Morgan accepted that the Purchaser Argument, which he had by then seen in the Claimants' trial skeleton argument, raised a pure point of law. I took this to be a concession that the argument did not raise matters which needed to have been

investigated in the evidence. In closing submissions however Mr Morgan made the point that if the First Defendant had known of the Purchaser Argument prior to trial, it would have raised this issue for consideration by the experts. As I have already noted, this did not happen. It seems to me that this was a point on which Mr Morgan was entitled to row back from the position which he had adopted in opening submissions, particularly in circumstances where the application to amend was not made until the closing submissions. What the experts would have had to say in relation to the Purchaser Argument is unknown. The argument was not investigated with them, either prior to or at trial. In his closing submissions in reply, Mr Miall suggested that it was unlikely that the experts would have had anything material to say in relation to this argument, given their general position that Jersey law looks to English law in relation to doctrines of equity such as the bona fide purchaser for value without notice. Mr Miall's essential point was that Jersey law in relation to the Purchaser Argument was unlikely to be different to English law, with the consequence that the expert evidence of the Advocates was unlikely to add anything.

252. Mr Miall may very well have been correct on this point, but this is speculation on my part. The relevant point is that I do not know what the experts would have had to say in relation to the Purchaser Argument. They might have agreed that the position in Jersey law was the same as in English law. They, or one of them might have had material evidence to give in relation to Jersey law, which might have been of assistance to me in resolving an argument which, at least so far as English law is concerned, raises a difficult issue. The reason I am forced to speculate on this point is because the Purchaser Argument was only raised at trial, and was only the subject of what I have decided was a required application to amend in the course of closing submissions, at the end of the trial. This position seems to me to be one which causes prejudice to the First Defendant, which has not had the opportunity to raise the Purchaser Argument with the experts, and also the court, given that I have not had the opportunity to receive the assistance of the experts, such as it might have been, in considering the Purchaser Argument.

253. The fact that an application to amend is made at a late stage of an action is not normally, in itself, sufficient to justify the refusal of permission to amend. In the present case however it seems to me that the lateness of the application, when combined with the other factors which I have identified does justify the refusal of permission to amend. Accordingly, I refuse the Claimants' application to amend paragraph 36.1 of the Reply to the Amended Defence of the First Defendant. It follows that the Claimants are not entitled to pursue their argument that the First Defendant was prevented from being a bona fide purchaser for value without notice by reason of the fact that there remained, at the commencement of this action, a contingent liability to pay deferred consideration under the SPAs.

254. The refusal of permission to amend means that it is not necessary to decide the Purchaser Argument. I did however hear argument on the Purchaser Argument, without prejudice to the question of whether permission to amend should be granted, and I was referred to a number of legal authorities. Mr Morgan did also submit that permission to amend should be refused because, so he submitted, the merits of the Purchaser Argument were too poor to justify the grant of permission to amend. I would not have been prepared to refuse permission to amend on this ground. As I have said, the Purchaser Argument does seem to me to raise a difficult, and arguable issue which,

if there had not been other reasons for refusing permission to amend, would have justified the grant of permission to amend. Indeed, the difficulty of the Purchaser Argument was the principal reason why it seemed to me material that the experts had not had the opportunity to consider the Purchaser Argument as a matter of Jersey law.

255. Given that I have heard argument on the Purchaser Argument, and while this is not strictly necessary given my refusal to grant permission to amend, I will, as briefly as possible, state my view on the Purchaser Argument. Given that I have not heard from the experts on the Purchaser Argument, I express my view as a matter of English law. It may be that the answer would be the same as a matter of Jersey law, but I do not have to decide this, given my decision on the application for permission to amend and, in any event, I do not think that it is sensible to decide this in circumstances where the experts have not been given the opportunity to consider the Purchaser Argument.

256. The proposition that the relevant consideration must be paid in full, if the defence of bona fide purchaser for value without notice is to be relied upon, is one which can be found in the textbooks; see Lewin on Trusts (20th Edition) at 44-120, Megarry & Wade: The Law of Real Property (9th Edition) at 5-008, and Snell's Equity (34th Edition) at 4-027.

257. The relevant propositions are stated in each of the textbooks (with the accompanying footnote also included in the quotation) in the following brief terms:

Lewin

"Consideration consisting of money must actually be paid, it seems in full.[452]"

"452 Story v Windsor (1743) 2 Atk. 630; and see Megarry and Wade, The Law of Real Property (9th edn), § 5-008. It is striking that if someone agrees to purchase property worth £1,000 for £1,000, and pays £900, he does not have the defence, while if he agrees to purchase the same property for £100 and pays that, then he has the defence."

Megarry & Wade

"If the purchase is for money consideration, the purchaser must have actually paid all the money before receiving notice of the equitable interest in order to have a defence.[25] If notice of an undisclosed equitable interest is received before the money is paid, an obligation or security for its payment may be unenforceable. [26]

"25 Taylor Barnard v Tozer [1984] 1 E.G.L.R. 21 at 22.

26 Tourville v Naish (1734) 3 P.Wms. 307; Wh. & T. ii, 140."

Snell

"The purchaser must have had no notice of the equitable interest at the time when he gave his consideration for the conveyance. Thus if notice was received before all the money was paid, even after the conveyance was executed, the purchaser remained subject to the equitable interest. [90]

"90 Tourville v Naish (1734) 3 P. Wms. 307; Story v Windsor (1743) 2 Atk. 630."

258. As can be seen, the propositions relied upon in support of the Purchaser Argument in the present case are themselves all based on two 18th Century cases and, more recently, *Taylor Barnard v Tozer* [1984] 1 EGLR 21.

259. *Taylor Barnard* concerned a claim for specific performance of an agreement alleged to have been created by the exercise of an option to purchase in a lease. The claim was made by the tenant under the relevant lease, which was the plaintiff company in the case, and was the tenant by assignment of the lease. The defendant landlords claimed rectification of the option clause in the lease, on the basis that the option clause should in fact have been a pre-emption clause. One of the issues in the case was whether the assignee tenant of the lease (the plaintiff) was bound by the claim for rectification, as it was not the original tenant under the lease. The claim for rectification failed, which rendered it unnecessary to decide whether the plaintiff, as assignee of the lease, was bound by the rectification claim (the equity to rectify). The judge (Judge Thomas sitting as a Judge of the High Court) did however briefly express his opinion on this question. The judge said this, at 22F-G:

> *"Secondly, are the plaintiffs bound by the equity to rectify? In the light of my decision on the first issue, this issue does not now arise. I shall, nevertheless, give my opinion very shortly on it.*
>
> *The plaintiff company first received notice of the defendants' claim for rectification on December 17 1980, that is, between the date of the plaintiff's contract to purchase the lease for £17,500, which was November 7 1980, and the date of the assignment, which was December 31 1980, which was when the purchase price was paid.*
>
> *It is not disputed that a bona fide purchaser of an equitable interest without notice of an equity to rectify takes free from it. See Westminster Bank Ltd v Lee [1956] Ch 7. It is also not disputed that the plaintiff acquired an equitable interest on entering into the contract of December 7 1980. See Shaw v Foster (1872) LR 5 HL 321.*
>
> *The question is, was the plaintiff a bona fide purchaser for the value on that date? I do not think so. The plaintiff had not then paid the purchase price and could not be regarded as a purchaser for value until the full price was paid. See Tourville v Naish (1734) 24 ER 1077."*

260. Returning to *Tourville v Naish* (1734) 3 P. Wms. 307, the report of the decision is only a brief one. According to the report the case concerned the purchase of an estate by A. A, who appears to have been the defendant in the case, paid part of the purchase money, but gave a bond for the remainder of the purchase money. The plaintiff had an equitable lien over the purchased premises, of which the defendant claimed to have had no notice at the time of the purchase. The defendant did become aware of the lien before payment of the money due on the bond. According to the report, Lord Chancellor Talbot decided that if a person, who had a lien in equity over the premises, gave notice before actual payment of the purchase money that was sufficient to fix the purchaser with notice of the lien.

261. The report of *Story v Windsor* (1743) 2 Atk 630 is also very brief. It does however appear to have been decided in this case that a purchaser could not deny that he had received notice of an equitable interest before paying the purchase money. The following extract from the report appears to be most relevant:

> *"The first objection was, That there is not a sufficient denial of notice, because it is not averted the purchase money was [631] paid before notice, but only that the purchaser had no notice, at or before the time of the execution of the deeds.*
>
> *As it stands upon this plea, the money might not be paid before notice.*

And if it be the established rule of this court, that notice must necessarily be denied at or before the execution of the deed, and at or before the payment of the money;
Then there is not a proper averment here, and therefore I am of opinion this denial of notice is not sufficient, unless it had gone farther, and shewn that the purchaser had no notice before he paid the money. (Vide Fitzgerald v. Burk, ante, 397. Hardingham v. Nicholls, post, 3 vol. 304.)"

262. The point made by Mr Morgan, in answer to the Purchaser Argument, was that the cases to which I have referred can be distinguished. His argument was that there is a distinction to be drawn between (i) a case where a purchaser fails to pay, on completion, the entirety of the price agreed to be paid for the relevant land and (ii) a case where the price to be paid on completion contains an element of that price which is agreed to be deferred, under the terms of the relevant contract for the purchase of the relevant land, and may only be payable (as in the present case) if a particular contingency is realised. In the former case the purchaser cannot claim to be a purchaser without notice unless and until the purchase price has been paid in full. In the latter case the purchaser can, as from completion, claim to be a purchaser without notice, notwithstanding that part of the purchase price is agreed to be deferred. In support of this argument Mr Morgan referred me to two cases which establish that where the agreed consideration for a purchase is a bond securing future payment or an annuity, the consideration is correctly treated as the bond or annuity, and not as the sums payable under the bond or annuity; see *Parrott v Sweetland* (1835) 3 MY & K 656 and *Buckland v Pocknell* (1843) 13 Sim 406.

263. In response to this argument Mr Miall contended that there was no sensible basis, either on the basis of the authorities or in principle, for drawing a distinction between the position of a purchaser who has failed to pay part of what is due by way of the purchase price, and a purchaser who has paid only part of the purchase price by reason of an agreement to defer part of the purchase price. In each case the purchase price has not been paid in full, and the purchaser cannot claim to be a bona fide purchaser for value without notice until the purchase price has been paid in full.

264. So far as the authorities are concerned, they seem to me to provide only slender support for Mr Miall's argument. The textbook commentaries which I have quoted above are too brief to address the question of whether the distinction contended for by Mr Morgan exists. Turning to the case law, I start with *Taylor v Barnard*. It is important to note the facts of that case. The plaintiff company received notice of the rectification claim after it had contracted to take an assignment of the lease, but before completion of the assignment and payment of the purchase price. Given these facts it seems to me that it was clear that the plaintiff could not be a purchaser without notice. At the time when the plaintiff was put on notice of the rectification claim, it had not paid the purchase price at all, because completion of the contract had not taken place. This seems to me to be a very different position to a case where the purchase price has only been paid in part. In my view *Taylor v Barnard* is not properly treated as authority for the proposition that a person cannot be a purchaser for value in circumstances where only part of a purchase price has been paid.

265. Turning to *Story v Windsor*, the report of the case which I have seen renders it difficult to treat the case as authority which supports the Purchaser Argument. This leaves *Tourville v Naish*. The problem with *Tourville v Naish* is that the critical facts in the case do not seem to me to be clear from the report. It is not clear whether the bond which secured the unpaid residue of the purchase price was given (i) because the plaintiff was liable to pay the entire purchase price on completion, but could not pay the relevant part of the purchase price and secured an agreement to defer payment on the security of the bond, or (ii) because it had been agreed from the outset that the relevant part of the purchase price would not be payable on completion, but on a later date, secured by the bond.

266. Looking at the question as a matter of principle, I am bound to say that I find it very odd that a person cannot claim to be a purchaser without notice simply because the relevant purchase may, by agreement, include a term that payment of part of the purchase price is to be deferred beyond completion of the purchase. This is all the more so in circumstances where, again by agreement, some security is put in place, on completion of the purchase, for payment of the deferred part of the purchase price. In this latter situation, it seems to me that Mr Morgan was right to submit that the reality of the position is that the relevant part of the purchase price is constituted by the security, not payment of that which is secured by the security.

267. Agreements for the sale and purchase of land which involve deferring part of the purchase price beyond the date of completion are common. An obvious example of such an agreement is one which includes an overage clause. What is payable pursuant to the overage clause is usually uncertain, and depends upon future contingencies. The time for payment, if the contingency is satisfied, may lie a long way in the future. Indeed, the present case may be said to be an example of a species of overage clause, given that the Deferred Consideration, subject to the Cap, only fell to be paid out of any profits realised from the Loan Assets. I have difficulty in understanding why a purchaser who pays what is due by way of the purchase price on completion, is prevented from being a purchaser for value without notice, simply because the relevant contract for the purchase of the relevant land includes some provision for deferral of part of the purchase price, whether a simple agreed deferral of part of the purchase price or an overage provision the effect of which depends upon a future contingency.

268. In my view the propositions stated in Lewin, Snell and Megarry & Wade, which I have cited above, are correctly seen as being confined to situations where the purchaser fails to pay all that is due, at the time of completion, by way of the purchase price. In my view these propositions do not extend to a case, such as the present case, where there is an agreed deferral of part of the purchase price to a time after completion of the relevant purchase price. Provided that the purchaser pays what is due on completion, it seems to me that the purchaser should, as from the date of completion, be entitled to claim the status of a bona fide purchaser for value without notice, assuming that the other conditions for claiming this status are satisfied.

269. In conclusion, if I had been minded to grant permission to amend to the Claimants, so as to permit the Claimants to advance the Purchaser Argument, I would have rejected the Purchaser Argument. I would have decided that the First Defendant was not prevented from claiming the status of a bona fide purchaser for value of the Loan Assets without notice by reason of the fact that the SPAs provided for part of the

consideration payable for the Loan Assets to be deferred on the contingent basis set out in the SPAs.

270. For the sake of completeness, I should mention that the Claimants' trial skeleton argument raised a further argument, additional to what I have called the Purchaser Argument. This further argument was that the First Defendant was not a purchaser for value because the consideration which was payable on the Disposal itself comprised the sum of £100,000, which had been paid by Slap 8 long before the time of the Disposal. As such, so the Claimants' argument ran, this was not material consideration. It was in truth past consideration, which was not paid by the First Defendant and which derived from a different transaction. This particular argument was not however, as I understood the position, pursued either in the expert evidence or in closing submissions. Applying my reasoning in relation to the Purchaser Argument, an amendment of the Reply to the Amended Defence of the First Defendant would have been required, in order to allow this particular argument to be advanced. The draft amendment to paragraph 36.1 which was produced in the course of closing submissions did not however include this particular argument. In these circumstances I say no more about this particular argument, which I take to have been abandoned.

271. This then brings me on to the main battleground between the parties in this context, which was the question of whether the First Defendant had notice of the breach of trust, namely that the Disposal was being made for an improper purpose, at the date of the Disposal. This generated a substantial dispute over what type of notice was required, in order to have put the First Defendant on notice of the breach of trust. This raised, in turn, two questions. The first was whether such notice needed to be actual notice or could include constructive notice. The second was as to what types of knowledge were included within the concepts of actual notice and constructive notice.

272. So far as notice is concerned, there are three types of notice by which a purchaser may be affected; see Snell, at 4-027. They are (i) actual notice, where the relevant equity is within the knowledge of the purchaser, (ii) constructive notice, where the equity would have come to the knowledge of the purchaser if proper inquiries had been made, and (iii) imputed notice, where the agent of the purchaser in the course of the relevant transaction, acting as such, had actual or constructive notice of the equity. In the present case imputed notice is not in issue. In relation to the Disposal the First Defendant was represented, principally, by Mr Reid and Mr Emblin. I did not understand it to be in dispute that, for the purposes of considering the question of notice, the persons whose knowledge and state of mind were relevant, depending upon the type of notice required, were Mr Reid and Mr Emblin. If and insofar as I may have misunderstood the position in this respect, I find that the question of whether the First Defendant had notice that the Disposal was made for an improper purpose falls to be answered by reference to the knowledge and state of mind of Mr Reid and Mr Emblin at the time of the Disposal, as the principal persons acting on behalf of the First Defendant in relation to the Disposal.

273. More specific guidance on what knowledge is required, for the purposes of actual notice and constructive notice can be found in the judgment of Sir Robert Megarry V-C in *Re Montagu's Settlement Trusts* [1987] 1 Ch 264, at 277D-F:

“Now until recently I do not think there had been any classification of "knowledge" which corresponded with the classification of "notice." However, in the Baden case, at p. 407, the judgment sets out five categories of knowledge, or of the circumstances in which the court may treat a person as having knowledge. Counsel in that case were substantially in agreement in treating all five types as being relevant for the purpose of a constructive trust; and the judge agreed with them: p. 415. These categories are (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. If I pause there, it can be said that these categories of knowledge correspond to two categories of notice: Type (i) corresponds to actual notice, and types (ii), (iii), (iv) and (v) correspond to constructive notice.”

274. Notwithstanding what was said by Sir Robert Megarry in this extract, concerning the knowledge required to show actual notice, counsel were agreed that, as a matter of English law, actual notice comprised the first three of the *Baden* categories identified in the extract above; namely (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. As I understood matters, this agreed position had been reached on the basis of the analysis of Stephen Morris QC (sitting as a Deputy High Court Judge, as he then was) in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) at [111]-[123]. I also note that the editors of Lewin discuss the requirements of actual notice in these terms, at 44-126:

“Actual notice includes actual knowledge. Actual notice no doubt also includes knowledge which would have been acquired but for wilfully shutting one’s eyes to the obvious, or wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. However notice is not confined to knowledge of this kind. Actual notice also includes a fact indicated by some document in the possession of the purchaser, whether or not read or remembered. A purchaser may be treated as having actual notice of interests in land through registration, though if he has actual knowledge of some matter which requires to be registered in order to be protected then he does not have notice.”

275. The parties were however in dispute as to whether this agreed position, as a matter of English law, was the same in relation to Jersey law. The First Defendant argued that, under Jersey law actual notice comprised, and only comprised *Baden* category (i); that is to say actual knowledge.

276. The other key issue between the parties, in terms of what was required by way of notice, was whether the case was one where actual notice was required or whether the case was one where either actual notice or constructive notice would be sufficient. On this issue and on the issue of what knowledge, as a matter of Jersey law, was required for actual notice, I read and heard a good deal of evidence from the experts and a good deal of argument from counsel.

277. I will take first the second of these issues, which occupied the lion’s share of the argument in this part of the case. The issue derives from various provisions of the 1984

Law (the Trusts (Jersey) Law 1984) which deal with notice. The first of these provisions is Article 33, which provides as follows:

> *"(1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be a trustee of that profit, gain, or advantage.*
>
> *(2) Paragraph (1) shall not apply to a bona fide purchaser of property for value and without notice of a breach of trust.*
>
> *(3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it.*
>
> *(4) This Article shall not be construed as excluding any other circumstances under which a person may be or become a constructive trustee."*

278. There is then Article 54, which provides as follows:

> *"(1) Subject to paragraph (2) –*
>
> *(a) the interest of a trustee in the trust property is limited to that which is necessary for the proper performance of the trust; and*
>
> *(b) such property shall not be deemed to form part of the trustee's assets.*
>
> *(2) Where a trustee is also a beneficiary of the same trust, paragraph (1) shall not apply to the trustee's interest in the trust property as a beneficiary.*
>
> *(3) Without prejudice to the liability of a trustee for breach of trust, trust property which has been alienated or converted in breach of trust or the property into which it has been converted may be followed and recovered unless it is in the hands of a bona fide purchaser for value without notice of a breach of trust or a person (other than the trustee) deriving title through such a person.*
>
> *(4) Where a trustee becomes insolvent or upon distraint, execution or any similar process of law being made, taken or used against any of the trustee's property, the trustee's creditors shall have no right or claim against the trust property except to the extent that the trustee himself or herself has a claim against the trust or has a beneficial interest in the trust."*

279. Finally, there is Article 55, which provides as follows:

> *"(1) A bona fide purchaser for value without actual notice of any breach of trust –*
>
> *(a) may deal with a trustee in relation to trust property as if the trustee was the beneficial owner of the trust property; and*
>
> *(b) shall not be affected by the trusts on which such property is held.*
>
> *(2) No person paying or advancing money to a trustee shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the propriety of the transaction or the application of the money."*

280. As can be seen, Article 55(1) provides protection for a bona fide purchaser for value who is without actual notice of a breach of trust. Article 54(3) provides protection in relation to a claim to recover trust property where a bona fide purchaser for value is without notice of the breach of trust, or is a person deriving title through such a purchaser. In the case of Article 54(3) any notice is sufficient. In the case of Article

55(1), the notice must be actual notice. Given the language of each Article, there is no obvious way of drawing a dividing line between claims which are within Article 54(3) and claims which are within Article 55(1). A case in point is the present case. So far as notice is concerned, is the position of the First Defendant governed by Article 54(3) or Article 55(1)? Is it sufficient for the First Defendant to demonstrate that it had no actual notice of the breach of trust, or must the First Defendant demonstrate that it had no notice of the breach of trust of any kind; actual or constructive?

281. Mr Miall contended that Article 54(3) was concerned with proprietary claims, while Article 55 was concerned with personal liability for breach of trust. He drew my attention to certain provisions of the Turks and Caicos Islands Trusts Ordinance (25 of 1990, as amended as at 1998), which he submitted had the same architecture as Articles 33, 54 and 55 of the 1984 Law and, by reason of what he submitted was their clearer drafting, brought out more clearly the distinction which he sought to draw between Articles 54(3) and 55(1). Mr Miall also referred me to what was said by Sir Robert Megarry in *Re Montagu's Settlement Trust*, at 276B-D and 277G, again in support of his distinction between proprietary claims and personal liability for breach of trust.

282. For his part Mr Morgan disputed that this distinction existed. His argument was that Article 55(1) qualifies the provisions of Article 33 and Article 54(3). In the case of a person dealing with a trustee who is a bona fide purchaser for value, that person is protected unless he has actual notice of a breach of trust.

283. I prefer the argument of Mr Morgan on this issue. Although, as I have said, I have read and heard a great deal of argument on this issue, and a good deal of expert evidence from the Advocates, I can express my reasons for this decision fairly briefly. In doing so I intend no disrespect to counsel or the Advocates. I have taken all of the arguments and evidence into account, but I do not regard a detailed review of these arguments and evidence to be necessary.

284. The starting point is that I am concerned with the construction of a statute. There was no authority identified to me which deals with this particular issue. In his addendum report, Advocate Passmore helpfully confirmed that Jersey law would approach the construction of a statute in the same way as English law. There is therefore no special rule of construction, particular to Jersey law, which needs to be applied.

285. While the reference to similar provisions in the Turks & Caicos legislation was interesting, I think that it is very difficult to draw any reliable conclusions from that legislation as to the meaning of the legislation of another jurisdiction. I am inclined to agree with the following blunt summary of the position provided by Mr Morgan in his closing submissions:

> *"Our short point, my Lord, is different wording, different jurisdiction, different point in time, and that limited assistance can be derived from a different statute in a different jurisdiction and a different point in time in trying to inform the court what the Jersey statute meant."*

286. Ultimately therefore, I have to consider the language of Articles 54(3) and 55(1), and to give effect to that language, as best I can. It seems clear to me that the purpose of Article 55(1) was to provide protection to persons dealing with a trustee in relation to trust property. This was achieved in four ways. First, such protection was provided to

bona fide purchasers. Second, such protection allowed the relevant person to deal with the trustee in relation to trust property, as if the trustee was the beneficial owner of the trust property. Third, such protection was made available to the bona fide purchaser for value without actual notice. The reference was not to any kind of notice, and clearly did not mean any kind of notice, given the difference in language in this respect between Article 55(1) and Article 54(3). The reference was to actual notice. Fourth, such protection was made available to anyone having dealings with a trustee in relation to trust property. The words *"deal with"* are very wide and, as it seems to me, are capable of applying to a wide variety of transactions and situations.

287. One can see good reason why an offshore jurisdiction such as Jersey might think it right to give a relatively high level of protection to persons dealing with trustees in relation to trust property, and might think it right to help in achieving this by requiring actual notice of the breach of trust, as opposed to any notice. Indeed, Article 55 is cited as an example of this kind of approach in various jurisdictions in Panico; International Trust Law (2nd Edition) at page 407.

288. By contrast, I cannot see how Article 55(1) can be said to be confined to situations of personal liability only. This is not what Article 55(1) says. It is widely drafted, and contains nothing which, in my view, can be relied upon as confining Article 55 to situations of personal liability for breach of trust only. It seems to me that if the language of Article 55(1) is to be given proper effect, as it must be, it falls to be construed as qualifying the provisions of Article 54(3) and Article 33. I agree with the point made by Advocate Passmore that if Article 55(1) is not read in this way, but is treated as giving way, effectively, to the lesser requirement of notice in Article 54(3), the protection which Article 55(1) was intended to confer on persons dealing with trustees in relation to trust property would seriously be undermined.

289. I accept that this construction of Article 55(1) does not sit easily with the provisions of Article 33 and Article 54(3). Given the width of the language in Article 55(1) it is not easy to see in what situations Article 33 and Article 54(3) will apply. In particular, in relation to the operation of Article 54(3), it seems inevitable, at least in most cases, that the bona fide purchaser for value referred to therein will be a person who has dealt with the trustee, within the meaning of Article 55(1). If the First Defendant is right in its argument, the requirement of actual notice in Article 55(1) must trump the requirement of notice in Article 54(3). Ultimately however I come back to the point that I cannot see how the language of these Articles allows one to draw the distinction between personal and proprietary claims which Mr Miall seeks to draw, either by reference to the language of these Articles, or by reference to the statutory provisions of another jurisdiction, or by reference to English trust law such as the analysis of Sir Robert Megarry in *Re Montagu's Settlement*.

290. I therefore conclude that the First Defendant is right on this particular issue. Article 55(1) qualifies the provisions of Article 33 and Article 54(3). In the case of a person dealing with a trustee who is a bona fide purchaser for value, that person is protected unless he has actual notice of a breach of trust. This protection is not confined to situations of personal liability for breach of trust.

291. Applying this conclusion to the present case, it seems to me that the present case is clearly one where Article 55(1) applies. The First Defendant was a party which dealt

with the trustee of the Loan Assets and, as I have decided, was a bona fide purchaser for value of the Loan Assets. As such, and applying my construction of Article 55(1), the First Defendant was entitled to deal with the trustee (Pinotage PTC and/or the Second Defendant in the case of the 2014 Trust) on the basis that it was the beneficial owner of the Loan Assets and without being affected by the fact that the Disposal was made in breach of trust, provided that the First Defendant can demonstrate that it had no actual notice of the breach of trust.

292. This leaves the shorter of the two issues concerning the type of notice required; namely whether actual notice includes *Baden* categories (ii) and (iii), as a matter of Jersey law. In this context Mr Morgan relied upon a decision of the Jersey Royal Court, *Midland Bank Trust Company v Federated Pensions* [1994] JLR 276, in which, so he submitted, the Jersey Royal Court had approved what was said by Sir Robert Megarry in *Re Montagu Settlements*, concerning actual notice being confined to actual knowledge; see the report of the case at pages 296 and 297. The *Midland Bank* case subsequently went on appeal, but the particular part of the decision to which I have just referred was left unaffected by the decision of the Jersey Court of Appeal. I was also referred, in this context, to the extract from Panico; International Trust Law, at 7.116, which I have already cited in the context of Article 55 of the 1984 Law. Mr Morgan relied upon the Panico extract as explaining the commercial justification behind Jersey law adopting a narrow classification of actual notice.

293. I was not persuaded that Jersey law differs from what the parties agree to be the position under English law in this respect. So far as the *Midland Bank* case is concerned, I do not think that the reference to *Re Montagu's Settlement* in that case can be taken as establishing any rule or principle of Jersey law that actual notice is confined to actual knowledge. I accept the point made by Mr Miall; namely that the relevant issue which was being considered, in the part of the decision upon which the First Defendant seeks to rely, was the question of whether the trustee could take advantage of a trustee exoneration clause in the trust deed, which stated that the trustee would not be liable for *"anything whatever other than a breach of trust knowingly and wilfully committed"*. It was in this context that the court, at pages 296 and 297 of the report, cited Sir Robert Megarry's discussion of the *Baden* categories in *Re Montagu's Settlement*. The court was not concerned with the meaning of actual notice in the context of the defence of bona fide purchaser for value without notice. I agree with Mr Miall that *Midland Bank* is not authority for the proposition that actual notice is confined to *Baden* category (i).

294. Nor do I consider that Panico assists on this particular point. One of the general points established by the expert evidence of the Advocates was that Jersey trust law, as a general rule, follows English trust law, unless Jersey statute or case law points to a different position. In the context of this particular issue, namely the content of actual notice in Jersey law, I cannot see any basis for departing from the agreed position under English law, namely that actual notice comprises the *Baden* categories (i), (ii) and (iii). By way of reminder, that means (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; and (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make.

295. I therefore conclude that the knowledge required for actual notice, as a matter of Jersey law comprises *Baden* categories (i), (ii) and (iii); that is to say (i) actual knowledge; (ii)

wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make.

296. I turn now to the facts of the present case. Applying the conclusions which I have already reached in this section of my judgment, the First Defendant was, by the Disposal, a bona fide purchaser for value of the Loan Assets. The First Defendant will not have been affected by the fact that the Disposal was (as I have found) made in breach of trust, if the First Defendant can demonstrate that it had no actual notice of this breach of trust. Actual notice means that the First Defendant either had actual knowledge of the breach of trust, or wilfully shut its eyes to this fact, or wilfully and recklessly failed to make such inquiries as an honest and reasonable man would have made. The First Defendant's knowledge and state of mind at the relevant time can and should, in my judgment, be taken as the knowledge and state of mind of Mr Emblin and Mr Reid at the relevant time.

297. I have already made a number of findings in relation to Mr Emblin and Mr Reid, in my discussion of whether the Disposal was made for an improper purpose. In particular, I have made the following findings:
    (1) At the time of and prior to the Disposal, Mr Emblin and Mr Reid did not know the true value of the Loan Assets. They did know that the Loan Assets could have had substantial value.
    (2) At the time of and prior to the Disposal Mr Emblin and Mr Reid knew that the purpose of the Disposal, as demonstrated by the existence of the Cap, was to pay the creditors without leaving any surplus for the Beneficiaries, so that the Trusts could be terminated.
    (3) In effecting the Disposal the principal purpose of each of the principal actors, whom I have identified as Mr Emblin, Mr Reid and Mr O'Shea, was to ensure that the consideration payable on the Disposal would leave no surplus for the Beneficiaries.

298. Other findings follow from these findings and from what was conceded by Mr Emblin and Mr Reid in cross examination. First, at the time of and prior to the Disposal, Mr Emblin and Mr Reid also knew or must be taken to have known that there was a real possibility that the Beneficiaries still had an economic interest in the assets in the Trusts. Second, at the time of and prior to the Disposal, Mr Emblin and Mr Reid also knew or must be taken to have known that the interests of the Beneficiaries were being disregarded in the Disposal, in the sense that, if the Beneficiaries did have any economic interest in the assets in the Trusts, this would not be reflected in the terms of the Disposal.

299. Mr Morgan sought to argue that Mr Emblin and Mr Reid had no reason to think, at the time of the Disposal, that the Disposal was being made for an improper purpose. His argument was that Mr Emblin and Mr Reid were entitled to take the view, and were in fact advised that it was legitimate to put the interests of the creditors first. On the facts of this case, I cannot accept this argument. It seems quite clear to me (and I so find), both from the evidence of Mr Emblin and Mr Reid and from the evidence of the contemporaneous documents, that neither Mr Emblin nor Mr Reid was or could have been satisfied that it was legitimate to disregard the interests of the Beneficiaries. The reality was that Mr Emblin and Mr Reid, in concert with Mr O'Shea, designed the Disposal in a way which would achieve what they wanted to achieve; namely payment

of the creditors and termination of the Trusts. The history of their dealings together demonstrates that they were looking for ways to justify their design of the Disposal, but I do not accept that any of them, at the time of the Disposal, considered that they had achieved a position where it was clear that the interests of the Beneficiaries could be disregarded in the Disposal.

300. Mr Morgan also argued that actual knowledge required evidence of knowledge on the part of Mr Emblin and Mr Reid that the Disposal was being made in breach of trust. In this context Mr Morgan argued that the allegation that Mr Emblin and Mr Reid had this knowledge, or any such knowledge falling within the first three *Baden* categories was a serious matter, which should have been put to Mr Emblin and Mr Reid in cross examination, but had not been. Mr Miall had two answers to this point. He contended, first, that what was required was knowledge of the facts which constituted the legal wrong in question, not knowledge that those facts did constitute the relevant legal wrong. As to the relevant facts, Mr Miall submitted that there had been proper cross examination. Second, he pointed out that the burden of proof in relation to this part of the case rested upon the First Defendant, so that it was for the First Defendant to prove, if it could, that Mr Emblin and Mr Reid had been unaware that the Disposal was being made in breach of trust, assuming that this was the level of knowledge required to constitute notice. Mr Miall contended that evidence of this kind had not been given by Mr Emblin and Mr Reid, with the consequence that there was nothing to challenge in cross examination in this respect.

301. On the question of whether and, if so, when it is appropriate to impute the legal consequences of facts to a party who is aware of the relevant facts, there is useful guidance to be found in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 [2012] Ch 453, at [102]-[108]. It is clear that such knowledge is not automatically to be imputed to a party. In the present case, it must also be kept in mind, in relation to the guidance in *Sinclair*, that I have decided that actual notice of the breach of trust was required. Constructive notice will not have been sufficient.

302. In the particular circumstances of the present case however I cannot see that the First Defendant can claim to have had no knowledge of the breach of trust, within the terms of the first three *Baden* categories. I say this for two related reasons.

303. First, it seems to me that Mr Miall is right to draw attention to the fact that the burden is upon the First Defendant to establish that the First Defendant did not have actual notice of the breach of trust. The evidence of Mr Emblin and Mr Reid was not presented on the basis that, while they may have known of the facts which constituted the breach of trust, they were unaware that those facts constituted a breach of trust. In those circumstances I find it difficult to see how Mr Miall can be criticised for cross examining Mr Emblin and Mr Reid on the basis of their knowledge of the facts which, as I have decided, constituted the breach of trust. Ultimately, I do not consider that it has been established, on the evidence, that this is a case where Mr Emblin and Mr Reid, despite being aware of the facts which constituted the breach of trust, were ignorant of the fact that these facts constituted a breach of trust.

304. Second, I am not convinced that the facts of the present case justify the separation which Mr Morgan sought to make between the facts which constituted the breach of trust, and the breach of trust itself. This does not seem to me to be a case of wilful

shutting of eyes or of wilful and reckless failure to make such inquiries as an honest and reasonable man would have made. The reason for this is that the eyes of Mr Emblin and Mr Reid were not shut, and there was no need to make the inquiries. I refer back to my findings on the question of whether the Disposal was made for an improper purpose, and to the narrative section of this judgment. It is clear from all the evidence that Mr Emblin and Mr Reid, on the one side, and Mr O'Shea, on the other side, did not deal at arm's length, as would have been the case in a normal sale transaction. Instead, as I find, Mr Emblin, Mr Reid and Mr O'Shea collaborated in the design of the Disposal and, in particular, in the design of the components of the Disposal which resulted, as I have found, in the Disposal being made for an improper purpose. Given this position, I think that Mr Miall was right in his submission that, at least on the facts of the present case, the actual knowledge which the First Defendant, by Mr Emblin and Mr Reid, was required to possess, in order to be fixed with actual notice, was knowledge of the facts which constituted the impropriety of the Disposal, as opposed to knowledge that the impropriety was, as a matter of Jersey law, a breach of trust.

305. One can test the matter this way. I have found that Mr Emblin and Mr Reid, in concert with Mr O'Shea, designed the Disposal in a way which would achieve what they wanted to achieve; namely payment of the creditors and termination of the Trusts. I have found that Mr Emblin and Mr Reid could not have been satisfied and were not satisfied that it was legitimate to disregard the interests of the Beneficiaries in this way. Given this state of knowledge it strikes me that it would have been perverse, if this had been the evidential position, that the First Defendant could have escaped being affected by the breach of trust which resulted from the design of the Disposal, on the basis of evidence from Mr Emblin and Mr Reid that they did not know that their design of the Disposal would constitute a breach of trust under Jersey law.

306. I therefore conclude, on the evidence in this case, that the First Defendant has failed to discharge the burden of demonstrating that it had no actual notice that the Disposal was made in breach of trust.

307. Drawing together all of the discussion in this section of this judgment, I conclude that the defence of bona fide purchaser for value without notice is not available to the First Defendant. I accept that the First Defendant was a bona fide purchaser for value of the Loan Assets. I do not accept that the First Defendant was such a purchaser without notice of the breach of trust. I conclude that the First Defendant is affected by the fact that the Disposal was made in breach of trust.

Was the Disposal void or voidable?

308. I have found that the power of disposal which existed under the Trusts was exercised for an improper purpose. I now turn to the question of whether this rendered the Disposal void or voidable.

309. In contending that the Disposal was thereby rendered void, the Claimants relied upon *Cloutte v Storey* [1911] 1 Ch 18. The case concerned a marriage settlement. Under this marriage settlement the husband and wife, after successive life interests to themselves, had a joint power of appointment over personal property vested in the trustees of the settlement in favour of the issue of their marriage. The husband and wife appointed a sum out of the settlement to the eldest of their seven children, subject to their own life interest. The son then mortgaged the appointed sum to secure an

immediate sum to himself. The parents then appointed to the same son the whole of the residue of the wife's reversionary interest, subject to the previously appointed sum. The son then sold both of these appointed sums, with the interest in both sums ultimately ending up in the hands of the defendants. Both appointments were made on a secret arrangement between the parents and their son, for the benefit of the parents and were, to use the language of the time, frauds on the power of appointment. The purchasers of the appointed sums had no notice of the fraud on the power, and did not have the legal title to the sums. Two of the children, who would have had an entitlement to the sums which were the subject of the appointments, claimed a declaration that the appointments were void.

310. Neville J decided that the appointments were void. His decision was upheld in the Court of Appeal. The substantive judgment in the Court of Appeal was given by Farwell LJ, with whom Cozens-Hardy MR and Fletcher Moulton LJ agreed. The core of the reasoning of Farwell LJ on this question can be found on page 31 of the report:

> *"Any questions of a fraud on the power would be for equity only : Sugden on Powers, 8th ed., pp. 602 and 606. In such a case the appointee would have the legal estate, and it would be necessary to set aside the appointment in order to get rid of the legal estate which had passed thereunder; and in an action for that purpose the plea of purchase for value without notice passing the legal estate would be a good defence: M'Queen v. Farquhar.(l)~ But in equity the appointment is void, not voidable : see Duke of Portland v. Topham (2), where the order of the Court of Appeal was affirmed by the House of Lords, and in the second case of Topham v. Duke of Portland (3) ; although by reason of the immateriality of the distinction in equitable transactions " voidable " is sometimes used when " void " would be more accurate. The difference is apparent on comparing the order of the Court of Appeal in Topham v. Duke of Portland (3) (Seton, p. 1742) declaring simply that the fraudulent appointment is void with that in cases of deeds procured by fraud at p. 2312, directing the deeds to be set aside and delivered up to be cancelled. If an appointment is void at law, no title at law can be founded on it; but this is not so in equity: the mere fact that the appointment is void does not prevent a Court of Equity from having regard to it: e.g., an appointment under a limited power to a stranger is void, but equity may cause effect to be given to it by means of the doctrine of election."*

311. Farwell LJ continued in the following terms, at pages 31 and 32 of the report:

> *"The law may be stated thus: an appointment under a common law power, or a power operating under the Statute of Uses by which the legal estate has passed, is voidable only, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power; but an appointment in fraud of an equitable power, i.e., not operating so as to pass the legal estate or interest, is void, and a purchaser for value without notice but without the legal title can only rely on such equitable defences as are open to purchasers without the legal title who are subsequent in time against prior equitable titles. In the present case the children. have vested equitable estates or interests in remainder expectant on their surviving parents' death; the appointment purports to interpose an equitable estate or interest in priority thereto; both are of the same nature, and the argument founded on Phillips v. Phillips (1) does not arise, nor is there anything in Carver v. Richards (2)*

opposed to this view: it is true that in that case the estates were limited to uses, but nothing turned on the legal estate: the question was whether the third appointment (which was unobjectionable, and was to the same appointees as the two first) was effectual in equity; it was immaterial whether the legal estate had passed by the former appointments or by the third, and the question was therefore not discussed."

312. On the authority of *Cloutte v Storey* Mr Miall submitted that the Disposal was void, so far as it purported to transfer the beneficial interest in the Loan Assets. So far as the legal estate in the Loan Assets was concerned, Mr Miall accepted that the Disposal was effective to vest the legal title to the Loan Assets in the First Defendant, but not the beneficial interest, which remained with the Beneficiaries. In the case of the 2014 Trust the question of what happened to the legal estate on the Disposal did not arise. It will be recalled that the legal estate in the assets in the 2014 Trust was not settled into the 2014 Trust. Mr Miall relied upon *Foskett v McKeown* [2001] AC 102 for the proposition that, if the Disposal was void, the Beneficiaries had an absolute proprietary right to the beneficial interest in the Loan Assets. There was no discretion for the court to exercise. The Beneficiaries simply retained the beneficial interest and were entitled to call upon the First Defendant to revest the legal estate in the Loan Assets, so far as transferred by the Disposal. As Lord Millett explained, at 127E-F:

"Having completed this exercise, the plaintiffs claim a continuing beneficial interest in the insurance money. Since this represents the product of Mr Murphy's own money as well as theirs, which Mr Murphy mingled indistinguishably in a single chose in action, they claim a beneficial interest in a proportionate part of the money only. The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no "unjust factor" to justify restitution (unless "want of title" be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair, just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property."

313. I did not understand Mr Miall's analysis of the position to be in issue, if the transfer of the beneficial interest in the Loan Assets (**"the Beneficial Interest"**) was void. The issue, which was contested at length, in very great detail, and with an impressive degree of legal scholarship, was whether the transfer of the Beneficial Interest was void. This in turn resolved into a dispute over whether *Cloutte v Storey* should be followed. The First Defendant contended that it should not, either because it could be distinguished, or because it was wrongly decided. Ordinarily, it would not have been open to me to decide that *Cloutte v Storey*, a decision of the Court of Appeal, was wrongly decided, but I am deciding whether the transfer of the Beneficial Interest was void as a matter of Jersey law. As such, the case is not directly binding upon me, unless it represents the settled law of Jersey.

314. Starting with a textbook reference, the editors of Lewin, in their discussion of fraud on a power, say this, at 30-067:

"The term "fraud" in this context does not necessarily denote any conduct on the part of the donee amounting to fraud in the common-law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.[259] *Such an exercise is void.*[260]*"*

315. The footnoted reference, under footnote 260, is to 30-090, where the editors say this:

"As the authorities now stand, an exercise of a power which is vitiated as a fraud on a power is void in equity,[337] ***e.g.*** *(in the case of a dispositive power) it does not alter the beneficial interests; it is not merely voidable,* ***e.g.*** *an exercise which does have such an effect though it can be set aside on application by those interested in the trust. The exercise is outside the scope of the power and is treated as not having taken place. Hence an assignee from an appointee under a fraudulent appointment will rank behind those entitled to challenge the exercise, unless he can raise a recognised equitable defence.*[338] *If a power in a pension trust to make a transfer payment is exercised fraudulently, only the legal and not the beneficial interest in the funds transferred passes to the recipient trust.*[339] *It has been said that the rule that a fraudulent appointment is void may have to be revisited;*[340] *but it remains binding at all levels below the Supreme Court.*[341]*"*

316. The first of the footnoted cases, under footnote 340, is *Pitt v Holt* [2013] UKSC 26 [2013] 2 AC 108. In that case Lord Walker, further to previous expressed judicial doubts as to the reasoning of Farwell LJ, said this at [62]:

"62 There is Court of Appeal authority that a fraudulent appointment is void rather than voidable: Cloutte v Storey [1911] 1 Ch 18. In that case the appointee under an improper appointment had charged his equitable interest as security for a loan (and in doing so made two false statutory declarations as to the genuineness of the appointment). It was held that the lender had no security, even though it had no notice of the equitable fraud. It is an authority which has bedevilled discussion of the true nature of the Hastings-Bass rule. Lightman J in Abacus Trust Co (Isle of Man) v Barr [2003] Ch 409, para 31 found the judgment of Farwell LJ problematic and Lloyd LJ shared his reservations [2012] Ch 132, para 98. So do I. It is hard to know what to make of Farwell LJ's observations [1911] 1 Ch 18, 31:

> *"If an appointment is void at law, no title at law can be founded on it; but this is not so in equity: the mere fact that the appointment is void does not prevent a Court of Equity from having regard to it: e g, an appointment under a limited power to a stranger is void, but equity may cause effect to be given to it by means of the doctrine of election."*

The decision in Cloutte v Storey may have to be revisited one day. For present purposes it is sufficient to note that a fraudulent appointment (that is, one shown to have been made for a positively improper purpose) may need a separate pigeon-hole somewhere between the categories of excessive execution and inadequate deliberation."

317. In this context my attention was also drawn to an article written by Sir Robert Walker, as he then was, in Private Client Business (P.C.B. 2002, 4, 226-240), in which Sir Robert was discussing *Re Hastings-Bass (Deceased)* [1975] Ch 25. In the course of

this article Sir Robert considered *Cloutte v Storey*. Sir Robert noted the considerable practical importance of whether the exercise of a power was void or voidable, given that if the exercise is merely voidable, *"all the restrictions appropriate to the equitable remedy of recission would come into play, including delay and the acquisition of third party rights"*. Commenting on the judgment of Farwell LJ in *Cloutte v Storey*, Sir Robert noted that *"It is not easy to find one's way through this thicket"*, but then moved on in his discussion without resolving what he described as *"the problem"*.

318. So far as English law is concerned, the decision in *Cloutte v Storey* remains, so far as I am aware, un-revisited. Turning to Jersey authority, there has been no case in which *Cloutte v Storey* has been directly considered. In *Crociani v Crociani* [2018] JCA 136A the Jersey Court of Appeal made reference to *Cloutte v Storey* at [149], in the following terms:

> *"149. Cloutte v Storey [1911] 1 Ch 18 is a decision of the Court of Appeal of England and Wales that establishes that an appointment resulting from a fraud on the power is void in equity, not voidable – a conclusion that, although not universally accepted, we are content for the purposes of this judgment to accept. The case concerned a claim by a purchaser of a reversionary interest to have acquired title to the interest as a bona fide purchaser for value of it without notice of the fact that the interest had been appointed to the vendor in breach of trust. The claim failed because the interest acquired by the purchaser was an equitable interest, not a legal estate. The terminology of the leading judgment, delivered by Farwell LJ, is founded on the distinction between legal and equitable interests that is a product of the development of English law and has no direct parallel in Jersey law, and for present purposes is further complicated by the fact that the judgment relates to the law as it stood before the 1925 property legislation, including the Trustee Act 1925. It nevertheless appears to us that the following passage from the judgment of Farwell LJ at pages 30-31 draws precisely the distinction between an appointment that involves the passage of title to a trust asset and one that does not is relevant in the present case:"*

319. The Jersey Court of Appeal then went on to quote a lengthy passage from the judgment of Farwell LJ, at pages 30-31 of the report in *Cloutte v Storey*, which I have also quoted above. Reference to *Cloutte v Storey* was also made by the Jersey Royal Court in *Crociani v Crociani* [2017] JRC 146, at [345], where the court said this:

> *"345. An excessive execution, being outside the scope of the trustees' powers, is void (Lewin 29-240) and as the English authorities now stand, a power which is vitiated as a fraud on the power is void in equity. That authority is Cloutte v Stroey [1911] Ch 18, which Lord Walker at paragraph 93 of Pitt v Holt described as a difficult case without overruling it, but none of the parties before us sought to argue that we should not follow it. Article 47(H) of the Trusts Law allows the Court to declare the exercise of the power as voidable and having such effect as the Court may determine, or as having no effect from the date of its exercise."*

320. In *Re Bird Charitable Trust* [2008] JLR 1, the Jersey Royal Court considered the question of what constitutes a fraud on a power. At the outset of its summary of the law, the court quoted a statement from Thomas & Hudson; The Law of Trusts

(paragraph 19:01) to the effect that where there is excessive execution in respect of a power, the exercise of the power is not simply excessive, but fraudulent and void. In *Representation of Z Trusts* [2015] JRC 196C, the Jersey Royal Court, at [26], set out a series of principles governing the exercise of fiduciary powers, which had been submitted by one of the Advocates in the case. The first of these principles was stated in the following terms:

> *"(i) An exercise of a power to appoint a new trustee which is a fraud on the power is void: Lewin on Trusts at 14-067; Re Bird Charitable Trust at paragraph 71."*

321. So far as I can see none of the above Jersey cases involved a direct consideration of whether *Cloutte v Storey* was correctly decided or not. Instead, the courts were prepared, in the absence of contest on the point, to proceed on the basis that the case represented the law. Indeed, in the *Crociani* litigation there is a decision of the Privy Council (*Crociani v Crociani* [2014] UKPC 40), in which the Privy Council, at [41] made reference to a number of issues of Jersey trust law which were raised by the proceedings. They included *"the correctness of Cloutte v Storey"*. The Privy Council did not however have to decide this particular issue.

322. So far as the experts were concerned, they were agreed that whether the exercise of a power that is vitiated as a fraud on the power is void or voidable is currently not settled under Jersey law, and that the position was currently reflected in the English case law to which a Jersey court might refer in considering this issue; see paragraph 12 of the joint statement of the experts. I do not find it necessary to go further into the expert evidence on this issue. In the light of what is agreed between the experts, it seems to me that the question is primarily one for submissions, rather than expert evidence of Jersey law.

323. Mr Miall sought to persuade me that there was an evidential presumption to be applied that Jersey law was, in this respect, the same as English law. For this purpose he sought to rely upon *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45 [2022] AC 995, where Lord Leggatt JSC considered at some length the presumption of similarity in relation to foreign law. The basic presumption was explained by Lord Leggatt in the following terms, at [108]:

> *"108. Historically, the rule on which the claimant relies has been expressed as a presumption that, in the absence of evidence to the contrary, foreign law is presumed to be the same as English law. For example, in Dynamit AG v Rio Tinto Co Ltd [1918] AC 260, 295 , Lord Dunedin said:*
>
> > *"I am clear that it is for those who say that the German law is different from the English to aver it as fact and to prove it. This they have not done, and that being so the German law must be presumed to be the same as the English."*
>
> *In the same case Lord Parker of Waddington said at p 301: "Until the contrary be proved, the general law of a foreign state is presumed to be the same as the law of this country." Many statements to similar effect can be found in the case law. To give one other, more recent example, in Bumper Development Corpn v Comr of Police of the Metropolis [1991] 1 WLR 1362, 1368F, Purchas LJ giving the judgment of the Court of Appeal said:*

"It is trite law that foreign law in our courts is treated as a question of fact which must be proved in evidence. In the absence of any evidence to the contrary, it is to be assumed to be the same as English law."

324. Lord Leggatt reviewed the criticisms which had been made of this presumption, and the limitations of its operation. He summarised the position, in terms of the limits of the presumption, in the following terms, at [126]:

"126. These factors provide good pragmatic reasons for applying the presumption in a range of cases, but they also determine its proper limits. There is no warrant for applying the presumption of similarity unless it is a fair and reasonable assumption to make in the particular case. The question is one of fact: in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning that any differences between the two systems are unlikely to lead to a different substantive outcome)?"

325. The facts of the present case are very different to *Brownlie*. In the present case there is ample evidence of the state of Jersey law, both from the experts and from the researches of counsel. In addition to this, the experts are agreed that the position is not settled in Jersey law, on the question of whether a fraud on a power is void or voidable. In these circumstances I can see no room for the operation of a presumption that *Cloutte v Storey* should have the same status under Jersey law as it has under English law; that is to say a binding decision of the Court of Appeal, unless it can be shown to be distinguishable. It may be that this is the position, as a matter of Jersey law, but I do not think that this position can be achieved by the operation of any presumption.

326. This therefore clears the way to consider the arguments of the First Defendant that the decision in *Cloutte v Storey* is either distinguishable, or wrong, or at least rests on questionable foundations; sufficient to justify a Jersey court in not following the decision. The arguments of the First Defendant in this context were ably presented by Mr Lewison. Given that Mr Lewison's submissions, quite reasonably, did not observe a rigid demarcation line between the questions of whether *Cloutte v Storey* rested on insecure foundations, or was wrong, or was distinguishable, I will take the submissions as a whole, before coming to my answer to these various questions Before doing so I also remind myself, in particular, of what was said by Lloyd LJ, in the Court of Appeal in *Pitt v Holt*, at [98]:

"I confess that I do not find everything in Farwell LJ's judgment on this point as cogent as that judge's decisions so often are. I share the reservations expressed on this by Lightman J: see para 87 above. It is not necessary to go into the point in more detail for present purposes, but although we are bound to hold that the effect of an appointment being found to have been made in fraud of the relevant power is that it is void, not merely voidable, I am not willing to apply that decision more extensively, by analogy, to cases to which it does not relate directly as a matter of decision."

327. Consistent with this, Mr Lewison submitted that the reach of *Cloutte v Storey* was limited. He referred me specifically to the way in which Farwell LJ summarised the law, at pages 30 and 31. His argument was that, in the case of the 2011 Trust and the 2012 Trust, legal title to the Loan Assets had passed. In such circumstances, and applying Farwell LJ's own statement of the law, the Disposal was voidable, not void, in

relation to the 2011 Trust and the 2012 Trust. In the present case the powers of appointment which were exercised were legal powers, by which the legal estate passed, in the cases of the 2011 Trust and the 2012 Trust. As such, and again applying Farwell LJ's own statement of the law, the Disposal was voidable, not void, in relation to these two Trusts.

328. Beyond this, Mr Lewison submitted that *Cloutte v Storey* rested on insecure foundations. He started by referring me to two cases, *Campbell v Home* (1842) 62 ER 1062 and *Wellesley v Mornington* (1855) 69 ER 728. His submission was that each of these cases supported the proposition that the exercise of a fiduciary power for an improper purpose was seen as voidable rather than void. Taking the cases in chronological order, *Campbell* involved the appointment of a fund by a widow and the assignment of her own life interest in the fund to her eldest child, although the actual dispute in the case appears to have concerned the question of whether the trustee, who had refused to transfer the relevant fund pursuant to the appointment and the assignment, could have his costs of litigating that question. The appointment and the assignment were upheld as valid by the Vice-Chancellor (Sir J.L. Knight Bruce), on the basis that there was no evidence of fraud, or mistake, or misconduct in the exercise of the power of appointment. As such, the trustee was refused his costs. The particular extract from the report of the Vice-Chancellor's judgment upon which Mr Lewison fastened was in the following terms:

> *"If it can ever be shewn that this deed was executed from improper motives, those who are interested in doing so can apply to set it aside. There is nothing whatever to justify this Court in not giving effect to it at present."*

329. In *Wellesley* the court was again considering the question of whether the exercise of a power of appointment constituted a fraud on a power. The Vice-Chancellor (Sir W. Page Wood) concluded that the relevant appointments could not stand, for the reasons given in his judgment. The Vice-Chancellor concluded his judgment in the following terms:

> *"Holding, therefore, as I do, that the appointment has been made by Lord Mornington, not for the benefit of his son but for his own benefit, it seems to me consistent with the whole class of authorities, and to follow the principle of the class of authorities in which the object of the power was capable of entering into a bargain with the father, which this unfortunate gentleman was not, to hold that this is a fraud upon the power, that it is an exercise of the power by which the father endeavoured to obtain a benefit for himself, which of course the Court will not allow him to retain; and the consequence is that the deeds must be set aside, and Lord Mornington must pay the costs of this suit."*

330. Mr Lewison concentrated this part of his submissions however on *Preston v Preston* (1869) 31 LT 346, which was another case where the exercise of powers of appointment and, in that case, a deed of confirmation were subject to challenge. In his judgment Lord Romilly MR said this:

> *"This brings me to the consideration of the effect of the deed of the 1st Jan. 1854, and this raises two questions: Was this a transaction capable of confirmation? and, if it was, has it been confirmed? On the first question I think it clear that the appointment was not ipso facto void, but that it was only voidable. As the appointments stand alone on the deed polls they are good and valid; it is only the discovery of the purpose for which they were made that renders them invalid and*

this purpose must be proved by the persons who seeks to impugn the appointments. I therefore hold it to be clear that they were only voidable and consequently that they were capable of being confirmed. The next question is, Has this deed of the 1st Jan. 1854 [the deed of confirmation]*, confirmed these two appointments? I have no doubt that it has, provided that it has been duly executed by every person who is a party thereto understanding its true purport and effect."*

331. *Preston v Preston* was relied upon by counsel for the defendants in *Cloutte v Storey*; see the report of the argument (at first instance) in the case, at page 23. In deciding that the relevant appointments were void as being in fraud of the power, Neville J distinguished what Lord Romilly said on the basis that, in *Preston v Preston*, the decision of the Master of the Rolls on the question of whether the appointments were void or voidable was not actually necessary to his decision; see page 25 of the report. In the Court of Appeal in *Cloutte v Storey* counsel for the defendants again relied on *Preston v Preston*, in support of their argument that the appointments were voidable, and not void. According to the report of the argument, at page 27, Farwell LJ intervened in response to the reference to *Preston v Preston* to make reference to the form of order which was made in *Topham v Duke of Portland* (1869) LR 5 Ch 40 as set out in Seton on Judgments (6th Edition), at page 1742. I was provided with what I understood to be the equivalent extract from the 7th Edition of Seton, which contains a form of declaration where the exercise of a power of appointment is to be set aside as a fraud on a power. The form of the declaration is that the exercise of the power of appointment is void, not voidable. I assume that, in the relevant part of the argument in *Cloutte v Storey*, Farwell LJ was drawing attention to a form of declaration in the same terms in the 6th edition of Seton.

332. So far as the actual judgment of Farwell LJ was concerned, his Lordship returned, in his judgment, to the subject matter of his intervention in the argument. The relevant part of the judgment is at page 31 of the report, and I have already set it out. I repeat it however, for ease of reference:

"But in equity the appointment is void, not voidable : see Duke of Portland v. Topham (2), where the order of the Court of Appeal was affirmed by the House of Lords, and in the second case of Topham v. Duke of Portland (3); although by reason of the immateriality of the distinction in equitable transactions " voidable " is sometimes used when " void " would be more accurate. The difference is apparent on comparing the order of the Court of Appeal in Topham v. Duke of Portland (3) (Seton, p. 1742) declaring simply that the fraudulent appointment is void with that in cases of deeds procured by fraud at p. 2312, directing the deeds to be set aside and delivered up to be cancelled."

333. Mr Lewison's argument in this context was that *Preston v Preston* could not be disposed of in this way. All that Farwell LJ was relying upon was a form of order in a textbook, based on an order made in other cases in the Court of Appeal. The relevant cases were *Duke of Portland v Topham* (House of Lords reference - (1864) 11 ER 1242 (HL)) and *Topham v Duke of Portland* (1869-70) LR 5 Ch App 40). The submission was that the reasoning which resulted in the relevant order being made in each case was unknown.

334. Mr Lewison referred back to the suggestion by Lord Walker, in *Pitt v Holt*, that an appointment made for an improper purpose might need a separate pigeon-hole, somewhere between the categories of excessive execution and inadequate deliberation. Mr Lewison suggested that the critical distinction between the two categories of excessive execution and inadequate deliberation lay in what an outsider could see. In the case of excessive execution an outsider can look at the terms of the relevant power and the relevant exercise, and see whether the exercise has been in excess of the power, and is thus void. In a case of inadequate deliberation the relevant question is the state of the trustee's mind, which the outsider cannot see. In cases of inadequate deliberation, and Mr Lewison submitted that *Cloutte v Storey* was such a case, the relevant appointment should be treated as voidable.

335. In general support of his arguments Mr Lewison drew an analogy with the company law position. Mr Lewison relied, in particular, upon the judgment of His Honour Judge Russen KC (sitting as a Judge of the High Court) in *Stobart Group Ltd v Tinkler* [2019] EWHC 258 (Comm), where Judge Russen KC ultimately concluded that the transgression by the directors of a company of what he described as the proper purposes rule resulted in the relevant act of the directors being voidable, not void; see the judgment at [481]. The judge did briefly consider *Cloutte v Storey* in his judgment but, as it was not directly in point, did not carry out any detailed analysis. The judge's comments on *Cloutte v Storey*, at [474]-[475] are however valuable, and should be set out:

> *"474. Having further reflected on the void versus voidable point for the purposes of this judgment, I can see that my tentative observation during closing submissions was not entirely misplaced: see Cloutte v Storey [1911] 1 Ch 18, 31, per Farwell LJ (where, unlike Neville J in the court below, the judge refrained from citing his own leading textbook on powers). In that case, the power which had been exercised on the back of a secret arrangement between appointor and appointee was an equitable one (not capable of passing the legal interest in the property which was still held in reversion but instead a "mandate to the trustees") and its fraudulent exercise meant the appointment was void, as there was no transfer to be set aside or cancelled. However, the Court of Appeal held that "an appointment under a common law power, or a power operating under the Statute of Uses by which the legal estate has passed, is voidable only, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power." The reference to a common law power in this context must be a reference to one by which the person holding the power (or his or its agent for the purpose) can convey the legal estate, in contrast to the fiduciary power – the discretionary dispositive power – which a trustee has under a power of appointment. The discussion of Cloutte v Storey in Pitt v Holt, Futter v Futter [2012] Ch 132, [96]-[101], where Lloyd LJ was "not willing to apply that decision more extensively, by analogy, to cases to which it does not relate directly as a matter of decision", makes it clear that it is only in the latter case that a disposition outside the scope of the trustee's discretionary power to benefit one or more objects of the power (because of some fraud on the power) will be void.*
>
> *475. But I have not had the benefit of submissions from the parties upon Cloutte v Storey (or Pitt v Holt) and the equitable principles as applied to powers*

of appointment and the facts of that case are some considerable distance away from the actions of the Four Directors in transferring the Treasury shares or dismissing Mr Tinkler. As Mr Taylor QC did not offer resistance to my tentative observation as to what appeared to come out of Eclairs v JKX on the void versus voidable point, and indeed Mr Tinkler accepts that the transfer of shares to the EBT should stand (i.e. be regarded as legally effective) at least for some purposes, I have therefore not thought it necessary to invite their further submissions on the application of those principles in the noncorporate context."

336. It seems to me that there are a number of difficulties with the arguments advanced by Mr Lewison. I start with the question of whether *Cloutte v Storey* can be distinguished in the present case, on the basis that the Disposal engaged the transfer of the legal title to the Loan Assets in the 2011 Trust and the 2012 Trust and/or on the basis that the Disposal involved the exercise of common law powers of appointment. I must confess that, in common with far more distinguished legal minds than my own, I have had some difficulty in following the reasoning of Farwell LJ in *Cloutte v Storey*, at pages 30-32 of the report and, in particular, in following the distinction drawn between an appointment under a common law power and an appointment in fraud of an equitable power; *"not operating so as to pass the legal estate or interest"*.

337. In this context I have however found useful the discussion of this area of the law by the editors of Snell, in chapter 10. The editors' discussion seems to me to provide a valuable guide through this particular legal *"thicket"* (to borrow Sir Robert Walker's expression). In their discussion of powers in chapter 10, at 10-31, the editors consider the consequence of acting outside the scope of a power:

"If a power is purportedly exercised beyond its scope, the purported exercise is in principle a nullity, and any action taken pursuant to such a purported exercise of a power will be ipso facto beyond its scope and amount to a breach of duty (unless otherwise justified) with all the consequences that flow from such a breach.[140] However, the operation of equitable defences may preclude a particular claimant from successfully making such an allegation and so give some effect to the purported exercise of the power. Furthermore, other rules of law may well apply to the acts which constitute the purported exercise of the power, and those rules may mean that the acts have some legal effect or consequences. Some examples serve to make these points clearer."

338. The editors then consider the position, in relation to directors' dealings, at 10-032:

"The same principles apply in the context of directors' dealings; but their application is affected and shaped by the different context. Directors act as agents for their company in bringing about corporate transactions[146]: they are not trustees in the sense that they do not own property for the benefit of the company.[147] Once again, acts of a director beyond his authority are prima facie void, not voidable, though various rules of law may nevertheless render those acts binding on the company. But in certain cases, for very specific reasons, the transaction is voidable rather than void.[148] So, where a director makes a contract that is beyond his authority, it does not bind the company unless by operation of law, most likely through the doctrine of ostensible authority.[149]

Where the director abuses his powers in purporting to make a contract, the abuse is still relevant to the existence of his authority, though not in quite the same

way.[150] If the counterparty to the purported contract knows about, or is put on inquiry as to, the director's bad faith or improper purposes, the purported contract does not bind the company[151]: it is then void, not voidable.[152] Otherwise, a contract made within the terms of the director's authority will bind the company, even though the director acted in bad faith or for improper purposes.[153] But in those circumstances the director cannot have actual authority to bind the company, because such action is not lawful as between the director and the company:

> *"[a]ctual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it."[154]*

Nevertheless, the counterparty's rights do not necessarily stem from the doctrine of ostensible authority. Unless the counterparty knows of the director's breach of duty, or is put on inquiry about it, the counterparty is allowed to proceed on a footing (contrary to the facts) that the director still had actual authority at the relevant time.[155] Of course, the counterparty may still put forward an alternative case based on the director's ostensible authority.[156]"

339. The editors then deal with the particular position in relation to an allotment of shares, at 10-33:

"The seeming exception to these principles concern improper exercises of directors' powers to allot new shares.[157] In those cases, the improper exercise of the directors' powers has been held voidable, rather than void. But on closer examination, these cases are perfectly consistent with principle. Any exercise of that power operates to create an asset recognised as the object of legal property rights (i.e. shares).[158] Equitable doctrine has nothing to say about the nature and scope of a statutory power. Once the statutory power is exercised, and in consequence a person is put on the register of members, he becomes a member of the company, again by virtue of statute,[159] even though the directors' decision *(as distinct from their action) to allot and issue the shares would be void as taken in breach of fiduciary duty.[160] Equally, equity cannot remedy the situation by continuing to recognise a pre-existing equitable right to the shares, in order to justify reversing the transaction at law: there neither was, nor could be, any such right because the shares are a new item of property created by the allotment and issue. Nor can equity treat the shares as property improperly lost to the company and consequently held on trust for it: the shares never were, and never could lawfully be, issued to the company.[161] So the best equity could do was to hold that the transaction could be reversed—that is, to render it voidable.[162]*

In fact, this is the consequence precisely presaged in Cloutte v Storey.*[163] That case considered (albeit strictly obiter) the exercise of a power to appoint a legal estate in land, as was possible before 1926,[164] rather than a power to allot and issue shares. Still, the key point for present purposes is that Farwell LJ explicitly addressed the improper exercise of a* legal *power—a power which operates to create a legal proprietary interest. He confirmed that such an exercise of the power would be* voidable*: as a matter of authority, equitable doctrine did not go to define the scope of the power, so equity had to recognise the effect of the power to create new legal property and then reverse that effect."*

340. The editors conclude their discussion of the consequences of acting outside the scope of a power, at 10-033, in the following terms:

> *"The principle, therefore, is this. The basic response of equitable doctrine to a fiduciary who acts beyond the scope of his power is to regard his decision, and his consequent action, as a nullity, but only in so far as that is possible given the context. Sometimes the scope of a power is not limited by equitable doctrine: for example, where the power is conferred by statute. Sometimes a power may allow the creation of new legal property. If a power has both of these characteristics, and it is exercised within its terms, it will create new legal property. Even if the power was exercised improperly by equitable standards, those standards do not limit its scope and effect at law. So a court cannot ignore what has happened; nor can it treat the property as subject to continuing rights or rights raised in favour of former owners. All it can do is to render what has happened voidable."*

341. It seems to me that this discussion supports the Claimants' argument that, in the present case, what matters is the transfer in equity of the Beneficial Interest. The transfer of the legal title to the Loan Assets, so far as it took place pursuant to the Disposal, might be voidable, but the transfer of the Beneficial Interest was void. In other words, and using the language of Snell, the present case is not one where equitable doctrine did not go to define the scope of the power, with the consequence that the present case is not one where equity has to recognise the effect of the power to create new legal property, and then reverse that effect.

342. While I have not found this an easy matter to decide, I therefore arrive, with some hesitation, at the conclusion that the relevant principle which emerges from *Cloutte v Storey* is not one which can be distinguished in the present case. As a matter of English law it seems to me that *Cloutte v Storey* binds me in the present case.

343. This is not of course the end of the matter, because there is still the question of whether *Cloutte v Storey* was wrongly decided, or at least rests on shaky foundations, with the consequence that Jersey law should not and would not follow this decision.

344. So far as *Campbell* and *Wellesley* are concerned, I do not think that they can be regarded as undermining the decision in *Cloutte v Storey*. So far as the reports of these cases disclose, the court was not being called upon to decide the void/voidable issue in either of these cases. The language of setting aside in these two cases might equally well have been used to express the conclusion that the relevant appointments were void, not voidable. The point does not appear to have been in issue, and was not articulated in either of the judgments.

345. *Preston v Preston* falls into a rather different category, given that it contains a statement by Lord Romilly MR which appears to be at odds with the relevant part of the judgment of Farwell LJ. The difficulty here however is that *Preston v Preston* was cited to Farwell LJ in *Cloutte v Storey*. His reaction to the decision can be seen in the report of the argument in the Court of Appeal, and in his reference to the *Topham* decisions in his judgment (page 31 of the report). There is therefore no question of Farwell LJ giving his decision in ignorance of *Preston v Preston*. Beyond this, in referring to the *Topham* decisions, Farwell LJ was referring to (i) a decision of the House of Lords which had affirmed the decision of the Court of Appeal that a deed of appointment was void, having been made for an improper purpose, and (ii) a decision of the Court of Appeal which had affirmed the decision of the Vice-Chancellor that a further deed of appointment was also void as a fraud on a power. These *Topham* decisions do not

appear to have been cited in *Preston v Preston*, although an earlier case, *Topham v Duke of Portland* (1862) 31 Beav 525, is referred to in the judgment of Lord Romilly MR (page 348 of the report). This earlier case was not however concerned with the void/voidable issue.

346. It also interesting to note that in *Vatcher v Paull* [1915] AC 372 the Privy Council, after explaining the concept of fraud on a power, as it was then known, recorded the following position, at page 380:

> *"In the Courts below the question of the validity of the appointment was a question of fact to be determined on evidence. On the evidence before them those Courts could come to no other conclusion than that the appointment was void as constituting a fraud on the power. Their Lordships, however, have to determine the question as a question of law independent of the evidence which was before the Courts below, and in their opinion the appointment was in all respects a good and valid appointment within the scope and intention of the power and cannot be impeached as constituting a fraud thereon."*

347. The concept of a fraud on a power being void is not one which appears to have troubled the Privy Council, who were hearing a Jersey appeal, in *Vatcher v Paull*. While this decision postdated *Cloutte v Storey* by a few years, it might be thought to suggest that Farwell LJ was not saying anything particularly controversial in *Cloutte v Storey*, in relation to an appointment being void where there was a fraud on the power.

348. In all these circumstances I do not think that it can be said that the decision in *Preston v Preston* undermines the authority of *Cloutte v Storey*. *Preston v Preston* was cited to Farwell LJ and, as it seems to me, Farwell LJ had solid grounds for declining to follow what Lord Romilly MR had said concerning the status of an appointment which had been made as a fraud on the power. I therefore reject the argument of the First Defendant that the decision of *Cloutte v Storey* rests on shaky foundations.

349. The position might be different now if there was a statement to the effect that *Cloutte v Storey* was wrongly decided, or if it could be seen that the reasoning of Farwell LJ was clearly flawed. It seems to me however that this has not happened. I confess to finding the reasoning of Farwell LJ somewhat difficult to follow, but it is not easy to see why Farwell LJ's essential reasoning, to the effect that the appointments in that case were void in equity by reason of the fraud on the power committed by the parents, was wrong. So far as modern case law is concerned, the decision has been subject to some criticism, but no court either in England and Wales or in Jersey, so far as I am aware, has decided that the decision is wrong. Equally, it does not seem to me that Mr Lewison's company law analogy provides a good reason for treating *Cloutte v Storey* as wrongly decided. In that context, as I have said, I find the discussion in Snell to be illuminating.

350. An accurate summary of the position, in my view, is that provided by Lord Walker in *Pitt v Holt* at [62]; namely that the decision in *Cloutte v Storey "may have to be revisited one day"*. So far as I am aware, that day has not yet come.

351. In my view this position applies as much to Jersey law as it does to English law. It seems to me, for the reasons which I have already given, that a Jersey court would not be persuaded that the decision in *Cloutte v Storey* either rested upon shaky foundations

or was clearly wrong. Although a Jersey court would not formally be bound by *Cloutte v Storey*, it seems to me, and I so find, that a Jersey court would follow *Cloutte v Storey*. If *Cloutte v Storey* was to be revisited at the highest level, which is what it seems to me would be required given that the decision is a Court of Appeal decision, then I have no doubt that the Jersey courts would follow the outcome of such revisiting. As matters stand this revisiting has yet to occur.

352. Drawing together all of the above discussion on the void/voidable issue, I reach the following conclusions.
   (1) I do not think that *Cloutte v Storey* can be distinguished in the present case.
   (2) *Cloutte v Storey* is Court of Appeal authority which binds me as a matter of English law.
   (3) I would expect a Jersey court to follow *Cloutte v Storey*, as a matter of Jersey law. Accordingly, I consider that *Cloutte v Storey* remains good law, so far as Jersey law is concerned.
   (4) I therefore conclude that, in the present case, the Disposal was void rather than voidable, in so far as it constituted a transfer of the Beneficial Interest.

353. These conclusions render it strictly unnecessary to consider whether the Disposal should be set aside, on the basis that it was a voidable transaction rather than a void transaction in relation to the Beneficial Interest. In case however I am wrong in my decision on the void/voidable issue I will set out what my decision would have been if I had been persuaded that the transfer of the Beneficial Interest was only voidable. For ease of reference I will refer to the Disposal being voidable in setting out my decision on this question. It will be appreciated that this means the Disposal so far as it transferred the Beneficial Interest.

354. The exercise which the court is required to go through on the hypothesis that the Disposal was voidable, in order to determine whether the relevant transaction should be set aside, was described in the following terms, in *Rice v Rice* 61 ER 646. The judgment of the Vice-Chancellor (Sir R.T. Kindersley) repays reading in full. I highlight however the following extract from the Vice-Chancellor's judgment, at pages 78 and 79 of the report:

   "I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that, in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i.e., that a Court of Equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all other respects equal; and that, if the one has on other grounds a better equity than the other, priority of time is immaterial.

   In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the Court must direct its attention are obviously these : the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points it must apply the test, not of any technical rule or any rule of partial application, but the same

broad principles of [79] right and justice which a Court of Equity applies universally in deciding upon contested rights."

355. The court is therefore entitled to carry out a wide inquiry into the rival merits of the competing claims. Priority in time is, as Mr Lewison put it, the tiebreaker, but not the rule. For a modern statement of the exercise of the court's discretion in relation to competing equitable interests, I refer to Snell, at 4-047(a):

> *"Where there is a conflict between two equitable interests in property other than registered land the rule that the first in time prevails applies only where the equities are equal. In this instance, however, it is not so much a matter of estoppel or gross negligence as of the positive conduct of the prior owner or his trustee[171] in relation to the equitable interest claimed.[172] The inequality of the equities provides the justification for altering the usual rule as to priorities.[173]Therefore, although the prior interest will not be lightly postponed in favour of the subsequent interest,[174] it will be postponed if the owner of the prior interest or his trustee has been guilty of inequitable behaviour."*

356. The First Defendant advanced four reasons, on the hypothesis that the transfer of the Beneficial Interest was voidable, as to why the Disposal should not be set aside. I will take these reasons in my own order. I should make it clear, for the avoidance of confusion, that their order was not the same in the First Defendant's submissions.

357. The first reason was what was said to be the inequitable conduct of the Claimants. The First Defendant contended that the Claimants had behaved inequitably by their widespread failure to engage with the trustee of the Trusts (the Second Defendant and then Pinotage PTC) and to provide KYC information. The Claimants could have had their loans written off for a modest fee, but they chose not to engage. As such, they cannot now complain that the Loan Assets have been sold and the Trusts terminated.

358. I accept that there is justification in the charge of substantial non-engagement by a substantial number of Claimants; see my earlier findings on the Claimants' bundle of correspondence. I cannot however see that this justifies, or comes anywhere near justifying giving priority to the interest of the First Defendant over the equity to set aside the Disposal. I say this for two reasons. First, I do not think that conduct of this kind can be said to disqualify the Claimants from their entitlement to have the Disposal set aside on the basis that the Disposal was made for an improper purpose. It seems to me that this would be grossly disproportionate, as between the conduct complained of and the right which the Claimants would otherwise have to set aside the Disposal. Second, I accept the point made by Mr Miall that, in theory, any one of the Claimants, as a Beneficiary, could have challenged the validity of the Disposal. The First Defendant's colour coded spreadsheet demonstrates that there were a number of Claimants who did fully engage, and whose engagement has turned out to be futile by reason of the Disposal. Again, I cannot see that it would be right to deny these Claimants the right to have the Disposal set aside, simply because other Claimants were less conscientious and/or more obstructive in relation to the administration of the Trusts.

359. The second reason was that the Claimants were said to be participants in artificial tax avoidance schemes. They ran the risk, so it was submitted, that the schemes would not work and that the loans would be called in. That risk has now eventuated, and the court

should not lend itself to granting relief which allows the Claimants to escape from the consequences of the artificial tax avoidance in which the Claimants took the risk of participating. In *Pitt v Holt*, at [135], Lord Walker commented that, in some cases of artificial tax avoidance, where the claimants were seeking to extricate themselves from a tax-avoidance scheme which had gone wrong, the court might think it right to refuse relief, either on the basis that the claimants had accepted the risk of the scheme not working or on the basis of public policy. The same principles have been articulated in other cases where those engaged in tax avoidance schemes which have gone wrong have sought to have them set aside pursuant to the equitable jurisdiction of the court; see, most recently, the judgment of Snowden LJ in *Bhaur v Equity First Trustees (Nevis) Limited* [2023] EWCA Civ 534, at [73]-[73] and [103]-[106].

360. It seems to me that there is an obvious answer to this argument, on the facts of the present case. The Claimants are not seeking to extricate themselves from the consequences of artificial tax schemes which have gone wrong. On the assumption that the schemes in the present case are properly described as artificial tax avoidance schemes which have gone wrong, my understanding is that the tax position of the Claimants will be no better, following the setting aside of the Disposal, than it was before the Disposal. I do not recall any argument or evidence in the course of the trial to the effect that the setting aside of the Disposal would improve the tax position of the Claimants. What the Claimants are seeking to do is to set aside a transaction which disregarded their interests entirely, and was thereby rendered unlawful. The unwinding of the Disposal will put the Loan Assets back into the Trusts, where they will be held for the benefit of the Beneficiaries. Whether this will allow value to be realised, which will assist the Beneficiaries in dealing with their tax position, remains to be seen. What however I cannot see is that the setting aside of the Disposal will either extricate any of the Claimants from their current tax position, or breach any principle of public policy.

361. The third reason was that restitution of the consideration paid and payable pursuant to the Disposal is said now to be impossible. Pinotage PTC, to which the upfront consideration of £100,000 was agreed to be paid under the terms of the SPAs, has been wound up and dissolved in the BVI (British Virgin Islands). So far as the additional consideration is concerned, the right to receive this additional consideration had been assigned to Hatstone LLC, which is not a party to this action.

362. There was some debate between the parties, and between the experts, as to whether the Claimants could be required to make counter-restitution of the consideration paid on the Disposal. In opening it was accepted by the First Defendant, by virtue of its pleaded case, that this debate existed only on the hypothesis that the Disposal was voidable. On the hypothesis that the Disposal was voidable, it seems to me that there is no obstacle to requiring the Claimants to make counter-restitution, if I consider such counter-restitution to be appropriate in the exercise of my equitable discretion. While I did not hear any substantial argument on this point, I am prepared to proceed on the basis that, as a matter of English law a court could, in the exercise of its equitable jurisdiction to set aside a transaction, order counter-restitution of a sum paid on the transaction, if the court considered this appropriate. I am also prepared to proceed on the basis that Jersey law would follow English law in this respect.

363. In theory therefore, it seems to me that it is legitimate to consider the practical problems which are said by the First Defendant to exist in the present case, in relation

to such counter-restitution. This however assumes that these practical problems arise for consideration. This will only be the position if I consider it appropriate, in principle, to order such counter-restitution.

364. It seems to me, on the facts of this case, that there is no good reason to order to any counter-restitution or to be concerned about the additional consideration. Starting with the basic consideration of £100,000, it is true that this sum, split into three parts, was agreed to be paid to and received by Pinotage PTC pursuant to clause 3.1 of the first set of SPAs. In terms of its provenance however, I refer to my findings in the narrative section of this judgment. I have found that this payment actually constituted the payment of £100,000 paid by Slap 8 to Hatstone Jersey on 17th May 2019, which was paid in response to the request for payment of £100,000 which was re-issued to the First Defendant on 16th May 2019. This was then treated as the basic consideration paid on the Disposal to Pinotage PTC. While I accept that this sum of £100,000 falls to be treated as part of the consideration paid to Pinotage PTC on the Disposal, it seems to me that in the exercise of my equitable discretion, I am entitled to look at the reality behind the appropriation of this sum to the consideration payable on the Disposal. The reality is that the party which had the benefit of this payment of £100,000 was the Second Defendant. In these circumstances, and in the exercise of my equitable discretion, I cannot see a good reason for requiring the repayment of the sum of £100,000. Accordingly, the practical difficulties with making the repayment do not arise.

365. Turning to the additional consideration payable under the SPAs, it was not entirely clear to me that the right to receive this additional consideration had been assigned to Hatstone LLC. I heard very little in the course of the trial on this topic. Paragraph 24N.2 of the Re-Amended Particulars of Claim pleads that the right to receive the additional consideration was assigned to Hatstone Jersey *"on a date presently unknown to the Claimants."*. I was told by Mr Miall that the Claimants pleaded this on the basis of what they had been told. The matter was not within the direct knowledge of the Claimants. This pleaded case is the subject of a non-admission by the First Defendant in paragraph 34c of its Re-Amended Defence and Counterclaim. The Second Defendant pleads a different arrangement concerning the rights to the deferred consideration, in paragraph 39.2 of its Re-Amended Defence. The First Defendant's trial skeleton argument identified the three sale and purchase agreements between Pinotage PTC and Hatstone LLC, each dated 11th December 2019, as the instruments which effected the assignment of the right to receive the additional consideration. Notwithstanding the uncertainty which seems to exist in this respect, I will assume that it is correct that the right to receive the deferred consideration was assigned to Hatstone LLC, and was so assigned by the sale and purchase agreements of 11th December 2019.

366. It seems to me that the assignment of this right to receive the additional consideration only matters if there is additional consideration still capable of being received. The provisions governing the payment of the Deferred Consideration are to be found in Schedule 1 to each of the first set of SPAs. By paragraph 2.2 of each Schedule 1 no Deferred Consideration was to be payable in respect of any period after the Deferred Period. The Deferred Period was defined to mean the period beginning on Completion (30th October 2019) and ending on 30th September 2022, *"or such other date as may be agreed in writing by the Buyer and the Seller"*. 30th September 2022 has now gone by and, so far as I am aware, no extension was agreed to the Deferred Period. I also

understand that no payment of the Deferred Consideration has been triggered. In these circumstances it seems to me that any right which Hatstone LLC may have had to receive the additional consideration has come to an end. Accordingly I cannot see the assignment of the right to receive the additional consideration poses any obstacle to the Disposal being set aside.

367. The fourth reason advanced by the First Defendant for not setting aside the Disposal is a practical one. If the Disposal is set aside, the assets transferred to the First Defendant by the Disposal (the Loan Assets) will come back to the Beneficiaries, where they will need to be held by a trustee on the terms of the Trusts. This creates an obvious problem, because there is no such trustee. No arrangements have been made by the Claimants to put a new trustee in place and, so far as I am aware, there is no person ready to step into this role. Mr Miall sought to dismiss this difficulty on the basis that it could, if necessary, be sorted out by the Jersey courts, as a matter going to the administration of the trusts, with a court-appointed trustee taking over as trustee. It was not however clear to me whether this would be feasible and, if it was feasible, how it would be achieved. There was no evidence, at least to which my attention was drawn, of the Claimants having taken any steps in this direction.

368. In closing submissions Mr Morgan put this part of the First Defendant's case in an appropriately measured way. As I understood his submissions, his essential point was that if it turned out that a new trustee could not be appointed, then it would be pointless for the Disposal to be set aside. For this purpose Mr Morgan relied upon the principle that equity does not act in vain. His proposal was that the court should not make any order setting aside the Disposal at this stage, but should put in place some kind of regime which would hold the ring, while the Claimants took whatever steps they proposed to take for the purposes of putting a new trustee in place. If those steps produced no result, the court could then consider whether it was in fact appropriate to set aside the Disposal.

369. It seems to me that there is some merit in this particular objection to the court setting aside the Disposal at this stage. In particular, I am conscious of the fact that the argument at trial only touched upon this particular problem. As I have already noted, it was not clear to me whether the appointment of a new trustee would have been feasible and, if so, how.

370. I am of course considering the question of whether the Disposal should be set aside on a hypothetical basis. I have already decided that the Disposal was void, with the consequence that the Beneficial Interest will have remained in the Trusts. If however I had decided that the Disposal was voidable, I can summarise the decision which I would have made, on the question of whether the Disposal should be set aside, in the following terms:

    (1) I would have rejected the first three reasons advanced by the First Defendant for not setting aside the Disposal. For the reasons which I have set out above, I do not consider that any of these reasons have merit.
    (2) I would have required to hear further argument on what I should do, given the apparent absence of anyone available to act as trustee of the Trusts. I stress that this further argument would have been confined to the merits or otherwise of the fourth reason advanced by the First Defendant for not setting aside the Disposal. This would not have been a licence to re-open the first three reasons.

(3) I would not have made a decision at this stage, to set aside the Disposal. I would have reserved that decision until I had heard the further argument from the parties on what I should do, given the apparent absence, at least as matters stand, of anyone available to act as trustee of the Trusts.

371. Returning however to my principal decision in this section of this judgment, I conclude that the Disposal, by reason of the fact that it was effected for an improper purpose, was void.

372. I add one final point for the sake of good order. The First Defendant, by virtue of its pleaded case, only took the counter-restitution point on the hypothesis that the Disposal was voidable. Accordingly, I make no decision on whether counter-restitution could, as a matter of law, have been ordered in circumstances where, as I have found to be the case, the Disposal was void, not voidable. In any event, I would not have needed to decide this point, if it had been a live point, because I would not have been prepared to order counter-restitution of the sum of £100,000, assuming that I had the ability to do so. My reasons for saying this are the same as those I have set out above, in my analysis of the position on the hypothesis that the Disposal was voidable, not void.

The claim for damages and/or equitable compensation against the First Defendant

373. Paragraphs 48 and 49 of the Re-Amended Particulars of Claim plead a claim for damages and/or equitable compensation against the First Defendant on the basis that the First Defendant *"is accountable to the Claimants as constructive trustee"*. An order is sought for the payment of damages and/or equitable compensation *"to the extent that it is not possible for all and each one of the Loan Assets to be transferred back to the relevant 2011, 2012, and 2014 Trusts"*. I assume that the claim is made on the basis that the First Defendant is, by reason of the Disposal, liable for knowing receipt of trust property.

374. The oral submissions did not deal with this particular claim in any detail, and the claim was only briefly mentioned in the written submissions. It seems to me that Article 55 of the 1984 Law would constitute a defence to this claim, if the First Defendant had been a bona fide purchaser for value of the assets in the Trusts without actual notice of the breach of trust constituted by the Disposal. In this context however I refer to my findings in the section of this judgment where I have dealt with this question. For the reasons set out in the relevant section of this judgment, I have found that the First Defendant did have actual notice of the breach of trust.

375. Beyond this, I cannot see any defence to the claim for damages and/or equitable compensation which is available to the First Defendant. Accordingly, it seems to me that the First Defendant does, in theory, have a liability to the Claimants for knowing receipt of trust property. On my findings however, all that the First Defendant actually received, by the Disposal, was the legal title to the Loan Assets in the 2011 Trust and the 2012 Trust. I therefore assume that this claim only arises, at least as a material claim, in the event that the Loan Assets cannot be reconstituted as assets of the Trusts. In these circumstances I will hear the parties further, as necessary, on what order, if any, I can and should make in relation to this particular claim. As matters stand I make no further decision on this particular claim, beyond my decision on liability.

The claim for damages and/or equitable compensation against the Second Defendant

376. The Claimants plead, at paragraphs 45-47 of the Re-Amended Particulars of Claim, that the Second Defendant is personally liable to pay damages and/or equitable compensation. The claim is made *"To the extent that it is not possible for all and each one of the Loan Assets to be transferred back to the relevant 2011, 2012, and 2014 Trusts"*.

377. The essential basis of the claim in relation to the 2011 Trust and the 2012 Trust, as it is pleaded in paragraph 46 of the Re-Amended Particulars of Claim, is that the Second Defendant retired as trustee of the Trusts in order to facilitate the breach of trust constituted by the Disposal and, in retiring, breached the duties which it had owed to the Beneficiaries as trustee of the Trusts. Those duties are pleaded in paragraph 18 of the Re-Amended Particulars of Claim. The Second Defendant admits that it owed those duties, subject to the qualifications to this admission (as mentioned earlier in this judgment) set out in paragraph 20 of its Re-Amended Defence.

378. In relation to the 2014 Trust, paragraph 47 of the Re-Amended Particulars of Claim alleges that each of the Second Defendant's (i) purported retirement as trustee of the 2014 Trust in favour of Pinotage PTC, (ii) vesting of the 2014 Trust assets in Pinotage PTC, and (iii) purported ratification of Pinotage PTC's actions as trustee de son constituted fraud on a power and/or wilful misconduct. It is said that the Second Defendant, by Mr O'Shea, knew that the Disposal was contrary to the interests of the Beneficiaries, or was recklessly indifferent as to whether it was contrary to their interests or not.

379. In relation to the liability of a retiring trustee for a breach of trust committed by his successor my attention was drawn to the decision of Kekewich J in *Head v Gould* [1898] 2 Ch 250, which provides useful guidance in this context. The case involved breaches of trust which had been committed by the former and present trustees of certain settlements, whereby the bulk of the assets subject to the settlements had been dissipated. For present purposes the relevant part of the judgment of Kekewich J comprises that part where he dealt with the question of whether the former trustees (Houlditch and Clapp) could be held responsible for breaches of trust committed by the present trustees. Kekewich J explained the nature of this question in the following terms, at page 267 of the report:

> *"This brings me to the large and important question whether Messrs. Houlditch and Clapp can be held responsible for the breach of trust committed by the present trustees in selling the house, surrendering the policies, and spending, it matters not how, the produce of the two transactions. To the parties concerned the question is both large and important. As regards those not concerned in the particular case the amount involved is immaterial, but the alleged liability of the former trustees is of vast importance, affecting, as it does, not only the two large classes to one or both of which most men belong, trustees and cestuis que trust, but also all members of the legal profession to which the position and duties of trustees are a source of constant anxiety."*

380. Kekewich J then went on to explain, at pages 267-268 of the report, how the case was put against the former trustees in this context:

> *"The case made against Messrs. Houlditch and Clapp may be thus fairly stated. "You had exhausted all the trust property except this house at Seaton and the policies. You knew that this remaining property was barely sufficient to provide*

the plaintiff's portion, even assuming that the policies were maintained; and you further knew that the income derived from the house was not more than sufficient to maintain those policies. You were urgently pressed to make further advances to Mrs. and Miss Head, and you asserted with perfect truth that no further advances could properly be made, that is to say, could not be made at all without a breach of trust far more serious in fact and in its consequences than any that had yet been committed. In order to relieve yourselves and to indirectly assist Mrs. and Miss Head you suggested, or if you did not suggest assented to, the appointment of new trustees who you knew would be more accommodating, and contemplated, if they did not actually intend, that which you had properly declined to do." I have no doubt that if this charge can be regarded as proved against Messrs. Houlditch and Clapp the responsibility insisted on must follow, and that they must be held liable to make good the loss to the trust estate occasioned by the breach of trust which they did not themselves commit."

381. Kekewich J explained the basis of this case in the following terms, at pages 268-269 of the report (underlining added):

"This doctrine, to the authorities in support of which I will presently refer, is based, according to a passage in Lewin on Trusts (9th ed. page 752) on agency, and the retiring trustee is treated as actually doing what he does not do in person, because his successor is treated as his agent for this purpose. This view is also taken by Stuart V.-C. in one of the cases to which I have to refer. Far be it from me to say that it is not a sound and satisfactory view, but I venture to think that a different and equally satisfactory explanation of the doctrine can be given. It is the duty of trustees to protect the funds intrusted to their care, and to distribute those funds themselves or hand them over to their successors intact, that is, properly invested and without diminution, according to the terms of the mandate contained in the instrument of trust. This duty is imposed on them as long as they remain trustees and must be their guide in every act done by them as trustees. On retiring from the trust and passing on the trust estate to their successors—and this whether they appoint those successors or merely assign the property to the nominees of those who have the power of appointment—they are acting as trustees, and it is equally incumbent on them in this ultimate act of office to fulfil the duty imposed on them as at any other time. If therefore they neglect that duty and part with the property without due regard to it, they remain liable and will be held by the Court responsible for the consequences properly traceable to that neglect. This explanation will, I think, be found consistent with all judicial utterances on the subject, and haply aid to make them consistent with themselves."

382. On the facts of the case Kekewich J decided that the former trustees could not be responsible for the breaches of trust committed by the present trustees. As the judge explained, at page 273 of the report (underlining again added):

"As regards the rule laid down by the Master of the Rolls in Palairet v. Carew, and supported, I think, by both judgments in Clark v. Hoskins, the case is still clearer in favour of Messrs. Houlditch and Clapp. What their successors did was to convert the whole remaining trust property and improperly to spend it. They knew that G. D. Gould was reflecting on some possible mode of assisting Mrs. Head, and he had told them, by his letter to Mr. Clapp of November 2, 1894, that he was turning his attention to some means of doing this; but apparently he was

as conscious as Messrs. Houlditch & Clapp themselves of the difficulty of doing this, and he certainly never hinted at doing it in the manner ultimately adopted. On reflective study of the evidence and correspondence, and notwithstanding suspicious criticism of some unhappy expressions in Mr. Clapp's letters, <u>I do not believe that Messrs. Houlditch and Clapp contemplated any breach of trust at all, and I am convinced that they never contemplated that actually committed.</u>"

383. The judge summarised the law in the following terms, at pages 273-274 of the report (underlining again added):

"With the judgment of the Court of Appeal in Clark v. Hoskins before us it is easy to understand the Master of the Rolls as meaning what he probably intended to express—that in order to make a retiring trustee liable for a breach of trust committed by his successor <u>you must shew, and shew clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustee when such retirement and appointment took place.</u> That is clearly the doctrine of Clark v. Hoskins . It will not suffice to prove that the former trustees rendered easy or even intended, a breach of trust, if it was not in fact committed. <u>They must be proved to have been guilty as accessories before the fact of the impropriety actually perpetrated.</u>"

384. I have set out a good deal of the judgment of Kekewich J in *Head v Gould* because, as I have said, the decision provides valuable guidance in the present case. It was also the case relied upon by Mr Flavin in his defence of the Second Defendant against the personal claim made against it.

385. I start with the claim against the Second Defendant in relation to the 2011 Trust and the 2012 Trust. Mr Flavin's argument was a simple one, and can be summarised in the following terms. It is clear from *Head v Gould* that it is not sufficient to show that a breach of trust committed by a successor trustee was merely the outcome of the retirement of the previous trustee and the appointment of the successor trustee. It must be shown that the breach of trust was contemplated by the original trustee when the retirement and appointment took place. It must be shown that the Second Defendant retired in order for the breach of trust constituted by the Disposal to be committed by Pinotage PTC. On the facts of the present case however, so it was submitted, the retirement of the Second Defendant had nothing to do with facilitating any breach of trust, but was the result of (i) the Second Defendant's problems with obtaining KYC information from the Beneficiaries and (ii) the associated concerns for the position of the Second Defendant in relation to the Swiss regulatory authority. As such, and on the evidence in this case, the claim for breach of trust against the Second Defendant personally, in relation to the 2011 Trust and the 2012 Trust, must fail. The Second Defendant did not retire as trustee in order to facilitate the breach of trust.

386. At first sight, this argument appears to be well-founded. It is perfectly true that the Second Defendant resigned from its position as trustee of the 2011 Trust and the 2012 Trust (and purported to do so in relation to the 2014 Trust) by reason of regulatory concerns. This was clear from the evidence of Mr O'Shea, and is corroborated by the contemporaneous documents; see, by way of example, the email from Mr O'Shea to Mr Emblin, Mr Reid and Ms Stone, sent on 23rd May 2019, the terms of which I have quoted in the narrative section of this judgment. Indeed, as I understood Mr O'Shea's

(characteristically well-informed) evidence in cross examination, Pinotage PTC was put in place as the new trustee because it was, at least arguably, a non-financial entity which would not be subject to the same regulatory requirements as the Second Defendant.

387. The difficulty with Mr Flavin's argument is that what I have said in my previous paragraph is only a part of the story. It assumes that the Second Defendant was effectively in the same position as Messrs Houlditch and Clapp in *Head v Gould*; that is to say trustees who retired in circumstances where they had no contemplation of the breach of trust which followed; see in particular the underlined section of the extract from the judgment of Kekewich J (the first extract from page 273 of the report) which I have quoted above.

388. The facts of the present case are however very different to *Head v Gould*. I refer again to the narrative section of this judgment and, in particular, to the chronology of the Disposal. The Disposal was not something which was conceived and executed after the Second Defendant had retired as trustee and left the scene. To the contrary, the Disposal or, putting the matter more generally, the sale of the Loan Assets, had a lengthy gestation period, which substantially predated 30th June 2019; being the date when Pinotage PTC took over as trustee of the 2011 Trust and the 2012 Trust, and purported to take over as trustee of the 2014 Trust. It is clear from the evidence that the sale of the Loan Assets was being considered between Mr Emblin, Mr Reid and Mr O'Shea from April 2019, following the failure of the Pyrrhus Scheme and the failure of a large number of Beneficiaries to engage with the Second Defendant. Nor is it the case that the Second Defendant departed the scene after 30th June 2019. Instead, the Second Defendant retained an administrative role in relation to the Trusts. Indeed, so far as the implementation of the Disposal was concerned, it seems to me that little, if anything changed on 30th June 2019. Mr Emblin, Mr Reid and Mr O'Shea continued to work together to implement the Disposal.

389. In his closing submissions Mr Flavin argued that the questions which had been put to Mr O'Shea in cross examination were insufficient to establish liability on the basis that Second Defendant retired as trustee in order to facilitate a breach of trust. I do not accept this. It seemed to me that Mr O'Shea's evidence in cross examination confirmed what one can also derive from the contemporaneous documents; namely that the Second Defendant's role in the Disposal did not significantly change after 30th June 2019. I give two examples of this from Mr O'Shea's cross examination.

390. First, in cross examination Mr O'Shea was asked about the service agreement which was entered into between the Second Defendant and Pinotage PTC. In terms of the work to be done by the Second Defendant, Mr O'Shea said this:

> *"Q. Okay. So this all shows that SARL is the entity that is going to continue to do the work necessary for the administration of the trust. Is that right?*
> *A. It's going to support PTC acting as trustee.*
> *Q. It is going to do all the back office work?*
> *A. All the back office, yeah."*

391. Second, and earlier in cross examination of Mr O'Shea, Mr O'Shea was asked about an email which had been sent by Nicola Stone to David Gill on 26th June 2019. The email

was responding to an email from Mr Gill, sent on the same day, in which he queried the change of trustee:

"I am just back today after my latest operation – straight into an all day meeting with accountants.

Can we please speak about this update tomorrow as obviously it is not what we expected after our last conference call? ie. change of trustees.

We have been encouraging engagement and for people to appreciate their limited options – and face up to reality. Clearly, we need a sensible timetable to allow people to make arrangements – this will control the flow of information and prevent unnecessary distress – this update will have the effect of an Exocet missile.

I look forward to hearing from you."

392. I take Mr Gill's reference to *"our last conference call"* to be a reference to the conference call of 28th May 2019, of which a lengthy note exists. In her email in response, sent on 26th June 2019, Ms Stone said this:

"I wasn't involved in that call, but I understood that the sale of the debts was raised with you, and that you had acknowledged that action needed to be taken (and there would be costs involved).

The sale of the debt book is a fait accomplis, so the beneficiaries need to be informed; therefore the trustees will issue this communication next week. Whilst I am of course happy to discuss this with you, I'm not sure anything can now be changed.

Mark is also happy to discuss this with you. He is in the office today.

As I've said before, the current situation could not continue to exist. There are regulatory, commercial and reputational reasons why. People need to be realistic regarding their options. None of the options are ideal but this is a fair way forward."

393. It was put to Mr O'Shea that this email demonstrated that Ms Stone was sure that the transaction, that is to say the sale of the Loan Assets, was proceeding. The relevant passage of cross examination covers a number of pages of the transcript, but the following extract, itself rather lengthy, should be quoted in full:

"Q. The reality is that the decision had been made by this stage to sell the loan assets to FS Capital and it was just simply the finer details of the draft documentation that remained. Is not that right?

A. Yes, but deals can fall over on finer details so in theory yes, we're close to doing a deal, but deals fall over at the last minute all the time, so there's still a way to go because otherwise if it was that done we would have signed there and then, we wouldn't have had to wait until 30 October. Obviously there's quite a lot more to do if the agreements are not signed until 30 October.

Q. So is your evidence really that what you are saying is that you consider that a deal is not finally done until it is executed effectively, until you sign on the dotted line.

A. Because deals always fall over at the very last minute.

Q. But your intention – and as far as you knew the intention of everyone around you – was that that sale would proceed. That is what everyone wanted and expected to happen.

A. We were going through the process to do the sale. We were a motivated seller, so…

Q. But the decision had been taken in principle, all things being well, that that would happen.
A. To go through the sale process, correct.
Q. So it is not accurate to suggest, if that is right, that either Pinotage Sarl or PTC was in that sense still considering its options at 30 June 2019, let alone 30 October 2019. It was of the mind that the sale would go ahead. It had decided that, all being well, that would happen.
A. It was proceeding, yes. We were proceeding with the sale.
Q. The reason, I suggest, you are keen to say a decision was not taken by 30 June is to try and avoid the second defendant being liable in this action, is it not?
A. I don't think that's possible, because if you look later on, Pinotage does actually ratify the – Pinotage ratifies the sale anyway. So it's being proposed that Pinotage are trying to step out because it doesn't want to go through the sale, but Pinotage is forced to step out, but if it hadn't been forced to step out I think it probably would have gone through the sale.
Q. So if Pinotage Sarl had not stepped out for the reasons you are saying it stepped out – you say that for now – it would have been Pinotage Sarl that went through with it instead. Yes?
A. Yes, unless something peculiar happened between May – you know, dealing with the May, June, July, August, September, and signing the deal on 30 October – unless something sort of scuppered the deal, which does happen a lot, then yes. If Pinotage didn't have to step up because of non-compliance, then it – all things being what they were – Pinotage probably would have gone through the deal and ratified the deal anyway, so…
Q. So you knew then when Pinotage Sarl decided to resign and Pinotage PTC was appointed on 30 June 2019 that that sale, all being well, would occur. That was what was planned.
A. It was going to go ahead, yes, so --
Q. And your intention at the time was that this would happen.
A. I'd still carry on, yes."

394. This evidence demonstrates, or more accurately confirms what can also be derived from the contemporaneous documents, namely that when the Second Defendant came to resign as trustee, it did so in circumstances where the intentions of the parties, namely the Second Defendant and the First Defendant, as represented by Mr O'Shea, Mr Emblin and Mr Reid, were (i) that the Disposal should proceed, (ii) that the Second Defendant would continue to be involved in an administrative role, and (iii) that Pinotage PTC would be put in place as trustee/vendor of Loan Assets in order to avoid the regulatory difficulties which might result from the Second Defendant continuing as trustee of the Trusts. To use the language of *Head v Gould*, the evidence demonstrates that the Disposal was very clearly contemplated by the Second Defendant, at the point when it resigned, or purported to resign in favour of Pinotage PTC.

395. Returning to Mr Flavin's argument, it is true, as I have said, that the Second Defendant retired as trustee by reason of its regulatory concerns. This is however, as I have said, an incomplete statement of what occurred. The breach of trust which, as I have found, was constituted by the Disposal, was not merely the outcome of the retirement of the Second Defendant as trustee. The whole purpose of putting Pinotage PTC in place as new trustee was to allow the sale of the Loan Assets, on terms which excluded the interests of the Beneficiaries, to proceed to completion, with the Second Defendant still

dealing with the administration of the sale, but not having to deal with the regulatory issues which would or might arise if it continued as the actual trustee of the Trusts. Put more simply, Pinotage PTC was put in place as trustee in order to ensure that the Disposal would proceed, and would not be frustrated by the Second Defendant's regulatory concerns. These facts seem to me to be about as far from the facts of *Head v Gould* as they could be.

396. These facts also seem to me to demonstrate, and I so find, that the Second Defendant contemplated the very breach of trust which was in fact committed, namely the Disposal, at the time when the Second Defendant resigned, or purported to resign as trustee of the Trusts in favour of Pinotage PTC. These facts also seem to me to demonstrate, and I so find, that the Second Defendant retired in order to facilitate the breach of trust which was committed, namely the Disposal.

397. In these circumstances, and in relation to the 2011 Trust and the 2012 Trust, I conclude that the Second Defendant did breach its obligations as trustee of the Trusts in the manner set out in paragraph 46 of the Re-Amended Particulars of Claim.

398. In theory, it seems to me that the above analysis should also apply to the 2014 Trust, given that the Second Defendant also intended to retire as trustee of the 2014 Trust on 30th June 2019. Here however the position is different because the Second Defendant did in fact continue as trustee of the 2014 Trust and, applying my analysis from earlier in this judgment, it was by the Deed of Confirmation that the Loan Assets were effectively assigned to the First Defendant. The assignor of the Loan Assets was therefore the Second Defendant. In these circumstances it seems to me that it was the Second Defendant which committed the breach of trust which, as I have found, was constituted by the Disposal.

399. In closing submissions I asked Mr Flavin how matters stood in this respect in relation to the 2014 Trust. At that point, of course, Mr Flavin did not have the advantage of knowing what my decision would be on the issue of whether, in relation to the 2014 Trust, the Loan Assets did pass to the First Defendant. Mr Flavin focussed on the ratification resolution of 6th December 2019. Mr Flavin's analysis was that the sale of the Loan Assets in the 2014 Trust was effectively made by the Second Defendant, as continuing trustee of the 2014 Trust. As such, Mr Flavin fairly accepted that the Second Defendant was liable for any breaches of trust which occurred in relation to the 2014 Trust. It seems to me that Mr Flavin's analysis equally holds good in relation to my actual decision on the question of the assignment of the Loan Assets in the 2014 Trust. On the basis of my decision the Second Defendant was, by the Deed of Confirmation, the party which made the effective sale of the Loan Assets in the 2014 Trust.

400. I therefore conclude that the Second Defendant was, in relation to the 2014 Trust, in breach of trust by reason of its making of the Disposal, so far as the Disposal was a disposal of the Loan Assets in the 2014 Trust. The Disposal was, as I have already decided, made for an improper purpose. I do not think that it is necessary to go further than this, and consider the case in wilful misconduct which is pleaded in paragraph 47 of the Re-Amended Particulars of Claim. It seems to me that it is sufficient to conclude that the Second Defendant, by its vesting of the Loan Assets in the 2014 Trust in the

First Defendant, committed a breach of trust by reason of the fact that the Disposal was made for an improper purpose.

401. I therefore conclude that the Second Defendant was in breach of trust, in relation to all three of the Trusts, and is liable to the Claimants for such breaches of trust. As I have however already noted, the Claimants seek an order for the payment of damages and/or equitable compensation to the extent that it is not possible for the Loan Assets to be transferred back into the Trusts. Given my earlier decisions in this judgment, it seems to me, at least in theory, that there are no damages or equitable compensation which need to be paid. In these circumstances I will not make a formal decision on this claim in this judgment, beyond what I have decided above. Instead, I will hear the parties further, as necessary, on what order, if any, I can and should make in relation to this particular claim.

The Counterclaim

402. As I understand the position it is common ground that the Counterclaim stands or falls with the Claimants' claims. As I have decided that the Disposal was made for an improper purpose, and is thereby rendered void (at least in relation to the Beneficial Interest), it follows that the First Defendant is not entitled to enforce the loans made to the Claimants. As such, the Counterclaim falls away, and falls to be dismissed.

Summary of my conclusions

403. In summary, my conclusions are as follows:

(1) In relation to the 2014 Trust, the Loan Assets were vested in the Second Defendant, as trustee of the 2014 Trust.

(2) In relation to the 2014 Trust, the Loan Assets were, subject to the question of improper purpose, vested in the First Defendant by the Deed of Confirmation.

(3) The Disposal was effected for an improper purpose, and thereby constituted a breach of the Trusts.

(4) The First Defendant had actual notice of the fact that the Disposal was effected in breach of trust. As such, the First Defendant cannot claim to be a bona fide purchaser for value of the Loan Assets without notice, and is bound by the rights of the Claimants, as Beneficiaries, in respect of the breach of trust.

(5) By reason of the fact that the Disposal was effected for an improper purpose, the Disposal was void, so far as it purported to transfer the Beneficial Interest to the First Defendant.

(6) The Claimants are not required, as a condition of the relief which they will be granted in relation to the Disposal, to make payment or repayment of the sum of £100,000 which constituted the basic consideration payable on the Disposal. While this position was accepted by the First Defendant on the hypothesis (which I have found to be correct) that the Disposal was void, the position would have been the same if I had decided that the Disposal was voidable.

(7) In theory, the First Defendant is liable to the Claimants for knowing receipt of trust property. On my findings, this does not give rise to a material claim. Whether any order is required in this respect is a matter on which I will need to hear further from the parties.

(8) The Second Defendant was in breach of its obligations as trustee of each of the Trusts. In the case of the 2011 Trust and the 2012 Trust this breach of trust arose out of the retirement of the First Defendant as trustee of the 2011 Trust and the 2012 Trust and the appointment of Pinotage PTC as new trustee. In the case of

the 2014 Trust, this breach of trust arose out of the direct involvement of the Second Defendant with the Disposal. Whether any order is required in this respect is a matter on which I will need to hear further from the parties.

(9) The Counterclaim falls to be dismissed.

404. The question of whether the Disposal should be set aside, on the assumption that it was voidable rather than void so far as it transferred the Beneficial Interest, does not arise. If this question had arisen, I would have been prepared to exercise my equitable jurisdiction to set aside the Disposal, subject to the qualification that, before making a decision to this effect, I would have wanted to hear further argument on the problem of there being no evidence of a trustee available to take over the trusteeship of the Trusts.

The overall outcome of the trial

405. The overall outcome of the trial is as follows:

(1) The Claimants' challenge to the Disposal succeeds. I will make an appropriate declaration or declarations to reflect my conclusions on the Claimants' challenge to the Disposal.

(2) The Counterclaim fails. I will make an order for its dismissal.

406. I will hear the parties further, as necessary, as to the terms of the order which falls to be made, consequential upon the conclusions which I have reached in this judgment, and on all other outstanding matters consequential upon this judgment. In the usual way the parties are encouraged to agree as much as they can in this respect, subject to my approval of such terms.