Neutral Citation Number: [2021] EWHC 2219 (Ch)

Case No: BL-2019-001517

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES LIST

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 4th August 2021

Before:

MR NICHOLAS THOMPSELL

sitting as a Deputy Judge of the High Court

- -

Between:

BARONESS JACQUELINE VAN ZUYLEN

Claimant

- and –

(1) RODNEY WHISTON-DEW
(2) GBT GLOBAL LIMITED

Defendants

Mr Derrick Dale QC and Mr Imran Benson (instructed by Lock & Marlborough Solicitors) for the **Claimant**
Mr John Davis, Solicitor-Advocate (instructed by **Davis-Law Associates)** for the **Second Defendant**

Hearing dates: 7 June - 11 June 2021

APPROVED JUDGMENT

MR NICHOLAS THOMPSELL:

1. INTRODUCTION

1. In 2011, the Claimant, Baroness Jacqueline Van Zuylen made a decision that she now deeply regrets. She entrusted over £2.1 million – effectively her entire fortune – to the stewardship of the First Defendant, Mr Rodney Whiston-Dew. Less than half of this money has been returned to her and, with one exception, she has little idea of what has happened to the rest of it. The exception is that some of it (in her submission) is currently represented by advances made on the security of identified land in Essex.

2. By means of this case she is now seeking to make recovery of her losses against the First Defendant and against the Second Defendant, a company incorporated in the Seychelles, now called GBT Global Limited, which I will refer to as "**GBT**". Since 12 April 2018, after the events giving rise to claims in this action, GBT has been separately owned and controlled by Mr John Davis. Prior to this GBT was within the ownership and control of the First Defendant and was the vehicle that he used for dealing with the monies entrusted by the Claimant.

2. THE CIRCUMSTANCES OF THE TRIAL

(A) Representation at trial

3. The Claimant has been represented in this action by Mr Derick Dale QC and Mr Imran Benson of counsel.

4. GBT has been represented by Mr John Davis, who is a solicitor-advocate as well as being the sole shareholder and director of GBT.

5. The First Defendant is a litigant in person. As a former solicitor and former member of the New Zealand Bar, he is better equipped than most people to represent himself. He has chosen, to the extent that he had a choice given his financial circumstances, not to be represented for this trial. How much choice his financial circumstances have afforded him is not known to the court – the court learned that he has filed for bankruptcy, but there has also been a suggestion that there may exist discretionary trusts and companies offshore from which he might benefit and these may or may not have provided a potential source of funding for representation.

6. The First Defendant did, however, arrange for Mr Timothy Becker of counsel to attend briefly at the start of the trial on his behalf. Mr Becker's role was limited to explaining the First Defendant's non-attendance and to informing the court that the First Defendant had filed a petition for bankruptcy very shortly before the

commencement of the trial.

(B) The absence of the First Defendant

7. The First Defendant is currently in jail, having been convicted for his part in a fraudulent tax evasion scheme. His conviction was unrelated to the matters involved in this trial. It related to the dishonest formation and abuse of offshore companies and trusts. At his request, he has been permitted to participate in this trial by video link. However, he has chosen not to attend, citing as his reason that he is suffering from stress, anxiety and depression.

8. This is not the first time that the First Defendant has failed to attend a hearing in this matter. On various occasions during this litigation he has sought adjournments based on his personal difficulties.

9. This trial was due to take place on 15 March 2021 but was adjourned until 21 April 2021 at his request. He asked for this because of his difficulties in dealing with the bulk of paperwork involved following its late delivery owing to the document-screening procedures adopted by the prison where he is resident, and his lack of access to legal textbooks, and because of the stress this was causing him.

10. At the adjourned trial date on 21 April, the First Defendant did not attend but instead (via Mr Becker) asked the court to hear a very late and unmeritorious challenge to the court's jurisdiction and asked for a further adjournment based on the stress and anxiety that the trial was causing to him in the circumstances of his incarceration.

11. His claims concerning his mental health were supported by very weak medical evidence. Despite this, acknowledging the difficulties that he may have had in prison in arranging for a proper medical report, I gave him the benefit of the doubt and accepted a further adjournment until 7 July 2021.

12. I considered that appearing remotely from prison via a video screen might be more stressful than appearance in person. As a result, I also ordered a change to the arrangements previously ordered for a remote trial so that the trial would instead be held in court, and I made a production order requiring the prison to deliver the First Defendant for the trial.

13. I later received an application from the First Defendant requesting permission to attend the trial remotely on the grounds that he was continuing to experience stress, anxiety and depression and that he would find this less stressful than being transferred to a prison in London for the duration of the trial. This application was supported by a copy of part of a medical report.

14. This medical report also was not particularly satisfactory as evidence. It was not addressed to the court but had been produced for other purposes, and the court was given only part of the report and that part did not include any signature. Despite this, I was prepared to take account of it for the purposes of that application. I also considered that the First Defendant was the best person to decide what arrangements for his appearance he would find less stressful. Accordingly, I granted this request.

15. Although the First Defendant, through counsel, has explained that he has not attended this trial owing to the difficulties that he is continuing to face from depression, stress and anxiety, he has not on this occasion, requested any adjournment. Neither has he produced any medical evidence to support any proposition that he is unable to attend, even remotely from his prison. He did inform the court what types of drugs he had been prescribed but not the dosages and with no explanation as to the effect that they might have on him.

16. Under CPR rule 39.3, the court may proceed with the trial in the absence of a party.

17. In anticipation that the First Defendant might not attend (which he had indicated informally shortly before the trial via Mr Becker) and might request an adjournment, I had already reminded myself of the steps that a judge should consider where a party requests an adjournment having failed to attend citing medical reasons.

18. As Gibson LJ noted in *Teinaz v London Borough of Wandsworth* [2002] EWCA Civ 1040:

> *"Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so is a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment."*
> However,
> *"the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment".*

19. No evidence was put before the court to substantiate the First Defendant's inability (as opposed to unwillingness) to attend this hearing. There was no suggestion that he lacks capacity within meaning of the Mental Capacity Act 2005 so as to engage considerations under CPR rule 21.1. On the contrary, it appears that the First Defendant had been able to take various steps to promote

his own interests in this litigation. These included most recently bringing forward an application to appeal my earlier decision dismissing his application to strike out these proceedings on the grounds of this court's lack of jurisdiction, and an unsuccessful application for a stay of proceedings on the grounds that this application for appeal was pending. He had also managed to commence an application for his own bankruptcy and to brief counsel to appear, briefly, at the trial.

20. The question of the court's discretion in adjourning on medical grounds was considered by Norris J in *Levy v Ellis-Carr and others* [2012] EWHC 63 (Ch.). The judge dismissed a claim that the Registrar who heard that matter had erred in law when she went ahead with the hearing after being informed that the appellant had been medically unfit to attend court. After noting the discretion that the trial judge had on this matter he found that there were ample grounds upon which the Registrar could properly refuse the adjournment noting that:

> "*There was a history of making applications for adjournments at each stage. The hearing before her was itself a re-listed hearing. There was evident non-cooperation in preparing for the trial. Even on the Appellant's own case he had made his application for an adjournment at the last possible moment. He adduced no medical evidence. His solicitor deliberately withdrew instructions from Counsel and told Counsel not to attend the hearing. The solicitor on the record made a conscious decision not to attend the hearing. The application was already a year old (partly because the Appellant had sought adjournments to put in evidence and had then not done so) and related to a bankruptcy that had commenced in 1994. The Court could if the hearing proceeded take into account such evidence as he had adduced (even if it did not have the benefit of the criticisms he wanted to make of the trustee's case all the benefit of any argument he wanted to advance in support of his own). The Appellant would always have available the opportunity afforded by CPR 39.3."*

21. Many parallels apply in the current case. Again, we have a re-listed hearing. The application for adjournment has not, in this case, been made at the last moment – there has been no application at all. The First Defendant has not arranged any representation for the trial and the proceedings have been carried on for some time. Whilst the court is aware of some medical evidence about the First Defendant's mental health from the previous proceedings, the court has nothing that is more up to date and that evidence was not of the standard that provides a basis for a proper assessment by the court of the First Defendant's ability to attend the hearing.

22. In *Levy* Norris J set out a suggestion of the quality of medical evidence needed to support an adjournment on medical grounds. Having given the First Defendant

the benefit of the doubt once in accepting an adjournment on weak medical evidence, had I received an application for adjournment late this time I would have wanted this to be supported by proper medical evidence. I had previously issued a warning to the First Defendant that better evidence would be needed for any further adjournment. Needless to say, the requirement for cogent medical evidence is not satisfied in this case as there is no application to adjourn and no evidence tendered supporting a decision to adjourn.

23. The court cannot just take it on trust that a defendant is prevented from appearing merely on the basis of what he has told his counsel to say, particularly in this case, given the history of First Defendant's conviction for a matter involving fraud. The court cannot know whether his decision not to attend is a tactical one, in the hope of buying time and/or finding grounds to challenge a decision of this court on procedural grounds because he suspects that he cannot win on the merits. For the first adjournment, I was prepared to give the First Defendant something of the benefit of the doubt in relation to the quality of the medical evidence, given the difficulties he might be having in arranging for better evidence. I did not consider that I should do so again after the First Defendant had had some weeks to arrange for this and had been warned of the need for this.

24. Had I received an application supported by cogent medical evidence I would have needed to think very carefully about this. Coulson J in *Fitzroy Robinson v Mentmore Towers* [2009] EWHC 3870 (TCC) provides an approach for considering whether to go ahead in the absence of a party. The matter should be rooted in consideration of what is known as the "overriding objective" which requires cases to be dealt with justly and at proportionate cost, as enumerated in more detail in CPR rule 1.1(2), the notes in the White Book at paragraph 3.1.3, and the decision of the Court of Appeal in *Boyd and Hutchinson (A Firm) v Foenander* [2003] EWCA Civ 1516. Following this approach and the further comments made by Norris J in *Levy* I would have needed to have weighed various matters.

25. In particular, I would have needed to have given a great deal of consideration to whether there could be a fair trial with the parties being placed on an equal footing, especially given the First Defendant's dual role as advocate for himself and as a material witness. The stakes are increased by the fact that this is the trial that should finally determine these matters rather than any interim proceedings.

26. However, it certainly is not the case that a final hearing can never go ahead in the absence of one of the parties. As with the judge in *Levy*, I note that, to the extent that trial going ahead does lead to an unfair result, he would be able to seek to have any order put aside under CPR rule 39.3. The availability of this remedy provides an answer to any objection against proceeding in the absence of the First Defendant based on Article 6 of the European Convention on Human Rights.

27. Even taking account of the considerations mentioned at paragraph 25, I am by no means sure that I had I been asked for an adjournment on substantiated medical grounds, I would have necessarily determined that a further adjournment would be in the interests of justice. I would have needed to weigh also the further factors that are to be taken into account within CPR rule 1.1 and the guidance provided by the decisions in the cases mentioned above.

28. Under CPR rule 1.1(2), the court is required also to ensure that that the case is dealt with proportionately, expeditiously and fairly; and that an appropriate share of the court's resources is allotted, taking into account the need to allot resources to other cases. I would need to consider costs that would be wasted by the Claimant and by GBT in preparing for trial if we adjourn further and the waste involved of the court's time. In considering the requirement that the trial should be dealt with expeditiously I would need to consider the many delays that have already been occasioned by the First Defendant. Furthermore, the court has been aware that matters have been fast moving, with the looming bankruptcy of the First Defendant and the prospect of an action challenging the validity of the charge over the land in Essex. It is also relevant that the material circumstances of the First Defendant that are causing him stress and anxiety are unlikely to change in the next few years so there can be no certainty as to when he might be any more ready for trial.

29. As regards the other specific matters suggested by Coulson J, to apply where a court is considering a contested application at the 11th hour to adjourn the trial, those relevant in this case include:

    (a) ***The parties' conduct and the reason for the delays***. The Claimant and GBT are all but blameless in relation to the recent delays in the trial and that these are all due to the position of the First Defendant. Whilst I acknowledge the difficulties the First Defendant has had in managing his affairs from prison, I am not satisfied that he has been doing his best to prepare for the trial. Instead he seems to have concentrated on procedural matters, with a view to stopping or delaying it.

    (b) ***The consequences of an adjournment for the Claimant, the First Defendant, and the court***. I consider that a further adjournment would cause difficulties for the Claimant as she is left out of her money and unable to take steps to react to other issues affecting the charge over the land in Essex. Also, according to her counsel, she too may be suffering from anxiety caused by the continuing uncertainty of the outcome of this action. For both the Claimant and GBT, a further delay would increase their costs. As regards the First Defendant, whilst it is possible that proceeding now may cause stress to him, this is something which he must face at some time and there is an argument that his mental health might be better served in the

long run by getting this trial over with one way or another.

30. There is another consideration that can sometimes arise, and which arose in *Boyd and Hutchinson v Foenander*. This is that it may appear to the court at the outset or after hearing some at least of the rival arguments that one or other side is bound to succeed on the matter to be determined. The closer the case appears to one or other of these extremes the less likely it is that proceeding will represent an injustice to the litigant. If asked to consider an application to adjourn, I would approach this last consideration with a large degree of caution in a case that will turn on disputed facts, if it were possible that the evidence of the First Defendant, or his cross examination of evidence given by others, could have an effect on the outcome of the trial. However, in this case I am struck by the fact that to a very large extent the First Defendant's Defence and witness statements to date have not been substantially based on any factual dispute. Instead they depend largely on what appeared to me to be a doubtful proposition that that none of the various causes of action alleged against the First Defendant applied because the matter was entirely governed by the terms of the alleged "Azure Trust" and he was not under those terms obliged to account for his actions.

31. In summary, in the absence of an application to adjourn and, crucially, of any evidence that the First Defendant was unable, as opposed to unwilling, to attend, I considered that it was in the interests of justice for the trial to continue as requested by both the Claimant and GBT. However, had I received an application to adjourn supported by cogent medical evidence, I am not sure whether I would have granted this application but it would be by no means certain that I would have done so.

32. Having made the decision within my discretion under CPR rule 39.3(1) to proceed with the trial, I noted that a consequence was that the court had power under CPR rule 39.3(1)(c) to strike out the First Defendant's Defence. Neither the Claimant nor GBT requested this and I did not think it appropriate to do this.

33. Accordingly I allowed trial to proceed and for the Defence to stand.

(C) The First Defendant's petition for bankruptcy

34. On the first day of the trial, the court was informed that the First Defendant had filed for his own bankruptcy. The court later saw evidence of this.

35. Under section 285(2) of the Insolvency Act 1986 the court has power to stay an action or to allow it to continue on such terms as it sees fit, where it has seen proof that a petition for bankruptcy has been presented.

36. I could see no reason to invoke this power to order a stay.

37. No party requested a stay and the First Defendant, even in his absence, could have asked Mr Becker to request a stay.

38. As was explained by Knox J in *Polly Peck International plc v Nadir and others* [1992] BCLC 746, the power to stay proceedings under section 285(2) was put there by the legislature for the protection of the bankrupt's estate for the benefit of all creditors. However, as was found in that case, the court has discretion whether or not to use that power. It had been suggested by Mellish LJ in the much earlier case of *Re-Blake, ex parte Coker* (1875) 10 Ch. App 652 that:

> *"the Court of Bankruptcy ought not to restrain any suit or action against bankrupt to which the discharge of the bankrupt would not be a defence."*

39. As the Claimant has alleged deceit in this case, the current litigation is of the nature described by Mellish LJ. This is as a result of section 281(3) Insolvency Act 1986 which provides that:

> *"(3) Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party."*

40. Knox J in *Polly Peck* (after considering other precedent) considered that it would not be appropriate today to treat *Re Blake ex parte Croker a*s laying down an inflexible rule, but considered instead that it was appropriate to regard what was said in that case as

> *"constituting a factor which it is legitimate for this court to bear in mind, but not as laying down a hard and fast rule which this court is bound to follow in relation to claims which would survive a discharge in bankruptcy."*

41. Knox J went on to consider the question of a stay in that light, and in particular to consider whether the further prosecution of the action would cause damage to the defendant's bankruptcy estate. He concluded that, in view of the provisions of section 285(3) Insolvency Act 1986, there was no prospect of any significant damage to the defendant's bankruptcy estate arising from the further prosecution of the action and that there may well be benefit to the plaintiff in pursuing a course of action which, if valid, will remain unaffected by the bankruptcy process and by the discharge. He accordingly, took account of the reasoning in *Re Blake ex parte Croker* as a factor in determining that there was no sufficient prospect of any damage to the bankruptcy estate to outweigh the legitimate advantage to the plaintiff in resisting a stay.

42. It seems to me that precisely the same considerations arise in this case.

43. If the First Defendant wanted a stay, he should have asked for one, and it would have been for him to satisfy the court that this would be appropriate. Following the reasoning in *Polly Peck* it is doubtful whether he could have satisfied the court on this.

44. The Claimant also might have requested a stay but did not do so. I must assume that the Claimant has weighed the risk of continuing to accrue costs with a remoter chance of recovery of damages and of costs from the First Defendant, against the benefit of settling the matters to be determined in this trial.

45. This seems to me to be an eminently reasonable position for the Claimant to take. One of the important issues to be determined in this trial is the extent to which GBT is holding certain interests by way of security in land on behalf of the Claimant. Whatever the financial position of the First Defendant, it is greatly within interests of both of those parties to determine this matter. Also, as I have mentioned above, any recovery relating to the matters alleged against the First Defendant involving his fraud would survive any period of bankruptcy as a result of the application of section 281(3) of the Insolvency Act 1986. It is not unlikely that the fortunes of the First Defendant could recover following a period of bankruptcy. It is clear that the First Defendant has an established *modus operandi* of making extensive use of overseas companies and overseas trusts established in jurisdictions where they can operate with minimal transparency. There is a strong probability that he may have used such devices to place some of his own assets (whether gained lawfully or unlawfully) beyond the sight of his trustee in bankruptcy and perhaps also beyond his trustee's reach. I hope that his trustee in bankruptcy pays full attention to this possibility and makes full use of his or her abilities to challenge transactions at an undervalue and transactions designed to defraud creditors.

46. In summary, despite the absence of the First Defendant, and despite hearing that he had petitioned for bankruptcy, I allowed the trial to proceed in the normal manner. I asked Mr Becker to convey this decision to the First Defendant and to convey to him that he was free to change his mind and attend the trial at any point and I ensured that the court would continue to make arrangements for him to do so remotely.

3. THE EVIDENCE

47. The evidence before the court in relation to this matter has been less than satisfactory. The First Defendant and GBT have not, it appears, maintained

proper records (or if these exist, they have not disclosed them) and there has had to be undue reliance on solicitors' ledgers to have any idea of what has happened to the money in question.

48. The paucity of documentary evidence has been compounded by the limited nature of the witness evidence. The court has had the benefit of witness statements made by the First Defendant, but the First Defendant has not made himself available for these to be cross-examined.

49. The Claimant herself has provided witness statements and gave oral witness evidence in court. As the First Defendant was not there and was not represented, she was not cross-examined as thoroughly as she might have been otherwise, but she was cross-examined by Mr Davis acting for GBT and also answered various questions that I put to her. I formed the opinion that she was answering truthfully to the best of her abilities, although as might be expected given the lapse of time since the events in question her memory might not be reliable.

50. The other witness whom the court heard was a Mr Lawrence Ford who worked for Davis Law. Unfortunately, his evidence was of limited usefulness. At the time in question GBT was managed by the First Defendant and the only involvement that Davis Law had was as solicitors to GBT (once they had taken on that role). Mr Ford had had no personal involvement with the accounting side of the firm, having been banned by the SRA from involvement in solicitors accounts and had been required only to work under supervision. He was able, however, to give some evidence about dealings in 2018 that were relevant to the charge of the Essex land. Mr Ford was robustly cross-examined by Mr Benson of counsel. He remained calm and consistent throughout and I have no reason not to accept his evidence, for what it was worth.

51. In relation to all of the witness evidence, for the most part this relates to events that occurred several years ago. I remind myself of the warnings made by Leggatt J (as he then was) in *Guestmin SGPS SA v. Credit Suisse (UK) Ltd* [2013] EWHC 3650 (Comm) regarding the malleability of memory particularly in the context of litigation.

52. It is regrettable that other witnesses who might have cast some light on the matters in hand including Mr Littman and Mr Narlborough were not called as witnesses.

53. Despite these weaknesses in the evidence, I believe the court had enough material in front of it to make the determinations that are set out in this judgment.

4. THE FACTS

54. It is useful first to lay out the main events that are relevant to the claim as the court finds them to be.

(A) The commencement of the relationship

55. In 2011 the Claimant was introduced to the First Defendant by a mutual acquaintance. Her interest in consulting him related to various actions which she was considering against her previous financial advisers, who had been unsuccessful in investing her money. She had been told that the First Defendant was a retired lawyer with "*considerable relevant international experience with the operation of trusts and duties of trustees.*" This is not in dispute. The First Defendant agrees in his a witness statement that he initially "*was consulted in my capacity as an experienced administrator of hundreds of discretionary Trusts over a period of some 35 years in many tax-efficient international trust and corporate jurisdictions.*"

56. Their initial discussions regarding the possibility of a claim against previous financial advisers did not yield any positive result – the First Defendant and other legal advisers engaged to advise on this considered such an action to be difficult to pursue. However, it did lead to a discussion of the Claimant's investment portfolio, comprising some £2.1m invested in a diversified portfolio of stocks and shares and various forms of insurance based or other collective investment funds. She considered they were not being well managed by her then financial adviser and she had been disillusioned with this form of investment given the losses that her portfolio had sustained following the 2008 financial crisis.

57. It appears that some of the funds that were later transferred may not have been held by the Claimant absolutely, but may have been assets of a trust (referred to as the "A-Z Trust") established by her previous husband, Baron van Zuylen, in which she had only a life interest. However, that is not something that is relevant to the matters in issue in this trial and I will make no determination about whether the Claimant may be obliged to account for any amounts or assets that she may recover under this present action to the trustee(s) or beneficiaries of any such trust.

58. It is clear that the Claimant was deeply impressed by the First Defendant and what he said he could do for her and that she readily fell in with his proposal that he would arrange for her money to be invested as directed by him.

59. According to the Claimant's evidence, he said that he could deliver higher and safer returns, providing her with a substantial monthly income for life by investing her funds in property and/or loans against property. He also persuaded her that this could best be achieved through establishing an offshore trust. She says she found him convincing and trusted him completely. She agreed to this arrangement.

60. The First Defendant challenges some of the detail of this this account, pointing

out the inherently unlikely nature of a safe investment that can offer the type of returns that were being sought. Nevertheless, I believe the Claimant's account of what the First Defendant told her. Certainly, this was borne out by the actions that she took.

61. I am satisfied that the Claimant, on the basis of the First Defendant's representations as to how her money would be dealt with, quickly placed her complete trust and confidence in the First Defendant. Not only did she direct the transfer of her entire portfolio of assets to be sent as he directed, but she signed (in December 2011) a broad power of attorney in favour of him appointing him "*to do all things, sign and execute all documents and take any action which he may consider necessary or expedient and this power is granted pursuant to the Powers of Attorney Act 1971*."

62. She also made him an executor of her will in December 2011 and again in January 2015. She recommended her daughter and various friends to him over the years.

63. Despite suggestions to the contrary from the First and Second Defendants, who point to the Claimant's involvement in various small business ventures and her previous involvement as a beneficiary of trusts established by her former husband, my assessment is, that the Claimant was (and probably remains) unsophisticated when it comes to financial matters (for example having no clear idea of what was meant by a loan to value ratio in the context of a property loan). Certainly, her actions in 2011 suggest this. She took no steps to check whether the First Defendant was authorised to provide financial advice. She was not put on guard by the First Defendant's failure to produce an engagement letter setting out the basis of his fees or to undertake and record the formal fact-finding and checks that would be undertaken by a respectable investment firm or other financial professional.

64. The Claimant is not to be blamed for this. Her experience was not experience in the financial world. She had been a wife and a mother and had spent much of her time doing charity work and competitive riding and had relied on others to look after her finances. No doubt, having looked with hindsight, the Claimant will have asked herself how she could have been so trusting as to commit her entire fortune to someone who was not in any way regulated, being neither a practising solicitor, nor a regulated investment adviser, and to do so with a complete absence of paperwork. Nevertheless, I am satisfied that this is what happened.

(B) The transfer of the Claimant's money to Charles Whiting

65. In November 2011, the Claimant started to liquidate her portfolio so as to transfer it as directed by the First Defendant. On 24 November 2011, she directed a funds administrator to pay a little over £1 million held as proceeds of liquidating her portfolio to a firm of solicitors called Charles Whiting.

66. It appears that the file to which these monies were credited was a file in the name of GBT. However, there has been some difficulty in ascertaining the precise arrangement. There has been no disclosure of any solicitor's engagement letter for that firm. Mr Whiting himself has died and his firm is no longer operating. The firm was made subject to an intervention by the Solicitors Regulatory Authority ("**SRA**") but the SRA had only limited success in investigating its affairs. The files were not well organised and some of the relevant information was on a hard-drive that was password protected and inaccessible.

67. In view of the paucity of records on this point, GBT has not admitted that these funds were received by it and in its formal Defence has put the Claimant to proof on this point.

68. The Claimant's argument that this was the case was based on the following:

    (a) The Claimant caused the money to be paid to Charles Whiting on the First Defendant's instructions.

    (b) GBT was the First Defendant's wholly-owned company.

    (c) It is the First Defendant's own evidence in his witness statement that Charles Whiting was acting for GBT.

    (d) This reflects what is said by the solicitors that took over the file from Charles Whiting, Rhodda & Co (then known as Powells Law). Since Powells Law were acting for GBT and received the file and money from Charles Whiting on a file transfer, it should be inferred that Charles Whiting was also acting for GBT.

    (e) No- party has suggested any other candidate as Charles Whiting's client.

69. I agree with the Claimant's argument that this is sufficient to show that GBT was the client of Charles Whiting for the purposes of the receipt of the Claimant's money and that Charles Whiting held this money (as far as it was concerned) on behalf of GBT and at the direction of GBT in the form of its director, the First Defendant.

70. According to the SRA, which has analysed Charles Whiting's bank statements, Charles Whiting received the following sums into its client account on behalf of Claimant: £1,010,244.31 on 24 October 2011; £253,191.85 on 10 November 2011; £236,733 on 15 December 2011; and £294,604 on 11 January 2012. These sums add up to £1,794,773.49.

(C) The first Azure Trust

71. A substantial point in dispute in this trial has been the existence and relevance of

a purported trust named the "Azure Trust".

72. The First Defendant puts a great deal of reliance on the existence and terms of the Azure Trust. He relies on the existence of the Azure Trust to insulate him personally from responsibility to account for the money entrusted to him by the Claimant.

73. Mr Dale argues on behalf of the Claimant that such a trust was never properly created, or at least was never endowed with the monies that came from the Claimant. Indeed, the Claimant goes further and says that the Azure Trust, and GBT itself, were nothing more than instruments of fraud used by the First Defendant and that GBT when it purported to be undertaking matters on behalf of the Azure Trust was operating as the First Defendant's *alter ego* and a device for carrying out wrongdoing. He argues that at the most the term "*Azure Trust*" where it is referred to in documents or solicitors' accounts serves only as a convenient shorthand to identify the monies that have been entrusted to the First Defendant (and/or GBT). These monies should be taken as being held on a constructive or resulting trust, rather than on the terms of the purported trust deed for the Azure Trust.

74. I will consider these legal arguments below, but meanwhile it is useful to explain the facts relating to the Azure Trust.

75. It is common ground that the First Defendant agreed in late 2011 with the Claimant that he would arrange for the investment of the Claimant's money and that he recommended a trust be arranged with the Claimant as the principal beneficiary and said that he would make arrangements for this. He proposed that a Swiss company, Fiduciaire Leman Trust SARL ("**FLT**") should act as the trustee. The trust would be an offshore trust. He told the Claimant that the trust would be established in the Seychelles (which is the jurisdiction in which GBT is established). In the event the trust deed that was signed by FLT purported to establish a trust under the laws of St Kitts and Nevis, a jurisdiction in the Caribbean.

76. I am satisfied that the First Defendant made representations to the Claimant to this effect and that she relied on these representations as providing assurance that there would be a proper arrangement for the custody of the monies that she was arranging to be transferred into the First Defendant's control and for the oversight of these investments.

77. It may be wondered why the establishment of an offshore trust was put forward as being necessary. The First Defendant has given two reasons why he proposed an offshore trust.

78. First, he claims that a trust would afford her protection from creditors such as "*her bank, credit card supplies, local food and beverage suppliers, medical and dental practitioners, car repairers and service garages*". It is not credible that modest liabilities to everyday suppliers would form any proper justification for setting up an offshore trust, and there is no evidence that the Claimant, before she entrusted her money to the First Defendant, was having any difficulty meeting her liabilities. Whilst a properly set up trust might give some protection from creditors, there are substantial disadvantages involved in such an arrangement. There are the costs of administration, the lack of control that the settlor would have over her money and, certainly in the case of a trust in the form of the original Azure Trust Deed a substantial loss of control, direction, transparency and accountability of such a trust.

79. Secondly, the First Defendant says that an important merit of the trust was that it protected the Claimant from any demands which might be made by tax authorities from the USA (given that the Claimant was a US citizen).

80. This seems a doubtful proposition. The Claimant does not accept that she had experienced any such demands. Given what we know about the losses that the Claimant had been making on her investments, it does seem doubtful that she would have had any substantial present liabilities to US tax. The Claimant was a UK resident. It was envisaged that the returns would come from loans made secured on land in the UK and there is a double tax treaty between the UK and the US. To establish the Claimant's tax position would have required detailed analysis by a qualified tax adviser with knowledge of both jurisdictions. The First Defendant in his witness statement claims that the Claimant told him that she had consulted a suitably legally qualified lawyer. However, there is no suggestion or evidence that he was aware in detail of that advice or able to provide any proper evaluation of how that advice would be affected by the trust arrangements he was proposing to put in place.

81. It is credible that the Claimant was convinced that, if the future investment strategy was to be a successful as she had been led to believe, she might accrue tax liabilities in the future and that these liabilities might be mitigated through an offshore trust structure. It is less believable that the First Defendant's motive in proposing the structure had resulted from a proper and honest analysis of her needs and tax position. It is more likely that the First Defendant proposed this for his own aims and that these aims were to avoid any transparency in his dealings with the Claimant's assets.

82. The court has seen copies (but not the originals) of the documentation that was originally established in relation to the Azure Trust. There is therefore a modicum of doubt as to whether such documents were signed, as no original documents have been traced, (and no evidence was adduced as to whether such documents would

require notarisation if signed by a Swiss company but in relation to a trust under the law of St Kitts and Nevis). However, I will assume that originals were executed.

83. The documentation comprises principally a trust deed dated 12 November 2011 signed by the trustee, FLT. The trust was on extremely wide terms. It operated to benefit any person whom the Trustee might nominate and, failing any such nomination, any charity recognised in Nevis or failing that the International Red Cross. The trustee itself (but not the protector) was excluded from being a beneficiary. The trust had wide powers of investment. The trust property was described as US$100 but there was an ability for the trustee to bring other property within the terms of the trust, although there is no evidence that any formal step was ever taken to do so.

84. There was a separate document signed by FLT appointing GBT as protector, and a separate document nominating the Claimant as the first nominated beneficiary.

85. None of this documentation was signed by the Claimant. The Claimant says that she was never given a copy of this documentation. I believe her. It is also notable that no documentation has been produced either to evidence the vesting of any of the Claimant's assets into the trust or to provide any basis of authority for the First Defendant or for GBT to manage any of the assets of the trust on behalf of the trustee. The role of asset manager was not part of the role of the "protector" to which GBT had been appointed.

86. In fact, what documentation that we know the Claimant did see grossly misrepresented the arrangements within the purported Azure Trust. On 26 November 2011, the Claimant signed a letter that the First Defendant produced for her to sign in which she purported to give instructions in her role as "Protector of the Azure Trust", as to the terms on which the Trust should invest. These allowed for an investment of up to £1.2 million by means of loans with a minimum 8% yield on terms as to security which would include a first priority legal charge and a loan to value ratio of not less than 60%. Later (on 7 December 2011), this was followed by the Claimant signing, at the instigation of the First Defendant, a letter in very similar terms, but where the amount to be invested was £1.7 million, rather than £1.2 million.

87. The First Defendant knew that the Claimant was not a protector under the terms of the trust deed that he had produced. He must have known when drafting these letters that they were misrepresenting the Claimant's position according to the documentation for the Azure Trust.

88. The most credible explanation of the First Defendant's motive for producing these documents was that he wanted to give the Claimant false comfort that the trust

arrangements with FLT were properly in place, that she retained a measure of control over these investments and that her money would be properly invested in a way to which she had agreed. The First Defendant knew this not to be true so this must be regarded as a fraudulent intention.

89. The Claimant also signed two letters of wishes on 12 December 2011 addressed to the trustees of the Azure Trust. One was addressed to FLT and the other to GBT. It is not clear why the First Defendant caused her to write to two different trustees on the same day but it is difficult to conceive an honest reason for this. These letters of wishes also make it clear that the Claimant expected that there would be proper governance around the arrangements within the Azure Trust, including reporting and trustee meetings to review investment performance. As these letters were prepared by the First Defendant, by presenting these letters, the First Defendant may be taken as having represented these to be the arrangements that would be applicable to the Azure Trust (or at least that they would be wishes that the trustee would properly consider).

90. I also conclude that the Claimant is telling the truth when she said that the documents were in front of her only briefly and that she did not read them in any detail. If she had had proper time to study these documents, she would have remarked upon their incompatibility with one another.

91. As I have already mentioned, from November 2011 the Claimant, acting on instructions from the First Defendant started to liquidate her existing investments and to instruct those holding these investments for her to pay the proceeds of this to Charles Whiting Solicitors. There is no suggestion that these proceeds ever went into an account of FLT, and Mr Brice Littman the principal behind FLT has denied receiving them. Neither has FLT accounted for the US $100 said in the original Trust Deed to have been the original trust property.

92. The Claimant's funds went into a solicitor's account. We do not have details of the ledgers at Charles Whiting Solicitors, but by the time that the files were taken over by Powells Law the ledgers were in the name of GBT (rather than for the Trustee of the Azure Trust), although the matter ledger to which these funds were assigned was denoted "the Azure Trust". It is fair to assume that the same arrangements applied when the funds were held by Charles Whiting.

93. When a solicitor takes on a new matter for a client and is entrusted with monies relating to that matter, the solicitor will open a client ledger to record the monies it is holding for the client and will open a separate matter ledger for each matter with which the solicitor is dealing. The name on the client account denotes the party for whom the solicitor is acting. The name on that matter ledger denotes the matter in respect of which the solicitor is acting. If that denotation includes a reference to another person or to a trust, it does not create any implication that

the solicitor is holding on trust for any person or trust of that name. The solicitor is holding the funds on behalf of, and to the order of, the named client (in this case GBT) not on behalf of any other party that might be named on the matter ledger. These arrangements therefore cannot of themselves be regarded as creating any vesting of assets into the Azure Trust.

94. The First Defendant claims in his witness statement that the Claimant met Mr Whiting and that the First Defendant told her that Mr Whiting was prepared to act for GBT to receive the funds for the benefit of the Azure Trust, and so she knew about these arrangements from the beginning. The Claimant denies this and I believe her.

95. The Claimant says that she only learned about GBT's role through talking to Mr Davis later in November 2017 after the First Defendant had been imprisoned. I accept that the Claimant had understood for the majority of the time in question that the trustee of the Azure Trust was FLT. I note that as late as November 2017 the First Defendant was still writing to the Claimant referring her to Mr Littman/FLT (although the email in question does not specifically refer to FLT as being trustee). Whilst certainly there are documents which she signed referring to GBT, these were only passed briefly in front of the Claimant and I accept her evidence that she did not read these in detail and that it did not occur to her to question why GBT was mentioned on these documents.

96. Whether or not it did actually execute and deliver the documentation relating to the first Azure Trust, FLT never did commence acting as a trustee in relation to the funds the Claimant had sent. Mr Littman later explained in writing that he had been unwilling to take up the appointment as the Claimant was a US citizen and had not demonstrated that she was in compliance with her obligations as a US taxpayer. Mr Littman has also written that FLT did not receive any assets as trustee. I accept that the original October 2011 Azure Trust was never formally constituted for lack of property.

97. For completeness I should add that there was in the bundle a separate declaration of trust (dated 2 November 2011) entered into by GBT Nominees Ltd. According to documents at the Seychelles Registrar of International Business Companies, GBT Nominees Limited was the former name used by GBT prior to 18 May 2012. Under this deed of trust, GBT declares that it holds a first legal charge over the land at the south side of Low Road, Harwich registered at Land Registry under title numbers EX788234 and EX799 5518 on trust for "*the trustees and the discretionary beneficiaries from time to time of the Azure Trust*". From the date of this document, this must refer to the first Azure Trust. This is a somewhat curious document as it is difficult to see how the beneficiaries of this separate trust could be both the trustees and the beneficiaries of the Azure Trust. There is no evidence that this asset was accepted by FLT as a trust asset under the Azure

Trust. Its existence may be pertinent to the tracing claim discussed further below, but I cannot regard it as evidence supporting the proposal that the first Azure Trust ever came into any meaningful existence.

(D) The second Azure Trust

98. Presumably as a result of FLT's refusal to act and the need to demonstrate to solicitors the source of funds that were being applied to accounts opened by GBT, the First Defendant arranged for GBT to execute a second trust deed constituting the "Azure Trust". This trust deed was in identical or near identical terms to the original trust deed signed by FLT and was dated 22 October 2012.

99. Once again, the trust property was described as US$100 (with an ability for the Trustee to accept further monies). As with the first trust, it operated to benefit any person whom the Trustee might nominate and failing any such nomination any charity recognised in Nevis or failing that the International Red Cross. In this case, however, there is no evidence that a principal beneficiary was separately appointed by the Trustee. There is no document seen by the court appointing the Claimant or anyone else as principal beneficiary. As a result, under the terms of that trust (if it ever came into being), the beneficiaries were charities recognised under the laws of Nevis or the International Red Cross.

100. As with the first Azure Trust, there was provision for a protector to be appointed. These is no document seen by the court appointing anyone as protector.

101. This was at best a half-hearted attempt to put trust arrangements in place.

102. On its terms, the new trust deed produced a new trust, bearing no relationship to the original Azure Trust. There was no document appointing GBT as a successor trustee of the original Azure Trust. There was no evidence, or even suggestion, that there was any kind of deed or instrument that transferred any assets which may have been held by the original Azure Trust to this new Azure Trust.

103. It is clear from the terms of and dating of these documents that GBT cannot have been described as a trustee pursuant to either Azure Trust Deed prior to 22 October 2012. Neither has there been any suggestion or evidence that GBT was appointed as an investment manager or asset manager for the first Azure Trust. If GBT was holding or controlling assets derived from Claimant before this date, then it was doing so as a constructive or resulting trustee.

104. It does not follow that from October 2012 GBT should be considered as holding the money received from the Claimant on the terms of the second Azure Trust. There is no evidence that these assets were properly vested so as to be impressed with the terms of that trust. Up to that date, GBT was holding as a constructive trustee or a resulting trustee, having received the funds with a view to their being

passed to FLT as trustee of the original Azure Trust. Accordingly, GBT was not unilaterally entitled to decide that it would change the basis on which it held these assets to the terms set out in a trust deed for the second Azure Trust (especially if it failed formally to appoint the Claimant as a beneficiary of that trust). If the First Defendant had been acting honestly, he and GBT should have accounted to the Claimant for the failure of the original proposed arrangements and sought consent for the new arrangements.

105. Accordingly, even if GBT did purport to appoint these assets to become assets of the second Azure Trust (and there is no document that the court has seen under which it did purport to do so) that appointment would itself be a breach of trust and could not be asserted against the Claimant.

106. I find, therefore, that throughout the period during which it had any ownership or control of the monies entrusted by the Claimant, or any assets deriving from such monies, GBT was holding such assets not on the terms of either of the Trust Deeds relating to an Azure Trust. It was holding them as a bare trustee on a constructive or resulting trust, as discussed further below.

107. The Claimant has also advanced an argument that, even if it appeared that the money had been settled on GBT under the terms of the second Azure Trust, this was nothing more than an instrument of fraud. This point too has considerable merit and I discuss it further below in the context of the First Defendant's claim to avoid responsibility for his role in this on the grounds that the acts complained of were not the acts of the First Defendant himself but were undertaken by GBT in its role as trustee of the Azure Trust.

(E) The investment of the property

108. Neither the First Defendant nor GBT have been able to produce any records to speak of relating to the investment, if there was any investment, of the Claimant's funds other than some documentation relating to the land in Essex, which I will deal with in more detail separately.

109. In his discussions with the Claimant, the First Defendant had suggested that her money was being used to make loans secured on properties. There was particular mention of leasehold properties in Norwich, and indeed on one occasion the Claimant was invited to visit this property. In his witness statement, the First Defendant claimed that some £360,000 had been repaid in relation to Norwich properties and had been combined with funds available to "*another company of which* [GBT] *was the director to make a loan to third party to assist the purchase of an apartment in Central London"*. The value of this investment was said in that witness statement now to have a value to the Azure Trust exceeding £460,000. No documentation has been produced to substantiate these arrangements.

110. It appears that some £25,000 of the monies were invested, and lost, in a start-up business venture called Property Wishes Limited, which was developing a website or portal relating to the marketing of real estate. There was a proposal that this company would provide a consultancy role to the Claimant which would give her an income. The First Defendant was also an investor in this company and there is no evidence or suggestion that any proper process was followed in dealing with the conflicts of interest involved in that.

111. Neither the First Defendant nor GBT has produced any proper accounting records to show how the monies have been invested. The First Defendant has claimed in his witness statement that "*A list of payments made for the benefit of, and to, the claimant was kept by the first defendant's staff,* was *regularly updated and provided to the Claimant for viewing*", but even if this claim were true, it does not amount to a statement that proper accounts dealing with all aspects of the alleged trust were properly kept. It certainly does not mitigate the fact that there appears to be no documentation for the loan investments that were said to be made. This failure to keep proper records, and to take reasonable care of monies invested must of itself be seen as a breach of trust and breach of fiduciary duties.

112. The records that are available relate to the payments made out of and into the solicitors' accounts and these are analysed further below.

(F) The Essex Land

113. It is useful to set out firstly ownership of what is referred to in this judgement as the "Essex Land". This is land at Low Road, Harwich comprised in two titles with the Land Registry: EX788234 and EX705518.

114. This land, which is thought to have development potential, was acquired by a company called Windermere Overseas Limited in September 2006. In January 2010 it was transferred (for nil consideration) to a company called ORI Universal Ltd. In December 2011 it was transferred to a Seychelles company called Onslow Holdings Limited, again for no consideration.

115. Various legal charges have been registered over the land.

(a) A first priority legal charge in favour of a company based in Monaco called Quay Investments Limited (affecting only title EX795518) was created on 1 November 2010, securing a principal sum of £1 million which was said to be repayable on 1 November 2011.

(b) A first priority legal charge in favour of company based in Nevis called GB Trust Co. Ltd (again affecting only title EX795518) was created on 2 November 2010, securing a principal sum of £370,000 which was said to be repayable on 2 November 2012.

(c) A second priority legal charge in favour of a company in Monaco called GBT Nominees Ltd (affecting only title EX795518) was created on 3 November 2010, securing a principal sum of £250,000 which showed on its face no fixed date for repayment.

(d) A first priority legal charge in favour of GBT in its previous name of "GBT Nominees Ltd" (which, confusingly, is the same name as the Monaco company that is mentioned in previous sub- paragraph). This charge affected both titles and was created on 2 November 2011, securing a principal sum of £1 million which was said to be repayable on 1 November 2014. A copy of this has been annotated in the handwriting of the First Defendant to say "*Held for Azure Trust/collateral security*". The Claimant is making a tracing claim against this charge (and the obligations secured by the charge) and so I will call this the "**Relevant Charge**"). The availability of this remedy is considered later in this judgment.

(e) A second priority legal charge in favour of GBT. This charge affected both titles and was created on 1 January 2016, securing a principal sum of £893,792. This was said to be repayable on 1 January 2017.

116. In addition, the court was provided with copies of the following charges which were never registered.

(a) A first priority legal charge in favour of FLT affecting both titles was executed on 1 November 2016. This secured a principal sum of £1,561,000 which was said to be repayable on 1 November 2018.

(b) A first priority legal charge in favour of FLT affecting only title EX795518 was executed on 1 November 2017, securing a principal sum of £1,617,100 which was said to be repayable on 1 November 2019. A copy of this has been annotated in the handwriting of the First Defendant to say "*Beneficiary FLT as trustee of Azure Trust Baroness Jacqueline (Bee) van Zuylen as to capital (interest capitalised)*".

(c) A similar first priority legal charge in favour of FLT affecting only title EX788234 was created on 1 November 2017, securing a principal sum of £650,000 which was said to be repayable on 1 November 2019. A copy of this has been annotated in the handwriting of the First Defendant to say "*Beneficiary A-Z Trust Bee van Zuylen as to interest for life, Allegra van Zuylen as to capital on mother's passing*".

(G) The transfer to Powells Law

117. In January 2012, Powells Law (which later became Rhodda & Co LLP) took over from Charles Whiting as GBT's solicitors. On 3 January 2012 Charles Whiting transferred funds to Powells Law of £400,000 for the account of the GBT/Azure Trust matter ledger. This was a curiously round figure.

118. On 14 June 2012 Powells Law received a further £306,935.60 from Friends Life, one of the Claimant's investment custodians. Combined with the amounts paid to Charles Whiting (£1,794,773.49) this shows that the Claimant parted with a total of £2,101,709.09.

119. In addition to the £400,000 received from Charles Whiting on opening the account on 3 January 2012 Powells Law also received some £300,000 in three £100,000 payments -two from Gonet et Cie (one explained as "part loan repaid" and another as "investment proceeds") and one from FLT (explained as "part loan repaid").

120. The total amount received by Powells Law, therefore, was £1,006,935.60.

121. Over the period during which Powells Law was operating these accounts, the Claimant is aware of only some £128,200 that was paid to her direct or transferred clearly at her request or for her benefit. The only such transfers were two transfers to a charity called Relief Riders.

122. By the time that Powells Law closed its file in October 2012, the balance had reduced to £78,680.83. This amount was transferred to Davis Law.

123. The difference, of £800,054.77, was, according to the ledger, paid to various individuals, companies and other entities in each case following instructions from the First Defendant. The Claimant's case is that none of this was at Claimant's direction, for her immediate benefit or with her knowledge.

124. Overall the impression given by the Powells Law ledger is that it was used as a banking facility with money being paid in and out to and from a large number of third parties.

125. The First Defendant has suggested that the payments out of the account were "*private loans and other investments made for her benefit to generate a good return which beat bank interest and avoided the risk of the stock market*". That position might have been sustainable had there been any evidence that there were enforceable loan agreements in place, or any regular pattern of repayment. In fact there were only a few ledger items that were explicable as repayments. In some cases these payments clearly involved matters in which the First Defendant and/or GBT had a conflict of interest.

126. The Claimant's position has been that these were transactions using her money to benefit the First Defendant, or to cover payments expected by other clients of the First Defendant and were not for her benefit. This explanation seems more likely having regard to the absence of documentation showing any legitimate basis for

payments and the various unsubstantiated explanations that the First Defendant made from time to time as to the satisfactory progress of the Claimant's portfolio.

127. The nature of the payments that were made from and into the solicitors' accounts is discussed further below.

(H) The transfer to Davis Law

128. In October 2012 a new solicitors firm, Davis Law, took over the files and solicitors accounts previously handled by Powells Law on behalf of GBT. Davis Law undertook a degree of due diligence as to who would be its client and relied on the documentation that it had been provided by the First Defendant as to the incorporation details of GBT and as to the existence of the Azure Trust. It noted GBT as its client and operated a matter ledger under the name Azure Trust.

129. The GBT monies earmarked for the Azure Trust were spent by the end of 2013. Some of it had been returned to the Claimant and some was referable to the Essex property, but a large amount had been paid to persons with no connection to her at all.

130. Nonetheless, GBT via Davis Law continued to make payments to the Claimant from other ledger accounts. This was apparently on the direction of the First Defendant, even after he had been imprisoned.

(I) The use made of the solicitors' accounts

131. The court has reviewed and has been taken through the ledger entries and some of the emails giving instructions that led to the transactions underlying the entries during the Powells Law and the Davis Law periods of stewardship. These show a pattern of payments being made that were not explicable by reference to transactions that the solicitors were handling on behalf of GBT.

132. At one point, one of the junior lawyers handling the affairs at Powell's Law made an attempt to query the purpose of a payment but her queries were deflected by the First Defendant.

133. From the information on the solicitors' ledgers it is impossible to understand any legitimate purpose that there might be behind many of the payments. Many are made in the names of individuals, companies or businesses with no further explanation. Sometimes there is some form of half explanation such as "*payment to trustees*", or a reference to the assignment of some unspecified investment. Other payments appear to be paying for some services, for example a payment to Crane & Associates for "*designer fees*"; and a payment to Hill House International Junior School. If it is the First Defendant's case that these amounts were as advanced as loans out of the purported Azure Trust, there are very few

instances of repayments being received from the supposed borrowers.

134. In at least some cases the transferee has some association with the First Defendant. For example a payment was made to a company called Bellgold of £140,000 on 29 June 2012. It is understood that a 50% shareholder of Bellgold is Wadhurst Ltd which is a company associated with the First Defendant. A payment of £50,000 was made to Property Wishes Limited but the board minutes disclosed dealing with these arrangements show that this payment appears to have split so that only half of this amount went to acquire shares said to be for the benefit of the Azure Trust whilst the other half acquired shares for a trust called the Swan Trust where, according to the Claimant, the First Defendant has a family interest.

135. Had the First Defendant appeared at trial, he would have been questioned in detail about these payments. I will not go so far as to draw an inference that his refusal to attend may be motivated by a desire not to be questioned about this. However, I will draw a negative inference from the fact that he has had many months in which he has known that he would be required to account for what has happened to the money and in all that time has produced no satisfactory explanation.

136. A strong impression is created that in effect GBT was using its solicitors' accounts as its bank account, rather than for specific transactions where the law firm had been instructed. I understand that the SRA has raised concerns that Powells Law and Davis Law were involved in breaches of the Solicitors Accounts Rules in allowing the accounts to be used in this way. This is a matter between those firms and the SRA.

137. It is also notable from studying the ledger records of other clients of Davis Law that have been disclosed that many payments made to the Claimant were being made from ledgers other than the GBT/Azure Trust ledger. These include payments from a client called Lavender Properties (against a matter ledger entitled "*Sale of Mole Cottage*") and various payments from a company called Wadhurst Ltd, where the payments were labelled with the Claimant's name together with various justifications such as "*loan instalment*", "*further loan instalment*", "*consultancy fee*", "*dividend*" and "*part repayment of loan*". There were payments from the account holder for another company called Bestar Overseas Ltd with the Claimant's name, sometimes with such rubrics as "*loan instalment*" or "*loan repayment*" and sometimes with no supporting justification. Similarly a company called 36 Shrewsbury Ltd made payments to the Claimant with no explanation on the ledger.

138. Neither the First Defendant nor GBT has proffered a full explanation of the basis for these payments. The only explanation is that proffered by the First Defendant in his witness statement. He claims that he "*kept faith to his commitment to the*

claimant and her status as beneficiary of AZT, by arranging for further instalments to be loaned to her by third-party companies directed by the second defendant totalling in excess of £100,000".

139. These so-called loans were made without the Claimant having any knowledge that she was borrowing money from other companies, and in some cases were labelled in a manner that was inconsistent with the concept of a loan advance. Where these were labelled as loan repayments to the Claimant, it is not said how the Claimant (as opposed to the Azure Trust or GBT) had advanced money to these companies. Where they are labelled as a dividend or as a consultancy payment there is no documented basis for this.

140. The First Defendant went on to state in his witness statement that these payments were made in anticipation of repayment of a loan that the Azure Trust made to another company of which GBT was a director to assist with the purchase of an apartment in Central London and that this investment had a value, at the time of his witness statement, exceeding £460,000, but repayment of it had been delayed as a result of some issue relating to proceedings under the leasehold reform legislation. No evidence has been produced about this loan and there has been no suggestion that repayment of this amount has been received during the six months since that witness statement was made.

141. Taking together the information shown in the GBT/Azure Trust ledger, the payments made to the Claimant from other GBT ledgers, the lack of documentation to demonstrate any proper audit trail justifying the payments, and the less than credible explanation given, the arrangements are entirely inconsistent with what would be expected from a properly and honestly run trust arrangement. What little explanation the First Defendant has provided makes no sense whatsoever. If the Azure Trust was an actual entity it would have properly segregated accounts with a clear documentary explanation for where and why the money went to a particular place, what it was owed, how it was secured and when it would be repaid.

142. The pattern is far more consistent with the proposition that the First Defendant was operating something like a Ponzi scheme - that is to say he was taking in cash from a number of clients, promising to invest it and to provide them with high returns, and then convincing them that these returns had been achieved by using their money, or the money of other clients, to make what appeared to them to be distributions of income or profits. These arrangements always end badly.

143. I have considered whether it is possible that the arrangements only later developed this way and that at the beginning the First Defendant intended to operate honestly and in accordance with the arrangements that he had described to the Claimant, but I find this unlikely. That explanation is impossible to

reconcile with the lack of due process, in terms of properly setting up Azure Trust, in maintaining accounts, documenting investments, providing frequent, detailed and accurate summaries of the investment. I find that it is far more likely that the First Defendant (and therefore GBT, as the First Defendant was its operating mind at the time) always intended to operate this way.

144. I accept the Claimant's case that the way these accounts were run shows a dishonest intent on behalf of the First Defendant.

(J) Money paid and received by the Claimant

145. The Claimant's evidence is that a total of £2,101,709.09 was paid into the various solicitors' accounts and that she received back (directly or through payments made on her behalf to her charity Relief Riders) £128,200 from Powells Law and £591,000 from Davis Law, and so between them a total of £719,200. She acknowledges that she has also received a further £126,876 on her bank statements where the payer is someone else (or is not marked).

146. GBT does not dispute these figures.

147. The First Defendant claims that the Claimant has received back more value than this. He suggests that he settled numerous bills on behalf of the Claimant. He speaks at length in his Particulars of Defence of being called upon "*daily to deal with expenditures incurred by the Claimant, including to landlords, travel agents, clothing suppliers, food suppliers, beverage suppliers, horse product suppliers, vehicle repairers, furnishing suppliers, gas, electric and water suppliers, landline and mobile suppliers, amongst others*." He says that his staff "*kept careful records of these expenditures, and each year the Claimant was informed and would meet with the First Defendant to discuss the same and review and determine the requisite budget for the ensuing year*". He says that payments to or on behalf of the Claimant were advanced to her as loans from the Azure Trust and that "*as at May 2018, the total amount of the Loans what was in excess of One Million Pounds £1,000,000)*". In his witness statement he claims that the figure for payments made to the Claimant or to creditors and third parties amounted to a sum in excess of £1,040,000 by mid-2018.

148. The First Defendant has not produced any detailed accounts or any comprehensive set of receipts or invoices to substantiate the difference between what the Claimant says she received and what he says he paid on her behalf. However he did adduce a number of receipted invoices for modest amounts as evidence for some of these payments, although these were for amounts that fell far short of demonstrating the total quantum of payments that he claims were made on behalf of the Claimant.

149. The invoices that he produced were examined at trial and were compared with

the payments made out of the solicitors' accounts. They did not match.

150. The Claimant gave evidence that these accounts had been settled by her personally and that the reason why the First Defendant held these invoices was that she had passed to the First Defendant a bundle or bundles of papers that included these invoices. Having examined some of these invoices in detail, I find the Claimant's explanation more likely than the explanation offered by the First Defendant and I do not accept the production of these invoices as discharging the First Defendant's, or GBT's, obligation to account for the money entrusted to them. They should be ignored in calculating any amount due back to the Claimant.

151. At the request of the First Defendant, the Claimant (from October 2012 onwards) signed letters annually addressed to GBT as trustee of the Azure Trust in which she agreed amounts paid to her were loans. These were witnessed by the First Defendant's assistant who gave the First Defendant's Mayfair address. The copies of these that were produced to the court had been disclosed by First Defendant from his files.

152. The Claimant's evidence, which I believe, is that she was required to sign the loan letters in order to get money, and that she did not read these very carefully when signing them and was not given copies to retain. She explained that the normal pattern of her meetings with the First Defendant when she asked for money was that he would waste most of the time for any meeting in social talk, and only turn to the business of the meeting very briefly before stating that he had to leave for an urgent appointment. As a result, she had little time during the meetings to ask probing questions or to study documents and she was not given the documents to keep and to study. The First Defendant agrees that his meetings with the Claimant were hurried, although he blames this on the Claimant's insistence on meeting at a restaurant or being late because she insisted on driving into Central London. He does not deny that the Claimant was not given a copy of these letters to keep.

153. The fact that she was not given copies of the loan agreements to keep, or any trust accounts, serves as an indicator that she was not being honestly dealt with.

154. The First Defendant in his witness statement appears to acknowledge that the amounts in the letters were signed in advance of receipt. He talks of amounts totalling over £1 million being advanced to the Claimant over the seven year period from late 2011 and says that these were "*included in the sums anticipated by the terms of the loan agreements signed annually by the claimant in favour of the second defendant*". No separate loan agreements have been produced and I assume that the First Defendant is speaking here of the loan acknowledgement letters which were produced to the court. This is at odds with the terms of the documents themselves which operated as letters acknowledging a debt that had

already been advanced.

155. Given the circumstances in which these documents were presented, and the confused explanation as to whether they were letters signed in anticipation of receiving amounts from the purported Azure Trust, and given the dishonesty that I have found in other documents which the First Defendant asked the Claimant to sign, I do not trust these letters as evidence that the Claimant was indebted to GBT to the extent that they state on their face. I also accept Mr Dale's submission that as the Azure Trust did not exist in any meaningful sense these notes cannot be taken as making her a creditor of the Azure Trust (or of any purported trustee of it) and at most they should be regarded as evidence of her receiving back some funds but not necessarily to the full extent stated on the face of these loan acknowledgements.

156. Whilst these letters refer to GBT as the trustee of the Azure Trust, and therefore suggest that the Claimant was, or should have been, aware of the trust arrangements involving GBT, I do not think that any reliance can be put on the contention that her signing these documents can be taken as demonstrating that she will have realised that her previous understanding that FLT was the trustee of the Azure Trust was no longer true or that she had accepted that GBT was acting as trustee of the Azure Trust under the terms of the second trust deed. She simply signed what a trusted adviser told her to sign.

157. As I do not accept either of these loan acknowledgements or the invoices produced by the First Defendant as evidence of value being transferred back to the Claimant, I should instead accept her explanation and the figures that she has substantiated as representing the amounts that were repaid to her.

(K) The arrangements unwind

158. Although the Claimant has given evidence that she had become increasingly concerned about the lack of transparency in these arrangements, she did not do anything about this until after she received the news that the First Defendant was going to jail. She learnt this in November 2017. She received an email from him saying: "*it is with a heavy heart that I have to inform you that I will be going away for some time…I am treating it like a sabbatical*". She found out quickly that he was referring to the fact that he was going to prison.

159. This naturally caused alarm and she sought to understand the implications for her position. She was introduced to Mr Davis and he explained that he had taken over the files.

160. Mr Davis took some considerable pains to get a clear understanding of the arrangements affecting GBT and its clients, and in particular the circumstances of the Azure Trust and what had happened to the Claimant's money. He produced

two reports for the Claimant summarising his understanding of how the money had been used. He got into contact with Brian Narlborough and Mr Bruce Littman (who claim to be the beneficial owners of Onslow Developments Limited, then the owner of the Essex land) and enlisted their support for arrangements to recognise the Claimant's interest in the Essex Land, although ultimately this initiative appears to have failed when these individuals withdrew their cooperation.

161. The Claimant became his client in relation to these matters and the Claimant attended a number of meetings with Mr Davis. However it appears that at one point the Claimant (and her then boyfriend) became suspicious of Mr Davis's motives and the suspicions were recorded in an email, not intended for Mr Davis but inadvertently copied to him. Mr Davis terminated the retainer and the Claimant sought advice from different solicitors.

162. In January 2019 Mr Davis reported that that the money that he held in his client account for the Claimant had been exhausted.

5. THE CLAIMANT'S BASES OF CLAIM

(A) The overarching case

163. The Claimant, in her amended Particulars of Claim, has sought redress under a number of different headings. The Claimant's overarching case is that she has been the victim of what Mr Dale describes as a "fraudulent scam" and which I would characterise as being most likely a form of Ponzi scheme. Mr Dale put it very simply. She was deceived. She paid over her money, not as a gift, and wants it and its fruits to the extent that they are traceable, or compensation for being denied the ability to profit from its investment.

164. The First Defendant's general response is that the monies were vested into the Azure Trust and that the Azure Trust did invest the Claimant's money mainly by making loans against property as was envisaged.

165. I do not accept the First Defendant's case on this. I do not consider that the Azure Trust was ever properly constituted. I consider that the evidence from the ledger accounts, and the inability of the First Defendant to produce any documentation for the various secured loans that he says were made, are not compatible with the contention that these arrangements were properly operated in the interests of the Claimant.

166. A large element of the First Defendant's defence has involved his seeking to distance himself by claiming that the money went into one or other of the Azure Trusts that were created and accordingly that it is subject to the jurisdiction of a foreign court. The latter point is entirely without merit.

167. The First Defendant claims that he has never benefited from the personal receipt of the Claimant's money, but it is clear that acting through GBT (which at the time was entirely his creature and was his instrument for wrongdoing) he did arrange for various unexplained payments to be made, at least some of which appear to have benefited companies or trusts associated with him, and he operated with no regard to conflicts of interest.

168. I have found that the second defendant, GBT, received the Claimant's money. GBT accepts that, to the extent it did receive funds from the Claimant, and still holds them in a manner that they are identifiable as the Claimant's funds, they are held on trust for the Claimant. The extent to which GBT is also the proper target of the other heads of claim was not much discussed during the course of the trial, but I will consider it below.

169. The Claimant, in her amended Particulars of Claim, sought redress under a number of different headings. These included various remedies available under the Financial Services and Markets Act 2000 ("**FSMA**"), under the tort of deceit, in contract, for breach of trust, for breach of fiduciary duty and in restitution. These claims, insofar as they were actively pursued into the trial, are considered further below.

(B) Deceit

170. The head of claim which Mr Dale was most keen to emphasise during the trial was that based on the tort of deceit. In the context of what may be the imminent bankruptcy of the First Defendant, as has been discussed above, Mr Dale was aware that, unlike some other heads of claim, this head of claim may continue to be enforceable after the end of any period of bankruptcy.

171. To make a claim in deceit a claimant must establish that the defendant: (a) made a representation, (b) that was false, (c) knowing it was false, not believing in its truth or not caring whether it was true or false, (d) intending it to be relied on; and that (e) the claimant relied on it, thereby suffering loss.

(a) Was there a representation?

172. It has been said that "*fraud must be distinctly alleged and as distinctly proved*". It is important that the false representation relied upon is identified.

173. Perhaps, on the basis that it was obvious on the facts put in front of the court, Mr Dale did not spend very much time itemising the particular false representations that were relied on for the purposes of this claim, but when pressed on the point Mr Dale cited the express representations made at the money would be looked after within the Azure Trust by FLT acting as a trustee. The very act of setting up formal trust arrangements with a professional trustee company implied that

the investments would be operated in a normal business-like manner. Even if this was not expressly said, there would have been a clear implication that FLT would have stewardship of the money, ensuring that uninvested monies were being held in bank accounts under its control, and that monies invested would be properly secured, for example by ensuring that there was proper documentation of any loan made and that any security would be held by the trustee or by a responsible nominee for the trustee. Furthermore, the involvement of a professional trustee implied that investment decisions would be made by reference solely to the interests of the beneficiaries and not so as to benefit anyone else involved and that conflicts of interest would be avoided, or at least, appropriately managed in accordance with the provisions of the trust deed and applicable law.

174. I have no doubt that these representations were made. To the extent (if any) that they were not made expressly, they were implied. It is established law that implied representations can form the basis of an action for deceit. Also, where there is a fiduciary relationship relation between the parties (as would have been the case here since the First Defendant was making arrangements as agent on behalf of the Claimant) the fiduciary may be under a duty to reveal information so that non-disclosure would be capable of amounting to a fraud at common law (see for example *Conlon v Simms* (1986) 18 H.L.R.219). This point is particularly relevant to the First Defendant's failure to inform the Claimant about the refusal of FLT to act as trustee, leading to the first Azure Trust never being constituted and its purported replacement with a new Azure Trust where GBT would be trustee.

175. These representations were made by the First Defendant at or before the time that the Claimant started to send money. They were not, however, made by GBT, which remained unknown to the Claimant at this point. Even at a later point, the court has not been directed to any specific representation made by GBT that is said to form the basis of an action for deceit.

176. Of course, there is a distinction between a statement and a promise about the future. This opens the possibility that the First Defendant could argue that, at the time he started his business relationship with the Claimant, he genuinely intended to set up proper trust arrangements operating on the basis described above, and so the statement was either a promise about the future (which cannot form the basis of an action for deceit) or at most a true representation as to his current intentions.

177. There are two objections to such an argument.

178. The first is that, viewing the pattern of conduct I consider it far more likely than not that the First Defendant never intended the original Azure Trust to be set up on a proper and above board basis. If he had meant to do this, he would have

ensured, or at least attempted, the transfer of the Claimant's funds to FLT and would have made arrangements for him or GBT to be given some official standing in relation to the management of these investments. He would not have misrepresented to the Claimant that she was a protector in relation to the Azure Trust. When the trust arrangements with FLT failed, he would have honestly discussed this with the Claimant and obtained her consent to setting up GBT as a replacement trustee. He would have also made better efforts for GBT to be properly constituted as a trustee, for example arranging some form of succession from FLT and by appointing the Claimant as its principal beneficiary.

179. Furthermore, had the initial Azure Trust arrangements been honestly conducted, he would not have regarded himself as being empowered to determine what payments should be made by the Trust. He would also have taken proper steps in relation to the custody of the assets, the documentation of loan terms and the holding of any security.

180. The second objection is that as the matter progressed there would have been continuing representations in this regard. The Claimant says that she had understood that FLT remained the Trustee throughout the period in which she was making the investments. Whilst it is possible that she did at some point become aware that GBT rather than FLT was purporting to act as trustee, given that she did see and sign documents referring to GBT as trustee, I do not believe that she was ever given a clear explanation that there had been a change of trustee and the implications of this. Even if she thought that at some stage GBT had become the trustee she would still have relied on a continuing implied representation that there would at least be an attempt to run matters run on a proper business-like basis by a trustee who would be making investment decisions for her benefit and taking the appropriate steps to secure her investments. It is clear from the facts as I have found them above that this did not happen, rendering such continuing representations false.

(b) Was the representation false?

181. It will be clear from my description of the arrangements that the arrangements that were made in no way matched the express or implied representations I describe above.

(c) Did the First Defendant know the representation to be false?

182. The First Defendant (with many years' experience as a solicitor operating in the field of international trusts) must have understood what he told the Claimant and what were the implications of this and must have clearly understood that the way that he was arranging for the Claimant's monies to be dealt with did not meet the position as he had represented it.

183. His various dealings with the Claimant indicate that he continued to seek to

provide false reassurance that everything was in order through such devices as getting her to sign letters suggesting that she was the "protector" of the Azure Trust when he knew that she was not, and a letter of wishes which he had no intention of observing; by producing from time to time statements suggesting that her investments were going well. He made payments to her knowing that she would have assumed that they came from the Azure Trust but which in fact seem to have in some cases to have been funded by transfers from ledgers held by other clients of GBT.

184. The Claimant gave evidence that the First Defendant was adroit in controlling the meetings that he had with her so that the time spent with her was mostly wasted in small talk and any business element was left to be hurried at the end of the meeting so that she was not left with time to consider what was said or any document that was put in front of her. The fact that the First Defendant did not provide written explanations for her to keep is also consistent with an intention to deceive.

(d) Did the First Defendant rely on the representation and thereby suffer loss?

185. It is clear that the Claimant acted in the way that the First Defendant intended for her to do. She sent her money to the solicitors' accounts controlled by GBT. It is fair to conclude, and I do conclude, that she was doing so in reliance on these representations. I have given consideration to the possibility that the Claimant's naïveté in financial matters was such that she would have sent the money to GBT even if plainly told that there was to be no proper trust arrangement put in place for her but I find this unlikely.

186. Judged on the figures that were placed before the court, it is equally clear that the Claimant has suffered loss as a result of her reliance on these representations. There is a large shortfall between the money that she has received back and the money which she put into the control of the First Defendant. As well as losing money, she has lost the prospect of a commercial return on that money over a lengthy period.

187. It is, of course, possible that, even if the arrangements had been operated in accordance with the terms that had been represented to her, that she might have lost money. That is a risk that any investor takes. However, on the basis of the express or implied representations made to her she was not expecting to have the additional risk that her monies would not be properly accounted for. Neither could she have expected that, where investments were made, they would not be properly protected by means of loan agreements or security, or that the trustee that she was told would be operating the fund would not do so and instead another company, with no credentials would act as trustee would do so (and would do so otherwise than on the basis of any appointment from FLT, the person represented as being the trustee who would have custody of her funds.

188. The arrangements were not as falsely represented, and she has suffered as a result.

189. It is just possible that these losses could be largely mitigated if the Relevant Charge is transferred to her and yields a substantial profit. Nevertheless, as things stand at present the Claimant has suffered a loss and the court should look for a suitable remedy for this.

190. I conclude, therefore, that a remedy for deceit is available to the Claimant against the First Defendant, but not against the Second Defendant.

(C) Breach of Fiduciary Duty

191. The Claimant has also claimed a remedy for breach of fiduciary duty. Again not much time was spent discussing the elements of this cause of action during the course of the trial. The Claimant's submissions in this regard are largely those set out in the skeleton arguments produced in relation to the opening of the trial.

192. In their skeleton argument, Mr Dale and Mr Benson reminded me of the nature of a fiduciary. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is a duty of loyalty: a fiduciary must act in good faith, must not profit out of his trust, and may not act for his own benefit for that of a third person without the informed consent of his principal. Counsel referred me in this regard to *Bristol and West Building Society v Motthew* [1998] Ch. 1, 18, per Millet LJ. Additionally, a person exercising a fiduciary power must not exercise it "*for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power*" as was said in *Vatcher v Paull* [1915] 1 A.C. 372 (PC), 378, by Lord Parker.

193. The First Defendant clearly took on a role as acting as agent for the Claimant. He received the Claimant's money into a bank account controlled by him via his company GBT. The Claimant reposed trust and confidence in him as her adviser. He took on the direction of the investment (or at least the disposition) of that money. He purported to deal with FLT and with others on behalf of the Claimant.

194. I am reminded by counsel for the Claimant that an agent owes a fiduciary duty to his principal (see for example, *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [5], per Lord Neuberger). Certainly (in the absence of contractual provision to the contrary), an arrangement according to which an investment manager is given exclusive control over the assets of another gives rise to fiduciary duties (for which see *SPL Private Finance (PF1) IC Ltd v Arch Financial Products LLP* [2014] EWHC 4268 (Comm), [174], per Walker

J).

195. I accept that the First Defendant should be regarded as a fiduciary and held to the duties applicable to a fiduciary.

196. The case put forward by the Claimant is that the First Defendant breached his personal fiduciary duties by the way in which he dealt with the Claimant's monies. Instead of arranging for these to be held on an independent trust with proper supervision, as he said that he would, he kept control of those monies himself. The use to which these monies was put has never been properly explained. Nevertheless, there is enough information within the ledgers, as discussed above, for the court to conclude that these monies were not being used in a way to benefit the Claimant and in making the types of documented, secured investment that she had expected, but rather were used for his own purposes, which may have included accommodating other clients and which appear to have included transactions for his own benefit.

197. I consider that this case is made out. The First Defendant was in breach of his fiduciary duties and that the Claimant has suffered loss as a result.

198. Except insofar as a trustee may be considered to be a type of fiduciary, or at least to have fiduciary obligations, I do not think that any case has been made that GBT was acting as a fiduciary. I consider GBT's liabilities as trustee below.

(D) Breach of the general prohibition under the FSMA

(a) The general prohibition

199. The Financial Services and Markets Act 2000 (the "**FSMA**") includes provisions prohibiting a person from carrying out, or purporting to carry out, a regulated activity unless that person is an authorised or exempt person. This restriction is referred to as the "general prohibition". The regulated activities to which the general prohibition applies are defined in section 22 FSMA. Under section 22 FSMA, a regulated activity is one which is specified for the purposes of the FSMA and is carried on by way of the business.

200. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (as amended) (the "**RAO**") specifies various activities, which as a result become regulated activities for the purposes of the general prohibition. The Claimant, in her amended Particulars of Claim, identified various of these specified activities which she alleged the First Defendant to have undertaken.

201. Two of the types of activity that were originally pleaded on behalf of the Claimant were those of "accepting deposits" and of "safeguarding and administering investments". However those arguments were not pursued at trial and I do not

consider them further.

202. Mr Dale did, however, make a case for redress based on two further activities specified within the RAO.

(b) Managing investments

203. The first of these was that of managing investments. Article 37 RAO provides as follows:

> *"37. Managing investments*
> *Managing assets belonging to another person, in circumstances involving the exercise of discretion, is a specified kind of activity if—*
>
> *(a) the assets **consist of or include** any investment which is a security, structured deposit or a contractually based investment; or*
> *(b) the arrangements for their management are such that the assets **may consist of or include such investments**, and either the assets have at any time since 29th April 1988 done so, or the arrangements have at any time (whether before or after that date) been held out as arrangements under which the assets would do so.*

204. The Claimant's case here was that the First Defendant, through GBT or otherwise, was in broad terms managing, or at least purporting to manage, the Claimant's investments.

205. It may be objected that these investments did not comprise any of the types of assets listed in paragraph (a) of article 37 RAO on the basis that the investment remit was such as to avoid shares and similar securities. The assets were held either as balances on a solicitor's account or were unsecured loans or loans charged on property.

206. In answer to this objection, Mr Dale makes the case that nevertheless under the arrangements agreed with the First Defendant, the First Defendant was to have an extremely broad discretion in selecting assets including assets which could have been of the type specified in part (a) of Article 37, and furthermore that at least one of the investments purchased was a shareholding (the investment in Future Properties Limited).

207. I will accept, therefore, that the First Defendant was managing himself or via GBT, or was purporting to manage the investment of assets that consisted of or included, or may have consisted of or have included investments of the types specified in article 37(a) RAO.

208. Usually article 37 RAO will not apply when property is being managed by a

trustee because the assets are not assets belonging to another person - the assets are in the legal ownership of the trustee. This will usually mean that the trustee (and any director of the trustee who actually undertakes the activities on behalf of the trustee) will not fall within article 37.

209. I do not consider that in this case that argument is available to the First Defendant or the Second Defendant. First, even on the First Defendant's own case that the arrangements were originally made under the auspices of the first Azure Trust, any activity undertaken by the First Defendant or GBT cannot have been made by them as owners in any sense of the assets before GBT purported itself to become a trustee. Secondly, it is my finding that the defendants cannot rely on the terms of the Azure Trust as being applicable. To the extent that GBT was holding any assets it was doing so under a bare trust and the position of a bare trustee is not sufficient to say for the purposes of article 37 RAO that the shares "belong" to the trustee so that the bare trustee is entitled to manage them.

210. The RAO contains various exclusions (listed at article 39 RAO) which could apply in certain circumstances but none of them are relevant to the circumstances under consideration here. Neither do I consider that there is any argument that the First Defendant and/or GBT were not acting by way of business when they were managing, or purporting to manage, the Claimant's investments.

211. Breach of the general prohibition is a criminal offence. I am not sure that I have had sufficient information and argument to conclude to the standards required by the criminal law that the First Defendant and/or GBT committed this criminal offence. It may be that the Financial Conduct Authority will wish to look into this point. However, I consider that on the standard applicable in this civil case, that of the balance of probabilities, the case is made out that the First Defendant and the Second Defendant were in breach of the general prohibition either by managing investments on behalf of the Claimant or purporting to do so without being authorised or exempt to allow them to do this.

(c) Advising on investments

212. Article 53 RAO specifies the following activity (which therefore becomes a regulated activity if carried on by way of business):

> *53. Advising on investments*
> *Advising a person is a specified kind of activity if the advice is—*
> *(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and*
> *(b) advice on the merits of his doing any of the following (whether as principal or agent)—*

> *(i) buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular investment which is a security, structured deposit or a relevant investment, or*
> *(ii) exercising or not exercising any right conferred by such an investment to buy, sell, subscribe for, exchange or redeem such an investment."*

213. The specific act that the Claimant alleges that the First Defendant undertook which falls within this specified activity was when he advised her to cash in her existing investments in order to invest her money with him. There is no doubt that these existing investments included investments falling within article 53(b)(i).

214. The evidence that the First Defendant advised the Claimant to cash in her investments derives from the Claimant's witness statement and oral evidence. She said in her witness statement that:

> *"RWD persuaded me that he would be able to invest all of my savings on my behalf in such a way as to protect my capital and provide a monthly income for life. He said the property was much better than stocks or the share market, "especially on islands like England". He said that he would be looking after my money. He was very convincing, and I trusted him completely".*

215. The Claimant elaborated on this statement during her oral evidence. She was clear that she had specifically been advised by the First Defendant that her existing investments were not appropriate for her needs and that she should sell them in order to allow him to provide better investments.

216. As Mr Dale points out, if this is correct, the arrangements are very similar to those that were dealt with by the court in the recent case of *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474, where the Court of Appeal (at paragraph 75) approved a dictum by Henderson J that, in drawing the line between what amounted to providing information what amounted to advice that "*any element of comparison or evaluation or persuasion is likely to cross the dividing line*".

217. The First Defendant does not really deal with this issue in his formal defence. However, in his first witness statement he discusses these meetings, mainly in the context of how he says he was instructed to set up trust arrangements. The relevant extracts from his witness statement relating to investment advice include the following:

> *"During the course of meetings to discuss and determine the strategy to be engaged with regard to the proposed litigation in Guernsey the claimant*

requested me to review the performance of her IFA, Financial Relationships LLP. The claimant complained that, whereas Rothschild's Trust had performed badly enough, Financial Relationships LLP had overseen far greater losses. She complained that she had experienced continual difficulties in being able to secure sufficient payments to enable her to sustain her lifestyle. She instructed me to consider taking action against all them to recover losses.

The claimant asked me to advise her [if] what was left of the Rothschild and Financial Relationships funds could be invested to recover capital and yield sufficient to meet her lifestyle requirements. She was adamant that she wanted to avoid the share market and its uncertainties. Bank deposits were out of the question as annual returns were modest to the point of nominal.…

The claimant was adamant that she wished to change the basis of the Financial Relationships LLP investments and to seek opportunities to replace them and secure greater returns for the ultimate benefit of the claimant on a tax beneficial basis.…

The claimant took time to consider her options and ultimately reverted with instructions to proceed…"

218. The First Defendant, therefore, appears to have accepted that he reviewed her existing investments, although he says that this was in the context of advising whether there might be a case for litigation against her advisers. He also appears to accept that he was asked to advise on how the funds currently held by his advisers could be invested and he does not suggest that he refused to provide such advice. Whilst he indicates that the impetus for changing investments came from the Claimant, rather than from him, his explanation is not inconsistent with the Claimant's explanation that he, in the context of having reviewed her existing portfolio, advised her that she could do better by investing in property.

219. It is important also to the context here that it is clear that the advice that the First Defendant is said to have given cannot be regarded as generic advice. It related to the specific investments in a portfolio that he had reviewed.

220. Mr Dale, quite properly, discharged his duties to the court by pointing out various exclusions to the application of article 53 RAO that are set out elsewhere within the RAO. These are listed at article 55 RAO.

221. Of these exclusions, the only one that might fall into consideration in this case is the exclusion at article 67 which applies where advice is given in the course of carrying on any professional business which does not otherwise consist of the carrying on of regulated activities in the United Kingdom. Under article 67(2)

RAO, this exclusion does not apply if the activity in question is remunerated separately from the other services but there is no evidence or suggestion that this was the case.

222. However, in my view this exclusion does not apply here. For this exclusion to apply, it must be the case that the activities "*may reasonably be regarded as a necessary part of other services provided in the course of that other profession or business*". I cannot see how it would be a necessary part of any other business carried on by the First Defendant that he should provide investment advice to the Claimant of the type given here. The proper course for him if he had been asked to advise the Claimant on whether she should sell her existing investments was for him to say that he was not authorised to provide investment advice and that she should discuss the matter with a qualified investment adviser. There is no suggestion in the evidence before the court that this is what he did.

223. Once again, I am not sure that I have had sufficient information and argument to conclude to the standards required by the criminal law that the First Defendant was breaching the general prohibition, and I will leave it to Financial Conduct Authority to consider whether it wishes to look into this point. However, I consider that on the standard of balance of probabilities applicable in this civil case the case is made out that the First Defendant was in breach of the general prohibition by advising or purporting to advise her to sell her existing investment portfolio without being authorised or exempt to provide that advice. For completeness, I will mention again that I do not consider that there is any argument that the First Defendant when doing this was not acting by way of business.

(d) The civil consequences of breach of the general prohibition

224. The civil law consequences that flow from a breach of the general prohibition are set out in section 26 FSMA. This provides as follows:

"26. Agreements made by unauthorised persons.

(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.

(2) The other party is entitled to recover–

(a) any money or other property paid or transferred by him under the agreement; and

(b) compensation for any loss sustained by him as a result of having parted with it.

(3) "Agreement" means an agreement–

(a) made after this section comes into force; and

(b) the making or performance of which constitutes, or is part of, the regulated activity in question.

(4) This section does not apply if the regulated activity is accepting deposits."

225. Accordingly, section 26 provides a separate means of recourse for the Claimant entitling her to recover any property that she has transferred and compensation for any loss she has sustained to having parted with her property.

(E) Breach of contract and rescission

226. The Claimant in her amended Particulars of Claim has also claimed a remedy in contract and in relation to the rescission of that contract. Very little time was spent discussing these causes of action during the course of the trial as Mr Dale on behalf of the Claimant preferred to concentrate on questions of fraudulent conduct, breach of trust, breach of duty and deceit. The Claimant's submissions in this regard were largely confined to those set out in the skeleton arguments produced in relation to the opening of the trial.

227. As a result, no time was spent at trial analysing the formation or terms of any contract between the Claimant and the First Defendant. I do not think it has ever been alleged that there was a contract between the Claimant and GBT.

228. It may well be that a case can be made out in contract and in relation to the rescission of that contract, but that case was not sufficiently explored at trial for me to reach any meaningful decision about the matter, nor do I need to, in view of what I have found in relation to some of the other causes of action pleaded. Accordingly, I will not make any determination on this question.

(F) Restitution

229. A further claim made in the Claimant's amended Particulars of Claim was a right to restitution on the grounds of unjust enrichment. Again this point was not pursued in any detail at trial and, given what I find in relation to other matters there is no need for me to make any finding in relation to this.

(G) Breach of Trust

(a) Who held assets on trust?

230. As noted above, for various reasons I agree with the contention made on behalf of the Claimant that the funds were never held on the terms of the so-called Azure Trust. That purported trust was an instrument of fraud and any purported transfers to it were void, with the result the purported trustee held any funds received on constructive or resulting trust for the Claimant.

231. The Claimant goes further and argues that, because GBT was the First

Defendant's creature and nominee, its receipt of money can be treated as the First Defendant's receipt of money following *Prest v Petrodel Resources Ltd* [2013] UKSC 34 and its analysis of *Gencor ACP Ltd v Dalby [2000] 2 BCLC* 734 (which I deal with in more detail below).

232. I do not agree that these cases can be read as having this effect. It is one thing to say that, where a wholly owned company is used for the purposes of carrying out a fraud, the use of a company does not afford a defence to its owner for his own wrongdoing. It is another to seek to reassign who should be regarded as the legal owner of the property in question. The First Defendant was never an owner of the assets held by GBT and in the absence of an ownership interest it is difficult to see how he could be regarded as a trustee. He may have brought about a breach of trust by GBT, and may be liable for doing that, but it is not correct to regard him as the person holding assets on trust for the Claimant.

233. I do accept, however, that GBT, insofar as it held assets deriving from the Claimant was doing so as a bare trustee.

234. It is clear that in transferring funds into the control of GBT the Claimant was not intending to gift them to GBT, or to the First Defendant, and it must be the case that GBT held such funds as it received upon trust from the moment of their receipt into a solicitors' account controlled by it.

(b) The nature of the trust

235. The precise legal analysis for the classification of this trust is not particularly important in this context. Given the Claimant's lack of awareness about GBT it seems unlikely that the funds were being received by GBT under the terms of an express trust. The facts better fit an analysis that the arrangements be analysed as having given rise to a constructive trust or a resulting trust.

236. There are various ways in which a constructive trust could be said to have arisen. As noted by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669 (HL), 715, if money is paid to someone by mistake and he knows of the mistake but retains the money, he is a constructive trustee of the money for the payer.

237. Similarly, if a transfer is induced by a fraudulent misrepresentation, the transferee will hold the transferred funds on trust for the transferor once the transaction is rescinded, as was found in *National Crime Agency v Robb* [2015] Ch. 520. That case is also authority for the proposition that a constructive trust will also arise where the contract begins as a legitimate transaction but is later affected by supervening fraud.

238. However, the principle that a constructive trust will arise only at the point of

rescission is subject to an exception where the transfer is not merely induced by fraud but is itself nothing more than an instrument of fraud, as explained in *Global Currency Exchange Network Ltd v Osage 1 Ltd* [2019] EWHC 1375 (Comm). In that case Andrew Henshaw QC, sitting as a deputy judge of the High Court said (at [41] onwards):

> *"Lewin on Trusts, para 7-031 states as an exception to this principle that the rules relating to rescission are not requisite "where a contract is not merely induced by fraudulent misrepresentation but is itself the instrument of fraud and no more than a vehicle for obtaining money by false pretences". GCEN relies on this exception. It argues that there is a real foundation for believing that Osage was operating a Ponzi scheme. If so, then investors would still own the Funds in equity without the need to rescind their investment contracts: the contract would have been merely a dishonest device to obtain money for which "it is meaningless to impose a requirement for the fraudster to be notified as 'rescission'": Halley v Law Society [2003] WTLR 845, para 48. The situation would be "not simply a case of a valid contract being induced by fraud; but that the fraud so infected the whole transaction that it had no legal effect at all", i e where "The 'agreements' were fictitious contracts ... merely part of an elaborate charade (or mechanism) by which the loser was persuaded to part with his money": ibid, para 45. On that basis, the position would be "akin to theft" with the result that the Funds would be immediately traceable by investors: Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, 705C–D, 715H*

239. Given what I have found in relation to deceit, and to the non-applicability of the terms of the Azure Trust, the description given here seems highly apposite to me and I think that GBT should be regarded as having held the funds throughout as a constructive trustee under an immediately effective constructive trust.

240. However the effect is little different if the arrangements are instead classified as giving rise to a resulting trust.

241. As explained in one of the leading works on trust law, *Lewin on Trusts*, (20th Edition at paragraph 8-002), a resulting trust arises by operation of law if a person makes a disposition of property upon trust but no trusts are effectively declared, or if the trusts that are declared failed to exhaust the beneficial interest.

242. If I am wrong that the arrangements gave rise to a constructive trust, then I see a strong argument that GBT was holding the assets on a resulting trust.

243. Either way, GBT should be regarded as holding these assets on bare trust and should be regarded as subject to the duties of trustee.

(d) Consequences of finding a trust

244. GBT has, rightly, not placed any reliance on the so-called Azure Trust and has accepted that the money transferred by the Claimant to it was held on a bare trust. It follows that GBT must account for this receipt and the fruits and that the Claimant is entitled to call for the money and an account at will.

245. GBT accepts that, to the extent it did receive funds from the Claimant, and still holds them in a manner such that they are identifiable as the Claimant's funds, they are held on trust for the Claimant (although it does not accept that it is still holding any such funds). However, GBT, under the stewardship of Mr Davis, has been concerned to give due consideration to any other creditors. In this, I think Mr Davis has been operating quite properly. Mr Davis and his firm can be criticised for their original involvement in allowing the First Defendant to use the firm's client account as if it were a bank account. They will need to account for their actions in this regard to the SRA and may well suffer regulatory sanctions as a result. However, my impression has been that since taking over GBT, Mr Davis has been doing his very best to act fairly in the interests of all of those who have a claim against GBT.

246. Mr Dale has asserted that GBT must be regarded as acting as a bare trustee of any asset that is holding on behalf of the Claimant. I agree. If this were the only money that GBT had received that was held on trust for anybody, then it would be right that returning the money subject to the trust would take precedence over the claims of any other creditors of GBT. However, GBT denies that it is still holding any of the Claimant's money and also it seems highly unlikely that the Claimant's money was the only money that had been held on trust by GBT. It seems likely from what the court has seen in the various ledgers that the Claimant is not the only victim of this Ponzi-like arrangement and that others too may well claim that GBT is holding their funds on a bare trust.

247. The casual way in which monies were transferred from one client of GBT to another makes it extremely difficult, if not impossible, to determine how far any particular balance or asset that GBT may have held at any point should be regarded as representing funds derived from one client of GBT or another. Where funds that were held on trust become mixed with other funds held on a different trust, and the total remaining is less than the amount needed to meet claims of all beneficiaries, then the funds remaining available will need to be shared amongst all those who have a valid equitable claim.

248. To the extent that GBT has received the trust funds and has not accounted for them, then Mr Dale is correct in his argument that GBT cannot deny an obligation to return money because it has parted with it or mingled it, in breach of trust. However that obligation to account is an unsecured claim (except to the extent that it might be secured by a lien over the Relevant Charge, as explained below).

If, as I expect will prove to be the case, GBT does not have the assets to meet all of the claims that will be made against it, it will need to go into some form of insolvency proceedings. Its liquidator or administrator will have a hugely difficult task in working out what are the valid claims made against GBT and on what trusts any assets remaining to be held by GBT are held. The Claimant's claim will need to take its place alongside other unsecured claims - behind secured claims and after repayment of any segregated funds that are substantiated to have been held on trust for others. In anticipating this likely outcome, I can understand Mr Davis's caution about GBT paying or transferring assets to the Claimant ahead of other potential claimants without the sanction of a court order to justify this.

(H) Tracing into the Essex Land

(a) The Claimant's tracing claim

249. The Claimant claims that she should be entitled to trace her monies into the charge over the Essex Land which I have defined at paragraph 115(d) above as the "Relevant Charge".

250. During the trial the court heard that the existence of this charge, and of other charges over the property, are being disputed in a separate action. I have seen the Particulars of Claim in relation to that action. This alleges further frauds on behalf of the First Defendant. It is not proper for me to comment on that action and I have been invited on behalf of the Claimant to ignore both this action, and any other purported charges over the same property for these purposes, and concentrate solely on the proposition that has been put to me that this particular charge (for whatever it is worth and on the assumption that it validly exists) is traceable as an asset of the Claimant. I am content to approach the matter on this basis.

(b) The nature of tracing

251. Tracing trust property or property subject to a fiduciary relationship is a well-established process which may be applied where funds or assets are transferred in breach of trust or fiduciary duty. It is based on the legal theory that the beneficial interest in the property will persist unless it is transferred to a *bona fide* purchaser of the legal estate without notice or until the beneficial interest is overreached. The beneficiary may claim a proprietary remedy to vindicate his beneficial interest provided that he can follow his property or trace into its proceeds.

252. In tracing trust money through bank accounts, the courts may encounter

evidential difficulties, but this does not necessarily operate as a bar to prevent the tracing remedy being successfully pursued. This is explained in *Lewin on Trusts* as follows:

> *"Evidential difficulties may arise, however, particularly where a number of bank accounts are involved, some of which may be abroad and banking records are incomplete or not available. In such cases the court may be prepared to draw the inference that a payment into one account is attributable to a previous payment out of another account and therefore traceable where the two payments are of a similar though not identical amount and the time gap between them is reasonably short."*

253. One of the principal cases cited in *Lewin* as demonstrating the court's willingness to draw the appropriate inferences is *El Anjou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717, 734–736.

254. In *El Anjou*, the claimant was the victim of a fraudulent share-selling scheme perpetrated by three Canadians. The fraudulent scheme involved the transfer of money through various jurisdictions and ultimately into a London-based property development project. The first defendant in that case was not itself involved in the fraud. The claimant faced various evidential difficulties. There was no direct evidence linking the funds received into the ultimate recipient's account to the funds the claimant had previously transferred. The claimant had transferred $1,600,000 but the funds ultimately received were only $1,541,432 and the funds were ultimately received 20 days after the claimant's transfer.

255. Nonetheless, the Millett J held that the claimant could trace into the ultimate recipient's account. He placed particular emphasis on the fact that there was "*no evidence that the Canadians had any substantial funds available to them which did not represent proceeds of the fraud*" (735F) and said, at 735H-736A:

> *"The victims of a fraud can follow their money in equity through bank accounts where it has been mixed with other moneys because equity treats the money in such accounts as charged with the repayment of their money. If the money in an account subject to such a charge is afterwards paid out of the account and into a number of different accounts, the victims can claim a similar charge over each of the recipient accounts. They are not bound to choose between them. Whatever may be the position as between the victims inter se, as against the wrongdoer his victims are not required to appropriate debits to credits in order to identify the particular account into which their money has been paid. Equity's power to charge a mixed fund with the repayment of trust moneys (a power not shared by the common law) enables the claimants to follow the money, not because it is theirs, but because it is derived from a fund which is treated as if it were subject to a charge in their*

favour."

(c) The evidence for the Claimant's tracing claim

256. I have already set out above some of the circumstances relating to the Relevant Charge. There are some further details and facts that are relevant to the tracing claim.

257. On 2 November 2011, less than two weeks after the first large payment of over £1 million was paid to Charles Whiting, the First Defendant instructed Mr Whiting to pay £1 million from the GBT Azure Trust/Investment File to a company called Quay Investments Limited. This company had a bank account at HSBC Monaco. The reference used for the transfer was "*Investment Capital*".

258. The First Defendant provided an explanation for this payment in his witness statement. He said that:

> *"The funds were used to acquire from Quay Investments Limited, a company administered in Monaco, the asset of an existing first priority legal charge registered against title to a property situated at Low Road, Harwich, Essex. A TR4 form for transfer of charge form had been executed by Quay Investments Ltd in advance of the transaction being completed and the first defendant then ensured the investment was collaterally secured by a further legal charge executed by the then registered proprietor of the Land, Ori Universal S.A, which arrived in London on 2 November 2011."*

259. Ori Universal SA was the registered owner of the land at the time and it did execute the Relevant Charge in favour of GBT and it must be presumed that the First Defendant is referring to that charge as the charge "*which arrived in London on 2 November 2011"*.

260. GBT declared that it held the charge on trust for the "*the trustees and the discretionary beneficiaries from time to time of the Azure Trust*" as I have described above at paragraph 97.

261. The First Defendant's explanation is to a certain extent confirmed in letters that the First Defendant sent (much later) to the Claimant and to John Davis.

262. On 7 November 2017 the First Defendant wrote to the Claimant saying:

> *"The loan on the Essex property has grown now to in excess of £1.7m £1,067,000 of that amount is for Azure, of which you are the beneficiary. £650,000 (grown from £400,000 received from Pat Peters for A-Z Trust) is held for Allegra as to the capital and yourself as to the income. These two loans are*

now separated into the two components as explained above and the details are held by Bruce Littman of Fiduciare Leman Trust SARL in Geneva."

263. This letter includes a reference to the A-Z Trust which requires an explanation. It appears that the First Defendant was drawing a distinction between monies held on behalf of the Claimant as absolute beneficiary, and monies which derived from a trust pursuant to the terms of an earlier trust established by her former husband. It is understood that under this trust the Claimant was a lifetime beneficiary but there was provision for the capital or some of it to be preserved for her children after her death. This distinction is difficult to equate with the First Defendant's case that his dealings with the Claimant were determined by the terms of the Azure Trust (which made no such distinction). I think the reference is explained as follows. Whilst the First Defendant was not keeping proper accounting records, he was maintaining an idea broadly of what was coming from and going to his various clients. He was aware that some of the money advanced to him by the Claimant had derived from this previous trust but had forgotten that, at most, this provenance was reflected in the letter of wishes referred to above rather than through any other formal recognition in the trust deed that he had drafted.

264. I have been invited to ignore this reference and assume that the monies that were said to be held on behalf of the A-Z Trust form part of the monies that were being held on behalf of the Claimant and are not held on behalf of a separate trust in which the First Defendant or GBT were involved. I accept this argument for the purposes of this present litigation, but I express no view as to whether the Claimant might be obliged to account to the trustees of the A-Z Trust for any recovery that she might make from the First Defendant or GBT (or indeed for her part in in allowing or causing assets of that trust to be transferred into the control of the First Defendant).

265. It was about the time of this letter that the two unregistered charges mentioned at paragraphs 116(b) and (c) were executed in favour of FLT. The figures in these charges provide a close match to the figures mentioned in the letter as to the amounts held by way of "*the loan on the Essex property*" mentioned in the letter (certainly if read in the light of the annotations made in the First Defendant's handwriting). Whether or not these charges gave rise to enforceable obligations, the fact of their execution suggests that FLT and Onslow Holdings Ltd were at the time accepting that the Claimant had contributed to the financing of the Essex property and was owed a claim in return for that.

266. On 19 November 2017 the First Defendant wrote to the Claimant saying:

"The first charge investment in Low Road, Dovercourt, Essex, started at £1,050,000 of this a portion is held for the A-Z Trust, of which you are entitled to the yield and Allegra is entitled to the capital on your passing. This

investment has now grown to a capital sum of £1,717,000, in total, of which £1,016,000 is held for Azure Trust and £650,000 is held for A-Z Trust…"

267. On 28 March 2018 the First Defendant wrote to Mr Davis saying:

> ***"****The amounts received to Charles Whiting's client account totalled approximately £1.3m. I invested these amounts through Azure Trust, created by BvZuylen and had.*
> *Current Valuation of Trust Assets:*
> *1st mortgage*
> *Legal Charge*
> *Low Road*
> *Dovercourt*
> *£1,067,000*
> *Interest 1¼ to (20) March 2018 £26,675****"***

268. There was evidence that at one point the company Onslow Developments Ltd, which had become the owner of the Essex Land, and Brian Narlborough and Mr Bruce Littman (who claim to be the beneficial owners of Onslow Developments) were prepared to document the Claimant's right to an interest in the land. This was discussed at a meeting on 7 December 2017 with Mr Davis. The Claimant also met Mr Littman and a Brian Narlborough. At that point they both seemed to accept that the Claimant's money had been the source of an advance that had justified the creation of the charge and that the Claimant accordingly should be regarded as having the beneficial interest of the interest in land represented by this charge.

269. Mr Littman emailed Mr Davis on 28 December 2017 offering to register a charge in the Claimant's name, and repeated this offer on 12 January 2018. Mr Davis's firm drew up a deed of memorandum of understanding. Under the terms of this memorandum of understanding the Claimant's ownership of the charge either in her own capacity or as beneficiary of the Azure Trust was to be acknowledged and it was to be agreed that she should be provided with an investment interest in the property for a principal sum of £1,617,000, interest on that sum and a right to a payment of 10% of the profit on the sale of the land and that Onslow Developments would consent to a new charge being issued against the land to protect the interests of the Claimant until such repayment.

270. It appears that, for reasons that have not been explained, Mr Littman and Mr Narlborough did not go ahead with signing this agreement.

271. There is, therefore, a great deal of circumstantial evidence to support the Claimant's tracing claim. In summary:

(a) The payment made on behalf of the Claimant into the solicitor's account of just over £1 million, was closely related in time and amount to the payment of the £1 million from the GBT Azure Trust/Investment File to Quay Investments Ltd, the holder of a charge over the Essex Land.

(b) It is a reasonable presumption that, one way or another, this payment was the reason why the holder of the Essex Land at that time, Ori Universal S.A., issued the Relevant Charge.

(c) The First Defendant has stated in his witness statement that it was his intention that the payment would obtain transfer of the charge for the Claimant's benefit and that the charge mentioned above was entered into as "collateral security" securing this transfer.

(d) The copy of the charge that has been produced in evidence was annotated at some time in the handwriting of the First Defendant as being "held for Azure Trust/Collateral Security".

(e) GBT executed a declaration of trust stating that it held the charge on trust for the trustees and beneficiaries of the Azure Trust. Having found that the Azure Trust has no existence, and as I am baffled by the drafting of this trust deed in how it refers to both the trustee and the beneficiaries of the Azure Trust, I do not think I can find that the Claimant can claim her interest on the basis of this trust deed as it stands. However, its existence indicates a strong connection between the funds advanced by the Claimant and the Relevant Charge.

(f) Mr Davis, at the point when he was still acting as a solicitor to the Claimant, expressed in writing the view that GBT was this holding the charge on behalf of the Claimant.

(g) There is evidence that Onslow Developments Ltd, the owner of the land at the relevant time, accepted that monies deriving from the Claimant had been received for the purposes of financing the Essex Land and there is evidence that it was, at least at one point, willing to recognise this claim by suggesting that it might enter into the memorandum of understanding.

(h) Onslow Developments Ltd also executed (but did not register) further charges acknowledging indebtedness in amounts that matched the amounts which the First Defendant said were owing to the Azure Trust. FLT was the chargee and there is a credible suggestion that it accepted the charge with a view to taking up responsibilities as trustee of a revived Azure Trust.

(i) No other explanation has been advanced for the payment to Quay Investments Ltd, or for the execution of the charge in favour of GBT.

272. GBT accepts the fact that the charge has been registered. It does not suggest that it gave any consideration for this charge from its own resources, but beyond that says that it has no knowledge as to the terms on which the charge is held by it. In its formal Defence it advanced no positive case but put the Claimant to proof on

her claim of beneficial ownership. However during the trial Mr Davis pointed out two weaknesses in the Claimant's argument.

273. The first was that the explanation that the money was paid in order to purchase the charge from Quay Investments is not compatible with the record, which is not that this charge was transferred, but rather that a new charge was issued and the Quay Investments charge was much later discharged.

274. This is a fair point, but is not, in my view, incompatible with the idea that the First Defendant considered this to be a "*purchase of the charge*" from Quay Investments. I think it is possible that businessmen might use this description to describe a position whereby the money was advanced on the instructions of Quay Investments directly to the borrower so that the borrower and then land-owner, Ori Universal S.A., would discharge the charge in favour of Quay Investments and to replace it with a similar charge in favour of GBT. The fact that the discharge came much later can be explained by the general lack of care taken by all involved to document transactions in a proper manner.

275. The second is that, whilst it can be shown that the money was transferred to an account in Monaco, there is no evidence, beyond the First Defendant's own statement, that the money went any further so as to end up in the pockets of Quay Investments or Ori Universal S.A. It is equally possible that this money was simply stolen by the First Defendant, or used for some other purpose. How can the Claimant rely on the First Defendant's unsupported evidence when it is the Claimant's case that he has been fraudulent throughout?

276. Mr Davis fortifies this point by drawing the court's attention to the various steps that the Claimant could have taken to go further in obtaining information about the flow of funds and obtaining witness evidence from those involved. These points seem a little unfair to me given the straitened circumstances of the Claimant which will not have allowed her to pursue every potential avenue to gather information that might be available to a litigant with an unlimited budget, even if as appears to be the case at one stage she was receiving assistance with funding from her then boyfriend or fiancé.

277. I agree that there is some irony in the Claimant relying on the First Defendant's word in relation to this matter when the thrust of her argument is that she has suffered from his deceit, but this is not the whole of the Claimant's case on this point. The First Defendant's evidence is supported by the later actions of Brian Narlborough and of Brice Littman who were both deeply involved in this matter and who at least at one point accepted (apparently against their own interests) that this charge was for the benefit of the Claimant, and offered to create a charge directly in her name (and indeed did issue two charges in favour of FLT, apparently on the basis that FLT would hold these on trust for the Claimant and/or

the A-Z Trust).

278. Mr Davis makes the point that no new charge would have been needed if it was accepted that the existing charge was enforceable and was the asset of the Claimant, but again I do not see very much force in that argument. It was perfectly consistent for Mr Littman and Mr Narlborough to take the view that the Claimant was entitled to the charge but that there were sufficient doubts about the provenance of the charge that it would be cleaner to create a new charge for the benefit of the Claimant.

279. In my view, the circumstantial evidence is such that it is more likely than not that the Relevant Charge can be regarded as the fruits of an investment of the Claimant's money. Whilst there is some doubt in the matter, I find it far more likely than not that the money paid out of the Claimant's money to Monaco was used to replace the charge given in favour of Quay Investments with the charge given in favour of GBT, and that this charge must be regarded as derived from the monies provided by the Claimant. I will therefore, allow the Claimant to trace her assets into this charge.

280. Of course this finding may be of little use to the Claimant if the other litigation referred to above results in the charge being rendered void. Nevertheless, I think it is useful for the Court to determine that as between GBT and the Claimant, this charge should be regarded as being held on behalf of the Claimant.

6. THE FIRST DEFENDANT'S DEFENCE

281. I have already largely dealt with the points that the First Defendant has made by way of defence, but it is useful to gather together my findings in relation to these points. The First Defendant's defence appears to rest on three propositions.

(A) That he acted properly and honestly

282. The first is that the arrangements were operated properly for the benefit of the Claimant (and/or for the benefit of the beneficiaries of the A-Z Trust which the First Defendant appears, for reasons unexplained, to believe that he was bound by). It will be apparent from my analysis above that I do not accept this.

(B) That he is protected by GBT's corporate veil and the Azure Trust

283. The second was that he has no personal responsibility since matters were not undertaken by him but were undertaken by GBT acting as trustee of the Azure Trust.

284. I do not find this argument at all persuasive for two reasons.

285. The first is that the acts complained of are largely acts undertaken by the First Defendant personally and not when he was clearly or decisively operating as a director of GBT. As regards the complaint in deceit, the false representations relied on were made by him personally, and the reliance on this that is complained of was the act committing funds to his control (within the solicitor's account operated by GBT), and at the time that this was done the Claimant had no awareness of GBT. There is no evidence that he did as much as even present a business card suggesting that he was operating as a director of GBT, and certainly there was no engagement letter or other contract or document to the effect that the Claimant accepted her dealings were to be with GBT to the exclusion of the First Defendant. The two trust deeds for the two iterations of the Azure Trust were not signed by the Claimant. As far as the Claimant was concerned she was dealing with the First Defendant or with FLT – and as we have seen she never was dealing with FLT.

286. Similarly, as regards the case in relation to the claim against the First Defendant for breach of fiduciary duty. It is clear that the First Defendant personally undertook a role as a fiduciary in relation to the Claimant and he cannot hide behind GBT in relation to his discharge of that role.

287. A similar point can be made in relation to the case made for breach of the general prohibition. As regards the giving of investment advice, this was done by the First Defendant personally and not under the auspices of GBT, and therefore the involvement of GBT does not help the First Defendant in this regard. As regards the undertaking of investment management, it is perhaps arguable whether investment management was undertaken by GBT or by the First Defendant personally, but it is my finding that the First Defendant personally did at least purport to offer and provide investment management to the Claimant, and this is enough to give rise to a breach of the general prohibition.

288. My second reason is that I consider that the introduction of GBT into the arrangements as purported trustee of the purported Azure Trust formed part of a plan to conceal from the Claimant and obscure the arrangements that the First Defendant was making for the investment of her money.

289. Mr Dale has referred me to the decision in *Prest v Petrodel Resources Ltd* as authority for the proposition that the courts will prevent the abuse of corporate structures for fraudulent ends. The leading decision was given by Lord Sumption. Lord Sumption took as a starting point a principle stated by Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712:

> *"No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find*

fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever…"

290. After reviewing various cases which are considered the issue often described as "piercing the corporate veil" Lord Sumption stated his view that:

"*the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities*"

He acknowledged, however, a difficulty in identifying what is a relevant wrongdoing. He suggested that there were two principles to be considered: the "concealment principle" and the "evasion principle" which he explained (at paragraph 28) as follows:

"The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical."

291. Mr Dale argued that the current case may be considered to fall into the category of the concealment principle as illustrated by Lord Sumption when he referred in *Prest* at [31] to the case at of *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 as a case in which the concealment principle was applied.

292. The plaintiff in that case sought an account of profits from a former director, Mr Dalby. It was submitted on Mr Dalby's behalf that only Burnstead Limited, an offshore company, had received the relevant profits. Rimer J (as he then was) rejected this argument at [26]:

"The facts of this case are that Burnstead was an offshore company which was wholly owned and controlled by Mr Dalby and in which nobody else had any beneficial interest. Everything it did was done on his directions and on his directions alone. It had no sales force, technical team or other employees

capable of carrying on any business. Its only function was to make and receive payments. It was in substance little other than Mr Dalby's offshore bank account held in a nominee name. In my view this is the type of case in which the court ought to have no hesitation in regarding Burnstead simply as the alter ego through which Mr Dalby enjoyed the profit which he earned in breach of his fiduciary duty to ACP. If the arrival at this result requires a lifting of Burnstead's corporate veil, then I regard this as an appropriate case in which to do so. Burnstead is simply a creature company used for receiving profits for which equity holds Mr Dalby to be accountable to ACP. Its knowledge was in all respects the same as his knowledge. The introduction into the story of such a creature company is, in my view, insufficient to prevent equity's eye from identifying it with Mr Dalby…"

293. The description of the roles of Burnstead Limited and of Mr Dalby in that case almost exactly parallels the roles of GBT and the First Defendant in the current case, and I am persuaded that I should treat them in the same way.

(C) That the court has no jurisdiction

294. A third defence that the First Defendant has attempted to raise was based on the proposition that this court had no jurisdiction as the matters in question fell to be determined by the courts of St Kitts and Nevis under the terms applicable to the Azure Trust. The First Defendant raised this challenge to the court's authority very late in the proceedings and it was dismissed at a previous hearing. As well as being raised late, the point was utterly without merit given that the Claimant has not made any claim for breach of the Azure Trust and has never bound herself to any foreign jurisdiction. Her principal complaints against the First Defendant were based on his deceit, breach of fiduciary duty, breach of contract and breach of the general prohibition under the FSMA. In addition, I have found that the purported second Azure Trust, was used by the First Defendant as an instrument of deceit and as such it should be ignored.

7. REMEDIES

(A) The Claimant's substantiated claims

295. To summarise my findings above:

(a) the First Defendant is liable to the Claimant under the tort of deceit;

(b) the First Defendant is liable to the Claimant as a result of his breaching the general prohibition under the FSMA by giving investment advice to the Claimant;

(c) the First Defendant and GBT are each liable to the Claimant as a result of their breaching the general prohibition by managing or purporting to manage the Claimant's assets;

(d) the First Defendant is liable to the Claimant for breach of fiduciary duty and as such liable to account for the Claimant's assets which he dealt with as a fiduciary;
(e) GBT is liable to the Claimant for breach of the trusts on which it had been holding the Claimant's assets;
(f) the Claimant is entitled to trace her assets into the Relevant Charge (to the extent that this is a valid charge, which has been contested elsewhere).

(B) The remedies available to the Claimant

296. The Claimant has a number of options in how she chooses to use her remedies in relation to the Relevant Charge.

297. In *Re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696, Sir George Jessel MR acknowledged that where an asset was acquired exclusively with trust money, the beneficiary could either assert equitable ownership of the asset or enforce a lien or charge over it to recover the trust money. This principle was affirmed (and clarified in relation to its application to mixed assets) by Lord Millett in *Foskett v McKeown* [2001] 1 A.C. 102 (HL), 127. The Claimant has asked for the former remedy, although in view of my further findings below, I will give her an opportunity to consider whether this is the remedy that she seeks.

298. In view of her success with these multiple causes of action, there are a number of ways in which the Claimant could claim for the remainder of loss. She can recover her loss from the First Defendant or from GBT or partly from each of them. Of course, she cannot recover her loss more than once.

299. In terms of quantifying the Claimant's loss, her loss includes the difference between the monies that she entrusted to the First Defendant and GBT and the amount or value that she has received back from them.

(C) Quantifying the loss: account taken of the Relevant Charge

300. An issue arises in calculating that loss. How should the court take into account the fact that her recovery from the defendants will, under the order that the Claimant has requested, include her obtaining the benefit of the Relevant Charge?

301. There are three possible ways in which this could be taken into account.
(a) ***Ultimate realised value.*** Under this approach the Claimant would wait to see what value she could realise from the Relevant Charge and then only bring that value into account. If I have understood correctly, this was the approach that Mr Dale was arguing for.
(b) ***Value at acquisition.*** Under this approach, the asset would be brought into account at what I have found to be her cost of her acquisition of her

interest the Relevant Charge – the £1 million of her money that was used to acquire it.

(c) ***Value at the date of the court order.*** Under this approach, the asset would be brought into account at its market value at the date of the court order, on the basis that she is choosing to trace into this asset and should be considered to have acquired this asset at the date on which her ownership is recognised, and the remainder of the liability of the defendants is calculated.

302. I can see the attractions to the Claimant of the first approach (ultimate realised value). However, this approach does not appear apt given the remedy that she has sought to date: that of asserting equitable ownership of the property. I do not think that it does justice to the defendants for the Claimant to be able to determine how and when the asset is realised and for them to take the risk on the decisions that the Claimant takes to recover value from this asset.

303. This would, however, be appropriate as an approach if the Claimant were instead to seek to enforce a lien against this property to secure her rights against GBT.

304. The second approach (value at acquisition) could perhaps be justified in this case on the argument that this type of investment (a loan secured by a first charge on property) was of the type of investment that the Claimant had agreed upon. Indeed it does appear that this particular investment was discussed with her and she assented to it. Arguably it is fair, therefore, that if it has more or less value today, and she chooses to assert equitable ownership over that asset, which always has been beneficially hers, she should get the benefit or suffer the loss relating to that asset instead of that gain or loss reducing or adding to the defendants' liability.

305. However, against this there is the consideration that the Claimant has a choice that instead of asserting equitable ownership, she could claim a lien over the asset to secure her loss. If she chooses not to do this, and instead to claim the asset, she should accept the asset at its current value. As a general proposition, where a trust exists and a claimant alleges a breach of trust in the way that the trust property has been invested, it would overcompensate the claimant if the claimant were to be allowed to cherry-pick among the wrongly acquired trust assets, taking the gains on the assets that have gone up in value but requiring the defendant to compensate him or her for the assets that had gone down in value.

306. As a result I consider that the third approach (value at the date of the court order) would be the most natural and normal approach to take if the Claimant chooses to trace into the asset. It is the choice of the Claimant whether she wishes to assert equitable ownership over the asset or to obtain a lien over it and otherwise rely entirely on her other rights against the defendants. In making this choice she will

have regard to what is the value of the asset at this point.

307. Based on the above considerations, I consider that the Claimant should be asked again to confirm whether she chooses:
   (a) to assert equitable ownership over the Relevant Charge, on the basis that it will be brought into account for the purposes of calculating the remaining liability of the defendants at its current valuation as at the date of the order; or
   (b) to accept a lien over the Relevant Charge so that it remains in the ownership of GBT but she is acknowledged as having a proprietary right over the Relevant Charge to secure her claim for damages against GBT. If this option is chosen, the Relevant Charge will reduce the liability of the defendants only to the extent that value is realised from it.

308. If the Claimant chooses option (a), the court should order for a valuation to be undertaken by an independent valuer (at the cost of the defendants) agreed between the Claimant and the defendants, or in the absence of agreement, appointed by the court. The basis of valuation would be that the Relevant Charge would be valued at what would be paid for it between a willing buyer and a willing seller having regard to its terms, the property over which it provides security and the existence of a challenge to its existence and/or validity.

309. If the Claimant chooses option (b), then there will arise an issue about how to deal with the conduct of any action that may need to be taken in defence of any challenge to the existence or validity of the Relevant Charge. I would invite the Claimant and GBT to arrive at a suitable understanding over that matter, but in the absence of that understanding, I would give leave to either such party to approach the court to seek directions.

(D) Quantifying the loss: interest calculation

310. As well as the difference between the monies that she entrusted to the First Defendant and GBT and the amount or value that she has received back from them, the Claimant has lost the opportunity to receive the fruits that she might have received through the honest investment of her fortune over a period of some 10 years and it is fair that she should be compensated for this.

311. Mr Dale has suggested to me that the correct approach for compensating this latter point is to allow for interest. He has drawn my attention to the Court of Appeal decision in *Kea v Watson* [2019] EWCA Civ 1759. This was a case based on breach of fiduciary duty in relation to the conduct of an investment joint venture arrangement. Nugee J was the judge at first instance. He awarded equitable compensation which he fixed at the rate of 6.5% per annum compounded annually. He did this on the basis of

"a broad-brush approach based upon what a person with the general characteristics of the claimant might have received by way of investment on trustee investments, not a rate that reflects what the individual claimant itself would have done."

312. The leading judgment on appeal was given by McCombe LJ. He agreed that the judge at first instance had approached the matter correctly "*within his wide discretion and in accordance with the principles to be derived from, the relevant cases"*.

313. Mr Dale suggested that as that case dealt with an appropriate rate of interest over a very similar period to the one that is now under consideration I should adopt the same rate in this case. I was loath to do this without receiving some further evidence about investment returns over the period, and I considered that regard should be given to the fact that the Claimant had looked for an investment based on property lending rather than one based on the risks of the stock market. Accordingly, I invited the parties to provide some examples of how property lending investments had fared over the period.

314. Only Mr Dale responded to this request. He provided some information about the returns on some property funds. These related to portfolios of property and property share investments, rather than the return on the business of lending secured on property.

315. However, more importantly, Mr Dale was able to provide further argument based on the case law which has persuaded me that I was wrong in entertaining the thought that the Claimant's personal preferences as to investment should be taken into account.

316. It may be seen from the passage that I have reproduced at paragraph 311 that the approach that was approved in *Kea v Watson* was based on the general returns that a trustee might obtain on a portfolio rather than based on what the individual claimant would have done. This point was reinforced in a recent judgment of the Court of Appeal in *Glossop Cartons & Print Limited* v *Contact (Print & Packaging) Limited* [2021] EWCA Civ 639. Sir Geoffrey Vos MR emphasised that in a fraudulent misrepresentation case (and our current case is close enough to a fraudulent misrepresentation case for this to be pertinent) the judge ought not to speculate about what the claimant would have done if the fraudulent misrepresentation had not been made or had been true.

317. In our current case, the wisdom of this approach is perhaps borne out by the difficulty that the parties have had in finding an appropriate benchmark that would have matched the Claimant's preference for investment based on property

lending. There is also the difficulty of working out whether this indeed would have been what the Claimant would have done had she not met the First Defendant and relied on his advice. Whilst there is evidence that she was unhappy with her current investment advisers, it is more than possible that she would have continued with a traditional diversified portfolio of investments.

318. I am, therefore, satisfied that I should follow the approach in *Kea v Watson* and allow for interest on the balance of the monies advanced and not yet returned from time to time. I am also in this case content to follow the assessment made by Nugee J in that case that a rate of 6.5% compounded annually was an appropriate rate. Whilst that rate should not be regarded as a rate set by law, and will need to be looked at in each case by reference to market conditions for the period in question, it so happens that the period in question in *Kea v Watson* was very similar to the period in question here and I am happy to rely on the detailed consideration of evidence that was given in that case as to relevant returns from what Nugee J described as his benchmark of "*large private trusts with no special features*" - certainly in the absence of any better evidence in the current case.

319. Again there is a difficulty in considering how the Claimant's interest in the Relevant Charge should be factored into this interest calculation. I think this depends on whether the Claimant to asserts equitable ownership over the Relevant Charge or claims a lien over it.

320. If she asserts equitable ownership over the Relevant Charge, thereby taking to herself the full investment return of the asset over the period from its acquisition, then there is no logic in her being awarded interest in relation to that investment over the same period in which that return is earned. It should be regarded that she received that investment from the date on which the Relevant Charge was created and interest will cease to be payable on the acquisition cost of the Relevant Charge (£1 million) from that date.

321. If the Claimant instead claims a lien over the Relevant Charge, then she should not be regarded as having received the Relevant Charge as her investment when it was created and her entitlement to interest would include interest on the monies used to purchase the Relevant Charge.

(D) What order should the Court make?

322. Mr Dale helpfully drafted a form of order which he respectfully asked the Court to consider. It will be apparent from my judgment above that I am content to provide an order largely in the form he has suggested, although some adjustments will be required to deal with my findings in relation to the calculation of damages. The adjustments required will depend on the Claimant's decision as to how she wishes to deal with the possibility of tracing her assets into the Relevant Charge.

323. In addition, Mr Dale's draft order contains certain provisions as to costs which I am not yet ready to make. Before making an order as to costs, I think the court should be addressed generally on costs. Whilst there is no doubt that the Claimant has been successful in this action, I think the parties should be given an opportunity to provide representations as to costs, and in particular, as to Mr Dale's proposal that costs be given on the indemnity basis; whether it is correct that the First Defendant and GBT should be treated in the same way as to costs; and as to the quantum of any interim costs award. A short early hearing should be held to deal with this matter and any other consequential matters arising out of this judgment.