Abacus (C.I.) Ltd, trustee of the Esteem Settlement and the Number 52 Trust v Sheikh Fahad Mohammed Al Sabah

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	11 March 2002
Neutral Citation:	[2002] JRC 15A
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Date:	11 March 2002

Text

[2002] JRC 15A

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Deputy Bailiff, **and** Jurats de Veulle, **and** Georgelin.

In the Matter of a settlement made on 21st August 1981 between Sheikh Fahad Mohammed Al Sabah and Abacus (CI) Limited ("The Esteem Settlement")

And in the Matter of a settlement made on 24th August 1992 between Sheikh Fahad Mohammed Al Sabah and Abacus (CI) Limited ("The Number 52 Trust")

Between
Abacus (C.I.) Limited, trustee of the Esteem Settlement and the Number 52 Trust

The Trustee

and

Grupo Torras SA
Plaintiff
and
Sheikh Fahad Mohammed Al Sabah
First Defendant

and

Barbara Alison Al Sabah
Second Defendant

and

Mishal Roger Al Sabah
Third Defendant

and

Advocate Michael St. John O'Connell, representative of the minor and unborn beneficiaries of the Esteem settlement and the Number 52 Trust
Fourth Defendant

and

Advocate Michael St. John O'Connell, representative of any person who may in the future be the spouse or former spouse of any child or remoter issue of the first defendant
Fifth Defendant

and

Ceyla Establishment
Sixth Defendant

and

Esteem Limited
Seventh Defendant

Advocate J. A. Clyde-Smith **for Abacus (CI) Limited and for the Sixth and Seventh Defendants**

Advocate N.F. Journeaux **for the Plaintiff**

The First Defendant did not appear and was not represented

Advocate N.M. Santos-Costa **for the Second and Third Defendants**

The Fourth and Fifth Defendants did not appear and were not represented

Authorities

Judgments (Reciprocal Enforcement) (Jersey) Law, 1960.

Golder v Société des Magasins Concorde Limited (1973) JJ 721.

Westdeutsche Landesbank Girozentrale v Islington London Borough Council (1996) AC 669 at 716.

Black v S Freedman & Co (1910) 12 CLR 105 at 110.

Lipkin Gorman v Karpnale Limited (1991) 2 AC 548 at 565; 580.

Trusts (Jersey) Law 1984.

Matthews and Sowden: Jersey Law of Trusts (3rd Ed'n): para. 1.20.

Smith: "The Law of Tracing" (1997): page 6.

Foskett v McKeown (2000) 2 WLR 129 at 1322.

Re the Viscount in the matter of PKT Consultants (Jersey) Limited (1st August, 1991) Jersey Unreported.

Royal Bank of Scotland Limited v Khan (19th October, 1999) Jersey Unreported; [1999/183].

Devaynes v Noble, Clayton's case (1816) 1 Mer 572.

Re Walter J Schmidt & Co Exp Feuerbach (1923) 298 F 314 at 316.

Barlow Clowes International Limited (in liquidation) v Vaughan (1992) BCLC 838.

Re Diplock (1948) All ER 318 at 360.

Goff and Jones: The Law of Restitution (5th Ed'n) page 110.

Re Montague's Settlement Trust (1987) Ch 264.

Belmont Finance Corporation v Williams Furniture Limited (No 2) (1980) 2 All ER 393.

Birks "Misdirected Funds: Restitution from the Recipient" (1989) LMCLQ 296.

Hanbry and Martin: Modern Equity (15th Ed'n) at 300.

Knowing Receipt: The Need for a New Landmark – Essays in honour of Gareth Jones (1988).

Poingdestre: Lois et Coûtumes de l'Ile de Jersey (1928): 210, 211.

Public Services Committee v Maynard (1996) JLR 343 C of A at 350.

Pothier: "Traité des Obligations" (1781 Ed'n) Tome 1, Part I, Chapter II, Article II at para. 153 page 65.

Dalloz: Répertoire (Titre Obligations) (1860) Tome 33 Chapter 6, Section 3, Article 2 at page 237.

Dalloz: Répertoire (1846 Ed'n) Tome III Section 2 para 75, page 20.

Aubry et Rau, Cours de Droit Civil Français (1902) (5th Ed'n): page 220.

Planiol et Ripert: Treatise on the Civil Law, Transl. Louisiana State Law Institute (1938) Volume 2, para. 316 at page 186; page 183; para. 962 at page 267.

Sériaux: Droit des Obligations (1982) at para. 218 at page 673; page 676.

Fraudulent Conveyances Act 1571 (Statute of Elizabeth).

MacKay v Douglas (1872) LR 14 Aq. 106.

Bankruptcy (Désastre) (Jersey) Law 1990: Articles 17 and 29.

Insolvency Act 1986.

Wood: Principles of International Insolvency (1995): para. 4–21 at page 83.

Grouber: "L'Action Paulienne en droit civil François" (1913) Chapter 1, Section 2, pp.48–59.

Foster v AG (1982) JLR 6 C of A at 31.

Domat: Loix Civiles: livre II, section 1 paras. II, VII.

Re Mercer (1886) 17 QBD 290.

Lloyds Bank v Marcan (1973) 1 WLR 1387.

Jyske Bank (Gibraltar) Limited v Spjeldnaes (1999) 2 BCLC 1 at 120, 121.

Chohan v Saggar (1992) BCLC 306.

Law Society v Southall (11th December, 2000) Unreported English Judgment.

Digest of Justinian, book 42, Chapter 8 para. 6.

Nolan: Change of Position from "laundering and tracing" (Ed Birks) OUP 1995.

RBC Dominion Securities Limited v Dawson (1994) 111 DLR 230 (Newfoundland).

Gibbs v Rea (1998) 2 WLR 72.

Gautier v Nicolle (1951) 13 Cr. 110.

Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960 Art. 2.

Boyd v Pickersgill (1999) JLR 284.

Albright v Wailes (1951) JJ 31.

Godfray v Godfray (1865) 111 Moore NS 316.

Guyot: Répertoire de Jurisprudence (1784): Tome 1 at p. 153.

Pothier: Oeuvres (1821 Ed'n): Tome XV: para. 119: p. 62.

Poingdestre: Remarques et Animadversions sur la nouvelle Coûtume de Normandie.

Le Geyt: Priviléges, Lois et Coûtumes: Tome III; Titre X: Art. 9.

Duranton, Cours de Droit Français (1844 edition) Tome 10 p. 583.

Ankum "de Geschiedenis der Action Pauliana" (official translation) p. 299.

The following claims by the Plaintiff:

1. proprietary tracing claim for £1.276 million, to trace this sum into the assets of Esteem Settlement.

2. alternatively, claim in restitution for £1.276 million against Esteem Settlement.

3. claim to set aside all transfers made into Esteem Settlement, Number 52 Trust, and Ceyla at any time after fraud began in May, 1988, on basis that these transfers were made in fraud of Plaintiff, as Creditor of Sheikh Fahad (the 'Pauline' action).

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Deputy Bailiff

THE

A. INTRODUCTION

1 Grupo Torras S.A. (" *GT*") is a company owned by the Kuwait Investment Office. At all material times the First Defendant (" *Sheikh Fahad*") was the Chairman. Between May 1988 and October 1990 Sheikh Fahad conspired with others to defraud GT of some US$430 million, of which his personal share was $120 million.

2 GT has obtained judgment against Sheikh Fahad in respect of the fraud in the English High Court for a total, with accrued interest, of some $800 million. That judgment has been registered in Jersey under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 and is therefore enforceable in this jurisdiction.

3 Sheikh Fahad is hopelessly insolvent. We are informed that he has been declared bankrupt in the Bahamas, where he now resides. GT is unable to recover its judgment debt from Sheikh Fahad's personal assets.

4 Between 1981 and 1994 Sheikh Fahad set up a number of trusts in different jurisdictions. GT now seeks to recover its judgment debt from those trusts. Two of them are situated in Jersey, in that the trustee is resident in the Island and the trusts are governed by Jersey Law. The first is the Esteem Settlement. This was established in 1981; Abacus (CI) Limited ("Abacus") was and remains the trustee. At about the same time Sheikh Fahad also acquired ownership of a Liechtenstein Anstalt called Ceyla Establishment ("Ceyla"). This was administered by Abacus. In August 1992 Sheikh Fahad established the Number 52 Trust of which Abacus is also the trustee.

5 Prior to the commencement of the fraud, Sheikh Fahad contributed assets to the Esteem

Settlement and to Ceyla from time to time. These transfers are not subject to attack. Between 1988 and 1992, after he had begun to defraud GT, he contributed further of his own funds to the Esteem Settlement and to Ceyla. In April 1992 he contributed £4.4 million of monies which he had stolen from GT. In August 1992 he contributed £4 million of his own funds to the Number 52 Trust.

6 In 1999 the Court gave directions on the procedure to be followed in order to resolve any questions as to the validity of the two trusts or of transfers of assets to those trusts in the light of the judgment of the English High Court. These proceedings are known as " *the 1999 Action*". In the 1999 Action as now pleaded, GT lays claim to all the assets in the two trusts on a number of grounds:-

(i) It alleges that the general circumstances surrounding the use of the trusts by Sheikh Fahad enable the trusts to be set aside in law on three grounds; namely, that they are contrary to public policy; the "veil" of the trusts should be lifted; or that a remedial constructive trust in favour of GT should be imposed on the assets of the trusts.

(ii) It alleges that all transfers of assets to the trusts at any time after the fraud began in 1988 were made with the intention of defrauding creditors; such transfers are therefore liable to be set aside.

(iii) It alleges a proprietary claim over certain of the trust assets in respect of £1,267,686.

7 In April 2000 (" *the 2000 Proceedings*") Abacus, following the raising of this possibility by GT in its pleadings in the 1999 Action, sought the directions of the Court as to whether the assets of the two trusts should, pursuant to the discretionary powers conferred on the trustee by the trust deeds, be distributed wholly or partly to Sheikh Fahad, such distribution to be effected by way of payment to GT as his judgment creditor. The Court of Appeal ordered that the 2000 Proceedings should be heard before the 1999 Action. The Court gave judgment in the 2000 Proceedings on 9th January 2001 and held that it did not have jurisdiction, on the facts of the case, to make the suggested distribution or, alternatively, that if it had such jurisdiction, it would not be right to make such a distribution. That decision was subsequently upheld by the Court of Appeal.

8 On 12th February 2001 this Court ordered that the issues at (ii) and (iii) in paragraph 6 above be tried as separate issues prior to the trial of the remaining issues in the 1999 Action. This is the matter which is now before us. Following further amendment to its pleadings GT brings its claim under three headings:-

(i) It brings a proprietary tracing claim in respect of £1.276 million (being the balance of the £4.4 million referred to above) and seeks to trace this sum into the assets of the Esteem Settlement.

(ii) Alternatively it brings a claim in restitution for the sum of £1.276 million against the Esteem Settlement.

(iii) It brings a claim to set aside all transfers made into the Esteem Settlement, the Number 52 Trust and Ceyla at any time after the fraud began in May 1988 on the basis that these transfers were made in fraud of GT as a creditor of Sheikh Fahad. This part of the claim is referred to as the Pauline Action.

9 The transfers which are subject to attack in the Pauline Action are as follows:-

(i) The provision of an undertaking by Sheikh Fahad on 28th September 1989 and the subsequent payment of £5 million to the Esteem Settlement on 14th March 1990.

(ii) The series of contributions (" *the income re-settlements*") made between May 1988 and December 1992 whereby income which had been distributed to Sheikh Fahad out of the Esteem Settlement or Ceyla was immediately resettled by him as capital in the relevant entity.

(iii) The payment of £1.5 million to Ceyla on 17th October 1990.

(iv) The transfer of ownership of Ceyla to the Esteem Settlement on 17th September 1992.

(v) The payment of £4 million to the Number 52 Trust on 25th August 1992.

10 The claims raise a number of complex and novel issues of Jersey law. Thus:-

(i) Does Jersey law recognise the ability to trace assets and, if so, in what circumstances?

(ii) Does Jersey law recognise a claim in restitution even where there is no fault on the part of an innocent recipient?

(iii) Although the case of *Golder v Société des Magasins Concorde Limited* (1973) JJ 721 establishes that Jersey law recognises a right of action to set aside gifts made in fraud of creditors, what are the limits of and principles underlying such an action?

(iv) What limitation period is applicable to the Pauline Action?

11 The structure of this judgment is that we will first set out the relevant evidence and make certain findings of fact where there is a dispute. We will then go on to consider each claim in turn beginning with the tracing claim, moving to the claim in restitution and finally dealing with the Pauline action. In each case we will set out the law in relation to each cause of action (there are arguments of law in relation to all three) and then apply the law to the facts as we find them to be.

B. EVIDENCE

12 Much of the evidence in this case has been documentary (over 5,000 pages). But we have also received evidence from witnesses. On behalf of Abacus we heard from Mr Charles Blampied who is the director of Abacus with principal responsibility for the trusts in question, and from Mr Peter Beamish, a forensic accountant with Deloitte & Touche, who prepared a report showing movements of cash in the various structures from 1981 to the end of 1992. Abacus also produced a report from Mr Philip Hutley of Strutt & Parker giving an expert opinion on the value of certain farming land as at 17th September 1992, being the date upon which Ceyla was transferred to the Esteem Settlement.

13 GT produced evidence from Mr Abdul Al-Haroon. His evidence was not challenged and accordingly it was received by way of written affirmation. He was employed by the KIO between March 1990 and early 1992 and gave evidence of events during that period. Mr Andrew Keltie is a solicitor with Baker & McKenzie, English solicitors, who have the conduct of the litigation on behalf of GT in a number of jurisdictions. He gave evidence concerning the English proceedings and the trusts in other jurisdictions. Mr David Smith is a forensic accountant with KPMG. He gave evidence concerning Sheikh Fahad's state of solvency at various times between May 1988 and July 1993.

14 The defendants began by calling Mrs Barbara Al-Sabah (" *Barbara*"), the wife of Sheikh Fahad. They also called Mr Michael Jennings and Mr Edward Manisty, both partners at the relevant time in the firm of Stephenson Harwood, English solicitors, with responsibility for advising Sheikh Fahad on his personal affairs. The defendants also called Mr James Baskerville, a forensic accountant with Kroll, Lindquist Avey, who conducted a tracing exercise in relation to various payments and Mr R Adams-Cairns of FPD Savills, who gave expert evidence concerning the value of 97 Dulwich Village, London both now and in October 1990.

(i) The fraud

15 Sheikh Fahad is related to the royal family of Kuwait. He worked for the Kuwait Investment Office (" *KIO*") in London from 1965 onwards. The KIO is part of the Kuwait Investment Authority and manages the investments of the Government of Kuwait. Sheikh Fahad rose to become chairman of the KIO in July 1984.

16 By 1988 he was not only chairman of the KIO, but he was also chairman of GT, a company incorporated in Spain which became an indirect subsidiary of the KIO. GT had substantial investments in Spain. Between May 1988 and October 1990 Sheikh Fahad conspired with others to defraud GT of very substantial sums of money. The frauds centered around four transactions known in the proceedings in the English High Court as Croesus, Oakthorn I, Oakthorn II and Pincinco.

17 The first of these was the Croesus transaction. This involved a fraudulent payment away of $27.4 million in May 1988 from a company called Kokmeeuw Holdings BV, which was covered up by a sham loan to a company called Croesus International Limited. There is no evidence that Sheikh Fahad benefited personally from this payment, but it is accepted for the purpose of these proceedings that he conspired with others to defraud GT of this sum.

18 The second transaction is known as Oakthorn I. In July 1989 the sum of $55 million was fraudulently paid away from Torras Hostench London Limited (THL), a wholly owned subsidiary of GT, to a company called Oakthorn Limited. The payment was covered up by a sham loan to Oakthorn. From the sum of $55 million paid to Oakthorn, $22.5 million was, on 31st July 1989, paid into an account known as the G772 account at the Geneva branch of Lombard Odier & Cie (" *the G772 account*"). This was an account in the name of Operfina S.A. but it is accepted for the purposes of this trial that the account was beneficially owned and controlled by Sheikh Fahad.

19 The third transaction was known as Oakthorn II. In this case $50 million was fraudulently paid away to Oakthorn in June 1990. Of this sum, $22.5 million was paid on 13th June 1990 to a personal account of Sheikh Fahad at the London branch of Chemical Bank.

20 Finally, in early October 1990, $300 million was fraudulently paid away from the account of THL. It was covered up by a sham loan to a company called Pincinco Limited. Of this sum, $75 million was paid to the G772 account on 4th October 1990.

21 In summary, GT was defrauded of a total sum of approximately $430 million, of which $120 million was paid to Sheikh Fahad. Of this $120 million, $97.5 million was paid to the G772 account in 1989 and 1990 and $22.5 million was paid to the Chemical Bank in June 1990.

22 It is clear that, from 1990 onwards, questions were being asked about these transactions. We received uncontested evidence from Abdul Wahab al Haroon who was appointed as Chief Investment Manager of the Direct Investment Department of the KIO by the Executive Committee of the KIO. He took up his appointment in March 1990. It would seem that he was appointed because of concern on the part of the Executive Committee.

23 It is clear from his evidence that Sheikh Fahad was obstructive of his efforts to find out what was going on at GT. In particular he gave evidence that, on 26th June 1990, he attended a meeting with the auditors of GT and THL, who were querying the loans to Croesus and Oakthorn. Subsequently, on 29th June 1990 he sent a memo to Sheikh Fahad raising queries about these loans. Sheikh Fahad's response was to circulate a memo on 5th July 1990 to the chairmen and chief officers of wholly owned or partly owned subsidiaries advising that enquiries from the Direct Investment Department would in future have to be countersigned by Sheikh Fahad or his deputy Sheikh Khaled. He circulated a further memo to all chief investment managers dated 9th July 1990 requesting that all accounting queries be directed in future to the chief financial officer. In other words Sheikh Fahad was trying to

ensure that Mr Al Haroon was kept tightly in check.

24 Mr Al Haroon's main concern at this stage was the large sums which were being loaned by the KIO to GT for purposes which were not clear. He discovered that in about September 1990 KIO had lent a further $1.2 billion to GT. In an attempt to try and find out more, he organized a visit to Spain in May 1991. However it is clear from his evidence that Sheikh Fahad so arranged matters as to ensure that he learned nothing of any use during the visit.

25 In April 1991 Mr Al Haroon expressed concern to the new Minister of Finance concerning the KIO's investment in Spain and the lack of access to information in that regard. He repeated his complaint at a meeting of the Executive Committee of the KIO in September 1991. It is clear that Sheikh Fahad was being asked to report to the Executive Committee and it would appear that, as a result of these concerns, Sheikh Fahad was told by the Executive Committee to let the Direct Investment Department take over responsibility for the investments in Spain. Certainly, by a memo dated 9th December 1991 Sheikh Fahad purported to do this. Mr Al Haroon sent a number of memos to Sheikh Fahad stating that the position of GT appeared to be serious and querying various statements and figures which Sheikh Fahad had presented. But it became clear that, despite the memo of 9th December, 1991, Sheikh Fahad was still retaining control of GT and was not involving Mr Al Haroon in the decision making process.

26 Later, in December 1991, a draft balance sheet of GT was prepared. It showed that GT was in a perilous position and faced a cash flow shortfall of approximately $80 million at the end of December 1991 and a further $110 million in January 1992. Mr Al Haroon informed Sheikh Fahad of this fact. Even on an optimistic basis, the KIO was facing a loss of some $1.5 billion on its investment in GT. Furthermore the figures did not show where the $2 billion injected by the KIO in 1990 and 1991 had gone. According to Mr Al Haroon this evidence showed that it was clear that, at that stage, GT was on its last legs and something would have to be done very quickly. He constantly sought further information from Sheikh Fahad but was ignored.

27 In early February 1992 there was a meeting of the Board of the Kuwait Investment Authority in Kuwait chaired by the Minister of Finance. Despite the information just referred to, the members of the Board of GT and the KIO portrayed a favourable picture of GT and its subsidiaries. They were supported by Sheikh Fahad. Mr Al Haroon raised questions at the meeting which sought to cast doubt on this position, but he was not aware of the outcome of the meeting as he left before the end. On 18th February 1992 he sent a memo which he copied to the members of the Executive Committee. This expressed his view that there had, at the least, been gross mismanagement of GT's affairs.

28 It is quite clear, and indeed is accepted for the purposes of this hearing, that the KIO's Spanish investments including GT, and the extent of the loans advanced directly and indirectly by the KIO to GT came increasingly under scrutiny at meetings within the KIO and the Kuwait Investment Authority in the latter part of 1991 and early 1992 and that Sheikh

Fahad's conduct in extending such facilities was challenged.

29 On 12th February 1992 Sheikh Fahad submitted a letter of resignation as chairman of the KIO. This was accepted on 22nd April 1992 with effect from 8th April. On 26th May 1992 his directorship of GT was recorded at a board meeting as having been terminated.

30 On 6th July 1992 the KIO appointed KPMG and Stephenson Harwood to conduct an investigation into GT's managerial, financial and legal position. On 23rd October 1992 Sheikh Fahad was interviewed by Stephenson Harwood in connection with this investigation. They asked him about some of the transactions referred to above, which subsequently became the subject matter of the English action. On 26th October 1992 the Attorney General of Kuwait commenced criminal proceedings against Sheikh Fahad, freezing his assets in Kuwait. The issue was also coming into the public domain. For example, on 30th November 1992, there was an article in the Financial Times reporting that the KIO were considering bringing legal action in respect of the misappropriation of monies. On 13th January 1993 Stephenson Harwood, acting for the KIO, wrote to Sheikh Fahad's then English solicitors seeking information about the Croesus, Oakthorn and Pincinco transactions.

(ii) The English legal proceedings

31 On 14th April 1993 GT and THL issued a writ alleging conspiracy to defraud against Sheikh Fahad and others. On 26th November 1993 GT obtained in the English action a world wide mareva injunction against Sheikh Fahad's assets. A further mareva injunction, relating to trusts with which he was concerned, was made in the English action on 28th March 1994. Broadly speaking, it restrained Sheikh Fahad from dealing with any such trusts or communicating with their trustees.

32 On 8th April 1994 GT issued and served a summons in the English action for an order that Sheikh Fahad serve an affirmation providing full particulars of all trusts of which he had procured the establishment or was the settlor (or otherwise contributed funds from the benefit of the trust) or was at any time a beneficiary or one of a class of potential beneficiaries. Mance J made an order to that effect on 29th July 1994.

33 The trial of the English action began in the latter part of 1998 before Mance J (as he then was). Initially Sheikh Fahad was represented by counsel. However, in mid November 1998, during the course of the trial, information was received from a Swiss judge, Judge Tappolet, concerning the G772 account. This showed that Sheikh Fahad controlled the account and had received payments from the Oakthorn I and Pincinco transactions into the account. As a result, Mance J ordered Sheikh Fahad to swear a further affirmation supplementing and, so far as necessary, correcting his eighth affirmation made previously (in comported compliance with disclosure orders made ancillary to the world wide mareva injunction). On 4th December, being the day by which Sheikh Fahad was ordered to serve such further

affirmation, his counsel informed the court that Sheikh Fahad had not complied with the order, that no affirmation would be served and that henceforward Sheikh Fahad would not be legally represented in the trial. Sheikh Fahad took no further material part in the trial.

34 On 24th June 1999 Mance LJ delivered a reasoned judgment which formed the basis of an order dated 30th July 1999. As already stated, Sheikh Fahad was found liable to GT for a principal sum of approximately $430 million. When interest was taken into account the total judgment debt was for some $800 million. This Court was not given up to date information on the amount outstanding but the evidence before us in December 2000 (for the purposes of the 2000 Proceedings) was that, after allowance for accumulated interest less amounts recovered, the outstanding balance owed by Sheikh Fahad to GT pursuant to the judgment debt was then approximately $687 million. That was continuing to accrue interest, in the absence of any further payments, of approximately $55 million per annum.

(iii) Administration of the structures until 1988 (a) Establishment

35 The Esteem Settlement was established by deed dated 21st August 1981. Sheikh Fahad was the settlor and Abacus was the trustee. The Settlement is governed by Jersey Law. It is a discretionary settlement and the beneficiaries were and remain Sheikh Fahad, his wife Barbara, his son Mishal, any other children or remoter issue born to the settlor and any spouse of Mishal or such other children or remoter issue. The Settlement incorporated a wholly-owned company in Jersey known as Esteem Limited (" *Esteem*"). We refer hereafter to Barbara and Mishal as "the defendants".

36 Ceyla Establishment (" *Ceyla*") is Liechtenstein Anstalt established in June 1980. The founder rights were held for Sheikh Fahad. It was administered by Abacus in Jersey. Both Ceyla and the Esteem Settlement were set up on the advice of Stephenson Harwood who in turn took advice from leading tax counsel. Mr Edward Manisty was one of the partners of Stephenson Harwood who advised Sheikh Fahad. He stated that the structures were set up for two reasons: First, in order to avoid the Kuwaiti Laws of forced inheritance so that Sheikh Fahad could make unrestricted provision for his English wife Barbara and their son Mishal after his death; and secondly to shield Sheikh Fahad's assets from the impact of UK taxation. It is accepted by all parties that the structures were set up for these perfectly legitimate purposes.

37 Initially Sheikh Fahad transferred $2 million to Ceyla in July 1981. Most of this was subsequently transferred to the Esteem Settlement as the initial funds of that settlement. In May 1982 Sheikh Fahad added a sum of Swiss Francs 1,444,307. This was placed on deposit and remained there until distributed in December 1992.

(b) Wissington Grove Farm

38 In 1982 Wissington Grove Farm, Suffolk, was purchased. The farm was purchased by a

company Mouflon Limited which was owned as to 52% by Ceyla and 48% by Esteem. Sheikh Fahad provided the necessary funds for the purchase. At the same time a farm trading company Cycle Tree Limited was formed. This was owned by the same entities and in the same proportions as Mouflon.

(c) Chardwell Farm

39 In 1983 a further farm was acquired, namely Chardwell Farm, Essex. The farm was purchased by a company called Toccata Holdings Limited for £620,000. Toccata was wholly owned by Ceyla. Ceyla also owned the associated farm trading company Chardwell Farm Limited. Sheikh Fahad contributed the necessary funds to Ceyla for this purchase.

(d) 97 Dulwich Village

40 97 Dulwich Village had been the home of Sheikh Fahad and Barbara since 1976. Barbara came originally from Dulwich and was attached to the area. In April 1982, as envisaged when the Esteem Settlement was established, the property was transferred to Esteem. This was achieved by Esteem using the original settled fund of the Esteem Settlement to the extent of $443,250 to purchase 97 Dulwich Village from Sheikh Fahad, who then settled the sale proceeds as additional settled funds of the Esteem Settlement.

(e) 86 Chester Square

41 In October 1986 Esteem purchased the leasehold interest in 86 Chester Square for occupation by Mishal following his marriage. The purchase price was £850,000. This was funded partly by way of a loan from Ceyla to Esteem; the balance came from funds held within the Esteem structure.

(f) Income distributions and re-settlements

42 In October 1984 Mr Philip Giddings of Abacus wrote to Mr Manisty in connection with a potential United Kingdom tax problem if income were to be accumulated in Ceyla or the Esteem Settlement (or their underlying companies). In essence he advised that, if a capital distribution were later to be made to beneficiaries in the United Kingdom at a time when undistributed income remained in the relevant offshore structure, such a distribution would be chargeable to UK income tax. He advised that, if all the income were periodically distributed to Sheikh Fahad and then resettled by Sheikh Fahad as capital, no such problem would arise. This suggestion was considered by Stephenson Harwood who put it to leading tax counsel. The idea was approved. The necessary arrangements were subsequently reduced to writing in a note prepared by Stephenson Harwood dated 21st January 1986. This set out the stages which were to be followed. Because the resettlements following income distributions made after May 1988 are the subject of attack

by GT, we think it is helpful to set out the note in full:-

"A Preliminary

(1) These distributions will be made on a regular basis in February and August each year.

(2) Messrs. Coopers & Lybrand ("C&L") will be responsible for implementing the various steps. They will liaise as necessary with Dr. Pucher ("Dr. P") in relation to the completion of necessary steps in Liechtenstein, with Bedell & Cristin ("B&C") as to completion of the necessary steps in the Channel Islands, and with Stephenson Harwood ("SH") who will obtain the Client's signature to documentation as necessary.

(3) Relevant documentation will be prepared for completion by C&L and will follow the form of skeleton drafts annexed to these notes.

(4) Documentation will be prepared on the basis that payments are made in sterling, and in so far as is possible, sums due will be satisfied in sterling.

B. Timetable

(1) Esteem

Step 1: The Directors of Esteem will pay an interim/final dividend of the maximum amount of distributable income, this dividend to be paid to the Trustee of the Esteem Settlement (£X) Attention C&L

Step 2: Abacus (C.I.) Limited, as Trustee of the Esteem Settlement will appoint £XX (being £X less any desirable retention within the trust for expenses payable out of income or plus any surplus income in the trust) to the Client (Document 1). Attention C&L

Step 3: Abacus (C.I.) Limited will pay £XX to the credit of the Client's account. Attention C&L

Step 4: C&L will send SH a Deed (Document 2) for completion by the Client returning £XXX (being £XX plus or minus a small sum) to the Esteem Settlement. SH will arrange for this document to be completed by the Client outside the UK and for its return to C&L for execution by Abacus and dating. Attention C&L and SH

Step 5: C&L with the assistance of B&C will see that £XXX is returned from the Client's Jersey bank accounts under the control of Abacus as Trustee of the Esteem Settlement. Attention C&L & B&C

Step 6: The Trustees of the Esteem Settlement will lend to Esteem £XXX less any cash retention desired by the Trustees. This additional loan to be recorded by a memorandum (Document 3) endorsed on the Bond recording earlier loans made by the Trustees to Esteem. Attention C&L

(2) Ceyla

…

C. Conclusion

On completion of all the various steps C&L would supply copies of the completed documentation to SH."

We have omitted the passage dealing with Ceyla but it provided to similar effect as the plan for the Esteem Settlement.

43 It is clear from the evidence given by Mr Blampied and by Mr Manisty that this plan was adhered to. Thus Abacus decided on how much was to be distributed having regard to the available income in the Esteem Settlement, Ceyla and their respective underlying companies. Abacus then prepared the documents to reflect the income distribution and the subsequent capital contribution by Sheikh Fahad of an equivalent amount. It was Mr Blampied who decided on the amount that was to be resettled by Sheikh Fahad having regard to the instruction in the note that such sum should be the income distribution plus or minus a small sum. Abacus inserted the appropriate figure in the deed. This was then sent to Stephenson Harwood who, in due course, arranged for Sheikh Fahad to execute the deed. On receipt of the deed of addition Bedell & Cristin, acting under power of attorney over Sheikh Fahad's bank account in Jersey, arranged for the necessary sum to be paid back to the Esteem Settlement or Ceyla, as the case may be. There was some uncertainty in the evidence as to whether Stephenson Harwood engrossed the documents for signature by Sheikh Fahad but, even if they did, it is clear that they took the documents which had been prepared by Abacus and included the figures which had been inserted by Mr Blampied. There was a catching up exercise at the end of 1985 but thereafter monies were distributed and then resettled on a regular basis in accordance with the plan.

(iv) The position immediately prior to the commencement of the frauds

44 GT accepts that all the transfers into the Esteem Settlement and Ceyla before May 1988 were lawful and valid and make no claim in respect of such transfers. It is therefore convenient to take stock of what was in the structures as shown in the accounts at 31st December 1987.

(a) Esteem Settlement

45 Ignoring the underlying corporate entities and loan accounts between the various structures, the Settlement owned the following assets:-

(i) 97 Dulwich Village

(ii) 86 Chester Square

(iii) 48% of Wissington Grove Farm and the associated farming business

(iv) Bank deposits of approximately £1.9 million.

(b) Ceyla

46 On the same basis Ceyla owned the following assets:-

(i) 52% of Wissington Grove Farm and the associated farming business

(ii) Chardwell Farm and the associated farming business

(iii) Bank deposits of approximately £950,000.

47 There was in fact little change until 1990. Thus the accounts as at 31st December 1989 show the position of both the Esteem Settlement and Ceyla to be very much the same save that the cash in the Esteem Settlement at that date was standing at approximately £2.15 million and £55,000 had been lent to Mr and Mrs Weston by way of mortgage. In Ceyla the assets were also broadly the same as at 31st December 1987 save that the cash was standing at £900,000.

(v) Renovation of 97 Dulwich Village and provision of the undertaking of 28th September 1989

48 GT attacks the provision of the undertaking by Sheikh Fahad on 28th September 1989 and the transfer by Sheikh Fahad to the Esteem Settlement of £5 million in March 1990. It is therefore necessary to rehearse the evidence concerning this complex area in some detail. The relevant evidence is that of Mr Blampied, Mr Manisty and the contemporaneous documents.

49 It is to be recalled that 97 Dulwich Village was the home of Sheikh Fahad and Barbara. It had been transferred into the Settlement in 1982 when it was purchased by Esteem. The first mention of improvements seems to have been in a telephone conversation on 10th April 1987 between Anne Phillips, an associate solicitor at Stephenson Harwood and Philip Mangnall, a manager at Abacus, who reported to Mr Blampied. During the conversation Mrs Phillips informed Mr Mangnall that funds would be required for the improvement of the Dulwich property and that whatever sterling funds were required over and above those already held by Esteem would be introduced as additional funds by Sheikh Fahad. It is clear that this remark was in the context of a desire not to break into the dollar accounts held by the Esteem Settlement. At this stage almost all the deposits were held in dollars.

50 This was followed up by a letter dated 16th April 1987 from Mr Manisty to Mr Blampied which included the following:-

> *"Proposals have recently been made for improvements to the Dulwich property held by Esteem.* It is proposed that the swimming pool on the property should be covered, and the Client intends to add funds to Esteem to enable the Company to carry out this work. As a preliminary, however, we are investigating the consents that may be required to carry out the work and I will be in touch with you when further details are known. Meanwhile perhaps you would confirm that in principle the proposal is approved by the Company."

Mr Blampied stated in evidence that he understood that the only work which was contemplated at that stage was the covering of the swimming pool. Mr Manisty was also under that impression. Support for this can be obtained from a file note made by Mrs Phillips on 9th September 1988 (some seventeen months later) when she records that she was unaware that such substantial works were to be carried out to Dulwich Village. Mr Blampied did not in fact consult the directors of Esteem because, as he put it in evidence, he " *took it as read that the directors would agree because it seemed such a minor item*". He responded on 24th April 1987 noting that Sheikh Fahad proposed to add additional sterling funds as and when required and stating that he could foresee no problem at that stage in the directors of Esteem giving their consent to the alterations. We find as a fact that the exchanges between Stephenson Harwood and Abacus in 1987 were understood by all concerned to relate only to the work on the swimming pool. Neither of them was aware of any wider work which was to be undertaken at that stage.

51 Nothing further seems to have come to the attention of Stephenson Harwood or Abacus until 9th September 1988 when, as already referred to, Mrs Phillips made a file note in which she records having been informed by St. Martin's Property Corporation (" *SMPC*") that £319,000 worth of work had been carried out at Dulwich Village over the last twelve months. This clearly came as a surprise to her and raised concerns because Esteem's cash deposits were almost entirely in US dollars. We should add that SMPC was the property management arm of the KIO and Sheikh Fahad was the chairman of SMPC. Shortly after this file note, the dollars held by Esteem were converted into sterling because of the need to put Esteem in funds to cover the proposed works to Dulwich Village.

52 On 29th September 1988 Mr Manisty wrote to Mr Blampied concerning the proposed works to 97 Dulwich Village. He enclosed correspondence with SMPC indicating the general nature of the work. He stated that it appeared that all necessary consents had been obtained in relation to the building works to the house as opposed to the swimming pool. He said that the works were apparently scheduled to commence on 3rd October and he had been promised a draft of the building contract with up to date estimates of costs for consideration by the board of Esteem very shortly. He went on to say that the works were intended to restore the property to " *its former Georgian glory"*.

53 The directors of Esteem were clearly concerned at the uncertain level of expenditure

because the contemporaneous documents show that they wished to ensure that the works were within the company's resources. Various correspondence and exchanges took place between Stephenson Harwood and Abacus. However, in due course, on 19th October 1988 the board agreed to enter into a contract with Savesecurity Construction Limited (" *Savesecurity*") for the sum of £1,602,289 plus VAT plus professional fees. It was also agreed that SMPC would underwrite the cost of the building works during execution and that accounts would then be submitted by SMPC on completion. The board of Esteem noted that the company then had £2,231,756 on deposit and therefore had sufficient funds to cover the building works. The contract was signed on behalf of Esteem on 4th November 1988 but was eventually dated 25th November 1988. On 18th November, Esteem gave authority to the project architect to agree minor variations in the contract up to £5,000; any variation in excess of that sum was to be referred to the board for prior approval.

54 On 19th December 1988 Mr Blampied received a letter from Mr Manisty enclosing a letter from Mr Stevens of SMPC reporting that Sheikh Fahad, having seen a television programme, had said that he did not wish any chemicals to be used in building. This was said to be likely to have a " *catastrophic*" implication for the overall cost. Nothing further of note occurred until 22nd March 1989 when Mr Magnall was informed on the telephone by Mrs Phillips that the work undertaken by Savesecurity was not of a satisfactory standard and that Mr Stevens of SMPC had served noticed on the contractors that, unless matters improved, the contract would be terminated.

55 On 12th April 1989 Mr Manisty advised by fax that Mr Stevens had in fact terminated the contract with Savesecurity, that a mutual termination had been agreed and that the contractor had left the site. He went on to say that it was proposed that a new management contractor should take over the site with effect from Monday 17th April retaining all existing sub-contractors. It was thought that there would be little variation in the cost figures compared with those previously envisaged under the contract. Mr Manisty went on to ask that the matter be referred to the board of Esteem for confirmation that the new arrangements were agreed in principle. On 17th April the board of Esteem (which by now comprised Mr Blampied and one of his partners) agreed to the request.

56 On 19th April 1989 Mr Stevens of SMPC issued a letter of intent to Dore Building Contractors Limited (" *Dore*") to take over the contract with effect from 17th April 1989. On 24th April Mr Manisty informed Mr Blampied that the form of contract and payment had been referred to the quantity surveyors for advice. On 30th May the quantity surveyors reported that it had not proved possible to enter into a fixed price contract and had therefore been necessary to negotiate a different contract which included day work. A copy of this letter was sent to Abacus on 9th June 1989 by Mrs Phillips, who also stated that Mr Stevens had reported that costs had been evaluated and it was expected that these would be kept within the previous limits.

57 It is clear that Dore went on site in April, as envisaged, and began work even though no formal written contract had been put in place. They were clearly willing to proceed on the basis of the letter of intent from SMPC dated 19th April 1989.

58 Abacus appears to have heard nothing further until it was sent the contract in September 1989 (see below). It appears that Stephenson Harwood also heard nothing further because, on 9th August, Mr Manisty wrote to Mr Stevens of SMPC asking for a progress report. Mr Chamberlain of SMPC replied on 21st August informing Mr Manisty that Dore were carrying out the building works which were proceeding satisfactorily; the likely completion date was thought to be late October with a further six weeks for furnishing and the property being ready for completion in early December. He did however say that there had been a number of amendments to the specification at the request of Sheikh Fahad and that the cost implications of these variations was still being assessed.

59 Although we have not heard evidence from any representative of SMPC or from Sheikh Fahad, it is clear that the work had continued apace from April onwards and that Sheikh Fahad had requested a number of alterations to the project, which alterations had been acted upon by SMPC. The consequences of this were to become all too apparent. The background can be seen from a letter dated 21st August 1989 from the Chinman Partnership (the quantity surveyor) to SMPC placing on record their concern at the many changes to the project. It is clear that this letter had not been received at the time that Mr Chamberlain replied to Mr Manisty on 21st August. On 31st August Mr Manisty replied to Mr Chamberlain criticising the lack of reports on progress and asking for details of the amendments to the specification and cost implications so that he could pass this on to Esteem. He also asked for the formal contract which had been promised as long ago as 5th June.

60 The contract was clearly supplied promptly because, on 8th September, Mr Manisty wrote to Mr Blampied enclosing the contract documents in relation to the works being carried out by Dore. He pointed out that the form of contract was not a fixed price contract and that the sum entered in the contract was only an estimate, so that close cost control had to be exercised. He went on to say that a report on the progress of the work was due to be sent to him by SMPC within the next few days and he would forward a copy as soon as he received it. He went to ask that the contract be signed and returned to him so that it could be sent to SMPC for completion by Dore. The directors of Esteem considered the contract and Stephenson Harwood's letter of 8th September at a board meeting on 12th September and resolved to enter into the contract. Mr Blampied returned the documents, duly signed, to Stephenson Harwood on 15th September. It is quite clear that at this stage Esteem had no knowledge that costs had substantially overrun the original contract price. This had only become clear to Stephenson Harwood from a letter dated 11th September written by Mr Stevens of SMPC to Mr Manisty. This stated that Sheikh Fahad had initiated a number of changes to the project which led, as he put it, to the site being " *in turmoil*". He listed many of the changes and enclosed a current statement number 7 from Chinman Partnership, the quantity surveyors, showing the estimated contract price had risen from £1,602,289 to £2,092,925. It is clear that Stephenson Harwood appreciated immediately that this was a serious problem because the total costs were now likely to exceed the cash available to Esteem. On 20th September Stephenson Harwood prepared a note of the additional costs, the relevant part of which reads as follows:-

"Estimated costs:-

1 Building works (Statement 7 of 6/9/89 – Attachment B)	*£2,092,925*
2 Interior works (say)	*£500,000*
3 Professional fees (at say 12.5%)	*£324,115*
4 VAT on 1,2 and 3 at 15%	*£437,556*
Total	*£3,354,596*

Notes

(a) No account is taken of variations post 6th September 1989 (Attachment C)

(b) 2,3 and 4 above are very rough estimates as discussed with Mr J. Stevens on 19th September 1989."

61 The estimated cost considerably exceeded the cash held by Esteem of approximately £2.1 million. There was a preliminary meeting with Sheikh Fahad on 20th September at which the figures were put to him. It appears that he met the following day with Mr Leonard Prouten, the senior partner of Stephenson Harwood, at which time the provision of additional finance to Esteem was raised. This appears from a file note dated 21st September which Mr Manisty made of a conversation with Mr Prouten following that meeting. It seems that Mr Manisty and Mr Prouten agreed that one way forward might be to obtain a written undertaking from Sheikh Fahad to provide additional finance to Esteem as necessary.

62 Following various further discussions Mr Manisty met with Sheikh Fahad on 25th September. Representatives of SMPC were also present and initially the discussion concerned how the cost overrun had occurred. After the representatives of SMPC had departed, Mr Manisty discussed the position of Esteem with Sheikh Fahad. His file note records the outcome of that discussion as follows:-

> *"As to the manner in which the contract was taken you accepted that in view of the increase in costs it was only reasonable that the directors of Esteem should obtain some written comfort from you.* It was agreed that you would sign an undertaking that to the extent that the original contract sum of £1.6m plus VAT was exceeded you would add to the offshore vehicle sufficient additional cash to enable Esteem to meet its obligations under the contract. We were to send you round a suitable piece of paper for signing."

63 In fact, at that meeting, an updated " *current cost projection*" dated 24th September had been presented. This showed that, in the light of further variations, the estimated building

cost had risen to £2,105,583. That was counterbalanced by a reduction in the estimate for furnishings to £467,000. Furthermore no account had been taken of VAT on the professional fees or on the furnishings. The total prediction on that basis was £3,212,431.

64 On the same day, immediately following the meeting with Sheikh Fahad, Mr Manisty telephoned Mr Blampied to give him the bad news about the cost overrun. However he was able to soften the blow by emphasising that Sheikh Fahad had agreed to provide a legally binding commitment to inject funds into the Esteem Settlement to the extent that the cost exceeded the original contract price. He emphasised that he felt that this would cover the directors against any claim that they were fraudulently trading providing that, as he intended, the commitment was binding in law upon Sheikh Fahad.

65 It is clear that Stephenson Harwood prepared an undertaking promptly and Sheikh Fahad signed it under seal on 28th September. It is an important document and therefore we set out the relevant parts in full:-

> *"Esteem ("Esteem")*,
>
> *La Motte Chambers*,
>
> *St. Helier, Channel Islands*
>
> *Dear Sirs*,
>
> ***Re Building works ("the building works") at 97 Dulwich Village, London, SE21 under contracts made between Esteem and SCL (formerly Savesecurity M&E Services Limited) and Esteem and Dore Building Contractors Limited***
>
> *I understand that you have signed a contract with Dore Building Contractors Limited in relation to building works at the above property*.
>
> *I am aware that the original contract for the building works with SCL anticipated a contract price of £1,602,289.13 ("the original cost") before VAT*.
>
> *Owing to the failure of SCL to complete the original contract and other factors the cost of the buildings works is now likely to be significantly in excess of the original cost and I believe it would be helpful to the Board of Esteem for me to confirm in writing that to the extent that the original cost plus VAT is exceeded I would introduce new funds into Esteem to enable it to fulfill its obligations under the contracts relating to the building works*.
>
> *You may take this instrument as containing my covenant in favour of Esteem (which would be binding upon my estate in the event of my being unable to satisfy it in full during my lifetime) to transfer to Esteem an amount equal to the excess over the original cost plus VAT thereon at the appropriate rate of sums due from you on account of the buildings work, my obligations hereunder to Esteem to be satisfied within twenty-one days of your notifying me in writing of*

the discharge by you in full of the original cost plus VAT as aforesaid and of the sum or sums due from me hereunder.

I further confirm that the obligations assumed by me hereunder shall be governed by and construed in accordance with the laws of England and Wales."

66 When giving evidence, Mr Manisty was unable to recall whose idea the provision of the undertaking had been. However he agreed that it would certainly not have been Sheikh Fahad's. We are in no doubt that the idea of a legally binding undertaking came from Stephenson Harwood (whether Mr Manisty, Mr Prouten or a combination) as a way of dealing with the problem which had arisen through the overspends. Stephenson Harwood ensured that the document was executed under seal. As Mr Manisty said in evidence, he wished to ensure that the document was legally binding under English Law so as to protect the directors of Esteem from any suggestion of insolvent trading. Under English Law a document executed under seal is legally binding and enforceable even if there is no consideration.

67 On 2nd October 1989 Mr Manisty wrote to Mr Blampied to bring him up to date in writing with what had occurred. The letter summarised the present position and enclosed most of the recent material. It also enclosed the original undertaking executed by Sheikh Fahad under seal. At the end of the letter Mr Manisty stated that he had retained the contract with Dore, which had been signed by Esteem and would only release this upon confirmation that Esteem was willing to proceed. Esteem held a meeting of its directors on 4th October and agreed to proceed in the manner envisaged. Mr Manisty was subsequently authorised to release the contract with Dore.

68 It is worth considering the amount which it was anticipated at the time would be payable by Sheikh Fahad pursuant to the undertaking. There were in fact two different sets of figures in circulation. The first is that set out in the memo dated 20th September prepared by Stephenson Harwood. This showed the total anticipated amount as being £3,354,596.

69 The second document was the "current cost prediction" dated 24th September. This showed an increase in the building contract from £2,092,925 to £2,105,583 but a reduction in the furnishings from £500,000 to £467,011. If an adjustment is made to the professional fees and VAT to reflect these two figures one emerges with the following:-

Building Contract	£2,105,583.00
Furnishings	£467,011.00
Professional fees at 12.5%	£321,574.00
VAT on above three items at 15%	£ 434,125.00

Total	£3,328,293.00

70 The original contract price was £1,602,289. VAT at 15% thereon is £240,343. This gives a total of £1,842,632. Deducting that figure, the amount which it was anticipated would be payable under the undertaking at the time is £1,485,661.

71 We should also address at this stage the question of Esteem's legal position vis-à-vis Dore at the time of the provision of the undertaking because it may be relevant when considering the Pauline action.

72 Mr Blampied and Mr Manisty both accepted that SMPC was the agent of Esteem for the purpose of negotiating with Dore. Mr Blampied accepted that, so far as he was concerned, Abacus was bound by anything agreed by SMPC with Dore. He was therefore of the view that Esteem had to pay for all the work undertaken by Dore. Mr Manisty, when cross-examined by Mr Journeaux, initially appeared to accept that Esteem was bound to pay the costs incurred to date. Indeed his reference to being concerned about insolvent trading on the part of Esteem was consistent with this view. Later in his evidence he preferred to put it on the basis that he was " *apprehensive*" that Esteem may have been bound, although he did go on to say that he was sure that he had taken the view that the undertaking had to be under seal as otherwise it would not be worth the paper it was written on, because Esteem was already bound to the building contract and was therefore giving nothing of value in signing that contract.

73 Mr Santos-Costa accepted that, as against third parties (i.e. Dore) Esteem was bound by the actions of its agent SMPC. However he argued that Esteem would have a claim against SMPC for anything over the original contract price because its authority was limited to agreeing variations not exceeding £5,000. He based this submission on the letter dated 18th November 1988 from Mr Curtis, a director of Esteem, to Mr Blampied stating that any variations in excess of £5,000 must be referred to the board for prior approval. Interestingly there does not appear to be any evidence before the Court that this was ever communicated by Abacus to Stephenson Harwood and/or SMPC. But, assuming that it was, he argued that, although he accepted that the letter was written in the context of the original building contract with Savesecurity, it must be taken as having been equally applicable to the second contract with Dore.

74 The difficulty is that none of this was ever put to Mr Blampied. It was never suggested to him that the £5,000 limit applied equally to the new contract with Dore, which was of course a contract of a very different nature to that with Savesecurity. On the face of it, the decision of Esteem relates to a contract with Savesecurity. In the absence of specific evidence, it is not to be taken also to apply to a completely different type of contract with a different building firm. Accordingly in the absence of such evidence and of the point being raised with Mr Blampied, we are not willing to infer that the restriction referred to applied to the second contract as well as to the first.

75 We find therefore that, at the time of the provision of the undertaking by Sheikh Fahad in September 1989, Esteem was legally bound to pay, at the very least, for all the works undertaken to date.

76 A further question then arises as to whether Esteem was in fact bound to pay not only for the work already undertaken to date, but also for the work which remained to be done under the project with all the variations agreed by SMPC at that date. Suppose Esteem had refused to sign the formal contract and had ordered Dore to cease work, would Dore have had a claim for breach of contract? Inevitably we have not heard all the evidence because this is only an incidental part of the dispute before the Court. Nevertheless we have to do the best we can on the evidence which we do have. On balance, it is our judgment that Esteem was so bound. In practice, both SMPC and Dore had proceeded on the basis of an oral agreement between them; that is why there was no urgency in preparing the written agreement which was not produced until September despite the fact that Dore had been on site since April. The natural inference is that SMPC and Dore were quite content that they both understood the agreement between them and that it was on the basis (as to day work and fees) which was subsequently reflected in the written contract produced in September. As SMPC was its agent, Esteem was bound in the same way. Furthermore, Esteem was bound by all variations to the project which had been agreed by SMPC as its agent. It follows that the signature on the written contract did not make any difference to the legal position. Esteem was already bound to a contract with Dore whereby Dore agreed to undertake the whole of the contract on the daywork/fee basis agreed with SMPC. In the absence of the provision restricting SMPC's right to agree variations to those of less than £5,000, Esteem would not have had any claim against SMPC in respect of the extra costs caused by the variations to the works which SMPC had authorised.

(vi) The payment of £5 million to Esteem Settlement on 14th March 1990

77 There is no evidence before the Court to suggest any material further discussion concerning the works to Dulwich Village until 7th March 1990. On that day Mr Manisty spoke to Sheikh Fahad on the telephone, following which he made a file note which said:-

> *"1 …*
>
> *2 You said that the costs of the works at Dulwich were much greater than expected and you had no wish to raid the cash deposits held in the offshore vehicles.* You were prepared to inject an amount of £3.5 – £5 m to the overseas vehicles to enable the bills to be met. You asked us to let you have this afternoon a note of the relevant bank account in Jersey so that you could make the transfer. You *promised that you or Miss Clarke would let us know the exact sum to be paid so that we could complete any necessary documentation in relation to the addition to the trust."*

78 Later that same day Mrs Phillips telephoned Mr Magnall and advised him that, sometime

during the course of the next week, Sheikh Fahad would be arranging to transfer a substantial amount of cash in either sterling or dollars. The next day she telephoned again and said that it had now been decided that the sum to be transferred was £5 million and it should be placed on seven day fixed deposit upon receipt. She went on to say that the client did not want to complete any formal documentation recording the settlement of these additional funds but that she would be preparing a form of receipt for completion by Abacus.

79 On 12th March Mr Manisty wrote to Mr Blampied informing him that instructions had been given for the transfer of the sum concerned to Abacus. Mr Manisty enclosed a draft memorandum to record the addition of £5 million to the trust fund by Sheikh Fahad. Because GT has placed some significance on the reference to there being no formal documentation, we set out in full the memorandum prepared by Stephenson Harwood and subsequently executed by Abacus:-

> *"In the trusts of the settlement dated 21st August 1981 known as the Esteem Settlement ("the settlement").*
>
> *WHEREAS at the direction of His Excellency Sheikh Fahad Mohammed Al Sabah ("the settlor") a sum of £5,000,000 has been transferred to the account number 49834312 operated by Abacus (Nominees) Limited for the settlement with National Westminster Bank Plc, London Overseas branch, sub-account Broad Street, St. Helier, Jersey, Channel Islands.*
>
> *NOW WE HEREBY RESOLVE to accept the said sum provided by the settlor as an addition to the trust fund as defined in Clause 1 of the settlement."*

80 GT has argued that the reference to there being no formal documentation assists in concluding that Sheikh Fahad had a fraudulent intention in relation to the transfer of the £5 million. Mr Journeaux points out that the only other occasion when there was a similar lack of formal documentation was in connection with the gift of £4.4 million of proprietary funds in April 1992. We do not think that any significance can be attributed to this point. GT alleges that Sheikh Fahad also had a fraudulent intention in relation to transfers where formal documentation (by which is meant documentation signed by Sheikh Fahad personally) was executed. Why would Sheikh Fahad sign formal documentation in relation to some fraudulent transfers and not others? Furthermore, the transfers were done through Stephenson Harwood and they prepared the documents which made it absolutely clear that the funds came from their client Sheikh Fahad. The only thing missing was his signature. We conclude that it is not possible to infer anything one way or the other about this particular gift by reason for the form of the documentation.

81 The sum of £5 million was paid to Abacus' account in Jersey on 14th March 1990. It came from the G772 account in Geneva. Mr Blampied stated in evidence that nothing had been said to him at the time as to the purpose behind the contribution of the additional funds. In particular no mention was made of it being for payment of the works to Dulwich Village. It was on 29th March, during a telephone conversation between Mrs Phillips and Mr Magnall that Abacus was first advised that an interim payment of approximately £2 million would be

required sometime in April in respect of the building works at Dulwich Village. The next day Mr Manisty wrote to Mr Blampied to like effect.

82 On 8th May Mr Manisty met with Mr Chamberlain and Mr Stevens of SMPC. They produced an interim invoice, although it had not yet been shown to Sheikh Fahad as he was abroad. Following discussion it was agreed to amend it slightly and resubmit it. At the meeting Mr Manisty enquired as to the likely total cost. Mr Stevens estimated that the building contract was now £2.5 million (as compared with £2.1 million in September 1989) plus £550,000 for furniture and fittings. He said that he had yet to differentiate between the fitting expenses payable by Esteem and the furniture expenses payable by Sheikh Fahad. To this had to be added professional fees and VAT as well as security costs.

83 On 10th May an amended interim invoice in the sum of £2,374,388 was sent to Mr Manisty and copied to Sheikh Fahad. No VAT was included in this sum. Mr Manisty sent the invoice to Mr Blampied under cover of a letter dated 4th June 1990. The final paragraph of his letter read:-

> *"The Client has of course placed additional funds in the Esteem Settlement to meet expenditure on Dulwich.* Payment will involve an increase in the borrowing of Esteem from the Esteem Settlement and no doubt you will see that this is documented, and will send me a copy of the Memorandum endorsed on the Bond of 26th March 1982."

This was the first time that Abacus was informed that the transfer of £5 million was connected with the refurbishment costs.

84 Esteem agreed to settle the invoice at a board meeting on 11th June, at which time it accepted a loan in the necessary sum from the Esteem Settlement. Payment was subsequently made to SMPC. Payment was made out of the £5 million transferred on 14th March.

(vii) Conclusion of the works to Dulwich Village

85 The final accounts for the work at Dulwich Village were not rendered until 1992, some two years later. The accounts were in the sums of £1,861,149, £1,453,096 and £20,652 and were paid on 19th May 1992, 2nd June 1992 and 1st October 1992 respectively. The total cost of the works to Dulwich Village amounted to £5,709,282. Furthermore this enormous sum was without VAT as it eventually transpired that VAT was not chargeable on the works. We have not received any explanation as to why the sums escalated so much, even beyond that envisaged in May 1990. At certain times there appears to have been a suggestion on the part of Sheikh Fahad or SMPC that he would be personally responsible for the furniture rather than Esteem but nothing seems to have come of this because the bills were eventually rendered to and paid by Esteem.

(viii) Addition of £1.5 million to Ceyla in October 1990

86 On 2nd October 1990, at a meeting between Mr Manisty and Sheikh Fahad on other matters, Sheikh Fahad indicated that he was minded to add a substantial sum, probably from the Chemical Bank, to the existing offshore vehicles. On 16th October Mr Manisty was informed that it would be £1.5 million and would be transferred the next day. He advised that this sum should be added to Ceyla rather than the Esteem Settlement. This appears to have been because Sheikh Fahad was at the time considering the establishment of two new settlements and the £1.5 million might be contributed to those settlements. Mr Manisty advised that it would be easier to extract the money from Ceyla than from the Esteem Settlement. That advice was accepted and the sum was duly added to the Ceyla establishment on 17th October 1990 with all the necessary paperwork being duly completed.

(ix) The events of 1992

87 A number of significant events took place in 1992. Thus:-

(i) On 2nd April Sheikh Fahad contributed £4,417,686 to the Esteem Settlement. This came from Sheikh Fahad's account at Chemical Bank into which $22.5 million from the Oakthorn II fraud had been paid. GT brings a proprietary claim in respect of this sum. Of the £4,417,686, £3,150,000 was used to purchase 52 Cadogan Place in the name of Esteem. In his judgment Mance LJ held that GT was entitled to trace into Cadogan Place. That property has been sold and the proceeds paid to GT. GT now brings a proprietary claim for the balance of £1,267,686.

(ii) On 24th August Sheikh Fahad established the Number 52 Trust with Abacus as trustee. The next day he contributed £4 million to the Trust. As part of its Pauline Action GT claims to set aside this gift.

(iii) On 17th September Sheikh Fahad transferred the founder rights of Ceyla into the Esteem Settlement. As part of the Pauline Action GT claims to set aside this transfer.

(iv) On 11th December Abacus appointed absolutely to Sheikh Fahad £3,783,781 from the Esteem Settlement and £2,036,511.96 and SFr2,477,589 out of Ceyla. The distributions stripped the two entities of virtually all their cash.

88 GT claims that the transfers to the Esteem Settlement and the Number 52 Trust were all made with the intention of defrauding GT as Sheikh Fahad's creditor. The defendants, on the other hand, contend that these transactions were all undertaken for perfectly proper tax planning reasons. It is therefore necessary to describe the key events. We have heard very detailed evidence from Mr Jennings of Stephenson Harwood in particular, but in view of the fact that it is not disputed that Stephenson Harwood were giving tax advice and that tax planning was one of the purposes of the transactions, it is not necessary to rehearse all the

evidence which was given.

89 In order to put the events of 1992 in context, it is necessary to remind oneself of Sheikh Fahad's position. He had spent more than seventeen of the previous twenty years in the United Kingdom and therefore fell foul of the " *deemed domicile*" provisions in relation to Inheritance Tax. These provisions meant that, although he was in other respects domiciled in Kuwait, he was deemed to be domiciled in England for Inheritance Tax purposes. It followed that Inheritance Tax would be chargeable on his worldwide estate upon his death and he would also be chargeable to such tax upon lifetime gifts. However Sheikh Fahad was a diplomatic attaché to the Kuwaiti Embassy and therefore had diplomatic immunity. This meant that he was exempted from the Inheritance Tax provisions. Accordingly, for so long as he had diplomatic immunity, he could freely make gifts to offshore structures and Inheritance Tax would not be chargeable upon his worldwide estate upon his death. This situation was well understood by Sheikh Fahad.

90 Until 1992 Mr Manisty had been the lead partner of Stephenson Harwood advising Sheikh Fahad on his personal affairs. However Mr Manisty had decided to leave Stephenson Harwood. Accordingly from early 1992 Mr Michael Jennings took over as the partner responsible for Sheikh Fahad's affairs.

91 It appears that Stephenson Harwood first got wind of the possibility of Sheikh Fahad losing his diplomatic status in early February because Mr Jennings wrote to Sheikh Fahad on 19th February 1992 asking for an early meeting to discuss the position. In the meantime, no doubt at his request, a member of his staff spoke to both the Foreign and Commonwealth Office and the Capital Taxes Office on 19th February from which it was established that the FCO normally regarded diplomatic immunity as continuing for one month after the date upon which the person concerned relinquished his diplomatic office. The period of one month ran from the date of relinquishing office, not from the date that the FCO was notified of the change by the relevant embassy, as embassies often notified the FCO much later. The Capital Taxes Office confirmed that they would follow the FCO line; i.e. a person would not have diplomatic immunity for taxation purposes once the FCO ceased to regard that person as having diplomatic immunity. In practice therefore this meant that diplomatic immunity for taxation purposes ceased one month after the person ceased to hold the relevant diplomatic post.

92 On 5th March Mr Jennings spoke to Sheikh Fahad on the telephone and in his file note of the conversation he records Sheikh Fahad as saying that he was "contemplating retirement within the next two or three months" and that, at that time, he would lose his diplomatic status. We would say in passing that this was a somewhat inaccurate description of the position bearing in mind that Sheikh Fahad had already tendered his resignation as chairman of the KIO in writing on 12th February. Mr Jennings made it clear it would be necessary to consider the appropriateness of the offshore structures, particularly Ceyla.

93 A meeting was fixed which took place on 10th March. At that stage Sheikh Fahad stated

that he had put in his request to retire but that he did not know when it would be accepted. He said that he would remain on the Board of the KIA but would not retain his diplomatic status. He thought that this would be in three to four months' time; Mr Jennings noted that they should assume therefore that Sheikh Fahad would no longer have diplomatic status after, say, early June. Sheikh Fahad said that he was buying a home in Kuwait and intended to live there in due course but that he wished to be able to continue to have unrestricted access to the United Kingdom as his wife was British. There was a long discussion about the various consequences of losing diplomatic status but the key point was that Mr Jennings explained that Sheikh Fahad would become deemed domiciled in the UK immediately his diplomatic status ended and that they must accordingly ensure that, before then, all assets were vested in offshore structures such as the Esteem Settlement. Mr Jennings' file note also records him as pointing out the desirability of dividing his wealth between a number of structures based in different jurisdictions so as to minimise the risk of seizure in the event of " *hostile action*". In cross-examination Mr Jennings said that he believed that, in using that expression, he had had in mind the invasion of Kuwait in 1990, but he accepted that Sheikh Fahad fully understood already — and that he pointed out to him again – that assets which were in trust were not his and therefore those who wished to attack him would not have access to trust assets. It was agreed that, following the meeting, Mr Jennings should make contact with Sheikh Fahad's US attorney Mr Tom Regan of Jones Day Reavis & Pogue (" *Jones Day*").

94 That meeting took place on 18th March. Mr Regan explained that there was a revocable Bahamian trust (the Roger Trust) which owned certain assets and that there were some other companies owned by Sheikh Fahad personally which owned assets such as the house in the Bahamas.

95 Mr Jennings reported to Sheikh Fahad on the outcome of that meeting by telephone on 23rd March. At that time Sheikh Fahad agreed in principle to transfer Ceyla to the Esteem Settlement and to establish a new " *remittance trust*" i.e. one that would enable capital to be remitted to him in the United Kingdom following loss of his diplomatic immunity. However, during the conversation, Sheikh Fahad apparently said that he thought that he might be able to have his diplomatic status extended by a year. The next day Mr Jennings wrote to Sheikh Fahad setting out the steps which had to be taken prior to 6th April 1992 (the tax year end). Essentially these related to closing his bank accounts in the United Kingdom and setting up separate income and capital accounts outside the United Kingdom.

96 On 27th March Mr Jennings visited Sheikh Fahad at his home, Fairview, Lyford Cay, Bahamas. There was a long discussion in which, essentially, Mr Jennings repeated his advice that all Sheikh Fahad's assets should be placed in offshore settlements at the earliest opportunity and that it would be too late to do so once he had lost his diplomatic immunity. Sheikh Fahad expressed reservations saying that it all seemed rather complicated. The file note of the meeting records Sheikh Fahad as saying the following in connection with his retirement:-

"You told us that your general philosophy was that you were keen to retire from

> *diplomatic life.* You had thought about extending your diplomatic status and you realised that this would have considerable tax advantages but, frankly, you did not want to be beholden to any of the government authorities in Kuwait. You wanted to have an ordinary Kuwaiti passport, not a special diplomatic one. As we knew, you had put in your request for retirement, saying that you might be prepared to remain on the Board at the Kuwait Investment Authority. You said that you did not know what had happened to your request although you had been upset to read in an Arabic newspaper a report that the request had been put in and that it had been agreed in principle even though you had not had any reply to your letter."

Sheikh Fahad also asked Stephenson Harwood to provide him with an opinion letter describing the effect of Inheritance Tax on his assets once he retired, as he felt that, if he showed that letter to the Kuwaiti authorities, he would be able to persuade them that they simply had to allow him to retain his diplomatic status if he wanted it, in order to prevent all of his assets from becoming taxable. Arrangements were firmed up as to closing the United Kingdom bank accounts before 5th April.

97 On 30th March Mr Jennings spoke with Ms Dianne Clarke, Sheikh Fahad's assistant, and was told by her that Sheikh Fahad would close his personal account with Chemical Bank and another bank and transfer these overseas. Mr Jennings need not therefore concern himself with these. He therefore concentrated on arranging to transfer the accounts held with National Westminster. However different instructions were given on 1st April. On that date Ms Clarke told Mr Jennings that Sheikh Fahad wished to add the cash in his account at Chemical Bank to Ceyla in order to purchase 52 Cadogan Place and to pay for the refurbishment of Dulwich Village. Mr Jennings advised that, in that case, the money ought to go to the Esteem Settlement. This advice was accepted and the necessary instructions were duly given. This resulted in the payment of £4,417,686 being made to the Esteem Settlement on 2nd April.

98 Mr Jennings met with Sheikh Fahad again on 14th April to discuss his affairs generally. For our purposes the significant points from the file note of the meeting were that it was agreed that the purchase of 52 Cadogan Place by Esteem for £3.15 million should go ahead. The property was owned by SMPC. Secondly Mr Jennings reiterated that all Sheikh Fahad's worldwide assets had to be put into trusts before he lost his diplomatic immunity. The file note also shows that the name of Sheikh Fahad's successor as chairman of the KIO had just been announced. It follows that Sheikh Fahad must have realised by that date, at the latest, that his resignation had been accepted. In addition Mr Jennings produced two opinion letters for production to the Kuwaiti authorities, as Sheikh Fahad had requested at the meeting in the Bahamas on 27th March, but Sheikh Fahad said that he no longer needed them.

99 Mr Jennings then instructed Mr Michael Flesch QC to advise on the proposals from a taxation point of view. A conference was held on 29th April. In essence Mr Flesch broadly supported what was being suggested. In particular:-

(i) the founder rights of Ceyla should be put into the Esteem Settlement;

(ii) the Roger Trust, as a revocable trust, would be vulnerable to Inheritance Tax on the basis of the value of the power of revocation. The trust should be revoked and the assets placed in a new discretionary settlement before diplomatic status was lost; and

(iii) a new remittance trust should be established before the loss of diplomatic status.

100 Following the conference with counsel, Mr Jennings met again with Sheikh Fahad on 30th April. Again there was a long discussion but the key points were as follows:-

(i) Sheikh Fahad agreed that, despite his request at the previous meeting that the final accounts from SMPC in respect of the refurbishment of Dulwich Village be left outstanding pending possible contribution by the KIO, he now wished Esteem to settle them all.

(ii) He said that there was still a possibility that he would retain diplomatic immunity. He felt that he had only been put in the predicament caused by the deemed domicile provisions because the Kuwaiti Government had posted him to the UK for some twenty-seven years. The Government therefore owed it to him to save him from the consequences of Inheritance Tax by preserving his diplomatic status as a financial attaché. He therefore asked Stephenson Harwood to draft a letter explaining this. However it was agreed that Stephenson Harwood should proceed on the basis that his diplomatic immunity would not continue. He therefore broadly approved the proposal to transfer Ceyla to the Esteem Settlement and to establish the remittance trust. He also agreed the proposed technical modifications to the Esteem Settlement which counsel had recommended and which would involve turning it into an interest in possession settlement by conferring a life interest on Sheikh Fahad. As to revoking the Roger Trust and replacing it with a new discretionary trust, he was supportive but asked Stephenson Harwood to consult further with Mr Regan of Jones Day.

101 On 1st May Mr Jennings produced the required letter for production to the Kuwaiti Government and also wrote to Mr Regan explaining the proposals concerning the Roger Trust. Following further discussion with Abacus and Michael Flesch QC it was agreed that the remittance trust would begin life as a discretionary settlement and then be converted into an interest in possession trust after two months.

102 On 3rd June Mr Regan telephoned to say that Sheikh Fahad was reluctant to give up his ability to revoke the Roger Trust. Subsequently Mr Jennings saw Sheikh Fahad on 22nd June and brought him up to date. In relation to the Roger Trust, Sheikh Fahad produced a letter from a partner at Ernst & Young to Jones Day advising that a revocable settlement would not be a problem for Inheritance Tax purposes i.e. it appeared to contradict the advice given by Stephenson Harwood. Mr Jennings reiterated his arguments but Sheikh Fahad said that he would like to think about it further.

103 For the next month or so there was considerable activity between the various professionals in different jurisdictions with a view to preparing the documents to give effect to the proposed arrangements. On 4th August Mr Jennings wrote to Sheikh Fahad updating him on progress and again advising that the Roger Trust should be revoked and replaced by a discretionary settlement.

104 On 12th August Mr Jennings attended upon Sheikh Fahad. The remittance trust (now known as the Number 52 Trust) was produced for execution. Sheikh Fahad queried the need for it and the fact that it was discretionary. Could he rely upon the trustee to act in accordance with his wishes? However he was persuaded and duly signed the trust deed together with a memorandum contributing a further £4 million to the settlement. Mr Jennings duly sent these on to Abacus for execution and, as we know, the Number 52 Trust was established on 24th August 1992.

105 Discussion also took place concerning the Roger Trust and Sheikh Fahad again referred to the advice from Ernst & Young. Mr Jennings pressed his case and Sheikh Fahad asked him to discuss the matter once again with Jones Day.

106 Mr Jennings also produced the documents necessary to transfer Ceyla into the Esteem Settlement. However it would appear that some original document could not be found and accordingly the documents were left with Sheikh Fahad for the time being.

107 At the same meeting a discussion took place concerning Cadogan Place upon which GT places some reliance in connection with the Pauline action. Although Esteem had acquired the leasehold interest in Cadogan Place from SMPC in April 1992, the lease had not been assigned into its name. It was still held by SMPC but with a declaration of trust in favour of Esteem. Negotiations had been taking place with the Cadogan Estate in order to allow the assignment of the lease from SMPC to Esteem but the estate required guarantors. Sheikh Fahad had previously agreed in principle that he and Mishal could act as guarantors of Esteem. At the meeting on 12th August Mr Jennings produced a draft document which incorporated a licence to assign and guarantees. This produced a very strong reaction from Sheikh Fahad as can be seen from Mr Jennings' file note:-

> *"we then produced the Licence to Assign which incorporated the Guarantee.* You confirmed that you had no objection to your and your son's guaranteeing the obligation of Esteem in relation to the Lease but on starting to read the Licence, you took strong objection to your and Mishal's being party to a deed to which St. Martin's was a party. You said that for a number of personal reasons you did not wish your *name or that of your son to be linked to St. Martin's in a document to which, or to a copy of which St. Martin's would have access, nor did you wish your and Mishal's names to be linked to Esteem in that way.* You indicated that you had given the impression to those who had been asking questions that number 52 had been sold not to you but to a company, and when we asked whether it would not be apparent that the sale had taken place on

> your instructions, you said that it was not you who had given the instructions but your former deputy at the Office. We said that we would try to think of a way around this problem but we warned you that it might not be easy. You said you did not care but we had to think of a way."

108 This issue came up again on 19th August when Sheikh Fahad telephoned Mr Jennings. Mr Jennings' file note records that discussion as follows:-

> *"You telephoned and said that you had our letter about 52 Cadogan Place and you asked if we could guarantee that St. Martin's would not see the document that you were signing.* We told you that we would not offer a copy to St. Martin's and that the only document they would be interested in seeing was the Licence, to which you were not a party. However, in answer to your question we said that we could not guarantee that Cadogan Estate would not give a copy of the guarantee to St. Martin's if they asked for it, but we thought it would be an extraordinary thing if St. Martin's did ask for a copy because it was no concern of St. Martin's. Their only concern was to see that they had a valid licence to assign the Lease to Esteem, and whatever arrangements enabled Esteem to take that assignment were a matter between you, Esteem and Cadogan Estates, not St. Martin's. You seemed reasonably assured by this and we got the impression that you were prepared to sign the document."

From this we take it that Stephenson Harwood had separated the guarantee document from the Licence to Assign.

109 In cross-examination it was put to Mr Jennings that these conversations show that Sheikh Fahad wished to keep secret from SMPC his connection with Esteem and furthermore had not been frank in his dealing with SMPC at the time of the purchase of Cadogan Place. Mr Jennings seemed strangely reluctant to acknowledge this. In our judgment it is quite clear from the file note that Sheikh Fahad wished to keep his connection with Esteem secret. We accept the point made by Mr Santos-Costa, namely that this was a hopeless aspiration, as SMPC had been dealing with Esteem over 97 Dulwich Village (Sheikh Fahad's home) and must have known that Sheikh Fahad had some connection with Esteem. Be that as it may, we are in no doubt that, for whatever reason and however hopelessly, Sheikh Fahad wished to keep his involvement with Esteem secret from SMPC and therefore from the KIO. It must not be forgotten that by this time, not only had Sheikh Fahad's resignation from the chairmanship of the KIO been accepted on 22nd April (with effect from 8th April) and his directorship of GT terminated on 26th May, but the KIO had appointed KPMG and Stephenson Harwood to investigate the whole Spanish matter on 6th July. Indeed, on 28th July, Mr Jennings had spoken to a former partner of his, John Geoffrey, who had spoken to Sheikh Fahad the previous day. Sheikh Fahad had apparently informed Mr Geoffrey that "*the Spanish problem*" was not going to go away and that a fiercely critical campaign against him was being waged in the Kuwaiti press. Indeed the Prime Minister had apparently indicated that he intended to take legal action against Sheikh Fahad. So Sheikh Fahad knew that the KIO's attitude towards him was hardening.

110 Subsequently Mr Jennings established that the missing Ceyla document was held by Abacus. As a result, on 26th August, he sent the necessary documents to Sheikh Fahad for execution. These were signed by Sheikh Fahad on 4th September and subsequently sent by Mr Jennings to the relevant parties. The necessary procedures for adding the founder rights in Ceyla to the Esteem Settlement were completed by the other parties on 17th September 1992.

111 At a meeting on 4th September the question of a possible conflict of interest on the part of Stephenson Harwood was raised by Sheikh Fahad. Stephenson Harwood had at all times acted for the KIO and, as mentioned above, they had been instructed to prepare a report for the KIO on the Spanish position. Sheikh Fahad was concerned that Stephenson Harwood might be required to provide information to the Kuwaiti Government about his affairs or take legal action against him on behalf of the Government. Mr Jennings said that Stephenson Harwood did not act for him in relation to his business affairs and that the firm would be forbidden by the Law Society from providing information in relation to his private affairs. They were keeping an eye on the position.

112 After several further conversations and meetings between members of Jones Day and Mr Jennings, Jones Day were eventually persuaded to go along with Stephenson Harwood's advice concerning the revocation of the Roger Trust. Mr Joseph Field of Jones Day met Sheikh Fahad on 29th September with Mr Jennings in order to give Sheikh Fahad their joint advice. Sheikh Fahad seemed somewhat surprised at the change in stance but eventually signed the documents revoking the Roger Trust and then contributing the relevant assets to the new trust called the Chester Trust.

113 When, during the course of the meeting, Sheikh Fahad did not seem to react when warned of potential Inheritance Tax liabilities on his death if he lost diplomatic immunity, Mr Jennings asked him whether he was considering changing his passport. He replied that he was planning to obtain an ordinary Kuwaiti passport but that he had no immediate plans of giving up his diplomatic passport. Indeed, he said, this had been part of the " *deal*" which he had struck with the Embassy at the time of his retirement. He had agreed to buy 52 Cadogan Place and they had agreed that he could remain on the diplomatic list at least until the middle of next year (i.e. 1993). The note records that Mr Jennings and Mr Field were pleased to hear that because, otherwise, there would be difficulty in getting the Bahamian assets into the Chester Trust.

114 GT points out that this allegation of a " *deal*" is quite inconsistent with a desire on the part of Sheikh Fahad to keep secret his connection with the purchase of 52 Cadogan Place by Esteem and is also quite inconsistent with the suggestion made by him on 30th April that Stephenson Harwood should write a letter in support of his application to the Kuwaiti Government to extend his diplomatic immunity on the grounds that they had allowed him to reside in the UK for sufficient time to become deemed domiciled in the UK. If he had in truth reached the " *deal*" referred to, there would have been no need to ask for an extension of his diplomatic immunity (because that would already have been agreed to as part of the

deal) and there would have been no need to keep secret his connection with Esteem (because the KIO would know that he was behind the purchase of 52 Cadogan Place because that had been the deal). We are in no doubt that Sheikh Fahad was lying to his lawyers when he said that there had been such a deal.

115 At the same meeting, Sheikh Fahad, in answer to a question from Mr Jennings, said that he owned nothing that Stephenson Harwood were not aware of. This was also, of course, a lie. He had not told them of the G772 account.

116 The only other transaction with which Stephenson Harwood were concerned, which we should mention, is the purchase of 242 Turney Road. This had first been raised by Sheikh Fahad with Mr Jennings at the meeting on 12th August. He wished the Esteem Settlement to buy a house in the Dulwich area in which John Whitfield, a member of his staff, could live. That matter duly progressed and was completed in November 1992 when Esteem purchased 242 Turney Road for £160,000.

117 In October it became clear that Stephenson Harwood could no longer continue to act for Sheikh Fahad because of the conflict of interest in its acting for the KIO concerning the Spanish problems. Accordingly, on 21st October, Mr Jennings wrote to Sheikh Fahad informing him that he should seek alternative advice. Conduct of Sheikh Fahad's personal affairs was taken over by Mr David Way of Simmons and Simmons.

118 In fact only two days later, on 23rd October, Sheikh Fahad was interviewed by other members of Stephenson Harwood (acting on behalf of the KIO) in connection with the investigation. The matters raised included those transactions which in due course gave rise to the English Court action. On 26th October criminal proceedings were begun in Kuwait by the Attorney General which included freezing Sheikh Fahad's assets.

119 The defendants did not call Mr Way to give evidence. Nor are there many detailed file notes dealing with the period. We are therefore reliant on Mr Blampied's evidence supplemented by the documentary evidence in order to establish what occurred following Mr Way's arrival on the scene. We were referred by Mr Journeaux to two sets of jottings (which appear to be those of Mr Way). The first is dated 16th November and contains a comment " *how to move assets from the trusts?*". Second is on 19th November when, amongst many other references, there is a reference to " *political risk*", " *Cook Islands*" and " *Grupo Torras*". However there is no narrative connecting these and it is difficult to draw any firm conclusions from them. There is however a brief file note dated 26th November of a meeting between Mr Way and Sheikh Fahad which records as follows:-

> *"I went through the Esteem Settlement's structure with him and pointed out my concerns about the tax position of having income generating and real property assets in the same structure.* He accepted this point. Through Jones Day in New York he had set up a new trust in the Bahamas called the Bluebird Trust and he gave me a copy of the trust instrument. He would like me to arrange for

the funds held in the various structures to be put on call rather than on deposit so that they can be transferred.

The new trustees would be the Private Trust Company of the Bahamas. The Private Trust Company had a collection account with Citibank in Zurich or Lloyds Bank and he would let me have details. The Number 52 Trust (remittances) should be left intact for the time being.

I subsequently spoke to Charles Blampied in Jersey."

120 That conversation took place the next day when Mr Way requested Mr Blampied to place all Esteem/Ceyla funds on call and indicated that he was not happy in having income assets (i.e. the liquid funds) being held in the same structure as the property assets. We should add, as an aside, that Mr Jennings was asked in evidence about this advice and said that he could not understand it. Neither he nor the two experienced counsel that he had consulted, had thought that there was such a problem.

121 From there things moved very quickly and it is quite clear to us that Sheikh Fahad and/or Mr Way were exerting very considerable pressure to move the funds as a matter of urgency. On 1st December Mr Way discovered in a telephone call that the Swiss Franc deposits of Ceyla had been replaced on a fixed deposit. He was irritated and insisted that the deposit be broken and the necessary penalty paid. It appears that, during a telephone conversation with Mr Magnall of Abacus, Mr Way referred to the possibility of payment to a " *new offshore vehicle*" because that point is mentioned in a letter from Mr Blampied to Mr Way dated 3rd December. However, according to Mr Blampied, there was no mention of any specific vehicle and no other mention of offshore vehicles generally.

122 On 7th December Mr Way telephoned Mr Blampied and confirmed that it was " *time to move the funds per Mr S*". Mr Blampied told him that the necessary deeds of appointment would need to be drafted and he also wanted comfort that this was a proper exercise of the trustee's discretion.

123 Mr Blampied met with Mr Way in London the next day. Mr Way confirmed that Sheikh Fahad wanted the liquid funds held in Ceyla and the Esteem Settlement to be transferred elsewhere. He confirmed that Sheikh Fahad maintained his diplomatic immunity as he was listed as a financial attaché to the Kuwaiti Embassy. He produced draft deeds of appointment appointing the funds to Sheikh Fahad absolutely. These had presumably been prepared since his conversation with Mr Blampied the previous day. Mr Blampied asked for indemnities from Sheikh Fahad and Mr Way agreed to refer this to Sheikh Fahad. In the meantime Mr Blampied agreed to speak to Mr Tim Hollingsworth, the in-house legal counsel of Abacus, about the documents.

124 The next day Mr Way telephoned Abacus. He was unable to speak to Mr Blampied but left a message to say that Sheikh Fahad was anxious that the distributions should be made

from the vehicles as soon as possible and it was likely that he would receive a fax from Sheikh Fahad that very afternoon advising when and where the payments were to be made. Mr Way went on to say that Sheikh Fahad was not keen to complete indemnities and made the point that substantial assets would still be held in the vehicles, which would be in excess of the value of the cash distributed. He asked Mr Blampied to consider this urgently. Later the same day he rang again to give the details of the account to which the funds to be appointed should be paid. This was a specific account at Citibank Private Bank in Zurich with the reference name " *Marlin*". Mr Blampied made it clear in his evidence to us that he had not liked the way in which matters were being approached. He felt that Abacus was being pressurised to make the appointment and he was concerned as to whether Abacus ought to exercise its discretion and make the appointment to Sheikh Fahad, as requested by Mr Way. As he put it, there was very little in writing from Mr Way, in contrast to what he had been used to with Stephenson Harwood, and no reason for the move had been given at the meeting in London; the only reference to a reason had been in the earlier telephone conversation concerning income producing assets being in the same settlement as real property. However Mr Hollingsworth advised that it was not Abacus' place to try and second guess the advice that Sheikh Fahad was getting from his lawyers and that it was not necessary to have an indemnity in view of the substantial assets which would be left in the settlement. Accordingly Abacus agreed to proceed although it was not willing to go ahead until it had written confirmation from Mr Way of the account to which the distribution was to be made. The necessary deeds of appointment were executed on 11th December. These record the trustee of the Esteem Settlement as making an appointment of capital of £3,783,871.99 to Sheikh Fahad absolutely and Ceyla making a capital distribution to Sheikh Fahad absolutely of £2,036,511.96 and SFr2,477,589. Upon execution of those deeds, the funds were then held directly to Sheikh Fahad's order. On the instructions of Mr Way, acting on behalf of Sheikh Fahad, Abacus then forwarded the sums (with a small amount of accrued interest) to the Marlin account on 11th December.

125 As indicated from the file note referred to above, it is apparently the case that the Marlin account was a collection account for the Private Trust Corporation, which company was the trustee of a settlement under Bahamian law known as the Bluebird Trust. Mr Journeaux sought to argue that we should regard the payments made on 11th December from the Esteem Settlement (and Ceyla) as being payments to the Bluebird Trust. We are quite satisfied that that was an erroneous submission and the funds were distributed to Sheikh Fahad. In particular:-

(i) The deeds themselves are quite specific. They are appointments of capital to Sheikh Fahad absolutely. It would need some clear evidence to show that the trustee intended something different to the deeds.

(ii) Far from there being evidence to the contrary, Mr Blampied has given evidence. We found him to be an honest and straightforward witness. He asserts that the appointment was indeed to Sheikh Fahad absolutely. He did not know anything about the Bluebird Trust or the Marlin account. Although there had been a passing reference to another offshore vehicle, nothing specific had ever been said and, so far as he was concerned, it was an appointment to Sheikh Fahad. We accept his

evidence.

(iii) In any event, the Bluebird Trust did not come into existence until 17th December. It was therefore not legally possible for the capital sums to be appointed out of the Esteem Settlement (and Ceyla) to the Bluebird Trust on 11th December. The correct legal analysis is that these sums were paid outright to Sheikh Fahad and he gave instructions that the sums should be paid to the Marlin account. If these funds subsequently found their way into the Bluebird Trust once it was established, that was a fresh disposal by Sheikh Fahad of assets to which he was absolutely entitled.

(x) Transfer of £185,013.90 in July 1993

126 So far as the Esteem Settlement is concerned, the only other material transaction relates to a payment of £185,013.90 on 23rd July 1993. This sum was paid out of the Number 52 Trust by way of capital distribution to Sheikh Fahad and was immediately, according to the books of Esteem, used to reimburse a loan in this sum made by Esteem to Sheikh Fahad.

127 The background appears from the evidence of Mr Blampied supported by a file note of a meeting dated 7th July 1993 at the offices of Simmons and Simmons in London, attended by Mr Way, Mr Blampied and Mr Magnall, Mishal and Ms Clarke. It seems that, in earlier years, the day to day running expenses of the various properties had been met by Sheikh Fahad personally. However, in 1992, Esteem authorised Ms Clarke, as Sheikh Fahad's personal assistant, to act as its agent in connection with the maintenance and day to day running of the properties and send the invoices to Esteem for settlement. This had resulted in the company paying such expenses during the calendar year 1992.

128 At the meeting, the accounts of Esteem for 1992 were produced. These showed a deficit in the profit and loss account because of the property expenditure referred to. Mr Way thought that such expenses should be borne by the occupiers of the relevant property and that was agreed as the future policy. It was agreed that the accounts should be amended to show the expenses as a debt due to Esteem. This would extinguish the deficit in the profit and loss account. It was further agreed at the meeting that a distribution would be made to Sheikh Fahad from the Number 52 Trust so that he could then immediately repay the debt to Esteem. This would have the dual advantage of clearing the debt and providing a cash float in Esteem.

129 The amended accounts were faxed to Mr Way on 22nd July with a covering letter explaining how the debt of £185,013.90 was made up by reference to the property expenditure. In his covering letter Mr Blampied said that, provided Mr Way agreed, he thought Abacus should make an immediate capital distribution from the Number 52 Trust to Sheikh Fahad's capital bank account (which was under the control of Abacus). Following this a transfer would then be made to Esteem in order to repay the debt.

130 At 3.00 p.m. that same day Mr Way telephoned and spoke to Mr Magnall. He agreed with

the proposed course of action and said that it would be in order to proceed. At 4.30 p.m. the same day Mr Magnall spoke to Ms Clarke and informed her that Mr Way had approved the distribution to Sheikh Fahad and subsequent repayment of the debt. It would appear that the relevant transactions took place the next day, namely 23rd July.

131 There is no evidence to suggest that Sheikh Fahad personally was consulted in any way about this proposal. It seems to have been a technical decision taken by Mr Way and Mr Blampied to deal with the fact that Esteem had paid for day to day expenses which ought more properly to have been borne by Sheikh Fahad or the relevant occupier.

132 In our judgment, although shown in the books of Esteem, as a repayment of a loan, the transfer of £185,013.90 was in fact a gift from Sheikh Fahad. Sheikh Fahad had never agreed to borrow this sum from Esteem: on the contrary the accounts as originally drawn up by Abacus had shown that the expenses were to be borne by Esteem. It was only because that produced a loss on the revenue account that it was decided by Mr Blampied and Mr Way that the relevant expenditure should be shown as a debt due to the company and should be repaid by Sheikh Fahad. We make no criticism of the parties for showing the sum as a loan for book keeping purposes but, for the purposes of the Pauline Action it was not a repayment of a loan; it was a gift from Sheikh Fahad to reimburse Esteem for expenditure it had incurred.

(xi) The foreign trusts

133 In support of its allegation that Sheikh Fahad contributed funds to the various Jersey structures with intention to defraud his creditors, GT has produced evidence of and relies upon Sheikh Fahad's conduct in connection with a number of other trusts in other jurisdictions. It is necessary therefore to rehearse this evidence, which comes substantially from Mr Andrew Keltie, a partner of Baker & MacKenzie which firm has the overall conduct of the worldwide litigation for GT, and from the agreed statement of facts and documentary evidence.

134 On 7th February 1991 Sheikh Fahad established the Blatant Trust under CAyman Law. On 8th February 1991 he contributed $20 million to the Blatant Trust from the G772 account. At the time he was of course advised by Stephenson Harwood but, interestingly, he did not tell Stephenson Harwood of the creation of the trust nor of his contribution of funds to it. In evidence both Mr Manisty and Mr Jennings said that they had never heard of it until the present proceedings.

135 On 14th February 1992 (i.e. at the very time that Mr Jennings was beginning to advise Sheikh Fahad on the need to rearrange his assets on the light of his impending retirement) Sheikh Fahad constituted the Eaglet Trust. It was governed by Cayman Law but the trustee was a Swiss company. On 19th February 1992 he contributed $5 million to the Eaglet Trust from the G772 account. Again neither Mr Jennings nor Mr Manisty had ever heard of this

trust until these proceedings. It is clear that, despite the very detailed consideration given to his tax affairs by Stephenson Harwood in 1992, Sheikh Fahad did not see fit to disclose that he had set up the Blatant Trust and the Eaglet Trust and had funded them as stated.

136 As we have already seen, on 17th December 1992, the Bluebird Trust was established under Bahamian Law. Although the trust deed is dated 14th December, it cannot have been executed on that date because there is a fax of 17th December from Jones Day to Simmons and Simmons with the final draft of the Trust Deed together with an indication that it is about to be signed subject to any further changes which Mr Way may require. As already indicated it would appear that the sums paid out of the Esteem Settlement and Ceyla on 11th December found their way into the Bluebird Trust.

137 On 13th January 1993 the Better Trust was established under Bahamian Law. It was funded shortly afterwards. In total it received approximately $135.3 million from the G772 account in three tranches; $50 million on 15th January, $80 million on 19th January and $5.3 million on 3rd March. The transfers from the G772 account to the account of the Better Trust were by circuitous routes through a number of other bank accounts. Mance LJ held in the English action that GT was entitled to trace a substantial proportion of these funds as representing monies belonging to GT which had been paid into the G772 account.

138 On 9th February 1993 $20 million was transferred from the Better Trust to the Bluebird Trust. On 12th February 1993 the Chester Trust (which had been created on 29th September 1993 immediately following the revocation of the Roger Trust) was restated as the Comfort Trust, governed by the law of the Cayman Islands.

139 In early 1993 Sheikh Fahad undoubtedly knew that the net was closing in and that his activities at the KIO and GT were under intensive investigation. Thus an investigation was being carried out by Stephenson Harwood in England; there were criminal investigations in Spain and Kuwait and much speculation in the media. It was only a matter of weeks before GT would begin the English action in April. It is of interest that he closed the G772 account completely in March 1993 having tipped the assets of this account into various trusts in the Caribbean. By June 1994, GT had begun the English proceedings; had obtained a worldwide mareva injunction against Sheikh Fahad on 26th November 1993 in those proceedings; and had obtained a further mareva injunction on 28th March 1994 restraining Sheikh Fahad, in relation to any trust with which he was connected, from (a) exercising any power in relation to the trust or dealing with the trust or trust property; (b) knowingly communicating about the trust with a trustee, settlor, protector or person possessed of power of revocation or appointment or management; or (c) inducing any person to deal with the trust or property of the trust. GT also rely on a file note of Mr Way concerning a meeting which he had with Sheikh Fahad in the Bahamas on 4th and 5th March 1993. Part of the file note reads:-

> *"Query whether we should charge the London properties to a third party bank or cross-mortgage them to other trust assets to take away equity.* Joe Field apparently says Butterfield Bank will do that in the Bahamas and perhaps CIBC

in London. This should be discussed further."

Mr Journeaux argues that this shows clearly that Sheikh Fahad and those advising him were willing to take steps to depress the equity in the London properties held in the Esteem Settlement and that the only purpose for this would have been to reduce the assets in the settlement which might one day be available to meet the claims of creditors.

140 Furthermore on 8th April 1994, GT had issued and served a summons in the English proceedings for an order that Sheikh Fahad make an affirmation providing full particulars of all trusts in relation to which he procured the establishment or was the settlor (or otherwise contributed funds for the benefit of the trust) or was at any time a beneficiary or one of a class of potential beneficiaries.

141 Despite – or perhaps because of – this, on 16th June 1994 Sheikh Fahad established two new trusts in the Bahamas known as the Lake Trust and the River Trust. Within a few days of their creation, cash and securities to the value of approximately $119.7 million were moved from the Better Trust to the Lake Trust. This was despite the fact that neither Sheikh Fahad nor any member of his family were at that stage beneficiaries of the Lake Trust. The only apparent beneficiaries of that trust were charities although there was power to add beneficiaries. At the same time cash and securities to the value of approximately $24.6 million were moved from the Blatant Trust to the River Trust. The same comment in relation to beneficiaries is applicable.

142 We appreciate that it is not for us to make definitive findings of fact binding on other parties in relation to the transfers to these various trusts. These may come before courts of the Bahamas or the Cayman Islands in due course and we have not heard full evidence in relation to them. Nevertheless it has at all times been known that GT would be relying upon the activities in relation to these other trusts in order to show a dishonest intention on the part of Sheikh Fahad. The beneficiaries and Sheikh Fahad have therefore had the opportunity of bringing any evidence which they might have wished to do in order to negate GT's case.

143 They have chosen not to do so. On the evidence before us we are in no doubt that the establishment of the Lake Trust and the River Trust and the payments to them in 1994 were a desperate last attempt on the part of Sheikh Fahad to try and safeguard the assets which had previously been in the Blatant and Better Trusts. There can be no other explanation for these transfers which were made at a time of intense pressure in relation to the English proceedings, at a time when he had long since lost his diplomatic immunity and at a time when mareva injunctions prevented him from taking such steps.

144 We are also in no doubt that the establishment and funding of the Better Trust in January 1993 and the Comfort Trust in February 1993 were made for the same reason. Sheikh Fahad knew that the net was closing in because of all the enquiries and investigations that were going on and he was determined to make it as difficult as possible for GT to recover

assets from him. We shall deal with the Blatant, Eaglet and Bluebird Trusts when we come to record our findings in relation to the Esteem Settlement.

(xii) Diplomatic Immunity

145 In relation to Sheikh Fahad's intention at the time of the restructuring in 1992, GT places some weight on the date that, it contends, Sheikh Fahad lost his diplomatic immunity and on the fact that he was aware of that loss. It is necessary therefore to recount the evidence on this aspect.

146 On any view the latest date upon which Sheikh Fahad lost his diplomatic immunity was 30th September 1992, because that is one month after the date (30th August) upon which the FCO was notified by the Kuwaiti Embassy that Sheikh Fahad no longer held a diplomatic post (see the certificate of the Deputy Head of Protocol at the FCO dated 5th October 2001). However, as we know from the conversation which Stephenson Harwood had with the FCO in February 1992 (to which we have referred earlier) Embassies are often slow to notify the FCO. The relevant date for diplomatic immunity is the date of termination of office, not the date of notification to the FCO. There is then a period of one month's grace. It is not disputed that Sheikh Fahad's resignation as chairman of the KIO was accepted on 26th April 1992 with effect from 8th April. GT contends that, after allowing one month's grace, the relevant date upon which Sheikh Fahad lost his diplomatic immunity was therefore 8th May 1992. It argues that he had therefore lost his diplomatic immunity by the time of the gift of £4 million to the Number 52 Trust on 26th August and the transfer of Ceyla to the Esteem Settlement on 17th September and must have known this. There could not therefore have been a proper tax planning purpose in making these two transfers. On the contrary, Inheritance Tax would be chargeable on the transfers. The same comment would apply in respect of the creation of the Chester Trust and, most significantly, the transfer by Sheikh Fahad to the Bluebird Trust in December 1992. It followed that the capital payment out to Sheikh Fahad on 11th December 1992 must have been made for other reasons.

147 In support of the date of 8th May, GT refers to a letter from a director of the Protocol Department of the Ministry of Foreign Affairs dated 28th August, 2001 which (in translation) reads:-

> *"We would like to inform you that the official and diplomatic capacity for [Sheikh Fahad] had been terminated as of the date of his resignation which was mentioned in your [letter of 12th August 2001]."*

148 Unfortunately the letter of 12th August was not drawn to our attention and, so far as we can ascertain, is not to be found in the bundle of documents before the Court. If that is right, the letter from the Ministry of Foreign Affairs does not assist. Is the date of resignation referred to that of his resignation as chairman of the KIO, as a director of GT or as a financial attaché?

149 GT also relies on a letter dated 28th April 1993. This is a letter from the Chargé d'Affaires of the Kuwaiti Embassy in London addressed " *to whom it may concern*". It reads:-

> *"This is to confirm that Mr Fahad Mohammed Al-Sabah was appointed by the Government of the State of Kuwait as Financial Attaché to their Embassy in London on the 1st January 1964, and that he left the Embassy on the 8th April 1992."*

150 Mr Santos-Costa is critical of the evidence. He says that we do not know the status of the writer of the letter, nor its purpose. Is the date on which Sheikh Fahad "left the Embassy" the same as the date upon which he ceased to be a financial attaché? We do not know. He says that it would have been very straightforward for GT (which is after all owned by the Kuwaiti Government) to provide a satisfactory certificate from the Kuwaiti Embassy making it clear, from the records of the Embassy, when and in what circumstances Sheikh Fahad ceased to be a financial attaché at the Embassy in 1992. It is not satisfactory, he says, for the Court to have to infer dates from what is before it, particularly bearing in mind the serious possible tax consequences of a finding as to exactly when Sheikh Fahad did lose his diplomatic immunity. Furthermore, as Mance LJ found, Sheikh Fahad remained a director of GT until 26th May 1992. Was he therefore still a financial attaché?

151 Equally, says Mr Santos-Costa, there is no evidence as to when Sheikh Fahad discovered that he had lost his diplomatic immunity even if, in fact, he had. Thus GT has produced no evidence to show that Sheikh Fahad was written to or otherwise informed of the date upon which his position as financial attaché or, indeed, as chairman of the KIO, had come to an end. On the contrary, it is said, it is clear from all the various file notes of Mr Jennings that he was under the impression that the diplomatic immunity continued certainly until he ceased to act in October and Sheikh Fahad's observations to him over the period were consistent with a belief that diplomatic immunity continued, albeit with some uncertainty as to how long it would continue for. Furthermore Mr Way of Simmons and Simmons asserted on 8th December 1992 that Sheikh Fahad still retained his diplomatic immunity although he seems to have been relying on a published list of diplomats. GT replied that Sheikh Fahad must have been lying to his advisers and knew full well that his diplomatic immunity had come to an end.

152 We accept that we should be cautious about making a definitive finding as to when Sheikh Fahad lost his diplomatic immunity unless we are satisfied that we have heard all the available evidence. Ultimately we have concluded that we do not have to resolve definitively whether Sheikh Fahad lost his diplomatic immunity on 8th May (being the earliest date) or on 30th September (being the latest date) or on some date in-between; nor are we satisfied that there is evidence to show that Sheikh Fahad knew of the loss of his diplomatic immunity before the last of the gifts into the Esteem Settlement in 1992, namely the gift of Ceyla on 17th September 1992.

(xiii) The Esteem Settlement since December 1992

153 In 1996 the two farms were sold realising an aggregate sale price of some £3,880,375. Pursuant to an order of this Court made on the application of Abacus, a proportion of the net proceeds were placed on a specific deposit in order to ensure the availability of funds to meet the proprietary claim, if successful. The balance was invested. The net proceeds were lent interest free by Ceyla to the Esteem Settlement in order that these steps might be taken.

154 The draft accounts to 30th September 2001 show the Settlement as owning Ceyla and Esteem together with cash and securities of approximately £3 million. Ceyla owns nothing of note other than the sum of £3,522,685 which it has lent upstream to the Esteem Settlement. Esteem owns 97 Dulwich Village, 242 Turney Road and 86 Chester Square together with some £60,000 in cash. The Court has heard of a number of different valuations of these properties but they are carried in the balance sheet at an aggregate valuation (given in June 2000) of £6,450,000.

(xiv) The Number 52 Trust since August 1992

155 We have received the evidence of Mr Beamish of Deloitte & Touche and have seen the accounts for all years to date. The only capital contribution was the sum of £4 million contributed in August 1992. Over the years, sums have been paid to Sheikh Fahad (both from income and capital). In more recent times these have been made with the sanction of the Court to whose order the trust assets have been held since 7th July 1994, but other substantial payments were made before then. Almost all of the monies paid out to Sheikh Fahad were to enable him to meet legal fees incurred in a number of jurisdictions in connection with the litigation brought by GT. The draft accounts to 30th September 2001 show the net assets of the trust standing at approximately £710,000.

(xv) The result of the expenditure on 97 Dulwich Village

156 The defendants called Mr A.R. Adams-Cairns, a director and head of the Residential Valuation and Litigation Support Departments of FPD Savills to give expert evidence on the market value of 97 Dulwich Village. He was asked to undertake a difficult exercise. First he was asked to take the property in its present state and to estimate its market value both now (September 2001) and in October 1990. Secondly he was asked to assume that the extensive refurbishment and improvement undertaken between 1988 and 1992 had not been carried out so that the property remained as previously. He was asked to estimate the market value of the property in that state both now and in October 1990.

157 His conclusions were as follows:-

In summary he estimated that the alterations increased the value of the property by £400,000 at the time. He was of course aware that the refurbishment had cost a total of £5.7 million but said that it was not unusual for certain sectors of the market to spend vast sums

of money on property and add very little in value. As can be seen, both as at 1988 and 2001, the enhanced value of the property represented 25% of the overall value.

Date	September 2001 Condition	1988 Condition	Difference
October 1990	£1,600,000	£1,200,000	£400,000
September 2001	£5,000,000	£3,750,000	£1,250,000

158 Mr Journeaux was critical of Mr Adam-Cairns' evidence and tested it in cross-examination. He pointed out that Mr Adam-Cairns' report suggested that one of the reasons why the costs had escalated was because of the need to deal with dry rot, wood worm and damp which were discovered during the course of the work. He pointed out that the report had assumed, based upon conversations with the caretaker, that the property had been in sound condition in 1988 and had presented reasonably well although the décor was dated. The difference of £400,000 therefore reflected only the structural alterations and improvements together with the general “smartening up” resulting from the redecoration. He went on to submit that, if there had been a substantial outbreak of dry rot, that would have affected the valuations in two respects. In the first place it would suggest that the true value of the property in October 1990 was less than the figure of £1.2 million. Mr Adam-Cairns' response to this was that, unless the outbreak of dry rot was of such a degree that it would have been obvious to a purchaser, it would not have affected the market value. It was unusual for surveyors instructed by a purchaser to do anything more than lift up the odd floorboard. Mr Journeaux's second point was that, if none of the refurbishment had been done (so that the dry rot remained untreated) the property would have been in a terrible state by September 2001 and therefore worth far less than the figure of £3,750,000 given in the report, which assumed that the property remained in the state in which it was in 1988. Mr Adam-Cairns' response was that the task which he had been given was difficult enough without factoring in subjective matters such as that. He accepted that he had not made an allowance for depreciation of the property because of a failure to treat the dry rot. We accept that, by definition, the exercise undertaken was a difficult one and cannot be carried out with complete precision. Mr Adam-Cairns did not see the property in its unaltered state. Mr Journeaux submits that, at the very least, we should deduct from the October 1990 valuation of the property in its original state the costs of repairing the dry rot because that would have been the true market value of the property at that time. The difficulty is that, even if we accept this point, we have not been provided with these costs. It may be that, somewhere hidden in the detail of the SMPC invoices, the costs of repairing the dry rot can be extracted but nobody has undertaken that exercise and we are not willing to delay this case for it to be done.

159 In any event we do not think that it would be relevant. Many houses have dry rot. We accept Mr Adam-Cairns' evidence that this does not affect the market value (the price which a purchaser would pay) unless it is ascertained at the time of purchase. Many a purchaser has found later that he has to spend money on dry rot or other defects in the property which

sum is not reflected in the price that he was willing to pay. There is no evidence in this case that the dry rot had reached such a state. On the contrary the evidence seems to have been that it was only ascertained when the works of refurbishment were carried out.

160 Nor do we accept Mr Journeaux's second point, namely that the 2001 valuation of the property in its 1988 condition should have allowed for ten years untreated spread of dry rot. Mr Adam-Cairns' task was not to ascertain what condition the old property would have been in by 2001. All of the paint work, guttering etc. would have been in a very poor state of repair if no works of maintenance and repair had been done between 1990 and 2001. The report was entitled to assume that the property in its old state was maintained in the same condition as it was immediately prior to the work being carried out; thus dry rot was to be taken to be present only to the extent that it was present at that time. Mr Adam-Cairns' task was to try and calculate the increased value attributable to the improvements and alterations made, not to try and assess what the value of the 1988 version of the property would have been by 2001 if no works of repair and maintenance had been undertaken in the interim period.

161 Even if we had accepted Mr Journeaux's points, the fact remains that GT has produced no evidence to enable us to come up with any alternative valuations. It is not sufficient simply to proffer a few criticisms and suggest that the expert valuation should be somewhat less, without suggesting how much less and how this should be calculated. This case has been going on for some time and it is necessary to bring it to a conclusion. As mentioned earlier we are not willing to give parties further time to produce evidence that they should have produced at the hearing. Accordingly, even if we had felt that GT's points were valid, we would have found it impossible to come up with any different figures from those suggested by Mr Adam-Cairns because we would have had no material to go on. As it is we do not think that GT's criticisms are valid and we accordingly accept Mr Adam-Cairns' evidence.

(xvi) Mr Beamish's evidence

162 Mr Beamish prepared a very thorough report concerning the movements of cash in relation to the various structures. He supplemented this with oral evidence. We do not think it necessary to recite much of his evidence but we do think it would be helpful to summarise the main three different cash streams which existed in the Esteem Settlement structure. The first stream relates to the initial funds and further contributions made before 1990. In essence, by March 1990, approximately £2.2 million in cash was held by Esteem resulting from this stream. At that stage the cash resources of the settlement were held for the most part at the corporate level. This sum was kept quite separate to the £5 million contributed to the Settlement on 14th March 1990. Various sums were taken out of it to fund dividends, further amounts were injected as a result of re-settlements of income; expenses were paid, interest earned etc. but no major transactions took place so that, by 1st June 1992, this cash deposit stood at £3,473,806.

163 In the meantime, the £5 million contributed in March 1990 had been held in the Esteem

Settlement itself. £2,374,388 was used to settle the first invoice of SMPC in June 1990 but thereafter the balance earned interest, was used to fund some income distributions to Sheikh Fahad and to receive re-settlements of income and otherwise used to pay expenses. By 15th April 1992, this sum totaled £2,628,536.

164 As we know, on 2nd April 1992 Sheikh Fahad contributed proprietary funds of £4,417,686 to the settlement of which £3,150,000 was immediately used to purchase 52 Cadogan Gardens. The balance was, on 15th April, added to the remnants of the £5 million, namely £2,628,536. Between 15th April and 1st June £3,395,000 was loaned to Esteem in order to settle the remaining SMPC invoices in respect of the refurbishment. This left £463,000 which, on 1st June, was merged with the sum of £3,473,806, which was the balance of the first stream referred to above. This made a total of £3,936,806. This sum was used, inter alia, to fund a loan to Esteem from which 242 Turney Road was purchased. Allowing for interest etc., the balance of £3,784,487 was distributed to Sheikh Fahad on 11th December 1992.

165 In summary therefore, taking a very broad approach (not the technical rules of tracing) and ignoring the fact that income re-settlements found their way into both the original funds stream and the £5 million stream, it would seem that one can draw the following conclusions:-

(i) The costs of the refurbishment of 97 Dulwich Village were paid for entirely out of the £1,267,686 of proprietary funds and the £5 million. The original funds did not contribute to these costs.

(ii) Turney Road was funded out of an amalgam of the original funds (£3,473,806) and the £463,000 (which in turn came predominantly from the £5 million with perhaps a very modest amount from the proprietary funds).

(iii) The capital distribution to Sheikh Fahad of £3.7 million in December 1992 came mainly from the original funds together with a proportion of the £463,000.

C. PROPRIETARY TRACING CLAIM

(a) The law

166 GT claims to be able to trace the sum of £1,267,686 into the assets of the Esteem Settlement on the grounds that it has an equitable proprietary interest in this sum. This raises the issue of whether Jersey law recognises and enforces such a claim. It seems to us that the following questions arise:-

We will take each of these in turn:-

(i) Does the victim of fraud have an equitable proprietary interest in the proceeds of the fraud?

(ii) If so, does Jersey law permit tracing to assets into which such proceeds have been converted?

(iii) If so, should Jersey law apply English principles of tracing? In particular, when tracing through a mixed fund, should Jersey law apply FIFO (first in first out) or some other rule?

(iv) Does the tracing exercise stop at the loan account between the Esteem Settlement and Esteem or does it extend to the assets of Esteem? That question has to be addressed both generally and having regard to the particular circumstances of this case, in view of what was done in the English action.

(v) If tracing extends to the assets of Esteem, can a plaintiff trace into improvements to pre-existing real property?

(vi) Can a tracing claim be defeated on the grounds that it would be inequitable to allow it?

(vii) What remedies are available?

(i) Does the victim of fraud have an equitable proprietary interest in the proceeds of the fraud?

167 Under English law and many other common law jurisdictions, the position is clear. As Lord Browne-Wilkinson put it in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996) A.C. 669 at 716:-

> ***"I agree that the stolen monies are traceable in equity.*** But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity."

See also the dicta of O'Connor J in the High Court of Australia in *Black v S Freedman & Co* (1910) 12 CLR 105 at 110 which was approved by Lord Templeman in *Lipkin Gorman v Karpnale Limited* (1991) 2 AC 548 at 565. Thus a person in the position of Sheikh Fahad, who, as a director, defrauds the company of which he is a director, holds the proceeds on constructive trust for the company, which has an equitable proprietary interest in the property in question.

168 Mr Santos-Costa argued that there is no justification for importing this concept into Jersey law. The Jersey law of property is very different and is essentially based on the civil law, which does not recognise differences between legal and equitable ownership. Even in the case of express trusts, the Trusts (Jersey) Law 1984 (" *the 1984 Law*") does not state clearly that beneficiaries have an equitable proprietary interest in the trust assets rather than a personal right against the trustee. Even if beneficiaries under an express trust do have such

a proprietary interest, the same is not necessarily true in respect of a constructive trust.

169 Although the point does not arise specifically (therefore we can express our views briefly), we think that the submissions of Mr Santos-Costa mean that we need first to consider whether a beneficiary under an express Jersey trust has an equitable proprietary interest in the trust property. In our view he does. It is true that nowhere does the 1984 Law state specifically that a beneficiary under an express trust has an equitable proprietary interest in the trust fund. However the 1984 Law is not a codification. Trusts were recognised and enforced by the Jersey courts well before the passing of the 1984 Law and, in doing so, they looked to English law for guidance on trust matters and, by and large, adopted English principles save where it was appropriate to differ. A Jersey trust is essentially the same animal as is found in English law subject to certain local modifications. We conclude that *Matthews and Sowden: Jersey Law of Trusts* (3 rd Ed'n) summarises the position correctly at paragraph 1.20 when it says as follows:-

> ***"Turning to consider trusts proper, it is also clear from the terms of various of the provisions in TJL that in a Jersey trust the beneficiary is intended to have and does have a proprietary interest in the trust property and not merely a personal right against the trustees to compel to administration.*** Indeed, were this not so Art. 50(1), (4) would mean that, in some circumstances at least, no one had a proprietary interest in the trust assets (see also Arts. 9, 23, 29, 31, 34, 42 and 43). It is true that the beneficiary's interest is not stated to be an "equitable interest" although in Art. 50(4) there is reference to "beneficial interest". On the other hand, the trustee has some interest in the property of the subject of the trust, however limited (see Arts 2, 50(1)). And so, whether or not the trustee's and beneficiary's interests are properly called "legal" and "equitable" in the English style, there is little doubt that the TJL is referring to concepts serving identical purposes: CF *Hawksford and Renouf v Giffard* (1885) 210 Ex 206 ***at 211, where the court drew the distinction, in the case of a trust of immovables, between the owners "en droit" and those "en équité."***

170 Mr Santos-Costa argues that, even if a beneficiary under an express trust has a proprietary interest, there is no reason to follow English law in holding that the position is the same outside the context of an express trust. Both parties sought support from two particular articles of the 1984 Law:-

> ***"Article 29***
>
> ***Constructive Trustee***
>
> ***(1) Subject to paragraph (2) where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust he shall be deemed to be a trustee of that profit, gain or advantage*** .
>
> ***(2) Paragraph (1) shall not apply to a bona fide purchaser of property for***

value and without notice of a breach of trust .

(3) A person who is or becomes a constructive trustee shall deliver up the property of which he is a constructive trustee to the person properly entitled to it .

(4) This Article shall not be construed as excluding any other circumstances under which a person may be or become a constructive trustee."

"Article 50

Nature of trustee's estate, following trust property and insolvency of trustee

…

(3) Without prejudice to the liability of a trustee for breach of trust, trust property which has been alienated or converted in breach of trust or the property into which it has been converted may be followed and recovered unless:- … (b) it is in the hands of a bona fide purchaser for value without notice of a breach of trust or a person (other than the trustee himself) deriving title through such a person."

171 Mr Santos-Costa argued that, if the notion of equitable property interests were current in Jersey, it was difficult to see why express provision had to be made for a constructive trust in the limited and simple case of a profit made by a trustee on trust property. Similarly it would not have been necessary to have included article 50(3) in a jurisdiction which already recognised the notion of an equitable proprietary interest arising in the event of an alienation or conversion of trust property. Thus there was no counterpart in the English Trustee Act 1925, no doubt because it was basic jurisprudence that trust beneficiaries can assert proprietary interests in the traceable proceeds of an unauthorised disposition.

172 The flaw in this argument is that the 1984 Law was not a codification, nor was it enacted in a vacuum. There was already a customary law of trusts in existence. Many of the provisions of the 1984 Law were simply reflections of the pre-existing law or of English principles. There is no implication that, because a provision is included in the 1984 Law, it is something which did not exist beforehand. Take, for example, Article 17(1)(a), which provides that a trustee must act with due diligence, as would a prudent person, to the best of his ability and skill and observe the utmost good faith. Is it the case that prior to the enactment of the 1984 Law, Jersey customary law was not to like effect? Of course not. It is the same for Article 29. We are in no doubt that Jersey law was already to the effect that the making of a profit from a breach of trust gave rise to a constructive trust, but it was clearly reasonable and sensible to reflect that principle in the statute.

173 These provisions provide that a beneficiary under a constructive trust imposed by virtue of

Article 29(1) has a proprietary interest in the property (see in particular article 29(3) and article 50(3). Article 29(4) clearly envisages that constructive trusts will arise in circumstances other than those set out in Article 29(1). It would be highly illogical if a constructive trust arising in such other circumstances did not involve a proprietary interest on the part of the beneficiary whereas those arising pursuant to Article 29(1) did so. It would be unusual and confusing to have two different types of constructive trusts, one recognising an equitable proprietary interest on the part of the beneficiary and one recognising only a personal right against the trustee. Accordingly we hold that a beneficiary under a constructive trust does have an equitable proprietary interest in the assets which are the subject of that trust.

174 The question then arises as to whether Jersey law should follow English law in holding that a constructive trust exists in circumstances such as the present. As already mentioned, Article 29(4) clearly envisaged the courts recognising constructive trusts in other situations and we think that there are strong arguments for holding that such a trust exists in the case of fraud.

175 The constructive trust has been used by the courts of England and other jurisdictions as a mechanism to assist in fashioning appropriate remedies to deal with problems of commercial fraud. It accords with the interests of justice. If the fraudster does not hold the property on constructive trust, the victim has to prove his claim alongside ordinary creditors of the fraudster because the assets belong to the fraudster and would be available for such creditors. We have no doubt that Jersey law should draw on the experience of English law and other jurisdictions to impose a constructive trust in a case such as the present. We think that in Jersey too, when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient so that the victim has a proprietary interest in such property.

176 In reaching this conclusion we recognise the dangers of too liberal an imposition of constructive trusts. Although the observation was made in the context of resulting trusts rather than constructive trusts, the House of Lords in *Westdeutsche* counselled against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs. (See Lord Browne-Wilkinson at 704). But that would not be the consequence of holding that a constructive trust exists in circumstances such as the present. On the contrary we would merely be adopting what has long been the position in many other jurisdictions.

177 We appreciate that the recognition of constructive trusts in such circumstances may raise questions concerning Article 10(2)(a)(iii) of the 1984 Law, which provides that a trust shall be invalid to the extent that it purports to apply directly to immovable property situated in Jersey. That will be for decision on another occasion but, as at present advised, we think it is strongly arguable that that provision does not apply to constructive trusts. Articles 29 and 50 refer to “property”, which is defined by Article 1(1) to mean “property of any description wherever situated”. It is hard to envisage that Jersey law would accept that, if a trustee, in breach of trust, uses trust monies to purchase Jersey immovable property for his own

benefit, he should be permitted to hold that immovable property free from any trust for the beneficiaries. In any event, any concerns about Jersey immovable property are not sufficient, in our judgment, to negate the general principle which we have described.

(ii) Does Jersey law permit tracing?

178 We begin by saying what we mean by tracing. It is not the same as " *following*". Following is the process whereby property is identified and pursued in its original form as it moves from person to person. The exercise of tracing is the response of a number of jurisdictions to the problem that arises when the thing in question can no longer be located because it has been substituted by something else. *Smith: "The Law of Tracing"* (1997) says at page 6:-

> ***"Tracing identifies a new thing as the potential subject matter of a claim, on the basis that it is the substitute for an original thing which was itself the subject matter of a claim.*** The new thing, as the substitute, stands in the place of the old thing, and therefore can be subject to the same claim."

Or as Lord Millett put it in *Foskett v McKeown* (2000) 2 WLR 129 at 1322:-

> ***"The process of ascertaining what happened to the plaintiffs' money involves both tracing and following.*** These are both exercises in locating ***assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership.*** The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner."

179 It is clear that, under English law, tracing is part of the law of property, not part of the law of unjust enrichment. Thus in *Foskett* Lord Millett said later on at 1322:-

> ***"The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment.*** There is no "unjust factor" to justify restitution (unless "want of title" be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property."

In the same case Lord Browne-Wilkinson at page 1304 made it clear that it is was a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. It is a question of, as he put it, 'hard-nosed

property rights'.

180 Mr Santos-Costa argues that the Court should be very slow to adopt rules concerning the English law of property. The Jersey law of property has wholly different origins to that of England. It does not appear that countries based on the civil law have adopted the concept of tracing.

181 There are only two previous Jersey cases dealing with the issue of tracing. The first is *re the Viscount in the matter of PKT Consultants (Jersey) Limited* (1st August, 1991) Jersey Unreported This involved an insolvent company, PKT Consultants, which had undertaken trust and company administration. The records were unclear as to the source of funds for various assets held by PKT Consultants. A dispute arose as to whether the sale proceeds of a particular asset belonged to an intervening party in the désastre. Eventually there was an agreed order but the Court carefully considered whether it was proper to make that order and in doing so Tomes DB said this at page 7:-

> ***"Insofar as legal authority is concerned the well known leading case of*** *In re Halletts Estate* (1880) 13 Chancery Division 696 CA ***is sufficient authority for the proposition that if money held by a person in a fiduciary character though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands*** .
>
> ***Furthermore, in*** *In re Diplock* (1948) 1 Chancery Division 465 CA ***the Court of Appeal held that the equitable right of tracing into a "mixed fund" is not confined to cases like Halletts Case where the right is asserted against the original "mixer" who was in a fiduciary relationship to the claimant.*** The case of *Sinclair v Brougham* (1914) AC 398 ***decided that Halletts Case was an illustration of a much wider principle, viz: that one whose money has been mixed with that of another or others may trace his money into the mixed fund (or assets acquired therewith) though such fund (or assets) be held, and even though the mixing has been done, by an innocent volunteer, provided that (a) there was originally such fiduciary or quasi-fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant; (b) the claimant's money is fairly identifiable; and (c) the equitable remedy available i.e. a charge on the mixed fund (or assets) does not work an injustice*** .
>
> ***I have not had time to research Jersey cases but the Royal Court is a Court of equity and we have inherent jurisdiction to do what is necessary to ensure that justice be done, not only between the parties, but between one of the parties, and third parties i.e. between Dr. Robinson and the other creditors.*** We apply the Hallett Case and the Diplock Case."

182 It seems clear that, even if he had had the time to carry out researches into Jersey cases,

Tomes DB would not have discovered any previous case. Counsel's exhaustive researches in this case have only turned up *PKT Consultants* itself and the subsequent one to which we are about to refer.

183 In *Royal Bank of Scotland Limited v Khan* (19th October, 1999) Jersey Unreported; [1999/183] Crill, Commissioner, approved the decision in PKT Consultants and stated that the Court should allow tracing as part of its " *power in its equitable jurisdiction to remedy … fraud*".

184 Mr Santos-Costa submitted that both of these decisions were based on a misunderstanding of the law of tracing. On each occasion the Court seems to have regarded tracing as a matter of achieving justice between parties or in remedying fraud; whereas it is clear from the English cases quoted above that tracing is to be regarded as part of the law of property, not part of equity's ability to do justice.

185 We accept that that may be a fair criticism of these two decisions. But, even accepting that tracing is part of the law of property, is there any reason why Jersey law should not incorporate tracing as part of its law of property? The history of Jersey law is full of examples of where we have incorporated concepts which have originated in other jurisdictions. That is inevitably the case in a small jurisdiction. A classic example concerns the law of trusts. The sort of argument put forward by Mr Santos-Costa would have been a strong reason for saying that Jersey law should not recognise or enforce trusts. Trusts (as they exist in England and here) were and are not known to countries whose law is based on the civil law. Yet, well prior to the enactment of the 1984 Law, Jersey law recognised and enforced trusts. The concept of a trust was incorporated into our customary law notwithstanding its very different roots, compared with English law.

186 It is of note that two judges as experienced in the Jersey law of property as Crill Commissioner and Tomes DB saw no difficulty in incorporating the process of tracing into the law of Jersey. They did not see any fundamental conflict with our law of property. Nor indeed was Mr Santos-Costa able to point to any concrete example of potential difficulty, save in relation to Jersey immovable property, upon which we have already commented.

187 The upshot is that there is no Jersey authority which suggests that tracing should not be part of our law; such authority as there is suggests that tracing does form part of Jersey law. Although accepting that our law of property has very different roots from that of England, there would appear to be no practical difficulty or any objection of principle to recognising tracing of movable property. On the contrary, in our judgment, there are strong policy reasons for doing so. Tracing offers an effective method of vindicating and safeguarding proprietary rights, particularly in cases of fraud. It has proved a useful tool in English law.

188 Furthermore, Article 50(3) of the 1984 Law expressly recognises the ability to trace to assets into which trust property has been converted. There would be no logic in allowing

tracing in cases of a constructive trust arising from breach of an express trust but disallowing it in cases of a constructive trust arising from fraud by a person owing another type of fiduciary obligation (e.g. a company director).

189 Accordingly we hold that *PKT Consultants* and *Royal Bank of Scotland*, albeit that they did not have the benefit of the full argument which we have had, were correctly decided in holding that the principle of tracing forms part of the law of Jersey where there is an underlying proprietary interest on the part of the claimant.

(iii) The rules of tracing – FIFO or not

190 The rules to be applied should, as a starting point, be those established in English law. However the Court is not bound by any English rule of tracing and is free to depart from such a rule if convinced that there is a better alternative. When we talk of the rules of tracing, we are, for the purposes of this case, speaking of the rules of equitable tracing because we are dealing with an equitable proprietary interest on the part of GT. There is much debate in England as to whether the time has come for the common law tracing rules to be subsumed into the more flexible rules of equitable tracing. In particular this would allow tracing through a mixed fund. We have not heard argument on this and therefore offer no definitive view. However we express the preliminary view that the differences between the two systems of tracing in England have an historical origin which has no application in Jersey. On the face of it, there would seem to be little reason to incorporate such technical distinctions into Jersey law and there would seem to be some advantage in applying the more flexible rules of equitable tracing (as constituting the Jersey rules of tracing) to all tracing actions.

191 As we have said, equitable tracing under English law permits tracing through a mixed bank account i.e. a bank account where proprietary funds have been mixed with other funds. Where the proprietary funds are mixed with the trustee's (i.e. the fraudster's) own money, there are special rules which ensure that monies paid out and lost are deemed to be the trustee's own funds, thereby treating the remaining funds as those of the victim. However, that is not the situation here. Abacus is accepted by GT to be an innocent volunteer. The £4.4 million of proprietary funds received in April 1992 were paid into an account of Abacus and mixed with other funds belonging to Abacus. We are therefore dealing with an account where trust monies have been mixed with monies belonging to an innocent third party. How then does the law decide whose money has been paid out of such an account and whose money remains?

192 In the case of a current account, English law applies the “first in, first out” (FIFO) basis. This derives from *Devaynes v Noble, Clayton's* case (1816) 1 Mer 572. Thus money is deemed to be paid out in the same order as it was deposited. Though *Clayton's* case itself was concerned with the respective interests of a banker and its customer. it seems to have been subsequently accepted as covering tracing generally. The rule can work in a haphazard manner. Suppose, on day one, £10,000 of A's money is paid into the account of

B, an innocent volunteer. The next day £10,000 of B's own funds are paid into the account. On day three B withdraws £10,000 and it is spent so as no longer to be traceable. *Clayton's* case dictates that the £10,000 paid away is deemed to consist entirely of A's money because it was paid in before B's money. The loss therefore falls entirely on A.

193 *Clayton's* case has been subject to considerable criticism over the years. As an example we would refer to the American case of *Re Walter J Schmidt & Co.* Exp. Feuerbach (1923) 298 F 314 at 316 when Judge Learned Hand said:-

> ***"When the law adopts a fiction, it is, or at least it should be, for some purposes of justice.*** To adopt [the fiction of first in, first out] is to apportion a common misfortune through a test which has no relation whatever to the justice of the case."

That criticism was adopted by two of the judges of the Court of Appeal in *Barlow Clowes International Limited (in liquidation) v Vaughan* (1992) BCLC 838. In that case, the Court of Appeal held that the rule in *Clayton's* case was not an invariable rule of law but could be departed from if it were impracticable or resulted in an injustice between the parties. On the facts of that case the Court of Appeal did not apply the rule for that reason.

194 In the United States and Canada, an alternative method of tracing through a current account has been formulated. It was described by Woolf LJ in *Barlow Clowes* as follows at 852:-

> ***"The second solution for resolving the claims of the investors among themselves is the rolling charge or North American solution ('North American' because it is the solution adopted or favoured in preference to the rule in Clayton's Case in certain decisions of the courts in the United States and Canada because it is regarded as being manifestly fairer).*** This solution involves treating credits to a bank account made at different times and from different sources as a blend or cocktail with the result that when a withdrawal is made from the account it is treated as a withdrawal in the same proportions as the different interests in the account (here of the investors) bear to each other at the moment before the withdrawal is made. This solution should produce the most just result, but in this case, as counsel accept, it is not a live contender, as while it might just be possible to perform the exercise the costs involved would be out of all proportion even to the sizeable sums which are here involved."

The method described by Woolf LJ has been referred to in this case as the "Apportionment Method".

195 GT has argued that we should apply the rule in *Clayton's* Case in respect of the current account of Abacus into which the £4.4 million was paid. It is accepted that it is a current account which, under English law, would therefore fall to be dealt with by the rule in *Clayton's* Case but the defendants have argued that we should not follow *Clayton's* Case

and should apply the Apportionment Method.

196 We are not bound by *Clayton's* Case and we see no advantage in adopting into Jersey law a rule which has been much criticised and which can clearly produce capricious and arbitrary results. The Apportionment Method is more likely to produce a fair result and we see no reason not to adopt it. We therefore hold that, as a general rule, monies to be traced through a mixed bank account (whether current or deposit) should be dealt with by application of the Apportionment Method.

(iv) Does tracing stop at the loan account between the Esteem Settlement and Esteem or does it extend to the assets of Esteem?

197 The next issue which we must consider is whether the asset into which GT can trace is the loan account between the Esteem Settlement and Esteem or whether it is the relevant assets of Esteem. In this particular case, the issue needs to be addressed both generally and specifically having regard to events in the English proceedings.

198 The general background is that whenever Esteem needed funds for any reason, these were provided from the Esteem Settlement by way of loan account. In other words the books of account of both the Esteem Settlement and Esteem showed a loan account between the two entities. The terms of the loan were expressed in all the documentation to be interest free, unsecured and with no fixed date of repayment. Whenever there was a change in the loan account, a memorandum was executed showing the new balance. Periodically sums were repaid by Esteem to the Esteem Settlement and this would also result in a new memorandum to reflect the new sum.

199 The balance of the loan account shown in the accounts of both entities as at 31 December 1991 was £6,717,975 (i.e. Esteem owed the Esteem Settlement that sum). We do not have any evidence as to whether this had altered by April 1992 but there do not seem to have been any major transactions during that period which might have affected the loan account to any material extent. Abacus received the sum of £4,417,686 into its bank account on 2nd and 3rd April (three tranches). On 14th April the sum of £3,150,000 was loaned to Esteem and transferred to the account of Esteem. On the same day it was paid away to Stephenson Harwood for the purchase of 52 Cadogan Place. On 21st April the sum of £1,600,000 was loaned to Esteem; on 19th May an additional sum of £325,000 was so loaned; and on 1st June a further sum of £1,490,000 was loaned i.e. £3,415,000 in total. These sums were essentially used by Esteem to pay the balance of the amount due to SMPC in respect of the refurbishment of 97 Dulwich Village.

200 GT asserts that the loan owed by Esteem to the Esteem Settlement is a chose in action and that GT can choose whether to stop at that stage or go on and trace into the underlying assets of Esteem (as it did in respect of the £3,150,000 used to purchase 52 Cadogan Place). The defendants, on the other hand, argue that the loan account is merely a

convenient method of accounting for the transfer of funds between the Esteem Settlement and its wholly owned subsidiary Esteem. The reality is that no “value” has been given by Esteem (other than a promise to repay when agreed between the two parties) and Esteem is therefore not to be treated as a bona fide purchaser for value, which would bring the ability to trace to an end.

201 GT's approach would have some surprising results. Take a simple case of A's proprietary funds of £5,000 being received by B, an innocent volunteer. B's assets at the time comprise solely a house worth £100,000. B chooses to spent the £5,000 on changing the colour of the house to suit his taste; but no value is added. The house remains worth £100,000. In effect therefore the £5,000 has been lost. It is quite clear that, in these circumstances, B has no asset into which A can trace. The £5,000 has been lost and A's claim fails. B is no better off than he was before the transfer because, as previously, he simply owns a house worth £100,000.

202 Conversely, let us take an example where the facts are exactly the same save that the house is owned by B's wholly owned company, C Limited. When B receives the £5,000, he injects this sum into C Limited by way of loan account. C Limited then spends the money on changing the colour of its house and the £5,000 is lost. C Limited therefore remains in exactly the same position. It has one asset worth £100,000. B's assets have not increased. Prior to the transfer, he owned shares in C Limited worth £100,000 (reflecting the value of the underlying asset of C Limited). Although he now has a £5,000 loan account with C Limited, C Limited's assets have not increased. They remain worth £100,000. It follows that the value of B's shares in C Limited must now be worth £95,000 because of the existence of the loan account. B's overall position remains the same; his interest in C Limited is worth £100,000. Thus neither B nor C Limited is better off as a result of what has occurred. Yet, according to Mr Journeaux, A is entitled to trace into the loan account because it still exists as an asset. If that is right, the result would be that B would be left with shares worth £95,000. Despite being an innocent volunteer, he would be left £5,000 worse off than before receipt of the money.

203 In our judgment, to treat a loan account in such circumstances as a separate asset into which a claimant can trace is to part company from reality. Where an innocent volunteer has a wholly owned company into which proprietary funds are injected, whether by way of share capital, loan account or any other method, it is artificial to treat that company as a bona fide purchaser for value so that the tracing exercise stops at the relationship between the beneficial owner and his wholly owned company. We think that, where there is a wholly owned company – and we confine our observations to such a situation – the tracing exercise must be continued into what the company did with the proceeds.

204 If we are wrong in this general approach, we consider that there are particular reasons for doing so in the present case. This is because, in the English proceedings, GT deliberately chose to trace into the assets of Esteem. Thus, during the course of the English proceedings, GT, despite being in possession of documents of Abacus which describe the transfer of £3,150,000 between the Esteem Settlement and Esteem as being a loan, argued

that the transfer was not a loan and that the payment of that sum to Esteem was made without consideration. On the basis of these arguments Mance LJ held in his judgment (at page 343) that GT could trace into Esteem's interest in 52 Cadogan Place because " *neither … Esteem Limited nor any intermediary between the Plaintiffs and … Esteem Limited can claim to have provided value …*". The evidence of Mr Blampied shows that the net sale proceeds of 52 Cadogan Place (including interest) was £4,222,618.20 and that this was paid to GT in satisfaction of the proprietary interest found to exist by Mance LJ.

205 In our judgment it is quite unacceptable for GT, having persuaded the English High Court that Esteem had provided no value and that therefore GT could trace into Esteem's assets, to seek now to argue quite the contrary, so that it can trace into the loan account. The fact is that all of the £4.4 million originally received by the Esteem Settlement was loaned to Esteem. Of this some £3,150,000 was used to purchase 52 Cadogan Place (which has increased in value) and the balance was spent on the refurbishment of Dulwich Village – and has therefore been partially lost. It cannot be right that GT is allowed in the English proceedings to trace to the underlying asset which has increased in value but, in these proceedings, claims to trace to the loan account thereby seeking to avoid the consequences of the fact that some of the loan proceeds have been lost by Esteem. Either it can trace to the loan account or it can trace to the underlying assets of Esteem on the basis that Esteem has provided no real value to the Esteem Settlement in the context of a tracing exercise. It cannot do both.

206 Mr Journeaux argued that it was reasonable for GT to have changed its stance on two grounds. First he sought to argue that GT had now heard the evidence of Mr Blampied who asserted that, in his view, the entries in the books of Esteem Settlement and Esteem meant what they said, namely that there was a loan between the two entities. We were not impressed with this point. Mr Journeaux could not point to any new evidence (as opposed to the expression of opinion by Mr Blampied) that had become available to GT since the English proceedings. In our judgment it chose to ignore the documentary evidence in the English proceedings and it cannot now choose suddenly to conclude that the documentary evidence is to be relied upon after all.

207 Secondly he argued that the trial of these particular issues (as ordered by the Court on 12th February 2001) is being held on the basis that the Esteem Settlement is a valid trust (without prejudice to GT's allegation in the remaining part of its pleadings that the trust should be ignored). It followed, he said, that GT had no option but to accept the validity of the loan account. It is true that the validity of the Esteem Settlement is not open to question during the trial of the present issues, but that does not extend to the question of how transfers between the Esteem Settlement and Esteem should be regarded. Nothing was said about this point during the course of the argument concerning whether there should be a trial of preliminary issues and, in our judgment, acceptance of the validity of the Esteem Settlement carries no implication that one therefore has to accept the trustee's characterisation of transactions undertaken by the Settlement. In any event it was GT who pressed for the trial of the separate issues without alluding to the significance of the treatment of the loan account. In our view, it is fully open to GT to assert, in these

proceedings, as it did in the English proceedings, that it can trace into the underlying assets of Esteem because Esteem provided no real value for the purposes of a tracing exercise.

208 Accordingly we hold that, having elected in the English proceedings to trace into the underlying assets of Esteem on the basis that the loan account did not reflect the provision of value by Esteem to the Esteem Settlement, GT cannot now be allowed in these proceedings, for its own benefit, to reverse its position and treat the loan account as an asset of value into which it can trace.

209 If we are wrong on both of these points – so that GT can trace into the loan account in respect of the sum of £1,267,686 – we hold that it must bring into account all the proceeds that it has received in respect of the sale of 52 Cadogan Place. It cannot be right to allow GT to divide up the proprietary claim in this way. The fact is that the Esteem Settlement received proprietary funds in the sum of £4,417,686. The application of the Apportionment Method will determine the exact proportion of this original sum which is to be reflected in the amount transferred to Esteem by way of loan account. That is then the sum which can be traced by GT. It must then give credit for the amounts which it has received from the realisation of Cadogan Place. On the face of it, that will leave very little recoverable by GT from the loan account.

210 Finally, we should add this. Mr Journeaux initially argued that, having established the amount of the loan account into which GT could trace, that was the sum which GT was now entitled to receive because the loan account still exceeded that sum. The Court put it to him that that could not possibly be right and, after reflection, he agreed. We think that he was right to do so. The loan account, if it is to be treated as a traceable asset, is like a bank account. It is a chose in action owed to the trustees of the Esteem Settlement. There was already a loan account between the Esteem Settlement and Esteem prior to the injection of the proprietary funds. Accordingly there has been a mixing of funds in the loan account between the Esteem Settlement's own funds and the proprietary funds. It follows that, if after the injection of the proprietary funds, any part of the loan account has been repaid to Esteem, the Apportionment Method must be applied in order to determine how much of each repayment should be attributed to the proprietary funds and how much to the Settlement's own funds. There was certainly one substantial subsequent repayment of the loan account on 1st June 1992 in the sum of £3,473,806. That exercise would have to be undertaken in exactly the same way as it has been for the bank accounts of the Settlement and Esteem into which the proprietary funds have been paid. That exercise has not been undertaken, but would have to be if a higher court were to hold that GT could trace into the loan account.

(v) Can tracing extend to improvements to pre-existing property?

211 Mr Baskerville gave expert evidence, which was not challenged, that, applying the Apportionment Method, £1,084,701 of the sum of £1,267,686 can be traced to expenditure on the refurbishment of 97 Dulwich Village. In what circumstances, if any, can funds be

traced into improvements to pre-existing property?

212 The defendants argue that, under English Law, the position is quite clear. Tracing cannot extend to the value of improvements in pre-existing real property. They rely upon the authority of *Re Diplock* (1948) All ER 318 at 360 where the Court of Appeal said:-

> ***"Where the contribution of a volunteer to a mixed fund or the acquisition of what we may call a "mixed asset" is in the form of money, it is, as we hope to have shown, inequitable for him to claim the whole fund or the whole asset.*** The equitable charge given to the other claimant in respect of the money contributed by him results merely in the division of the mixed fund between the two of them or the reduction of the asset by sale to its original components, i.e. money which is then divisible in the same manner. The volunteer gets back what he put in, i.e., money. On this basis, if a charity had used a mixed fund, consisting in part of its own money and in part of Diplock money, in the acquisition of property, whether, e.g. land or stock, the application of the equitable remedy would have presented no particular difficulty. The Diplock money and the charity money could each have been traced. A charge enforced by sale and distribution would have been effective as well as fair to both parties. The charity would not, as the result of the mixture, have been deprived of anything that it had before. In the present cases, however, the charities have used the Diplock money, not in combination with money of their own to acquire new assets, but in the alteration and improvement of assets which they already owned. The altered and improved ***asset owes its existence, therefore, to a combination of land belonging to the charity and money belonging to the Diplock estate.*** The question whether tracing is possible, and, if so, to what extent, and also the question whether an effective remedy by way of declaration of charge can be granted consistently with an equitable treatment of the charity as an innocent volunteer, present quite different problems from those arising in the simple case above stated. In the case of the purchase of an asset out of a mixed fund, both categories of money are, as we have said, necessarily present throughout the existence of the asset in an identifiable form. In the case of adaptation of property of the volunteer by means of trust money, it by no means necessarily follows that the money can be said to be present in the adapted property. The beneficial owner of the trust money seeks to follow and recover that money and claims to use the machinery of a charge on the adapted property in order to enable him to do so. But in the first place the money may not be capable of being followed. In every true sense, the money may have disappeared. A simple example suggests itself. The owner of a house who, as an innocent volunteer, has trust money in his hands given to him by a trustee uses that money in making an alteration to his house so as to fit it better to his personal needs. The result may add not one penny to the value of the house. Indeed, the alteration may well lower its value, for the alteration, though convenient to the owner, may be highly inconvenient in the eyes of a purchaser. Can it be said in such cases that the trust money can be traced and extracted from the altered asset? Clearly not, for the money will disappear leaving no monetary trace behind. The asset will not have increased (or may

even have depreciated) in value through its use."

213 Having then gone on to mention the difficulties of enforcing a sale under a charge and the possible unfairness of so doing, the court went on to conclude:-

> ***"In the absence of authority to the contrary, our conclusion is that as regards the Diplock money used in these cases it cannot be traced in any true sense and, further, that, even if this were not so, the only remedy available to equity, viz., that of a declaration of charge, would not produce an equitable result and is inapplicable accordingly."***

214 The case appears to have been taken as authority for the proposition that there is an absolute prohibition on tracing money into improvements in land already owned by a third party. We are not entirely sure that the case should necessarily be taken to extend that far. The court was clearly concerned as to what would happen where value was not added. It did not however go on to consider specifically the case where value definitely had been added. However we will assume for present purposes that the case is authority for the proposition contended for by the defendants.

215 Should we follow it in Jersey? We think not. The court held that, where funds being traced are mixed with an innocent recipient's funds and used to purchase real property, the funds can be traced into that property; but that where the funds being traced are used to improve an asset already owned, they cannot be traced. It is hard to see the logic of this distinction. If the funds being traced have added value, why should the innocent volunteer benefit from that increase in value to which he has contributed nothing, but the beneficiaries whose funds have been used to add value not be entitled to anything? Fairness would surely dictate that they should be able to recover that increased value. This would leave the innocent volunteer in no worse position than he was previously in the sense that he would be left with the value of the unimproved property.

216 There have been criticisms of *Diplock* for the reasons set out above and we think they are justified (e.g. Goff & Jones – The Law of Restitution (5th Edition) at 110 and Smith – The Law of Tracing at 241). We hold that, where funds being traced are spent on improvements to property already owned by an innocent volunteer, the claimant can trace into the increased value of the property which is attributable to those funds. Clearly if, as envisaged in *Diplock*, there has been no increase in value attributable to the funds, there can be no tracing as the funds will have been lost.

217 Mr Santos-Costa submitted that, even if we allow tracing into the value of improvements to preexisting property, it should be confined to the increase in value at the time. So, in this case, it would be restricted to the appropriate proportion of the sum of £400,000 in accordance with the evidence of Mr Adams-Cairns. We do not see the logic of this argument. Tracing into an asset means that the claimant has a proprietary interest in the asset. Thus if money is traced into the purchase of shares or real property, the claimant

takes the shares or the property and can retain any increased value. An example is the fact that GT, having traced into 52 Cadogan Place, was entitled to keep the entire sale proceeds, notwithstanding that these exceeded the cash which had been traced into the purchase of the property. We see no reason why a different rule should apply in connection with improvements to pre-existing property. The theory is that the claimant's money has caused or contributed to the increase in value by reason of the improvements and he is therefore entitled to the value of those improvements from time to time.

218 We agree that difficult questions can arise as to what remedy should be given in support of such a tracing claim. In particular it often may not be right to force an innocent volunteer to realise preexisting real property immediately. Such problems fall to be dealt with in the next two sections.

(vi) Can a tracing claim be defeated on the grounds that it would be inequitable to allow it?

219 Under English law, a plaintiff's equitable title is defeated and the right to trace is lost, either in whole or in part, if it would be inequitable to allow the plaintiff to trace – see Goff and Jones, The Law of Restitution (Fifth Edition) at page 110 relying on *Diplock*.

220 It seems to us that that must be right in principle. Let us take two examples. In the first, B receives A's proprietary funds of £1,000 as an innocent volunteer. He spends it on a once in a lifetime holiday which he would not otherwise have taken. The money is lost and cannot therefore be traced. The claim fails. In the second example, suppose that, instead of using the £1,000 to pay for the holiday, B places the sum in a separate bank account and then uses his own funds for the holiday. In these circumstances the £1,000 is still clearly identifiable and, in theory, traceable. Nevertheless it would clearly be inequitable to allow the claim. In reality B is in exactly the same position as in the first example. If one were to allow the tracing claim merely because he had kept the £1,000 in a separate bank account, he would end up being £1,000 worse off than if he had never received the money at all.

221 As can be seen from this example – and as is suggested by Goff and Jones – the principle that a tracing claim is lost if it would be inequitable to allow it is probably a different way of saying that a change of position defence is available in respect of a tracing claim just as it is in relation to a restitutionary claim based on unjust enrichment. Indeed, Mr Journeaux accepted that this was so although Mr Santos-Costa disagreed. However, for the time being, it is probably more convenient to continue to refer to it in its existing form and we therefore hold that, as a matter of Jersey law, a right to trace is lost, either in whole or in part, in circumstances where it would be inequitable to allow the plaintiff to trace.

(vii) What remedies are available?

222 In support of his contention that Jersey law should not recognise the concept of tracing,

Mr Santos-Costa also relied upon the fact that, in English law, the machinery for enforcing a tracing exercise through a mixed fund is the equitable charge. This is not, he says, a concept known to Jersey law. The lack of it suggests that equitable tracing has so far not been part of Jersey law. Furthermore the lack of it will make it difficult, if not impossible, for the Court to enforce any equitable tracing exercise which it may permit.

223 We accept that the Court may need to fashion remedies which ensure that effect can be given to a tracing decision. We do not foresee any insurmountable difficulty in doing so in an appropriate case and we are not to be taken as accepting that the Court could not impose an equitable charge. On the contrary, we see no reason why the Court should not have such a power. But, in the present case, the trustee has sought the directions of the Court and the issue does not therefore arise for decision. Effect can be given to any decision of the Court by giving the trustee appropriate directions.

(b) Application to the facts

224 We are satisfied that Sheikh Fahad, in his position as chairman of GT, owed a fiduciary duty to GT. We are further satisfied that, when he defrauded the company, he became constructive trustee of the sum of $120 million that he received and GT had an equitable proprietary interest in that sum.

225 It is not disputed that, of these funds, the sum of £4,416,686 was paid to Abacus as trustee of the Esteem Settlement on the 2nd April 1992. GT is therefore entitled to trace that sum into the hands of the Esteem Settlement. The sum was then mixed. From the mixed fund, £3,150,000 was loaned to Esteem and used to purchase the leasehold interest in 52 Cadogan Place. For the reasons which we have given, we respectfully agree with the decision of the English High Court that GT could trace the proceeds through the loan to Esteem into the interest of Esteem in 52 Cadogan Place.

226 As to the balance of £1,267,686, the undisputed evidence of Mr Baskerville shows that, using the Apportionment Method, the sum of £1,084,701 is traceable into expenditure on the refurbishment of 97 Dulwich Village by Esteem. The total expended on the refurbishment was £5,709,282. It follows that the traceable funds accounted for 19% of the refurbishment costs and GT can therefore trace into 19% of the increase in value attributable to the refurbishment.

227 The evidence of Mr Adams-Cairns shows that the increase in value attributable to the refurbishment works constitutes 25% of the market value of the property. Thus, to find the percentage of the overall value of 97 Dulwich Village which is represented by the traceable funds, one takes 19% of 25% which comes to 4.75%. We hold therefore that, subject to consideration of whether it would be inequitable to allow GT to trace into 97 Dulwich Village and of what remedy would be suitable, GT is entitled to trace into 4.75% of the property.

228 The evidence of Mr Baskerville also showed that, using the Apportionment Method, £7,077 of the sum of £1,267,686 can be traced to the purchase of 242 Turney Road in November 1992. The trustee's accounts show the total cost of Turney Road as £165,867. The traceable funds thus constitute 4.27% of the total cost. Accordingly we hold that, subject to the same reservations as for 97 Dulwich Village, GT is entitled to trace into 4.27% of Turney Road.

229 The defendants argue that it would be inequitable to allow these two tracing claims and, as a result, to force a sale of the properties in order to pay GT its entitlement now. This is particularly so in respect of 97 Dulwich Village. That property has been the home of Sheikh Fahad and his wife since 1976 and has been owned by the Esteem Settlement since 1982, many years before the fraud started in 1988. It would be inequitable to require the sale of this property with the consequent loss to Sheikh Fahad and, more particularly, Barbara – who is an innocent party in the matter – of their home. This, say the defendants, is why the court refused to allow tracing in the *Diplock* case because of the unfairness of requiring the owner of pre-existing real property to realise that property simply because he has innocently expended proprietary funds on its improvement. We accept that, in many circumstances, it would not be right to grant a remedy which requires an innocent recipient to realise his home. This may result in the tracing claim being denied altogether or in some form of charge being granted which is not realisable until the property is sold by its owner in the ordinary course of events.

230 The defendants also argue that it would be inequitable because of the capital distribution made in December 1992. If Abacus had known at that time that it would have to account to GT for a percentage of the value of 97 Dulwich Village and 242 Turney Road, it would have held back sufficient cash to settle those claims, so as to avoid the need to sell properties in which beneficiaries or their staff lived. The Court should therefore take that into account – which really amounts to a change of position argument – when deciding whether it would be inequitable to make an order allowing GT to trace into the properties and causing them to be sold to meet the claim.

231 We do not think that it would be inequitable to allow the tracing claim and to make such order as results in the sale of 97 Dulwich Village and the accounting to GT of its entitlement. We so conclude for the following reasons:-

(i) In the first place the innocent recipient in this case is not the beneficiaries as a class or individually. Nor is it Abacus as such. It is Abacus in its capacity as trustee of the Esteem Settlement. The most convenient way of looking at matters is to regard the recipient as the Esteem Settlement, albeit that a trust is not a legal entity. The Esteem Settlement comprises of a bundle of rights with the legal estate in Abacus and the equitable estate in the beneficiaries. So far as the Settlement is concerned, it does not seem inequitable to it to require a particular asset, namely 97 Dulwich Village, to be sold in order to account for the equitable interest of GT which has been traced into the asset. The Settlement will receive its share of the proceeds and GT will receive its

share. The Settlement will not be treated unfairly from a financial point of view.

(ii) However we agree that the Court should take a broad approach and must have regard to the realities of the situation; in this case that the property is made available as the home in England of Sheikh Fahad and Barbara. However it is relevant to note that it is not their primary home. They live in the Bahamas. Sheikh Fahad has not visited 97 Dulwich Village for many years and Barbara does so only occasionally. In evidence she said that, apart from staying at the house for a few days on the way to this trial, she had not stayed in the property in 2001. It may well be that, if Sheikh Fahad predeceases her she will wish to return to live in the Dulwich area but there would seem no reason why she should need to live in a house as large as 97 Dulwich Village. In this context the words of Lord Millett in *Foskett* at 1334, although given in a different context, are relevant:-

> ***"It is morally offensive as well as contrary to principle to subordinate the claims of the victims of the fraud to those of the objects of the fraudster's bounty on the ground that he concealed his wrongdoing from both of them."***

(iii) Furthermore, one cannot ignore the fact that this is the home of Sheikh Fahad as well as his wife. Sheikh Fahad stole the proprietary funds in this case; he caused them to be contributed to the Settlement; and he organised the refurbishment which was done largely for his benefit. It is most certainly not inequitable to require this home to be realised in order to reimburse proprietary funds which he has stolen and which have been used to pay for improvements to the property.

(iv) 242 Turney Road is let commercially and there would seem to be no good reason not to order its sale if that is the best method of realising GT's interest.

232 In all the circumstances we are quite satisfied that it would not be inequitable to recognise and enforce the tracing claims which we have found to exist. We will hear the parties following delivery of this judgment on the exact form of order but, in principle, we would be willing to order the sale of 97 Dulwich Village and to consider the sale of 242 Turney Road.

D. CLAIM IN RESTITUTION

(a) The law

233 As an alternative to its proprietary tracing claim GT brings a claim in restitution based upon unjust enrichment. It accepts that the claim only arises if it does not succeed in its tracing claim. In the light of our conclusions on the tracing claim, we do not therefore strictly need to consider the restitutionary claim. Nevertheless, we have heard full argument on the matter and it raises issues of considerable importance. Furthermore, it would become relevant if we were held to have been wrong in recognising tracing as part of the law of Jersey. We think it right therefore to express our conclusions.

234 It is accepted by GT that Abacus was an innocent recipient of the sum of £4.4 million paid to it in April 1992. It did not have actual or constructive notice of Sheikh Fahad's breach of trust. Abacus was not at fault in any way. All parties before us are agreed that, were this case being heard in England, a claim in restitution could not succeed for the following reasons.

235 Under English law, where the property in question or its identified proceeds are still in the hands of the innocent recipient (applying the relevant tracing rules) the plaintiff is entitled to recover the property or those proceeds as a proprietary claim. But if the recipient does not still have the property or its identifiable proceeds, then no claim lies against the recipient unless he has been at fault in some way. If he is guilty of fault, equity treats him as a constructive trustee. The nature and degree of fault has been the subject of conflicting decisions in England (cf. *re Montague's Settlement Trust* (1987) Ch 264 and *Belmont Finance Corporation v Williams Furniture Limited (No 2)* (1980) 2 All ER 393; but these need not concern us.

236 It follows that there is therefore a lacuna in English law. This can best be illustrated by the following example. B receives A's proprietary funds of £1,000. Let us assume that he places the £1,000 on a separate deposit account. He then spends £1,000 of his own monies on ordinary everyday expenses that he would have incurred in any event. I.e. he does not change his position as a result of the receipt. In such circumstances A can trace to and recover the £1,000 which is still identifiable. B is no worse off than he would have been if he had not received the money; he has merely spent £1,000 which would have been spent anyway. Suppose that instead of putting the £1,000 on deposit, B had used that sum to pay for his ordinary every day expenses. He has therefore enjoyed the benefit of the £1,000 and his other assets are correspondingly greater than they would have been. In those circumstances a proprietary tracing claim will fail on the grounds that the £1,000 has been lost. It is no longer identifiable. Yet English law will give A no remedy in restitution because B has not been at fault. Accordingly B will be £1,000 better off than he would have been if he had never received the funds and A will still be out of pocket to the extent of £1,000.

237 This has been the subject of much academic debate in England and many commentators have expressed the view that a person wrongfully deprived of property should have a personal right of recovery against a fault-free recipient for the benefit to which he was not entitled (e.g. *Birks "Misdirected Funds: Restitution from the Recipient"* (1989) LMCLQ 296: *Hanbury & Martin: Modern Equity* (15 th Ed'n) at 300). It is said that this is so particularly in cases of 'ignorance'. As Birks put it at 341:-

> ***"The personal liability of the recipient of misdirected funds is a strict restitutionary liability.*** It is based on the proposition that the defendant (the recipient) has been enriched at the expense (in the subtraction sense) of the plaintiff, in circumstances in which that enrichment is unjust by reason of the plaintiff's not having consented to it. The 'unjust' factor can be named 'ignorance', signifying that the plaintiff, at the time of the enrichment, was

> absolutely unaware of the transfer from himself to the defendant. 'Ignorance' is similar to but, as a factor calling for restitution, stronger than mistake, for in cases of mistake the plaintiff's decision is impaired but in cases of 'ignorance' impairment is an understatement: there is no decision at all."

238 The view has been expressed extra judicially by Lord Nicholls (see Knowing Receipt: The Need for a New Landmark – Essays in honour of Gareth Jones (1988)) that it may be open to the higher courts in England to develop the *Diplock* principle to allow for personal recovery against fault free recipients. In passing we would like to express our admiration of and gratitude to this article for setting out the issues so clearly. In *Diplock* the courts affirmed the continuing existence of an equitable principle whereby those to whom a deceased's estate has been erroneously distributed are personally liable to repay the persons rightfully entitled to the deceased property. It is a strict liability applicable irrespective of the recipient's good faith and it applies even though the recipients have spent the money. That of course was a very harsh decision but Lord Nicholls argues that it could be widened into a general principle for recovery, provided that a change of position defence is allowed.

239 In Jersey, we are not bound by any of the decisions which require fault on the part of a recipient. In our view the position in England is unsatisfactory and we express the tentative view that, taking account of the enormous development of the law of restitution in England in recent years since *Lipkin Gorman*, it is probably only a matter of time before the law develops to give a remedy in such circumstances.

240 We do not see why Jersey law should await this development. We are under no obligation to follow the law of England when, for the reasons so compellingly explained by Lord Nicholls and the other commentators, that law would appear to be unsatisfactory.

241 Any principle of restitutionary recovery against a fault free recipient can only be based on the principle of unjust enrichment. It follows that the claim can only succeed if the recipient remains unjustly enriched. He must therefore have available to him a change of position defence. The underlying principle must be that in no circumstances should the innocent recipient be left worse off than if he had never received the funds in the first place.

242 This is a complex area. We are conscious that many ramifications may flow from a decision to allow such a claim. Accordingly we deliberately express our decision in terms that are no wider than is strictly necessary for the present case, without wishing to be taken to suggest that a remedy would not also be available in other analogous situations. We hold that, under the law of Jersey, where property in respect of which a person (a beneficiary) has an equitable proprietary interest (because the property has been taken from the beneficiary by a person who is in a fiduciary position towards that beneficiary) is received by an innocent volunteer, the beneficiary has a personal claim in restitution against the recipient even where the recipient has not been guilty of any 'fault' in receiving the property. In other words, the state of mind required for a 'knowing receipt' claim under

English law is not required in Jersey. It is a strict restitutionary liability. However, the claim is based upon unjust enrichment and, accordingly, the beneficiary can only succeed to the extent that the recipient remains unjustly enriched. A defence of change of position is therefore available. We emphasise that the liability is a personal one; the recipient is not a constructive trustee for the beneficiary.

(b) Application to the facts

243 For the reasons which we have set out in the tracing claim, the sum of £1,267,686 was in the equitable proprietary ownership of GT. Sheikh Fahad had a fiduciary obligation to GT as its chairman and GT was ignorant of the abstraction and subsequent transfer of funds to the Esteem Settlement by Sheikh Fahad. That sum having been received by Abacus as trustee of the Esteem Settlement, there is an obligation on the Settlement to make restitution of that sum, subject only to a change of position defence.

244 Unlike his position in relation to the tracing action, Mr Journeaux accepts that, for the purposes of a claim in restitution, the Court must look at what Esteem did with the money rather than stop at the stage of the loan account from the Esteem Settlement to Esteem. He accepts that, to the extent that the money has been lost by Esteem, then although the loan account still exists in the original sum, the value of the shares in Esteem has decreased by the amount that has been lost, so that the Settlement's overall position reflects the money which has been lost.

245 Essentially, the sum was used as part payment for the refurbishment of 97 Dulwich Village; a small proportion was used for other expenses. It is clear that the contractual obligation in respect of the refurbishment of 97 Dulwich Village was already in place at the time of the receipt in April 1992. Abacus merely chose to use this particular sum towards payment for the works. Accordingly there was no change of position; if Abacus had not received the sum of £1,267,686, it would still have had to pay for the refurbishment and would simply have had to have used other funds for payment. Indeed it is conceded by Mr Santos-Costa that there was no change of position in this respect.

246 However, the defendants do argue that Abacus would not have appointed £3.7 million to Sheikh Fahad in December 1992 if it had known that it was not entitled to the £1,267,686 and had to repay it. Abacus did change its position in this respect and should therefore not have to repay any of the claimed sum. Because the same point arises in relation to the Pauline Action, we think it preferable to defer consideration of this argument until we have dealt with the Pauline Action.

E. THE PAULINE ACTION (a) The law Introduction

247 We now turn to consider the Pauline action. This is a quite different claim from the proprietary tracing claim and the claim in restitution. Both the former are based upon the

fact that Abacus received money belonging to GT. In the Pauline action GT accepts that Sheikh Fahad transferred his own assets to Abacus. However it is alleged that he did so in order to defraud GT as his creditor and that, in the circumstances, the transfers can be set aside.

248 It is clear that Jersey law recognises an ability, in certain circumstances, to set aside a transfer undertaken in fraud of creditors. There is judicial authority to this effect, namely *Golder v Société des Magasins Concorde Limited* (1973) JJ 721. The facts in that case were clear cut. The plaintiff, having been the managing director of the defendant company, brought an action for wrongful dismissal and conspiracy. Judgment on the issue of liability was given in his favour in February 1966. In June 1966 the defendant company sold its business to an associated Guernsey company partly for cash – sufficient to pay off the liquidated creditors of the company – and partly for shares. In July 1966 the Royal Court gave judgment on quantum. By then the defendant company had settled the claims of all its other creditors and had no assets left. It was unable to meet the liability to the plaintiff. The Court held that the plaintiff was a creditor of the defendant company with effect from the date of the judgment on liability (February 1966) even though his claim was unquantified until the judgment on quantum. It further held that the sole purpose of the disposal by the defendant company to the Guernsey company had been to ensure that the defendant company had no assets with which to meet its liability to the plaintiff.

249 The Court approved as an accurate statement of Jersey law the comments of *Poingdestre: (Lois et Coûtumes de l'Ile de Jersey)* at 210:-

> ***"Nul Debteur ne peut aliener ny transporter a un autre, par aucun Acte solennel, en fraude (in damnum, au prejudice ou domage …) de ses créditeurs chiropgraphaires & personnelles tant seulement, quand mesme ce seroit a une personne ignorante de la fraude: et que s'il le fait, lesdits Crediteurs qui auront esté fraudez, seront receus a rappeller ladite Alienation."***

The Court considered that it was very likely that the passage from Poingdestre was inspired by the Pauline action of Roman Law. Having then referred to certain passages from Dalloz and Pothier, the Court held that, in order to succeed, the creditor had to prove an intention to defeat creditors and their actual defeat by showing that the debtor was insolvent and that the insolvency was due to the act which was challenged if the debtor was not already insolvent before the act. The Court had no doubt in concluding that both requirements were met in that case and the plaintiff was therefore entitled to succeed.

250 GT argues that Jersey law allows recovery in circumstances which go beyond those which existed in *Golder*, whereas the defendants argue that we should hold that Jersey law does not go beyond that articulated in *Golder*. It is therefore necessary to look into the position in considerably more detail than was necessary in *Golder*. We emphasise that, for convenience, and having regard to the comments of the Court in *Golder*, all parties have referred to this part of the claim as a Pauline action and we will do the same. However it is important not to be misled by the label. It does not mean that we are considering the exact

nature of the action in Roman Law and how that would have applied to the particular case. We are endeavouring to establish the parameters and principles of Jersey law in relation to transfers made to defeat creditors.

251 It is agreed that the following issues need to be considered:-

Having ascertained the legal principles we will then apply them to the facts of the case.

(i) Who is a creditor? When did GT become a creditor for the purposes of the Pauline action? (ii) Is the insolvency of the debtor a precondition to a Pauline action? If so at what stage?

(iii) How is insolvency to be measured?

(iv) What is the relevant state of mind on the part of the debtor which needs to be shown? How is that to be established?

(v) What principles are applicable to transactions “onéreuse” and “lucrative”?

(vi) In the case of an innocent recipient, what is the nature of the action? Are there any defences such as no continuing enrichment/change of position?

(vii) What is the period of limitation for a Pauline action and is GT's claim time-barred?

252 Before we turn to these issues, we think that we should make a general observation about the weight to be attached to the various writers to whom we have been referred. In the absence of Jersey judicial authority, the greatest weight has to be attached to writers on the law of Jersey. In the present case, that means Poingdestre (when he is writing of Jersey law rather than Norman law) and Le Geyt. Apart from on the issue of prescription, we have not been referred to writers on the law of Normandy (whether the Ancienne Coutume or the Coutume Reformée). We have however been referred to Pothier and Domat. They were both writing before the introduction of the Code Civil. Although they were not writing on the law of Normandy, from which Jersey law derives, they are often relied upon in this Court on the basis that they were writing on the customary law and the civil law and that the content of these may well provide useful guidance as to what the law of Normandy may have been.

253 Finally one comes to French law since the introduction of the Code Civil. Many of the texts cited to us in this case fall into this category. In this context we would refer to what was said by the Court of Appeal in *Public Services Committee v Maynard* (1996) JLR 343 at 350:-

> ***“However, care has to be taken in referring to French legal texts in connection with the law of Jersey.*** After the Channel Islands were severed from the rest of the Norman territories in what is now France, Norman customary law continued to develop in Jersey, Guernsey and Normandy in parallel, but not with identical developments. In Normandy, development was naturally affected

> by doctrines prevailing in other parts of France. The Napoleonic Codes embodied much of the pre-existing laws of the French provinces, but with some material changes. After the Napoleonic Codes came into existence, French law developed independently of developments in Jersey ***and Guernsey, under the direction or influence of French statutes, French jurisprudential writers and the case law of the French courts.*** Accordingly, no great weight can be placed on French law as it exists today in ascertaining what is Jersey law, except perhaps on a comparative basis as showing how the same problems have been treated in another legal system."

We would add respectfully that modern French law may also be of assistance if it is clear that the principles being considered originated in the old customary law and have not been subject to great change. More detailed exposition of the old principles than was undertaken by the writers on customary law is sometimes available. Dalloz, in particular, may be of assistance in this respect, both because of the fact that he was often writing about principles which were based upon the law before the introduction of the Code Civil, and because he often considered the matter in greater detail than the old writers. Nevertheless, the Court must always be careful, when considering writers on modern French law, to ensure that it is not inadvertently incorporating some aspect of French law which is not the same as that from which the law of Jersey is derived.

(i) Who is a creditor?

254 The defendants contend that only a person who is a creditor at the time of the transaction under attack can bring a Pauline action and that a person does not become a creditor until he has a certain claim. GT's claim does not arise out of contract, it arises out of tort. GT did not have a certain claim until Mance LJ delivered his judgment in June 1999. Any disposal made by Sheikh Fahad before that time cannot be attacked by GT as it was not then a creditor.

255 Two issues therefore arise:-

We will take each of these in turn.

(a) Does the claim of a creditor have to predate the transaction under attack? and

(b) When can the debt of a creditor be said to arise, particularly in cases of tort?

(a) Does the claim of a creditor have to predate the transaction under attack?

256 The defendants submit that the general rule is that only creditors whose claims predate the transaction can bring a Pauline action and it is only in comparatively recent times that modern French law has allowed future creditors to do so in certain circumstances.

257 Although the Court in *Golder* did not specifically address this aspect, it is clear that it went to some trouble in its judgment to show that, on the facts, the plaintiff had become a creditor of the defendant company before the disposal in question. Poingdestre dealt with the matter specifically at 210:-

> ***"Mais quand il s'agist de quelque vendition ou Alienation faite en fraude des Crediteurs par un Debteur, il ne faut point distinguer entre obligation recognue ou non recognue, privée ou publique, privilegiée ou non privilegiée, avec tesmoings ou sans tesmoings: car il est indubitable que toute debte, obligation ou scedule quelle qu'elle soit est tousjours plus favorable & plus privilegiée qu'un contract fait en fraude des Crediteurs; & qu'elle luy doibt estre preferée, si elle est premiere en Dapte; mais si elle estoit posterieure, on ne pourroit pas pretendre que le Contract eust été fait en fraude d'elle, puis quélle n'estoit pas quand le contract fut fait***." (emphasis added).

258 *Pothier: "Traité des Obligations"* (1781 Ed'n) Tome 1 Part I, Chapter II, article II at paragraph 153, page 65 states:-

> ***"Observez néanmoins que, si le débiteur, lorsqu'il ä fait passer à un tiers la chose qu'il s'étant obligé de me donner, n'étant pas solvable, je pourrais agir contre le tiers acquéreur pour faire rescinder l'aliénation que lui en a été faite en fraude de ma créance, pourvu qu'il ait été participant de la fraude, conscius fraudis, s'il était acquéreur à titre onéreux: s'il était acquéreur à titre gratuit, il ne seroit pas méme nécessaire pour cela qu'il eût été participant de la fraude."***

259 The most detailed exposition is to be found in *Dalloz: Répertoire (Titre Obligations)*, (1860) Tome 33, Chapter 6, Section 3, Article 2, page 237:-

> ***"997. Pour que les créanciers puissant exercer l'action révocatoire, il faut que l'acte soit fait en fraude de leurs droits, c'est-à-dire qu'il préjudicie à ces droits et qu'il ait eté consommé avec l'intention de leur causer ce préjudice (V.nos 954, 965 et s.). Il résulte de là que les créanciers antérieurs à l'acte contre les droits desquels seuls il peut avoir été frauduleusement fait, au moins en règle générale, peuvent seuls aussi le faire révoquer. C'est ce que décidait le droit romain (L. 10., § 1; L. 15 et 16, D. Quce in fraudem), qui n'accordait l'action paulienne qu'aux créanciers mémes que l'on avait voulu frauder, et notre ancien droit (V. Domat, Lois civiles, liv.2, tit, 10, sect.1). …***
>
> ***998. Quant aux créanciers postérieurs à l'acte, ils ne peuvent l'attaquer: n'étant pas encore créanciers, l'acte n'a pu leur porter aucun préjudice sauf les cas de faillite (art. 444c. com.). …***
>
> ***999. Il a été décidé en ce sens: 1° que des créanciers n'ont qualité pour attaquer comme frauduleux les actes de leur débiteur, qu'autant que leurs***

droits sont nés antérieurement à ces actes. 2° Que pour être recevables à agir, en vertu de l'art. 1167, les créanciers doivent avoir un droit antérieur, un droit à la chose ou un droit sur la chose. 3° Qu'ainsi, un créancier est irrecevable à attaquer, comme fait en fraude de ses droits, un acte passé par son débiteur, antérieurement à l'origine de sa créance. …" .

260 *Aubry et Rau, Cours de Droit Civil Français* (1902) (5 th Ed'n), although writing of French law, are to like effect at page 220:-

"Il faut enfin que la créance en vertu de laquelle l'action est intentée soit d'une date antérieure à celle de l'acte attaqué."

261 However it is clear that modern French Law has developed and now allows creditors whose claims post-date the transaction to bring a Pauline action in certain circumstances. Thus Dalloz at paragraph 1004 states:-

1004. En règle générale, comme nous l'avons dit, il faut que les créanciers aient des droits antérieurs à l'acte qu'ils attaquent, et l'une des raisons que nous en avons donné, c'est que, pour que l'acte fait en fraude des droits des créanciers fút annulé, le droit romain exigeait qu'il eút préjudice à ceux-là mêmes que le débiteur avait eu l'intention de frauder. Scilicet si hi creditores quorum fraudandorum causd fecit, bona ipsius vendiderunt (L. 10, § 1, et L. 15 et 16, D., Quce in fraudem). Mais on conçoit que pour que cet événement se réalise il n'est pas absolument nécessaire que les droits des créanciers soit antérieurs à l'acte. Le débiteur peut avoir voulu par cet acte frauduleux nuire aux droits de ses créanciers à venir et leur avoir causé un véritable préjudice. Dans ce cas l'acte réunissant toutes les conditions voulues pour qu'il soit fait en fraude des droits des créanciers, on ne saurait refuser à ces derniers l'action paulienne ou révocatoire, quoique en général elle ne puisse étre accordée qu'à des créanciers antérieurs, les seuls que l'on ait d'ordinaire l'intention de frauder, les seuls aux droits desquels on préjudicie. — Il a été décidé en ce sens: 1° qu'un acte peut être attaqué pour fraude à leurs droits, par des créanciers même postérieurs à cet acte, si la fraude, telle qu'on l'allègue, a eu précisément pour objet de frustrer les créanciers à venir; par exemple, en exagérant frauduleusement le prix d'un bail à long terme de manière a conférer au bailleur, pour toute la durée du bail, un privilége qui lui affecte, au détriment des créanciers à venir, la totalité ou du moins la plus claire partie de l'actif de leur débiteur (rej. 2 féf. 1852, aff. Belleisle, D. P. 52. 1. 49); — 2° Qu' il en est ainsi encore lorsque, dans la prévision de la perte d'un procès encore pendant, le débiteur s'est entendu avec un tiers pour simuler une obligation hypothécaire en faveur de ce dernier, afin de rendre illuscire la créance que son adversaire obtiendrait contre lui (Poitiers, 12 déc. 1854, aff. Chauvin-Du-breuil, D.P. 55. 2. 231). – V aussi MM. Massé et Vergém, sur Zachariae, t.3, p. 413, note 6; Larombière, sur l'art. 1167, No 20."

262 Similarly *Planiol et Ripert, Treatise on the Civil Law, Trans Louisiana State Law Institute* (1938) Volume 2, para 316 at page 186:-

> ***"316 Creditors After the Fraudulent Act***
>
> ***In the normal state of affairs the creditor who attacks an act of his debtor should prove that his credit arose prior to the act attacked.*** In fact if he has not dealt with the debtor until afterwards, what can he complain of? He could not have counted on property which had already left the hands of his debtor; he has dealt with a man already impoverished and has taken him as such. …
>
> ***Those who became creditors after the fraudulent act have therefore no right to attack it.*** They have such a right, however, if the fraud was directed against them. Examples of this are seen in practice: certain debtors commit frauds against their future creditors, in arranging in advance the manner of withdrawing the pledge on which creditors will count in dealing with them. (Cass., 5 Jan 1891, D. 91.1.-331, S. 91.1.147; Cass., 30 May 1905, D. 1905.1.408)."

263 Finally *Sériaux in Droit des Obligations* (1982) at para 218 on page 673 states:-

> ***"Dans certains cas la jurisprudence va même plus loin en admettant l'action paulienne exercée par un créancier dont la créance est pourtant née après l'acte d'appauvrissement, dès lors que cet acte avait justement pour but de faire échec aux droits du créancier futur.*** Si, en principe, l'acte critiqué doit être postérieur à la naissance de la créance, il n'en est plus ainsi lorsqu'il est démontré que la fraude a été organisée à l'avance en vue de porter préjudice à un créancier futur."

264 Mr Journeaux also referred us to a number of cases decided under the Fraudulent Conveyances Act 1571 (the Statute of Elizabeth) in England. That statute referred to conveyances etc. " *… to delay, hinder or defraud creditors and others …"*. The English courts have held in a number of cases that conveyances made with the intention of defeating future creditors are caught by this statute. Thus, for example, in *MacKay v Douglas* (1872) LR 14 Aq. 106 it was held that a voluntary settlement by means of which the settlor took the bulk of his property out of the reach of his creditors shortly before engaging in a trade, could be set aside by those who became creditors after the date of the settlement, despite the fact that there were no creditors whose debts arose before the date of the settlement and that it was doubtful, at that date, whether the arrangements under which the settlor was to engage in the intended business would even take effect. We have to say that we have not derived much assistance from these cases or from the statutes which various countries have introduced in order to address the issue of fraudulent dispositions to which we were also referred.

265 It is quite clear that all the authorities before the introduction of the Code Civil in France required that the debt must predate the disposition. This was consistent with the underlying

principle of the Pauline action, namely that a person contracts with a debtor on the strength of an implied undertaking that the whole of the debtor's patrimony is available to support his obligation and he will therefore not dispose of it to the prejudice of those contracting with him. In modern times (the earliest cases seem to date from the mid nineteenth century) French law has changed the rule by providing that, in certain circumstances, future creditors may bring an action to set aside transactions effected before they became creditors.

266 In our judgment, this is one of those areas where we have to be wary of modern French Law. We have an authoritative statement from Poingdestre that Jersey Law requires the debt to predate the transaction. The only Jersey judicial decision seems to have proceeded on the same basis. We do not think that it is open to us to say that, in the light of changes to the law of the Pauline action introduced by French judicial decisions since the Code Civil, we should depart from the existing law of Jersey as stated by Poingdestre, particularly when that is clearly consistent with the previous customary law of France. Even if it were open to us, we do not think that it would be right to effect such a change by way of judicial development. Article 17 of the Bankruptcy (Désastre) (Jersey) Law 1990 provides for transactions at an under value to be set aside if they have occurred within a certain time before the bankruptcy. This is so regardless of whether the debts arose before or after the transaction in question. Any further development of the law to allow transactions undertaken before the facts giving rise to a debt occur should be a matter to be undertaken by the legislature. Just as it is right that creditors should be protected from fraudulent debtors, so is it important that security of receipt and an assumption of validity of transactions be considered. To set aside transactions at the instance of a person whose claim did not exist (even on the extended definition to which we shall refer in a moment) at the time of the transaction is a major interference with the freedom for a person to deal with his assets freely and for persons who transact with him to be able to rely on what has been done. If to be undertaken at all, such a step should only be undertaken after widespread consultation and consideration of all the implications.

267 Accordingly we hold that the law of Jersey is as stated by Poingdestre and, implicitly, by the Royal Court in *Golder*, namely that only a creditor whose debt precedes the transaction in question may bring a Pauline action.

(b) When does a person become a creditor

268 The defendants argued that a person claiming in tort does not rely upon the debtor's creditworthiness and the implied undertaking that his patrimony is available to support his obligations. The Pauline action is therefore not available to a person claiming in tort until he becomes a judgment creditor (as in *Golder*).

269 The defendants also relied upon the fact that, in the Bankruptcy (Désastre) (Jersey) Law 1990, article 29 was drawn more narrowly than the equivalent provision in the Insolvency Act 1986 of the United Kingdom and only allows proof in a désastre of "… *certain debts and*

liabilities, present or future, certain or contingent, to which the debtor is subject at the time of the declaration, or to which he becomes subject before payment of the final dividend by reason of any obligation incurred before the time of the declaration …". Thus a claim for liability in tort, particularly where the proceedings have not yet been brought, is not provable in a bankruptcy. The claimant cannot therefore be classified as a creditor. It would be wholly illogical, say the defendants, for a person who cannot claim in a bankruptcy to be treated as a creditor for setting aside a transaction in a Pauline action.

270 The defendants also relied upon the fact that the Pauline action originally envisaged a claim based in contract. Yet, even there, problems may occur as to when the debt may be said to have arisen. Suppose A sells B some defective goods. Before B discovers the defects, A disposes of his assets. B then discovers the defects and brings an action to recover the purchase price. The fact that the goods were defective is disputed by A. Clearly it will not be known for certain whether A owes B any money until the court has ruled on the question of the quality of the goods. Once a judgment has been issued, it must surely relate back to the date upon which the breach of contract (giving rise to the obligation) arose.

271 Furthermore the consequences of taking a very narrow approach to the question of when a debt is said to arise would be unappealing. Mr Santos-Costa accepted that, on his test, GT did not become a creditor until the judgment in June 1999. This was so despite the fact that, between 1988 and 1992 Sheikh Fahad had personally received $120 million which had been stolen from GT and despite the fact that litigation between the parties had been continuing since 1993 with mareva injunctions issued to preserve the assets of Sheikh Fahad and of the trusts. According to Mr Santos-Costa, Sheikh Fahad was free at any time prior to June 1999 to dispose of all his assets to trusts or relatives and there would be no right to claim these assets back by way of Pauline action. That does not seem acceptable to the Court.

272 It would also be unrealistic. Suppose that Sheikh Fahad had been asked to draw up a balance sheet of his assets and liabilities in October 1990, just after he had received a total of $120 million of GT's stolen monies into his bank accounts. He would know at that time that he had stolen this sum from GT; he would know therefore, with complete certainty that, once discovered, he would have to repay that money to GT. Can it really be said that it would have been reasonable for him not to include the stolen sum as a liability when working out what he was worth. If he should have included it as a liability, surely it is right that GT should have the status of a creditor for the purposes of bringing a Pauline action to set aside transfers made after that date with the intention of defeating that liability.

273 Examples were given in argument to show the difficulty which might be caused by extending the definition of creditor to cover cases where the facts underlying the claim had taken place. Thus the example was given of a surgeon who, unknown to him and to his patient, had negligently carried out an operation, the consequences of which would show up many years later. In the meantime he makes a settlement believing himself to be solvent. Years later the patient brings an action for negligence and is awarded large damages which the surgeon is unable to pay. Can the disposition be set aside at the

instance of the patient in such circumstances? GT's response was that the real defence to an action in such circumstances would be that there was no intention to defraud rather than that the patient was not a creditor (for the purposes of a Pauline action) at the time he made the settlement.

274 We accept that Poingdestre and Pothier appear to have had in mind claims based on contract but it is also clear that they did not have to analyse to any great depth the question of when a debt could properly be said to arise for the purposes of a Pauline action. They simply refer to creditors without considering when they became creditors.

275 However that issue did arise in the succeeding years and modern French law has elaborated on the position. The best exposition is to be found in Dalloz as follows:-

> ***"1001. Pour qu'un acte passé par un débiteur puisse être attaqué par un créancier comme fait en fraude de ses droits, il n'est pas nécessaire que les droits du créancier aient été liquidés à l'époque de l'acte; il suffit qu'ils aient une date certaine antérieure à cet acte, et, par exemple, qu'ils aient déjà été réclamés «(Bordeaux, 13 fév. 1826, aff. Belle, V. suprà, no 990–40)***
> .
>
> ***1002. De même, il a été décidé qu'un créancier peut attaquer, comme fait en fraude de ses droits, un acte de son débiteur antérieur au jugement de condamnation qu'il a obtenu contre ce dernier, si le fait qui a donné lieu à cette condamnation, et qui forme ainsi le principe de sa créance, est lui-même antérieur à l'acte attaqué (Bastia, 29 mai 1855, aff. Castellani, D. P. 56. 2. 112; V. aussi Req. 12 mars 1827, aff. Grief, no 1046). Cette decision n'est pas contraire à celles rapportées, car la creancé ne prend pas seulement naissancé à l'époque du jugement qui la consacre; elle existe réellement dès le jour où le fait qui en est la source s'est accompli; le jugement est simplement déclaratif du droit: il suffit dès lors, pour que le créancier puisse exercer l'action paulienne, que ce fait soit lui-même antérieur à l'acte contre lequel est dirigée cette action: seulement il faut que le fait ait une date certaine à l'égard des tiers, comme cela avait lieu dans l'espèce (Conf. MM. Massé et Vergé, t. 3, p. 413, note 6; Larombière, sur l'art. 1167, No 20)*** . (emphasis added).
>
> ***1003. Toutefois, il a été jugé que celui qui n'est devenu créancier d'un donateur que postérieurement à la donation n'est pas recevable à attaquer cette donation comme faite en fraude de ses droits, alors même qu'à l'époque où elle a été faite, le principe de sa créance existait déjà, et que le donateur pouvait prévoir qu'elle deviendrait l'objet d'une action contre lui (Orléans, 9 jahv: 1845, aff. Deneveu, V. No 896–3)."***

276 Mr Journeaux also referred to Sériaux, who wrote at paragraph 218 on page 673 in terms consistent with Dalloz:-

> ***"Surtout, il a été plusieurs fois jugé qu'il n'est pas nécessaire, pour que l'action paulienne puisse être exercée, que la créance dont se prévaut le demandeur ait été certaine au moment de l'acte argue de fraude; qu'il suffit (…) que le principe de la créance ait existé avant la conclusion dudit acte par le débiteur"*** .

277 In our judgment, this is one of those areas where it is proper to have regard to writers on modern French law. As Dalloz makes clear in paragraph 1002, there is nothing in what has been decided in this regard which is inconsistent with the underlying principle of the Pauline action, namely that the debt must predate the disposition under attack. All that is being said is that, once liability to the creditor is established, it relates back to the date of the facts which give rise to that liability. There is nothing in that elucidation which is inconsistent with the rule as laid down by Poingdestre and the other writers.

278 Furthermore it accords with common sense and the interests of justice to hold that, for the purposes of a Pauline action, a person is deemed to become a creditor when the facts giving rise to his cause of action occur, even if the validity of the cause of action is not established until later. But all the facts necessary to give rise to the cause of action must have occurred before a person can be deemed to be a creditor. He cannot, in our judgment, be considered a creditor when only some of the facts which support his cause of action have occurred.

279 In summary, we hold that Jersey law on this question of when a person can be considered to be a creditor accords with paragraphs 997 to 1002 of Dalloz, but does not accord with the contents of paragraph 1004.

(ii) Is insolvency on the part of a debtor required? If so at what stage?

280 It is clear that a Pauline action arises as a result of a disposal by the debtor to the prejudice of his creditors. All the texts are agreed that it is necessary to show actual prejudice to the creditor. It is accepted by both counsel that there must be insolvency at the date of the action; otherwise there are sufficient assets to meet the claim and therefore no prejudice. But Mr Santos-Costa argues that a creditor must also show that the debtor was insolvent at the time of the disposition or became insolvent as a result of it. Mr Journeaux disagrees.

281 Poingdestre and Domat do not address this issue; they make mention of prejudice without explaining what they mean by that expression.

282 Pothier, in the passage cited by the Court in *Golder*, states that the debtor must be insolvent at the time of the alienation. In his Traité des Donations entre-vifs (1861 Edition) Section III para 137 on 396 he states that a Pauline action will lie if the donor is insolvent at the time of the gift or leaves himself insufficient assets to pay his creditors as a result of the

gift. Dalloz deals with the position in some detail (see paragraph 965–968 on page 231). It is sufficient to quote paragraph 968:-

> ***"Les créanciers doivent prouver aussi que l'insolvabilité existait à l'époque où l'acte a été passé ou qu'elle a été le résultat de cet acte; l'insolvabilité survenue depuis ne peut être opposée au débiteur, car si elle n'avait été amenée que par un événement postérieur à l'acte, cet acte n'aurait évidemment causé aucun préjudice aux créanciers dont les droits, lorsqu'il a été fait, étaient garantis par un gage suffisant: il faut que le tort causé provienne directement de l'acte.*** S'il en était autrement, personne ne voudrait contracter avec un individu ayant des dettes, dans la crainte qu'il ne devint insolvable, dans la crainte qu'on ne remontât à des actes faits à une époque où le débiteur était encore parfaitement solvable … ." (emphasis added)

283 It is clear therefore that, under the old customary law, insolvency had to exist at the time of the disposal or result from it. A subsequent insolvency arising as a result of other circumstances was insufficient. As Dalloz argued, to hold otherwise would make it difficult to contract with persons who had debts.

284 Mr Journeaux accepted that this was the position under the old law but argued that modern French law had moved to a position whereby insolvency was but the usual manifestation of prejudice. It was prejudice which was the requirement, not insolvency at or immediately after the disposition. In support he referred the Court to Sériaux at paragraphs 218 and 219 commencing on page 674, where it is stated that insolvency at the date that the action is brought is the key requirement. Sériaux goes on to instance an example of prejudice without insolvency where property over which a creditor has specific security is disposed of to the prejudice of that creditor. We do not think that that is of general application. Indeed Sériaux does not argue that it is.

285 We are by no means satisfied that modern French law has abandoned the need for insolvency at the time or as a result of the transaction, as contended by Mr Journeaux. Thus Sériaux himself does not specifically discuss the question of whether insolvency following the transaction is required as well as insolvency at the time of bringing the proceedings. Other writers on modern French Law support the position as stated by Dalloz. Thus Aubry et Rau at page 220 state:-

> ***"Il faut, en second lieu, que le préjudice soit résulté, pour le créancier, de l'acte même contre lequel son action est dirigée, en d'autres termes, que le débiteur ait été au-dessous de ses affairs dès avant la passation de cet acte, ou que du moins son insolvabilité en ait été la conséquence."***

Similarly Planiol and Ripert say at page 183 in connection with a Pauline action (in the Louisiana translation):-

> ***"The damage is the determining cause of the action.*** It consists in the fact that the act of the debtor brings about his insolvency, or augments a preexisting

insolvency."

286 Mr Journeaux also referred to Wood — Principles of International Insolvency (1995). In the relevant chapter the author is discussing the Pauline action in very general terms by considering it in various jurisdictions around the world. At paragraph 4–21 on page 83 he says as follows:-

> ***"Although the various*** (i.e. in different countries) ***versions differ, the authentic Action Pauliana has a number of features which, cumulatively, distinguish it from the main stream of ordinary preference doctrines, and which are most truly exhibited mainly in the civil code countries in the non-germanic group.*** …
>
> ***— No actual insolvency.*** The debtor need not be insolvent when he enters into the transaction. The intention to defeat is enough. Hence there is commonly no suspect period of specified length. But, if a debtor is not insolvent or not rendered insolvent as a result of the transaction, prejudice to creditors is inherently more difficult to prove."

Mr Journeaux also relied on the various cases decided on the statute of Elizabeth and later United Kingdom legislation which do not require insolvency. However, for the reasons given earlier, we do not find these of assistance in ascertaining this area of the customary law of Jersey.

287 In *Golder*, this Court held that the principles stated in Dalloz on the requirement for insolvency accurately reflected the law of Jersey. Thus the creditor had to prove that insolvency existed at the time of the disposition or as a result of it. In our judgment, the weight of authority which carries influence in this Court is overwhelmingly in favour of such a requirement. Indeed, in none of those texts is there anything to the contrary. Sériaux is of course writing very recently about modern French Law and even he does not specifically disagree. Other writers on modern French law maintain the requirement for insolvency at the time, or as a result of the disposition. Wood is writing in the most general of terms and cannot be regarded as authoritative. The English cases, which turn on the terms of an English statute which has no application in Jersey, are not of assistance. It is hardly surprising that this Court in *Golder* found that Dalloz represented the law of Jersey. We could only disagree with that if we thought that it was plainly wrong. Far from so thinking, we are satisfied that it was entirely right.

288 However we believe that the principles set out in Dalloz and approved in *Golder* have to be applied with common sense having regard to the modern world. In those days assets were comparatively few and readily identifiable. Nowadays, insolvency, particularly when the action is being heard many years after the disposition in question, cannot be measured with precision. Assets are more fluid. Furthermore it is extremely unlikely that the creditor bringing the action will have access to all the information concerning the financial affairs of the debtor so many years ago. In addition, as the present case shows, the debtor's assets may be spread throughout the world and may be held through the medium of companies.

Accordingly we hold that, once the plaintiff has established insolvency on the part of the debtor at the time of the action, the burden then shifts to those seeking to uphold the disposition to prove that he was not also insolvent at the time of or as a result of the disposition.

289 Furthermore we think that a broad commonsense approach has to be taken to the question of insolvency resulting from the disposition. Assets fluctuate greatly in value nowadays; much more so than when Dalloz was writing. This has to be taken into account. Suppose that a debtor disposes of almost all of his assets leaving himself net assets of £1,000. He may stagger on for a month or two before becoming insolvent. In our judgment, such a situation would fall within the principle described by Dalloz and would permit a Pauline action to succeed. In other words, it is not a question of carrying out a meticulous balance sheet exercise the instant following the disposition. In most cases that is simply not practical and is an unfair and unrealistic burden on the creditor. It is more a question of seeing whether, within a reasonably short period following the disposition the debtor becomes insolvent so that it can be said that the disposition contributed to or exacerbated the insolvency. The Court must simply be satisfied that there is a close connection in time and effect between the disposition and the subsequent insolvency.

(iii) How is insolvency to be measured?

290 Although initially Mr Santos-Costa was inclined to argue that a claim which was contingent, but was later found to be due, should not be brought into account when calculating insolvency at the time of the disposition, he did not maintain the point. We think that he was right not to do so. In a case such as the present, once the liability of Sheikh Fahad to GT was established by law, it relates back to the facts which give rise to the liability. Accordingly the liability is to be taken into account from that time for the purpose of calculating solvency.

291 Both counsel have assumed that a balance sheet test is the appropriate manner of testing insolvency for these purposes. We agree that that would seem to be the appropriate manner but we have not heard any argument on whether, in some circumstances, it might be appropriate to consider a cash flow test and accordingly we have not considered that aspect.

292 On the face of it, balance sheet solvency should be calculated as it always is; namely by calculating the value of all the debtor's assets and deducting his liabilities. However Mr Journeaux sought to argue that, when calculating insolvency for the purposes of a Pauline action, the Court should take a different approach. It should exclude from the debtor's assets those items which are inalienable, difficult to distrain upon or concealed. The only text to which he referred us to support this proposition was a commentary by *Grouber: 'L'Action Paulienne en droit civil François'* (1913) Chapter 1, Section 2, pp 48–59. We were informed by Mr Journeaux that this was taken from a thesis on the Pauline action written by Grouber for his doctorate. Inalienability does not arise in this case. As to whether assets

which are difficult to distrain upon should be excluded, the only specific authority referred to by Grouber arose in relation to a case where the assets of a French debtor were situated in Spain. The Court held that because they were difficult to distrain upon, they should be excluded. When we asked Mr Journeaux whether he was therefore contending that any assets outside Jersey – or perhaps the United Kingdom – should be excluded, he conceded that he could not go that far. In our judgment he was right to do so. The case in question dates from 1835. Things have moved on since then in terms of the international movement of assets and the ability to enforce judgments overseas. Nevertheless, in reliance upon the principle, Mr Journeaux argued that the founder rights in Ceyla should not be taken into account as an asset of Sheikh Fahad because they would be difficult to distrain upon. As to concealed assets, Grouber does not appear to have cited any specific authority for the proposition. In any event how would it work? When is an asset concealed? Most creditors do not know what bank accounts or securities are owned by their debtor, nor do they have any right to force him to disclose it. Are assets to be treated as concealed if the debtor has failed to tell his creditors details of the location and amount of his bank accounts and securities even if he is not asked: or is it only if he refuses to do so? Mr Journeaux seeks to argue that the G772 account should be excluded because Sheikh Fahad tried to conceal it. We certainly accept without reservation that Sheikh Fahad did make strenuous efforts to conceal that account as was found by Mance LJ in his judgment.

293 We have to say that the reliance upon *Grouber* shows the dangers (so graphically described by the Court of Appeal in *Foster v AG* (1982) JLR 6 at 31) of dipping into a foreign system of law. On the face of it, a thesis for a doctorate is not of great persuasive value. We have no way of knowing whether Grouber accurately reflects the accepted view of French law or whether he is putting forward theories of what he thinks French law ought to be.

294 Even if we were satisfied that the article accurately reflected modern French law, we do not think that this would assist us in establishing the law of Jersey on this particular point. It has never previously been suggested in any Jersey judicial decision or by any writer on Jersey law that this approach should be taken. Nor have we been referred to any suggestion to like effect in writers on the Law of Normandy, nor Pothier and Domat; nor even Dalloz who, although writing on the Code Civil, was at least writing some time ago and often makes reference to the pre-existing law.

295 In any event we consider it to be an impractical suggestion. When does an asset become sufficiently difficult to distrain upon to be disregarded? When is an asset sufficiently concealed for these purposes? Accordingly we do not accept Mr Journeaux's contentions. The solvency of the debtor is to be determined by reference to all the debtor's assets and liabilities in the usual way. It follows that Ceyla and the G772 account fall to be taken into account.

296 At one stage a query was also raised in relation to whether the Roger Trust should be included as an asset of Sheikh Fahad for these purposes. It is to be recalled the Roger Trust was a Bahamian trust which was revocable by Sheikh Fahad with the consent of the

protector, but no protector had been appointed. In 1992 it was revoked and eventually became the Comfort Trust, which is governed by the law of the Cayman Islands. In fact it became clear as the case progressed that the Roger Trust was not relevant. This was for two reasons. First, certain assets which were originally thought to have been in the Roger Trust (e.g. Fairview, an apartment and a boat) were agreed not to have been in that trust. Secondly, in so far as the defendants sought to adduce documentary evidence (which had not previously been disclosed) that the Roger Trust contained certain securities in an underlying company (which were now to be found in the Comfort Trust) the Court refused to let them do so. This was on the grounds that the defendants had opposed GT's application to the Cayman Island Court for permission to use certain documents concerning the Comfort Trust in the present proceedings. Having adopted such a stance, the Court held that they should not be allowed to cherry pick by adducing some of the documents which they considered suited their case.

297 Had we been called upon to resolve the issue, we would have held that assets in a revocable trust are not to be counted as assets of the debtor for these purposes. Unless and until revoked, the assets are held by the trustees upon the trusts set out in the trust deed. They owe fiduciary duties to the beneficiaries and the assets cannot properly be considered to be those of the debtor merely because he has a power of revocation.

(iv) The difference between transactions 'lucrative' and 'onéreuse'

298 In *Golder* the Royal Court approved the statement of Poingdestre that there were two types of alienation to be considered in a Pauline action. The first is an alienation to a volunteer which Poingdestre called " ***aliénations faites pour cause lucrative"***. The second is an alienation made for value which he calls " ***aliénations faites pour cause onéreuse"***. In the first case the alienation is voidable when the alienor alone is guilty of an intention to defeat his creditor but, for the alienation to be voidable in the second case, both the alienor and the alienee must be privy to the real nature of the transaction.

299 Poingdestre made it clear that an alienation did not become 'onereuse' simply because there was some 'cause' given. Thus he said at 211:-

> ***"Pour la première il faut regarder à la cause desdites Aliénations, si elle est Lucrative ou Onéreuse.*** Nous disons qu'une Aliénation se fait pour cause onéreuse, laquelle se fait moyennant un Prix, ou quelque chose tenant lieu de prix, commesuré & proportionné à la Valeur de la chose aliénée, comme au contraire, quand il n'y a pas prix ny chose qui en tienne lieu; ou quand le prix n'est pas commesuré & approportionné à la chose aliénée, c'est une Cause Lucrative, laquelle se trouve ordinairement en Legs ou Legation Testamentaires, Donations simples ou Rémunératoires, & choses semblables."

Thus a transaction only becomes 'onéreuse' if the 'cause' given by the recipient is commensurate and proportionate to the value of the thing alienated; if the price is not commensurate or proportionate in this way, it is a transaction 'lucrative'.

300 GT alleges that all the transfers in this case were 'lucrative'. The defendants say that they were all 'onéreuse' because of the fiduciary obligations undertaken by Abacus in relation to the transfers. Furthermore, in relation to the transfer of £5 million in March 1990, it is argued that this sum was paid pursuant to a legal obligation to do so as a result of the undertaking given in September 1989 and that the provision of the undertaking was itself a transaction 'onéreuse'. We shall address those arguments on the facts.

(v) What is the required state of mind on the part of the debtor?

301 GT argues that a debtor has the necessary intention for the purposes of a Pauline action if he is aware at the time he makes the transfer that it would or could prejudice his creditors in the recovery of their debts. The defendants, on the other hand, argue that a plaintiff must show an intention on the part of the debtor to defeat his creditors. In *Golder* the Court said this:-

> ***"According to Dalloz, the creditor in order to succeed had to prove the intention to defeat creditors and their actual defeat by showing that their debtor is insolvent and that his insolvency was due to the act which is challenged."***

The Court went on to approve that statement. It is clear from the passage from Dalloz (para 954 on page 229) cited in *Golder* that Roman law required two elements for a Pauline action, namely the intention to defraud and real prejudice. That had been carried through to French law.

302 This is reflected by Domat who at livre II, Section I paragraph VII says:-

> ***"Toutes les manières dont les débiteurs diminuent frauduleusement le fonds de leurs biens pour en priver leurs créanciers sont illicites."*** (emphasis added).

He goes on at paragraph VIII to describe how certain transactions can be set aside if done "***… pour frauder des créanciers …***".

303 Dalloz reviewed the position in some detail at paragraph 965 on page 230 where he said:-

> ***"Pour que les actes du débiteur soient révoqués sur la demande des créanciers, il faut qu'ils aient été faits en fraude de leurs droits.*** Mais quand des actes auront-ils ce caractère ? On doit évidemment, pour le reconnaître, recourir au droit romain dont les expressions ont été employées par les rédacteurs du code: Quae in fraudem creditorum. Or deux éléments, comme nous l'avons vu, constituaient la fraude en droit romain, l'animus ou le consilium fraudandi, l'intention de frauder les créanciers et l'eventus, le préjudice réel

causé à leurs droits par l'acte frauduleux (V. supra, no 954). Les créanciers qui attaqueront l'acte devront donc prouver tout à la fois qu'il leur est préjudiciable et qu'il a été fait avec intention de leur nuire. Il a été jugé dans ce sens: 1° que c'est au créancier qui exerce l'action paulienne qu'il appartient de prouver. Que le contrat dont la rescission est poursuivie a été passé dans le but de frustrer ses droits 2°. que son débiteur est insolvable (Bastia, 11 mai 1841) (1); 2. Que les créanciers qui veulent attaquer, en vertu ***de l'art.*** 1167 c. nap., les actes de leur débiteur, doivent établir qu'il y a eu réellement fraude, c'est-à-dire non-seulement préjudice, mais intention de nuire, mauvaise foi et détournement (Paris, 8 fev. 1843) (2).” (emphasis added).

304 The position there described is very clear. The creditor has to show both actual prejudice and a dishonest (bad faith) intention to harm the creditor. However it is clear from paragraphs 972 to 974 of Dalloz that things were perhaps beginning to change at the time Dalloz was writing. At para 972 he records that it is incontestable that, for transactions carried out for consideration, there must be an intention to inflict real prejudice. However, in the succeeding paragraphs, he goes on to say that the situation is more difficult in relation to transactions “ *à titre gratuit*”. He asserts that, in general, modern authors were of the view that creditors could only attack the actions of their debtor in relation to such transactions if they were effected fraudulently, that is to say that the debtor knowingly and intentionally caused prejudice. However he goes on to say that other authors have expressed a view that, in gratuitous transactions, it is sufficient for the creditors to prove that the transactions caused prejudice to their rights.

305 It is clear that, since those days, modern French law has moved on. This appears very clearly at page 676 of Sériaux who states:-

> ***“LA MAUVAISE FOI DU DÉBITEUR.*** – Le seul fait que l'acte passé par le débiteur ait causé un préjudice à son créancier ne suffit pas. Une jurisprudence constante exige en outre que le débiteur ait agi de mauvaise foi. Si cette preuve n'est pas rapportée, l'action paulienne ne peut aboutir. Comment entendre cette notion de mauvaise foi? De prime abord la référence à la notion de fraude paraît bien impliquer que les actes du débiteur aient été accomplis par lui dans le dessein de nuire à son créancier. De fait, c'est bien dans cette direction que la jurisprudence a paru s'orienter dans un premier temps. Mais, très rapidement, elle s'est ravisée. Aujourd'hui, la jurisprudence est bien fixée en ce sens que ‘la fraude paulienne résulte de la seule connaissance qu'a le débiteur du préjudice causé à son créancier par l'acte litigieux’. Ainsi, l'intention de nuire n'est pas requise; il faut mais il suffit que l'on puisse établir que le débiteur savait qu'il nuisait ou qu'il pouvait nuire à son créancier en accomplissant tel ou tel acte.”

Thus, although the law had initially required an intention or purpose of prejudicing the creditor (and Sériaux refers to a case of 1857 which confirmed this), Pauline fraud nowadays results merely from knowledge on the part of the debtor that he knew that he was causing prejudice or that he might cause prejudice to his creditor by carrying out the relevant transaction.

306 We were also referred to various English authorities by both counsel. For the reasons which we have given earlier, we have found these of limited assistance. They concern interpretation of English statutes which do not fall for consideration in this case. However we would refer briefly to the case of *Re Mercer* (1886) 17 QBD 290 where the English Court of Appeal made it clear in trenchant terms that the fact that a particular result is the necessary consequence of a man's action does not necessarily mean that the man intended that result. We think that Mr Journeaux's submissions tended to elide intention (or purpose) with result. The two are not the same, although naturally the fact that X is the natural result of a particular act may be powerful evidence in support of a finding that, in carrying out the act, a person intended X.

307 In our judgment *Golder* correctly stated the law of Jersey. It is clear that, at all times until well after the introduction of the Code Civil in France, the Pauline action required the two elements of prejudice to creditors and an intention on the part of the debtor to cause that prejudice. Dishonesty was required. We accept that, during the latter part of the 19th century and the 20th century French law has changed and it is now enough that the debtor foresaw that prejudice would or might result from the transaction. This is very far removed from any normal meaning of intention. On the contrary a requirement merely to be aware that a particular result might follow is really a requirement of recklessness rather than intention. A debtor may indeed wish not to prejudice his creditors but may be prepared for other reasons (e.g. tax advantages) to go ahead and take the risk of it transpiring that they are in fact prejudiced.

308 In our judgment GT's formulation – with its reference to the debtor making a transfer in the knowledge that it could prejudice his creditors — does indeed substitute a test which includes recklessness for a test of intention. It is not open to this Court to do that. Recklessness has never been sufficient until recent developments in French law. All the sources which carry weight in Jersey required intention. Accordingly we hold that, in order to succeed in a Pauline action, it must be shown that the transaction in question was undertaken by the debtor with the intention (object) of defeating his creditors. Of course, in order to ascertain the state of a person's mind the Court has to consider all the evidence and draw inferences. The fact that the defeat of creditors is the natural result of a transaction is undoubtedly a material factor in assessing whether the necessary state of mind on the part of the debtor is established. The weight to be given to this factor will vary according to the circumstances, not least by reference to the degree of certainty that prejudice to the creditors will result from the transaction. The greater the certainty that prejudice will follow, the easier it will be for the Court to conclude that the debtor intended that prejudice but, as the English Court of Appeal made clear in *Mercer*, the conclusion does not follow automatically.

309 Even if it were open to us, we would not think it right to change the law in this way. The underlying philosophy of the Pauline action has always been that it requires an intention to cause prejudice to the creditors by defeating their ability to recover. The bankruptcy legislation of the Island deals with the position where there is no such intention by

providing for transactions to be set aside in certain circumstances without regard to the debtor's intention. We think it would be going beyond the judicial function to so change the customary law concerning the Pauline action, when the legislature has already addressed this area and could do so further should the need arise.

310 Having held that a transaction may not be set aside unless carried out by the debtor with the intention of defrauding his creditors, what happens should the debtor have more than one purpose in relation to the transaction? Must the intention to defraud be the dominant purpose? We have been referred to a number of English authorities on the relevant English statutes. E.g. *Lloyds Bank v Marcan* (1973) 1 WLR 1387 in relation to section 172 Law of Property Act 1925. More recently, in relation to creditor protection provisions of the Insolvency Act 1986, it has been held in *Jyske Bank (Gibraltar) Limited v Spjeldnaes* (1999) 2 BCLC 1 at 120 – 121 and in *Chohan v Saggar* (1992) BCLC 306 that, where more than one purpose exists for carrying out a transaction which prejudices creditors, for the subsection to be met, the intention to defeat creditors must be the dominant purpose. However the point does not appear to have been strenuously argued and in *Law Society v Southall* (11th December 2000) Unreported English Judgment Hart J held that the point remained open.

311 We see no reason for imposing a dominant purpose requirement. In reality, when there is more than one purpose, it would often be a very artificial exercise to try and establish which purpose was dominant; furthermore what if they were equal? We consider that the requirements of a Pauline action are satisfied under Jersey law if, where there is more than one purpose, a substantial purpose of the transaction is to defeat creditors.

312 Many matters may be relevant for the Court in determining the state of mind of the debtor. We have been referred to the so-called badges of fraud but, in the event, both sides were agreed that these were merely matters which are capable of giving rise to inferences that the debtor had the necessary intention; they are not presumptions of law. Accordingly we do not propose to deal with them further under this heading.

(vi) The nature of the claim – possible defences

313 The Pauline action has always been a revocatory action. The creditor is not entitled to compensation from an innocent volunteer from whom the creditor has transferred property; he is entitled to reclaim the property. What is the situation where the original property is no longer in the hands of the recipient? In our judgment, it is clear that, in the case of innocent receipt, there is no liability beyond the enrichment (if any) which the recipient still enjoys. If, and to the extent, that the recipient no longer retains any benefit, then no recovery is permitted from him. Mr Journeaux and Mr Santos-Costa were agreed on this. As authority for that proposition, we would refer to the following texts.

314 The *Digest of Justinian*, book 42, chapter 8 paragraph 6 states:-

> ***"… an innocent donee is not regarded as suffering a wrong because when a benefit is taken away from him, he is not made to suffer any loss.*** However, those who innocently receive some liberality from an insolvent are liable to an action to the extent of their enrichment thereby but not beyond."

315 Similarly Domat at livre II, section I paragraph II states:-

> ***"Mais si le donataire ayant été de bonne foi, la chose donnée n'étoit plus en nature, & qu'il n'en eût tiré aucun profit, il ne seroit pas tenu de rendre un bienfait dont il ne lui resteroit aucun avantage."***

316 In relation to modern French law on this topic, *Planiol and Ripert, Traité de Droit Civil Français* (1931 Ed'n) Tome VII have the following to say at paragraph 962 on page 267:-

> ***"L'acquéreur à titre gratuit au contraire, lorsqu'il est de bonne foi, n'est tenu que dans la mesure de son enrichissement, tel qu'il subsiste, lorsque la demande est introduite contre lui.*** Il ne répond pas de la perte ou des dégradations survenues à la chose, même par son fait; il garde les fruits déjà perçus et a droit au remboursement intégral de ses impenses; s'il a vendu la chose, il ne doit restituer que le prix qu'il a touché."

317 Both parties made detailed submissions about the relationship between continuing enrichment (as envisaged in the texts referred to above) and a change in position defence. In particular we have been referred to several learned articles which analyse in great detail the underlying principles of a change of position defence (e.g. Nolan – change of position from "laundering and tracing" (Ed Birks) OUP 1995). However for an authoritative statement as to the principle of a change of position defence we are content to rely on the words of Lord Goff in *Lipkin Gorman* at 580:-

> ***"At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.*** I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things."

318 In our judgment the two approaches are usually different ways of saying the same thing. Thus in the simple case where a recipient has wrongly received £100 and spent it on ordinary expenditure that he would have incurred in any event, we can say that he remains enriched to the extent of £100 because he still better off by £100 than if he had not received it. Alternatively, we can say that he has not changed his position (because he would have incurred the expenditure in any event). Conversely, if the recipient spends the £100 in a way that he would not otherwise have done (e.g. a once in a lifetime holiday) we can say

that he is no longer enriched (because the money has been spent and he is no better off as a result of its receipt) or that he has changed his position in reliance upon the receipt by expending it in a way that he would not have done but for the receipt.

319 It may be argued that, in some circumstances, a change of position defence will act in circumstances where there is still continuing enrichment. An example is the Canadian case of *RBC Dominion Securities Limited v Dawson* (1994) 111 DLR 230 (Newfoundland). In that case Mrs Dawson (in reliance upon the receipt of monies later found to have been paid to her by the plaintiff company by mistake), bought new furniture to replace her old furniture. Despite the fact that she clearly remained enriched by the receipt (the new furniture was more valuable than the old furniture) the court held that she was entitled to a change of position defence in relation to the purchase of the furniture and therefore did not have to return the money in that amount. She had changed her position and it would be inequitable to require her to sell the furniture.

320 But, in our judgment one could look at this in a different way by saying that it would not be "unjust" for her to retain the enrichment having regard to events since the original receipt. I.e. her continuing enrichment would not be an unjust enrichment.

321 We think that the approach mentioned in the preceding paragraph is probably more consistent with the texts on the Pauline action to which we have referred, where there is no reference to a change of position defence as such. However, in our judgment, the result will be the same whichever approach one adopts. The parties' detailed submissions on this aspect were all framed by reference to change of position. We therefore propose, for convenience, to consider the matter in that way. Accordingly, once a creditor has established that all the other conditions of a Pauline action are satisfied, the Court must consider whether, in reliance upon the receipt, an innocent recipient has so changed his position that it would be inequitable to require him to make restitution or to make restitution in full. The underlying principle is that an order for restitution should not result in an innocent recipient being worse off as a result of the transactions in question than he would have been if those transactions had not occurred. The burden of showing that it would be inequitable to order restitution lies upon the recipient.

(vii) What is the limitation period?

322 The next issue which we must consider is the prescriptive period for a Pauline action. All the parties are agreed that, whatever the period, it is suspended during such time as it was a practical impossibility for GT to have been able to exercise its rights (see *Public Services Committee v Maynard* (1996) JLR 143 and *Boyd v Pickersgill* (1999) JLR 284); and that such a practical impossibility existed until GT discovered that the transfers had taken place. It is further agreed that GT discovered the existence of the transfers on 8th July 1994.

323 The defendants argue that the prescriptive period is either a year and a day or three

years. In either case the Pauline action is therefore prescribed. GT argues that the prescriptive period is thirty years, failing which ten years. In either case the claim is brought in time. Both parties are agreed that there is no direct authority on the point. Furthermore, although on a matter such as prescription, it is unlikely that much assistance would be gained from French law, it seems that it may have been unclear as to what the position was in that jurisdiction. Thus *Aubry & Rau* at page 237 assert that the relevant period is thirty years whereas Duranton, Cours de Droit Français (1844 edition) Tome 10 at page 583, gives one of ten years.

324 In their amended pleadings, the defendants' primary assertion was that the Pauline action was " *une action purement personnelle*" in respect of which they asserted that the limitation period was a year and a day. They relied on *Gautier v Nicolle* (1951) 13 Cr 110. Alternatively they submitted that the claim was founded on tort, so that the prescriptive period was three years (article 2, Law Reform (Miscellaneous Provisions) (Jersey) Law 1960). Failing both of these arguments they submitted that the claim was an " *action personnelle mobilière*" and that the applicable limitation period was therefore ten years. They relied on *Albright v Wailes* (1951) JJ 31.

325 GT also asserted that the claim was an *action personnelle mobilière* but submitted that *Albright* was wrongly decided and that the correct limitation period for such actions was one of thirty years.

326 We begin by considering the defendants' argument as taken from their pleading. They relied first on the case of *Gautier v Nicolle*. That case concerned an action brought by a plaintiff whose property had been damaged as a result of a gas explosion on his neighbour's property. The explosion had occurred because the neighbour had fixed a home-made apparatus to his gas supply in order to try and defraud the gas company. A preliminary issue was taken that the action was prescribed, having been brought more than a year and a day after the cause of action arose. The court held that an action for a " *tort personnel*" as well as for a " *tort matériel*" was prescribed after a year and a day. The Court did not say into which category the particular action fell but it clearly fell into one or other because, having so ruled, the Court then dismissed the action on that ground. In our judgment this was not surprising. It is clear to us that that was an action brought in tort. If the case had been brought today, the limitation period would have been three years as a result of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.

327 In our judgment there is no separate argument available to the defendants on the basis of *Gautier v Nicolle* as contended in their pleadings. The first two aspects of the defendants' argument on the pleading amount to the same thing, namely that a Pauline action should be categorised as a tort with a prescriptive period of three years. Mr Santos-Costa argues that a Pauline action arises out of the 'wrong' of the debtor in transferring his assets with the intention of defrauding his creditors. In the case of alienation 'onéreuse' the action would also be based on the 'wrong' of the recipient in knowingly being party to that fraudulent intention. He accepted that, in the case of an alienation 'lucrative' there is no element of personal wrong on the part of the recipient. Nevertheless, if there is to be one prescriptive

period to cover all Pauline actions (whether in respect of alienations ‘onéreuse’ or ‘lucrative’) the best analogy is that of tort because of the need for ‘wrong’ on the part of one or both of the parties to the alienation.

328 The difficulty with this argument is that the action is not brought against the debtor; it is brought against the recipient of the assets. In a case such as the present, no ‘wrong’ is alleged against that recipient. Furthermore no damages or compensation for any wrong is sought. The action is essentially a restitutionary action seeking to place the parties (i.e. the creditor, the debtor and the recipient) back into the position in which they would have been before the transaction. The underlying principle of an action in tort is that the defendant should compensate the plaintiff for damage that he has suffered as a result of the ‘wrong’ committed by the defendant. The defendants themselves argued at paragraphs 305 and 306 of their closing submissions (albeit in a different context) that this was not a case where the recipient of the assets could be said to be liable in respect of any wrong and there was no basis for ordering compensation as contrasted with a reversal of the transaction so far as that was still possible.

329 We agree. In our judgment, a Pauline action does not constitute an action in tort. The action is essentially restitutionary and is aimed at restoring the position, as far as possible, to what it would have been had the transaction under attack not taken place. It is closer to an action based on unjust enrichment than to an action in tort. Accordingly we do not accept that the prescriptive period in this case is three years.

330 In their oral submissions, the defendants raised a new argument. They pointed out that Jersey law allowed long periods of prescription where title was at stake (e.g. forty years for immovable property and ten years for movable property) but only short periods where a possessory claim or the reversal of a settled transaction was at stake. In particular, they pointed out that a period of a year and a day was a common prescriptive period for a number of different types of actions. They relied upon *Godfray v Godfray* (1865) III Moore N.S. 316 as establishing a period of a year and a day for the revocation of title lawfully obtained under a transaction that is voidable. They argued that a Pauline action was a claim for such a revocation.

331 We do not think that *Godfray* lays down any general rule of this nature. The case concerned an attack on a deed passed before the Royal Court whereby the plaintiff transferred to his brothers his expectant share of the immovable and movable estate which would accrue to him on his parents' death. In our view the actual decision of the Privy Council is accurately stated in the head note which says:-

> ***“A sale by an expectant heir of his expectancy, in the absence of fraud or inadequacy of consideration, cannot be impeached after the lapse of a year and a day from the time of opening the succession.”***

That is entirely consistent with the thread of a number of cases on prescription, which have ruled that claims against or in connection with an estate must be brought within a year and

a day of the opening of the estate. It is clearly based on public policy considerations so as to enable the administration of the estate to proceed safely after the expiry of the year and a day. We do not think that *Godfray* is authority for the wider proposition which Mr Santos-Costa seeks to derive from it. We accept that a year and a day is a common prescriptive period for a number of different causes of action but we do not find that any of them provide a close analogy with the Pauline action.

332 We turn now to GT's case. In an interesting and informative submission, Mr Journeaux referred us to a number of French writers concerning the different ways of categorising causes of action and how such classification may assist in determining questions of prescription. In the interests of brevity, we will refer only to those aspects which seem most relevant to the decision which we have reached.

333 It is clear that French law divides actions into “actions personelles”, “actions réelles” and “actions mixtes”. The writers seem consistent on this. For convenience we take *Guyot: Répertoire de Jurisprudence* (1784) Tome I at page 153:-

> ***“Par l'Action personelle nous agissons contre celui qui est obligé envers nous par une des quatre causes d'où peut dériver l'obligation personnelle.*** Ces causes sont, le contrat, le quasi-contrat, le délit & le quasi-délit .
>
> ***L'Action réelle est celle que nous dirigeons pour nous faire remettre en possession d'une chose qui est détenue par un autre, & qui nous appartient.*** …
>
> ***L'Action mixte est tout-à-la-fois personelle & réelle; c'est-à-dire, que nous agissons en revendication d'une chose qui nous appartient, & en demandant un payement.*** Ces trois Actions principales se subdivisent en quantité d'autres.”

We should add that *Dalloz: Répertoire* (1846 Ed'n) Tome III Section 2 paragraph 75 at page 20 makes it clear that a personal action can arise out of more than the four categories referred to by Guyot. Dalloz suggests that such an action can arise out of any act that produces a personal right or obligation.

334 *Pothier: Oeuvres* (1821 Ed'n) Tome XV para 119 on page 62 divides personal actions into two categories:-

> ***“Les actions personelles se subdivisent en actions personelles mobiliaires, et en actions personelles immobiliaires*** .
>
> ***Les actions personelles mobiliaires sont les actions personelles qui n'ont pour objet qu'une somme d'argent ou quelque chose de mobilier: …***
>
> ***Les actions personelles immobiliaires sont celles qui ont pour objet un immeuble, comme celle qu'a l'acheteur d'un héritage contre le vendeur,***

pour se le faire livrer."

335 The French writers to whom we have been referred do not seem to be entirely agreed on how one should categorise a Pauline action. Thus Dalloz at paragraph 85 on page 22 of the tome referred to above states that it is clear that, if the thing alienated by the debtor is a movable, the Pauline action is an " *action personelle*". However he goes on to say that, where the alienation is of immovable property, the question is very difficult. He records that there is an argument that, even in those circumstances, the Pauline action remains an " *action personelle*" because the creditor does not seek to claim the immovable property for himself, only to annul the alienation and cause the immovable property to return to the debtor's patrimony. However he goes on to say that, in his opinion, the better view is that, where the alienation is of immovable property, the action becomes an " *action mixte*". However Planiol and Ripert Tome VII (1924 Edition) para 968 on page 274 assert that the Pauline action is an " *action personelle*" and Ankum " *de Geschiedenis der Action Pauliana*" (official translation) states at page 299 that the old French writers regarded the Pauline action as a personal action against the recipient either on the basis of unjust enrichment (in the case of an innocent recipient) or of fraud (in the case of a complicit recipient).

336 It seems to us that that is the better view. A creditor has no title in the thing alienated. Indeed he is not asserting any claim on his part to the thing itself. The creditor is actioning the defendant either to return the thing itself to the debtor's patrimony, if he still has it, or to return such value originating from the thing as may remain in the recipient's hands. In those circumstances it is a claim for money.

337 The Jersey law of prescription is, by and large, based upon judicial precedent and it is hard to find a consistent theme or principle which underlies the various prescriptive periods. But where there is no precedent, it is helpful to have regard to the nature of the action.

338 Mr Journeaux asserts that the claim in this particular case is clearly an 'action personelle mobilière' in that it is a personal claim which seeks money or the return of specific movable property (i.e. the founder rights in Ceyla). He asserts that the prescriptive period for such an action is 30 years. He bases this assertion on Poingdestre, Remarques et Animadversions sur la Nouvelle Coûtume de Normandie where Poingdestre comments on article 522 of the Coutume Reformée which provides:-

"Toutes actions personnelles et mobiliaires sont prescrites par trente ans."

It seems beyond doubt that this was the position under the Coûtume Reformée.

339 The case of *Albright* is against him. The Court preferred the authority of Le Geyt, Privilèges, Lois et Coûtumes, Tome III, Titre X Art 9 which states:-

"Toutes Cedules & Obligations faites entre Habitans & Resseans de l'Isle

> ***qui ne sont demandées judiciairement ou renouvelées dans dix ans continuels en fait de meuble, comme aussi toutes obligations mobiliaires de Rolles de Cour & condemnations de cette nature, ensemble tous Comptes de procurations, administrations & generalement toutes autres actions purement pour meuble entre Habitans & Resseans, sont aussi prescrites par le mesme tems & de la mesme maniere.*** Toutesfois une obligation pour l'interest de laquelle une rente assignee se reçoit de tems en tems n'est pas sujette à cette prescription."

340 The Court held that the claim in that case (a claim for damages arising as a result of a delay in granting possession of immovable property purchased by contract passed before the Royal Court) was an action " *purement pour meuble*" and an *"action personelle mobilière";* so the period of prescription was therefore ten years, not thirty years.

341 Mr Journeaux says that the Court in *Albright* was wrong in preferring Le Geyt to Poingdestre. In accordance with established principle, we would not depart from *Albright* unless satisfied that it was plainly wrong. Far from that being the case we are satisfied that it was correct. In his " *Remarques et Animadversions*", Poingdestre was writing about the Coutume Reformée. He was not writing about the law of Jersey. It is true that the purpose of the work was to try and explain those parts of the Coutume Reformée which formed part of Jersey Law and those which did not and that he usually makes clear in his commentary whether a particular article of the Coutume Reformée is followed in Jersey. But, it is difficult to extract from Poingdestre's commentary on article 522 whether he is asserting that it is part of Jersey law. There is certainly no positive statement to that effect. We think that assistance can be derived from his *"Lois et Coutumes"*. It is to be recalled that this is his work written specifically on the law of Jersey. He there writes extensively on the subject of prescription (see pages 35 – 74). After discussing the question of prescription generally, he goes on to discuss a number of specific periods of prescription. Thus he starts with that of forty years and goes on to discuss those of ten years, five years, four years, three years, two years and a year and a day. But nowhere is there a section on a thirty year prescriptive period. It seems to us unconceivable that, if Article 522 of the Coutume Reformée was reflected in Jersey law, so that a thirty year period was the normal prescriptive period for all personal actions, he would not have had a section on the thirty year period in such a comprehensive text on prescription. The fact that there is no such section suggests that the period was not applicable in Jersey to any significant degree.

342 Taking account of the content of the Lois et Coutumes, we conclude that Poingdestre was not suggesting in his " *Remarques et Animadversions*" that the thirty year period of the Coutume Reformée was part of the law of Jersey. It is not therefore a question of choosing between Le Geyt and Poingdestre. We think that the time has come to hold that the ten year period referred to by Le Geyt is a general period which should be taken to apply to all personal actions and all actions concerning movables save to the extent that they have already been held to be subject to a different period (e.g. tort, actions concerning estates etc) or that some other period is, by analogy, clearly more applicable. The thirty year period should be confined to actions for déception d'outre moitié and other actions (if any) where

that period is already established by judicial decision or by statute.

343 Even if we are wrong in our conclusion that it was not technically a matter of choosing between Poingdestre and Le Geyt, we think that the Royal Court was correct in *Albright* to choose Le Geyt. We are in no doubt that policy considerations point strongly in favour of the lesser period. The whole thrust of litigation nowadays is that litigants should get on with matters. A thirty year prescriptive period is wholly inconsistent with this, particularly bearing in mind the protection given by the principle that time does not run when it is " *practically impossible*" to bring the claim (see *Maynard*).

344 As we have already said, there is no judicial authority on the prescriptive period for a Pauline action. On the facts of this case, the claim is a personal action related to movables. The claim is for the founder rights in Ceyla and/or for money. In accordance with the principle which we have described above, the prescriptive period is therefore one of ten years. It follows that GT's claim is not prescribed.

345 We would add the following observations:-

(i) In deference to Mr Santos-Costa's argument, we would say that we accept that, where the recipient as well as the debtor is party to the fraudulent intention, there are stronger grounds for saying that the claim is based upon the " *wrong*" of the recipient and that the claim is therefore one in tort. However, it would be wholly illogical to allow a shorter limitation period where the recipient is fraudulent than where he is innocent. Furthermore the underlying principle of the action remains one of seeking restitution of the debtor's patrimony. Accordingly, although the point does not arise for decision, we express the view that one prescriptive period should cover Pauline actions against innocent and fraudulent recipients and that the prescriptive period in each case should be ten years.

(ii) We accept that a difficulty may arise where the assets alienated by the debtor consist of Jersey immovable property. It is possible – we express no view on the matter – that a consideration of the principles of Jersey law would lead to a prescriptive period of a year and a day in such a case on the basis that the limitation period applicable to transactions concerning Jersey immovable property tends to be a year and a day, presumably on the basis that people must be able to rely on the title shown in the Public Registry and that any period of uncertainty should be kept to the minimum. Having said that, an action for déception d'outre moitié relates to Jersey immovable property and has a prescriptive period of thirty years. Although it would clearly be preferable to have one limitation period for all types of Pauline action, we do not think that it is absolutely essential. Jersey law clearly recognises different limitation periods for similar causes of action depending on whether they are being applied to immovable or to movable property (e.g. an action to rectify a contract). Accordingly we simply leave this matter over for consideration in a case where the issue arises directly.

(iii) There is a strong argument that the period of ten years, that we have held to be applicable, is too long in this day and age. A period of prescription seeks to establish a balance between giving an aggrieved party sufficient time to bring his claim and respecting the need for people generally to be able to rely upon the validity of transactions which have not been attacked within a reasonable period. The availability of a defence of change of position ensures that a long prescriptive period should not cause too much hardship, but we express the view that, given that, under the *Maynard* principle, time does not run until the creditor learns of the existence of the transaction(s) in question, a period of somewhat less than ten years would strike a better balance between the need to protect creditors and the need to allow transactions to be relied upon. However, that is a matter for the legislature.

(viii) Summary of the law

346 In briefest summary therefore we hold that a creditor, whose claim predates the disposition in question, may set aside a disposition made by his debtor where the debtor is insolvent at the time of the disposition or becomes insolvent in consequence thereof, provided that the disposition is made with an intention on the part of the debtor to prejudice his creditors and provided further that prejudice is indeed caused. For these purposes the claim of a creditor is deemed to arise upon the occurrence of the facts which give rise to the creditor's cause of action, regardless of the date upon which the creditor's claim is upheld by a court. The right of action against an innocent volunteer who was party to the disposition is restricted to the continuing enrichment in the hands of the recipient, who will therefore have available to him a change of position defence.

347 As can be seen, we have in general held the law to be as it has been stated by Jersey judicial decision, by writers on Jersey law and by writers on the law as it was in France before the introduction of the Code Civil. We have only applied more modern French authorities where they reflect the pre-existing position. We have in general declined GT's invitation to declare that the law of Jersey should follow the changes introduced in modern French law. For the reasons which we have given, we have not thought it open to us to accede to GT's invitation in this way.

348 But even had we considered that it was open to us to do so, we would have declined the invitation. Although we have considered each ingredient of the Pauline action separately, it is necessary to stand back and look at the overall nature of the Pauline action in the light of the individual ingredients. Each of them serves a purpose and they make up the whole. The effect of accepting GT's contentions in relation to each individual element would have been to transform the nature of a Pauline action as previously understood.

349 Thus the action would enable future creditors (i.e. persons who had not had any dealings with the debtor at the time of the disposition in question) successfully to attack a disposition made before their involvement with the debtor, merely because the natural consequence of the disposition could have been to prejudice such creditors even if the debtor had remained completely solvent as a result of the dispositions in question. The only requirement would

have been that he must have been insolvent at the time that the creditor bought the action, which may have been many years later.

350 In our judgment, to widen the Pauline action to this extent would render security of receipt almost non-existent. Any gift (whether to a relative or to a trust) could prejudice creditors in the event of a subsequent insolvency on the part of the donor because the assets in question will no longer be owned by the donor. In effect, any creditor would be able to bring a Pauline action to set aside a gift to a relative or to a trust made at any time (within the prescriptive period) provided that the donor has at some stage subsequently become insolvent. All gifts to relatives and trusts would therefore be vulnerable to attack in the event of subsequent insolvency, even if wholly unrelated to the gift.

351 We appreciate that this is putting it at its highest, but it would lead to too much uncertainty. The law must be clear as to when gifts may be set aside and when they are valid. Furthermore the appropriate balance has to be struck between the need to protect creditors and the need to enable solvent individuals to dispose of their assets to their relatives, to charities or to trusts. In particular, gifts to trusts are a regular occurrence in Jersey and the law needs to be clear as to the circumstances in which a gift into trust may be set aside. In our judgment, the existing rules of Jersey law (under both customary law and the bankruptcy legislation) could be said to strike a reasonable balance but, should it be felt to be otherwise, we believe that this should be a matter for the legislature.

(b) Application to the facts

352 Having set out the legal principles of the Pauline action, we now turn to apply those principles to the facts of the case.

(i) When did GT become a creditor of Sheikh Fahad for the purposes of a Pauline action?

353 Our task is to ascertain when the facts giving rise to Sheikh Fahad's liability to GT occurred as, following the principles described earlier, that is the date upon which GT can first be considered a creditor for the purposes of a Pauline action.

354 On the face of it one would expect the relevant date to be May 1988, being the date of the Croesus transaction when $ 27.4 million was paid away as part of a conspiracy to defraud (to which Sheikh Fahad was a party). However the payment was not from GT itself; it was from Kokmeeuw Holdings B.V., another company within the group. There seems to have been some discussion about the way that GT put its case in the English proceedings, but the upshot was that Mance LJ held that GT had only suffered loss as from 13th November 1989 in respect of part of the transaction and 14th June 1990 in respect of the balance of the transaction. It was accordingly only from those dates that he awarded interest. Similarly, in relation to the Oakthorn I transaction, the money was initially paid away from THL and

Mance LJ concluded that GT itself only suffered loss from June 1990 and awarded interest from that date.

355 Certainly Sheikh Fahad owed somebody money from an earlier stage but it would seem that, on the findings of Mance LJ, we cannot say that it was GT, because the facts giving rise to GT's cause of action were not complete until 13th November 1989 (and then only in respect of the small part of the loss). Accordingly we hold that that is the date upon which, for the purposes of a Pauline action, GT can first be considered a creditor of Sheikh Fahad. It follows that any disposition prior to that date is not susceptible to attack by GT.

(ii) When did Sheikh Fahad become insolvent for the purposes of the Pauline action?

356 The evidence of Mr Smith of KPMG suggests that Sheikh Fahad became insolvent in June 1990 at the time of the Oakthorn II transaction to the extent of some $20 million. In doing so, he allowed the principal sums in relation to the Croesus and Oakthorn I transactions as debts from May 1988 and July 1989 respectively. In our judgment, he was right to do so. Although Sheikh Fahad did not owe money to GT at that stage, he did owe money to the companies initially defrauded. However, as we have said earlier, the Court's task is not to calculate insolvency with mathematical precision and, indeed, it is in no position to do so. Sheikh Fahad has given no assistance whatsoever in connection with the exercise. As Mr Smith asserted in evidence, where assumptions have had to be made, he has assumed them in favour of Sheikh Fahad. So, for example, he has not allowed for any general expenditure on the part of Sheikh Fahad. He had to make many assumptions in the absence of full information. His figures suggest that, immediately following the gift of £5 million in March 1990 to the Esteem Settlement, Sheikh Fahad was still solvent to the extent of some $5.6 million. However, as we have held earlier, the burden rests on the defendants to prove that Sheikh Fahad was solvent in March 1990 rather than on GT to show that he was insolvent at that date. We remind ourselves that, by March 1990, Sheikh Fahad had already conspired to steal $82.4 million; had personally received $22.5 million of that sum; was about (within the next three months) to conspire to steal a further $50 million of which he would receive $22.5 million; and was, on any view, to become hopelessly insolvent by a vast amount within three months. We have no way of knowing exactly when Sheikh Fahad's liabilities began to exceed his assets. We must apply a common sense approach as set out earlier. We are quite satisfied that, adopting that approach, the defendants have failed to satisfy us that the insolvency of Sheikh Fahad was not sufficiently closely related in both time and effect as to enable GT, if the other conditions are satisfied, to be able to set aside the gift of £5 million made in March 1990. However, we are not willing to go back any further. Any gifts made before March 1990 would not be sufficiently closely connected to the subsequent insolvency of Sheikh Fahad as to render them liable to be set aside in the Pauline Action.

(iii) Were any of the transactions ‘onéreuse’?

357 The defendants contend that all the transfers were ‘onéreuse’ because they were made to

Abacus as trustee of a trust. It is said that all the transfers were made in exchange for Abacus agreeing to undertake the onerous duties of a trustee in respect of the sums transferred. Abacus therefore gave 'cause'. We do not agree. Abacus had agreed to accept the trusteeship by reason of its execution of the trust deed. That deed obliged it to undertake its fiduciary duties as trustee in relation to all assets subject to the trust from time to time. Furthermore it was entitled to remuneration under the trust deed. In our judgment Abacus gave nothing of value by agreeing to accept additional property. Most trustee companies carrying on business as commercial trustees, are delighted to receive further assets into a trust as it usually results in greater fees. It is a novel argument that the receipt of extra funds should be regarded as a disadvantage and therefore the provision of 'cause' to the donor. A gift to a trustee company is no less a gift for the fact that the trustee company will hold the assets upon trust for its beneficiaries.

358 The only specific transfers which the defendants allege were 'onéreuse' for other reasons are the provision of the undertaking in September 1989 and the subsequent transfer of all or part of the £5 million in March 1990. If the provision of the undertaking and/or payment of the £5 million were found to be 'onéreuse', GT's claim in respect of these two transfers would fall at the first hurdle because it would need to establish the complicity of Abacus in the fraud on creditors and this, it accepts, it is unable to show.

359 The defendants argued that, to the extent that the £5 million was paid pursuant to the undertaking given in September 1989, it was paid under a legal obligation and is therefore 'onéreuse'. Alternatively, it is argued that the undertaking itself was given for 'cause' in that Abacus agreed to become bound by the building contract with Dore in exchange for the provision of the undertaking by Sheikh Fahad. Accordingly the provision of the undertaking was a transaction 'onéreuse'. It follows, say the defendants, that GT cannot succeed in relation to the provision of the undertaking or payment of the £5 million because it accepts that Abacus is an innocent recipient and was not party to the fraudulent intent on the part of Sheikh Fahad.

360 We considered briefly a subsidiary argument raised by the defendants. They submitted that the contribution of £5 million was 'onéreuse' to the extent that it was paid pursuant to an assurance which Sheikh Fahad gave in April 1987 to the effect that he would add funds to the Esteem Settlement to pay for the works then envisaged. This " *assurance*" was mentioned orally in conversation between Mrs Phillips and Mr Magnall on 10th April, 1987 and confirmed in a letter from Mr Manisty to Mr Blampied dated 16th April when he said that Sheikh Fahad did not wish the US Dollar of Swiss Franc deposits to be touched and "… *intends to add funds to Esteem to enable the company to carry out this work.*". We do not accept the argument for two reasons. In the first place it was clearly not a legal obligation. It was nothing more than a statement of future intention on the part of Sheikh Fahad. He did not become legally obliged to pay the sum and could have reneged on it if he wished. Secondly the statement of intention was subsequently extinguished in any event. It related only to the work of covering the swimming pool and that was included in the first building contract which Esteem agreed to pay for. There had by then been a change of plan, as we have said earlier. Esteem's assets had been converted into sterling and it was going to pay

for the work. The plan changed again in September 1989 when the written undertaken was given but that related only to the excess costs. We hold that no part of the £5 million was paid pursuant to the 'assurance' of April 1987.

361 In our judgment one must look at the transfer of the £5 million and the undertaking together. If A gives B £500, that is a gift. If A promises under seal (in England, so that it becomes legally binding upon him) to give B £500, he has become legally obliged to pay B that sum. Thus when he actually pays over the sum, he is not making a gift, he is paying pursuant to a legal obligation. But one has to stand back and look at the transaction as a whole rather than at its two individual parts. The fact is that A has still gifted £500 to B, albeit that he has initially committed himself legally to pay the money. B has given nothing to A in return. The overall transaction is one of gift and is *lucrative*.

362 So far as the £5 million is concerned, that is the position here. To the extent that the £5 million was paid pursuant to the undertaking, we need to consider whether the provision of the undertaking itself was 'lucrative' or 'onéreuse'; to the extent that the £5 million not paid pursuant to the undertaking, it is a gift and is therefore *lucrative*.

363 When considering whether the provision of the undertaking was 'onereuse', one must return to Poingdestre's description of what constitutes a transaction 'onéreuse'. We must assess whether the 'cause' given by Abacus was " *commensurate and proportionate*" (see Poingdestre) to the thing given by Sheikh Fahad, namely the provision of the undertaking.

364 What was the position at the end of September 1989? The original contractors had been dismissed and Dore had been on site since April pursuant to a letter of intent from SMPC. Dore had carried out very considerable work at that time; indeed there is correspondence indicating that it was hoped that the work would be finished in October/November of that year. There had been substantial variations to the contract which Sheikh Fahad had requested. SMPC had agreed to these and had instructed Dore to carry them out. In other words, all the relevant parties had acted exactly as if the written contract had been executed by Esteem. The absence of the written contract had had no effect. Indeed that is not surprising when one has regard to the relevant background. This was the house in which Sheikh Fahad and his wife lived; they had planned and chosen the works of refurbishment. The project was being managed by SMPC of which Sheikh Fahad was the Chairman. It is clear that all parties in reality looked to Sheikh Fahad as the client. All that happened in September 1989 was that Sheikh Fahad confirmed that, in exchange for Abacus procuring the signature of Esteem to the written contract, he would pay any excess over the original contract price. Abacus had agreed in 1988 (under the first contact) to pay that sum. Accordingly they were giving nothing of any value in that they simply remained committed to pay the same sum as previously. Sheikh Fahad was agreeing to pay everything else. What would have happened if Esteem had not signed the contract? We have already held that Esteem was bound (by the actions of SMPC as its agent) to pay for the works with all variations agreed to the end of September 1989. The signing of the contract did not therefore affect the position in this respect. There is no evidence that Dore were pressing for a written contract or otherwise concerned about the situation. They were

taking instructions from SMPC, which no doubt did Sheikh Fahad's bidding as its chairman. Dore expected to be paid by SMPC. If Esteem had not signed the contract, we doubt that it would have made very much difference. SMPC would no doubt have instructed Dore to carry on and would have paid Dore. SMPC would then have looked to Sheikh Fahad for any excess over that which Esteem had agreed to pay under the first contract.

365 In our judgment, applying the test described by Poingdestre, the value of the thing given by Abacus (namely the procuring of the signature of Esteem to the written building contract) was no way commensurate with or proportionate to the value of the thing given by Sheikh Fahad, namely a promise to pay any excess over the sum which Esteem had already agreed to pay. We are in no doubt that the provision of the undertaking by Sheikh Fahad was therefore a transaction lucrative. It follows that, assuming the other elements of the Pauline action are met, the value of that gift can be set aside without the need for Abacus to have been party to any fraudulent intent.

(iii) Did Sheikh Fahad have the necessary intention to defraud in relation to the various transactions under attack?

(a) The 1992 transactions

366 We have received extensive written and oral submissions from the defendants and from GT in relation to this crucial aspect. To do them justice would result in what is already a very long judgment becoming much longer. Accordingly we will attempt to summarise them. We will begin by considering the transactions in 1992, namely the gift of £4 million to the Number 52 Trust in August 1992 and the gift of the founder rights in Ceyla to the Esteem Settlement in September 1992. The transfer of £4.4 million to the Esteem Settlement in April 1992 is, of course, the subject of the proprietary claim upon which we have already ruled. In the light of that finding it is not strictly necessary to make a finding in relation to the alternative claim of GT brought as part of the Pauline action in relation to that sum. But in case we are overturned on appeal in connection with our finding that there was a proprietary equitable interest in that sum (so that the funds are to be treated as belonging to Sheikh Fahad) we will state our finding on that transfer as well.

367 The defendants made a number of submissions of general application to all the transfers. We have of course considered them in that light. However it is convenient to set them out at this stage in relation to the 1992 transactions. We would summarise these submissions as follows:-

(i) They refer first to the use of lawyers. The fact that Sheikh Fahad used a well known and respected firm of city lawyers (Stephenson Harwood) to effect these various transactions suggests that he had nothing to hide and did not have an illegitimate purpose. Indeed the lawyers suggested many of the transactions. Even when the suggestion came from Sheikh Fahad (e.g. the £5 million in March 1990, the £1.5 million to Ceyla in September 1990 and the £4.4 million to Esteem Settlement in April

1992) Stephenson Harwood carried out the transaction at the behest of Sheikh Fahad. Surely a person seeking to defraud creditors would not have acted in this way? Furthermore Stephenson Harwood were the KIO's lawyers. It would be a strange choice of solicitors on the part of a person seeking to defraud GT. The defendants also point out, which we accept, that none of the lawyers concerned i.e. Mr Manisty and Mr Jennings, had any inkling that Sheikh Fahad was pursuing a separate agenda of his own, namely an intention to defeat GT's claim.

(ii) Apart from the three transactions listed in the preceding sub-paragraph, all of the transactions were suggested by Stephenson Harwood for tax planning purposes. Thus they originated the Income re-settlement scheme and they suggested the reorganisation in 1992 by way of contribution of the founder rights of Ceyla to the Esteem Settlement and the establishment and funding of the Number 52 Trust. The whole impetus for these transactions came from the lawyers. This is inconsistent with Sheikh Fahad having a secret intention to defraud GT. In this respect the defendants point to the fact that, despite the existence of voluminous contemporaneous documents, there is nothing which points positively to Sheikh Fahad having such an intention. The whole of GT's case rests upon assumption and inference arising from the fact that Sheikh Fahad placed assets into trust at a time after he had committed the fraud on GT.

(iii) The defendants also point to the fact that Sheikh Fahad made all the transfers (apart from that to the Number 52 Trust) to existing entities established many years previously for perfectly legitimate tax planning reasons. If Sheikh Fahad's intention was to secrete money away in order to defeat GT, why should he have chosen trusts which owned his home and that of his son. To do so would clearly render them vulnerable to attack, as has in fact happened. Furthermore, it is clear, say the defendants, that SMPC (wholly owned by the KIO) must have known of the connection between 97 Dulwich Village and Esteem. It knew that Dulwich Village was Sheikh Fahad's home and it even addressed some of the invoices for the refurbishment to him personally in 1992. Other invoices were rendered to Esteem and the connection between Sheikh Fahad and Esteem was therefore clearly known to SMPC and, thereby, the KIO. The natural course of action, if Sheikh Fahad really wished to defeat GT's claim, was to put his assets into new trusts of which the KIO knew nothing. His use of the Esteem Settlement and Ceyla was inconsistent with the alleged intention to defraud.

(iv) Furthermore, say the defendants, Sheikh Fahad's conduct in certain other respects was also inconsistent with the existence of the necessary intention on his part. Firstly the timing is significant. It is GT's case that Sheikh Fahad first formed the necessary intention to defeat GT's claim in 1988, when the fraud started. Yet it was two years before he transferred the £5 million and the £1.5 million to Esteem Settlement and Ceyla respectively in 1990 and four years before he made the 1992 transfers. Why would he wait so long if his intention was to defeat GT's claim against him? The only explanation, say the defendants, must be that he did not have the necessary intention. Secondly the defendants point to the fact that, when contemplating his retirement in 1992, as expressed in various file notes of Stephenson Harwood, Sheikh Fahad appears to have envisaged buying a retirement

home in Kuwait and/or Spain. Such an intention was clearly not the action of a man who felt that the net was closing in. If he had been in that frame of mind, Spain (where GT's operations were centered) and Kuwait would have been the last places to have chosen. Thirdly the defendants rely upon Sheikh Fahad's reluctance to accept and act upon the tax advice that he was receiving from Mr Jennings in 1992. It is clear – and we accept – that Mr Jennings had to repeat his advice several times concerning the Number 52 Trust and the revocation of the Roger Trust. Sheikh Fahad had to be advised on several occasions that these moves really were necessary from a tax point of view. If, say the defendants, Sheikh Fahad really had a secret intention to defraud GT by putting his assets into trusts, he would surely have leaped at the tax advantages (as explained to him by Stephenson Harwood) as a godsend and a wonderful cover for his real intention. Yet he prevaricated and it took from February/March to August/September for Stephenson Harwood to put the relevant transfers into effect.

(v) In relation to the transfer of £4 million to the Number 52 Trust in August 1992 and the transfer of the founder rights in Ceyla to the Esteem Settlement in September 1992, the defendants repeat that these were steps taken entirely on the recommendation of Stephenson Harwood for what all parties accept as being valid tax planning reasons in the light of the anticipated loss of Sheikh Fahad's diplomatic immunity. It is clear that tax planning was the overriding reason for and intention behind these two transactions.

(vi) In relation to the gift of £4.4 million to the Esteem Settlement in April 1992, it is accepted by the defendants that this was not the subject of specific tax advice. However Stephenson Harwood had advised that all Sheikh Fahad's London bank accounts should be closed and replaced by offshore bank accounts. That explains the decision to close Sheikh Fahad's account at Chemical Bank in London, in which the £4.4 million, which originated from the Oakthorn II transaction, had lain since June 1990. The reason for money being paid to the Esteem Settlement was so that 52 Cadogan Place could be purchased and the balance used for the refurbishment of Dulwich Village.

368 We have carefully considered the submissions of the defendants but we find that Sheikh Fahad did have the required intention to defraud in relation to the £4 million contributed to the Number 52 Trust and the transfer of the founder rights in Ceyla to the Esteem Settlement. If it were to become necessary — because a higher Court found that GT did not have an equitable proprietary interest in the £4.4 million transferred in April 1992 — we find that he also had the necessary intention in relation to that gift.

369 Our reasons can be summarized as follows:-

(i) When assessing whether a debtor carried out various acts with intent to defraud his creditors, it is relevant to consider the character of the debtor in question. Of course this will not be determinative, but it is a factor properly to be taken into account. In this

respect one begins with the accepted fact that Sheikh Fahad is dishonest. His is not an insolvency which came about through the vagaries of trade; it occurred because he conspired to steal $430 million from the company of which he was chairman.

(ii) Is he a person who is capable of arranging his affairs so as to try and defeat his creditors? We have already held that, in relation to the transfers to the Lake and River Trusts in 1994 and the creation and funding with $135 million in January/March 1993 of the Better Trust, he was. Furthermore, we conclude that, on the evidence before us, Sheikh Fahad's purpose in the December 1992 capital distributions from the Esteem Settlement and Ceyla and the contribution of those sums to the Bluebird Trust was also to make it difficult for GT to recover their claim. The desperate urgency on the part of Sheikh Fahad, which resulted in heavy pressure being applied to Abacus to make the payments as a matter of urgency, is simply not consistent with some perceived possible tax risk from having income producing assets held in the same trust as real property (which tax risk was in any event not accepted by Mr Jennings nor (if it existed) was it apparently thought of by two specialist tax and chancery counsel consulted by Mr Jennings). We note that we have not heard from Mr Way or from Sheikh Fahad but we are left with the clear impression that Sheikh Fahad had decided to move the liquid funds further away from GT's reach. We note the defendants' point that, if this was the motive, it was inconsistent with an intention to defraud GT by putting assets into the Esteem Settlement or Ceyla in the first place earlier in 1992; but we do not agree. It is perfectly possible for a person to place assets into a trust in order to defeat the claims of his creditors, then subsequently think of a better way of achieving this objective by moving assets to a trust whose existence is unknown to the creditor and which is situated in a more distant jurisdiction. The Bluebird Trust was in fact split between jurisdictions in the sense that it was a Bahamian trust but the trustee was situated in Switzerland.

(iii) Accordingly we conclude that Sheikh Fahad was a man who, in the circumstances as they were in late 1992, early 1993 and 1994 was willing to take steps to try and defeat the claims of GT by the use of trusts. We accept, of course, that this does not prove that he had a similar intention in August and September 1992 or in earlier years. It is not simply a question of working backwards. Nevertheless when considering whether he had the necessary intention in those earlier periods, we are entitled to take into account that he is a man who, we have found, was willing to place assets into trusts in order to try and defeat his creditors when the going got tougher at a later period.

(iv) We accept that Mr Jennings was giving bona fide tax advice in relation to the establishment and funding of the Number 52 Trust and the contribution of the Ceyla founder rights to the Esteem Settlement in 1992. In the absence, for the reasons given earlier, of a finding that Sheikh Fahad knew that his diplomatic immunity had ceased by the time of these transactions, we are also willing to accept that, in relation to these two transactions, one of Sheikh Fahad's purposes was to obtain the tax advantages described to him by Mr Jennings. But that does not exclude the possibility of the existence of another parallel purpose. There are a number of indications that tax planning was not Sheikh Fahad's sole consideration. For example, it transpires that, in February 1991, he founded the Blatant Trust and transferred $20 million to it from

the G772 account. His UK tax adviser at the time was Stephenson Harwood, yet he said nothing to Mr Manisty or to Mr Jennings about the trust or his funding of it throughout the lengthy, almost tortuous, meetings and correspondence in 1992. The same goes for the Eaglet Trust. This was established on 14th February 1992 and funded with £5 million from the G772 account on 19th February. That was the very day upon which Mr Jennings first raised with Sheikh Fahad the need for tax planning in view of his impending retirement. Yet, astonishingly, Sheikh Fahad said nothing about this recent trust to Mr Jennings or to Mr Manisty at any stage. In our judgment this is quite inconsistent with the position of a man who reluctantly and after careful consideration accepts advice from Mr Jennings that he should place his assets into trusts in order to avoid the consequences of losing his diplomatic immunity. There is no evidence before us that he took any tax advice in relation to the creation of these two trusts and the funding of them from the secret G772 account (into which the proceeds of the fraud had been paid). His actions are far more consistent with those of a man who intends to make life difficult for the company which he has defrauded by transferring his assets into offshore trusts.

(v) Further doubt on the importance of the tax planning purpose on the part of Sheikh Fahad is cast by the lies which we find that he told to Mr Jennings. We have already held that he lied to Mr Jennings on 29th September 1992 concerning the alleged deal whereby he had obtained an extension of his diplomatic immunity in exchange for the purchase of 52 Cadogan Place. We have also found that he attempted (however doomed to failure the attempt was) to keep secret from SMPC (and therefore the KIO) his connection with Esteem by refusing to sign a guarantee of the liabilities of Esteem under the lease of 52 Cadogan Place when he thought the document would be shown to SMPC. In our judgment these actions are not consistent with those of a person simply engaged in perfectly legitimate and proper tax planning but are more consistent with the actions of a person who is not being truthful with his lawyers and wishes to keep matters secret from his creditor.

(vi) It is clear that Sheikh Fahad at all times knew the potential advantages of trusts in connection with protection against creditors. Thus he had been advised by Mr Manisty back in 1981 that putting assets into a trust would protect him from the Kuwaiti forced inheritance rules because the assets were not his and would not form part of his estate. In March 1992 Mr Jennings reminded him of the protection which trusts afforded against “hostile action”. In evidence Mr Jennings confirmed that he had advised Sheikh Fahad that, if persons attacked him, they would not be able to access trust assets. He further stated that Sheikh Fahad was already well aware of the fact that assets of a trust were not his assets.

(vii) At the time of the dispositions in 1992, Sheikh Fahad was hopelessly insolvent. The figures from Mr Smith suggest that he was insolvent to the tune of over $300 million by April 1992. Furthermore, in the absence of any evidence from Sheikh Fahad, we draw the inference that this must have been known to Sheikh Fahad. He knew that he had conspired to steal $430 million from GT and is therefore to be taken to have appreciated that, if it came to light, he would have to repay this sum and interest. In the absence of evidence from Sheikh Fahad we are certainly not going to

assume in his favour that he did not appreciate the full extent of his liabilities. A disposal at a time when a person is insolvent gives rise to a very strong inference that the person intended thereby to defeat his creditors; indeed that is a matter of common sense.

(viii) Furthermore it is proper for the Court to take account of the fact that the natural consequence of the disposal of assets in these circumstances will be to prejudice creditors. As stated earlier, we fully accept that the fact that this would be the natural consequence does not prove automatically that disposal was made with that intention but, in the circumstances of the present case, it clearly raises a strong inference that such must have been the intention. It is certainly something which calls for a reply from Sheikh Fahad.

(ix) In our judgment the various factors summarized in the preceding sub-paragraphs point strongly in the direction of Sheikh Fahad having made the dispositions in question in 1992 with a substantive intention of defeating GT's claim. They are certainly circumstances which cry out for an answer. Yet we have heard nothing from Sheikh Fahad despite a letter from Advocate Journeaux dated 11th April 2001 inviting him to reconsider his decision not to participate in the proceedings and warning him that GT would invite the Court to draw inferences. We were informed by Barbara, in her evidence, that Sheikh Fahad's health is poor (although we have no medical evidence) but she accepted that there was no reason why he could not give evidence by way of video link. We remind ourselves of the comments of the Privy Council in *Gibbs v Rea* (1998) 2 WLR 72 in connection with the inferences to be drawn against a party to a civil action who does not give evidence. We would quote from the majority judgment at page 82 as follows:-

> ***"It was of course open to the defendants to elect to give no evidence and simply contend that the case against them was not proved.*** But that course carried with it the risk that should it transpire that there was some evidence tending to establish the plaintiff's case, albeit slender evidence, their silence in circumstances in which they would be expected to answer might convert that evidence into proof: … .
>
> ***The burden on the plaintiff was to prove on the balance of probabilities that the detective inspector did not believe in good faith that there were grounds for suspicion that the plaintiff had carried on or benefited from drug trafficking.*** The state of a person's mind can be proved by evidence of what he or she has said or done. It can be proved also by circumstantial evidence .
>
> ***Mr Glasgow's approach in argument was to take each matter said to support the inference the plaintiff contended for and to submit that while it might be consistent with malicious procurement of the warrants it was also consistent with other credible explanations encompassing a belief in reasonable grounds for suspicion.*** But in the absence of any evidence supporting other explanations their Lordships see no reason to speculate for the benefit of the parties within

whose knowledge the true state of affairs rests."

And on page 83:-

> ***"The silence of the defence was maintained when some answer was called for.*** The absence of any answer supports the inference that there was no satisfactory answer and the detective inspector had no sufficient grounds …" .

(x) The defendants argued in this case that there was no need for Sheikh Fahad to give evidence because the facts appeared sufficiently from the contemporaneous documents. The fact remains that the critical issue for decision is Sheikh Fahad's state of mind at the time of the various dispositions. Who better to give evidence on this than Sheikh Fahad himself? That evidence would be likely to have helped not only because Sheikh Fahad would have been able to tell us about his state of mind, but also because the Court would have been able to see how he responded to cross-examination on behalf of GT when difficult points were put to him. The Court has had to do without that evidence. As the Privy Council put it, we see no reason to speculate for the benefit of Sheikh Fahad in those circumstances. We consider that the evidence produced by GT is amply sufficient to call for an answer from Sheikh Fahad. He has failed to provide any answer and this supports the inference that he has no satisfactory answer and that GT's case that he made the transfers with the necessary intention to defeat his creditors is correct. As the Privy Council put it, his silence in these circumstances is capable of converting evidence into proof.

370 For all of these reasons we find that a substantial purpose of Sheikh Fahad in making the transfers of £4 million to the Number 52 Trust in August 1992, the Ceyla founder rights to the Esteem Settlement in September 1992 and, if necessary, the £4.4 million to the Esteem Settlement in April 1992, was to defeat GT's claim against him. He therefore had the necessary intention to defraud. Had it been necessary to do so we would have found this to be his dominant purpose with the tax planning purpose being of lower significance.

(b) The provision of the undertaking in September 1989 and the gift of £5 million in March 1990

371 We turn to consider the provision of the undertaking in September 1989 and the payment of £5 million to the Esteem Settlement in March 1990.

372 We have already held that the provision of the undertaking in September 1989 cannot be set aside under the Pauline action because it was not sufficiently closely connected with the subsequent insolvency of Sheikh Fahad. We have also held that, pursuant to the ruling of Mance LJ, GT did not become Sheikh Fahad's creditor for the purposes of the Pauline action until November 1989, i.e. after the provision of the undertaking. It follows that, for these two reasons, GT cannot succeed in respect of the provision of the undertaking in September 1989 even if Sheikh Fahad had an intention to defraud. However, having heard

the evidence, we think it right to record our conclusions on whether Sheikh Fahad did provide the undertaking with the necessary intention of defeating GT's claim.

373 GT relies on many of the factors referred to earlier in relation to the 1992 transactions and we do not repeat these. It accepts that a purpose was to ensure that the refurbishment was carried out and paid for. But it asserts that that is not inconsistent with a parallel purpose of seeking to place funds in a trust beyond GT's reach. 97 Dulwich Village is owned, through Esteem, by the Esteem Settlement. Thus, says GT, spending money on refurbishment is therefore to transfer assets from Sheikh Fahad's own hands into trust. Sheikh Fahad is to be taken as having thought at the time that the money spent on refurbishment would add value to the property. By the time of the provision of the undertaking he had conspired in relation to the Croesus transaction to the extent of $27.4 million and had personally received $22.5 million from the Oakthorn I transaction. He knew therefore that he owed substantial sums of money and would have to repay the sums if the frauds were discovered. For the reasons set out earlier, he is a man who knows that placing money in a trust means that it is not available for creditors and the natural consequences of his action in transferring value from his own hands into the settlement was to defeat GT's claim. Although he might not have been insolvent in September 1989, he became so in 1990 and must be taken to have been aware of his dire financial position bearing in mind the frauds that he was committing.

374 We have concluded that Sheikh Fahad did not have the necessary intention to defraud in relation to the provision of the undertaking. Our reasons are as follows:-

(i) 97 Dulwich Village was the home of Sheikh Fahad and his wife Barbara. The first suggestion of work being done to the property was back in April 1987, although it seems to have been confined to covering the swimming pool. At the time, almost all of the liquid funds of Esteem Settlement were held in foreign currency. On 10th April 1987 Mrs Phillips informed Abacus of the fact that funds would be required for improvements to the property and that whatever sterling funds were required over and above those already held would be introduced by Sheikh Fahad by way of gift. It would seem from a file note dated 2nd April that it had been Mr Manisty's idea that further cash should be injected by Sheikh Fahad. This plan was confirmed in a subsequent letter dated 16th April from Mr Manisty to Mr Blampied. The idea that Sheikh Fahad should inject funds to pay for the repairs clearly therefore predated the commencement of any fraud and cannot therefore have been intended to defraud GT or any other creditor. The idea that Sheikh Fahad should add funds to pay for the improvements therefore had entirely innocent origins.

(ii) It is clear that much more extensive work than was originally envisaged subsequently took place because, as described earlier in this judgment, Mrs Phillips recorded her surprise at the extent of the works carried out over the previous twelve months in a file note dated 9th September 1988. Having regard to the need to meet this expenditure and other expenses payable by Esteem, a decision seems to have been taken on or about 27th September to convert all the dollar deposits held by the

Esteem Settlement and Esteem into sterling. This took effect on 5th October. Subsequently, on 4th November, Esteem signed the building contract in respect of 97 Dulwich Village for a price of £1,602,289 plus VAT plus professional fees. There is no trace in any of the documents of any further discussion concerning the provision of additional funds by Sheikh Fahad, presumably because there were now ample liquid funds in sterling in the Esteem Settlement. It is also clear that Esteem expected to pay for the refurbishment because, at the board meeting on 19th October, the directors were at pains to note that the company had sufficient funds for the contract, namely sterling deposits of some £2,231,756. There seems therefore to have been a change of heart concerning the injection of additional funds. To the extent that it was intended now that Esteem should pay for the refurbishment out of its own funds, there cannot have been any fraudulent intention on the part of Sheikh Fahad because he was not planning to transfer any funds to the Esteem Settlement; it was to be paid for out of funds which had been injected quite legitimately into the Settlement many years earlier. It follows that the decision to carry out the refurbishment cannot have been done with an intention of transferring value from Sheikh Fahad to the settlement; it can only have been undertaken because Sheikh Fahad and his wife wished to improve the home in which they lived.

(iii) The next significant period is September 1989. We have already set out the events of that period in considerable detail and will not repeat them. Suffice it to say that we are quite satisfied that the idea of the provision of a written undertaking came from Stephenson Harwood. They were faced with the fact that, just after they had sent the written contract to Esteem for signature, it had transpired that the costs of the work had spiralled and now exceeded the funds available to Esteem. There was therefore no alternative to Sheikh Fahad agreeing to inject further funds unless Esteem was to sell other assets (such as its interest in one of the farms or in Chester Square). Even then, the undertaking only agreed to pay the extra over and above the original contract price. If Sheikh Fahad had really intended to remove value from his hands into the Esteem Settlement, he would surely have undertaken to pay for all of the refurbishments. But he did not. He expected Esteem to pay that which it had originally agreed to pay and he would merely contribute the excess. We find it quite impossible to construe these actions as a means of getting money from his hands into the settlement in order to defeat his creditors. It was a necessary step, taken upon the advice of his solicitors, in order to ensure that Esteem had the funds with which to fulfill the obligation which it had undertaken by signing the building contract.

(iv) We have not forgotten that Sheikh Fahad has chosen not to give evidence in relation to the provision of the undertaking, or indeed any other aspect of this case. But the absence of a response from a defendant does not prove a case. It is only significant where the evidence called by the plaintiff tends to support the plaintiff's case and calls for an answer from the defendant. That is not the position here. In our judgment the evidence produced does not call for an answer from Sheikh Fahad because the natural inference from the events between April 1987 and September 1989 is that the undertaking was given because works of refurbishment, undertaken for perfectly proper and ordinary reasons, had spiralled out of control and Esteem had insufficient funds. Its directors therefore had to be protected from taking on a

contractual obligation which they could not afford to meet.

375 We turn now to consider the payment of £5 million in March 1990. To the extent that it was paid pursuant to the undertaking, it was not done with any intent to defraud because the undertaking was not provided with such an intention. However to the extent that Sheikh Fahad went beyond any legal obligation, we need to consider whether such monies were paid with a fraudulent intention. We should add that we attribute no significance to the fact that the undertaking was given to Esteem whereas monies were paid to the Esteem Settlement. It was clearly quite reasonable for monies to be contributed to the Settlement and then loaned down to Esteem in settlement of a legal obligation to pay money direct to Esteem. The key factor of the undertaking was to put Esteem in funds; it was not significant exactly how this was done.

376 The first task is to consider what sum, in March 1990, was payable pursuant to the undertaking. In one sense nothing was payable because at no stage did Esteem make formal demand on Sheikh Fahad in accordance with the detailed provisions of the undertaking, which provided that the sum would become payable by Sheikh Fahad within twenty-one days of Esteem notifying Sheikh Fahad that it had discharged in full the original cost of the building contract plus VAT. But GT has not taken this point and we think that it was right not to do so in the circumstances. The first invoice in respect of the refurbishment was raised on 10th May 1990 and it was perfectly reasonable for the parties to act on the assumption that Esteem was likely to become liable to start paying for the works in the near future.

377 What GT does contend is that the only obligation that Sheikh Fahad was under at the time pursuant to the undertaking was to contribute the difference between the first invoice (£2,374,388) and the original amount which Esteem was liable to pay (£1,842,632) i.e. £531,765. We would point out that the figures mentioned by GT in argument were slightly different to the above because they took £1,725,000 as being the original contract price plus VAT which Esteem was committed to pay. However, for the reasons set out in paragraph 70, we think that the correct figure is £1,842,632.

378 In our judgment this contention is an unduly narrow approach, particularly when we are considering the intention of Sheikh Fahad in paying more than he needed to. In the first place, the exact amount of the first invoice was not known at the time that the £5 million was paid over on 14th March. Thus, on 8th May Mr Manisty met with representatives of SMPC who produced an interim invoice but stated that it had not yet been shown to Sheikh Fahad, as he was abroad. It was subsequently amended and given to Mr Manisty and Sheikh Fahad on 10th May. Sheikh Fahad therefore had no means of making the calculation that GT says that he should have made. How therefore can it be said that he must have had a fraudulent intention in paying over more than £531,765 when it was not possible for him to calculate this figure at the time?

379 In our judgment we must turn to the estimated cost of the works. The latest available

figure at the time of the provision of the undertaking was £3,328,293 (see para 69). On this basis the amount payable under the undertaking was £3,328,293 minus £1,842,632 i.e. £1,485,661.

380 No evidence has been produced to us to show that any increased estimate of costs was made known to Sheikh Fahad by 14th March. The defendants say that he must have realised that the estimated cost had risen again since September 1989 because he had requested variations to the planned work. The defendants also refer to the file note of Mr Manisty of a meeting dated 7th March when he records Sheikh Fahad as having said that the costs of the works at Dulwich were much greater than expected. However that is an ambiguous phrase. Were they greater than originally expected or were they greater than estimated in September 1989? The defendants also refer to the file note of the meeting dated 8th May when Mr Manisty asked Mr Stephens of SMPC for an updated estimate of the total cost. Mr Stephens gave a figure of £2.5 million (compared with approximately £2.1 million in September 1989) for the main contract plus £550,000 for furniture and fittings (compared with approximately £467,000 in September). However he went on to say that this figure had not been split between furniture (which was apparently to be payable by Sheikh Fahad personally) and fittings (which would be payable by Esteem). In essence, say the defendants, it was perfectly reasonable for Sheikh Fahad to pay in well in excess of £1,485,661 because he knew that the amount ultimately required of him pursuant to the undertaking would be well in excess of that sum. However, even if one assumes in Sheikh Fahad's favour that he knew of the figures which Mr Stephens gave to Mr Manisty on 8th May – some two months after the payment of £5 million – the total estimated costs (assuming that Esteem would, as it did, pay for all the furniture and fittings) amounted to £3,945,937 (assuming professional fees and VAT at the same percentage rates as used in calculating the September 1989 figures). Deducting the original contract price, which was payable by Esteem, that meant that £2,105,937 was payable by Sheikh Fahad pursuant to the undertaking. Accordingly, even on this generous interpretation, by paying in £5 million, Sheikh Fahad was paying into the Esteem Settlement some £2.9 million that he did not need to.

381 However we are not willing to adopt this generous approach. As we say, there is no evidence before us that, by 14th March, Sheikh Fahad had been informed of the 8th May estimated cost figure. He has chosen not to give evidence and we do not see why we should assume in his favour that he must have known that the estimated cost had increased since September 1989 or that, at the meeting on 7th March, he was referring to the September figure rather than the original cost. We consider that, on the balance of probabilities, the total cost figure known to Sheikh Fahad on 14th March remained at £3,328,293, the figure used at the time of the provision of the undertaking in September 1989. It was therefore reasonable for Sheikh Fahad to pay over £1,485,661 in anticipated fulfillment of his obligation under the undertaking and we accept that, for the reasons given earlier, this sum was paid over without any dishonest intention on his part.

382 But what of the extra £3,514,339 that he paid over on 14th March 1990? What was his intention in doing that? The defendants argue that, even if he had the necessary intention to

defraud in 1992 and later, the situation was very different in March 1990. He could not have thought himself to be under suspicion at that stage. Although Mr Al-Haroon had been appointed, he had only just started work. Later that year Sheikh Fahad would be given wide powers over the external assets of Kuwait in view of the invasion by Iraq and he would therefore have believed at that time that he retained the confidence of the authorities in Kuwait.

383 But the defendants have not come up with a reason for Sheikh Fahad to inject these extra funds into the settlement other than a desire to ensure that Esteem could pay for the refurbishment. But, as we have pointed out, even on a most generous interpretation, he paid in some £2.9 million more than he could possibly have thought was needed. Although, for the technical reasons described by Mance LJ, GT was not a substantial creditor at March 1990 (apart from in respect of the sum of £2.5 million plus interest from November 1989), the fact was that Sheikh Fahad had conspired to steal $27.4 million in May 1988 in the Croesus transaction and had also conspired to steal $55 million in the Oakthorn I transaction in July 1989. He had also personally received into his own account $22.5 million from the Oakthorn I transaction in June 1989. He may not have owed GT much money at that stage but he owed substantial sums to the relevant company that had been defrauded. Furthermore he was shortly to receive a further $22.5 million of stolen funds into his account in June 1990. He must have known that there was a substantial risk that his frauds would one day be exposed. As we have already held, he knew of the advantages of trusts concerning the claims of creditors. In addition he showed in subsequent years that he was a man who was prepared to use trusts for creditor defeasance purposes. We are satisfied that all these factors combine to raise a strong inference that the excess payment was made for creditor defeasance purposes. They certainly call for an answer from Sheikh Fahad. But there is none. We conclude that this is because he has none to offer and we find that, of the transfer of £5 million to the Esteem Settlement on 14th March 1990, £3,514,339 was made with an intention to defraud his creditors.

(c) The income re-settlements

384 These payments had their origin as part of the legitimate tax planning scheme developed in 1985. They commenced well before the fraud started in May 1988. The steps in the scheme were set out in the guidance note shown at paragraph 34. It was clearly envisaged by all concerned that the plan would be followed.

385 The following income re-settlements were contributed to the Esteem Settlement after May 1988 and are the subject of attack by GT:-

Date	Amount £
03.10.88	60,500
08.03.89	88,500

20.10.89 127,500

22.03.90 127,000

01.03.91 769,000

22.10.91 308,000

16.03.92 255,500

15.04.92 114,000

01.09.92 120,000

386 The defendants argue that it was a composite scheme. It had begun legally and was simply carried on in essentially the same way. Although, as a matter of theory, Sheikh Fahad was free to choose not to recontribute the income distribution to the settlement, it was always envisaged that he would do so for legitimate tax planning reasons. Indeed, it was Mr Blampied of Abacus who drew up the memorandum of addition and inserted the relevant figure, taking account of the amount which Abacus had decided to distribute. The re-settlement did not really prejudice any creditors of Sheikh Fahad because funds had only just come out of the Settlement. They were only part of Sheikh Fahad's assets for a short while and the effect of the scheme was exactly the same as if the income had simply been accumulated in the Settlement.

387 We accept that it was expected that the scheme would be followed through in all its steps. But nevertheless this did not have to be done. The essential step was to remove the income from the settlement so that future capital distributions to beneficiaries resident in the United Kingdom could not be treated (and therefore taxed) as income by the Inland Revenue simply because there was accumulated income in the Settlement. For so long as Sheikh Fahad retained his diplomatic immunity it was not in fact essential for him to re-contribute the income remittance to the Settlement as capital, although it was clearly convenient to do so.

388 We remind ourselves that we have already found Sheikh Fahad to have been hopelessly insolvent and to have been aware of this fact in 1992, when he made the various capital contributions to the Esteem Settlement and the Number 52 Trust. We have also held that in making those capital contributions Sheikh Fahad had, as one of his purposes, that of creditor defeasance. Is it really logical to find that, for example, upon transferring £120,000 from his own assets into the Esteem Settlement on 1st September 1992 shortly after he had contributed £4 million to the Number 52 Trust with a fraudulent intention, he did not have the intention (along with the tax purpose) of protecting those assets from his creditor by putting them into a trust? We think not. We are in no doubt that Sheikh Fahad was just as

conscious of the advantages of recontributing income remittances as he was of making substantial capital contributions. We have already found that, in March 1990, he had a creditor defeasance purpose in relation to part of the £5 million. One of the income remittance payments, namely £127,000, was made at almost exactly the same time. We are satisfied that he had the same purpose in relation to that payment and the fact that he had a legitimate tax purpose that does not exclude the concurrent existence of a creditor defeasance purpose.

389 In our judgment the reasons which have led us to conclude that the excess payment (over and above that required by the undertaking) in March 1990 and the subsequent capital transfers in 1992 were made with a creditor defeasance purpose are equally compelling in leading us to conclude that the re-settlement of the income remittances were made for the same purpose. Again, the evidence calls out for an answer from Sheikh Fahad, but there is none. However, for the reasons given earlier, transfers made before March 1990 cannot be attacked. They pre-date GT becoming a creditor in November 1989 and were not sufficiently closely connected with Sheikh Fahad's subsequent insolvency. Furthermore, we are not satisfied that the necessary fraudulent intention existed in October 1989 (or earlier), being the date of the latest income resettlement before that of March 1990..

390 Accordingly the last six re-settlements (totaling £1,693,500) were made with the necessary intention.

391 There were of course income re-settlements to Ceyla, but in view of our finding that the transfer of Ceyla itself into the Esteem Settlement was made with the necessary intention, we do not think it necessary to consider these further.

(d) Contribution of £1.5 million to Ceyla in September 1990

392 For the same reason we do not think it necessary to consider this transfer further.

(e) Gift of £185,013.90 to Esteem Settlement in July 1993

393 We have set out the facts in relation to this gift in some detail at paragraphs 117 – 123. It is to be recalled that this sum was distributed from the Number 52 Trust to Sheikh Fahad and was immediately applied for the benefit of Esteem in purported repayment of a loan from Esteem. In fact, as we have held, it is to be treated as a gift because the amount involved arose out of payments by Esteem on behalf of Sheikh Fahad and others in respect of UK properties.

394 However there is no evidence to suggest that Sheikh Fahad even knew about this gift prior to its being made. It seems to have been entirely a technical matter decided upon by Mr Way and Mr Blampied in order to tidy up the accounts. In the absence of any

involvement on the part of Sheikh Fahad, we do not find it possible to conclude that the payment was made with an intention to defraud creditors. On the contrary, we think that the payment was made on the decision of Mr Way and Mr Blampied in order resolve an untidy accounting position.

(iv) Interim summary

395 It is perhaps convenient to summarise the position at this stage. We have found that, subject to considerations of continuing unjust enrichment/change of position, GT is entitled to have set aside the following transfers to the Esteem Settlement:-

(i) £3,514,339 out of the £5 million transferred on 14th March 1990.

(ii) Six transfers in respect of income re-settlements made between 22nd March 1990 and 1st September 1992 totaling £1,693,500.

(iii) The founder rights in Ceyla transferred on 17th September 1992.

396 Subject to the same reservation, GT is also entitled to set aside the gift of £4 million to the Number 52 Trust on 25th August 1990.

(v) Continuing unjust enrichment/change of position

(a) The transfer of Ceyla

397 We propose to deal with this first as it raises a discrete issue. The thing given in this case was the founder rights in Ceyla. They remain in the possession of Abacus as trustee of the Esteem Settlement. The gift can therefore be set aside with the result that Ceyla will notionally become the property of Sheikh Fahad once again and therefore available to his creditor. No doubt in practice a direct transfer to GT would be appropriate. It is clear from the passages which we have cited earlier (e.g. *Planiol & Ripert* at paragraph 316) that the creditor has to take the thing given in the condition in which he finds it at the time of the action. Thus the fact that Ceyla today is worth less than it was at the time of the transfer in September 1992 (substantially because of the capital distributions to Sheikh Fahad in December 1992) is immaterial.

398 But the defendants argue that there has been a change of position and it would be inequitable to transfer the founder rights to GT without more. The difficulty is said to arise in this way. In 1996 the two farms in which Ceyla had an indirect interest were sold. The net proceeds were loaned interest free to Abacus as trustee of the Esteem Settlement. The draft accounts of Ceyla as at 30th September 2001 show the interest free loan to the Esteem Settlement standing at £3,522,685. Similar accounts for the Esteem Settlement show that it has liquid assets of £3,020,414 and Esteem has liquid assets of £60,718.

There is therefore a deficit of £441,553. Accordingly, if the Esteem Settlement has to repay the loan in full, it will have to sell one or more of the real properties which are owned through Esteem i.e. 97 Dulwich Village, 242 Turney Road or 86 Chester Square.

399 The defendants argue that Abacus has changed its position by accepting the loan in the belief that it owned the founder rights in Ceyla. It was therefore an intra-trust loan. If Abacus had known that it would have to retransfer the founder rights in Ceyla, it would have left the funds in Ceyla so that, when the founder rights were retransferred to GT, there would have been no need for the Esteem Settlement to realise any of its real property.

400 We do not accept this argument. In the first place, no questions were asked of Mr Blampied on this topic by the defendants. We do not know what influenced the decision to loan the money from Ceyla to the Settlement. The defendants have simply not established the necessary evidential basis for their assertion. Indeed the indication is to the contrary because the accounts show an increase in the loan account balance from the figure of £2,922,685 as at 31st December 2000 to £3,522,685 as shown on the draft accounts at 30th September 2001. This increase in the loan was of course made at a time when it was known that GT was claiming to set aside the transfer of the founder rights in Ceyla to the Esteem Settlement. This therefore suggests that an assumption of continued ownership of Ceyla was not a factor in the decision to make the loan.

401 In any event, it is not the making of the loan which has caused the problem. The reason that the Esteem Settlement has insufficient liquid funds to repay the loan is that it has used the difference to fund substantial legal fees which it has incurred as a result of the litigation. These have not resulted from any change of position. These have arisen because of circumstances outside the control of Abacus. Following the December 1992 capital distributions, neither the Esteem Settlement nor Esteem nor Ceyla had liquid funds of any note. The only liquid funds which subsequently became available were those from the sale proceeds of the farms. They therefore had to be used to pay the necessary legal fees. The defendants argue that, if the funds had been paid directly out of Ceyla, GT would have had to accept Ceyla as it was. But the attack by GT was against the Esteem Settlement and it was the trustees of that settlement that had to incur the legal advice, not Ceyla. They therefore had to gain access to funds with which to pay for that advice; the only liquid funds in the Esteem Settlement structure were in Ceyla and they therefore had to be provided to the Esteem Settlement.

402 Given our decision in relation to the tracing claim, it seems probable that 97 Dulwich Village will have to sold. There will be more than sufficient funds from the sale of that property to enable the Esteem Settlement to repay Ceyla in full. We do not think that, in the circumstances of this case, it would be inequitable to require the founder rights of Ceyla to be retransferred with the full benefit of all the assets shown on its balance sheet.

(b) The £4 million paid to the Number 52 Trust

403 As described earlier, most of the £4 million originally contributed to the Number 52 Trust has been spent either by way of distributions to Sheikh Fahad (mostly for legal fees) or on administrative and legal costs. According to the draft accounts of 30th September 2001, the existing net assets total some £710,000.

404 In his oral submission, Mr Journeaux sought to argue that the Court should disregard the different settlements and treat the assets of the Esteem Settlement and the Number 52 Trust as one; so enabling the Esteem Settlement to be ordered to repay all of the £4 million paid into the Number 52 Trust notwithstanding that most of this had been lost. When it was pointed out to him that this had not been pleaded, nor had it been suggested in his skeleton argument and that it was quite inconsistent with the basis of the trial of the preliminary issue (namely to accept the validity of the settlements) he did not press the point although we do not think that he actually withdrew it. For the avoidance of doubt we wish to make it clear that we regard the argument as untenable. These were two different settlements with different beneficiaries (although some were common) and the legal structures simply cannot be ignored in this way.

405 He accepted that, if the Court were to be against him on his main point, then there had been a change of position in relation to the Number 52 Trust to the extent of the monies paid out of the Trust and the Court could therefore only order the return of what remained.

406 Although, for the reasons referred to earlier, we might prefer to categorise this state of affairs by saying that the Number 52 Trust remains unjustly enriched only to the extent of the assets that remain, it comes to the same thing. All that has been paid out of the Trust has been lost and the Trust, being a good faith recipient, cannot therefore be ordered to repay it. The payments were made in reliance upon the receipt of the £4 million. Subject only to any outstanding fees etc. we therefore hold that the gift to the Number 52 Trust is to be set aside and the net assets of the Number 52 Trust are to be treated as Sheikh Fahad's assets and therefore available to GT.

(c) The income re-settlements totalling £1,693,500 and the gift of £3,514,339 in March 1990

407 One of the difficulties for the parties in addressing the Court in detail in relation to the principle of continuing unjust enrichment/change of position concerning these transfers is that there were innumerable different possible findings of fact which the Court might make and which would affect such arguments. For example, no party made detailed submissions as to how the principle might apply, given the actual findings of fact which we have made. Indeed the defendants, in their submissions, specifically envisaged the need for further argument in this respect and we think it would be undesirable and unfair to the parties to descend into this complex and novel area without giving them the opportunity of making detailed submissions on the facts as we have found them to be.

408 We therefore propose to invite further written and oral submissions on this aspect and we will defer reaching a final decision until we have considered those submissions.

409 However there were a number of arguments made in relation to the question of change of position which we are in a position to deal with and which narrow the grounds on which further submissions are required.

410 We consider first the question of the £3.7 million paid out in December 1992. Mr Journeaux's first submission was that that distribution was to be regarded as a payment to the Bluebird Trust and that, if this was so, it was further to be regarded as still being available for the beneficiaries of the Esteem Settlement, because the beneficiaries of the Bluebird Trust were broadly the same. No change of position should therefore be allowed in this respect and the fact that this sum had been paid out should be ignored.

411 We have already found as a fact that the payment out in December 1992 was not to the Bluebird Trust, as Mr Journeaux contended, but was a capital distribution to Sheikh Fahad. That brings the argument to an end at the first hurdle. Nevertheless, even if we had not so held, we would not have accepted the remaining part of the argument. The Esteem Settlement and the Bluebird Trust are separate entities. In this particular case they have different trustees, are governed by different laws and do not have the same beneficiaries (Barbara is not a beneficiary of the Bluebird Trust). However this is not significant because even if all the parties were the same, it would not assist Mr Journeaux. The claim against the Esteem Settlement is in respect of gifts to that settlement. When funds in a trust are subject to an irrevocable distribution to another trust, this will in all normal circumstances amount to a change of position. Funds have been lost to the original trust and the distribution will have been made in reliance upon the fact that the sum originally given belonged to the first trust. The funds in question are now held by the second trust and it is to that trust that the claimant should look to recover the funds.

412 In his reply to the submissions of Mr Santos-Costa, Mr Journeaux adopted two new arguments. In the first place he argued that the bona fide recipient in this case was Abacus in its capacity as trustee. The sole interest of Abacus was therefore as legal owner; it had no beneficial interest in the assets. To the extent therefore that Abacus distributes assets to a member of the beneficial class, it personally is in no worse position (unless, as in the case of the Number 52 Trust, insufficient assets remain and it would have to pay the creditor out of its own resources) and the distribution cannot therefore amount to change of position. However, as we have set out earlier, we think that that is to adopt an erroneous approach. The “entity” in a case such as this is the trust itself. The trust consists of assets over which the trustee has legal title and the beneficiaries have a bundle of equitable rights. When assets are paid out to a beneficiary, they no longer belong to the trust; the trust no longer has any claim to the assets; they belong to the beneficiary. The position of the trust has undoubtedly changed as a result of the distribution. It is worse off and has ‘lost’ the assets. We do not accept therefore that a payment out of a trust cannot amount to a change of position for the purposes of a claim against the trustee of the trust.

413 As an alternative argument, Mr Journeaux submitted that, if the trustee was not to be viewed in isolation from the beneficiaries, the property must be regarded as being held by the trustee for the class of beneficiaries. It follows, says GT, that any defence put forward by one of the beneficiaries as such should logically be one that is available to the class of beneficiaries as a whole. They stand or fall together merely as objects of the discretionary class. Sheikh Fahad's fraud in settling funds into the trust effectively taints the class and the funds are not innocently received, so that the defence of change of position is not available.

414 We must confess to having had some difficulty in following this argument. But in our judgment it is simply not open to GT on the pleadings. It has at all times been accepted by all parties that these transfers were made to an innocent recipient. The whole case has been argued on that basis. For the first time, in its reply to the oral submissions of the defendants (and therefore too late for the defendants to deal with the point) GT seeks to argue that the funds were in fact not innocently received. It cannot be permitted to make such a fundamental change in its approach at the eleventh hour. In any event, we would reject the argument. We see no justification for saying that the fraud of one beneficiary (who happens to be the settlor and to have contributed funds to the settlement in fraud of his creditors) somehow taints all the other beneficiaries, who were in fact entirely ignorant of such fraudulent intention on the part of the settlor.

415 In our judgment, whether a distribution to a beneficiary amounts to a change of position or not is a matter of fact to be determined in the circumstances of each case. Take a trust where there are regular capital distributions of £100 per annum to a beneficiary which have been going on for many years. There is then a capital contribution to the trust of £10,000 in circumstances where a Pauline action prima facie lies against that capital contribution. Subsequent to that contribution the trustee makes its annual capital payment of £100 to the beneficiary. There has been no change of position in that respect; the payment would have been made regardless of the receipt of the £10,000. Conversely, if, in reliance upon the receipt of the £10,000, the trustee makes a one-off capital distribution of £7,500 to the beneficiary, it seems to us that the trust has changed its position to that extent and should only therefore have to repay £2,500 in the Pauline action, notwithstanding that it may possess substantial pre-existing capital assets which exceed £10,000. The trust is to be equated with an individual in this respect.

416 Whilst accepting this analysis, the defendants also assert that, to the extent that funds were paid out to Sheikh Fahad, the Pauline action must fail because there is no prejudice to the creditors. The funds have been returned to the debtor's patrimony and are available for his creditors unless he subsequently gives them away again, in which event the prejudice is caused by the second gift, not the first. As a matter of general analysis, that argument must be correct. But it requires elaboration in two respects. First, one still has to consider whether the payment to the debtor would have occurred anyway. In the example referred to above, we do not think that the regular capital distribution of £100 can be said to have reduced the prejudice suffered by the creditor as a result of the gift of the £10,000 because the debtor would have received this sum in any event. Even after receipt of £100,

the debtor's patrimony is still £10,000 less than it would have been if the fraudulent transfer had not been made. Secondly, one has to take account of lost interest/profit. If there is a long gap between the gift of the £10,000 and a subsequent distribution to the debtor of, say, £7,500, the debtor's patrimony has suffered the loss of the use of that money in the interim. It may be that in those circumstances the correct approach is to have regard to the lost interest. But it may be that the innocent recipient has used the funds to make substantial profits. Are these to be taken into account?

417 The difficulty is to apply the principles set out above to the complex facts of this case. We find as a fact that the trustee intended in December 1992 to distribute virtually all its liquid funds. This was the stated purpose of the distribution. If it had had more liquid funds at the time, it would have made a larger distribution; if it had known that it had less because it had to repay certain sums transferred to it by Sheikh Fahad, it would have distributed less. There was therefore a change of position to the extent that distributions were made which would not have been made but for receipt of gifts otherwise liable to be set aside.

418 The next point concerns whether there is a specific change of position defence in relation to the income re-settlements. The defendants argue that the income distributions were part of a scheme; Abacus made them in the expectation that it would receive the same sum back into the Esteem Settlement by way of capital re-settlement. It therefore changed its position in reliance upon the expected receipt of the capital re-settled.

419 We accept that a change of position defence can arise in reliance upon an expected receipt as well as a past receipt. If A promises to give B £1,000 as a result of which B buys a once in a lifetime holiday that he would not otherwise have taken, there would seem to be no logical justification for denying B a change of position defence to a subsequent claim by A or his creditors in respect of the £1,000. B would not have spent the £1,000 but for the promise of the transfer. If he has to repay it, he will be £1,000 worse off than if he had never received it in the first place. (See generally on this topic Nolan at page 163).

420 However we do not accept that the defendants have made out a change of position defence in relation to the income distributions and re-settlements. In the first place Mr Blampied was never asked what he would have done if Sheikh Fahad had not resettled the funds. Would he have stopped all subsequent income distributions? We rather doubt it. It was the distribution of income which was essential to avoid the risk of subsequent capital distributions to the United Kingdom beneficiaries being treated and taxed as income. There was accordingly a desirable objective in making the distributions even if Sheikh Fahad kept them and did not recontribute them. We accept that the trustee expected that the income distributions would be resettled in accordance with the proposed scheme but the defendants have failed to establish that the distributions would not have been made but for the return by way of capital re-settlement. It is to be recalled that the burden lies on a defendant to establish a change of position defence.

421 Turning to the transfer of the £5 million in March 1990 we heard detailed submissions on

what money would have been spent in any event on the refurbishment and how much was only spent because of the receipt of the £5 million. This in turn was related to the question of what Esteem was legally obliged to pay at different times. It seems to us that, in the light of the findings of fact we have made, many of the submissions on this aspect are no longer relevant. As stated at the beginning of this section, we are willing to hear further argument and what follows is therefore to be regarded as a provisional expression of views.

422 The question of change of position is now only relevant in respect of £3,514,339 out of the £5 million paid on 14th March 1990. At that time, Esteem had signed the building contract with Dore; it was therefore committed to pay for the refurbishment works. It knew by the date of signing the contract in September 1989 that SMPC, as its agent, had been in the habit of accepting variations to the contract requested by Sheikh Fahad, yet it chose not to impose any restriction on SMPC's ability to do that in the future. It would seem therefore that Esteem became legally obliged to pay for all that SMPC instructed Dore to do at any time during the continuation of the contract. No doubt Esteem was fairly relaxed about this because of the existence of the September 1989 undertaking on the part of Sheikh Fahad.

423 It seems arguable therefore that the receipt of the £3,514,339 did not change anything in relation to the building contract itself. No work was undertaken that would not have been undertaken but for receipt of that sum. Did Abacus change its position in any other way because of receipt of the sum? Arguably it did. If it had not received the extra sum, it would have had to have called upon Sheikh Fahad's undertaking to the extent that the ultimate contract price exceeded that envisaged in September 1989. In fact it did not do so because it had sufficient funds available to it as a result of the excess contribution in March 1990. It cannot now call in the undertaking because Sheikh Fahad is hopelessly insolvent. Arguably, therefore, there has been a change of position to the extent that the £3,514,339 was spent on Dulwich Village and has been lost as a result. Money spent on Dulwich Village was lost to the extent that it is not reflected in any increased value. Another way of putting it is that the only continuing enrichment from this sum is the proportion of the increase in the value of 97 Dulwich Village attributable to this sum. To the extent that the sum contributed to the purchase of Turney Road, there may also be a continuing enrichment in this regard.

424 We repeat that these are preliminary views and we remain open to argument. We therefore wish to hear further submissions on the extent (if any) to which the Esteem Settlement (through Esteem) remains unjustly enriched as a result of the receipt of £1,693,500 by way of income resettlements and £3,514,339 in March 1990, taking into account all the relevant circumstances including, for example, the refurbishment of 97 Dulwich Village, the purchase of 242 Turney Road, the capital distribution of £3.7 million in December 1992, the use of a proportion of the proprietary funds injected in April 1992 towards the Dulwich Village refurbishment and such other matters as the parties consider relevant.

425 We would end by reminding the parties of the essential rule in relation to unjust enrichment/change of position insofar as concerns innocent recipients (see for example the

comment of Lord Hope in *Foskett* at 1321). The law of unjust enrichment – and in this we include a claim under a Pauline action – should not make an innocent recipient worse off as a result of the transactions in question than he would have been had those transactions not happened. We have to say that some of GT's submissions appear to us to have given insufficient weight to this important principle. Mr Journeaux accepted in argument that the result of his submissions (because he was not willing to allow anything by way of change of position) would have been that all, or virtually all of the trust fund of the Esteem Settlement would have gone to meet GT's claims despite the fact that, before the transactions, the Esteem Settlement was the owner (indirectly) of 97 Dulwich Village (albeit not in its finally improved form) and Chester Square as well as a certain amount of cash. The test, of course, is not that the innocent recipient should be no worse off than he was before the transactions; he might have been worse off in any event. But it seems highly unlikely that, in the absence of the transactions in question, the Esteem Settlement would have had no assets left by now.

426 For the reasons given, we defer a final calculation as to the extent to which the Esteem Settlement should be held liable to repay the sums of £1,693,500 and £3,514,339 pending further argument on the question of continuing unjust enrichment/change of position.

[The Court heard further argument]

11th March 2002

Further interim summary

427 On 17th January the Court delivered an interim judgment which called for further argument on the question of change of position in relation to the gifts of £3,514,339 and £1,693,500 which the Court held otherwise liable to be set aside in the Pauline Action. We have now received further submissions on this topic and give our decision. This judgment can be regarded as a continuation of the previous judgment and, for convenience, we will continue the paragraph numbering from that judgment.

428 We described the applicable principles in our earlier judgment. Since the main hearing, the Privy Council has given judgment in the case of *Dextra Bank & Trust Company Limited v Bank of Jamaica* (26th November 2001). The Privy Council held that fault on the part of an innocent recipient was not relevant when considering a change of position defence and (consistently with the view which we had expressed at paragraph 419) that anticipatory reliance upon a future receipt could give rise to a change of position defence. For our purposes the most relevant aspect of the judgment of the Privy Council was the assertion that, when considering a change of position defence, a court should adopt a broad approach based on practical justice and avoid technicalities. As stated at paragraph 38 of the Privy Council's judgment:-

> *"The defence should be regarded as founded on a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit*

received by him in circumstances in which it would be inequitable to pursue that claim, or to pursue it in full."

429 In our judgment Mr Journeaux correctly summarised the tasks which we must undertake. The first is to consider whether there has been a subtraction of the recipient's original enrichment resulting from the transaction. If there has been no loss, then no question of a change of position defence arises. If, for example, the recipient, in reliance upon receipt of £100,000, spends that money on the purchase of shares (which he would not otherwise have done), the value of which equals or exceeds the amount expended on their purchase, there has been no subtraction of the original enrichment on the part of the recipient. A change of position defence is not therefore available. Secondly the subtraction of the enrichment must have been incurred in reliance upon the receipt of the enrichment i.e. it would not have been incurred "but for" receipt of the enrichment in the first place. Finally it must be inequitable to require restitution or restitution in full.

430 The defendants put forward three changes of position:-

We will consider each of these in turn. The decisions involved in the first two changes of position were taken in law by Esteem but no point has been taken on this, we think correctly. Abacus, as trustee of the Esteem Settlement, owned the entire issued share capital of Esteem and provided the directors. Decisions taken by Esteem are equally attributable to Abacus which caused or permitted Esteem to take those decisions.

(i) Extra expenditure was incurred in connection with the renovation of 97 Dulwich Village.

(ii) The undertaking of Sheikh Fahad dated 28th September 1989 was not called upon.

(iii) A capital distribution of £3,783,781 was made to Sheikh Fahad in December 1992.

(i) Increased expenditure on 97 Dulwich Village

431 The Court has already held (paras 75 and 76) that, as at September 1989, Esteem was liable to the building contractor in respect of the renovation contract with all variations agreed by SMPC prior to that date. The defendants argue that Esteem was not bound at that stage to any future variations. It was open to Esteem to refuse to agree to any further variations or to revoke SMPC's right to agree variations as agent on its behalf. The liability of Esteem under the building contract as at 28th September 1989 was £3,328,293 (see para 69). There was no new projection of the costs between September 1989 and March 1990. The next estimate was in May 1990 in the sum of £3,945,937 (see para 380). The £5 million was paid to Abacus on 14th March 1990 and Abacus was informed on 4th June 1990 that the sum was intended to meet the expenditure on 97 Dulwich Village. The final bill for the works was £5,709,282, an increase of £1,763,345 beyond the estimate of

£3,945,937 in May 1990. The defendants argue that these extra costs (i.e. £1,763,345) were incurred only because Abacus had received the £5 million (which included the sum of £3,514,339 with which we are concerned). However, they accept that it might be right to take account of any increased value consequential upon the expenditure of funds by way of a change of position. The increased expenditure (£1,763,345) amounted to 30.89% of the total expenditure of £5,709,282. The defendants therefore acknowledge the possibility that, although there was a change of position of £1,763,745, it may not succeed to the extent of the retained benefit, namely 30.89% of the increased value of 97 Dulwich Village attributable to the renovation works.

432 GT, on the other hand, argues that Esteem did not change its position as a result of the receipt of this sum. It would have incurred the extra expenditure referred to in any event.

433 Whilst we expressed initial doubts in paras 422 and 423 of our judgment at a time when we had not heard argument on the matter, we find that Abacus (through Esteem) did change its position as a result of the receipt of £3,514,339 by allowing extra expenditure to be incurred above and beyond that for which Esteem was liable as at May 1990. We agree that Esteem was not bound to all future variations to the contract. It was clearly open to it at any time to refuse to agree any further variations or to revoke the authority of SMPC to agree variations. In 1988 the directors of Esteem had shown considerable concern to ensure that the company had sufficient funds to meet its contractual obligations. We have no doubt that, once it had received the £3,514,339 (as part of the £5 million), Esteem was satisfied that it had sufficient funds and therefore took a relaxed view as to the need to keep checking on variations agreed by SMPC. In our judgment, if Esteem had not received this sum, it would not have allowed the extra expenditure incurred beyond that agreed up to May 1990.

434 However, notwithstanding that GT did not take issue with it, we do not agree that the relevant figure is the sum of £1,763,345 contended for by the defendants. The explanation of how the May 1990 figure is reached is set out in paragraphs 82 and 380 of our judgment. By May 1990 the building contract had risen to £2.5 million and the furniture and fittings were assessed at £550,000. Professional fees at 12.5% (£381,250) and VAT at 15% (£514,687) give the total of £3,945,937 relied upon by the defendants. They then deduct that figure from the final cost of £5,709,282 in order to arrive at the increased expenditure figure of £1,763,345. However the final total of £5,709,282 did not include VAT as it turned out eventually that no VAT was payable. Accordingly, in order to calculate the true value of the increased expenditure incurred between May 1990 and completion, one must deduct from the May 1990 figure that element which related to the estimated VAT. On that basis, the total cost of the building works and professional fees for which Esteem was liable as at May 1990 was £2,500,000 plus £550,000 plus £381,250; i.e. £3,431,250. The extra expenditure permitted by Esteem thereafter is therefore the difference between that figure and the eventual total cost of £5,709,282 i.e. £2,278,032. We hold therefore that there was a change of position of £2,278,032 as a result of the March 1990 gift of £3,514,339.

435 But, of course, that expenditure was not all lost. To the extent that it was not lost, there has

been no subtraction of the original enrichment which would justify the Court allowing a full change of position defence. The Court has already accepted Mr Adam-Cairns' evidence that the works of refurbishment increased the value of 97 Dulwich Village by an amount equal to 25% of its post-improvement value. The extra expenditure of £2,278,032 constitutes 39.90% of the total expenditure of £5,709,282. It follows that Abacus (through Esteem) retains a benefit as a result of the expenditure of that sum of 39.90% of 25% of the value of 97 Dulwich Village (i.e. 9.975% of the total value of the property). We hold therefore that there is a change of position defence in relation to the extra expenditure of £2,278,032 spent on 97 Dulwich Village less the retained benefit, which is 9.975% of the current value of the property.

(ii) The undertaking of September 1989 was not called upon

436 The second change of position relied upon by the defendants relates to the undertaking given by Sheikh Fahad in September 1989. The defendants argue that, but for the fact that Sheikh Fahad settled an additional £3,514,339 in March 1990, Esteem would have called upon the undertaking to fund the costs of the refurbishment. In giving evidence Mr Blampied said that, although he did not regard the gift of the £5 million as discharging the undertaking, it meant that it was not necessary to call on the undertaking. Later in evidence he repeated that there was no need for the company to call in the debt (meaning the undertaking) because of the receipt of the additional funds in March 1990.

437 GT argued that this point was not open to the defendants on the pleadings. The Court accepts that a number of the detailed arguments on change of position were not rehearsed in the pleadings; but that is not surprising. There were so many possible permutations of fact in this complex case that it was difficult for the parties to address each possible change of position before the Court had found which gifts were prima facie liable to be set aside. We would have been faced with endless arguments in the alternative. That is why the Court deferred its decision on this aspect and gave all parties the opportunity of making detailed submissions both orally and in writing in relation to the change of position defence in the light of the Court's findings of fact. The Court offered Mr Journeaux the opportunity of cross-examining Mr Blampied further but, on reflection, he accepted that GT would not suffer any prejudice if Mr Blampied were not recalled. In our judgment the general reliance by the defendants upon a change of position defence appears sufficiently from the pleadings and GT has had full opportunity of addressing and countering the detailed arguments on this point by reason of the Court's adjournment for further submissions.

438 In our judgment Abacus (through Esteem) did change its position as a result of the receipt of the £3,514,339 by not calling in the undertaking. This is clear from the evidence of Mr Blampied. What is the consequence? If the £3,514,339 had not been paid in March 1990 and if, contrary to the finding in relation to the first change of position referred to above, Abacus had nevertheless been content to run up the further expenditure on Dulwich Village, what would have been the consequence?

439 Esteem would still have incurred the aggregate liability of £5,709,282. The liability on the undertaking would therefore have been this sum less £1,842,632 (being the original cost plus VAT which remained payable by Esteem) i.e. £3,866,650. However the defendants accept that, of the £5 million gifted by Sheikh Fahad in March 1990, £1,485,661 can properly be regarded as a payment against Sheikh Fahad's liability on the undertaking (see paras 379 and 381). Accordingly his liability on the undertaking, if called upon by Esteem, would have been £2,380,989 i.e. £3,866,650 less £1,485,661.

440 Although insolvent in May/June 1992 (when the sum became payable by Esteem and would therefore have been called upon) Sheikh Fahad still had plenty of cash. Thus he was able to fund the Number 52 Trust with £4 million in August 1992 and transfer $135.3 million from the G772 account to the Better Trust in early 1993. We conclude that, if called upon, the undertaking would have been paid by Sheikh Fahad. He had the cash and there was no reason for him not to do so with the consequent risk of litigation with the trustees and/or sale of other assets in the Esteem Settlement. We find therefore that there has been a subtraction of enrichment to the extent of £2,380,989, being the sum which Esteem would have recovered from Sheikh Fahad pursuant to the undertaking if the March 1990 gift of £3,514,339 had not been made.

441 The defendants argue that, when considering this particular change of position in isolation, no credit should be given for any part of the increase in value of 97 Dulwich Village. We think that they are right in this submission. Under the first change of position referred to above, the change was constituted by the permitting of the additional expenditure. If funds had not been transferred in March 1990, the expenditure would not have been incurred. So it is right to give credit in respect of the value retained by reason of such expenditure. However the position is different in relation to the second change of position. The hypothesis in this case is that the work would have been undertaken in any event. The change of position is constituted by not making a call on the undertaking. The change of position is not constituted by the permitting of the renovation works but by not requiring payment of a debt.

442 There is no reason, under this second heading, why any credit should be given in respect of the increased value of 97 Dulwich Village. Under the first change of position, had the gift not been made, Esteem would not have had the liability to pay for the extra works but would not have had the benefit of the works. Under the second change, had the gift not been made, Esteem would have had both the benefit of the works and the payment of the debt pursuant to the undertaking. What Esteem has lost in the second case is the payment of the debt and the full value of that debt is therefore its change of position.

443 However the second change of position does not stand alone. We have already held that, as submitted by the defendants, Abacus (through Esteem) did change its position by permitting the increased expenditure as well as by not calling up the undertaking. The two changes of position cannot simply be added together as that would result in a doubling up in respect of the extra work. In our judgment the total change of position defence available to the defendants amounts to £2,380,989. However, credit must still be given for 39.90% of

the increased value of 97 Dulwich Village. This value has not been lost as a result of the changes of position; it is still retained by Abacus. There is no reason why Abacus should be able to keep that continuing enrichment. To put it another way, not all of the £2,380,989 has been subtracted from the original enrichment because there is still continuing enrichment to the extent of 39.90% of the increased value of the property. Furthermore we do not regard it as inequitable for Abacus to have to account for that continuing enrichment to GT.

444 At one stage in oral argument the Court floated the idea that Abacus could perhaps be said to continue to be unjustly enriched to the extent that the £3,514,339 was spent on 97 Dulwich Village and had therefore contributed to the increased value of that property. Whilst superficially attractive, we are satisfied that that approach is wrong. It confuses a tracing exercise with a change of position defence. The latter is not concerned with which particular pot of money has been used to pay for particular expenditure. The Court in such circumstances is concerned only to establish whether, in reliance upon the receipt, the recipient has changed his position and "lost" some or all of the enrichment which he has received so as to make it inequitable to order him to make full restitution. The approach referred to at the beginning of this paragraph makes no allowance for the fact that much of the refurbishment works would have been undertaken regardless of the receipt of the gift in March 1990 because Esteem was already committed to it. It follows that Abacus would therefore have received the benefit of the increased value of such works in any event. The proportion of the enhanced value attributable to the £3,514,339 is therefore irrelevant.

445 It follows from what we have said that, if there were no third change of position as outlined below, GT would be entitled to succeed in the full amount of £1,693,500 in relation to the income resettlements (because the two changes of position already referred to do not relate to the income resettlements) and in the sum of £1,133,350 (being £3,514,339 less £2,380,989) plus 9.975% of the value of 97 Dulwich Village in relation to the gift of £3,514,339 in March 1990.

(iii) The capital distribution in December 1992

446 But the defendants assert that Abacus changed its position in reliance upon both these gifts by making a capital distribution of £3,783,781 to Sheikh Fahad in December 1992. Their case is simple. They say that it is clear that Abacus intended to appoint virtually all the liquid funds in the Esteem Settlement structure. It follows that, if the income resettlements had not been made (so that the Esteem Settlement had £1,693,500 less than it in fact had) Abacus would not have had cash in that sum. The capital distribution would therefore have been £1,693,500 less than it was. Similar arguments apply in relation to the March 1990 gift.

447 Mr Journeaux submits that, from the evidence, there is no basis for an assumption in favour of the defendants that Abacus would not have made the distribution of £3,783,781 had it not received the gifts that are now liable to be set aside. The burden of establishing a

change of position defence rests upon the defendants and they have not produced the necessary evidence. In particular, no specific question was asked of Mr Blampied in order to establish whether he would have reduced the capital distribution correspondingly if the gifts in question had not been made.

448 We are quite satisfied from the evidence that, but for receipt of these gifts, the capital distribution in December 1992 would have been correspondingly less. Let us take the income resettlements of £1,693,500 as an example. Mr Journeaux accepts that his argument involves the hypothesis that, assuming these gifts had not been made — so that Abacus had £1,693,500 less than it in fact had as at December 1992 — it would nevertheless still have paid out £3,783,781. As Abacus would have been deficient in cash to the extent of £1,693,500, it would have had to have realised some of its real property or mortgaged or distributed real property in specie if it was to make an aggregate capital distribution of £3,783,781. It is clear to us that Abacus had no intention of doing any of these things. The sum fixed upon for the distribution was based upon the available cash. If there had been less cash (because some or all of the gifts under attack had not been made) the capital distribution would have been less.

449 To what extent was the capital distribution made in reliance upon the gifts under attack? The income resettlements are straightforward. If these had not been made, the cash distribution would have been £1,693,500 less than it was because Abacus would have had that much less cash. The position in relation to the gift in March 1990 of £3,514,339 is more complex. The Court has already allowed a change of position in relation to that gift to the extent of £2,380,989, leaving a balance of £1,133,350 liable to be set aside. When this is added to the income resettlements, the gifts under attack total £2,826,850. If these sums had not been transferred to Abacus, the capital distribution of December 1992 would have been less by a similar amount. That sum having been distributed as part of a larger distribution of £3,783,781, there has been a subtraction of all of the enrichment in reliance upon those gifts. There is therefore a valid change of position defence in relation to the whole sum of £2,826,850.

450 Mr Journeaux argues that if a subtraction is made in reliance on more than one enrichment, its effect must be apportioned between them. For example, if a person receives mistaken gifts from two people in the sum of £5,000 from each and, in reliance upon the receipt of both, spends £6,000 on a holiday, the only fair result would be that each of the donors is entitled to the return of £2,000. This must be correct. But it is not relevant in this case because the subtraction (of £3,783,781) exceeds the enrichment (£2,826,850) and apportionment is therefore not necessary.

451 Mr Journeaux goes on to argue that the Court should consider the December 1992 change of position first and apportion it before going on to consider any changes of position arising out of 97 Dulwich Village in relation to the March 1990 gift. On this analysis, one has transfers of £1,693,500 and £3,514,339 (totalling £5,207,839) against which there is a subtraction of only £3,783,781. The claims therefore succeed to an aggregate amount of £1,424,058. This has to be apportioned between the income resettlement claim and the

March 1990 claim in the proportion that they bear to each other. The income resettlements constitute some 32.52% of the total which means that the income resettlement claim would succeed to the extent of £463,104 and the March 1990 gift would succeed to the extent of £960,954. The latter figure would then be subjected to the changes of position in relation to Dulwich Village and, on the assumption that the first two changes of position summarised above are made out, the March 1990 gift would be extinguished (subject presumably to some residual value in the improvements although Mr Journeaux did not explore this). But there would be no further change of position defence available in relation to the income resettlements with the result that GT would succeed to the extent of £463,104.

452 Mr Journeaux was unable to put forward any reason of logic or principle as to why one should start with the December 1992 subtraction before considering those which had taken place at an earlier time and we are similarly unable to come up with any such reason. The purpose of allowing a change of position defence is to ascertain whether, as a result of reliance upon receipt of the transfer under attack, the recipient took certain steps which caused the enrichment resulting from the original transfer or be reduced or extinguished. Where there is more than one such subtraction, the only logical approach must be to consider them in the order in which they occurred. It cannot be right to start at the end and proceed on the assumption that there has been no previous subtraction when the evidence is that there has in fact been a previous subtraction. Accordingly we are in no doubt that it is not permissible to consider the December 1992 subtraction before considering the earlier subtractions (in relation to the March 1990 gift) which took place between March 1990 and June 1992. The December 1992 distribution has to be tested against the facts as they were, not the facts as they might have been if the earlier subtractions had not occurred.

453 Initially Mr Santos-Costa was minded to make an allowance for notional interest on the income resettlement sum of £1,693,500. However, upon reflection, he withdrew this suggestion and we think that he was right to do so. The whole effect of the income resettlement scheme was to strip out all the income earned in the Esteem Settlement structure every six months and resettle that income as a capital contribution. Accordingly the income resettlements exactly match and indeed constitute the income earned in the Settlement i.e. £1,693,500 was the income earned in the Settlement during the relevant period. To add notional interest to this sum would therefore be to double count.

454 Although not put forward in the skeleton argument prepared for the supplementary hearing, Mr Journeaux developed a new argument in his oral submissions at the hearing on 17th January. The Court had some difficulty in following the figures given and asked that GT submit a brief written summary of the argument following the hearing with a right on the part of the defendants to file a written submission in reply. That was duly done. As we understand it, the argument is that, even if the £3,514,339 had not been paid in March 1990, the Esteem Settlement would still have had some liquid funds (estimated by GT as approximately £0.5 million) in December 1992 which would therefore have been paid out. Accordingly a change of position defence is not available in relation to the whole sum. He accepts that the figure is calculated on the assumption that Esteem had called upon the undertaking and that Sheikh Fahad had paid the sum due.

455 However, the undertaking was not in fact called upon. There was a change of position in that respect to the extent of £2,380,989, as we have described, leaving only £1,133,350 to be carried forward to the December 1992 capital distribution. The change of position in December 1992 is not therefore the payment of the whole of the £3.7 million but only £2,826,850 of this sum (i.e. £1,693,500 + £1,133,350). It follows that at least £956,931 (i.e. £3,783,781 – £2,826,850) would, on these figures, have been distributed in any event because the Settlement would have had cash to that value. GT's contention that at least £0.5 million would have been paid out in any event is therefore correct, but it does not assist because a change of position is not being asserted in relation to that part of the December 1992 distribution.

456 We should also refer briefly to a new argument which GT appears to have raised in the written observations submitted after the hearing on 17th January. We can do no better than state it as set out in those observations:-

> *"3. If … the Court is against GT on its first case" [i.e. that there was no change of position in relation to the extra expenditure on 97 Dulwich Village] "then GT accepts that the defence succeeds to the extent of £1,763,345 less the retained benefit of 30.89% of the increase in the value of 97 Dulwich Village of £1.25 million (£1,250,000 x 30.89% = £386,125). However, no change of position defence in relation to the £3.5m should succeed to depress GT's entitlements to 25% of value of 97 Dulwich Village being the value of enrichment retained in respect thereof. (This last point is referred to as the "residual value argument")"*.

457 We must confess to having had some difficulty in following this paragraph. On the face of it, the second sentence appears to be suggesting that, come what may, GT is entitled to 25% of the value of 97 Dulwich Village i.e. the entire increase in value of the property. However this is inconsistent with the first sentence which appears to accept that, if there is a change of position, the defence succeeds save as regards 30.89% of the increase in the value of 97 Dulwich Village. It may be that the second sentence is not saying anything new and is just unhappily phrased in referring to all of the increase in value rather than 30.89%. If, on the other hand, it is intended to refer to the whole value of the improvements, we reject the argument. In the first place it is far too late to raise such an argument for the first time after the conclusion of the oral hearing. Secondly, no reasoning to support the argument is given and we cannot think of any.

(iv) Would it be inequitable?

458 Before considering whether it would be inequitable to allow or refuse a change of position defence, it may be helpful to summarise the present position. We have found that, by reason of the three changes of position referred to, the enrichment caused by the original gifts of £3,514,339 in March 1990 and £1,693,500 as income resettlements is no longer retained by the Esteem Settlement save to the extent of 39.90% of the increased value of 97 Dulwich Village (i.e. 9.975% of the total value of the property).

459 The defendants argue that the general principle of a claim such as this is as set out in paragraph 425, namely that an innocent recipient should not be left worse off than if the transactions in question had not happened in the first place. It would therefore be inequitable not to give effect to the changes of position found by the Court because not to do so would result in the Settlement being worse off than if it had never received the gifts in the first place.

460 GT argues that it would be inequitable to give effect to the changes of position by way of defence because the Esteem Settlement and its beneficiaries are volunteers. Mr Journeaux accepts that, if the change of position defence is not allowed, the Settlement will have to disgorge some or all of its original assets which it acquired quite legitimately well before Sheikh Fahad's fraud began. But he says that this is fair because those assets were all acquired by way of gift from Sheikh Fahad. He accepts this is a novel argument but asserts that it accords with principles of equity. He relies on the dictum of Lord Millett in Foskett quoted in para 231(ii) above.

461 We are unable to accept Mr Journeaux's argument. The fact that the assets of the Esteem Settlement originally came from Sheikh Fahad cannot affect the decision on whether to order the Settlement to make restitution in respect of the particular gifts now under attack. The fact is that the pre-existing assets were all legitimately owned by the Esteem Settlement and are not prima facie available to make restitution in respect of subsequent transfers. Let us take a simple example. A husband gives £100,000 to his wife. That gift is perfectly legitimate and is not liable to be set aside on any ground. Many years later he makes a further gift of £50,000 which is liable to be set aside. In good faith, his wife spends the £50,000 on a round the world holiday which she would not otherwise have taken and the money is therefore lost. On the face of it she has available to her a complete defence in respect of the £50,000 on the basis of her change of position. She no longer has the £50,000 and, if ordered to repay it, she would have to use £50,000 out of the sum of £100,000 which belonged to her and which she had received many years earlier. Mr Journeaux's argument is that, because her assets of £100,000 originally came from her husband, she should be ordered to repay the £50,000 despite the fact that it has been lost. The result is, in effect, to set aside part of a transaction (the gift of £100,000) which was perfectly legitimate and in respect of which there are no legal grounds to set it aside.

462 We do not think that this is a correct approach. It would certainly be quite contrary to the underlying principle concerning restitutionary actions, namely that a good faith recipient should not be left worse off as a result of the transactions than he would have been if they had not occurred. It would in effect serve to “punish” the recipient by making him worse off merely because, at some earlier date, he had quite legitimately received a gift from the person whose subsequent transactions are under attack. Lord Millett's comment was made in the wholly different context of who should receive a windfall obtained as a result of the transaction in question. We do not think that he was suggesting that one could strip a volunteer recipient of an earlier gift which was perfectly legitimate and not itself liable to be set aside on any grounds.

463 We also draw support from the refusal of the Privy Council in Dextra to introduce the concept of relative fault into the law of change of position. As the Privy Council said at paragraph 45 of its judgment:-

> *"Their Lordships are however most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so.* They regard good faith on the part of the recipient as a *sufficient requirement in this context … Their Lordships find themselves to be in agreement with Professor Peter Birks who, in his article already cited on 'change of position and surviving enrichment' at p 41, rejected the adoption of the criterion of relative fault in forthright language.* In particular he stated (citing *Thomas v Houston Corbett & Co* (1969) NZLR 151) *that the New Zealand courts have shown how hopelessly unstable the defence [of change of position] becomes when it is used to reflect relative fault."*

464 In our judgment, similar problems would arise if a court were to become embroiled in balancing the relative "merit" of the creditor and the innocent recipient in a Pauline Action when deciding whether it would be inequitable to force an innocent recipient to make restitution in circumstances where he no longer remained enriched as a result of the transaction in question. It would lead to the instability envisaged by the Privy Council in relation to fault.

465 We are in no doubt that the fact that the Esteem Settlement's pre-existing assets came from Sheikh Fahad is wholly irrelevant to whether it would be inequitable to give recognition to the change of position that has occurred. We are also in no doubt that it would be inequitable to deny the Esteem Settlement the change of position defence. To do so would undoubtedly have the result that the Settlement would be worse off than if it had never received the gifts of £1,693,500 and £3,514,339 in the first place. Accordingly we hold that, in relation to these two gifts, the Settlement should make restitution to the extent of 9.975% of the current market value of 97 Dulwich Village, but no more.

466 At paragraph 246 we said that we would defer consideration of the change of position argument in relation to the restitutionary claim of £1,267,686. In view of our decision on the tracing claim, the restitutionary claim does not arise because it was a claim brought in the alternative. Nevertheless, in case this matter goes further, we think that it would be helpful to set out how we would have approached the matter had it been necessary.

467 We have already held that there was no change of position as a result of the decision to use the £1,267,686 to pay for part of the refurbishment of 97 Dulwich Village (see para 245). In our judgment, the restitutionary claim for £1,267,686 falls to be treated in exactly the same way as the Pauline Action in relation to the capital distribution of £3.7 million in December 1992. If Abacus had not received the £1,267,686, it would have had to use other money to contribute towards the refurbishment and would therefore have had that amount

less in December 1992. It would therefore have paid out correspondingly less by way of capital distribution. The total claims, after allowance for the first two changes of position in relation to the March 1990 gift of £3.5 million would be £4,094,536 (i.e. £1,693,500 + £1,133,350 + £1,267,686). The total distribution in December 1992 was £3,783,781 and a change of position is therefore available for that sum. This however leaves a balance of £310,755 in respect of which there has been no change of position. Strictly speaking that sum should be apportioned between the three claims, as submitted by Mr Journeaux, but as the restitutionary claim does not in fact arise, we do not undertake that exercise. In summary, were the restitutionary claim to be substituted for the tracing action, the Esteem Settlement would be liable to make restitution of £310,755 plus 9.975% of the value of 97 Dulwich Village. However, on this assumption, GT would not of course have succeeded in the tracing action and would therefore not be entitled to a proprietary interest of 4.75% of 97 Dulwich Village and 4.27% of 242 Turney Road.

F. Summary

468 We will hear the parties further on the exact form of the orders which we should make and on other ancillary matters but our decision in this case can be summarised as follows:-

(i) GT has a proprietary interest of 4.75% of 97 Dulwich Village and 4.27% of 242 Turney Road. GT is entitled to an order which enables these interests to be realised.

(ii) The gift of Ceyla to the Esteem Settlement is to be set aside. Ceyla is entitled to recover the amount owed to it by the Esteem Settlement.

(iii) The gift of £4 million to the Number 52 Trust is to be set aside. GT is entitled to recover the net assets of the Number 52 Trust.

(iv) The gifts of £1,693,500 and £3,514,339 to the Esteem Settlement are to be set aside to the extent of 9.975% of the current value of 97 Dulwich Village.

469 Finally we would like to express our thanks to counsel and to those who have assisted them. Our task has been eased by both the written and oral submissions and by the efficient manner in which the voluminous papers in this case have been indexed and presented to us.