Joan Mary Nolan; Richard James Nolan; Seamus Patrick Nolan; Patricia Mary Nolan; Ann Mary Nolan; Elizabeth Mary Nolan; Raymond John Nolan; John Martin Nolan; Brendan Joseph Nolan; Sally Ann Nolan; Oliver Nicholas Nolan; Kevin Patrick Nolan; Noel Patrick Nolan; Serene Investments Ltd; Bilberry Investments Holdings Ltd; Nolan Transport Retirement Benefit Scheme v Minerva Trust Company Ltd; Michael Thomas Cordwell; Peter James Nicolle; Stephen Andrew Morgan

Jurisdiction:	Jersey
Judge:	D. R. N. Hunt, Jurats Clapham, Olsen
Judgment Date:	25 March 2014
Neutral Citation:	[2014] JRC 78A
Reported In:	[2014] JRC 78A
Court:	Royal Court
Date:	25 March 2014

Text

[2014] JRC 78A

ROYAL COURT

(Samedi)

Before:

D. R. N. Hunt, **Q.C., Commissioner and**Jurats Clapham**and**Olsen

Between
(1) Joan Mary Nolan
(2) Richard James Nolan
(3) Seamus Patrick Nolan
(4) Patricia Mary Nolan
(5) Ann Mary Nolan
(6) Elizabeth Mary Nolan
(7) Raymond John Nolan
(8) John Martin Nolan
(9) Brendan Joseph Nolan
(10) Sally Ann Nolan
(11) Oliver Nicholas Nolan
(12) Kevin Patrick Nolan
(13) Noel Patrick Nolan
(14) Serene Investments Limited
(15) Bilberry Investments Holdings Limited
(16) Nolan Transport Retirement Benefit Scheme
Plaintiffs
and
(1) Minerva Trust Company Limited
(2) Michael Thomas Cordwell
(3) Peter James Nicolle
(4) Stephen Andrew Morgan
Defendants

Advocate N. M. Santos-Costa **for the Plaintiffs**.

Advocate M. L. Preston **for the Defendants**.

Authorities

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Bagus Investments Limited v Kastening [2010] JLR 355 .

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Halley v The Law Society [2003] EWCA Civ 97 .

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Republic of Brazil v Durant International Corporation [2012] JRC 211 .

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Cattley v Pollard [2007] Ch 353 .

Cattley v Pollard [2006] EWHC 3130 (Ch) .

Re Northwind Yachts Ltd. [2005] JLR 137 .

Coulthard v Disco Mix Club Ltd. [2000] 1 W.L.R. 707 .

Knox v Gye (1872) L.R. 5 H.L. 656 .

Public Services Committee v Maynard [1996] JLR 343 .

Boyd v Pickersgill [1999] JLR 284 .

Medcalf v Mardell [2003] 1 AC 120 , [2002] UKHL 27.

Medcalf v Mardell [2002] UKHL 27 .

Trust — recovery of losses sought by the plaintiffs.

THE COMMISSIONER:

Introduction

1 The claim in this action has its basis in the Plaintiffs' allegation that over a period of some 18 months between March 2005 and September 2006 Mr Gerard Walsh fraudulently induced them to invest substantial sums of money in various schemes, all of which failed. The Plaintiffs' attempts to obtain redress from Mr Walsh himself or from his companies have proved unsuccessful. The Plaintiffs now seek to recover their losses (which they value at £5,257,074.25 and €8,398,000) from the Defendants, on the basis that the Defendants dishonestly assisted Mr Walsh in breach of the trusts arising from the Plaintiffs' investments by complying with Mr Walsh's instructions to pay away the monies which the Plaintiffs had transferred on unrelated expenditure, including expenditure for Mr Walsh's personal benefit. The Defendants all deny any such knowing assistance and further contend that the Plaintiffs' claims are barred by prescription.

2 In the Order of Justice the Plaintiffs pleaded alternative claims against the Defendants for breach of various statutory duties. By the conclusion of the hearing, however, all these alternative claims had, as the Plaintiffs confirmed in their final submissions, been abandoned. Accordingly we say no more about them in this judgment.

The parties

(1) The Plaintiffs

3 The 1st to 13th Plaintiffs, namely Joan, Richard, Seamus, Patricia, Ann, Elizabeth, Raymond, John, Brendan, Sally, Oliver, Kevin and Noel Nolan (“the Nolan family” or “the Nolans”) are all siblings. Together they form the Nolan Family Partnership (“the NFP”) and operate Nolan Transport (Oaklands) Limited (“Nolan Transport”), a successful road haulage business established by their father (“Mr Nolan senior”) in 1980. (For the sake of convenience only, and without intending any disrespect, we refer to the individual Plaintiffs in this judgment by their first names).

4 In about 1993 Mr Nolan senior, with a view to building a pension fund for the family's future, set up a trust called the Portobello Trust (“Portobello”) through a corporate services company based in the Isle of Man called Peregrine Corporate Services (“Peregrine”).

Between 2002 and 2006 the trustees of Portobello were provided by an Isle of Man company related to Peregrine called Chancery Trustees Limited ("Chancery Trustees") and Portobello was administered by another Isle of Man company, again related to Peregrine, called Chancery Trust Company Limited ("Chancery Trust"). Portobello owned both the 14th Plaintiff, Serene Investments Limited ("Serene"), a company registered in the Isle of Man, and the 15th Plaintiff, Bilberry Investments Holdings Limited ("Bilberry"), a company registered in the British Virgin Islands. Both Serene and Bilberry were managed by Chancery Trust which also provided their directors. The main individual at Chancery Trustees and Chancery Trust was Mr Gethin Taylor. Finally, the 16th Plaintiff, the Nolan Transport Retirement Benefit Scheme ("the NTRBS"), also known as the Nolan Transport Pension Fund, was a pension fund with four family trustees (of whom Joan was one) and an independent trustee on the board; the independent trustee at the time was Mr Paul Ryan.

5 The Nolans were represented in this action by Advocate Santos-Costa of Collas Crill.

(2) The Defendants

6 Minerva Financial Services Limited (now Minerva Trust and Corporate Services Limited) ("Minerva Financial"), originally the 1st Defendant, is a wholly owned subsidiary of Minerva Holdings Limited ("Minerva Holdings"). Minerva Trust Company Limited ("Minerva Trust") originally the 2nd but now the 1st Defendant, Minerva Nominees Limited ("Minerva Nominees") originally the 3rd Defendant, Minerva Services Limited ("Minerva Services") originally the 4th Defendant and Minerva Officer Limited ("Minerva Officer") originally the 5th Defendant, are all in turn wholly owned subsidiaries of Minerva Financial. They are all companies incorporated in Jersey. Save where it is necessary to distinguish between them in this judgment, we refer to these companies (with the exception of Minerva Holdings) collectively as "the Minerva companies" or "Minerva".

7 In November 2003 Professional Holdings Limited ("PHL"), the parent company of Professional Trust Company Limited ("PTCL"), acquired Mutual Trust Management (Jersey) Limited ("MTML"), which until 1 st August, 2001, had been called Hemisphere Trust (Jersey) Limited ("Hemisphere"). On 30 th June, 2004, there was a merger at law ("the Mutual Merger") between MTML and PTCL, with the new company operating as PTCL. In June 2006 Minerva Holdings acquired PHL and on 28 th February, 2007, PTCL merged with Minerva Trust ("the Minerva Acquisition"). The Defendants accept that by reason of the Minerva Acquisition Minerva Trust assumed any liability to which PTCL was subject at the date of the merger. The matters raised in this action essentially fall within the period between the Mutual Merger and the Minerva Acquisition.

8 The Nolan family initially commenced proceedings against all the Minerva companies because, as Mr Santos-Costa explained in his opening address, the Nolans did not know which company had inherited the liabilities of PTCL. In the light of the concession recorded

in the preceding paragraph, the Nolans in turn accepted that their claims against the remaining Minerva companies must be dismissed. The Court therefore acceded to the Mr Preston's application at the outset of his opening to strike out the Nolans' claims against Minerva Financial, Minerva Nominees, Minerva Services and Minerva Officer. So far as the Minerva companies are concerned, therefore, the trial continued against Minerva Trust only.

9 Turning to the individual Defendants, at the material time Mr Michael Cordwell (originally the 6th, and now the 2nd, Defendant) was the chairman of PTCL, Mr Peter Nicolle (originally the 7th, but now the 3rd, Defendant) was the chief executive and Mr Stephen Morgan (originally the 8th, but now the 4th, Defendant) was the finance director.

10 All the Defendants in this action were represented by Advocate Preston of Voisin.

The background

(1) Mr Walsh's companies

11 Prior to 2003 Mr Walsh was the ultimate beneficial owner of a group of companies most of which featured the name “Buchanan” in their title (“the Buchanan Group companies” or “the Buchanan Group”). In July 2003 he gifted his shares to the Arkaga Settlement, an Isle of Man interest-in-possession settlement which had been established by a declaration of trust dated 11 th June, 2003. Mr Walsh was the settlor, life tenant and first-named beneficiary as to capital of the settlement, the trustees being an Isle of Man company named Bankhill Trustees Limited (“Bankhill”); the corporate administrators of Bankhill were another Isle of Man company, Calmanx (apparently the trading name of Caledonian and Manx Corporate Services Limited (“Calmanx”)). Under the Settlement the trustees were, by clause 2, to pay the income of the trust fund to Mr Walsh and, by clause 3, they were empowered to pay or transfer the whole or any part of the capital of the trust fund to Mr Walsh. Bankhill held 100% shareholdings in the Buchanan Group companies. The Buchanan Group companies, which comprised certain Jersey companies within the overarching Arkaga structure (also known as the Arkaga Fund), were as follows (in alphabetical order):–

All of these five companies, together with subsequently (again in alphabetical order)

were incorporated in Jersey (“the Jersey companies”). Subsequently other companies were added to the corporate structure.

(i) Arkaga Nominees Limited (“ANL”), incorporated on 30 th March, 2001;

(ii) Buchanan Holdings Limited (“BHL”), incorporated on 20 th December, 2001;

(iii) Buchanan Smith Limited (“BSL”), incorporated on 12 th December, 2000;

(iv) Buchanan West Limited ("BWL"), incorporated on 20 th December, 1999; and

(v) PPIL Limited, incorporated on 11 th June, 2001, (which was majority owned by BSL).

(vi) Arkaga Holdings Limited ("AHL"), incorporated on 21 st July, 2006;

(vii) Arkaga Realty Investments Limited ("ARIL"), incorporated on 21 st March, 2006; and

(viii) Echemus Holdings Limited ("Echemus"), incorporated on 3 rd February, 2006,

12 As from 25 th April, 2007, AHL was interposed into the corporate structure as the holding company between the Arkaga Settlement and the Jersey companies, with the trustees of the Arkaga Settlement holding 100% of the shares in AHL, and with AHL in turn holding 100% of the shares in ANL, BHL, BSL and BWL. The reason for inserting AHL was to consolidate the structure into one holding company so as to simplify the security taken by Halifax Bank of Scotland ("BoS") over the group structure. This group structure was arranged so that investments could be made in various projects, some of which are relevant to the disputes in this action, in a tax effective manner for the benefit of Mr Walsh. The projects in which the Buchanan Group companies invested or sought to invest were wide-ranging. Funding for these investment projects typically came from one or both of two sources, firstly bank financing (sometimes secured against assets of the Buchanan Group companies or of other companies in the group structure) and secondly investments made by friends and business associates of Mr Walsh (and entities controlled by them).

(2) Mr Walsh

13 There was effectively no evidence in the present case regarding Mr Walsh's background and career prior to about 2002. It seems that he was born in 1957. By a letter dated 15 th December, 1999, Mr David Kinch, a partner in the London solicitors Edwin Coe, had provided a reference for Mr Walsh to Hemisphere confirming that they had known Mr Walsh for 6 years and that:–

> *"In that time, he has conducted dealings with us in a fit and proper manner and so far as we are aware we consider Mr Walsh to be good for normal business dealings".*

By the time that the Nolans came on the scene in late 2002 he was an apparently successful and prosperous man, running a substantial private investment business through the Buchanan Group, with generous support from BoS by way of overdraft facilities. Mr Preston emphasised that throughout the relevant period Mr Walsh enjoyed the support and confidence of major financial institutions such as BoS and the Royal Bank of Scotland ("RBS"), and of senior and well respected people from within the financial sector, including Mr George Mitchell, the former Governor of the Bank of Scotland, who sat on the board of

Kellykay Limited (“Kellykay”). As we find, however, the true position was very different. On the evidence presented to us we conclude that by 2005 at the latest Mr Walsh was, or had become, a fraudster. Whether by that time his business empire was also, in reality, no more than a house of cards we cannot say. Be that as it may, by 2009 his business empire had collapsed.

(3) PTCL's dealings with Mr Walsh and his companies

(a) Due diligence relating to the Mutual Merger

14 As of 23rd July, 2004, soon after the Mutual Merger, there were five directors of PTCL, namely Mr Cordwell, Mr Nicolle, Officer A, Officer B and Mr Morgan. Prior to the Mutual Merger, Mr Walsh's companies had been MTML's clients rather than PTCL's. As we have already mentioned, Mr Walsh was originally a client of Hemisphere, having been introduced by Mr Kinch.

15 In terms of due diligence performed in relation to the Mutual Merger, Mr Cordwell and Mr Nicolle, in addition to retaining a firm of consultants, themselves undertook a review of MTML's client files at random. Although Mr Cordwell did not recall whether Mr Walsh's companies were specifically included in this review, those files which they did review did not give rise to any concerns as to the manner in which MTML had administered its portfolio of businesses. Furthermore, in meeting its legal obligations MTML represented to PTCL at the time of the Mutual Merger that each of the MTML/Hemisphere clients (including Mr Walsh) had been subject to know your client (“KYC”) and anti-money laundering checks. Mr Cordwell had no reason to think that these representations were incorrect.

16 As a matter of PTCL's compliance policy, following access to the database of the now finance industry standard system known as World-Check, during 2005 all of the individual clients of PTCL were subject to a status search via that facility. These searches extended to Mr Walsh. This World-Check search did not alert Mr Cordwell to anything untoward in respect of Mr Walsh. In addition, Officer B and Officer A had periodic meetings with Mr Walsh during this early stage of the Mutual Merger, with Officer B then being the PTCL director with responsibility for the relationship with Mr Walsh.

(b) Overview of PTCL's role in the administration of Mr Walsh's companies

17 The effect of the Mutual Merger was that there were, to begin with, two regimes working under the PTCL umbrella in parallel, which had to merge over the weeks and months following the merger. On the one hand there were the historic PTCL client relationships, for which at first Mr Cordwell and Mr Nicolle continued to take particular responsibility; on the other hand, Officer A and Officer B continued at first to be particularly responsible for the clients who had previously been clients of MTML, which included Mr Walsh's companies. Each of these client portfolios had around 350 entities under administration, making

approximately 700 entities in total. The process whereby all the directors of PTCL collectively conducted an overview of all of PTCL's clients, regardless of which portfolio they may have originated from historically, consisted of monthly board and management meetings, at which the combined status for the whole of the business and its clients under administration was reviewed.

18 Following the Mutual Merger, Mr Cordwell, Mr Nicolle, Officer A, Officer B and Officer C were the directors of all of the Buchanan Group companies. However, at the time immediately following the Mutual Merger the director with primary responsibility for the Buchanan Group's files was Officer B. Officer A would also have been involved from time to time. At this stage the day-to-day conduct of the Buchanan Group companies' business was handled by Mr David Lloyd and, from January 2005 onwards, by Mr Robert English. Mr Lloyd, and latterly Mr English, were the administrators of the Buchanan Group's files, reporting to Officer B as trust director. Officer B and Officer C both resigned as directors of all of the companies on 31 st May, 2005, and Officer A resigned on 30 th September, 2005. In September 2005 the management of PTCL was restructured and Mr Morgan was appointed as finance director. On 30 th September, 2005, Mr Morgan was appointed as director of all of the Buchanan Group companies and of certain other client companies; he in turn resigned on 27 th October, 2006.

19 After the departure of Officer B and Officer C, the overall responsibility for the Buchanan Group's files fell in particular on both Mr Cordwell and Mr Nicolle. After Officer A's departure, Mr Cordwell and Mr Nicolle conducted a review of those client files for which Officer B and Officer A had previously had particular responsibility. As a result of this review they endeavoured to forge closer relations with former MTML clients, including Mr Walsh. Mr Walsh was one of the clients with whom Mr Cordwell had a face-to-face meeting during the autumn of 2005. This first meeting with Mr Walsh was at the latter's offices in London and was in company with Mr English; it was essentially a courtesy call rather than for any due diligence purpose. Upon meeting Mr Walsh Mr Cordwell found him to be plausible, straightforward and credible. During the years following this first meeting, Mr Cordwell had intermittent contact with Mr Walsh. On several occasions he met with Mr Walsh at his office in London, such meetings being arranged via Mr English or Mr Walsh's personal assistant, Ms Vicky Cappin. Most, if not all, such meetings were attended also by Mr Jim Little of Arkaga or by Mr English.

20 Following the departures of Officer B and Officer A, a new arrangement was put in place whereby Mr English would take responsibility for the day-to-day administration of the Buchanan Group companies and would report to Mr Cordwell or Mr Nicolle, as appropriate. From 14 th January, 2005, after the departure of Mr Lloyd from PTCL, Mr English had been the trust officer with particular responsibility for matters relating to the Buchanan Group companies and to Mr Walsh himself. Prior to that date Mr English had, in addition to the process of working alongside Mr Lloyd, undergone a broad induction into all of PTCL's internal protocols and compliance procedures. By September 2005, Mr English had had the opportunity to get to know Mr Walsh and the way in which the Buchanan Group companies operated. Mr English was promoted to the role of trust officer, with particular responsibility

for the Buchanan Group companies' files, with effect from the beginning of January 2006.

(c) The role of PTCL in the administration of the Buchanan Group companies

21 MTML administered each of the Buchanan Group companies pursuant to a client management service agreement ("CMSA") entered into between Bankhill and MTML, with PTCL becoming the party to the CMSA as a result of the Mutual Merger. Each CMSA defined in clause 1 the services which PTCL might, at the request of Bankhill, provide to the relevant Buchanan Group company as including:–

> *"(i) provision of directors, alternate directors, officers and nominee shareholders;*
>
> *(ii) provision of the registered office or administration office of the Company;*
>
> *(iii) maintenance of statutory records and filing of statutory returns;*
>
> *(iv) preparation and maintenance of minutes of meetings of directors and shareholders;*
>
> *(v) maintenance of the books of account of the Company and arranging for the preparation of financial statements;*
>
> *(vi) dealing with the Company's correspondence and day-to-day work;*
>
> *(vii) investing the funds of the Company taking into consideration [Bankhill's] recommendations or on the advice of such adviser as [MTML] may in its absolute discretion appoint;*
>
> *(viii) safekeeping and insurance (where applicable) of the assets of the Company."*

Clause 2 authorised MTML/PTCL to

> ***"take any steps that it may in its absolute discretion think fit to further the business or protect the assets of the Company and to take such professional advice on behalf of the Company or any of the directors thereof at the Company's expense as [MTML/PTCL] may consider necessary".***

Finally, clause 6 authorised MTML/PTCL

> ***"and any employees thereof to take such action with regard to the maintenance, administration and day-to-day running of the Company as may be requested in writing, orally, by telephone, telex, fax, electronic mail or otherwise howsoever and notwithstanding that such requests were not or may not have been given by [Bankhill] or with or under [its] authority".***

22 From late 2004 onwards the Buchanan Group companies and their directors relied on investment advice provided by Kellykay, an English company incorporated in 2004 and subsequently renamed Arkaga Limited ("AL"). (Save as necessary, in the interests of clarity we describe this company as Kellykay throughout this judgment.) Kellykay was an English company and a wholly-owned subsidiary of BHL. However, PTCL had no directors on the board of Kellykay and had no involvement in any aspect of its administration. The provision of advice by Kellykay to BHL was the subject of a services agreement dated 7 th October, 2005, ("the services agreement"). This agreement provided by clause 2.2 that Kellykay would provide advisory and execution services to BHL as set out in Schedule 1, including:–

> *"3 The provision of advice to [BHL] concerning all actions it appears to Kellykay would be advantageous to [BHL] in implementing the investment policy of [BHL].*
>
> *4 The evaluation of opportunities for possible investment by [BHL] and reporting such evaluation to [BHL] and the provision of commercial advice to [BHL].*
>
> *5 The continuous surveillance and review of the investments for the time being of [BHL].*
>
> *6 The provision of such advice to [BHL] on matters related to its investments as [BHL] may reasonably require.*
>
> *7 The provision of advice as to whether and in what manner any right conferred by [BHL's] investments should be exercised.*
>
> *8 The provision of such information and assistance as may be required in connection with the valuation of [BHL's] investments.*
>
> *9 The management of the investment and re-investment of [BHL's] investments with a view to achieving the then current investment objectives of [BHL]."*

In return for these services BHL agreed by clause 5 of the agreement to pay Kellykay the fees set out in Schedule 2, and in particular a

> *"Fixed Annual Fee of the lower of*
>
> *(a) £450,000; and*
>
> *(b) the annual operating expenses of Kellykay*
>
> *less any amounts received by Kellykay from investee companies".*

By clause 6 of the agreement BHL also agreed to pay Kellykay's expenses.

23 PTCL and the Buchanan Group companies also relied on legal advice as to proposed investment activities from Edwin Coe, in particular from Mr Kinch.

24 Essentially the Arkaga Group, of which the Buchanan Group companies formed part, was a private equity enterprise which engaged in four strands of activities, namely:–

(i) Raising money: This was done on a debt basis, initially by BSL (but after April 2007 by AHL), through a substantial line of credit from BoS.

(ii) Identifying investment opportunities: Kellykay/AL, from its incorporation in late 2004, advised BHL in relation to proposed investments.

(iii) Holding acquired assets: The Buchanan Group companies carried out this third strand of activity by holding acquired assets in special purpose vehicles ("SPVs"), the shares of which were owned by the Buchanan Group companies.

(iv) Selling assets: This fourth strand of activity itself comprised two parts:–

(a) *Identification of purchasers of shares in SPVs*: Kellykay and Mr Walsh fulfilled this role. The Buchanan Group companies played no part in this strand of activity and accordingly neither PTCL nor its directors or employees had any involvement in it.

(b) *Receipt of payment and transfer of assets*: Once purchasers had been identified by Kellykay and/or Mr Walsh, the Buchanan Group companies then processed the sale transaction.

(4) The way in which the Nolans conducted their financial affairs

25 Nolan Transport is clearly a substantial and successful company, with a current annual turnover of some €70 million. But, as Joan said in her evidence and we accept, despite the growth of the business, it is still very much a family enterprise with relations between the family members being informal. Generally the siblings, all of whom (except Ann, who has retired due to ill health) work in the business, leave each other alone to get on with their specific jobs. If there is something which needs discussing, it is discussed in person, often over the kitchen table after work, or on the telephone.

26 It was Joan who was principally authorised by her siblings to identify, advise on and ultimately enter into investments on behalf of the other family members. From time to time she and other members of the family would receive details of investment opportunities. They would consider any such investments and opportunities and, where appropriate, advise the trustees of Portobello. Where the trustees considered it appropriate to enter into a particular investment, they would recommend the directors of Serene and/or Bilberry to make such investments and the directors of Serene and/or Bilberry would take the final decision. As, however, Joan accepted in her evidence, this apparent three stage process (a recommendation by the family, consideration by Portobello and then a decision by Serene/Bilberry) in reality involved only two stages because the same individuals were involved in both the consideration by Portobello and the decision by Serene/Bilberry.

(5) Mr Walsh and the Nolans

27 The Nolan family began by investing in property. By 2004/2005 they had bought one office building in Dublin, one small office building in London and some flats in London. Joan managed the buildings, paid the loans and collected the rents. Prior to her involvement with Mr Walsh and the Buchanan Group companies she had had very little experience of private equity investment schemes such as those subsequently recommended by Mr Walsh. At the time her limited experience with property investments was that they generally went up in value. Joan was introduced to Mr Walsh in late 2002 by Mr John Handley, a tax and occasional investment adviser to the Nolan Family. Joan was then 29. She met Mr Walsh for the first time at the Berkeley Court Hotel, Dublin on 28 th November, 2002, with her sisters Elizabeth, Ann and Sally. Thereafter Joan remained Mr Walsh's primary contact with the Nolans. The purpose of this meeting was to discuss an investment opportunity in Entara Limited ("Entara"), now called Parthenon Entertainment Group Limited ("Parthenon"), which Mr Walsh described as his company. Mr Walsh described himself a venture capitalist looking for investors to put money into his company. He seemed to Joan to be a successful businessman. Following the meeting, Joan suggested an investment in Entara to Chancery Trust and on 16 th December, 2002, Serene invested £305,000. On 5 th April, 2004, Serene invested a further £250,000 in Entara, again on the recommendation of Mr Walsh which Joan in turn had suggested to Chancery Trustees. Parthenon went into administration on 17 th July, 2009, and was dissolved on 21 st October, 2010. The Nolans derived no benefit from their investments in Entara and their shares became completely worthless. The Nolans do not, however, make any claim in this action in respect of their investments in Entara.

The Nolans' claims

28 In summary, details of the investments made by the Nolans are as follows.

(i) First Elision

On 31 st March, 2005, the NFP paid £1,649,585 to BHL.

(ii) Columba

On 20 th October, 2005, Serene paid €1,748,000 to BHL.

(iii) Echemus

On 16 th January, 2006, Serene paid £2,000,000 to BSL.

(iv) First German nursing homes

On 3 rd March, 2006, the NTRBS (subsequently replaced by Serene) paid €4,250,000 to BHL.

(v) Second German nursing homes

On 30 th June, 2006, the NTRBS (subsequently replaced by Serene) paid €2,400,000 to BHL.

(vi) Big Ferries

On 30 th June, 2006, Bilberry paid £250,000 to BHL.

(vii) Irish Bio-Ethanol

On 30 th June, 2006, Serene paid £250,000 to BHL.

(viii) Second Elision

On 22 nd September, 2006, Serene paid £1,107,489.25 to BHL.

29 We now set out the detailed history regarding each of these eight investments.

(1) First Elision

30 During a meeting on 8 th December, 2004, at Mr Walsh's office in London, he informed Joan, Elizabeth and Sally that the Nolans' shareholding in Entara was now worth six times more than their initial investment, with Serene's shares being worth £7 each. On 13 th January, 2005, Mr Walsh sent Joan an email with another proposal for investing in one of his subsidiary companies called Elision Group Limited ("Elision"), subsequently renamed Arkaga Healthcare and Technology Holdings Limited ("Arkaga Healthcare"), which operated as a solutions provider for organisations intending to move from paper-based systems to IT-based data systems. The email read as follows:–

"This year we will make a profit before tax of around 7 million + sterling.

My proposal would be to sell to you 320,000 shares equivalent to approximately 13% of the company. Our sector is valued at the moment on about 10 to 12 times earnings.

These shares would be held by [a] nominee company to your order … The

purchase price would be in the region of £5.35."

Attached to Mr Walsh's email was an email link to the Elision website, which Joan visited.

31 On 28 th February, 2005, there was a meeting in London between Mr Walsh, Mr Handley and Officer B. Officer B's note of the meeting included the following:–

> *"[Mr Walsh] confirmed he and various friends are providing the funding for [BWL] to purchase Peggy Fordham's shares and loan stock.* His friends are providing funding in return for [ANL] holding their portion of the shares as nominee."

On 14 March Mr English sent Mr Handley an email, copied to Mr Kinch and Mr Walsh, summarising the matters discussed at the meeting, including the provision of funding by Mr Walsh and various friends for the purchase of Peggy Fordham's shares.

32 After further exchanges between Mr Walsh and Joan, on 1 st March, 2005, Mr Walsh emailed Joan enclosing details of the option agreement between BWL and Peggy Fordham and saying that the total number of shares was 367,500; he proposed that BWL should acquire the shares and place them in the name of ANL to her order in order *"avoid the pre-emption issue"*. The unsigned copy of the Peggy Fordham Option Agreement ("the Option Agreement") attached to Mr Walsh's email provided that BWL had a right to require Peggy Fordham to sell

In short, under the Option Agreement BWL could pay Peggy Fordham a total of £1,649,585 in return for 182,917 B ordinary shares, 293,334 deferred shares and £367,500 worth of loan stock convertible into 147,000 B shares. On this basis each of the B shares was valued at £5. In answer to a request from Joan on 2 nd March, Mr Walsh emailed the following day that the price per share would be £5.05.

> (a) "the Shares" (defined as 182,917 B ordinary shares of £1 each and 293,334 deferred shares of 25p each) for "the Share Price" (defined as £914,585 for all the shares); and
>
> (b) "the Loan Stock" (defined as £367,500 nominal amount of unsecured loan stock that was convertible into 147,000 B ordinary shares) for "the Loan Stock Price" (defined as £735,000 for all the loan stock).

33 On 2 nd March, 2005, Mr Kinch emailed to Mr Walsh a proposed share purchase agreement between BWL and Peggy Fordham ("the Share Purchase Agreement"). This provided that BWL would acquire 293,334 deferred shares of 25p each, 17,500 A ordinary shares of £1 each, 165,417 B ordinary shares of £1 each and £367,500 of convertible unsecured loan stock for a total consideration of £1,319,668 (broken down as nothing for the deferred shares, £70,000 for the A shares, £661,668 for the B shares and £588,000 for the loan stock). This valued both the A and B shares (including the B shares which were the subject of the convertible loan stock) at £4 each, and the deferred shares at nil. The evidence before us is silent as to why Peggy Fordham should have been prepared to sell each of her A and B shares for £1 less than the Option Agreement envisaged. The Share Purchase Agreement was not disclosed to Joan at the time.

34 In early March 2005 Joan spoke to Mr Walsh by telephone and he gave her further information about Elision's financial performance and worth. He mentioned in particular that his company had an option to buy the shares at £5, but that they were currently worth £15 to

£20 each. Following this conversation Joan discussed the matter verbally in varying degrees of detail with her siblings and they decided to proceed with the investment. In an email to Joan of 30 th March, 2005, Mr Walsh told Joan to make payment to the account of BHL, the parent company, at RBS in Jersey, adding:

> *"The shares will be held by [ANL] to your account on behalf of whatever entity you wish to nominate at the appropriate time."*

On 31 st March, 2005, the NFP duly paid the sum of £1,649,585 to BHL.

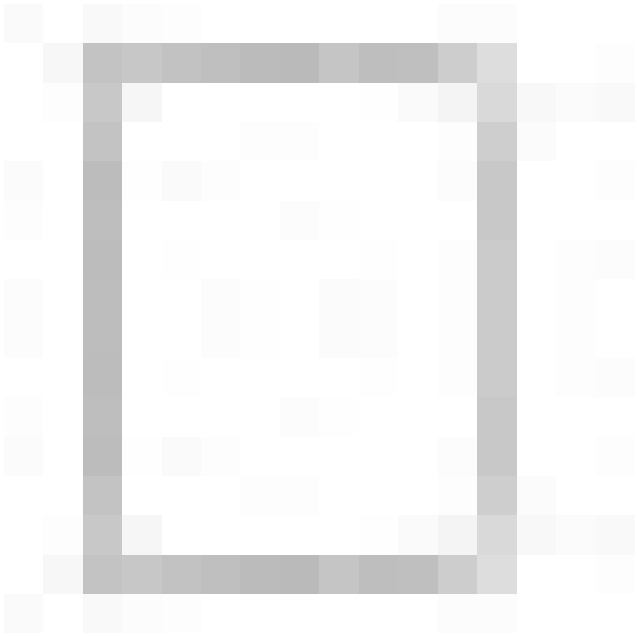
35 Pausing there, on 24 th March, 2005, Mr Walsh had had a telephone conversation with Officer B, principally about payments to his builder. However Officer B's note of the conversation also included the following:_

> *"NB £1.6 million will be coming in from one of his IoM companies (he will confirm which one) to fund £1.3 million needed for Peggy Fordham share purchase."*

Under the heading *"Follow-up action",* Officer B wrote *"Monitor receipt of funds."*

36 On 6 th April, 2005, Mr Walsh telephoned Mr English in response to a request from Mr English in an email of the same date. Mr English's handwritten note of the conversation read as follows:–

> *"GW called as requested.*
>
> *£1,649,585 received from Nolan Family Partnership*
>
> *Peggy Fordham deal is for £1,319,668*



Surplus of over £329,000

This surplus is to be used for trading with Arjent.

GW wants to treat the £1,649,585 from Nolan Family Partnership as an unsecured interest free loan for the time being. They are old business partners of his who will receive a share of future profits/investment returns. GW would not go into further detail on this but mentioned that he would explain it in more detail to Jane.

GW asked that this be kept confidential from John Handley — at the request of the Nolans."

On 12 th April, Mr English emailed Mr Walsh saying:–

> *"We believe it prudent to formally record the terms of the loan received from the [NFP] by [BHL] on 31st March, 2005, in the sum of £1,649,585 by way of a loan agreement, especially considering the sum involved.*
>
> *As such I should be grateful if you would provide us with full contact details for the NFP.*
>
> *I understand the loan is unsecured, interest free and repayable on demand."*

Mr Walsh did not respond to this request, so Mr English sent a chasing email on 21 st April. The following day Mr Walsh telephoned Mr English. The latter's note of the conversation read as follows:–

> *"GW called regarding the monies received from the [NFP].*
>
> *He does not wish us to put in place a loan agreement as it is a short term loan which is to be repaid by way of shares in Elision … similar to Martial Chaillet scenario.* When BWL acquires Peggy Fordham's shares a defined amount (to be confirmed) are to be held under Dec of Trust for the [NFP]. (GW mentioned he would like them to be held by [ANL] — although I am not sure how we could manoeuvre the shareholding given the pre-emption rights).
>
> *RE agreed to liaise with David Kinch of Edwin Coe in due course to put in place the necessary paperwork eg Dec of Trusts etc."*

Following this conversation, Mr English took the matter of a proposed loan agreement no further.

37 On 12 th May, 2005, the directors of BWL, namely Officer B, Mr Cordwell and Mr Nicolle, met to consider the Share Purchase Agreement. Officer B advised that the aggregate consideration of £1,319,668 would be less if other Elision shareholders took up some of the ordinary A or B shares under the preemption procedures. The meeting resolved that it was in the commercial interests of BWL to enter into the Share Purchase Agreement and also resolved that Edwin Coe be instructed to pay to Peggy Fordham's solicitors the £100,000 deposit required on exchange. The Share Purchase Agreement was signed the same day. On 13 th June the directors of BWL, namely Officer A, Mr Cordwell and Mr Nicolle, met again to consider the Share Purchase Agreement. The minutes of this meeting recorded that the sum payable to Peggy Fordham under the Share Purchase Agreement was £1,248,247.00, of which £100,000 had already been paid by way of a deposit. The directors approved the transfer of £1,148,247.00 to the client account of Edwin Coe by 23 rd June, being the date for completion of the share transfers.

38 Another shareholder, Mr Maurice Henchey, did indeed exercise his preemption rights and thereby acquired 18,538 B shares, so that BWL eventually received from Peggy Fordham 16,629 A shares and 146,879 B shares. Following the sale, it was necessary for BWL to exercise its option to convert the convertible loan stock into a further 147,000 B shares; this

process was not completed until 13 th September, 2005.

39 Meanwhile, on 25 th July, 2005, Mr Walsh had sent an email to Joan containing a statement of account in relation to the purchase of the Elision shares. He acknowledged receipt by BHL of £1,649,585, but detailed only 310,508 ordinary A and B Shares as having been purchased for the amount of £1,552,540 (the equivalent of £5 a share). Various charges for the fees of Edwin Coe (£23,523.50), stamp duty (£7,768.75) and a Buchanan Group administration fee (£1,995.00) were added, making the cost of the transaction £1,585,827.25 and leaving a balance of £63,757.75. The evidence before us was silent as to the reason for the figure of 310,508 shares; we can only assume that Mr Walsh had heard of Mr Henchey's exercise of his preemption rights. There was no written response from Joan to Mr Walsh's email, although she was in regular contact with him on the telephone.

40 A month later, on 25 th August, 2005, Mr English emailed Mr Kinch saying:_

> *"I understand that discussions have recently taken place with regards to the allocation of the Elision Group shares acquired by BWL from Peggy Fordham, more specifically with reference to the funding of £1,649,585 provided by the Nolan Family Partnership on 31st March, 2005.*
>
> *I look forward to receiving an update from you in this regard in order that we can correctly document this transaction."*

On 9 September Joan emailed Mr Walsh as follows:–

> *"We would like to tidy up legals and finalise investment in Elision.* I will confirm name of entity investing next week to you. During our meeting you mentioned we need to finalise this by 26th September, 2005."

On 16 th September Mr English sent an email to Mr Kinch, asking for a reply to his email of 25 th August.

41 On 22 nd September, 2005, PTCL couriered to Joan a Nominee Declaration dated 21 st September, 2005, according to which BWL declared that it held 17,500 A ordinary shares and 312,417 B ordinary shares in Elision as nominee for Joan. This was a total of 329,917 shares. Joan amended her address on the covering letter of 22 nd September, 2005, countersigned it and returned it to PTCL. On 3 rd November, 2005, however, Mr English emailed Mr Kinch in relation to the Nominee Declaration, pointing out that according to their records BWL was the registered holder of only 293,879 B shares in Elision, representing a shortfall of 18,538 B shares, and asking for Mr Kinch's comments. Mr Kinch responded by email on 9 th November, 2005, saying:–

> *"Not sure how the discrepancy arose but the figure in the declaration seems to include 18,538 shares that were acquired from Peggy Fordham by Merrill Lynch*

(or Maurice Henchey).

Assuming the original of the declaration has been sent to her I would suggest that a new declaration be prepared and sent to her making it clear that this supersedes the previous one and asking her to return that together with the copy passport etc you need for KYC purposes."

On 27 th January, 2006, BWL couriered a letter to Joan explaining that due to an administrative error the declaration of trust issued on 21 st September, 2005, was incorrect and enclosing an amended Nominee Declaration dated 26 th January, 2006. This Declaration confirmed that BWL held 17,500 A ordinary shares and 293,879 B ordinary shares (a total of 311,379) in Elision to her order. Joan again corrected the address on the signed letter of 27 th January, added the following handwritten note dated 7 th February, 2006:–

"Dear Sir,

Returned passport, KYC & utility bill

old declaration of trust

Regards,

Joan Nolan"

and returned the letter to Mr English.

42 In the meantime there had been a board meeting of BWL on 30 th January, 2006, attended by Mr Morgan, Mr Nicolle and Mr Cordwell, at which

(i) it was noted that BWL had agreed to sell 17,500 ordinary A shares and 293,879 ordinary B shares from its shareholding in Elision to Joan for a total consideration of £1,649,585.00, and this sale was ratified and approved;

(ii) it was noted that this shareholding was to continue to be held in the name of BWL but with a declaration of trust issued by the company in favour of Joan; and

(iii) it was resolved to ratify and approve the issuing of this declaration of trust.

43 Elision (as Arkaga Healthcare) went into administration on 10 th August, 2008, at which point the Nolans' shareholding became effectively worthless.

44 We now return to the £1,649,585 paid by the NFP into BHL's account on Thursday 31 st March, 2005. No inward receipt for this payment was disclosed or produced by Minerva, for reasons which Mr English was unable to explain. Nor did PTCL document the receipt of the

money until nearly a week later. The same day Ms Cappin emailed Officer B saying that Mr Walsh:–

> *"would like to know if £1.675 million has come into the [BHL] Account".*

The following day Officer B emailed Officer C asking her to:–

> *"arrange for BHL to lend BSL £1.5 million.* Funds should be transferred from BHL's RBSI account to BSL's account with BoS — Gerard has requested this be done today."

Also on 1 st April, Mr Walsh emailed Joan confirming the safe receipt of the money and saying that it would take about two weeks to process it.

45 The result of the NFP's payment was to take BHL's account balance from £73,260 to £1,723,563. Thereafter, in summary, PTCL paid £1,535,041 out of BHL's account on Mr Walsh's instructions within less than 24 hours of the Nolans' investment being received. The remaining £114,544 was paid out of BHL's account within three weeks (by 22 nd April). Of the £1,535,041 paid out of BHL's account by 1 st April, £1,500,000 was paid into BSL's account. This £1,500,000 was itself exhausted by payments out of BSL's account by 19 th May, 2005, including payment of a total of £1,081,115.78 to Arjent Limited ("Arjent"), a company of London stockbrokers, to which we refer again later in this judgment. Of the Nolans' investment only some £100,000, in the form of the deposit paid to Edwin Coe on 13 th May, 2005, was utilised in the purchase of the Peggy Fordham Elision shares. PTCL raised no query in relation to any of these payments.

46 Following the BWL board meeting on 13 th June, Mr Kinch emailed Mr Walsh the same day to inform him that the amount required to complete the Peggy Fordham transaction was £1,148,247 (including stamp duty). Mr Walsh forwarded the email to Mr English, again the same day, adding:–

> *"You can send instruction on this to Colin Mackie at HBOS*
>
> *He is already expecting it."*

Mr English duly sent the necessary instruction to make the payment from BSL's account. However the payment took BSL £46,056.74 over its overdraft limit of £1,750,000. It appears, therefore, that funding was not released from any sale of the Apple and Commerce Bancorp shares which had been bought through Arjent in April, as Mr Walsh had told PTCL would happen in order to allay PTCL's concern that there would not be funds to pay for the Peggy Fordham deal. The increase in the overdraft necessary to complete the deal was, it seems, arranged by Mr Walsh himself.

(2) Columba

47 On 30 th June, 2005, Mr Walsh met Joan and Patricia in a London restaurant. He provided Joan with a copy of a document dated 21 September 2004 and entitled *"Corporate Profile"*. It related to an Irish company called Columba, which had been founded in 2000 and provided management solutions for information retrieval. The document listed seven shareholders and said that Columba had a workforce of 20 employees. Mr Walsh told Joan that he had paid €7,000,000 for Columba, that he was willing to sell 25% at cost price, that he would invest this cash in the company and that this represented a fair market valuation of Columba for the purposes of any investment. A week later Ms Cappin emailed to Joan a *"Business Plan 2005–2007"* in respect of Columba. This projected a positive revenue stream by September/October 2005 and revenue of €20–30,000,000 in the medium term of three to five years; it also recorded that as of 20 th May, 2005, Columba was wholly owned by BHL.

48 In fact BHL had by a share purchase agreement dated 15 th May, 2005, bought the shares in Columba for €6, plus a so-called *"Earn-Out Consideration"* geared to pre-tax profits and limited to a maximum of €3,660,000. A meeting of the directors of BHL, namely Officer B, Mr Cordwell and Mr Nicolle, on 12 th May had authorised BHL to enter into this agreement. As Mr English confirmed in his evidence, Columba never made any pre-tax profit such as to trigger the Earn-Out Consideration.

49 On 1 September 2005 Mr Walsh sent Joan an email saying:–

> *"I confirm the proposal to sell 25% of [Columba] for a consideration of €1,748,000.* The shares are at present held in the name of [BHL] and will be transferred into whatever entity you nominate at your convenience."

Mr Walsh followed up the email with a telephone call to Joan to run through the offer. He confirmed what he had said at the 30 June meeting, namely that he had paid €7,000,000 for Columba and that the Nolans would be buying the shares at cost. Joan responded in an email to Mr Walsh of 9 September, saying:–

> *"(1) On Columba we do not have any information other than business plan and company profile.*
>
> *Is it possible to get financial information about the company (Profit & Loss and Balance sheet) before we make any decision.* We need to be [able to] verify that company has a net worth of approx 7 million."

In a telephone call to Joan after receiving her email of 9 th September, 2005, Mr Walsh led her to believe that Columba had been previously mismanaged, that its paperwork was not in order and that he did not have the information to hand, but would forward the information shortly thereafter. Notwithstanding this promise, nothing was in fact forthcoming from Mr Walsh.

On 16 th September, 2005, Mr Walsh emailed Joan again, saying:–

> *"On Columba, forgive me but I had taken it for granted you were going ahead with this at an earlier stage.* I had already allocated the shares. (However I can unwind this.) The Trustees will need to know by next Wednesday if you intend to proceed. Incidentally the company had taken off like a rocket."

50 On 22 nd September Mr Walsh emailed Joan giving her the bank account details of BHL at RBS International, St Helier branch. By the letter of the same date couriered to Joan, PTCL also enclosed a Nominee Declaration acknowledging that BHL held 202,839 ordinary shares of €0.126973808 each in Columba as nominee for Joan. On 3 rd November there was a meeting of the directors of BHL, namely Mr Morgan, Mr Nicolle and Mr Cordwell. The minutes recorded that BHL had agreed to sell 25% of its shareholding in Columba to Joan for €1,748,000. The meeting resolved to ratify and approve the sale and the issuing of a declaration of trust in favour of Joan in respect of the shares.

51 Sometime after receiving the Columba proposal from Mr Walsh, Joan posted it on to Chancery Trustees and she discussed it with Mr Taylor by telephone. She informed him of what she had discussed with Mr Walsh. Chancery Trustees then decided to recommend the investment to Serene and on 20 th October, 2005, Serene paid €1,748,000 to BHL for the 202,839 shares. The same day Joan, Patricia and Elizabeth had a meeting with Mr Walsh in Dublin. During the meeting Mr Walsh commented that as yet he had never had any failed investment, that all his investments made an internal rate of return ("IRR") of 30% and that he rolled over his investments after three years. He also said that any investment involving the Nolans would be non-risky and he guaranteed a full return of their money plus an IRR of 30%.

52 As Joan said in her witness statement:–

> *"[The Columba] investment was made when we had already been investing with Mr Walsh since 2002.* We had grown to trust him almost completely. As far as I was concerned, Mr Walsh had been providing outstanding performance and valuations on the Elision and Entara investments. It all looked wonderful. Mr Walsh seemed to have all the trappings of success and a man with great business acumen. He also appeared to us to genuinely have the Nolans' interests at heart. For example he would say that the shares he offered us were at a special and heavily discounted price than what they would be in the market price [sic]. And all because we were his close friends. Mr Walsh made us feel special that he had chosen to partner with us. At the time of the Columba investment, even though we had not seen a penny in real money returned, we really believed all he said to be true. I was not particularly experienced in investing at this level and I was entirely taken in by everything Mr Walsh said."

53 In fact Columba proved to be complete failure. As at 5 th September 2007, Kellykay valued BHL's shareholding in Columba at £500,000 in a presentation to BoS. But only four months later an internal, undated document entitled "Valuation of Columba Global Systems Limited

at January 2008", which according to Edwin Coe's letter of 1 st February, 2008, had "been prepared based on the financial performance for 2005 to 2007 and management's current strategy", said as follows:

> *"The entire equity of Columba is currently valued at nil, on the basis that, in each of the years 2005, 2006 and 2997, the company has traded at a loss; has negative cashflow; has not declared a dividend; and the balance sheet has net liabilities"*

of some £4,067,000. The document concluded:–

> *"Joan Nolan acquired 202,839 shares in Columba for a consideration of €1,748,000 on 20th October, 2005.* These shares are held under a declaration of trust in the name of [BHL]. This holding represents 24.999% of the issued share capital of Columba. The current valuation of this holding is nil."

It seems that eventually, and only after one of the Buchanan Group companies had loaned £2,500,000 to Columba (which loan was written off), a controlling stake in Columba was sold for €41,208. There is no evidence, or even suggestion, that any part of that €41,208 was paid to the Nolans.

54 Reverting to the €1,748,000 which Serene had transferred (via Chancery Trustees) to BHL's RBS account on 20 th October, 2005, no inward receipt for this payment was disclosed or produced by Minerva (as with the first Elision investment); again Mr English was unable to explain why. Nor did the relevant bank statement from RBS disclose the identity of the payer, although the outward payment confirmation generated by Serene's bank clearly did identify Serene. The €1,748,000 was not invested in Columba. Instead PTCL immediately utilised €1,479,600 to pay £1,000,000 into BHL's RBS sterling account. On Ms Cappin's instructions in an email of 20 th October, the £1,000,000 was then paid into BSL's BoS account, where it had the effect of reducing BSL's overdraft from £2,090,060.88 to £1,090.060.88.

55 In compliance with Mr Walsh's instructions, PTCL paid out the remaining €225,495 from BHL's RBS account (including a payment of €22,000 to an Irish garage in respect of the purchase of a new car for Mr Walsh's children) over the next two months, so that by 30 th December Serene's investment had all been disbursed. Of the £1,000,000 transferred into the account of BSL and paid away by PTCL on Mr Walsh's instructions, £69,228.41 went to Irish solicitors in connection with the acquisition of a property in Ireland and £210,000 went to Edwin Coe as a 10% deposit on an apartment which BHL was buying for Mr Walsh at 58 Eaton Square, London. Again PTCL raised no apparent query in relation to any of these payments.

(3) Echemus

56 On 25 th October, 2005, Mr Walsh rang Joan and explained on the telephone the

mechanics of an investment in Echemus, a company that was to specialise in funding and managing large commercial claims through the litigation process. Mr Walsh explained how the company would operate and suggested an investment of £3,000,000 from the Nolans.

57 On 2 nd November, 2005, Joan received from Mr Walsh via email a PowerPoint presentation described by him as *"the up to date executive summary"*. In addition, and posted on or around the same date as the email, an advance draft private placement document dated 20 th October, 2005, arrived in the post. Both the PowerPoint document and the private placement document stated that the company was looking for a £10,000,000 cash injection and that by year seven the company would make an annual profit of £50,000,000. The PowerPoint presentation described Mr Walsh as a founding team member, a venture capital investor, and chairman and chief executive officer of Elision Group, who possessed a track record of successful investment in numerous entrepreneurial start-ups. The private placement document suggested a minimum investment of £2,500,000 for a 25% interest in the venture.

58 On 5 th January, 2006, Joan spoke with Mr Walsh on the telephone. He proposed revised terms for the Nolan family's investment in Echemus, to the effect that the total investment required was now only £6,000,000, of which the Nolan family would provide £2,000,000 in cash and Mr Walsh the other £4,000,000 in cash, with the shares to be issued in March. Thereafter Joan discussed these details with Chancery Trustees. Joan informed Mr Taylor of Mr Walsh's revised proposal and Mr Taylor was happy to proceed. Chancery Trustees therefore recommended the investment to Serene.

59 On 16 th January, 2006, Ms Cappin emailed Joan with BSL's BoS banking details. The same afternoon Mr Taylor confirmed to Joan by telephone that Serene had made a payment of £2,000,000 and Joan in turn confirmed this to Ms Cappin by email, advising that the payment was referenced *"Serene".*

60 In a telephone call on 24 th January, 2006, Mr Walsh informed Joan that shares in respect of the Nolan family's one third shareholding in Echemus would be issued in March. Echemus Holdings Limited was incorporated in Jersey on 3 rd February and the inaugural board meeting of the company was held on 9 th February. Thereafter during conversations and meetings throughout 2006 Mr Walsh assured Joan that the Echemus project was progressing well. At a meeting on 4 th December at the Four Seasons Hotel in Dublin, Mr Walsh told Joan and Sally that the share certificates were being issued. Previous assurances from Mr Walsh to the same effect had been given on no less than five occasions between June and November 2006. On 12 th March, 2007, however, at a meeting at the Great Southern Hotel in Dublin, Mr Walsh told Joan and Patricia that the project would not be proceeding since there were problems with acquiring the necessary trading licence and that the insurance companies' requirement for reserves was too high. He promised to return all monies which had been invested by the Nolan family by the end of April 2007 together with interest. He did not do so.

61 The £2,000,000 was recorded on an inward receipt of PTCL initialled by Mr English. The payer was given as Serene and the narrative described the payment as

> *"Loan from BHL, received in from BHL as shareholder loan from Trustees (following the sale of NY Stock Exchange shares by Serene Investments Ltd*)".

BSL's statement with BoS recorded the payer as Ravenscliffe Serene Investments Limited.

62 The immediate effect of the payment was to reduce BSL's overdraft from £4,833,842.78 to £2,833,842.78. In summary, Serene's £2 million payment was thereafter disbursed within two weeks for BSL's benefit and not for investment in Echemus; the payments out included maintenance charges in respect of the Eaton Square property and £75,000 to Mr Walsh to pay for three paintings. As with the previous two investments, PTCL raised no query in relation to any of these payments.

(4) First German nursing homes

63 In about December 2005 Mr Walsh first mentioned to Joan the idea of a property-based investment and she expressed an interest in discussing the idea further. Mr Walsh then sent her a private placement memorandum for ARIL. The following month a further discussion took place between Mr Walsh and Joan and it was agreed that a property company would be set up and owned by Mr Walsh and the Nolan family on a 50–50 basis. Also in January 2006, Mr Walsh spoke about an opportunity which he had come across to invest in nursing homes in Germany. As Mr Walsh described the investment, the cost was to be €42,500,000 with each party injecting cash of €4,250,00 and both parties being equal partners. Mr Walsh confirmed that he would organise the borrowing, with the funding to be at 0.75% over the European Central Bank lending rate.

64 On 24 th January, 2006, Mr Walsh told Joan by telephone that the purchase of the nursing homes was due to be completed by the end of February. He repeated the 50–50 scenario and said that the value of the properties had already increased. The following day Joan met Mr Walsh; again it was clear that the arrangement would be 50–50 and that each party had to inject their €4,250,000 in cash. It was at this stage that Joan discussed with Mr Walsh the possibility of the NTRBS making the investment.

65 On 7 February 2006 Joan requested financial information on the nursing homes from Mr Walsh and he replied the next day, saying:–

> *"There is a substantial analysis on this, I will send by courier."*

Shortly afterwards Mr Walsh couriered Joan a document entitled *"Investment Plan December 2005"* which set out a proposal to acquire the two nursing homes based on 90% bank borrowings. The intention was to purchase two properties for €39,600,000 (totalling €42,496,000 with legal and other costs), which would then be leased back to the vendor at

an annual rent of €3,852,000. As the Plan explained:–

> *"…Arkaga plans to procure €38,246,400, representing 90% of the total asset (including ancillary costs) in debt financing for the purchase of these facilities.* Assuming a lending rate of 4.0%, this property will generate initial monthly before tax cashflows (BTCF) of €103,073 providing the lender with a debt service coverage factor of 1.56. The rental income will generate a return on total assets of 8.07%."

The Plan reiterated that:–

> *"The loan to value ratio of 90% on the above borrowing terms has been selected as the project will generate positive before and after cashflows at this level.* It also provides a debt service coverage factor of 1.56."

On 22 nd February, however, Joan discussed the borrowing ratio with Mr Walsh and it was agreed that the project would proceed on the basis of 80% borrowing, not the 90% that was detailed in the Investment Plan. Finally, in an email of 2 nd March to Joan Mr Walsh again confirmed that the investment would be a 50–50 joint venture between the Nolans and the Arkaga Fund. He also set out the details of BHL's RBS Jersey account into which the Nolans' subscription should be paid.

66 Meanwhile on 16 th February, 2006, Mr English had emailed Mr Little saying:–

> *"I have received your voicemail message reference the funding requirements for the Euro loan re the acquisition of nursing homes in Germany.*
>
> *I look forward to receiving the proposals from you in order that we can discuss."*

Mr Little responded the same day attaching a copy of the Investment Plan.

67 Joan spoke to the other trustees of the NTRBS about these discussions and on 3 rd March, 2006, the trustees decided to proceed with the investment and to transfer the funds. Accordingly the same day the NTRBS transferred €4,250,000 into BHL's RBS account in Jersey. After deduction of an inward payment charge, the sum credited was €4,249,989.26.

68 On 14 th March, 2006, Mr Little instructed PTCL to form ARIL as a Jersey limited company, wholly owned by BHL. PTCL applied to register the name with the Jersey Financial Services Commission ("the JFSC") the next day and applied for incorporation on 17 th March. The inaugural meeting of the company took place on 21 st March; Mr Cordwell, Mr Nicolle, Mr Morgan and Mr Little were appointed as directors. On 24 th March Joan emailed Mr Walsh asking various questions as to how the investment was to work. Mr Walsh replied on 28 th March by forwarding an email from Mr Little. Mr Little's email read, in extract, as follows:–

"In practice, Gerard and the Nolans will have proportional shares in the fund depending on their investments, and the fund in turn will own the exact same stakes in each company it sets up to invest in an individual property, or group of properties."

69 On 28 th March, 2006, Mr David Hayes of the Arkaga Fund emailed Mr English about the German lawyers' requirements to incorporate ARIL's German subsidiary, requesting €26,000 of which €25,000 was required by way of equity. The following day Mr English replied that:–

"as of today [ARIL] has no cash so we are unable to arrange for the transfer of €26,000 at this time."

Mr Hayes suggested that BHL make ARIL an inter-company loan and Mr English duly arranged for the payment of £20,000 from BSL's BoS account to BSL's RBS account, to be forwarded in turn as a loan to BHL and thence to ARIL. Also on 29 th March, Mr Nicolle executed a power of attorney confirming the German lawyers' authority to establish Arkaga GmbH using the funds sent to them. The board of Arkaga GmbH, consisting of Mr Denis O'Sullivan and latterly Mr Dermot Killeen, was provided by Kellykay, not PTCL.

70 Some months later, on 17 th August, 2006, Mr English emailed Mr Walsh as follows:–

"The amounts received by BHL from Nolan Transport reference the German property transaction in Arkaga GmbH are as follows:–

30.06.2006 £500,000

30.06.2006 £1,656,987.41 (being the equivalent of €2,399,980.56)

Total: £2,156,987.41

Could you please confirm that this is indeed the correct amount to be attributed to their 50% stake in Arkaga Realty."

Mr Walsh replied the same day saying:–

"No the 1656,987 was for Germany, the balance was for Irish Bio ethanol and Big Ferries.

However there was an earlier sum equivalent to 2 million euros."

Mr English's note of his subsequent telephone conversation with Mr Walsh on 17 th August read:–

"Amounts of £2,909,947.98 + £1,656,987.41 received from Nolans on 3/3/06 and 30/6/06 respectively are to be the cost of the shares acquired by Nolan

Transport."

The following day there was a meeting of the directors of BHL, namely Mr Nicolle, Mr Morgan and Mr Cordwell, at which it was recorded that BHL had received an offer to sell 50% of its shareholding in ARIL to Nolan Transport for £4,566,935.39. The meeting resolved to approve the sale and the same day Mr English wrote to Mr Walsh enclosing a share certificate for 5,000 ordinary £1 shares in ARIL, representing 50% of the issued share capital, and asking Mr Walsh to hand the certificate to Joan when they met on 21 st August.

71 Mr Walsh duly handed the letter and the certificate to Joan at the meeting. Joan immediately pointed out to Mr Walsh that the certificate had been made out to the wrong organisation; the certificate should have been in the name of the NTRBS, not Nolan Transport. Mr Walsh said that he would sort the problem out. Because the certificate had been made out in the wrong name, Joan did not respond to the request in the final paragraph of Mr English's letter for documents required for KYC purposes, or to Mr English's subsequent reminders.

72 At some stage in 2006 (the documents did not disclose precisely when) it seems that the terms upon which Arkaga GmbH purchased the nursing homes changed and 103% of the value of the two properties was borrowed from BoS. In late August 2006, through conversations with Mr Walsh, Joan understood that the financing arrangements for the nursing homes had been altered from the agreed 80% bank funding to 88%. This was in excess of what was allowed by the NTRBS and the monies invested by the NTRBS had to be refunded before the year end. The monies were refunded to the NTRBS by Serene on 27 th October, 2006, and Serene was substituted as the investor in the first German nursing homes scheme.

73 On 17 th November, 2008, Mr Taylor wrote to Mr Nicolle requiring that he should be appointed as a director and chairman of both ARIL and Arkaga GmbH. Having emailed Mr Walsh for his views, Mr Nicolle replied to Mr Taylor on 24 th November refusing his request in respect of ARIL. During December 2008 Serene made an application to the court in Frankfurt with a view to removing Mr O'Sullivan and Mr Killeen as the directors of Arkaga GmbH and appointing Mr Taylor in their stead. On 16 th December the German court granted an interim injunction appointing Mr Taylor the sole managing director of Arkaga GmbH and revoked the appointments of Mr O'Sullivan and Mr Killeen.

74 Arkaga GmbH was described during the hearing as a zombie company; although it continues to trade, its debts exceed its assets and all its income goes to BoS. The notes to the financial statement contained in the accounts of Arkaga GmbH for the year ended 31 st December, 2011, described the company as being *"in a state of accounting insolvency"*. In short, we conclude that Arkaga GmbH has no value. ARIL's only asset was its shareholding in Arkaga GmbH. We were informed by Mr Santos-Costa that ARIL has been liquidated and that ARIL's shareholding in Arkaga GmbH has been transferred in some way to the Nolans. The end result is that for all practical purposes the Nolans' investment in ARIL has been

entirely lost.

75 PTCL's inward receipt dated 3 rd March, 2006, confirming the transfer of the €4,249,989.96 recorded the payer as Nolan Transport. The narrative read:–

> *"Unsecured interest free loan from Joan Nolan re (yet to be determined) investment."*

The Nolans' investment was the first payment into the account in question. A note made by Mr English of a conversation with Mr Walsh on 4 March 2006 read:–

> *"Treat as loan for time being.*
>
> *Purchasing share in various assets eg Agirx etc but not yet decided on proportions"*

but also included the further instruction from Mr Walsh to pay £2,750,000 to BoS. On 6 th March Mr Walsh spoke to Mr English on the telephone and instructed him to convert the entire balance into sterling and transfer it to BSL's sterling account, and to pay £150,000 to Entara. Mr English complied with these instructions on the same day; BHL's sterling account was credited with £2,909,947.98 and the payments were made to Entara and to BSL's BoS account. Following certain small payments out of BHL's account, on 30 th May, 2006, the account was in credit to the tune of £31.70.

76 At the time of the transfer of the £2,750,000 to BSL's BoS account on 6 th March, that account was overdrawn; the debit balance was £11,727,902.96, £1,727,902.96 over the overdraft limit of £10,000,000, as BoS had written to advise PTCL the same day. The £2,750,000 payment had the effect of reducing the overdraft to £8,992,330.61. Thereafter PTCL effected payments out of BSL's account in accordance with Mr Walsh's instructions, the effect of which was that within three months the overdraft on the account had returned to the same level as before.

77 The payments effected by PTCL included the following.

Yet again, with the exception of the enquiries made of Calmanx, all the payments out of BSL's account were made by PTCL without query. None of the Nolans' monies was used for investment in the first German nursing homes project.

(i) £13,000 was paid to London Place Maintenance Limited on 8 th March in respect of Mr Walsh's occupation of an apartment. Ms Cappin had emailed Mr English on 6 th March to request payment from BHL. On 7 th March Mr English emailed Calmanx for authority. He noted that various payments made to Mr Walsh had been recorded as loans and continued:–

> *"Obviously these should have been referred to the Trustees at the time.*

> *Going forward I would be more comfortable in running such future requests through yourselves for Trustee approval in the correct manner.* Now would present a good opportunity to put this situation right."

He therefore attached Ms Cappin's email requesting payment of the £13,000 and asked:–

> *"Perhaps you could confirm the Trustees are happy for us to effect such a payment from BHL, effectively for the personal use and benefit of GW."*

There is no evidence that Calmanx replied before PTCL instructed BoS the same day to pay the £13,000 as soon as possible.

(ii) A total of £240,000 was paid in respect of refurbishment works at 58 Eaton Square and a further £89,889.85 was paid to an interior designer in respect of work at the same property.

(iii) £150,000 was paid to Mr Walsh personally in three tranches of £50,000 on 3 rd April, 3 rd May and 24 th May. On 3 rd May Mr Walsh telephoned Mr English *"for a quick cash balance check"* and requested that PTCL consider transferring £50,000 to his personal account *"to meet various living expenses"*. The same day Mr English emailed Calmanx in respect of this request, referring to his email of 7 th March and asking for confirmation that they could make the payment. Calmanx replied on 5 th May instructing Mr English to pay £50,000 (less Calmanx's fees) to Mr Walsh by way of distribution. In fact, however, Mr English had already instructed BoS to transfer £50,000 to Mr Walsh's account on 3 rd May.

(iv) €150,000 was paid to solicitors in respect of the purchase of a property in Ireland.

(5) Second German nursing homes

78 Mr Walsh's associate, Mr Ronnie Monaghan, first mentioned eight further German nursing homes to Joan in late March 2006. On 5 th April Mr Walsh also mentioned them to her and on 7 th April he emailed to her details of the further eight German nursing homes " *we are proposing to acquire";* she gave a copy to the other trustees of the NTRBS. On 4 th May, 2006, she received an email from Mr Handley confirming the joint venture, stating:–

> *"I spoke to Gerard about the proposed "joint venture" between yourselves and Arkaga.* As I understand it, this will be involved in property investments throughout Europe. The first investment being the nursing homes in Germany and thereafter the properties in Eire."

79 On 12 th May, 2006, Mr Hayes sent Joan an email, copied to Mr O'Sullivan and Mr Walsh, outlining the manner in which this property fund should be operated. It was clear from this email that equal board representation was expected. Notwithstanding several requests for

information, company documentation and proper representation on the board, nothing was provided to the Nolan family. Mr Walsh told Joan on the telephone on 25 th May that he had now acquired the eight additional homes and that he would require further equity from the Nolan family (but not as much as the initial investment).

80 On 11 th June, 2006, at a meeting at the Four Seasons hotel in Dublin, Mr Walsh told Joan and Patricia that the additional eight nursing homes had been purchased. On 16 th June he sent an email to Joan, which read:–

> *"German GMBH: The acquisition of further nursing homes at a 9% yield in line with our strategy.* While we have instructed King Sturge to carry out a valuation on the existing we need to fast track the purchase as the demand is growing rapidly. Equity required is 4.8 million euros including expenses and duty. Fifty per cent of this equates to approximately £1.5 million pounds.
>
> ….
>
> *I hope this is ok, I need to move on Germany much quicker than planned as the competition has become very strong with a major deal done at 7%.* We were one of the first into this market but now everybody seems to want to get involved."

Joan passed this further information to the other trustees of the NTRBS by telephone. The trustees of the NTRBS made the decision to proceed with this investment and on 30 th June the NTRBS paid €2,400,000 into BHL's RBS euro account as a 50% contribution to the purchase price of the eight additional nursing homes. In fact, no additional German nursing homes were ever purchased.

81 PTCL's inward receipt dated 30 TH June, 2006, confirming the transfer of the €2,399,980.56, recorded the payer as Nolan Transport. The narrative read:–

> *"Unsecured interest free loan from Joan Nolan re investment in German property transaction through Arkaga Realty (exact split yet to be determined)."*

Mr English gave instructions the same day that the €2,399,980.56 should be converted into sterling and the converted sum of £1,656,987.41 was immediately transferred to BHL's sterling account with RBS. There it was added to the £500,000 that Bilberry and Serene had paid the same day in respect of the Big Ferries and Irish Bio-Ethanol investments, to which we turn below. It is therefore convenient for us to deal with the disbursement of these sums together.

82 PTCL immediately set about disbursing the Nolans' investments in accordance with Mr Walsh's instructions. £2,000,000 was transferred the same day to BSL's BoS account, where it was immediately absorbed into BSL's overdraft, reducing the overdrawn balance from £12,514,194.15 to £10,514,194.15. PTCL continued, however, to make payments out

of the account so that the overdraft rose to £12,338,332 by 15 th September, 2006. The payments included:–

The payments made by PTCL from the £155,064.35 remaining in BHL's account on 30 th June, 2006, again included £75,000 to Mr Walsh for his personal use, in instalments of £50,000 on 3 rd July and £25,000 on 24 th July. (Mr English only sought the trustees' approval of the £25,000 payment the following day and only received approval on 31 st July).

(i) £102,372.16 (€150,000) to solicitors in Dublin in respect of a property in Meath;

(ii) £75,000 to Mr Walsh for his personal use, in instalments of £50,000 on 1 st August and £25,000 on 14 th August (both without reference to the trustees); and

(iii) £6,235.69 to the Grosvenor Estate in respect of the Eaton Square property.

83 In summary, therefore, none of the monies advanced by the Nolans in respect of the second German nursing homes investment was used for the purpose for which they were intended.

(6) Big Ferries

84 In late 2005 and early 2006 the Nolan family was approached by two separate individuals to invest in two separate ferry companies. One was operating on the Swansea to Cork route and the other on the Dublin to Liverpool route. The Nolans informed Mr Walsh of these approaches and the Arkaga Fund became interested in the potential investments. A number of meetings and exchanges of emails ensued. Then on 30 th May, 2006, Joan spoke with Mr Walsh on the telephone about (among other things) the Big Ferries project; it was proposed that each party would invest £250,000.

85 On 16 th June, 2006, Joan received an email from Mr Walsh which addressed a number of the investments under discussion at that time. Mr Walsh's comments on the Big Ferries project were as follows:–

> *"Ferries: This project for now remains high risk as we have not completed feasibility, however Cork-Swansea seems the most interesting as there is tried and trusted management in place whether that is transferable or scalable to Dublin-Liverpool is something to be decided.* We are putting £500,000 into this for now and accordingly your proportion is £250,000. If the project [does] not pass feasibility we will return the subscription less expenditure."

It was Joan's understanding that it was only from this point onwards that any fees or expenses incurred would be split. Joan then spoke with Chancery Trustees about this investment by telephone and they recommended it to Bilberry (which had been set up

specifically for the purposes of the Big Ferries project); Bilberry later decided to proceed. Accordingly on June 2006 Ravenscliffe Limited transferred the sum of £500,000 to BHL's account at RBS, of which £250,000 was for this investment. The RBS' bank statement identified the £500,000 transfer as coming from Serene.

86 On 30 June 2006 Mr English emailed Mr Walsh as follows:–

> *"I can confirm that we have received the sum of £500,000 today from Ravenscliffe Limited reference Serene.*
>
> *To meet our legal requirements please could you confirm who Ravenscliffe are and what the funds represent."*

Mr English made a note on a copy of his email of his subsequent conversation with Mr Walsh. The note read:–

> *"30/6/06*
>
> *Per tel. with GW this money is from the Nolan's investment company Represents Joan Nolan's contribution (part) of the German property venture*
>
> *To be recorded as a loan from her for time being until exact portion of investment is decided and shares attributed accordingly."*

PTCL's inward receipt dated 30 th June recorded the payer as Ravenscliffe Limited and the narrative read:–

> *"Unsecured interest free loan from Joan Nolan re investment in German property transaction through Arkaga Realty (exact split yet to be determined)."*

Finally we refer to Mr English's exchanges with Mr Walsh on 17 August as set out in para.70 above.

87 We have already set out in paras.81 and 82 above how Bilberry's £250,000 was disbursed. None of the Nolans' monies was spent on the Big Ferries project.

88 For whatever reason, the Big Ferries project did not in fact proceed. At a board meeting of AHL (the directors being Mr Nicolle, Mr Cordwell and Mrs Pierre) held on 26 th October, 2007, it was resolved following the recommendation of the Arkaga Fund board:–

> *"to approve the cancellation of the Big Ferries Limited project, given both the significant funding that the project would require and also the fact that it did not form part of the Group's core investment strategy."*

(7) Irish Bio-Ethanol

89 During telephone discussions between March and May 2006, Mr Walsh told Joan that to produce bio-ethanol required a government licence. He also told her that he had a Polish licence and that the Irish government was currently inviting applications for licences in Ireland. On 4 th May, 2006, Mr Walsh sent Joan an investment plan entitled *"Renetech Ethanol — The Irish Opportunity"*. From reading this document Joan understood the following.

The business plan required a budget of €300,000 and six months for a verification process. The company was looking for an investment of €1,000,000 to €2,000,000, although it was not clear whether this was before or after verification, or what was on offer for the money invested. Joan sent the document to Chancery Trustees for their consideration.

(i) The business plan originated with a company, Renetech, which was involved in renewable energy technologies. It, and its shareholders, had approached Mr Walsh seeking equity injections into the business.

(ii) Renetech had an experienced management team, which had identified ethanol production in Ireland as an opportunity. The opportunity arose because of the Kyoto Protocol, European Directives, finite petroleum resources, and environmental pressures on the one hand, and the lack expertise, large scale plants and suppliers, but with a large Irish agricultural base (including sugar beet) on the other.

90 During the telephone conversation on 30 th May to which we have referred in para.84 above, Joan and Mr Walsh also discussed the Bio-Ethanol project. It was proposed that:–

It was mutually understood that the Bio-Ethanol project was solely Irish and conditional upon an Irish licence being granted. If no licence was granted, the funds invested would be refunded in full.

(i) the Bio-Ethanol project also would be a 50–50 partnership between Mr Walsh and the Nolans, if it proceeded; and

(ii) the licence for Ireland would be released in mid-July and would guarantee production rights for ten years. Mr Walsh intimated that the grant of the licence was certain because of his political connections.

91 In his email of 16 th June, 2006, Mr Walsh also addressed the Bio-Ethanol project, saying:–

"Renetech Ethanol and Irish Ethanol and subsidiaries: Our investment here is again 50/50 with you and we require £250,000 to fund this to become a "Live business". This is a very exciting opportunity and we are confident of obtaining a number of licences throughout Europe."

Following this email, Joan spoke with Chancery Trustees on the telephone about the Irish Bio-Ethanol investment; they recommended it to Serene who later decided to proceed with

it. Serene's £250,000 formed part of the £500,000 payment by Ravenscliffe Limited to which we have referred in para.85 above.

92 We have already set out in paras.81 and 82 above how Serene's £250,000 was disbursed. We should, however, record that in his statement Mr English said that the sum of £174,095.46 (€250,000) was paid to Irish Bio-Ethanol on 12 th July, 2006, by way of an initial loan.

93 Again the Irish Bio-Ethanol project did not proceed, apparently because the requisite exclusive licence could not be obtained.

(8) Second Elision

94 Throughout 2005 and 2006 Mr Walsh continued to provide what the Nolan family now know to have been misleading and grossly inflated valuations of Elision. So, for example:–

At a meeting in London on 21 st August, 2006, Mr Walsh told Joan that Elision was going to be sold.

(i) on 14 th April, 2005, Mr Walsh told Joan that Capita Plc was offering £30 per share for Elision, putting a value of £70,000,000 to £80,000,000 on the company;

(ii) in June 2005 Mr Walsh represented to Joan that Elision was worth in excess of £80,000,000 on the back of a KPMG valuation;

(iii) in April 2006 Mr Walsh represented to Joan in his Net Worth Statement that Elision was worth some £86,000,000, backed by the KPMG valuation and an offer from Xerox;

(iv) in a telephone conversation on 5 th April, 2006, Mr Walsh told Joan that Barclays Capital would have an indicative offer on Elision the next day and that really good things were going to happen for Elision in September 2006; and

(v) in May 2006 Mr Walsh confirmed to Joan that he had received an offer of £114,000,000 million for Elision from Barclays Capital.

95 Against the background of these valuations of Elision, Mr Walsh explained to Joan that he had decided to buy out all existing Elision shareholders except the Nolan family and in this regard the Nolans would be entitled to a pro rata percentage of the shares that he would buy via BSL. On 23 rd August, 2006, Mr Walsh advised Joan by email that BSL had subscribed for 811,492 Elision shares at £8 each and that the Nolans would be entitled to 17.8% of these shares, namely 144,446, for a total purchase price, inclusive of stamp duty and legal costs, of £1,171,247. Accordingly on 22 nd September Serene paid

£1,107,489.25 to BHL for the purchase of 144,446 additional shares; the balance of £63,757.75 represented the refund due to the NFP under the first Elision share purchase.

96 Meanwhile there had been a telephone conversation between Mr Walsh and Mr English on 19 th September, 2006. Mr English's note of that conversation read:–

> *"GW advised that we would be expecting monies from the IoM from the sale of certain investments.* Due into BHL. When received can we transfer to the loan a/c in BSL.
>
> *We also need to transfer £500k to Kellykay Ltd.*
>
> *RE enquired about the payment to Elision re the purchase back of the BHL share.* GW advised that this is to be funded from the new extended loan facility of £30m due to be in place by month end."

Under " *Follow-up Action"* the note added *"Monitor receipt of money into BHL."* The same day as Serene's transfer, Sally telephoned Mr English. The latter's note of the conversation read:–

> *"Sally Nolan called on behalf of Joan Nolan to confirm that the sum of £1,107,489.25 had been transferred value today to the a/c of BHL.* This is in connection with the purchase of Elision Group shares by Joan."

Mr English also spoke to Mr Walsh on 22 September. Mr English's note of this conversation read:–

> *"RE called GW to advise that £1,107,489.25 had been received by BHL value today from Joan Nolan ref Elision share purchase.*
>
> *GW will confirm the amount of shares to be allocated on his return to the office next Tuesday.*
>
> *In the meantime, can we please transfer £1m to BSL and offset against the loan facility with Bank of Scotland.*
>
> *£500,000 is due to be paid to Kellykay on Monday next week."*

PTCL's inward receipt dated 22 nd September in respect of the payment recorded the payer as Joan Nolan. The narrative read:–

> *"Unsecured interest free loan from Joan Nolan re further investment in Elision Group Limited (exact amount of shares to be attributed shortly."*

97 Moving forward a year, on 10 th October, 2007, Serene wrote to BSL in respect of the £1,107,489.25 second Elision investment pointing out that the 144,446 shares had not been transferred and requiring that the monies be returned, together with accrued interest. The following day there was a board meeting of AHL, the directors being Mr Nicolle, Mr

Cordwell and Mrs Pierre. The minutes recorded that the Nolans had requested the return of, among other things, their second Elision investment and continued:–

> *"It was further reported that following discussions with the board of Arkaga Fund, the [Group's] investment advisors, that:–*
>
> > *a) funds had been received from the Nolan Group in respect of … Elision … for a stipulated number of shares … being 144,446 … and as such IT WAS RESOLVED to acknowledge said investments to the Nolan Group by way of issuance of formal declarations of trust over the investments."*

On 12 th October, 2007, Mr Kinch sent an email to, among others, Mr English headed *"Serene -Arkaga healthcare shares charged to B of S"*. The email read as follows:–

> *"Dealing with the bank security question, I have prepared and attach a schedule showing the AHT shares charged to the bank already.* These were charged in January 2006 (9 months before further funds were received from [Ravenscliffe]) when the minority interests in it were bought out.
>
> *It appears that there are enough unencumbered shares to enable the shares they claim to be transferred to them (so we would not need the bank to release anything from their existing security), but we would need them to agree to not getting security over them as until now it has only been the shares held under the declaration of trust for Joan Nolan that have been excluded from the charge."*

Finally, the board meeting of BSL to ratify and approve the sale of the 144,446 shares to Serene took place on 26 th October, 2007, the directors present being Mr Nicolle, Mr Cordwell and Mrs Pierre, and the Nominee Declaration in favour of Serene was signed by Mr Nicolle and Mr English the same day. The Declaration was sent to Mr Taylor under cover of a letter dated 29 th October, 2007.

98 Immediately on receipt of Serene's investment PTCL complied with Mr Walsh's instruction to transfer £1,000,000 to BSL's BoS account. From the funds remaining in BHL's account, the payments effected by PTCL included a total of £100,000 to Mr Walsh and £3,150 to Ms Rachel Walsh to pay fees for her studies. After deduction of various other small charges, BHL's account was in credit to the tune of £4,251.75 on 31 st October. The effect of the transfer of £1,000,000 into BSL's account on 22 nd September was to reduce BSL's overdraft to £11,338,332.88, but by 26 th October payments made by PTCL out of the account had returned the overdraft to the figure of £12,372,962.12. In summary, none of Serene's investment was used to acquire further shares in Elision.

Events after September 2006

99 By the autumn of 2006 the Nolans' relationship with Mr Walsh was beginning to deteriorate. Despite his constantly telling the Nolans that all of their investments were going very well, they began to have genuine concerns about them. They had been continually chasing Mr Walsh for share certificates and other key financial information evidencing the various investments, but these had not been provided to them. Board representation and the promised control over some of the investments had not materialised and they had seen no return whatsoever on their investments. Accordingly Joan called a meeting with Mr Walsh on 14 th October, 2006, at the Nolans' offices in New Ross which she and Patricia attended. The purpose of the meeting was to discuss the problems and outstanding issues regarding the investments. Mr Walsh agreed to put in place a three month reporting procedure for all projects and to provide the Nolans with copies of all share certificates and other missing items for all investments.

100 Joan followed up the meeting with an email to Mr Walsh on 16 th October, 2006, asking him to action the various points they had agreed, but she did not receive a response. She sent him a further email on 23 rd November and Mr Walsh replied on 29 th November, stating that he was sorting matters out and asking if they could meet on 4 th December in Dublin. This meeting duly took place with Sally and Joan, and Mr Walsh said that all outstanding share certificates would be issued the following week. By the New Year, however, the Nolan family had still not received any information from Mr Walsh. Joan and Sally therefore discussed matters with Mr Taylor and it was agreed that he would write directly to BHL requesting the relevant documents.

101 On 18 th January, 2007, Serene wrote a letter to BHL which read as follows:

> *"BUCHANAN SMITH LIMITED–*
>
> *BUCHANAN HOLDINGS LIMITED*
>
> *The above companies are presently holding the following shares as nominees on behalf of either ourselves or to the order of the beneficial owner:–*
>
> *1. Echemus re purchase in January 2006 for £2,000,000*
>
> *…*
>
> *4. Columba re purchase in October 2005 for €1,748,000*
>
> *5. Elision re purchase in September 2006 for £1,107,489*
>
> *6. Renetech re purchase in June 2006 for £250,000*
>
> *Having reviewed the matter it is now the policy to ensure that all investments held by the company are held directly by the company in certified form.* I would therefore be grateful if you would arrange to forward."

The same day Bilberry wrote in similar terms in relation to the Big Ferries investment. Mr

English made certain annotations on the letter from Serene. He forwarded the two letters to Mr Walsh by email on 30 th January. On 9 th February he also forwarded them to Mr Kinch by email, saying:–

> *"Please see the attached letters from the Isle of Man "co investors" in various of the Arkaga Fund investments.*
>
> *Could you please arrange to draft a letter for us in response advising that we cannot simply transfer the shareholdings in the respective companies at this stage as there are pre-emption rights in place etc etc.*
>
> *I understand that Gerard has spoken to you in this regard."*

Five days later he emailed Mr Walsh again asking him to chase Mr Kinch and commenting that:–

> *"The Isle of Man firm who look after Serene are chasing me daily now and are becoming somewhat irate at my avoidance tactics!"*

102 On 28 th March, 2007, Mr Taylor emailed Mr English as follows:–

> *"The attached letter was forwarded to your office by mail on the 18th January.* A month later we had not received a reply and my colleague spoke to Sylvie Pierre who in your absence advised she could not locate the original correspondence and requested we forward a duplicate. This was forwarded by e mail on the 19th February. No response was again received and my colleague sent a reminder e mail on 2nd March. Copies of these e mails are below.
>
> *We received a reply by telephone from Sylvie Pierre on 6th March advising that she had not had time to deal with the matter and that as you were now back in the office it had been passed back to yourself.* Subsequently we tried to contact you by telephone but despite leaving numerous messages we were not given the courtesy of a response. Finally, I managed to speak to you on 15th March when you advised that in essence we should receive a letter which had been drafted by your lawyers early the following week. Today nearly two weeks later we are still waiting for that letter.
>
> *Would you please respond by the end of today confirming the reason for the continued delay and when we might be expected to receive a reply to our letter of nearly ten weeks ago."*

Mr English replied by email the same day, saying:–

> *"Thank you for your email.*
>
> *We continue to research our records in conjunction with our lawyers and will respond to you in more detail as soon as possible.* In any event we will write to

you formally by Friday of this week.

Please accept our apologies for the continued delay."

Two days later, on 30 th March, Mr English wrote to Serene as follows:–

"We refer to your letter dated 18th January.

Whilst we continue to review our records in respect of the list of investments you outline it is apparent that we do not currently represent or hold any interest for or on behalf of your company.

You mention your understanding that certain investments may be held to the order of the beneficial owner of your company. Perhaps you could evidence who the beneficial owner of your company is to enable us to undertake further investigation of your claims.

Should it be apparent that we are, as you indicate, acting as nominee for the beneficial owner of your company we would obviously require a written instruction from the beneficial owner before we were able to give effect to any transfer."

103 Mr Taylor replied by email on 2 nd April, 2007, saying:–

"Thank you for your letter on behalf of [BHL] the contents of which I am slightly concerned about as obviously several million in sterling and punts is now un-accounted for in the books of our client companies.

In this respect I attach on a spreadsheet the relevant details of the payments made which should hopefully enable you to easily and quickly pick up the various receipts at your end. These should be fairly self-explanatory however would you note that the £500,000 received in one payment in June 2006 was in respect of £250,000 for Serene & £250,000 for Bilberry Investments. This was in respect of Renetech and Ferry Investments respectively."

The attached spreadsheet identified, among others, the payments by Serene on 20 th October, 2005, (€1,748,000) and on 16 th January (£2,000,000), 30 th June (£250,000) and 22 nd September, 2006, (£1,107,489.25), and the payment by Bilberry on 30 th June, 2006, (£250,000). The following day Mr English replied by email explaining that he had been with a client on 2 nd April and that he would respond as soon as possible.

On 3 rd April, 2007, Mr Kinch sent an email to Mr English, responding to the latter's email of 9 February, as follows:–

"Attached is a draft letter to Serene. As discussed with Gerard it proposes that the shares remain where they are but that to the extent that they have an interest, it be dealt with by way of a declaration of trust.

Whilst there are pre-emption provisions in the articles of Entara, I am not sure of the position with regard to Echemus or Renetech as I have not seen their constitutional documents. Columba is set up I believe as a single shareholder company in Ireland so any change there would necessitate a change of that status. Elision Group does not have pre-emption in its articles any longer.

I have therefore deliberately avoided going into detail about each company. Let me know whether you think the attached will satisfy them."

Although Mr English had the draft letter to Serene retyped on BHL notepaper we accept Minerva's submission that on the balance of the admissible evidence the letter was probably not sent to Serene by BHL.

104 On 8 th April, 2007, Mr Taylor emailed Sally to report on a discussion which he had had with Minerva (as PTCL had become on 28 th February, 2007,). Then on 13 th April Mr Walsh telephoned Joan. Her note of the conversation recorded:–

"GW said Nolan's were going to make a lot of money from him as he is going to buy us out penny for penny. JN said to this it was difficult to know what he is talking about, as to date she had not seen any valuations, any documents re the Nolan investments or updates or anything else."

105 On 25 th April Mr Taylor wrote to Mr English as follows:–

"There obviously appears to be a level of miscommunication between our respective clients which needs to be settled and accordingly I would propose to resolve the various matters on an individual basis. In this respect the most simple to deal with initially should relate to the payment of £2,000,000 on 16th January, 2006, which was from Serene's perspective for an interest in Echemus Group. In the books of [BSL] this though has been recorded as a loan from "The Nolan Family."

There is an obvious discrepancy here and our client is agreeable that the easiest way to resolve would be for Serene to likewise treat [it] as a loan since the investment documents have still yet to be received. On this basis Serene now requests the repayment of this loan in full together with accrued interest to date."

Mr Taylor then gave the relevant banking details and concluded:–

"I would be grateful if you would confirm your agreement to the above and advise if the above is sufficient …."

106 By the end of May 2007, however, no reply had been received from Mr English. Joan had been trying to contact Mr Walsh by telephone at his office and also on his mobile phone for a number of weeks, but he had not returned any of her calls or messages. The Nolans

therefore instructed their Irish solicitors, Reddy Charlton McKnight, who on 31 st May wrote letters to BSL, BWL, BHL, Minerva Financial, Edwin Coe and Mr Walsh, requesting (amongst other things):–

> (i) repayment of the £2,000,000 paid by Serene in respect of the Echemus investment, adding that Mr Walsh had assured the Nolans at the meeting in March 2006 that this money would be returned if the project did not proceed;
>
> (ii) copies of all documentation relating to ARIL and the acquisition of nursing homes, including resolutions relating to the issue of shares, title to the nursing homes, amounts paid and any borrowings;
>
> (iii) transfer of Columba shares into the Nolans' name, rather than being held on trust;
>
> (iv) copies of all documentation relating to the first Elision investment, a nominee declaration in respect of the second Elision investment and transfer of their entire Elision shareholding into Joan's name, rather than being held in trust; and
>
> (v) return of the Big Ferries and Irish Bio-Ethanol investments.

107 On 5 th June, 2007, Joan received an invitation to the opening of the Arkaga Fund's new office in London on 14 th June. Joan, Richard and Mr Robert Doyle (Patricia's husband, who was employed as a projects manager) used the occasion to meet privately with Mr Walsh at Elision's offices in Bond Street. They requested all outstanding information, board representation and monthly management accounts as appropriate in relation to each investment. At the meeting, Mr Walsh referred to a *"divorce"* between the Nolans and him/Arkaga and said that if they exited from all their investments at that stage they would be €26,000,000 in profit, with an overall payment of some €44,000,000. Mr Walsh also said that not all the projects into which the Nolan family had invested had in fact taken off or been pursued and that he had €3,000,000 on deposit belonging to them. He agreed to send it back to them once costs and fees had been signed off and deducted. It seemed to Joan that the Nolans would at last receive the documentation they had been promised for so long. Joan and Mr Walsh arranged a follow up meeting for 26 th June to progress their discussions on the outstanding documentation and to discuss the buyout proposal.

108 On 6 th June, 2007, Mr English emailed Mr Walsh, copied to Mr Kinch, saying that Serene had been in touch again, both directly and through Reddy Charlton McKnight, and attaching copies of their five letters. He asked for the opportunity to discuss a suggested response. Six days later, on 12 th June, Mr English telephoned Mr Walsh. Mr English's note of the conversation read:–

> *"RE called GW reference the Serene Investments/Nolan/Reddy Charlton McKnight situation and the recent letters regarding the nominee shareholdings being issued in certificated form and return of cash.*

GW advised that he was meeting with the Nolans on Thursday of this week and that for the time being he would like us to take no action. Requested that we hold back and do not respond until he has discussed matters on a personal level with the Nolans."

109 On 22 nd June, 2007, Joan received a text message from Mr Walsh, which read:–

"Joan jason has worked out as follows total sums invested 18 million euro approx less echemus 3 million approx present day assessment of value in event of divorce 40 mill approx going forward no board presence on any investee co's major issue with george he feels nolans are too small and much too difficult to deal with."

The reference to *"40 mill"* when added to the €3,000,000 to be returned was broadly the same as the €26,000,000 profit figure Mr Walsh had given as a return on the Nolans' original investment (€18,000,000) at the meeting on 14 th June.

110 On 25 th June, 2007, Mr Taylor wrote a series of letters on behalf of Serene and Bilberry. The letter in relation to Echemus read as follows:–

"You have confirmed receipt of the funds by [BSL] and advised that they are recorded in the books of the company as a loan from 'The Nolan Family' pending instructions from the client. I presume that the term 'The Nolan Family' may be a generic term used in respect of the structures where the Nolan Family may have an interest as I would otherwise be slightly concerned that the loan was not recorded against the remitter investor.

The investment was conditioned on the company obtaining the appropriate licences which we understand were not obtained. Would you therefore please arrange for all funds plus accrued interest to date to be returned to ourselves …."

The letter in respect of Elision asked for the 144,446 shares to be transferred to Serene. That in respect of Renetech (Irish Bio-Ethanol) was in similar terms to the letter relating to Echemus and asked for all funds plus accrued interest to be returned to Serene. Finally Bilberry's letter likewise asked for the return of its £250,000 investment, but added:–

"I understand that there may be a small level of costs to be deducted from the sum to be refunded. If this is the case would you please forward the appropriate schedule and copy invoices so these can be reviewed and agreed."

The same day Mr Walsh texted Joan asking for a *"one to one"* discussion with her at a meeting planned for the following day.

111 On 26 th June, 2007, there was a telephone conversation between Joan and Mr English. Joan's note of the conversation read as follows:–

"Asked about documentation

He advised, his records confirm

1. Columbo [sic]: 25% Holding: 202839 shares with a declaration of trust by [BHL] with Joan Nolan.

2. Elision: 311379 shares, with a declaration of trust by [BHL] with Joan Nolan — off the top of his head — approx 15% shareholding

3. Arkaga Realty: 50% issued to Nolan Transport and 50% issued to [BHL] — they set up company and do admin — Gerard gave Joan Share cert at meeting last year

Have received monies but not aware of the correct allocation for:

1. 250K re Irish Bioethanol — unaware of what to do with funds — monies are sitting in [BHL] as they haven't been allocated as yet

2. 250K re Big Ferries — unaware of what to do with funds — monies are sitting in [BHL] as they haven't been allocated as yet

3. 2M Stg re Echemus: again unaware of what to do with funds — monies are sitting in [BHL]. He believes there is an issue with the license and monies are to be refunded — but again needs to be confirmed by Gerard

4. 1.1M Stg to [BHL] — thinks its to be allocated to Elision — but Gerard hasn't advised — therefore paperwork has not gone out

Normally Gerard advised how many shares are to be issued upon receipt of monies –

….

I asked him to e-mail through a schedule so that we can establish the paperwork that needs to be filled out/amended — He said fine — But he wanted to run it past Gerard in case Gerard has not told him on the receipt of some monies especially in relation to the Entara — I said ok and to email me in on the correspondence / advise.

Conversation was all very amicable."

Mr English on his own admission made no note of the conversation. He did, however, send her a schedule.

112 On 27 th June, 2007, Richard, Joan and Mr Doyle attended a meeting with Mr Walsh at Eaton Square. All four of them chatted briefly before Mr Walsh requested a meeting with Joan on her own. Mr Walsh and Joan went into the dining room where they spoke for about 15 minutes. It is the Nolans' case that in the dining room Mr Walsh offered Joan

€43,000,000 in settlement of all the Nolans' investments with him and Arkaga. Joan accepted the offer and they shook hands. Mr Walsh added that he wanted Mr Handley to handle the payment from his side because he understood all of Mr Walsh's tax affairs. Joan rejoined Richard and Mr Doyle in the living room and told them of the settlement; Mr Walsh went and returned with a bottle of wine and glasses, and made a toast to which they all drank. Two days later Mr Walsh texted Joan saying that the Nolans would do very well Ain this seperation [sic].

113 Since what was said at the meeting on 27 th June, 2007, is not directly relevant to the issues in these proceedings, we express our conclusion on the meeting here and now. We conclude that, despite Mr Walsh's subsequent denials, he and Joan did indeed agree on a figure of €43,000,000 by way of an overall settlement. We accept Joan's evidence about the meeting, supported as it is, in our view, by the following:–

That said, equally we have no doubt that Mr Walsh knew at the time that he did not have €43,000,000, or anything close to that sum, to pay to the Nolans (as indeed Mr Nicolle confirmed in his oral evidence) and that the agreement was, therefore, one which Mr Walsh would never have been able to fulfill.

(i) what Mr Walsh had said at their earlier meeting on 5 th June and by his text message to Joan on 22 nd June;

(ii) Joan's letter to Mr Handley of 4 th July, in which she said:

> *"As you are aware we had a meeting with Gerard on 27th June to discuss our investment portfolio.* At the meeting it was resolved and considered to be in the best interest of all for Nolan's to divest themselves from all of their involvement in Gerard's companies.
>
> *In summary, Nolans will release our interest in seven different companies, being Elision Group Limited, Entara Limited, Columba Global Systems Limited, Irish Bioethanol Limited, Big Ferries, [ARIL] and Echemus Holdings Limited.* Funds were made available for investment in these companies through Nolan Transport …, Joan Nolan and Serene … We are aware that funds made available for investment in relation to a number of these companies have not, in fact, been invested and are retained on deposit account. At our meeting, it was agreed that a figure of €43,000,000 will be paid in full and final settlement of any claims between Nolans on the one side and Gerard and his companies on the other. It was also agreed that you would act for Gerard in implementing this agreement;"

(iii) Mr English's note of his conversation with Mr Handley on 5 th July, which read:–

> *"JH called reference the current position with the Nolans.*
>
> *GW is trying to resolve by offering the Nolans a lump sum of cash to exit*

from all of their joint venture investments";

(iv) Joan's response on 10 th July to Mr Handley's email of the same day, in which she pointed out to him that his email omitted any reference to her letter of 4 th July, and in particular that the Nolans had *"accepted a settlement offer from Gerard Walsh of 43M";* and

(v) Richard's letter to Mr Walsh of 13 th September in which he wrote:–

"to remind you of our agreement of €43m in full and final settlement for all our investments with you.

This agreement was reached with Joan first and then with Joan and myself at a meeting in your house in Eaton Square on the 27th June, 2007."

114 Reverting to the history, on 6 th July, 2007, Mr Handley met with Joan to discuss the implementation of the settlement agreement and the mechanics of the payment of the €43,000,000. On 10 th July Mr Handley emailed Mr Walsh, copied to Joan, as follows:–

"In advance of meeting tomorrow at 11, I thought I would set out where I think we are in the process of "divorce."

I have a schedule of payments made from the Nolans and also one of receipts prepared by Rob English in Jersey. Most of the entries tie in but there are a few differences which I need to resolve. The comparative figures are as follows …

He then set out the figures and continued:–

"As we know, the documentation regarding these investments is not complete in all case. In particular, as I understand it, the monies into Echemus, Irish Bio-Ethanol and Big Ferries has simply been held on deposit in Jersey.

….

I know that the Nolans are keen to get some cash as soon as possible. Is it possible to get those monies returned that have yet to be invested — as mentioned above?"

Joan replied the same day as set out in para 113(4) above. At the meeting on 11 th July Joan reiterated that a settlement of €43,000,000 had been reached on 27 th June. On 6 th August Mr English emailed Mr Taylor, saying:–

"Further to our earlier discussion I can confirm I am in the process of tying up figures for three transfers in particular, these discussions are through John Handley at the moment."

On 29 th August Joan received Mr Handley's valuations. Although these valuations were

irrelevant so far as the Nolans were concerned because of the agreed settlement, the family was extremely alarmed by the very low figures.

115 By September 2007 certain of the Buchanan Group companies were on Minerva's internal watch list. This meant that the files of the relevant companies would be subject to heightened supervision and ongoing review by the directors and the compliance officer of Minerva at regular management and board meetings until the issue or concern had been satisfactorily resolved. On 4th September Joan, Richard and Mr Doyle met Mr Walsh and others at his offices in Bond Street. Joan understood that the purpose of the meeting was to receive payment of the €43,000,000, but instead Mr Walsh denied having reached any agreement at the meeting in June.

116 On 17 th September, 2007, Mr Taylor emailed Mr English under the heading *"Serene Investments"* asking for an update and saying:–

> *"In the meantime we are looking for the immediate return of the cash held in respect of investments that did not proceed.* I am not sure why there appears to be a delay in this as I think it is clear that the investments have not proceeded and that accordingly the companies you manage have no interest in the funds. I am not therefore clear why they continue to retain the funds of "our" clients and I am beginning to get alarmed that the reason for the non return is that the companies do not have sufficient funds to return the monies."

The same day Mr Taylor wrote on behalf of Serene and Bilberry to Mr English at Minerva Financial as follows:–

> *"In my capacity as a director of the above companies which are administered by ourselves I wrote to you on the 25th June in respect of funds paid across to companies that are managed and controlled by yourselves.*
>
> *To date we have received no formal reply although we did speak briefly earlier this week after I contacted you by telephone.* This lack of response is causing me concern and it appears to be an ongoing difficulty.
>
> *I am disturbed and now seriously concerned that companies administered by Minerva have received funds in respect of investments and these investments have not proceeded, yet the companies continue to retain these funds.* It is now imperative that the funds are returned immediately. The Companies Minerva controls have no right, interest or lien over these funds and I believe that the continued retention of the funds when yourselves and the companies have been put on notice is a potentially actionable matter.
>
> *This is a matter that I wish to resolve urgently since, as directors of the relevant companies it is incumbent on us as directors to ensure that the positions of the companies and also ourselves are protected.* Equally I presume Minerva is concerned that it is managing and controlling companies that are retaining funds they have no right to and accordingly Minerva having been put on notice

may have to consider whether they are [placed] in the position of a constructive trustee."

Mr English immediately forwarded Mr Taylor's two letters to Mr Mark Stuart-Smith, the chief financial officer of Kellykay, and Mr Handley, saying:–

"The amounts I believe they are seeking to be repaid immediately are as follows:–

£2,000,000 reference Echemus

£250,000 reference Irish Bio- Ethanol

£250,000 reference Big Ferries

Given the nature of the letter and indeed the verbal comments made to me by Serene last week I believe we should repay the above sums now …"

117 Mr Taylor sent a chasing letter to Mr English on 19 th September, 2007, adding:–

"It is our considered view that the retention of these funds is an actionable matter and hence we insist you resolve it at once."

Mr English replied the next day in these terms:–

"We acknowledge receipt of your letters dated 17th and 19th September, 2007, however do not understand why you are addressing said letters to Minerva Financial Services Limited.

Minerva have not received any monies directly from either Serene Investments Limited or Bilberry Investments Limited and we therefore refute the possibility that we are acting as constructive Trustee.

We would suggest that any and all correspondence on this subject be addressed to the respective companies to which any funds have been paid as was the case with your letters dated 25 June and 18 January."

On 24 th September there was a board meeting of BHL, the directors present being Mr Nicolle and Mrs Pierre. The minutes (drafted by Mr English) read as follows:–

"The Chairman reminded the Meeting that [Serene] and [Bilberry], together with their principals, being members of the Nolan family (together the "Nolan Group") had undertaken various investments into certain of the Company's (and its sister companies') investment projects.

Certain of these investments, namely £250,000 for a stake in Big Ferries Limited, £250,000 for a stake in Irish Bioethanol Limited and £2,000,000 for a stake in Echemus Holdings Limited had not been formally documented by way of share certificates or declarations of trust confirming ownership and these

investments were now subject of a dispute, with the Nolan Group having understood that the said projects had not proceeded and as such they have demanded the return of their full investment capital for each of the projects."

The minutes then referred to the letters and continued:–

"IT WAS NOTED that a meeting had taken place in London on 4th September, 2007, between officials of the Arkaga Fund, members of the Nolan Group and John Handley, who had been appointed to value the Nolan Group's investments. The valuation sought to provide a means of agreeing an overall value of the Nolan Group's interest, however it is reported that no agreement was concluded….

IT WAS RESOLVED to ratify approve and confirm the instructions issued to the Company's lawyers, Edwin Coe LLP, to assist the Company in respect of the Nolan Group's claims by way of reviewing and advising on all correspondence both incoming and outgoing on the subject of the Nolan Group's claims, this in association with other companies in the group.

After due discussion IT WAS RESOLVED to authorise P J Nicolle, director, to sign a letter to DFK Chancery Trust dated 24th September 2007 in the form of the attached, as vetted by Edwin Coe LLP."

118 The letter of 24th September, 2007, signed by Mr Nicolle, was headed "Serene Investments Limited/Bilberry Investments Holdings Limited/Ravenscliffe and related persons and entities (together the "Nolan Group")". The letter read:–

"In response to your letters of 25 June, 17 and 19 September.

…

Additionally, turning to the particular substance of your letters of 17 and 19 September which refer back to 3 specific letters of 25 June which concern investments made by Serene and Bilberry in 3 projects, ultimately known as:–

Cork/Swansea Ferries aka Big Ferries Limited — £250,000

Irish Bioethanol Limited — £250,000

Echemus Holdings Limited -£,2,000,000

Firstly, we can confirm that, contrary to what you state in your letter, all 3 of these projects did in fact proceed to varying levels of completion although ultimately all 3 have been unsuccessful in reaching the intended outcome…

It is our understanding that the investments in each of these 3 projects was made on a 50/50 basis between Serene and Bilberry and our Group and therefore we have instructed independent auditors to carry out an audit of the expenses incurred on each of the 3 projects. This will provide independent

confirmation of the amount paid out and we will send you a copy of them as soon as they are available *so that we can agree the basis, quantum and timing for the return of the balance of the monies invested by Serene and Bilberry.*

Consequently, we are not in a position to immediately return all of the money from Serene and Bilberry that was invested in these 3 projects as a proportion of it has been correctly and appropriately expended in pursuing each of the 3 projects to their current positions."

119 Mr Taylor replied on 5 th October, demanding in particular the return of the £2,000,000 investment in Echemus. He also again threatened legal action, as follows:–

"Quite separately from the matter of the agreement there would appear to be no dispute over the ownership of the investments referred to in the opening paragraph of your letter and yet Buchanan Group continues to hold them in its own name despite having no right, interest or lien over the relevant assets. This we consider to be seriously prejudicial to Serene and accordingly it is the intention of Serene to take formal action to recover the assets if they are not returned within 10 days of the date of this letter. For the absence of doubt formal letters in this respect will be issued separately from Serene.

For the avoidance of doubt would you please note that such action will be against the companies in their own right, the directors of those companies (as we are of the opinion that they have not acted in accordance with their directorial responsibilities) and Minerva Financial Planning Limited as administrators of the companies.

….

Finally I have previously alluded to potential liabilities arising as a constructive trustee and I would reiterate that in our opinion this remains a live issue and is especially relevant in respect of the funds received [for] shares in Echemus as outlined above."

He sent further letters on 10 th October, on behalf of Serene and Bilberry, to the directors of the Buchanan Group companies and to Minerva in which he threatened similar legal action against the same prospective defendants if the monies in question were not paid within seven days.

120 On 11 th October, 2007, Mr English on behalf of AHL wrote to Mr Kinch formally instructing Edwin Coe to act:–

"on behalf of this company and its various subsidiaries in respect of the claims by the Nolan Group against certain of our subsidiary companies relating to joint investment projects."

Following further exchanges in October, on 1 st November Edwin Coe wrote to Serene and

Bilberry, as follows:–

> *"We acknowledge receipt of your letters of 26 October.*
>
> *In the letter from [BHL] to DFK Chancery Trust dated 24 September 2007 there was an undertaking to pursue a course of action to ensure that your interests in certain investments of the Arkaga Fund were correctly reflected by the issue of declarations of trust and share certificates; to undertake a valuation of each investment; and to repay the unused balance of the sums you provided in connection with the three specific projects.* There was a commitment to report back by 31 October 2007, which we do as follows:–
>
> *…*
>
> *Independent valuations have been carried out on the three projects of the Cork/Swansea Ferries (a.k.a. Big Ferries Limited), Irish Bio-ethanol Limited and Echemus Holdings Limited.* We understand that investments in these three projects were made on a 50:50 basis. The net liabilities of these three projects is £1,193,703 (excluding the funding provided by yourselves), of which half should be borne by you or your associated companies. Of the original investment of £2,500,000, an amount of £1,903,148 is therefore due to [Serene] after deducting its 50% share of liabilities of £596,852. The formal report on the expenditure incurred on these projects is expected shortly. Once you have studied the report, we would be grateful if you would confirm you accept this sum in full and final settlement of all claims in respect of the original investment of £2,500,000 made in these three projects. We will then request our clients to transfer £1,903,148 to your account with [RBS]."

Six days later, on 7 th November, the minutes of a meeting of AHL, signed by Mr Nicolle, Mrs Pierre and Mr Cordwell, recorded as follows:–

> *"A copy of Edwin Coe LLP's letter to [Serene] and [Bilberry] dated 1 November 2007 having been circulated to the board … IT IS HEREBY RESOLVED to ratify and approve the contents of the letter, which it is noted the board had instructed Edwin Coe LLP to write on behalf of the Arkaga Group."*

121 On 7 th December, 2007, the Nolans' solicitors, Blake Lapthorn Tarlo Lyons ("Blake Lapthorn"), wrote to Mr Walsh stating that *"our clients are preparing proceedings against you and the rest of Arkaga"* if payment of the €43,000,000 was not made within 14 days.

122 On 8 th January, 2008, Edwin Coe faxed a letter to Blake Lapthorn. The letter was headed "The Nolan Family Partnership, Serene Investments Limited and Bilberry Investments Holdings Limited and Arkaga" and read as follows:–

> *"Thank you for your fax letter dated 20 December 2007 enclosing draft Particulars of Claim.* We note the identities of the Claimants.

….

Our clients are holding funds in relation to three projects which were agreed with your clients. They have not been used for purposes other than for which they were provided. We wrote to your clients on 1 November 2007 with details of the liabilities incurred in relation to those projects and invited your clients to agree the valuations so that the appropriate balance could be transferred to your clients account at the [RBS]."

The same day Mr English emailed Mr Michael Whitton of Edwin Coe reconfirming the instructions given in his letter of 11 th October and adding:–

"I look forward to receiving a copy of your response to the latest correspondence in due course."

On 9 th January Edwin Coe faxed Blake Lapthorn to advise that they were also instructed on behalf of BHL, BSL and BWL. The same day Mr Whitton emailed Mr English attaching a copy of Edwin Coe's letter of 8 th January, which he described as:–

"a holding response I have sent to Blake Lapthorn Tarlo Lyons pending finalisation of the ongoing investigation into the various matters referred to in the draft particulars of claim."

123 On 15 th January, 2008, Blake Lapthorn responded to Edwin Coe's faxes of 8 th and 9 th January, saying:–

"We refer to the monies that your clients concede they hold on our clients' behalf. Our clients have no obligation to and are not prepared to agree the valuations that your clients have put forward. Nor do our clients agree that your clients are entitled to make the deductions that your clients propose. The deductions are clearly another matter of dispute between our respective clients but there is no reason why your clients cannot pay forthwith to our clients the sum that even your clients do not dispute is due to our clients….

… We trust that your clients will make immediate payment to our clients of that sum, together with accrued interest, by return."

On 31 st January Mr English was emailed a copy of a draft response to a further letter from Blake Lapthorn of 29 th January. The response proper was sent by Edwin Coe on 1 st February. It read:–

"The present position is that we are continuing to investigate and obtain our clients instructions in relation to the very wide ranging issues raised in the draft Particulars of Claim and in the recent correspondence between us. …

….

Dealing with your letter of 29 January 2008:

….

4. The monies representing the balance due to your clients in relation to the three investments concerned are in the process of being organised to be transferred to your client account on 18 February 2008."

On 19 th February Edwin Coe faxed Blake Lapthorn as follows:–

"We write to advise you that the monies to be reimbursed to your clients identified in previous correspondence is being transferred to our account tomorrow."

124 When no payment was made, Blake Lapthorn sent chasing letters on 28 th February and 7 th March 2008. The letter of 7 th March read:–

"You are aware that in your letter dated 8 January 2008, you stated that your clients were holding funds (in relation to 3 projects) and that they have not been used for any other purposes. It seems apparent from your clients' continued failure to pay to our clients those funds, despite repeated representations that your clients will do so, that your clients do not have those funds and that they have been used for other purposes. In those circumstances, it is clearly incumbent upon your clients and your firm (being aware of your professional obligations) to clarify any misrepresentation that your clients have made. We call upon you by return to confirm whether, at the time of your letter dated 8 January 2008, those statements were and, indeed, remain true. If not, you must explain to us precisely what has happened to those funds.

You must also explain why the promised payment has not been made. Please also let us know whether the payment will be forthcoming and if so when."

Edwin Coe replied on 12 th March, saying:–

"Our clients also reject your clients' remaining claims save in relation to the repayment of sums paid in connection with Irish Bioethanol Limited, Swansea Cork Ferries and Echemus UK Limited and are in the process of arranging that repayment."

125 On 14 th March, 2008, Blake Lapthorn wrote again, saying:–

"First letter

We asked you to comply with your professional obligation to inform us what has happened to the £1,903,148 your clients have said that they are holding for our clients and have promised to pay them.

On the instructions of your clients, you have, no doubt innocently, made a

number of misrepresentations about the fact that your clients have at all times been holding this money for our clients and about the timing of the payment of it to our clients. Given the inordinate delay in making a simple bank transfer of these funds, and broken promises as to when these monies would be paid, these representations appear to have been untrue.

You must have made enquiry of your clients as to whether they were indeed holding this money as stated and what has happened to it. Such enquiries were no doubt made at the time you represented that the monies were being held for our *clients order and subsequently when it became clear that this could not be the case since no transfers had been made.* It must be obvious to you that if your clients were indeed holding the money, it would have been paid to our clients a long time ago. The only conclusion is that your clients are not and were not holding the money, but have spent it and have misrepresented the situation. Consequently you must explain what has happened. We find it extraordinary that you and your clients should continue to prevaricate over this matter."

On 20 th March Edwin Coe responded that:–

"Our correspondence with you has, at all relevant times, been based upon instructions received from our clients. You are well aware that no representations are or have been made by this firm. It is mischievous of you to suggest otherwise."

Following a letter from Blake Lapthorn dated 27 th March in which they again asked Edwin Coe to let them know when payment of the £1,903,148 plus interest would *"finally be made",* on 9 th April Edwin Coe responded as follows:–

"First Letter

The funds paid in relation to Irish Bioethanol, Swansea-Cork Ferries and Echemus projects were held by our clients as part of overall funding for its businesses out of which payments were made against expenditure incurred in relation to those projects. It was not accurate, therefore, to have described the fund as being held otherwise. Our clients apologise for any confusion caused. Our clients are in the process of raising funds in order to repay the balance due to your clients.

Second letter

… Your clients' payments totalling €6.65m have been formally treated by [BHL] as consideration for your clients' 50% shareholding in [ARIL]."

126 In the meantime it seems that Mr Walsh had been trying to put together the funds necessary to pay off the Nolans. So on 3 rd March, 2008, Mr Walsh had telephoned Mr English, saying (according to Mr English's note of the conversation):–

"When funds in BHL reach the required amount for the Nolan repayment

(£1.930m) can we please transfer this amount to Edwin Coe client a/c reference the Nolan repayment for Echemus, Big Ferries and IBL."

Mr Walsh never did manage to put together enough monies to repay the Nolans.

The English and Jersey proceedings

127 On 16 th May, 2008, the NFP, Serene and Bilberry ("the English Claimants") commenced proceedings in the Commercial Court in England ("the English proceedings") against Mr Walsh, BHL, BSL, BWL, AL, AHL, Bankhill and Parthenon ("the English Defendants"). The English Claimants' main case was that they had reached an agreement with Mr Walsh on 27 th June, 2007, for the payment of the lump sum of €43,000,000. Alternatively they sued for return of the money they had paid to Mr Walsh and the Buchanan Group companies in respect of the investments in Entara, Elision, Columba, Echemus, the German nursing homes, Big Ferries and Irish Bio-Ethanol. Notwithstanding that none of the Defendants to this action were parties to the English proceedings, there is a number of features of the English proceedings which are of potential significance in this action.

128 The allegations pleaded by the English Claimants in their Particulars of Claim included the following:–

(i) (para.6a) that Mr Walsh:

"was the driving force behind and in control of substantial investment funds"

held in the Arkaga Group;

(ii) (para.6e) that the Arkaga Settlement Trust was a sham;

(iii) (para 20) that each of the investments made by the English Claimants (except for Elision and Columba)

"took the form of a Quistclose trust, with the monies being paid over to be used to make the specific investment stipulated and were not otherwise available to the recipient to make use of as part of its general assets"

(and see para.144 — Echemus; paras.155 and 160 — First and Second German Nursing Homes; paras.153, 170 and 176 — Irish Bio-Ethanol; paras.182 and190 — Big Ferries);

(iv) that in relation to the Elision investments (paras.108 and 114), and in relation to the Columba investment (paras.123, 130 and 131), the English Claimants were entitled to rescind their investments on the basis that they had been made in reliance on Mr Walsh's false and fraudulent representations; and

(v) (para.153) that in relation to the two German nursing home investments, both payments were made for the specific and only purpose of investing in the German nursing homes.

129 On 28 th July, 2008, after a hearing at which both sides were represented, the Commercial Court on the application of the English Claimants ordered BHL to pay £380,629.60, and BSL to pay £1,522,518, by 11 th August, 2008, by way of interim payments, these being the sums which Mr Walsh and the Jersey companies had accepted, and indeed asserted, were due to the English Claimants in respect of the Echemus, Big Ferries and Irish Bio-Ethanol investments. In his judgment Tomlinson J., having quoted from Edwin Coe's letters of 1 st November, 2007, and 8 th January, 9 th February and 9 th April, 2008, said as follows (at para.11):–

> *"I am afraid that I regard the suggestion that the Nolan interests would have been willing to pay over these substantial amounts simply by way of overall funding for the businesses of Mr Walsh's companies out of which payments could simply be made as he or his companies saw fit as wholly implausible.* The situation is, in my judgment, overwhelmingly likely to have been as the defendants' solicitors first represented it to be, that is to say that these payments were made over for the specific purpose of being placed into specific investments and as such they are overwhelmingly likely, in my judgment, to have become impressed with a trust for that purpose and the defendants' solicitors were absolutely accurate in saying, upon instructions, that those sums, not having been invested, were due and owing to the claimants."

In the course of argument there was the following exchange between the judge and counsel for the English Defendants:–

> *"MR MALLIN: What I do say is this.* The trust basis upon which any
>
> *liability has been alleged is, in my submission, something that comes too late in the day for your Lordship to consider.* So the question must be: what is the nature of the obligation to repay?
>
> *MR JUSTICE TOMLINSON: How can it have been anything else than a trust?* If the money as described here on this page, if the money was provided in connection with investment in three specific projects, it can only possibly have been held on trust in order to be applied in that way.
>
> *MR MALLIN: With respect, my Lord, I am not sure that is necessarily right.* If money, in the first place, is not stipulated to be paid into a segregated account, then it will necessarily mix with other money. If it is not stipulated at the time of payment over to be held for a specific purpose, namely, it may well be that a specific purpose is discussed and the general intent of the parties is to be used for that; but you need to go further to establish a specific purpose trust in fact. In particular, a characteristic of such a trust would be that the money was segregated and held in a separate account.

MR JUSTICE TOMLINSON: What conceivable interest would these investors have in paying over money which would then simply be part of the overall funding of all Mr Walsh's businesses?

MR MALLIN: It may be, my Lord, that you do not have to go so far in the other direction as that. My point is this. If you pay over money for the purposes of an investment, it does not B simply because you have done that B acquire the characteristics of a [Quistclose] trust type arrangement.

MR JUSTICE TOMLINSON: There may be circumstances in which it does not, but for the purposes of deciding whether they are more likely than not to win on the point B

MR MALLIN: I think, with respect again, my Lord, your Lordship has to [go] farther than deciding whether they are more likely to win than not because this is, as I say, tantamount to a summary judgment application.

MR JUSTICE TOMLINSON: At the moment I think they are overwhelmingly likely to make good that proposition, overwhelmingly likely and I regard the proposition to the contrary as almost bordering on the absurd."

Neither BHL nor BSL ever paid any part of the sums ordered.

130 On 6 th August, 2008, Mr Walsh met with Mr Cordwell and made his position clear to Mr Cordwell. The relevant part of Mr Cordwell's draft file note of this meeting (in the form of an email to Mr English of 7 August) read as follows:–

"With regard to the dispute with the Nolans generally, GW stated that heavy handed and distasteful tactics are being used including pressure in Ireland. Injunction(s) upon GW now exist which extended to GW's charity activities in Ireland, which have caused hardship for those concerned. GW said that the Nolans think that he has a net worth of euro200mn. It is clear that GW is deeply upset by this.

More specifically, GW said that the gbp 1.9 mn judgment cannot, and will not, be settled at this time. In the event of judgment in Jersey then it is intended to settle at the very last minute. The bank are fully aware of this tactic GW advised and that at a very senior level there is a tacit agreement for a further gbp10mn funding. The other side of course, must not know this said GW."

Just under two weeks later, on 18 th August, there was a meeting of BHL, chaired by Mr Nicolle and attended by Mr Cordwell by telephone. The minutes of the meeting recorded that Mr Nicolle tabled the order of Tomlinson J. and noted that BHL had insufficient funds with which to meet the judgment debt; it was therefore resolved that BHL should cease trading pending sufficient financial support being found in order to clear the debt owed by the company.

131 Edwin Coe served the Defence of all the English Defendants (except Bankhill) on 26 th August, 2008. Mr Nicolle signed the statements of truth as director on behalf of BHL, BSL, BWL and AHL. The Defence included the following assertions:–

(i) (para.4.3)

> *"Prior to the incorporation of [AL] in November 2004, [proposals for investments] were considered by the directors of the Buchanan companies in conjunction with [Mr Walsh].* After November 2004, [Mr Walsh] generally passed on these proposals to the management team at [AL]. That team considered the merits of the projects and made recommendations to [BSL], [BWL] and [BHL]. The directors of those companies considered the recommendations made and reached decisions as to which investments should be made";

(ii) (para.14.5) that the Defendants deny paragraphs 6a and 6b of the Particulars of Claim and

> *"[i]n particular it is denied that [Mr Walsh] was "the driving force behind and in control of substantial investment funds" held by the Arkaga Settlement Trust or [AHL] or that he was or remains a shadow or de facto director of the corporate Defendants";*

and

(iii) (para.190)

> *"Save that no admission is made as to the purpose for which the second [German nursing homes] payment was made, paragraph 153 is denied.* The first payment was made for the purpose of acquiring a 50% share in the investment of the two German nursing homes through the purchase of shares in [ARIL]."

132 On 6 th October, 2008, BSL was placed en désastre because it was unable to pay the £1,522,518 due under the interim payment order; BSL was, as Mr Nicolle accepted, insolvent. This constituted an act of default for the purposes of the banking facility with BoS. As a consequence BoS withdrew funding and demanded repayment of all outstanding loans, so that the Buchanan Group of companies was no longer able to trade.

133 At a case management conference on 19 th January, 2009, Tomlinson J. gave directions for Disclosure to be provided by 27th February and for the trial to take place in June 2009. BSL, AL and Bankhill were exempted from providing Disclosure, and the proceedings against them were stayed. On 22 nd January BHL, BWL, ANL and AHL each wrote a letter to Serene, signed by Mr English, stating it had "ceased trading as it is unable to meet its liabilities as they fall due".

134 In March 2009 it became apparent that the English Defendants were not going to comply with their Disclosure obligations, or with their obligations to exchange witness statements. On 14 th April Mr Nicolle wrote to Blake Lapthorn stating that Minerva Financial had ceased to provide any services to the Jersey companies with immediate effect. On 24 th April Tomlinson J. vacated the trial date at the instance of the English Claimants.

135 In the meanwhile the Royal Court had on 15 th April, 2009 issued a Mareva injunction ("the Jersey injunction") freezing the assets of Mr Walsh and the Jersey companies, and ordering them, Minerva and others, including RBS, to provide information relating to Mr Walsh's instructions to them. Despite the Jersey injunction, BWL, BHL, AHL and ANL did not provide the information required, but Minerva did, providing 144 files between 16 th June and 24 th July, 2009. Subsequently disclosure of 27 more of the files of BSL, which had not previously been subject to the Jersey injunction, was provided by 28 th April, 2010.

136 On 16 th April, 2010, the Commercial Court gave judgment on the English Claimants' application for summary judgment in respect of the two German nursing homes investments. As for the first investment, Burton J. granted a declaration that Serene was, and had been from 27 th October, 2006, the true owner of 100% of the shareholding in ARIL, rather than the 50% shareholding that had been previously granted. As for the second investment, the Court ordered BHL to repay the €2,400,000 million to Serene, because that sum had not been used for the purpose intended, namely to purchase the further eight nursing homes. The application was unopposed by the English Defendants, who did not file any evidence or appear at the hearing.

137 In his judgment [2010] EWHC 947 (Comm) Burton J. said as follows:–

> ***"6. One of the joint venture proposals that Mr. Walsh put forward to the Nolan Family was for investment in nursing homes in Germany. There are or should have been two tranches of nursing homes to be purchased with the benefit of borrowings, but otherwise intended to be based upon capital contributions by the two joint venturers, Mr Walsh and/or his companies and the Claimants.***
>
> ***7. The first tranche was to be in respect of, it was said by Mr. Walsh, the purchase of an entity which would own nine nursing homes in Germany. The payment was made by the First Claimant or the First Claimant's pension fund in March of 2006 in the sum of €4.25 million. I shall return to that in due course. It was, in circumstances which I shall describe, agreed and/or expected that that amount would be matched by an equivalent sum to be provided by Mr. Walsh and/or his sources, and the bulk would be supplied by borrowers [sic].***
>
> ***8. In the event it appears that the company in which, through the mechanism of these capital contributions, the First Claimant and/or Mr***

Walsh were to obtain their interest, Arkaga [Realty] Investments Limited ("ARIL"), only ever purchased, or became entitled to, two of the nine nursing homes. The position appears to be that ARIL still owns those two nursing homes, and it is to the shareholding in ARIL that the first relief, by way of declarations and orders, is directed by the Claimants, in order at least to salvage the value of that company and hence of the two nursing homes.

9. There was to be a second tranche of purchase of what was said to be another eight German nursing homes, and for that purpose, on the same basis and understanding, the two joint venturers were to make further contributions, and the payment was made by the pension fund on 30th June 2006 of a further sum of €2.4 million. Unfortunately, from the point of view of the Claimants, it seems clear now beyond doubt that no nursing homes were ever purchased with that second tranche of money, and no interest in any company owning nursing homes or otherwise has ever materialised. That forms the basis of the second form of relief which is sought to be achieved by the Claimants, namely the return, plus compound interest, of that sum of €2.4 million from the Second Defendant Company, still in existence, which was the recipient of that money.

10. Although logically and historically the first tranche falls to be dealt with first and the second tranche second, I propose, for reasons that will become clear in this judgment, to deal first with the claim in respect of the second tranche of €2.4 million. …"

138 The judge then dealt with the substitution of Serene and continued:–

"18. I turn then briefly to the facts of the second tranche. So far as that is concerned, I have indicated that I am satisfied that the monies were paid originally by the First Claimant on 30th June 2006, to the Second Defendant, and that they were paid for the purpose of acquisition of the second tranche of nursing homes. I am equally satisfied that no such nursing homes were ever purchased and, consequently, that I only need to concentrate on one of the causes of action put forward by the Claimants to be satisfied that the monies fall to be repaid.

19. The Claimants have in the wider action alleged all kinds of fraudulent and unlawful acts by the Defendants. I do not need to consider them today. I am simply satisfied that the monies were paid under a Quistclose Trust for an express purpose which was never fulfilled and, consequently, that the monies fall to be repaid in equity. If necessary there is a restitutionary claim. On either basis I am satisfied that it is appropriate to order repayment …

20. The case is wholly straightforward in the light of the evidence I have seen. I only mention one matter because it will become relevant when I

consider the issue in relation to the first tranche. In a letter dated 9th April 2008 sent by Messrs. Edwin Coe when they were instructed on behalf of the Defendants, an assertion was made that the €2.4 million was part of the €4.5 million or should be taken together with and aggregated to the €4.5 million, as being in respect of the Claimants' contributions for the shares in ARIL. That was so asserted in their letter to the then solicitors for the Claimants dated 9th April 2008.

21. That explanation has not been pursued and in a defence served on behalf of the Defendants dated 26th August 2008 the following pleading was made on behalf of the Defendants, in paragraph 182:

> ***"It is admitted that on 30 June 2006, [BHL] received the sum of €2.4 million.*** Save as aforesaid, and save that it is denied that the payment was made in reliance on the representations alleged, no admissions are made as to paragraph 159."

At paragraph 190:–

> ***"Save that no admission is made as to the purpose for which the second payment was made, paragraph 153 is denied.*** The first payment was made for the purpose of acquiring a 50% share in the investment of two German nursing homes through the purchase of shares in [ARIL]."

22. It is quite plain that that abjures any suggestion that the second payment was made for the purpose of acquiring the alleged 50% share in the shares of [ARIL], and that no explanation at all is given for the €2.4 million or as to what happened to it. As I have indicated, that only goes to show the absence of any evidence in response to the Claimants' clear case that they are entitled to the return of the €2.4 million, but it is of some substance when one comes to consider any case that may be put forward in respect of the first tranche, to which I now turn.

23. It is plain, so far as the first tranche is concerned, that the original intent was that there would be a contribution of the same amount by Mr Walsh, the other joint venturer, as there was being made by the Claimants, at that stage the pension fund, and in later course the Second Claimant.

24. There is a contemporaneous record of a note by a Mr. Robert English, keeping accounts, it seems, for the Second Defendant in Jersey, when €4.25 million, in those happy days translating as £2.75 million, was annotated as received by the Second Defendant. The note said, "treat as loan for time being. Purchasing share in various assets … but not yet decided on proportions". There was a similar note, it should be said, made by Mr English on 30th June, when the €2.5 million was subsequently contributed, to which I have already referred.

25. Had there been a contribution of an equivalent amount by the

Defendants then, of course, they would have been 50/50 shareholders in ARIL, but it was quite plain that the proportion was to depend upon the contribution."

139 Finally the judge quoted from Mr Walsh's email to Joan of 2 March 2006 and from Mr Little's email forwarded to Joan on 28 March and continued:–

"28. It is apparent from those e mails that the intention was that they would be 50/50 joint venturers, but that the agreement was in fact that the shares were to be owned in the proportions in which the two venturers did in fact make cash contributions. It is quite plain that in the event on the evidence Mr. Walsh on his side contributed nothing, and that in the outcome it now seems that such nursing homes as were purchased were purchased as a result possibly of the use of the Claimant's contributions but equally possibly, if not more likely, with the use of borrowed funds in excess of the 80% or, indeed, even the 90% mentioned at the stage when the nursing home project was being canvassed with the Claimants.

29. Mr. McGrath's case consequently is that the agreement was that the shares in the company would be owned as between the two joint venturers in proportions in which they made cash contributions."

Having referred to Edwin Coe's letters of 19 th February and (again) 9 th April, 2008, Burton J. concluded:–

"33. In those circumstances I am satisfied that the agreement between the parties was as was stated by Mr. Thompson in his evidence, and that as the Defendants have not contributed any sums at all to ARIL, or to the purchase of the two nursing homes acquired by ARIL, and all the cash contribution has been made by the Claimants, I should declare that as from the 27th October 2006 (when any doubt about the ownership as between the pension fund and the Second Claimant was resolved internally, and that is the only point to which I consider that goes), Serene, the Second Claimant, has been and remains owner of 100% of the shares of ARIL. …

34. In those circumstances I make also the order which is sought in the second paragraph of the draft order put before me by Mr. McGrath, namely that the Second Defendant is directed to take such steps as may be necessary to transfer or procure the transfer of the remaining 50% of the shareholding, which is not presently in the beneficial ownership of the Second Claimant, into the name of the Second Claimant."

During 2010 the ARIL shares held by BHL were transferred to the Nolans/Serene in accordance with the order of Burton J.

140 Ultimately, the English proceedings failed to produce documents from Mr Walsh and the

Arkaga structure (except from Parthenon, which disclosed a small number of documents). The English Claimants therefore issued a novel application in the Commercial Court seeking an order for the appointment of independent supervising solicitors to carry out Disclosure on behalf of Mr Walsh and Arkaga Healthcare. Teare J. granted the order on 11th February, 2011.

The dishonest assistance claims

141 In the Order of Justice the Nolan family's principal claim against both the Minerva companies and the individual Defendants was that they had dishonestly assisted Mr Walsh's breaches of trust.

142 The law applicable to the Nolans' dishonest assistance claims was to all intents and purposes common ground between the parties. Thus both parties accepted that for the claims in dishonest assistance to succeed the Nolans had to establish:–

We address each of these four constituent elements below, but it is convenient for us first to deal with the position of the individual Defendants.

(i) the existence of a trust in their favour;

(ii) a breach of that trust;

(iii) that PTCL assisted in that breach of trust; and

(iv) that in rendering that assistance PTCL acted dishonestly.

143 By way of introduction, the parties were agreed that whereas Minerva Trust would be vicariously liable for any acts of dishonest assistance committed by its employees or directors, the individual Defendants, sued in their capacity as directors of Minerva, would not be so liable. For any of the individual Defendants to be liable qua director, the Nolans would have to prove that that defendant committed an act of assisting a breach of trust and that he did so dishonestly. In broad terms the structure of the Order of Justice (in its original form) was that after a section (section C) entitled “The relationship between Minerva, Mr Walsh and the Arkaga group”, and a section (section D) on the English proceedings, the Nolans pleaded (at sections F to K) each of the investments in turn, including Particulars of Assistance and Particulars of Knowledge, against the Minerva companies. In the course of these sections there were certain, albeit very limited, references to acts by the individual Defendants; there were no particulars of why those particular acts were said to be dishonest. The Nolans' plea against the individual Defendants was to be found in para.131, which read:–

> *“The Plaintiffs claim against Mr Peter Nicolle and Mr Michael Cordwell and Mr Stephen Morgan in their capacity as directors of the relevant Jersey Companies supplied and employed by the relevant Minerva company.* By virtue of the facts

and matters set out above:–

> *1) Mr Peter Nicolle and Mr Michael Cordwell and Mr Stephen Morgan are each liable to the Plaintiffs for dishonestly assisting in a breach of trust and/or furtherance of a fraud in respect of each of the Investments.* The particulars of assistance and dishonesty set out above for each Investment are repeated and averred herein".

144 In the course of Mr Santos-Costa's opening address the Court expressed its concern as to whether the Nolans' case against the individual Defendants for dishonest assistance was properly pleaded and particularised. Mr Santos-Costa having made clear that he did not intend to amend the Order of Justice in this respect, Mr Preston applied at the outset of his opening speech to strike out the dishonest assistance claims against the individual Defendants. For the reasons given in the Court's ruling of 30 th April, 2013, we acceded to Mr Preston's application. In short, the Court concluded that the allegations of dishonest assistance in the Order of Justice against the individual Defendants fell far short of the requirements laid down in the speech of Lord Millett in *Three Rivers District Council v. Bank of England* [2003] 2 AC 1 at paras. 184 and 186. (For the sake of completeness we add that the principles laid down by Lord Millett were endorsed by the Royal Court in *Cunningham v. Cunningham* [2009] JLR 227 at paras.39 to 40.) Accordingly the only live claim for dishonest assistance is now against Minerva Trust.

(1) The existence of a trust

145 Although in para.40 of the Order of Justice the Plaintiffs had pleaded some seven different ways in which a trust had arisen in respect of each of the investments, in their opening skeleton argument they clarified that they were alleging in respect of each investment only three alternatives, namely

It was not disputed by the Defendants that Jersey law recognised each of these forms of trust. We now address each of these three alternatives.

(a) a constructive trust;

(b) a Quistclose trust; and

(c) a resulting trust.

(a) Constructive trust

146 In para.40(v) of the Amended Order of Justice the Nolans had pleaded that:–

> *"the money was transferred pursuant to a fraudulently induced contract and immediately held on constructive trust for the Plaintiffs (on the principle of the decision of the English Court of Appeal in Halley v The Law Society*

[2003] EWCA Civ 97) *alternatively was so held after the Plaintiffs rescinded the said contracts"*.

The Nolans expanded on this distinction, and summarised the position in English law, at para.301 of their opening skeleton argument, as follows:–

> *"Consequently, the position in England is that: a contract or 'deal' which itself is a vehicle to defraud is void and any property transferred to the fraudster thereunder is held by him on constructive trust"*

(which for the sake of convenience we described at the hearing and describe in this judgment as a "Halley trust"). Conversely:

> *"a valid contract the existence of which arises by reason of a fraudulent misrepresentation which induced the innocent party to enter that contract may be rescinded but, retaining its validity until such rescission, a constructive trust only arises on that rescission being effected"*

(which again for the sake of convenience we described at the hearing and describe in this judgment as a "non-Halley" trust).

147 The immediate problem which the Nolans faced as regards any non-Halley trust based on the principles of English law was that there was no suggestion that they had ever rescinded any of the relevant contracts pursuant to which their investments had been made. There was no plea anywhere in the Amended Order of Justice that any of the contracts had been rescinded and the Nolans' opening skeleton argument was equally silent on this issue. Accordingly at the outset of his opening Mr Preston applied to strike out this aspect of the Nolans' claim. In response Mr Santos-Costa made clear that he did not propose to make any further amendments to the Order of Justice in this respect. In those circumstances it was clear to the Court that this way of putting the Nolans' claim was inevitably doomed to failure and we therefore struck it out. Accordingly the Nolans' case in relation to any constructive trust based on principles of English law was thereafter confined to seeking to establish a Halley trust.

148 At para.302 of their opening skeleton argument the Nolans also relied on Jersey law, as follows:–

> *"In Jersey, [the] analysis [in para.301] is even more apt.* As the Jersey law of contract more resembles the French than English (albeit nonetheless distinct from either), where a contract …. is either fraudulent or procured by fraud it is void ab initio (even though it may only be subsequently declared so retrospectively)."

Mr Santos-Costa developed this argument based on Jersey law in his final submissions. Although he initially disavowed such a broad proposition, his submission as finally formulated was that whenever a contract has been procured by a fraudulent misrepresentation, a constructive trust arises in favour of the victim. He added that, unlike

the position in English law, there was no necessity for the contract to be rescinded. On the contrary, he contended that a constructive trust would arise unless and until the victim of the fraud validated the contract.

149 Mr Santos-Costa accepted that there was no Jersey authority which directly supported his proposition. As we understood his submissions, his proposition was said to flow from the combined effect of the following steps.

(i) The consent of the promisee must be a true consent ("volonté") to the obligation which he is undertaking (*Flynn v Reid* [2012] (1) JLR 370 at para.21).

(ii) Consequently if such consent is vitiated by fraud, there is no consent to the undertaking. An essential element of the contract is therefore absent, so the contract cannot exist. Thus in *Selby v Romeril* [1996] JLR 210 the Royal Court (at pp.219–220) cited with apparent approval from Professor Nicholas' The French Law of Contract (2nd ed., 1999), as follows:–

> ***"A contract vitiated by erreur, violence or dol is null, but the nullity is 'relative' not 'absolute'.*** By contrast a contract which, for example, lacks a cause or an objet, or of which the cause or the objet or cause is illicit, is absolutely null.
>
> ***…***
>
> ***(b) Effects of nullity***
>
> ***These, as we have said, are the same whether the nullity is relative or absolute, and whatever the reason for the nullity.***
>
> ***(i) Effects as between the parties***
>
> ***The contract, being null, is in principle without effect ab initio and each party must make restitution of what he has received."***

(iii) The distinction between absolute and relative nullity was not a reflection of the distinction in English law between a void and a voidable contract, or of any need to rescind the contract where the nullity was relative. On the basis of The French Law of Contract (at p.77), the practical effects of the distinction between relative and absolute nullity were confined to the question of who might bring the action and to the fact that a relatively null contract can be subsequently validated by confirmation on the part of the victim, whereas an absolutely null contract cannot. In short, the distinction was immaterial for present purposes, save that in relation to a relatively null contract the position was the opposite of that in English law. In Jersey law the constructive trust stands unless and until the contract is validated by the confirmation of the victim.

(iv) The authority of *In Re Esteem Settlement* [2002 JLR 53] ***shows that***

in Jersey law the remedy for a fraud is a constructive trust. As the Royal Court said in Esteem (at para.90):

> ***"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."***

150 Mr Preston took fundamental issue with Mr Santos-Costa's proposition. His submissions were essentially as follows.

In short, the Nolans were seeking to rely on an impermissible mixture of French and English law.

(i) There was indeed no Jersey authority which established or supported the proposition. In particular:–

(a) the remedy granted in *Selby v. Romeril*, namely the payment by the defendant of compensation in respect of the benefit which he had received by way of improvement to the property was the wording of a personal obligation, not of a proprietary obligation; and

(b) the relevant parts of the decision in *Esteem* do no more than establish that the principle set out by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, that a thief holds property on trust for the victim, forms part of Jersey law.

(ii) There was no reason to think that Jersey law in this area was any different from English law. The trust law of Jersey was derived from that of England and the Royal Court had said in *Bagus Investments Limited v Kastening* [2010] JLR 355 that Jersey law and English law as to constructive trusts are similar.

(iii) As for the passages from The French Law of Contract on which Mr Santos-Costa relied, it is necessary to distinguish between the circumstances in which a contract may be null and what the consequences of that nullity are in relation to property which has already been transferred under the contract, the latter point being relevant for present purposes. It simply does not follow that because a contract may be null then the property transferred under it is held on trust by the recipient. Indeed, the concept of trusts is not one recognised by French law and nowhere in The French Law of Contract is there any reference to any kind of trust, constructive or otherwise, arising under French law in relation to a contract. Rather the consequence of nullity is that the party at fault must make restitution of what he has received and that obligation to make restitution is a personal obligation.

(iv) Brown's Jersey Law of Trusts (4th ed.) does not suggest that a constructive trust arises automatically if a contract is procured by a fraudulent misrepresentation.

151 We have come to the firm conclusion that Mr Preston's argument on this issue is correct. In our view it is not the law of Jersey that a constructive trust arises immediately if a contract has been procured by a fraudulent misrepresentation. On the contrary, the law of Jersey is, we conclude, the same as English law so that (save in the case of a Halley trust) a constructive trust will not arise out of a contract which has been procured by a fraudulent misrepresentation unless and until the contract has been rescinded. It follows that if the Nolans are to establish a constructive trust in respect of any of their investments it can only be on the basis of a Halley trust.

152 The Claimant in *Halley v The Law Society* [2003] EWCA Civ 97 sought to recover a sum deposited in the client account of a solicitor, in whose practice the Law Society had intervened on the grounds of suspected dishonesty. Mr Halley claimed that the sum represented commission paid in connection with (in his words) high yield investments programmes or (in the Society's words) bank instrument frauds. The judge at first instance found that the sum claimed was derived from fraud, in that the bank instruments for which the commission was paid were worthless, as Mr Halley and his colleagues were aware. The Court of Appeal upheld the judge's decision to dismiss Mr Halley's claim, albeit on grounds different from those relied on by the judge.

153 Carnwath L.J. (with whom Mummery L.J. and Hale L.J. agreed) concentrated on the Law Society's submission that the *"contract"* into which the client of Mr Halley entered was no more than *"a dishonest device to obtain money"*. As he explained (at para.45):"

> ***"The submission, as I understand it, is that this is not simply a case of a valid contract being induced by fraud; but that the fraud so infected the whole transaction that it had no legal effect at all.*** The "contracts" were in reality no more than devices to extract money by fraud; in Mr Dutton's words —
>
> > ***"The "agreements" were fictitious contracts.*** They were as the judge found merely part of an elaborate charade (or mechanism) by which the loser was persuaded to part with his money."
>
> ***The position, accordingly, is said to be "akin to theft".*** Where property is stolen, no beneficial interest passes to the thief. Mr Dutton submits that the same applies where money is extracted by fraud, otherwise than under a legally enforceable contract."

He considered the case of *Twinsectra Lt. v Yardley* [2002] 2 AC 164 and continued as follows:–

> ***"47. In my view, however, there are important distinctions between that case and the present. In that case, there was a straightforward contract of loan, under which legal and beneficial interest in the money passed to Mr Yardley (subject only to a "purpose" trust, which does not affect the present argument). The contract may have been induced by the fraud, but it was not itself the instrument of fraud. In this case, the contract has been held to be the instrument of fraud, and nothing else. The elaborate***

documentation was, in the words of the judge, "no more than a vehicle for obtaining money by false pretences" (para 119). ….

48. In such a case, it is meaningless to impose a requirement for the fraudster to be notified of "rescission". From the fraudster's point of view there is nothing to rescind; for practical purposes, he has parted with nothing of value and incurred no obligations; the victim is left with some documents which, from the outset, were known and intended by the other party to be worthless. …. Subject to any direct authority, I see no reason why it should not be regarded as a simple case of "property obtained by fraud", in Lord Browne-Wilkinson's terms."

Carnwath L.J. concluded that there was no direct authority to the contrary and therefore upheld the Law Society's submission.

154 Mr Santos-Costa submitted by reference to *Esteem and Republic of Brazil v Durant International Corporation* [2012] JRC 211 that the decision of the Court of Appeal in *Halley* also represented the law of Jersey. Mr Preston agreed, as do we. The key question, therefore, is whether the arrangement in question between Joan and Mr Walsh can properly be described as, in the words of Carnwath L.J., ***"the instrument of fraud, and nothing else".***

155 In support of his case in relation to a Halley trust, Mr Santos-Costa relied on two other authorities, namely *Orix Australia Corporation Ltd. v. Moody Kiddell and Partners P/L* [2005] NSWSC 1209 and *Barrett & Sinclair v McCormack* [1999] VUCA 11.

156 In *Orix*, the Equity Division of the Supreme Court of New South Wales held that a trust arose on the basis of a fraud perpetrated against Orix, a finance company, by a Mr McCormick. Mr McCormick had incorporated a construction company, Queensland Construction Equipment Ltd. ("QCE"). QCE had an ongoing business relationship with a supplier of plant called Nelson Equipment Pty. Ltd. ("Nelson Equipment"), which separately had a business relationship with Orix. At the instigation of Mr McCormick, QCE entered agreements with Orix for the hire purchase of six cranes, which Orix in turn purchased from Nelson Equipment. QCE defaulted. The cranes did not in fact exist. Amongst other claims, Orix sued Mr Nelson, the managing director of Nelson Equipment, for knowingly or dishonestly assisting a breach of trust by Nelson Equipment.

157 The Court decided that Nelson Equipment held the money received from *Orix* on trust. At para.155 of his judgment White J. said as follows:–

"There was no fiduciary relationship between Nelson Equipment and Orix. I accept that Nelson Equipment held the purchase moneys paid to it by Orix on trust for Orix immediately it received the funds. It obtained the funds through fraud. Stolen property is trust money in the hands of the thief. (*Black v S Freedman & Co* (1910) 12 CLR 105***at 110).*** In *Westdeutsche Landesbank*

Girozentrale v Islington London Borough Council [1996] AC 669***Lord Browne Wilkinson said (at 716):***

> ***"…. when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity."***

In *Robb Evans v European Bank Ltd* (2004) 61 NSWLR 75 , ***moneys obtained by fraud were deposited by the fraudster into an account with a company called****Benford Ltd****which the fraudster controlled.*** Spigelman CJ, with whom Handley and Santow JJA agreed, held that*Benford Ltd****held the stolen funds as trustee for the defrauded credit card holders.*** (At 99, [111]). His Honour said that the trust was better described as a presumed or resulting trust, rather than as a constructive trust. However the trust is classified, it arises upon the receipt by Nelson Equipment of the moneys."

158 He continued (at para.156):–

> ***", the fraud went to the heart of the contract so that Nelson Equipment received the price from Orix, but gave nothing in return such that there was a total failure of consideration for the payment of the purchase price.*** It is not merely the fact that the purchase price was received by Nelson Equipment by a fraudulent representation that gives rise to the trust, but the fact that Nelson Equipment gave nothing of value in return. This was explained in a judgment of the Court of Appeal of Vanuatu, (noted in 79 ALJ 600), of *Barrett & Sinclair v McCormack* [1999] VUCA 11 . ***"***

White J. concluded that Mr Nelson had been guilty of dishonestly assisting the trustee, Nelson Equipment, in the latter's breach of trust.

159 In *Barrett*, Mr McCormack was an investor via an investment company he controlled, Axbridge Pty. Ltd. ("Axbridge"). He sued Messrs Barrett and Sinclair, who were partners in an accountants' firm in Vanuatu, for dishonestly assisting a breach of trust. The trust in question was a constructive trust arising from the frauds of a Mr Kennedy. On the instructions of Mr Kennedy, Messrs Barrett and Sinclair incorporated a Vanuatu company, McCullen & Suarez Ltd., as a subsidiary of his parent company, McCullen & Suarez Inc. They opened bank accounts in Vanuatu and provided administration services, including administering and acting as signatories in respect of those accounts. In so doing, Mr Barrett, Mr Sinclair and their staff acted in accordance with Mr Kennedy's instructions.

160 Mr McCormack (and other Australian based investors) were persuaded by McCullen and Suarez and its staff to buy shares in a company which Mr Kennedy had incorporated, called Mexigulf Sealand Inc. This company was held out as investing in offshore real estate and Mr McCormack was told by Mr Kennedy's sales staff that its shares were currently trading at a certain value. In fact, there was no such trading of its shares and the company does not appear itself to have traded at all. Mr McCormack purchased the shares. He transferred

money from Axbridge, to McCullen & Suarez Ltd.'s account in Port Vila, which Messrs Barrett and Sinclair immediately paid out on Mr Kennedy's instructions. Mr McCormack was issued with a certificate for shares in Mexigulf Sealand Inc.

161 Mr McCormack's claim for dishonest assistance succeeded at first instance before the Supreme Court of Vanuatu. The Court of Appeal dismissed the appeal by Messrs Barrett and Sinclair. The Court of Appeal concluded that a constructive trust had arisen in Mr McCormack's favour, as follows:–

> ***"The appellants have tried to downplay the kind of fraud involved in the present case.*** They submit that McCullen & Suarez is only guilty of fraudulently misrepresenting the true value of shares in Mexigulf Sealand, in an arms length vendor-purchaser transaction. As such, the respondent only has a contractual remedy against McCullen & Suarez and there is no basis for the imposition of a constructive trust which awards the respondent with the superior remedy of a proprietary right that takes priority to claims of the unsecured creditors of McCullen & Suarez.
>
> ***The evidence, however, discloses fraud of a different variety.*** The fraud here goes to the heart of the contract resulting in a total failure or absence of consideration. The appellants in essence provided nothing in exchange for the respondent's money. The shares in Mexigulf Sealand were a scam. This amounted to theft, the taking of something for nothing in return. The taking of something without anything in return, not qualifying as a gift or some other lawful assignment, is the very basis for the imposition of constructive trusts in the above cases of *[Neste] Oy, Cowern, Stocks and Bankers Trust* ***(supra).*** In *[Neste] Oy* , ***the payee [received] money when it knew it could not perform the contract.*** Likewise, the payee in *Cowern* ***provided the payer with nothing in return as the goods the payee supplied were worthless.*** Further, *Cowern*, ***like*** *Stocks*, ***are cases involving infants who could not at law contract for non-necessities.*** The promises of infants were not legally enforceable against them by the other party. Thus, these infants provided no consideration at the formation of executory contracts where consideration is the exchange of legally enforceable promises. There was an absence of consideration as the party contracting with the infant received nothing in exchange for its promise to provide and subsequent provision of property. The infants in *Cowern* ***and*** *Stocks* ***had fraudulently misrepresented their age.*** The fraud of the infants in *Cowern* ***and*** *Stocks* ***went to the heart of the contract as it concerned their ability to contract and provide consideration.*** In like fashion, though McCullen & Suarez had fraudulently misrepresented the true value of the shares in an arms length vendor-purchaser transaction, their fraud went to the heart of the contract, resulting in the total failure or absence of consideration. McCullen & Suarez was getting something for nothing. In *Bankers Trust*, ***the fraudulent parties had defrauded the bank with the use of forged cheques.*** Again, there was the taking of something without something in return. In every case, a proprietary remedy was appropriate. The fraud of McCullen & Suarez was no different from outright theft in the guise of a contract."

162 We agree with Mr Santos-Costa that those two cases provide valuable guidance as to the circumstances in which the Royal Court would impose a *Halley* trust.

(b) Quistclose trust

163 In *Bieber v Teathers Ltd.* [2012] EWCA Civ 1466, Patten L.J. summarised the necessary conditions for the imposition of Quistclose trust as follows (at paras.13–15):–

> ***"[13] … The name is of course derived from the decision of the House of Lords in*** *Barclays Bank Ltd v Quistclose Investments Ltd* ***…*** [1970] AC 567 ***where a company in serious financial difficulties negotiated a loan from Barclays of some £209,000 in order to meet an ordinary share dividend.*** The payment of the dividend was a prerequisite to the company obtaining a much larger loan from another third party. The bank agreed to provide the dividend loan on the express terms (imposed in a letter from the bank) that the money should only be used to meet the dividend due. The bank credited a specific dividend account with the amount of the loan but, before the dividend was paid, the company was placed into voluntary liquidation. The bank sought repayment of the money in the account on the basis that it had been held on a trust which had failed and was, as a consequence, now held on a resulting trust in the bank's favour. The House of Lords (applying a number of earlier authorities) held that money advanced for a specific purpose (such as the payment of a particular debt) was impressed with a trust for that purpose and did not become part of the debtor's estate. The trust continued to subsist until the moneys had been applied in accordance with the purpose for which they were lent .
>
> ***[14] These principles were reviewed by the House of Lords in*** *Twinsectra Ltd v Yardley* ***…*** [2002] 2 AC 164 ***and the judge directed himself in accordance with the following summary of the law*** ([2012] 2 BCLC 585***at [16]–[23]):***
>
> ***[16] First, the question in every case is whether the payer and the recipient intended that the money passing between them was to be at the free disposal of the recipient:*** *Re Goldcorp Exchange* ***…*** [1995] 1 AC 74 ***and Twinsectra … at [74] …***
>
> ***[17] Second, the mere fact that the payer has paid the money to the recipient for the recipient to use it in a particular way is not of itself enough.*** The recipient may have represented or warranted that he intends to use it in a particular way or have promised to use it in a particular way. Such an arrangement would give rise to personal obligations but would not of itself necessarily create fiduciary obligations or a trust: Twinsectra … at [73] …
>
> ***[18] So, thirdly, it must be clear from the express terms of the transaction***

(properly construed) or must be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient but should be used exclusively to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer: *Toovey v Milne* (1819) 2 B & Ald 683 ***and*** *Quistclose Investments* ***…*** [1970] AC 567 ***at 580*** .

[19] Fourth, the mechanism by which this is achieved is a trust giving rise to fiduciary obligations on the part of the recipient which a court of equity will enforce: Twinsectra … Equity intervenes because it is unconscionable for the recipient to obtain money on terms as to its application and then to disregard the terms on which he received it from a payer who had placed trust and confidence in the recipient to ensure the proper application of the money paid: Twinsectra at [76].

[20] Fifth, such a trust is akin to a "retention of title" clause, enabling the recipient to have recourse to the payer's money for the particular purpose specified but without entrenching on the payer's property rights more than necessary to enable the purpose to be achieved. It is not as such a Apurpose@ trust of which the recipient is a trustee, the beneficial interest in the money reverting to the payer if the purpose is incapable of achievement. It is a resulting trust in favour of the payer with a mandate granted to the recipient to apply the money paid for the purpose stated. The key feature of the arrangement is that the recipient is precluded from misapplying the money paid to him. The recipient has no beneficial interest in the money: generally the beneficial interest remains vested in the payer subject only to the recipient's power to apply the money in accordance with the stated purpose. If the stated purpose cannot be achieved then the mandate ceases to be effective, the recipient simply holds the money paid on resulting trust for the payer, and the recipient must repay it: Twinsectra … at [81], [87], [92] and [100] …

[21] Sixth, the subjective intentions of payer and recipient as to the creation of a trust are irrelevant. If the properly construed terms upon which (or the objectively ascertained circumstances in which) payer and recipient enter into an arrangement have the effect of creating a trust, then it is not necessary that either payer or recipient should intend to create a trust: it is sufficient that they intend to enter into the relevant arrangement: Twinsectra at [71].

[22] Seventh, the particular purpose must be specified in terms which enable a court to say whether a given application of the money does or does not fall within its terms: Twinsectra at [16].

[23] It is in my judgment implicit in the doctrine so described in the authorities that the specified purpose is fulfilled by and at the time of the application of the money. The payer, the recipient and the ultimate beneficiary

of the payment (that is, the person who benefits from the application by the recipient of the money for the particular purpose) need to know whether property has passed.' (Norris J's emphasis.)

[15] Both sides accepted this as an accurate statement of the relevant principles. I would only add by way of emphasis that in deciding whether particular arrangements involve the creation of a trust and with it the retention by the paying party of beneficial control of the moneys, proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved. As Lord Millett stressed in Twinsectra … at [73] … and the judge repeated in para [17] of his own judgment, payments are routinely made in advance for particular goods and services but do not constitute trust moneys in the recipient's hands. It is therefore necessary to be satisfied not merely that the money when paid was not at the free disposal of the payee but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the payer's rights and the control of the use of the money through the medium of a trust. Critically this involves the court being satisfied that the intention of the parties was that the moneys transferred by the investors should not become the absolute property of Teathers (subject only to a contractual restraint on their disposal) but should continue to belong beneficially to the investors unless and until the conditions attached to their release were complied with. Although directed to a slightly different context, it is worth recalling what Mason J said in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 ***at 97:***

> ***That contractual and fiduciary relationships may co-exist between the same parties has never been doubted.*** Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all-important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be ***superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.***'"

164 We accept those passages in Bieber as an accurate statement of the relevant law in Jersey, as did the parties.

165 Patten L.J.'s comment that:–

> ***"payments are routinely made in advance for particular goods and services but do not constitute trust moneys in the recipient's hands"***

has a particular significance in the present case since it was Minerva's primary contention

that in respect of all of the Nolans' investments the agreement in question between Joan and Mr Walsh constituted a contract for the sale and purchase of the relevant shares (albeit that in the case of Echemus, the Big Ferries and Irish Bio-Ethanol investments the contract in question was frustrated since the shares sought to be purchased could not in the event be transferred). In his final submissions Mr Preston developed this argument as follows.

Accordingly, said Minerva, the sum transferred to the relevant Buchanan Group company constituted simply the payment of the purchase price for the shares, so that both the legal and beneficial title to the sum passed immediately on the transfer. In those circumstances there could be no Quistclose trust.

> (i) starting point is that if money is transferred by the purchaser under a contract of sale, title to such funds will ordinarily pass from the purchaser to the seller. Indeed, unless the seller acquires title to the funds, the purchaser will not ordinarily discharge its obligation to pay the purchase price.
>
> (ii) There is therefore a strong presumption that where a payment is made pursuant to a contract of sale the intention of the parties is that title to the funds passes from purchaser to seller so that the purchaser's obligation to pay the purchase price is discharged.
>
> (iii) This is the case even where the property which is the subject of the sale and purchase has not yet been delivered. If the purchaser pays the purchase price, he discharges his contractual obligation to pay that price and he has a contractual right to delivery of the property being sold. However, he does not retain any proprietary interest in the purchase price pending the delivery of the property which is the subject of the sale. On the contrary, if the property is not delivered his remedy is a personal remedy for damages for breach of contract.

166 In his final submissions Mr Santos-Costa accepted that in the case of straightforward sale and purchase contract there would be no room for the imposition of a Quistclose trust. Accordingly we accept Minerva's submission to this extent. If on analysis the arrangement between Joan and Mr Walsh in respect of any particular investment did indeed constitute no more than a simple, bipartite contract for the sale and purchase of shares, then there could be no Quistclose trust.

167 It was, however, the Nolans' case that in respect of each investment the agreement which Joan reached with Mr Walsh went beyond the mere sale and purchase of shares and incorporated additional requirements, for example that the monies should be invested in the company in question. In its final submissions Minerva recognised that, in theory, it is possible for the seller and purchaser to agree, as a matter of contract, some alternative form of arrangement. It submitted, however, that it would be necessary for such an arrangement to be specifically agreed and entered into. In summary Minerva recognised that in principle a Quistclose trust could arise even where the contract involved the sale and purchase of shares if, but only if, there was some additional element to the agreement. Minerva contended, however, that the Nolans' argument for a Quistclose trust with an additional

purpose failed because there was nothing to suggest that any Buchanan Group company entered into any agreement to this effect with the entity transferring the funds. This is a matter for evidence, with which we deal separately below in relation to each investment.

168 Finally in the context of *Quistclose* trusts, Minerva relied on Lord Browne-Wilkinson's summary in *Westdeutsche* (at p.705C-E), of what he described as ***"the relevant principles of trust law":–***

> ***"(i) Equity operates on the conscience of the owner of the legal interest.*** In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).
>
> ***(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience."***

Mr Santos-Costa did not dispute these statements of principle.

(c) Resulting trust

169 As the Nolans made clear in para.332 of their opening skeleton argument, they relied on the concept of a resulting trust in one, and only one, factual scenario, namely that the Buchanan Group companies separately considered the investments made by the Nolans and that the Nolans' money was not received by the companies on the basis of agreements reached with Mr Walsh. As will be clear from this judgment, that is not, as we find, the factual position; the Buchanan Group companies did not separately consider the Nolans' investments and the monies which the Nolans paid to them were paid on the basis of agreements reached with Mr Walsh. Nor did the Nolans pursue a resulting trust claim in their closing submissions in respect of any of their investments. It follows that the resulting trust alternative fell away and we say no more about it in this judgment.

Summary

170 By the conclusion of the case, therefore, the Nolans' case on the existence of a trust depended, as we find, on their establishing either a *Halley* trust or a *Quistclose* trust. Under a *Halley* trust, the obligation on the relevant Buchanan Group company would be to repay the investment immediately. In respect, however, of a *Quistclose* trust the obligation would be to return the Nolans' investment to them subject to a power to use the money exclusively

for the purpose agreed between Joan and Mr Walsh, and for no other purpose. Since a *Halley* trust would trump, so to speak, a *Quistclose* trust in this respect, in relation to each investment we consider the possible trusts in that order.

(2) Breach of trust

171 It was the Nolans' case in relation to each investment that the breach of trust had occurred when the relevant Buchanan Group company had (in the case of a Halley trust) not returned the Nolans' monies at once, or (in the case of a *Quistclose* trust) disbursed any part of the monies transferred by the Nolans other than for the purpose of investment in accordance with Joan's agreement with Mr Walsh, and in particular disbursed any such monies outside the Buchanan Group structure. The payments effected by PTCL on behalf of the Buchanan Group companies of which the Nolans complained, as summarised earlier in this judgment, were not in dispute; this was hardly surprising since the details were taken from PTCL's own documents.

172 In their opening skeleton argument the Nolans listed in detail all of the payments made by PTCL out of the monies invested by the Nolan family. By the end of the trial, however, it had become apparent that these details were almost entirely irrelevant. If the Nolans were correct that all of their investments were the subject of some form of trust in their favour, all that mattered was that their monies had not been returned to them at once (in the context of a *Halley* trust), or had not been spent exclusively for the purpose agreed between Joan and Mr Walsh (in the case of a *Quistclose* trust). Conversely if the Nolans' investments were not subject to any form of trust, as Minerva contended, then the monies paid by the Nolans would form part of the general assets of the Buchanan Group which PTCL was entitled to disburse as they, or Mr Walsh, thought fit.

173 There is, however, one argument which it is convenient for us to address at this stage. Minerva contended that where several of the investments were concerned the Nolans did, sooner or later, receive the shareholdings that had been agreed between Joan and Mr Walsh, so that any relevant *Quistclose* trust had in due course been fulfilled. To the extent, therefore, that there had been any breach of trust arising out of the monies invested by the Nolans having been paid away prior to such shareholdings being received by them, any such breach of trust was, at worst, merely technical and not causative of any damage to them. Mr Santos-Costa accepted that in the case of a Quistclose trust that argument “might work”. But he denied that it could apply in the case of a Halley trust where the trust is simply to repay the money at once.

174 In our view Minerva's contention on this issue is correct. The Nolans have not sought to establish that they suffered any loss as a result simply of any delay on the part of the relevant Buchanan Group company (or of PTCL) in fulfilling the *Quistclose* trust imposed on the company, nor are we able to see that the Nolans suffered any loss in this way. It follows that if in relation to any of the investments we were to conclude that the Nolans did in due course receive the shareholdings that they had agreed to receive, any breach of trust

arising out of the delay in the receipt of those shareholdings would indeed be only technical and not such as to afford the Nolans any ground for redress in this action.

175 Conversely we accept Mr Santos-Costa's submission that since in the context of a *Halley* trust the only obligation on the constructive trustee is to repay the money immediately to the beneficiary, the subsequent receipt of the agreed shareholdings would be wholly immaterial, save to the extent that such receipt could found a plea of acquiescence in the breach of trust.

(3) Assistance in that breach of trust

176 The assistance relied on by the Nolans was the part played by PTCL, in its role as manager of the Buchanan Group companies, in effecting the payments relied upon as constituting the breaches of trust. Since it is not disputed that PTCL effected the payments in question, it follows that if there was any breach of trust in respect of any of the investments, PTCL assisted in such breach.

(4) Dishonesty

177 We deal with this issue in four stages.

(a) The basic principles

178 The case of Cunningham, to which we have already referred, concerned an application to amend in order to plead dishonest assistance. In refusing leave to amend, the Royal Court said as follows (at para.36):–

> ***"The requirements for dishonest assistance were authoritatively established in*** *Royal Brunei Airlines Sdn.* Bhd. v. Tan , ***and subject to further refinement in****Twinsectra Ltd. v. Yardley****and****Barlow Clowes Intl.* Ltd. v. Eurotrust Intl. Ltd.***The matter is conveniently summarised in the headnote of the latter case in The All England Law Reports which reads as follows*** ([2006] 1 All E.R.***at 333–334):***
>
> ***In considering whether a defendant's state of mind was dishonest an inquiry into the defendant's view about standards of dishonesty was not required.*** A defendant's knowledge of a transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. There was no requirement that he should have had reflections about what those normally acceptable standards were. Consciousness of the dishonesty required consciousness of those elements of the transaction which made participation transgress ordinary standards of honest behaviour; it did not also require the defendant to have thought about what those standards were.'

It is therefore an objective test of dishonesty."

We consider that we should treat that statement of principle as the authoritative starting point for the purposes of the present case.

179 That means that there is, thankfully, no need for us to undertake a detailed analysis of the trilogy of English cases to which the then Deputy Bailiff referred in Cunningham. It does seem to us, however, that there are certain statements in the three English cases which are of assistance in the context of the present case. We take each of the three cases in chronological order.

(i) In *Royal Brunei Airlines Sdn.* Bhd. v Tan [1995] 2 A.C. 378, Lord Nicholls, giving the judgment of the Privy Council, said as follows (at p.389C to G):–

> ***"[I]n the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances.*** …. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower standards according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> ***In most situations there is little difficulty in identifying how an honest person would behave.*** Honest people do not intentionally deceive others to their detriment. Honest people do not intentionally take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he know it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless. However, in the situations now under consideration the position is not always so straightforward. This can best be illustrated by considering one particular area: the taking of risks."

Under the heading ***"Taking risks"***, Lord Nicholls continued (at pp.390F-391B):–

> ***"He is required to act honestly; but what is required of an honest person in these circumstances?*** An honest person knows there is doubt. What does honesty require him to do?
>
> ***The only answer to these questions lies in keeping in mind that***

honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those ***circumstances.*** It is impossible to be more specific. Knox J. captured the flavour of this, in a case with a commercial setting, when he referred to a person who is "guilty of commercially unacceptable conduct in the particular context involved:" see *Cowan de Groot Properties Ltd. v. Eagle Trust Plc.* [1992] 4 All E.R. 700, 761 . ***Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty.*** An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did."

(ii) In *Twinsectra*, Lord Millett said of Lord Nicholls' judgment (at para.121):–

"In my opinion Lord Nicholls was adopting an objective standard of dishonesty by which the defendant is expected to attain the standard which would be observed by an honest person placed in similar circumstances. Account must be taken of subjective considerations such as the defendant's experience and intelligence and his actual state of knowledge at the relevant time. But it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was."

He added (at para. 123):

"Neither an honest motive nor an innocent state of mind will save a defendant whose conduct is objectively dishonest. … [E]quity looks to a man's conduct, not to his state of mind."

(iii) In *Barlow Clowes International Ltd v Eurotrust International Ltd.* [2006] 1 WLR 1476, Lord Hoffman, giving the judgment of the Privy Council, said (at

para.10):–

> ***"Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective.*** If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

He continued (at para. 12) as follows:–

> ***"The judge found that Mr Henwood may well have lived by different standards and seen nothing wrong in what he was doing.*** He had an
>
> ***exaggerated notion of dutiful service to clients, which produced a warped moral approach that it was not improper to treat carrying out clients' instructions as being all important.*** Mr Henwood may well have thought this to be an honest attitude, but if so, he was wrong."

Finally he said (at para.26):–

> ***"The court [below] went on to say that the judge's reasoning displayed the dangers of "drawing inferences from inferences", a process which they had earlier said was "notoriously productive of injustice".*** Their Lordships have some difficulty in understanding what this means. Mr Henwood's various subjective states of mind — whether or not he suspected misappropriation and whether he consciously decided not to ask questions about transactions in which he was assisting — were facts. Since there is no window into another mind, the only way to form a view on these matters is to draw inferences from what Mr Henwood knew, said and did, both then and later, including what he said in evidence. That is what the judge did and it is hard to see what other method could have been adopted."

180 In his final submissions Mr Preston accepted that evidence of later conduct may have some relevance to the question of dishonesty, but he submitted that that did not obviate the primary requirement to show that the relevant conduct at the time was undertaken with a dishonest state of mind. It is not enough to point to later examples of alleged dishonesty without also having material to prove that the relevant acts were themselves undertaken dishonestly. We agree with the broad thrust of this submission.

181 Minerva submitted, and the Nolans accepted, that the circumstances in which PTCL was placed included the extent of the services which it was contracted to provide to the Buchanan Group companies under the CMSAs to which we have already referred, the advice provided to PTCL by Kellykay under the services agreement and the advice provided by Edwin Coe. Conversely the Nolans submitted that such circumstances also included the statutory and regulatory environment to which PTCL was subject as a

company carrying on "trust company business" within the meaning of Article 2(3) of the Financial Services (Jersey) Law 1998 ("the FSL").

182 As a company carrying out trust company business, PTCL conducted "financial service business" and therefore required registration with the JFSC in accordance with Articles 2(1) and 8 of the FSL. PTCL was (and Minerva is) duly registered with the JFSC under Article 9 of the FSL.

183 Article 1(1) of the FSL defines ***"trust company business assets"*** as

> ***"(a) trust property; or***
>
> ***(b) any other assets or property not beneficially owned by the registered person".***

Article 21(1) then provides:

> ***"Where a registered person has control of or is otherwise responsible for trust company business assets which he or she is required to safeguard,***
>
> ***he or she shall arrange proper protection for them by way of segregation and identification of the assets or otherwise in accordance with the responsibilities he or she has accepted".***

184 Article 21(2) also empowers the Financial Services Minister to "prescribe the manner by which any classes of trust company business assets are to be protected". The Minister has exercised this power in the form of the Financial Services (Trust Company Business (Assets — Customer Money))(Jersey) Order 2000 ("the CMO"). Para.1(1) of the CMO defines "customer money" as:

> ***"trust company business assets consisting of money that the registered person has control of or is otherwise responsible for which the registered person is required to safeguard in accordance with the responsibilities the registered person has accepted in the course of carrying on that trust company business".***

Para.2(1) of the CMO requires that a registered person such as PTCL ***"must keep adequate records of customer money".*** By para.2 such records must

> ***"(a) show each transaction in respect of the money in a manner that allows the transaction to be identified and traced;***
>
> ***(b) be kept in a manner that allows the balance due to each customer to be identified and traced; and***
>
> ***(c) be in a form that allows the records to be reconciled on a timely basis so that any error can be corrected promptly."***

Finally, para.6 of the CMO provides that a registered person must ensure that a customer's money:–

> ***"(1) …. is not used for another customer without proper authority";***
>
> and
>
> ***"(2) …. is not disbursed unless it is –***
>
> ***(a) properly payable to a customer;***
>
> ***(b) properly payable by or on behalf of, or in respect of a customer; or***
>
> ***(c) otherwise properly transferred."***

185 Article 19(1)(a) of the FSL provides for the issue of Codes of Practice by the JFSC:–

> ***"for the purpose of establishing sound principles for the conduct of financial services business."***
>
> ***By Article 19(4) any Code of Practice so issued shall be admissible in evidence if it appears to the court to be relevant to any question arising in the proceedings.*** The Trust Company Business Codes of Practice — October 2001 ("the Codes") issued pursuant to Article 19 required PTCL to
>
> ***(i) (by para.1) conduct its business with integrity;***
>
> ***(ii) (by para.3.1.9.2) be able to demonstrate in relation to companies of which it was director that reasonable care had been taken to have knowledge of those companies;***
>
> ***(iii) (by para.3.7.1.2) document systems and procedures intended to safeguard trust company business assets to ensure that only authorised and proper transactions were undertaken; and***
>
> ***(iv) (by para.3.1.6) comply with the Proceeds of Crime (Jersey) Law 1999 ("the POCL") and the Money Laundering (Jersey) Order 1999 ("the MLO").***

Mr Preston submitted that it was not open to the Nolans to rely on the MLO because, amongst other things, the MLO had not been produced to the Court. We agree with that objection.

186 Articles 32 and 33 of the POCL provide directly against money laundering, prohibiting a person who knows or suspects that property (including money) which he is handling is the proceeds of crime from concealing it, making it available or acquiring or possessing it.

Article 34, however, goes further and provides:–

> ***"(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is or in whole or in part directly or indirectly represents another's proceeds of criminal conduct, the person:***
>
> > ***(a) conceals or disguises that property; or***
> >
> > ***(b) converts or transfers that property or removes it from the jurisdiction,***
>
> ***for the purpose of assisting any person to avoid prosecution for an offence specified in Schedule 1 or the making or enforcement in the person's case of a confiscation order.***
>
> ***(3) In paragraphs (1) and (2), the references to concealing or disguising any property include references to concealing or disguising its nature source, location, disposition, movement or ownership or any rights with respect to it."***

The Nolans did not suggest that PTCL was guilty of money laundering or was guilty of any offence under Article 34. Rather they relied on Article 34 as demonstrating that trust companies in the position of PTCL must be astute to consider the provenance of monies with which they are dealing.

187 Just as we accept Minerva's submission that the services which PTCL were contracted to provide under the CMSAs and the advice provided by Kellykay and Edwin Coe constituted part of the circumstances in which the personnel of PTCL were placed at the relevant time, so also we accept (subject to Mr Preston's point about the MLO) the Nolans' submission that the statutory environment within which PTCL operated was likewise part of those circumstances. By way of convenience we refer to the totality of the duties and responsibilities set out in paras.182 to 186 above as PTCL's ***"regulatory obligations".***

(b) Proof of dishonesty

188 The Defendants placed considerable emphasis on the standard of proof of dishonesty which they contended that the Nolans had to satisfy. In this regard they relied in particular on the following statements of principle.

(i) In *Re H (Minors)* [1996] A.C. 563 Lord Nicholls stated (at p.586E):–

> ***"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of***

probability. Fraud is usually less likely than negligence."

(ii) In the *Three Rivers case*, Lord Millett observed (at p.291D):–

> ***"It is not unfair to observe that, in the absence of some financial or other incentive, a charge of dishonesty against professional men and public officials is possible but inherently improbable.***

The rationale, Mr Preston submitted, behind this principle is that professional men or public officials are very unlikely to be dishonest in a way which entails a great risk to themselves personally and to the businesses in which they operate unless there is some incentive for them to do so.

(iii) In *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] 2 BCLC 324, Lord Hoffmann observed (at p.329g-h):–

> ***"The correct analysis is that the court is not looking for a higher degree of probability.*** It is only that the more inherently improbable the act in question, the more compelling will be the evidence needed to satisfy the court on a preponderance of probability."

We accept Minerva's submissions in this regard and adopt the guidance set out in the three cases mentioned above.

(c) The distinction between dishonesty and negligence

189 Minerva submitted that it was necessary for the facts from which dishonesty is sought to be inferred to be consistent only with dishonesty and not with negligence. The defendants relied in this regard on the speech of Lord Millett in the *Three Rivers* case, where he said (at p.292A-B):–

> ***"186 …. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.***
>
> ***187 In*** *Davy v Garrett* 7 Ch D 473, 489 ***Thesiger LJ in a well known and frequently cited passage stated: AIn the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence.*** They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent."

Minerva also referred to the passage in the *Royal Brunei* case in which the Privy Council observed (at p.392C):

> ***"There may be cases where, in the light of the particular facts, a third party will owe a duty of care to the beneficiaries.*** As a general proposition,

however, beneficiaries cannot reasonably expect that all the world dealing with their trustees should owe them a duty to take care lest the trustees are behaving dishonestly."

Again we accept Minerva's submissions in this regard.

(d) Summary of each party's case

190 The Nolans' opening skeleton argument read as follows:–

"371.7 [The] environmental and regulatory background essentially required PTC/Minerva to be honest, adequately protect funds it controlled which were not its own, know and understand the transactions it was undertaking, into which it should make active inquiry. Against this, PTC/Minerva blindly obeyed Mr Walsh's instructions in everything, including:

371.8 Misrepresenting the source of instructions to creditors, telling eg. Kellykay that the trustees were making the decision whether or not to pay it.

371.9 Prioritising expenditure from company accounts for Mr Walsh's personal benefit: into his personal accounts, payment of his credit card, buying cars for his daughters, buying him a Belgravia residence and redecorating it to his liking etc.

371.10 Keeping Kellykay starved of cash notwithstanding its payroll, tax and National Insurance liabilities were in arrears, while misrepresenting the reason for this as above.

371.11 Keeping secret the fact and source of funds received, and receiving large sums in the context of an instruction to keep this secret from particular individuals.

371.12 Accepting such large sums on the basis of implausible commercial explanations from Mr Walsh: that the Nolans lodged millions of pounds and euros for Mr Walsh's benefit via the companies in the expectation of some unspecified future share in an investment yet to be decided.

371.13 Accepting Mr Walsh's wish that it do not contact the Nolans properly to document the explanations he gave, despite its concerns it should do so given the sums involved."

We agree with the summary in the first sentence of para.371.7.

191 Minerva's opening skeleton argument, on the other hand, contended as follows:–

"128. … [A]s set out more particularly below, any assistance by the Defendants in any breaches of trust/fiduciary duties by any of the Buchanan Group

companies … cannot in any event be characterised as "dishonest" in the sense described above. In particular:

> *(1) The Defendants did not have actual knowledge that the monies transferred by the Plaintiffs were impressed with a trust (and/or that the Buchanan Group companies or Gerard Walsh were subject to any fiduciary duties owed to the Plaintiffs).*
>
> *(2) Moreover, the Defendants did not know facts which would have put an honest person in those circumstances on notice that the monies transferred by the Plaintiffs were impressed with a trust (and/or that the Buchanan Group companies or Gerard Walsh were subject to any fiduciary duties owed to the Plaintiffs).*
>
> *(3) The CMSAs expressly contemplated that PTCL should seek and rely on the advice of others when it came to investing the funds of the Buchanan Group companies (Clauses 1(vii), 2 and 6)….* Accordingly, the Defendants were entitled to rely and did honestly rely on the explanations of the various relevant transactions which [Mr Walsh] and/or [Kellykay] gave them.
>
> *(4) In light of the above, it was not "dishonest" (in the sense required for the Defendants to be fixed with liability for dishonest assistance) for the Defendants to treat the monies transferred by the Plaintiffs to the Buchanan Group companies as being at the disposal of the Buchanan Group companies and to be applied by them as they saw fit.*
>
> *(5) Further, in circumstances where the Defendants honestly considered that the Buchanan Group companies had obtained the entire beneficial interest in the monies transferred by the Plaintiffs, the purposes to which the monies were applied by the Buchanan Group companies were legitimate.*
>
> *(6) In particular, BOS had sanctioned [Mr] Walsh's personal expenses as a permitted item of expenditure from the Buchanan Group companies' BOS account.* Accordingly, the application of funds from the Buchanan Group companies' BOS account towards objects relating to [Mr] Walsh's personal expenses was legitimate. Further, in light of the fact Mr Walsh beneficially owned the Buchanan Group companies, these payments were not unusual."

The witnesses and other individuals

192 We heard oral evidence from the following witnesses (in the order in which they gave evidence):–

The statement of each witness had been ordered to stand as the evidence of that witness.

Neither party called any expert evidence.

(i) for the Nolans, the 1st Plaintiff, Joan; and

(ii) for Minerva,

(a) Mr English;

(b) the 2nd Defendant, Mr Peter Nicolle;

(c) the 3rd Defendant, Mr Michael Cordwell; and

(d) the 4th Defendant, Mr Stephen Morgan.

193 Although in the event the Nolans called only one factual witness, they also served a statement from Sally, the 10th Plaintiff. Para.2 of this statement recited the obtaining by the Nolans of the Jersey injunction on 15 th April, 2009, and continued:–

> *"As a result of the information obtained from Minerva following the Jersey injunction, Minerva's involvement in receiving and spending our money on Mr Walsh's instructions for things other than the investments it was paid over for became clearer.* I base the following accounts of Minerva's actions on documents obtained from Minerva as a result of this Jersey Injunction".

In the event it was unnecessary for the court to rule on whether Sally's statement was admissible as evidence of fact because she was unable to come to Jersey from Australia for medical reasons. On any view, however, it was open to the Nolans to rely on Sally's forensic analysis of the documents to which she referred both by way of submission and for the purposes of cross-examination of Minerva's witnesses, and this is the approach that the Nolans in due course adopted. Nor did Minerva challenge the accuracy of Sally's analysis.

194 Perhaps not surprisingly, Mr Walsh was not called to give evidence by either party. The court has not, therefore, had the benefit of hearing his side of the story of the matters raised in this action. In the circumstances of this case the absence of Mr Walsh has an added significance from an evidential point of view. In broad terms all of the Nolans' dealings with regard to their investments were with Mr Walsh, and all of PTCL's instructions as to the handling of the monies paid by the Nolans came from Mr Walsh; with the very limited exceptions to which we refer in this judgment, neither the Nolans nor PTCL had any direct contact with one another. Save, therefore for such limited exceptions, neither party was in a position to adduce direct evidence to challenge the factual assertions made by the other party and the only challenge which either party was able to mount had to be based on the contemporaneous documents.

195 Mr Walsh was not the only individual involved in the saga of the Nolans' investments who did not give evidence to us. Thus on the Nolans' side we did not hear from Mr Taylor, who formed the link between the Nolan family and the investments made by Serene and

Bilberry; apparently Mr Nolan senior decided to dispense with Mr Taylor's services in 2009 when the extent of the family's losses became clear. On Minerva's side we did not hear from, in particular Officer B, Officer A or Officer C, notwithstanding that it was, for instance, Officer B who, in Mr English's absence, was responsible for the immediate handling of the monies paid by the Nolans in respect of the first Elision investment.

196 Since in the ultimate analysis our decision on certain crucial aspects of this case depends on the view which the Court has taken of the facts, we state our conclusions at this stage about the witnesses whom we did hear.

(1) Ms Joan Nolan

197 Joan is now 40 years of age. She joined the family business in 1994 after leaving the University of Limerick where she obtained a Bachelor of Business Studies degree. She then started full time in Nolan Transport in accounts, and through evening and weekend study qualified as an accountant in 1997. She mainly worked with her sister, Elizabeth, in preparing the annual accounts, and dealing with customer accounts and credit control. From about 1998 onwards she began working with Patricia, Elizabeth, Ann and (later) Sally (when the latter joined the company in 2002) sourcing, arranging and negotiating various investments for the family. In 2005 the company appointed its first full-time financial controller from outside the family and she began to dedicate more and more of her time to the investment side of the business. As, however, we have already pointed out, she lacked experience in any form of investment except property. It is clear from the structure chart that was put to Joan during her cross-examination, and with which, subject only to minor details, she agreed, that the Nolan family's investments were extensive, and involved substantial sums.

198 Minerva criticised Joan's evidence on two counts. Firstly, it contended that she had given inconsistent explanations of the origin of the monies which Nolan senior had invested in Ravenscliffe. Secondly, Minerva argued that she had failed to give any proper explanation as to why she had received the shareholding in Columba personally notwithstanding that it was Serene which had paid for the shareholding. We reject both criticisms. As for the first criticism, even if (which we doubt) the source of the monies in Ravenscliffe is relevant for the purposes of this action, the simple answer is that there was no inconsistency in Joan's answers; she was pointing out that there was a distinction between the business of Ravenscliffe, which was that of leasing vehicles to, among others, Nolan Transport, and that of Nolan Transport itself. As for the second criticism, it was BHL which issued the Nominee Declaration in respect of the Columba shares in Joan's name. When asked why her name, not that of Serene, appeared on the Declaration she answered (correctly, as it seemed to us) because “Mr Walsh was very bad with his paperwork”. She accepted that she had taken no steps to remedy the error on the Declaration until 2007 but that is a different point and not one which, in our view, reflects adversely on her evidence.

199 Our overall assessment of Joan was that she remains sensitive, and understandably so,

about her role in the investments with which this action is concerned. Notwithstanding the extent of the Nolans' investment empire, she was clearly out of her depth in the world of private equity investment and we have no doubt that Mr Walsh deliberately took advantage of her comparative youth and inexperience to extract from the Nolan family the monies which the family invested with him. In short, she carries the burden of knowing that her misplaced confidence in Mr Walsh's representations has facilitated the loss by the Nolans of substantial sums which the family had earned through its hard work in Nolan Transport. This was, in our judgment, a factor which added to the evident stress of her giving evidence.

200 That said, we conclude that Joan was essentially an honest and straightforward witness. That does not mean that we have automatically accepted her evidence on every disputed issue, but we do find, for example, that her account of her discussions and dealings with Mr Walsh was in all material respects reliable.

(2) Mr Robert English

201 Mr English has worked in trust company business in Jersey since leaving school, beginning with Coutts (Jersey) Limited in 1994, where he was promoted to the position of client relationship officer in about 1997. He joined PTCL in November 2004 and has remained with PTCL/Minerva ever since.

202 Having joined PTCL as a trust officer, his initial role involved carrying out the day-to-day administration of company and trust entities, and undertaking preparatory work in relation to transactional matters for the directors or signatories to sign off. This included the preparation of board minutes for consideration and/or approval by the directors of the relevant Buchanan Group company. While he was in post as a trust officer, his work was supervised initially by Officer B and by his immediate line manager, Officer C. Subsequent to Officer B's departure from PTCL in May 2005 he was supervised by Officer A and, after Officer A's departure from PTCL in September 2005, by Mr Nicolle and Mr Cordwell, who had by then become the trust directors with responsibility for the relationship with Mr Walsh.

203 When he was promoted to the position of trust manager, following the departure of Officer C, he continued to be responsible for his own portfolio of some 55 entities. The role of trust manager also required him to supervise his team of four staff, check their work and provide support as required and complete staff reviews and appraisals. His team administered a total portfolio in excess of 300 entities. His duties as trust manager also included conducting day-to-day communication with clients and day-to-day administration of client companies. He successfully completed the diploma with the Society of Trust and Estate Practitioners during 2006. He became an associate director of Minerva in May 2011.

204 In his closing submissions Mr Preston asserted that Mr English was “patently honest” and that, as his evidence showed, he was a hard-working and professional member of the

Jersey trust company industry who enjoyed an unblemished professional record and was well-respected by his colleagues and superiors. He stressed the absence of any motive or incentive for Mr English to act dishonestly and thereby to put his reputation and livelihood at risk. Mr English was, we accept, a man with considerable experience of trust company business in Jersey; no doubt he was also a hard worker and he may well have been trusted by his superiors at PTCL. But we found him to be an unsatisfactory witness. He was by turns evasive and defensive, repeatedly refusing to accept the obvious until eventually driven to accept the inevitable. On many occasions his discomfiture when faced with questions he regarded as difficult was obvious. More importantly for present purposes we find that he was on a number of occasions untruthful in the evidence which he gave to us in the witness box, and dishonest in his conduct of the business of PTCL at the material time. We take just one example of each category at this stage.

205 As to his evidence being untruthful, in para.81 of his written statement, Mr English said:–

> *"As to my own role in deciding whether to action the various requests and recommendations which came in from Gerard Walsh or Arkaga Limited I always considered whether the proposed course of action was reasonable both as to how funds received by the Buchanan Group companies were to be treated and as to the transfer of funds out of the Buchanan Group companies to other bank accounts."*

Having confirmed in his cross-examination that that sentence was correct, his evidence continued as follows:

> *"Q. So you gave all of these various transactions your own independent consideration as to whether they were the right thing to do or not; would that be right?*
>
> *A. Yes, I would have done."*

And in the same vein Mr Preston asserted in his closing submissions that:_

> *"At all material times (i.e. during the period between March 2005 and September 2006), it was Mr English alone who had the necessary bank of knowledge in relation to the Buchanan Group companies to determine whether a given transaction proposed by Mr Walsh or Arkaga Limited was bona fide and honest or otherwise."*

206 On the evidence of Mr English himself those assertions were, we find, manifestly untrue. There is nothing in any document that we have seen, or in any evidence that we have heard, to suggest that Mr English ever brought any independent judgment to bear as to whether any of the Nolans' investments was the right thing to do. He never considered whether it was reasonable to treat the funds received by the Buchanan Group companies from the Nolans as loans; he treated them as loans because that was the system that he had inherited and because he was told to do so by Mr Walsh. Nor did he ever consider whether a transfer of funds out of the Buchanan Group companies was reasonable; he

simply made each and every payment that Mr Walsh told him to make. At best all he did was to ensure that the paperwork was in order. To Mr English what was reasonable or the right thing to do was what Mr Walsh said —— no more and no less. Similarly he never gave any thought as to whether a given transaction proposed by Mr Walsh or Arkaga Limited was bona fide and honest or otherwise. Mr Santos-Costa made this point to Mr English in cross-examination, as follows:

> *"Q. Pretty much what Mr Walsh says goes, isn't it, Mr English?*
>
> *A. He's the client, but that's not always the case, no."*

That denial was untrue, at any rate in the context of the investments with which we are concerned. Indeed when asked by the Court to identify a single instance when PTCL had not followed Mr Walsh's "advice", Mr Preston frankly admitted that he could not point to any occasion when Mr Walsh's "advice" had been rejected. Since these dishonest assertions by Mr English went to the heart of PTCL's modus operandi in respect of the Nolan family's investments, it is difficult to underestimate their seriousness.

207 In this respect we bear in mind also the evidence of Mr Cordwell, which we accept, as follows:–

> *"Q. … You refer [at para.72] to "proper protocol".* If all that Mr English did —and I put this hypothetically to you —was to rubber stamp Mr Walsh's instructions, is that proper protocol, as far as you're concerned?
>
> *A. No, not to rubber stamp.* But I don't believe that there was any rubber stamping.
>
> *Q. But if there was, that would not have been proper protocol; yes?*
>
> *A. I think that's right.* I don't think —I'm sure that's right."

Since we find that rubber stamping Mr Walsh's instructions is precisely what Mr English always did, it follows that Mr English was not following the proper protocol.

208 Finally we address the argument by Mr Preston that PTCL in general, and Mr English in particular, discharged their duty to give independent thought to transactions by relying on advice from Kellykay. To that argument it seems to us that there are at least two answers. Firstly, that is not what Mr English said, either in his statement or in his oral evidence as set out in para.205 above; nor does it accord with what Minerva said in its closing submissions that "it was Mr English alone who had the necessary bank of knowledge". Secondly, there is no evidence that Mr English relied on the advice of Kellykay in relation to any of the eight investments made by the Nolans.

209 Turning to Mr English's dishonesty in the conduct of the business of PTCL, on a number of occasions in 2005 and 2006 Mr English claimed in emails that he required, or was awaiting, trustee confirmation or approval before he could pay sums due from BHL to

Kellykay under the services agreement which we have set out in para.22 above. By way of example, on 21 October 2005 Ms Sheila Monaghan, the accounts manager of Kellykay, emailed Mr English asking for payment of two invoices totalling £87,755.32, covering several government agency bills and suppliers which Kellykay had to pay. Mr English forwarded the invoices to Mr Walsh on 26 October, saying that he was being pressed for payment by the month end and that he would appreciate receiving any comments in this regard. Mr Walsh replied the following day, saying:–

> *"Pay them £50,000 On account explain to them we need to get trustees approval."*

That is what Mr English did. His evidence in cross-examination about this episode began as follows:

> *"Q. Why did you do that?*
>
> *A. (Pause). Because that was Mr Walsh had suggested that and it seemed okay to do.*
>
> *Q. Mr Walsh is suggesting that you lie to [Kellykay], isn't he?*
>
> *A. No.*
>
> *Q. Well, he says: explain to them that we need to get trustee approval.* You know that's not true, don't you?
>
> *A. I do know that's not true because the trustees didn't want were happy for us to continue with operations but*
>
> *Q. So why did you lie to [Kellykay] on Mr Walsh's behalf?*
>
> *A. It was more a delaying tactic, in terms of assessing the finance position and creating a barrier so that they could become more self sufficient because they had been operational for nearly a year now and we needed them to start getting on the boards of companies and charging recharging their management fees so that they could start becoming more self sufficient."*

Although he resolutely refused to accept that he had told a lie, Mr English did accept that his answer was "not 100 per cent truthful". The cross-examination continued:

> *"Q. Why were you prepared to lie on Mr Walsh's behalf to his to your creditors?*
>
> *A. It was all part of Mr Walsh was the client. It was all part of the structure. [Kellykay] were a subsidiary of [BHL]. It's all part of his group. He was the entrepreneurial force behind the structure. So to all intents and purposes I looked to him as the client and the person with the overall funding picture, if you like.*
>
> *Q. So you were doing exactly what he told you to do, regardless of whether that involved the truth or not?*

A. No. Each request, each transaction was considered.

Q. And you considered it appropriate to lie on his behalf on this occasion?

A. I considered it appropriate to say that I would need to seek approval for from the trustees before releasing further funds.

Q. Even though you didn't need approval from the trustees and you were never going to get it?

A. That's true."

210 As Mr English had accepted in his evidence in chief, the reason why such payments to Kellykay did not require the approval of the trustees was because they were operational matters and the trustees of the Arkaga Settlement were content that PTCL should deal with such operational matters without their involvement. Therefore, as he admitted, "there was no need to contact the trustees at all in that situation". Indeed he likened his response to "from a legal perspective, I suppose if you say you're taking instructions from your client". As appears from the evidence we have set out in the preceding paragraph, Mr English sought to excuse his untruths variously on the basis that they constituted delaying tactics and/or that delay in paying Kellykay would incentivise Kellykay to get on with fulfilling its business plan to generate its own income. Indeed Mr Preston went so far in his final submissions as to describe Mr English's falsehoods as "white lies" because they had been told:–

"in order to expedite [Kellykay] becoming financially self reliant, a goal which was in the interests of the Arkaga structure as a whole and which Kellykay acknowledged to be desirable and necessary."

Even accepting that all concerned, including Kellykay itself, thought that it should achieve financial self-sufficiency sooner rather than later, by no stretch of the imagination, in our judgment, could Mr English's falsehoods be described as white lies; they were lies pure and simple. Neither of Mr English's own excuses can hold water. Nor does the comparison with a lawyer taking instructions bear examination; no honest lawyer would say that he was taking instructions if he was not in fact doing so. The reality, as Mr English effectively, if reluctantly, conceded, is that he was prepared to tell these lies because that is what Mr Walsh instructed or wanted him to do.

211 These two examples of Mr English's behaviour are also important in the context of Minerva's submission that Mr English would not, in the absence of some motive or personal incentive, have risked his reputation or livelihood by acting dishonestly. There has been no suggestion that Mr English had any motive or incentive to lie about exercising an independent judgment, or about the need for trustee approval of payments to Kellykay. But lie he did, without any apparent concern for his reputation or livelihood. This is clearly an important factor when we come to consider the Nolans' allegations that his conduct in other respects was also dishonest.

212 We make one final comment on Mr English at this stage. It seems clear to us that the attitude of mind which underlay Mr English's willingness to accommodate Mr Walsh's every wish, even to the extent of lying on his behalf, was also reflected in his generally unquestioning approach to third party investments in the Buchanan Group companies, with the result that he failed to make the enquiries of Mr Walsh that an honest trust officer would have made, as will appear later in this judgment.

213 Accordingly, while we do not, of course, reject in its entirety the evidence which Mr English gave to us, for the reasons set out above we have approached all parts of his evidence with considerable caution.

(3) Mr Peter Nicolle

214 Mr Nicolle is an Associate of the Chartered Institute of Bankers and a Member of the Society of Trust and Estate Practitioners and the Securities Institute. He started his career in trust and corporate services in Jersey in 1981. In 1990 he joined what was then known as Brown Shipley Trust Company Limited (“Brown Shipley”), which was subsequently acquired by Standard Bank (“Standard”), following an interview with Mr Cordwell, the then managing director of Brown Shipley. He was only involved in the trust activity of the business, not the banking side. He reached the level of trust manager and director while at Standard. In October 1996 he joined Mr Cordwell at PTCL as a director, becoming managing director two years later. Following the Mutual Merger he continued as chief executive and a director of PTCL. He was appointed a director of ANL, BHL, BSL, BWL and PPIL on 23 July 2004 and subsequently a director of AHL.

215 Mr Preston described Mr Nicolle as “patently honest” as well. We disagree. He was thoroughly unimpressive. Like Mr English, he was by turns evasive and defensive. When taxed with documents which he could not honestly explain away he resorted to long, rambling answers which frequently descended into unintelligibility, and when that tactic did not work he resorted to simple untruthfulness. Another ploy when faced with a difficult document was to fall back on the refrain that such documents could have been “better drafted” (or words to that effect). As we conclude later in this judgment, that excuse was also untrue.

216 The most obvious example of Mr Nicolle's lack of honesty when giving evidence arose from the English proceedings, in which he had, as we have recorded earlier in this judgment, signed the statements of truth on behalf of BHL, BSL, BWL and AHL. He was questioned in particular about the denial in para.14.5 of the Defence of the English Defendants of the allegation in the Particulars of Claim that Mr Walsh was A “he driving force behind and in control of substantial investment funds” held by the Arkaga Settlement or AHL.

217 Mr Nicolle's evidence in chief regarding his role in the preparation of the Defence can be summarised as follows:–

He added in his cross-examination that he did not check the Defence as served until sometime later, probably in 2011, by which time it was too late to do anything about the changes which had not been made. With the exception of the email of 26 August to which we refer below, no copies were produced of any of the documents to which Mr Nicolle referred dealing with the matter of any suggested corrections.

(a) He first saw the Particulars of Claim when they were emailed to Mr English by Edwin Coe on 19 th May, 2008.

(b) Two days later he attended a meeting with Mr Whitton, Mr Stuart-Smith and Mr Simon Chipperfield (the chief executive officer of Kellykay). Mr Walsh was not present. The purpose of the meeting was to explain the information gathering process necessary for the preparation of the Defence and how the court proceedings would work.

(c) When he saw para.14.5 of the draft Defence, he regarded it as a true statement. As he elaborated:

> *"A. Well, I read it on the basis that the driving force behind and in control of substantial investment funds was not something that I would say Mr Walsh was.*
>
> *Q. Why was that?*
>
> *A. Because I couldn't see that he was in control of substantial investment funds as part of that sentence.* It didn't he did not have control. There was a trustee. We were the directors of the companies. [AL] managed assets. He was not on the Board of these companies. I did not regard him as a shadow director. He did not have control. He was not a signatory on the bank account. Most of the investment activity was managed by [AL] without his involvement. The projects that were set up did not seem to have his involvement in them."

(d) There was an information gathering meeting in June, which was attended by Mr English and Mr Cordwell, but not by him. From that time on Minerva did not receive any further correspondence regarding the drafting of the Defence, nor did Minerva have any input into it.

(e) Mr Nicolle next saw the draft Defence on 26 August 2008, when it was explained that the pleading had to be filed with the English court by close of business that day. Minerva made some comments on the document and sent back an email specifying certain changes that Minerva wanted to see made where the draft did not accord with its understanding.

(f) On the basis of an assurance from Edwin Coe, he signed the statements of truth in

draft, so to speak, because he was told that Edwin Coe might well be working late that evening to get the document filed. So he signed:–

> *"on the assurance that those changes would be made, certain of which I think were and some of which were not."*

218 Obviously the proper course is for a pleading to be in its final form before the statement of truth is signed, but we do recognise that pressures of time may occasionally make this impossible. We do not, therefore, criticise Mr Nicolle for signing the statements of truth on behalf of the four defendants in question in draft, on the basis that any corrections to the draft pleading would be incorporated before the Defence was served. But it is impossible to believe, and we do not believe, Mr Nicolle's assertion that he did not read the final version of the Defence immediately after it was served. On his own evidence he had no previous experience of being involved in litigation. We have no hesitation in concluding that, contrary to his sworn evidence to us, he did read the Defence after it was served, as we would expect any person in his position to have done, if only to check that the desired amendments had been included in the pleading as served. We accept that it would have been both awkward and embarrassing for him to have had to draw Edwin Coe's attention to the errors which, on his version of events, remained in the Defence as served and that the consequence might have been to reveal a conflict of interest among the English Defendants. But we have no doubt that that is what an honest director of the relevant companies would have done; an honest director who had signed statements of truth in draft could not, and would not, have allowed what he regarded as continuing inaccuracies in the pleading as served to stand. We conclude, therefore, that Mr Nicolle's failure to draw Edwin Coe's attention to any continuing inaccuracies in the Defence was not because he did not read the Defence at the time, but because he was prepared to associate himself with those untruthful assertions if that is what suited Mr Walsh — who, we have no doubt, was the primary source of the instructions to Edwin Coe regarding the drafting of the Defence.

219 We now turn specifically to para.14.5 of the English Defence. Given that the English Claimants were alleging that the Arkaga Settlement was a sham, it is perhaps not surprising that Mr Walsh himself was anxious to deny the allegation in the Particulars of Claim that he "was the driving force behind and in control of substantial investment" funds held in the Arkaga Group, even if that denial in para.14.5 involved Mr Walsh making a false statement of truth. But the Buchanan Group companies and Mr Nicolle had no such excuse for associating themselves with para.14.5, which Mr Nicolle did not require Edwin Coe to alter in the draft Defence. We do not believe his account of why he was prepared to endorse the denial that Mr Walsh was the driving force behind the Arkaga Group. He acknowledged in cross-examination that Mr Walsh was the driving force behind, for example, the sale of 50% of ARIL to the Nolans and when questioned by the Court he accepted that Mr Walsh was the driving force behind the Arkaga Settlement. He must have realised that he (or more accurately the Buchanan Group companies of which he was a director) could distinguish between the various parts of the plea in para.6a of the Particulars of Claim and that they could deny one part while admitting another. We recognise that for BHL, BSL, BWL or AHL to have disavowed the denial in para.14.5 of the draft Defence would have created an irreconcilable conflict of interest between those companies and Mr

Walsh, with the result that Edwin Coe would not have been able to represent both them and him, and the companies would have had to have been separately represented. But if the PTCL directors of the four companies, and in particular Mr Nicolle, had been acting honestly, that is the price which the companies would have had to pay.

220 The reason why Mr Nicolle associated himself with the untrue denial that Mr Walsh was the driving force behind the Arkaga Group is, we find, that even in 2008 he was prepared to do Mr Walsh's bidding, just as he had done throughout his time at PTCL. As with Mr English, so with Mr Nicolle; whether through misplaced loyalty or otherwise, what Mr Walsh said went. And as with Mr English, this finding has the added significance of demonstrating that Mr Nicolle was prepared to be dishonest on Mr Walsh's behalf despite the absence of any personal motive or incentive (save to retain a valuable client) and even at the potential cost to his reputation and livelihood.

221 As, therefore, with Mr English, we have approached the totality of Mr Nicolle's evidence with great caution. That said, he had limited involvement in the individual investments; his substantive involvement with the matters raised in these proceedings did not, we accept, begin until early 2007 when Mr English consulted him about the letters sent by Serene and Bilberry on 18 January of that year.

222 There is one final comment that we would make at this stage arising out Mr Nicolle's evidence regarding the English proceedings, which echoes what we have already said regarding Mr English. The Defence of the English Defendants included the following pleas:–

> *"14.2 From time to time, [Mr Walsh] was approached by individuals with proposals for investments.*
>
> *14.3 Prior to the incorporation of [AL] in November 2004, these proposals were considered by the directors of the Buchanan companies in conjunction with [Mr Walsh].* After November 2004, [Mr Walsh] generally passed on these proposals to the management team at [AL]. That team considered the merits of the projects and made recommendations to [BSL], [BWL] and [BHL]. The directors of those companies considered the recommendations made and reached decisions as to which investments should be made."

Although Mr Nicolle rejected the suggestion that he simply acted as a rubber stamp for decisions that had already been taken by Kellykay, he accepted that he brought no independent commercial judgment to bear on any of the investment decisions because he simply did not have the expertise to second guess what Kellykay was recommending. (Kellykay did not, of course, recommend any of the Nolans' eight investments.) We also find, based on Mr Nicolle's evidence, that the expression "due consideration" which appears in the minutes of board meetings of the Buchanan Group companies would frequently amount to no more than a check that the paperwork relating to the transaction in question was in order. Indeed, as Mr English explained in his evidence, he would generally draft such minutes beforehand and the directors would review the minutes as presented,

although if any amendments were required he would incorporate the necessary changes. Finally, we record Mr Nicolle's evidence that on occasions board meetings recorded in minutes would not involve face to face contact between the directors but would consist simply of so-called paper based meetings, when each director considered the draft minutes individually.

(4) Mr Michael Cordwell

223 Mr Cordwell is a Fellow of the Institute of Chartered Secretaries and Administrators and a member of the Society of Trust and Estate Practitioners and the Chartered Securities Institute. He has 40 years of experience in the finance industry, mostly attained in the trust and corporate administration services sector.

224 In June 1993 Mr Cordwell established PTCL with himself as the principal and managing director. In 1998, when Mr Nicolle was appointed as managing director of PTCL, Mr Cordwell became chairman and he remained as chairman following the Mutual Merger. Under the terms of the Minerva Acquisition, Mr Cordwell stepped away from involvement in the day-to-day running of the business, becoming more involved in strategic and development matters, but he continued as one of the directors of Minerva Financial and as a director of Minerva Holdings. On 23 October 2008 he stepped down as a director of Minerva Financial, remaining as a director of Minerva Holdings. He continued on this basis with the Minerva group until he tendered his resignation in January 2009, to take effect on 30 June 2009. He remained a consultant to the Minerva Group for a further two years until 30 th June, 2011.

225 Mr Cordwell's personal involvement in the matters raised by the Nolans' claims was very limited. He conceded at the outset of his cross-examination that the parts of his statement dealing with the various investments in dispute in this action were, in the main, based on his subsequent review of the files. Although there was no formal challenge by Mr Santos-Costa to these parts of Mr Cordwell's statement, it seemed to us that they were inadmissible in the same way as the statement of Sally. There is, however, no need for us to make any formal ruling in this regard since we did not find the parts in question to be of any assistance and we have not relied upon them in this judgment.

226 We were not persuaded by Mr Cordwell's attempt to defend the way in which Mr English had behaved; in our view this attempt owed more to his loyalty towards an employee than to any real faith in Mr English's answers. Nor were we impressed by his reluctance to accept that BHL was insolvent following the interim payment order made by the Commercial Court in London. Subject to those points we found Mr Cordwell to be basically an honest witness. Furthermore Mr Santos-Costa did not in cross-examination suggest to Mr Cordwell that he personally had committed any acts of dishonest assistance and in his final submissions Mr Santos-Costa confirmed that the Nolans no longer accused him of dishonest assistance. Accordingly we have no hesitation in acquitting Mr Cordwell of any suggestion of personal dishonesty with regard to any of the Nolans' investments.

227 Finally, there was one exchange between Mr Santos-Costa and Mr Cordwell that we found to be of particular assistance, as follows:–

> *"[Q.] As a general principle, Mr Cordwell, when monies are received from third parties by companies that you are a director of, do you consider it important to understand clearly while why those monies had been received and what those monies are for?*
>
> *A. Yes.*
>
> *Q. And how would you establish that, in your opinion?*
>
> *A. Well, it depends on reasonableness in the circumstances.* And it depends on the nature and characteristics of the funds that are being received.
>
> *Q. And would it be prudent to obtain documentation or some kind of written evidence as to why the third party has paid the money to your company?*
>
> *A. Yes, it would be reasonable to have confirmation and/or albeit telephone conversation or some form of documentary evidence, of course.* That almost goes without saying, I think."

In our view that evidence of Mr Cordwell accurately reflected the effect of PTCL's regulatory obligations with regard to the receipt and handling of funds from third parties.

(5) Mr Stephen Morgan

228 Having qualified as an accountant, Mr Morgan joined MTML in August 2000 and on 1st January, 2002, he was appointed the financial director. Following the Mutual Merger with PTCL, he became the financial director of PTCL. He left PTCL in October 2006 and since June 2007 he has been employed by SG Hambros Trust Company (Channel Islands) Limited.

229 As the financial director of MTML, Mr Morgan was principally responsible for the preparation of the management accounts for the business and for the review of client accounts for each entity administered by MTML. There was nothing in the accounts of the Jersey companies that caused Mr Morgan any concern at any material time. He seldom had any involvement with administrative matters concerning particular clients. Following the Mutual Merger, Mr Morgan continued to provide the same services for PTCL that he had for MTML. Although he was appointed a director of various Buchanan Group companies following the departure of Officer A, and later a director of AHL and ARIL, in practice the administration of the companies was carried on by the relevant trust officer or manager and by the particular director responsible for the companies. When Mr Morgan left PTCL in October 2006, he resigned as a director of all of the Buchanan Group companies and of AHL and ARIL. It was, therefore, for only for a relatively brief period that he actually served

as a director of those companies.

230 In our view Mr Morgan was a clear and honest witness and we accept his evidence in its entirety. Mr Santos-Costa did not, in his cross-examination, challenge any part of Mr Morgan's evidence as set out in his written statement. In particular Mr Santos-Costa again put no allegations of dishonest assistance to Mr Morgan and in his final submissions Mr Santos-Costa confirmed that the Nolans no longer accused him of dishonest assistance. As, therefore, with Mr Cordwell, we have no hesitation in acquitting Mr Morgan of any suggestion of personal dishonesty with regard to any of the Nolans' investments.

231 In the witness box Mr Morgan asserted that it was the generally accepted accounting standard applied by all trust companies in the Jersey offshore financial industry to record funds received for investment, for example for the purchase of shares, as loans. As Mr Morgan succinctly put it:

> *"It is simply recorded as a loan by virtue of the fact that there is no other way to record it."*

This bookkeeping treatment, Mr Preston submitted, reflected the fact that the company, on receipt of funds from third parties for the purchase of shares, assumed a contingent liability to repay the purchase price; once the shares had been transferred, this contingent liability was extinguished. In his final submissions Mr Santos-Costa made clear that he did not accept that the industry practice was as described by Mr Morgan. He did not suggest that Mr Morgan's evidence was deliberately untrue in this regard; rather he suggested that Mr Morgan was mistaken. The problem for this Court is that we have no other evidence either way on this issue. In those circumstances we conclude that we have no option but to accept what Mr Morgan told us. It follows from that conclusion that Mr English cannot, in our view, be validly criticised for following the practice which he had inherited at PTCL of recording the monies paid by the Nolans as loans for bookkeeping purposes. But the way in which funds received for investment are treated for accounting purposes in the books of a company cannot, of course, affect the true legal position. Indeed Mr Morgan himself accepted, and rightly so in our view, that monies received for the purchase of shares were "not strictly" loans.

Preliminary matters

232 There are several issues which it is convenient for us to address before we turn to our detailed findings in respect of each investment. The common feature of all these issues is that they are not specific to any individual investment, but are of more general relevance. These issues are:–

(1) the absence of documents;

(2) the intentions of the corporate transferors;

(3) the knowledge of the Buchanan Group companies;

(4) the Nolans' rights as shareholders in Elision and Columba; and

(5) cumulative knowledge.

(1) The absence of documents

233 In his final submissions Mr Preston contended that the Nolans had given wholly inadequate Discovery. In particular he submitted that they had disclosed nothing, or practically nothing, in relation to the following categories of evidence:

We agree with his description of these categories of documents as very material. Mr Preston further submitted that the only conclusion which the Court could reach is that the Nolans had deliberately withheld this documentation.

(a) correspondence between the Nolans and Mr Taylor;

(b) documents relating to the internal administration of Serene and Bilberry;

(c) correspondence between the Nolans and the independent trustee of the NTRBS; or

(d) documents relating to the internal administration of the NTRBS.

234 It was Joan's evidence that the informality of the Nolans' dealings between themselves, which we have already described, also characterised their dealings with Mr Taylor of Chancery Trustees/Chancery Trust; thus her communications with Mr Taylor regarding Mr Walsh's proposals for investment were mainly by telephone and she did not exchange much physical or email correspondence with him. Similarly, while there were email exchanges between Joan and Mr Walsh, Joan made few notes of her discussions or conversations with Mr Walsh. Whilst it may seem odd that Joan, especially given her background of a business degree and her involvement in the financial side of Nolan Transport, was prepared to recommend the investment of the substantial sums involved in this action in such an informal manner, we accept her evidence in this regard.

235 What we regard as much more surprising is the apparent paucity of documentation from Chancery Trustees and Chancery Trust regarding the Nolans' investments. As trustees of Portobello and managers of Serene and Bilberry, and as professional service providers, we would have expected Chancery Trustees/Chancery Trust, and Mr Taylor himself, to have maintained proper documentary records. We are conscious that we have not had the benefit of any explanation from Mr Taylor for this state of affairs. That said, we have no reason to doubt Joan's evidence to the effect that the current directors of Serene and Bilberry have gone through the files and provided all documentation relevant to these proceedings. Furthermore, although Mr Preston did investigate the absence of documentation in his cross-examination of Joan, he did not put it to her that the Nolans had

deliberately withheld relevant documentation. Accordingly we reject Mr Preston's submission that that is what the Nolans had done. In those circumstances it seems to us that we should not draw any inferences adverse to the Nolans as a result of any inadequate record keeping on the part of Chancery Trustees, Chancery Trust or Mr Taylor himself.

236 Finally, we observe that it was not only Chancery Trustees or Chancery Trust that apparently failed to keep the documentary records that we would have expected of a competent and professional trust company. The record keeping of PTCL on a number of occasions fell significantly short of what we would have expected, in particular in relation to notes of telephone conversations.

(2) The intentions of the corporate transferors

237 In the context of the first Elision investment Minerva always accepted that Joan's knowledge and intentions could be imputed to the NFP for the purposes of any *Quistclose* trust. In the course of his final submissions Mr Preston also accepted, rightly in our view, that Joan's knowledge and intentions could likewise be imputed to the NTRBS (of which Joan was one of the trustees) for the purposes of any *Quistclose* trust in relation to the two German nursing homes investments. However Minerva argued that no *Quistclose* trust could arise in relation to the remaining five investments where the investors were Serene or Bilberry because there was no evidence of the purpose for which either of those entities transferred their investments to the Buchanan Group company in question. In this regard there was an obvious overlap with Minerva's complaint about the Nolans' inadequate disclosure.

238 More particularly Minerva's argument was that in the remaining five cases the purpose of the transfer was determined in the course of conversations between Joan and Mr Walsh. However, the transfer of funds was effected by a corporate entity (Serene or Bilberry) which was not a party to these conversations and was not itself in direct communication with Mr Walsh. In these circumstances, there was no sufficient evidence from which the Court could find that the corporate transferors had in mind, with sufficient clarity and precision for the purposes of a plausible *Quistclose* trust argument, the particular purpose(s) for which the Nolans now contended. Rather, such evidence as there was suggested that the corporate transferors of funds actioned the transfer of funds in each case on the understanding that the monies amounted to the purchase price under contracts for the sale and purchase of shares.

239 Joan accepted in cross-examination that in relation to these remaining five investments there was no documentary evidence to show that the purpose of the transfer was communicated to Mr Taylor who, for these purposes, represented Serene and Bilberry via Chancery Trustees or Chancery Trust. But Mr Santos-Costa submitted that unless Serene and Bilberry simply transferred the money at random, without knowing what the purpose of the transfer was (which would be a very strange scenario indeed), the basis upon which the money was transferred could only be what Joan had told Mr Taylor. It was Joan's evidence

that she discussed each investment with Mr Taylor and it was inconceivable that in the course of such discussions Joan did not relay to Mr Taylor what Mr Walsh had told her about the various investments.

240 Mr Santos-Costa also sought to rely on an Affidavit sworn by Mr Taylor in the English proceedings for the purposes of an initial freezing order. Mr Preston submitted that the Nolans should not be allowed to rely on this Affidavit because they had not served any hearsay notice in respect of it as required by Article 4(1) of the Civil Evidence (Jersey) Law 2003 and Rule 6.21 of the Royal Court Rules. But as Mr Preston accepted, by Article 4(4) a failure to comply with the requirement for a hearsay notice affects only the weight to be attached to the evidence, not its admissibility. In this respect we have had regard to the factors listed in Article 6 and we conclude that we should accept what Mr Taylor said in that Affidavit as accurate. Mr Taylor's evidence supports the general thrust of the Nolans' case that the investments were indeed made following recommendations by the Nolan family.

241 We recognise that there is some force in Minerva's submission on this point, but in the final analysis we do not accept it. It was only the absence of Mr Taylor from the witness box which allowed Minerva to run its argument at all, but we accept that Mr Taylor's Affidavit demonstrates that his account of events is consistent with Joan's evidence of her communications with him. Accordingly on the totality of the evidence we conclude that the Nolans have established that the intentions of the corporate transferors reflected Joan's intentions and purposes as determined following her discussions with Mr Walsh.

(3) The knowledge of the Buchanan Group companies

242 Minerva's case on this issue built upon the principles summarised by Lord Browne-Wilkinson as set out in para.168 above and may be summarised as follows:–

(a) In the case of a *Quistclose* trust, the trust cannot arise without the conscience of the putative trustee being affected since the trust requires an intention on the part of both the transferor and the transferee that the transferred assets are not to be at the free disposal of the transferee. This means that the trustee must be aware of the facts which give rise to the trust.

(b) In the present case (with the exception of the second Elision investment) there was no evidence of any communication of the alleged purpose to the transferee (the Buchanan Group company in question). Accordingly there was no basis on which it could be concluded that the parties understood and intended that the monies were being transferred for such purpose and were therefore not at the free disposal of the Buchanan Group companies.

(c) The Nolans' failure to communicate in writing to the Buchanan Group companies the purposes of the transfers of monies, especially in circumstances where it was open to them to have done so, inevitably increased the burden of demonstrating that

such a Quistclose trust might be inferred from the circumstances surrounding the various transfers of funds. As Hildyard J. observed in *Challinor v Juliet Bellis & Co.* [2013] EWHC 347 (Ch) (at para.551):

> ***"As it seems to me, the lack of writing does not necessarily mean that the circumstances are not such as to give rise to a Quistclose trust, though of course the burden of demonstrating that such a trust may be inferred in such circumstances is inevitably heavier."***

(d) In the present case, the failure to communicate the alleged purpose was fatal to the Nolans' argument. The Buchanan Group companies were not aware that the relevant funds were subject to any trust at the time the funds in question were dissipated. On the contrary, the companies understood (on the basis of what Mr Walsh told PTCL) that these monies were to be treated as the purchase price paid under share sale contracts and that the monies received would accordingly form part of the general assets of the companies in the usual way.

243 We add for the sake of completeness that in our view the same principle must apply mutatis mutandis to a *Halley* trust; the putative trustee must have knowledge of the facts which are alleged to give rise to the Halley trust.

244 It was Mr Santos-Costa's submission that the Arkaga Settlement, insofar as it could be called a trust, was nothing more than a sham. However, the legal status of the Arkaga Settlement, and in particular whether it was a sham, was not directly in issue in this action. In those circumstances, and given that the Arkaga Settlement was not a party (in whatever corporate guise) to the present proceedings, we do not consider that we should express any view on that point. Clearly, however, an integral element of that submission concerned the role which Mr Walsh played in the affairs of the Settlement and of the Buchanan Group companies, and the significance of that role.

245 The Nolans' simple response to Minerva's submission was that the knowledge of Mr Walsh was to be imputed to the Buchanan Group companies. They relied in particular on *Selangor United Rubber Estates Ltd v. Cradock* [1968] 1 W.L.R. 1555 where the directors carried out their functions in obedience to the fraudulent Mr Cradock without exercising any discretion or volition of their own.

246 Ungoed-Thomas J. first set out the law, as follows (at pp.1577H–1578H):

> ***"(2) How far is a director who acts on the direction of a third party bound by the state of mind of that third party?***
>
> ***How far, as put in argument, the director who acts, without exercising any discretion, at the direction of a stranger to the company is, in respect of his liability for funds under his control (for which he is, as I have concluded, a trustee) to have ascribed to him the purpose of that stranger,***

or, as I prefer to put it and which comes to much the same thing in our case and is sufficient for present purposes, how far is he bound by the stranger's knowledge of the nature of the transaction?

In *Gray v. Lewis Mellish L.J.* ***said:***

If a person allows himself to be the mere nominee of, and acts for another person, he must be bound by the notice which that other person for whom he acts has of the nature of the transaction.'

And that was said with reference to a fraudulent and illegal transaction. The nominees in that case were not directors but purchasers of shares.

In *Land Credit Co. of Ireland v Lord Fermoy* ***a company's funds were used by a duly appointed directors' sub-committee to buy the company's shares in order to raise the price and keep up a fictitious appearance of credit.*** This operation was carried out and cloaked by a sub-committee in the guise of loans, which were then used to buy the shares. The sub-committee disclosed the loans to the full board but not their purpose and use. The loans were not of unusual amount and there was nothing about them to put the board on inquiry. So a director who was not involved in the transaction, otherwise than as a member of the board, and presumed to have just the knowledge disclosed to ***the board, was held not liable to repay to the company the amount of the loan.*** The sub-committee was duly appointed and acted within the ambit of its authority in making the loans, its only report was of the loans and the loans qua loans were unexceptionable. The director therefore acted perfectly properly within the ambit of his responsibility, having regard to the proper delegation of responsibility to the sub-committee in accordance with the company's constitution. The objectionable part was concealment by the sub-committee, namely that the loans were but means of purchasing the company's shares with the company's money. In these circumstances, it was said 'a director cannot be held liable for being defrauded.'

But that does not touch upon the case of a nominee director putting himself blindly at the disposal of a stranger without status in the company, except the irrelevant status for present purposes of shareholder. The Land Credit Co. Case decision does not impinge in any way upon the observations of Mellish L.J. which I have quoted.

In my view, a director acting in a transaction on the direction of a stranger is fixed with that stranger's knowledge of the nature of that transaction."

247 Turning to the facts, one of the directors had explained (at p.1612C) that he was

"quite happy to do what I was told to do by the virtual owner of the company … because I obviously would have thought that he would not have invested the company's money in something where it would be lost."

Ungoed-Thomas J. continued (at pp.1613H–1614B) as follows:

> ***"It seems to me … that both Barlow-Lawson and Jacob were nominated as directors of the plaintiff to do exactly as they were told by Cradock, and that that is in fact what they did.*** They exercised no discretion or volition of their own and they behaved in utter disregard of their duties as directors to the general body of stockholders or creditors or anyone but Cradock. They put themselves in his hands, not as their agent or adviser but as their controller. They were puppets which had no movement apart from the strings manipulated by Cradock. They were voices without any mind but that of Cradock; and with that mind they are fixed in accordance with the view which I have already expressed on the law. They doubtless hoped for the best but risked the worst; and that worst has befallen them."

Mr Santos-Costa submitted that Mr English and Mr Nicolle were puppets of Mr Walsh just as the directors in the Selangor case had been puppets of Mr Cradock.

248 Finally Mr Santos-Costa relied on the following passage from the judgment of the Privy Council in the *Royal Brunei* case, where Lord Nicholls said (at p.393A-B):

> ***"The trust gave no authority to B.L.T. to relieve its cash flow problems by utilising for this purpose the rolling 30-day credit afforded by the airline.*** Thus B.L.T. committed a breach of trust by using the money instead of simply deducting its commission and holding the money intact until it paid the airline. The defendant accepted that he knowingly assisted in that breach of trust. In other words, he caused or permitted his company to apply the money in a way he knew he was not authorised by the trust of which the company was trustee. Set out in these bald terms, the defendant's conduct was dishonest. By the same token, and for good measure, B.L.T. also acted dishonestly. The defendant was the company, and his state of mind is to be imputed to the company."

249 In his final submissions Mr Preston made essentially two points in response. Firstly, he contended that the decision of Ungoed-Thomas J. in Selangor was no longer good law. The basis for this contention was that Selangor had been overruled in subsequent authorities, as Lord Nicholls recorded in the *Royal Brunei* case. We accept that what Ungoed-Thomas J. said in the Selangor case about the test for dishonesty has subsequently been disapproved. But we reject Mr Preston's submission that such disapproval extended to the passages quoted in paras.246 and 247 above. There is no automatic link between the test for dishonesty and the question of whether a director acting in a transaction on the direction of a stranger is fixed with that stranger's knowledge. We decline to treat them as linked. On the contrary, the final sentence from the judgment of Lord Nicholls which we have quoted in the preceding paragraph lends support, in our view, to the remarks of Ungoed-Thomas J.

250 Secondly, Mr Preston relied on the decision of the Privy Council in *Meridian Global*

Funds Management Ltd. v. Securities Commission [1995] 2 A.C. 500. The headnote to that case reads:–

> ***"Held, dismissing the appeal, (1) that a company's rights and obligations were determined by rules whereby the acts of natural persons were attributed to the company normally to be determined by reference to the primary rules of attribution generally contained in the company's constitution and implied by company law and/or general rules of agency; but that, in an exceptional case, where application of those principles would defeat the intended application of a particular provision to companies, it was necessary to devise a special rule of attribution to determine whose act or knowledge or state of mind was for the purpose of that provision to be attributed to the company; that, although the description of such a person as the 'directing mind and will' of a company did not have to be apposite in every case, knowledge of an act of a company's authorised servant or agent, or the state of mind with which it was done, would be attributed to the company only where a true construction of the relevant substantive provision so required."***

In reliance on that decision Mr Preston submitted that since Mr Walsh was not a director of any of the Buchanan Group companies, there was no basis whatsoever under the ordinary rules of attribution of knowledge for attributing his knowledge to the companies. Nor was this point affected by the allegation that the Arkaga Settlement was a sham, since the question of whether the trust was a sham and the question of whether the knowledge of Mr Walsh was to be attributed to the Buchanan Group companies were separate and distinct.

251 We accept that in the ordinary course of business the rules regarding attribution of knowledge are as set out in the *Meridian* case. But the decision in *Meridian* turned on the construction of the relevant provision of the Securities Amendment Act 1988 of New Zealand and for the purpose of that provision the court attributed to the company the knowledge of its chief investment officer. We do not regard the decision in *Meridian* as overturning, or excluding on the particular facts of the present case, the principles expounded by Ungoed-Thomas J. in the *Selangor* case, or what Lord Nicholls said in *Royal Brunei*; indeed we note that the *Selangor* case was not cited in *Meridian*. We therefore reject Mr Preston's second argument.

252 Reverting, therefore, to the test in the Selangor case, it will be apparent from what we have already said about Mr English and Mr Nicolle that in our view they were indeed simply puppets of Mr Walsh. Both of them did exactly what Mr Walsh told them to do without question. Both put themselves blindly at Mr Walsh's disposal. This was because Mr Walsh was in reality the Arkaga Settlement and the Buchanan Group companies.

253 We have reached that conclusion on the totality of the evidence presented to us. In addition to our comments about Mr English and Mr Nicolle, we mention the following examples.

(a) Joan's evidence, which we accept, is that Mr Walsh described BWL as *"his company"* to her. As she later put it, *"He was [BWL]"*. She added:–

> *"Mr Walsh told us that he had received the money and it was his companies, he owned it and he had the authority to do what [he] wanted with these companies."*

(b) On 11 April 2005 PTCL signed a letter from BHL instructing Arjent to purchase 30,000 Commerce Bancorp shares. The following day Mr English received an email from Arjent, outlining a proposal to buy 12,000 Apple shares, but as Mr English's handwritten note on the email records, the trade had already been undertaken the previous day on, as we find, Mr Walsh's instructions. In his evidence Mr English accepted that Mr Walsh did not have authority to trade on behalf of the Buchanan Group companies, but he did so anyway. He continued:–

> *"And we spoke to him about, again, that this was a possibility of him becoming a shadow director by giving the nod, if you like, for the Buchanan companies on a transaction out of hours."*

Notwithstanding that this trade had not been authorised in advance by PTCL, Mr English ratified the purchase.

(c) On the following day, 12 th April, 2005, Mr Walsh gave instructions to Arjent to purchase a second tranche of Apple shares. Again this trade was not authorised in advance by PTCL, but again Mr English ratified the purchase.

(d) In an email dated 8 th June, 2005, to Officer C regarding the Arjent trades, Mr English wrote that:–

> *"Ray — Not discussed and agreed with me and nor with you!* We agreed that they provide us with details of the proposed trades and we would then consider and confirm asap — not the day after the deal done!
>
> *Not an ideal situation at all.* We will shortly be selling our holdings to meet other commitments whereupon account can be closed.
>
> *In the meantime however GW should not be "clearing" trades as putting mind and management of co at risk and raises shadow director concerns for GW."*

(e) It was Mr Walsh who instructed Mr English to lie about the need for trustee approval of payments to Kellykay.

(f) Mr English himself described Calmanx in his evidence in chief as *"very passive trustees"*. They failed to respond to Mr English's attempt in March 2006 to obtain formal authority for payments from the Buchanan Group companies to Mr Walsh.

(g) Mr English was asked in cross-examination whether, so far as he was concerned,

Mr Walsh was ever a shadow director of any of the Buchanan Group companies. Having replied that that was not for him to decide, his evidence continued as follows:

> *"Q. Can you look at paragraph 31 of your statement, please.* There you say:
>
> *"Further, I considered it appropriate that the Buchanan Group companies should, on the whole, accede to the requests for action made by Gerard Walsh."*
>
> *"Q. Why do you say that, given what you've just told the court?*
>
> *A. Well, he was the settlor of the trusts.* He was the principal beneficiary, the life tenant. So in that regard he was obviously he was deeply involved in the activities of the underlying companies. The trustees, as I touched on earlier, were a passive trust company. They made it clear on several occasions that they were content to leave the underlying activities of the company to the directors. … So it was kind of a circuitous situation, which was, for want of a better expression, I suppose, just adding to the costs of administration. So it was left that the trustee would be happy for us to speak with Mr Walsh."

(h) Later in his cross-examination Mr English's evidence was as follows:

> *"Q. So the trustees had no control at all over the administration of the trust assets. Is that your evidence?*
>
> *A. They well, they appeared to have very little day to day interest in that particular aspect.*
>
> *Q. And you were content to proceed on that basis?*
>
> *A. (Pause). Yes.*
>
> *….*
>
> *Q. It wasn't a risk to yourself, but you're a fully qualified company and trust administrator. In your opinion, did you think this trust was being run in the way that it should as far as administering the assets were concerned, given that they were passive trustees and had no control over the assets?*
>
> *A. Well, I would say that were we the trustees it would have been run differently, yes.* There would have been more oversight and more recording of transactions at the trustee level."

(i) Still later in his evidence Mr English said that Mr Walsh "was looked upon as the client at the end of the day" and when asked by the Court if there was any occasion on which he had declined a request by Mr Walsh for payment he replied:

> *"A. Perhaps not for payment."*

(j) When asked about para.14.5 of the Defence in the English proceedings Mr English commented:

> *"But in terms of that from a Minerva point of view, Professional Trust at the time, Mr Walsh was the client, effectively the living being behind the structure.* It was for his benefit. In terms of the individual Jersey companies, I would say they would not have wanted to be seen, from a UK perspective, as Mr Walsh being, in effect, a shadow director."

(k) As we have already recorded, Mr Nicolle accepted the description of Mr Walsh as "the driving force" behind Arkaga.

254 Accordingly we conclude that for the purposes of Lord Browne-Wilkinson's principles the knowledge and intentions of Mr Walsh are to be imputed to the Buchanan Group companies.

(4) The Nolans' rights as shareholders in Elision and Columba

255 In their evidence both Mr English and Mr Nicolle accepted that they had made repeated errors with regard to the Nolans' rights as shareholders in both Elision and Columba, but claimed that these were innocent mistakes. We take each company in turn.

(a) Elision

256 The original Nominee Declaration of 21 st September, 2005, provided as follows:–

> *"We, BUCHANAN WEST LIMITED … HEREBY ACKNOWLEDGE and declare that we hold the shares hold in the Schedule … as nominee for JOAN NOLAN … (hereinafter called Athe Owner@) ….* AND WE FURTHER UNDERTAKE and agree to exercise our voting power as holder of the shares in such manner and for such purposes as the Owner may, from time to time, direct or determine."

(The amended Declaration of 26 th January, 2006, was in the same terms.) On 14 th November, 2005, there was a meeting of BSL, the minutes of which were drafted by Mr English, and at which the directors, Mr Cordwell and Mr Nicolle, approved a draft sale agreement between BSL, Readings Composite Limited ("Readings") and Canna Limited ("Canna") for the purchase of shares in Elision. As Mr English accepted, this represented the start of Mr Walsh's plan to acquire all of the shares in Elision from the other shareholders. On 12 December 2005 Elision sent two letters notifying BWL that Canna and Readings had offered for sale their shares in Elision and inviting BWL to indicate whether it proposed to exercise its preemption rights. Ten days later, on 22 December 2005, Mr English called Mr Kinch regarding the Elision letters and (to quote from Mr English's note of the conversation):–

> *"… advising that Canna and Readings Composites were offering their shares in Elision Group for sale.*
>
> *It was agreed that we would not complete these subscription forms as BSL is to purchase the available Elision Group shares per the sale agreements entered into between BSL and Canna + Readings Composite.*
>
> *BWL is not (to subscribe."*

The same day there was a board meeting of BWL at which it was resolved by Mr Cordwell and Mr Nicolle that the company would not exercise its preemption rights, following which BWL wrote to Elision to that effect. Mr English accepted in cross-examination that PTCL had thereby waived the Nolan family's preemption rights without any discussion with them, although he had known all about the preemption rights as long ago as April 2005. Mr English told us that this was an oversight or error on his part.

257 As part of the same scheme, on 26 th January, 2006, (the very same day that he signed the amended Nominee Declaration in Joan's favour) Mr English signed on behalf of BSL an agreement to purchase the Elision shares owned by Merrill Lynch Bank and Trust Company (Cayman) Limited ("Merrill Lynch") for £8 a share. Again the Nolans were not consulted about this transaction, Mr English's explanation being that their interests *"never entered my head"*. At the conclusion of his evidence on this issue, Mr English rejected the suggestion that he had deliberately ignored the Nolans' preemption rights, repeating that there had been *"a pure oversight"* on his part. Finally, on 27 th January, 2006, there was another board meeting of BWL at which it was resolved that Mr Nicolle and Mr English, for and on behalf of PTCL, were formally authorised to sign forms of waiver of BWL's preemption rights in respect of all the shares in Elision being acquired by BSL.

258 The Minutes of the board meeting on 27 January to which we have referred in the preceding paragraph also record the following:

> *"A Written Resolution of the shareholders of Elision Group Limited was then tabled whereby the entire share capital of Elision Group Limited is amended to one class of share ranking pari passu with each other and designated as ordinary shares and that the Articles of Association of Elision Group Limited be amended to reflect the same.*
>
> *IT WAS RESOLVED to approve the Written Resolution as presented …"*

Mr English again confirmed in his evidence that the Nolans were never consulted about this change in the share structure of Elision. Finally, on 6 February 2006 the members of Elision voted to convert the A and B shares of Elision into one class and to remove any rights of preemption.

259 Mr Nicolle's evidence was to a similar effect, as follows.

(i) When he resolved at the board meeting of BWL on 22 nd December, 2005, that BWL would not exercise its preemption rights

> *"I just didn't click that the declaration of trust that had been issued at the time, it just didn't click that that should have been taken into account.* So that's regrettable and a mistake on our part."

(ii) The same applied to the other instances where preemption rights in respect of shares in Elision were waived without reference to the Nolans.

(iii) Again, when voting on 27 th January, 2006, to restructure the share capital of Elision, his failure to obtain the input of the Nolans *"just didn't cross my mind at the time".*

(b) Columba

260 On 21 st October, 2005, a month after PTCL had sent Joan the Nominee Declaration in respect of the Columba shares, and the day after Serene had paid the €1,748,000 to BHL, there was board meeting of BHL, the directors present being Mr Nicolle and Mr Morgan. The minutes, which were drafted by Mr English, recorded that it was resolved that Mr Monaghan was nominated as BHL's representative with full rights to attend, speak and vote at the Annual General Meeting of Columba to be held the same day, and to sign the consent to short notice of that meeting on behalf of BHL. The Nolans were not notified of this short notice Annual General Meeting, Mr English's explanation being that this was *"an oversight in terms of"* the Nominee Declaration. Mr Nicolle's evidence was to the same effect, save that he added that he did not think that he would have known of the Nominee Declaration at the time.

261 Sometime later, in July 2006, Mr English was asked by Mr Hayes to inform BDO Jersey who the beneficial owners of Columba were for audit purposes under Irish law. Mr English's response was to outline to BDO that Columba was a wholly owned subsidiary of BHL, but to omit any mention of the 25% interest that was held by Joan Nolan. In his evidence Mr English explained this omission as purely an oversight; as Columba was an external company, the shareholders' register was not on PTCL's database and the only record of the Nolans' interest would have been in the minute book of BHL (and in the accounting records which he did not go to on a daily basis). At the conclusion of his cross-examination on this point, Mr English rejected the suggestion that he had deliberately withheld information about the Nolans' shareholding because that suited Mr Walsh, insisting again that it was simply *"an administrative oversight"* on his part.

Discussion and conclusion

262 The obvious question is whether these errors were just innocent oversights on the part of Mr English and Mr Nicolle (as Minerva maintained), or whether they were acts of dishonesty (as the Nolans alleged) given, in particular, the emphasis which Mr Preston

repeatedly placed on the experience and competence of both individuals. Of course we accept that everyone is capable of making an innocent mistake. We bear in mind, as Mr Preston submitted, that:–

We also take Mr Preston's point that there was no immediate incentive to PTCL, financial or otherwise, to commit these errors save, of course, that they might help retain Mr Walsh as a client. Finally we bear in mind the need, in the context of the Nolans' submission, for the conduct relied upon to be consistent only with dishonesty, and not with negligence.

(i) the majority of Mr English's working day whilst he worked at PTCL was taken up in dealing with matters entirely unrelated to the administration of the Buchanan Group companies;

(ii) at the material times Mr English spent roughly 15% of his working day dealing with matters arising from the administration of those companies;

(iii) Mr English was responsible for overseeing the administration of some 55 client entities during this time; and

(iv) Mr English would spend roughly 20% of his working day managing his team of three or four trust officers (depending on the exact date), who would draft documents such as correspondence and payment slips for his review.

263 Mr Santos-Costa accepted that there was no evidence to suggest that Mr Walsh gained financially from the way in which the shares in Elision were acquired by BSL rather than by BWL exercising its preemption rights. But by signing away the Nolans' preemption rights in Elision PTCL did clear the way for Mr Walsh to fulfill his plan to buy up (through BSL) all the shares in Elision from the existing shareholders, at a time when he apparently believed that the shares would increase in value. We also accept that there was no obvious advantage to Mr Walsh in, for example, Mr English misinforming BDO that Columba was a wholly-owned subsidiary of BHL. More generally, it is clear that the only people who were disadvantaged, actually or potentially, by PTCL's errors were the Nolans. Having carefully considered both the evidence itself and the demeanour of Mr English and Mr Nicolle as witnesses, we are driven to the conclusion that the various errors we have listed above were indeed deliberate, and not just negligent oversights as Mr English and Mr Nicolle claimed. We reach that conclusion for two principal reasons. Firstly, we are not looking at a single error; we are looking at a series of errors, covering two separate investments. Secondly, there is the striking factor of timing. Mr English signed on behalf of BSL the agreement to purchase Merrill Lynch's shares in Elision on the very day, 26 th January, 2006, that he signed the amended Nominee Declaration in Joan's favour. We simply do not believe that anyone as experienced as Mr English, busy as he may well have been, could have signed both documents on the same day without remembering the one when he signed the other. And it was on the following day, 27 th January, 2006, that he and Mr Nicolle were authorised to sign the forms of waiver of BWL's preemption rights. Similarly in relation to Columba, the meeting of BHL which nominated Mr Monaghan to attend the Annual General Meeting of Columba took place on 21 st October, 2005, the day after the

Nolans (via Serene) had paid the €1,748,000 for the shares in respect of which Mr English had signed a Nominee Declaration only a month earlier. Again we do not believe that both Mr English and Mr Nicolle could on 21 st October have overlooked the Nominee Declaration of the previous month or the payment of the previous day. Since their errors were deliberate, it follows that they were both acting dishonestly in this respect also. More generally, it is clear to us that PTCL simply never took the Nolans seriously as shareholders in either Elision or Columba.

(5) Cumulative knowledge

264 It was Minerva's case that in assessing whether PTCL had acted dishonestly in relation to any particular investment, the investment in question had to be viewed in isolation from any of the other investments, in other words in a watertight compartment. In his final submissions Mr Preston contended that it was incorrect to adopt a cumulative approach to an alleged failure to make enquiries. One could not approach later transactions on the basis that PTCL was to be treated as having had the knowledge which it would have gained if it had in fact made enquiries in relation to earlier transactions; that would be to import the principles of constructive knowledge and negligence into this area of the law. Rather it was necessary to ask in relation to each transaction whether PTCL had a dishonest state of mind, in other words whether it had solid grounds for suspicion of wrongdoing and then decided not to make enquiries which would result in its gaining knowledge of that wrongdoing. Mr Preston subsequently clarified that his submission extended to enquiries that an honest trust officer would have made. So even if an honest trust officer would have been obliged to find out some information in relation to a previous transaction and the dishonest trust officer failed to do so, the Court could not in relation to a subsequent transaction attribute to the dishonest trust officer the knowledge he would have acquired if he had made the enquiry that an honest trust officer would have made in relation to the earlier transaction. It is not what the honest trust officer would have had in mind had he done such and such in the past, it is what the actual trust officer had in mind at the time in question. In short the Court must ignore what PTCL ought, or ought not, to have done in relation to any previous transaction.

265 The Nolans, on the other hand, submitted that the knowledge of an honest trust officer was cumulative. Of course one has to look at each individual transaction, but one cannot ignore what an honest man would have done in relation to an earlier transaction. If in relation to an earlier transaction an honest trust officer would have made enquiries and thereby acquired knowledge that would have informed a subsequent transaction, one must look at both transactions as a continuum. The other side of the same coin is that it would be ridiculous if a dishonest trust Officer Could ignore the knowledge that he ought to have acquired in relation to a previous transaction. That would be put the dishonest trust officer at an advantage to an honest trust officer.

266 We have no hesitation in preferring the submissions of the Nolans on this issue. The suggestion that one should wipe the slate clean at the start of each transaction and ignore

the information that an honest trust officer would have acquired from an earlier transaction is, in our view, both logically indefensible and legally incorrect. Although we accept the broad proposition that constructive knowledge will not suffice for a dishonest assistance claim, that proposition must be kept within bounds. We do not regard the information which an honest trust officer would have acquired if he had made the necessary enquiries as constituting such constructive knowledge. Accordingly we conclude that the enquiries which Mr English, in particular, should as an honest trust officer have made both of Mr Walsh and of Joan, and the answers which he would have received to such enquiries, are both relevant and of potential importance in relation to any subsequent investments.

Dishonest assistance — findings in relation to each of the investments

267 In the light of what we have said thus far in this judgment we turn to our detailed findings in relation to each of the investments. We make clear at the outset that we have considered with care all the points raised before us by the parties both in their written submissions and in oral argument; in order, however, to avoid this judgment being longer than it already is, we confine ourselves to those issues which, in our view, are central to the disputes which we have to resolve. In this section we ignore the impact of Minerva's prescription defences, which we address separately.

268 With regard to each investment we adopt the same approach of addressing, as far as possible, each of the disputed issues, whether or not that issue has become academic in the light of our earlier findings in relation to the investment in question. We do so because our view of the way in which PTCL dealt with a particular investment has informed our assessment of PTCL's behaviour in relation to other investments. In relation to each investment we consider the issues under the following heads:

We then turn to the events and the correspondence from September 2006 onwards. In relation to these later events and correspondence we bear in mind that these parts of the story are relevant only to the extent that they may cast light on the honesty or otherwise of PTCL's dealings at the relevant time. We also have well in mind, and have sought at all times to guard against, the perfect vision of hindsight.

(a) the existence of a trust;

(b) breach of that trust;

(c) whether PTCL assisted in that breach of trust; and

(d) whether such assistance by PTCL was dishonest.

(1) First Elision

269 The first Elision investment was made on 31 March 2005 when the NFP transferred the sum of £1,649,585 into the account of BHL at BoS in Jersey.

270 The immediate complication that the Court faces in relation to this investment is the absence of any direct evidence from Minerva's side regarding the period immediately before or after 31 March. As we have already recorded, none of Officer A, Officer B or Officer C was called as a witness. Mr English was away from the office when the £1,649,585 was received by BHL; he did not return until a few days later (probably, we conclude, on Monday 4 April).

(a) The existence of a trust

271 Our first task is to determine what the agreement was between Joan and Mr Walsh pursuant to which the NFP paid £1,649,585 to BHL. It was Minerva's submission that the payment of £1,649,585 received by BHL on 31 st March, 2005, represented the purchase price for an allocation of shares in Elision, with the precise number of shares to be determined in due course as advised by Mr Walsh. These funds were not to be used only for the specific purpose of funding BWL's purchase of the Peggy Fordham shares. More particularly, the share sale contract between BHL and the NFP did not have any direct link to BWL's acquisition of Elision shares from Peggy Fordham. Conversely it was the Nolans' case that the agreement was (as Joan said in her statement that she believed it to be) for them to acquire the convertible loan stock and shares as detailed in the Option Agreement at cost, namely for the sum of £1,649,585 (being £735,000 in respect of the loan stock and £914,585 for the shares). This would amount, following conversion of the loan stock into shares, to 329,917 B ordinary shares of £1 each and 293,334 deferred shares of 0.25p.

272 On the evidence we conclude that the Nolan family's version of the agreement between Joan and Mr Walsh is correct. We do so for the following reasons. Firstly, we accept Joan's evidence, upon which the Nolans' version of the agreement is based. Secondly, we can see no reason why Mr Walsh would have emailed the Option Agreement to Joan unless the Option Agreement was to form the basis of the agreement between him and Joan. If Mr Walsh had intended his agreement with Joan to be independent of the Option Agreement, he could simply have informed her that he (or BWL) would sell the Nolans 329,917 Elision shares at £5 each. This point is of particular significance in the context of the "at cost" element of the agreement. The cost of the ordinary shares under the Option Agreement was the equivalent of £5 each, but under the Share Purchase Agreement BWL in fact acquired the shares for the equivalent of £4 each. We conclude that Mr Walsh, no doubt in order to make the deal more attractive to the Nolans, did represent to Joan that the Nolans would be getting the Elision shares at the price which it would cost BWL to acquire them under the Option Agreement, namely £5 a share. That conclusion is fortified by the request from Mr Walsh during his telephone discussion with Mr English on 6 th April, 2005, (as noted by Mr English)

> *"that this be kept confidential from John Handley — at the request of the Nolans."*

The *"this"* was, we have no doubt, a reference back to an earlier part of Mr English's note in

which he had referred to the *"surplus of over £329,000"* that Mr Walsh had made on his agreement with Joan. There is no evidence that the Nolans in fact requested that the first Elision investment be kept confidential from Mr Handley and it was not put to Joan in cross-examination that she had made any such request. We can think of no reason why the Nolans, as opposed to Mr Walsh, would wish to conceal a matter of this nature from Mr Handley. In our view Mr Walsh told Mr English this lie about the request coming from the Nolans because he did not want them to find out (via Mr Handley) that he had made a profit of over £329,000 on the deal, contrary to the terms of his agreement with Joan. Finally, the initial Nominee Declaration issued by BWL on 21 st September, 2005, was for the same total number of ordinary shares as in the Option Agreement.

273 Accordingly, and bearing in mind that at the request of Mr Walsh the NFP paid its investment to BHL, not BWL, we find there were four main elements of the agreement between Mr Walsh and Joan, namely

The practical consequence of the agreement that the Nolans should acquire the Peggy Fordham shares at cost is that Mr Walsh in effect agreed that the totality of the NFP's investment should be used to purchase the Peggy Fordham shares.

(i) that the monies paid by the Nolans to BHL should be used to enable BWL to acquire the shares and loan stock as detailed in the Option Agreement;

(ii) that the Nolans should in turn receive the same number of shares as mentioned in the Option Agreement;

(iii) that the price payable by the Nolans for each ordinary share should be the equivalent of £5; and

(iv) that £5 should be the cost price to BWL of each ordinary share.

(i) A Halley constructive trust

274 Although the evidence regarding the business of Elision was scanty, at the time of the Nolan family's investment it was clearly an established company. It was, in effect, a combination of two businesses, one dealing with small-scale health insurance claims and the other being concerned with arranging the provision of health services. Mr Walsh was the chairman of the company. According to the website which Joan visited in mid-January 2005, the company had six regional facilities in the United Kingdom, 200 staff and a fleet of 40 vehicles. The company had a considerable number of outside shareholders, including JTC Trustees Limited, Westmead Holdings Limited, HSDL Nominees Limited and Merrill Lynch. Although we have not seen any accounts of Elision, it was Mr English's evidence (which we accept) that Elision produced annual accounts, as one would expect. Finally, we note that Mr Henchey exercised his preemption rights in the context of the shares being purchased by the Nolans and that under the various agreements by which BSL acquired the other shares in Elision BSL paid the equivalent of £8 a share. In those circumstances, although Mr Walsh may well have overvalued the company to Joan, we agree with

Minerva's submission that it is impossible to describe the agreement between Joan and Mr Walsh for the purchase of shares in Elision as an instrument of fraud and nothing else. Furthermore BWL incurred a real obligation to the Nolans, not least because the shares which they were to sell to the Nolans were not in any sense worthless at the time. The shares in Elision were not a scam, unlike the Mexigulf Sealand shares in the *Barrett* case.

275 In their closing submissions the Nolans contended that there was a *Halley* trust because Mr Walsh never intended to use the Nolans' money to acquire the Peggy Fordham shares, as he had promised. Indeed in his final speech Mr Santos-Costa frequently asserted, in the context of the Nolans' investments generally, that Mr Walsh had simply set out to steal, or had stolen, the Nolans' money, no doubt seeking thereby to echo the expression *"akin to theft"* in the *Halley* case. We accept that Mr Walsh did not intend to use the Nolans' investment for the purpose that he had indicated to Joan, albeit that some £100,000 was in fact used to pay the deposit on the purchase of the Peggy Fordham shares. We do not, however, see how this alone could give rise to a *Halley* trust. In any *Halley* type situation, the transaction is necessarily going to involve misrepresentations on the part of the fraudster; a fraudster who admitted that his scheme was a fraud would be unlikely to prosper. It is clear from the decision of the Court of Appeal itself that mere misrepresentations, even fraudulent misrepresentations, are not sufficient to establish a *Halley* trust. We therefore agree with Minerva that there was no *Halley* trust in respect of the first Elision investment.

(ii) A Quistclose trust

276 We note that in the English proceedings the English Claimants did not assert a *Quistclose* trust in relation to the first Elision investment; Mr Santos-Costa was not in a position to explain why not. The only basis on which the English Claimants claimed to be entitled to rescind the first Elision investment was that it was induced by Mr Walsh's fraudulent misrepresentations. That basis of claim is, for the reasons we have discussed above, not open to the Nolans in these proceedings. Clearly, however, the failure of the English Claimants to assert a *Quistclose* trust in the English proceedings cannot be determinative in this action.

277 It was Minerva's submission that since the agreement between Joan and Mr Walsh was no more than a contract for the sale of Elision shares to the Nolans, no *Quistclose* trust could arise. If the agreement between Joan and Mr Walsh had indeed been as limited as Minerva contended, we would have agreed with its submission for the reasons we have discussed earlier in this judgment. But as we have already indicated, there was more to the agreement between Joan and Mr Walsh than a mere sale and purchase. In particular, firstly the money was provided by the NFP to BHL in order to enable BWL to purchase the shares and loan stock as detailed in the Option Agreement, and secondly the money was provided on terms that £5 should be the cost price to BWL of each ordinary share. It seems to us that each of these features was sufficient to take the agreement out of the category of a simple, bipartite sale and purchase agreement and instead to give rise to a *Quistclose* trust. The

intention of both Joan and Mr Walsh, as determined from an objective analysis of their agreement, was that the NFP's investment should not form part of the general assets of BHL/BWL but instead should be used exclusively to fund the purchase of the Peggy Fordham shares by BWL.

278 We add one final comment. Minerva did not argue that no *Quistclose* trust could have come into existence because Mr Walsh's subjective intention was never to use the NFP's investment to purchase the Peggy Fordham shares. (Nor did Minerva raise any such argument in the context of any of the remaining investments.) In our judgment Minerva was entirely correct in not so arguing; as is clear from para.21 of the judgment of Norris J. in *Bieber* (as approved by Patten L.J. at para.14 of his judgment), the subjective intention of the parties is irrelevant in this regard.

279 So far as knowledge of the trust is concerned, Minerva accepted, as we have already recorded, that the knowledge of Joan was to be imputed to the NFP. We reject the contention of Minerva that BHL lacked the necessary knowledge of the purpose of the transfer as intended by the NFP on the basis that, as set out above, BHL is fixed for these purposes with the knowledge of Mr Walsh himself.

280 In summary, for the reasons set out above we conclude that there was a *Quistclose*, but not a *Halley*, trust in the Nolans' favour in respect of the first Elision investment.

(b) Breach of that trust

281 We take first the £100,000 paid to Edwin Coe on 13 th May, 2005, by way of a deposit under the Share Purchase Agreement. We do not see how the Nolans can have any complaint about this payment. It was not made in breach of the *Quistclose* trust. On the contrary, it was made for one of the very purposes of the trust, namely the acquisition of the Peggy Fordham shares by BWL.

282 Clearly there was a breach of that Quistclose trust in that BHL paid away the remainder of the monies representing the Nolans' investment before the Nolan family received any Nominee Declaration in respect of the Elision shares. For the reasons set out in para.174 above, however, this point would not have availed the Nolan family.

283 We turn next to the substantive issue of whether the Nolans received from BWL the shareholding in Elision agreed between Mr Walsh and Joan at the cost price of £5 a share. (We acknowledge that to speak of the Nolans *"receiving"* shares in the context of a Nominee Declaration is something of a misnomer, but since it is a convenient way of describing the position we continue to use the expression throughout the remainder of this judgment.)

284 We start with the evidence of Joan. Having been asked in cross-examination about Mr English's letter of 27 January 2006, she said as follows:–

> *"Q. You didn't raise any questions at all with Mr English, did you?*
>
> *A. No.*
>
> *Q. And the reason for that is you'd received exactly what you bargained for, a shareholding in Elision.* That's right, isn't it?
>
> *A. No, I don't agree to that question.* I'd gotten shares in Elision but at this time I didn't know that I hadn't got exactly the Peggy Fordham agreement. And I didn't know that I hadn't got the shares at cost."

Later in her evidence Joan clarified the position as follows.

She also knew that the Nolans had not received any deferred shares.

(i) She knew the number of shares covered by the Option Agreement (329,917) and she knew that under the revised Nominee Declaration she was getting a different number of ordinary shares.

(ii) She regarded the discrepancy in the number of ordinary shares as being addressed by the refund of £63,757.75 set out in Mr Walsh's email of 25 th July, 2005.

(iii) She could work out what the cost of each ordinary share was.

(iv) What she did not know was that:

> *"there was another Peggy Fordham agreement where the shares were transferred at a lesser amount.* The Peggy Fordham agreement sent to me was a different Peggy Fordham agreement [than] was actually signed. And the amounts in the Peggy Fordham agreements are different."

The *"different Peggy Fordham agreement"* that *"was actually signed"* must be a reference to the Share Purchase Agreement, under which the shares were acquired for £4 each.

285 One thing is clear. The Nolans did not receive, either under the original Nominee Declaration dated 21 st September, 2005, or under the amended Nominee Declaration dated 26 th January, 2006, any deferred shares in Elision; nor was there any reference to deferred shares in Mr Walsh's email of 25 th July. 2005. We have received no explanation for this omission, although it would appear from the charge granted by BWL to BoS and dated 27 th January, 2006, that the deferred shares were charged to BoS from that date. Nor, on her own admission, did Joan think anything of the omission at the time. We note that under the Share Purchase Agreement the deferred shares were valued at nil. We also recognise that it was unlikely that the deferred shares would ever have conferred any

financial benefit on the Nolans but there was at least the possibility of such a benefit. The essential point, Mr Santos-Costa submitted, was that the Nolans did not get what they had bargained for. We agree. We conclude that there was a breach of trust on the part of BHL in that none of the deferred shares was delivered to the Nolans and that that failure cannot be described as *de minimis*.

286 Turning to the ordinary shares, Joan received a mixture of A and B shares, rather than all B shares. She herself was not concerned by the fact that the initial Nominee Declaration included both A and B shares because by September 2005 she had understood from Mr Walsh that the A and B shares had the same rights. Although we accept, as Mr Santos-Costa submitted, that a mixture of A and B shares is not what Joan had agreed with Mr Walsh, we consider that Mr Santos-Costa was right to categorise this state of affairs as a distinction without a difference. We therefore conclude that there was no breach of trust in this regard. Finally Mr Santos-Costa agreed that it did not matter that the shares were in fact held as nominees by BWL, rather than by ANL as Walsh had indicated to Joan would be the position.

287 After conversion of the loan stock into shares, the number of ordinary shares in Elision mentioned in the Option Agreement was 329,917, which is what Joan understood that the Nolan family was to receive. Mr Walsh's email of 25 th July, 2005, however, mentioned a reduced number of 310,508 shares. As Joan admitted in cross-examination, she did not query the reduced number; indeed, as we have recorded, it is apparent that she regarded the shortfall as addressed by the promised refund. The next step was the original Nominee Declaration of 21 st September, 2005, which mentioned the full number of 329,917 shares. But the problem is that BWL did not have 329,917 Elision shares to transfer to Joan because Mr Henchey had exercised his preemption rights. Accordingly, as Mr Santos-Costa submitted and Mr Preston agreed, the original Nominee Declaration was invalid from the outset. Finally, under the replacement Nominee Declaration dated 26 th January, 2006, the total number of shares was reduced to 311,379 (which were specifically excluded from the charge in favour of BoS); this was 18,538 shares fewer than in the Option Agreement, but 871 more than suggested in Mr Walsh's email of 25 th July. While this was a reduction of only 5.6% in the Nolans' entitlement under Joan's agreement with Mr Walsh, it cannot, in our view, be excused on that ground alone; at £5 a share the reduction on its face cost the Nolan family more than £92,000 worth of shares. We therefore conclude that by virtue of the amended Nominee Declaration of 26 th January, 2006, there was a clear shortfall in the number of shares that the Nolan family was supposed to receive under Joan's agreement with Mr Walsh.

288 Since the Nolans were charged the equivalent of £5 a share for the 310,508 shares mentioned in Mr Walsh's letter email of 25 th July, 2005, (and therefore slightly less than £5 per share for the 311,379 shares covered by the Nominee Declaration of 26 th January, 2006), there was, in our view, no breach of trust so far as the price of £5 itself was concerned (element (iii) of Joan's agreement with Mr Walsh). But turning to element (iv) of the agreement, £5 per share was not the cost price to BWL. To put this same point a

different way, not all of the NFP's investment was utilised by BWL to purchase the Peggy Fordham shares; some £329,000 was used to trade with Arjent. In *Quistclose* terms, therefore, the power to utilise the NFP's investment was not exercised in accordance with the agreement between Joan and Mr Walsh. Accordingly there was a breach of trust by BHL with regard to element (iv) also.

289 Finally we turn to the Nolans' contention that they did not get what Joan had agreed with Mr Walsh because of the way in which PTCL deprived them of the preemption rights which had attached to the ordinary shares, and deprived them of their right to be consulted about the change in the share structure of Elision. We have already concluded that the actions of PTCL in this regard were deliberate and not just accidental mistakes (though that distinction is immaterial in the present context). The waiver of BWL's preemption rights had taken place progressively between November 2005 and 26 th January, 2006. 26 January was also the date of the amended Nominee Declaration. It follows that by the time of the amended Nominee Declaration, PTCL had already deprived the Nolans of some of the benefits which their ordinary shareholding in Elision ought to have conferred upon them. The fact that the Nolans continued to enjoy the other potential benefits of holding ordinary shares in Elision, such as a right to participate in any dividends declared by the company and to sell the shares in due course, hopefully at a profit, is neither here nor there. What the Nolans were clearly entitled to under Joan's agreement with Mr Walsh was a holding of ordinary shares in Elision with all, not just some, of the attendant rights that that shareholding should have carried with it. It follows, in our view, that PTCL's actions in depriving the Nolans of their preemption rights did result in the Nolans failing to get what they had bargained for in terms of the ordinary shares. Accordingly we accept the contention of the Nolans that there was a breach of trust on this ground.

290 We add for the sake of completeness that the same reasoning does not, in our view, apply to the change in the share structure of Elision, which was effected (again without reference to the Nolans) on 27 th January, 2006, the day after the amended Nominee Declaration. If the amended Nominee Declaration had been validly made on 26 January, the fact that the following day PTCL ignored the Nolans' rights under the Nominee Declaration might well have afforded the Nolans a claim against BWL under the Nominee Declaration but it, would not, it seems to us, have invalidated the Declaration.

291 Pausing there, thus far we have concluded that BHL was in breach of the *Quistclose* trust in favour of the Nolans in four separate respects, namely:–

That, however, is not the end of the matter. As we have already recorded, Joan herself knew that the Nolan family had received fewer ordinary shares under the amended Nominee Declaration than she had originally been promised by Mr Walsh, and had received no deferred shares at all. But at no time did she query the shortfall in the ordinary shares or the absence of any deferred shares. On the contrary, on 7 th February, 2006, she returned Mr English's covering letter of 27 th January, together with the original Nominee Declaration and the various documents which Mr English had requested. She did so, as she said and as we find, because she regarded the refund of £63,757.75 as compensating

the Nolan family for the shortfall in the ordinary shares. Furthermore it is clear from her evidence that her real grievance against Mr Walsh so far as the first Elision investment was concerned was not the reduction in the number of ordinary shares (or the absence of any deferred shares) but that, as the Nolans subsequently discovered, they had been charged more than cost for the ordinary shares which they did receive. Minerva therefore contended that the Nolans had acquiesced in the reduction in their holding of ordinary shares (and, we assume, in the non-delivery of any deferred shares), so that they could not now complain on these grounds that any *Quistclose* trust in their favour had not been performed.

(i) the Nolans received no deferred shares;

(ii) the Nolans received fewer ordinary shares than agreed between Joan and Mr Walsh;

(iii) the rights in the ordinary shares that the Nolan family did receive were impaired; and

(iv) the ordinary shares had not been bought at cost.

292 It was common ground between the parties that the Jersey law of acquiescence with regard to a breach of trust is the same as English law. If the only bases on which there was a breach of trust by BHL had been the reduction in the number of ordinary shares, or the absence of any deferred shares, we would have found in Minerva's favour on this issue. In the final analysis Joan's return on 7 February 2006 of Mr English's letter countersigned by herself together with the documents listed is, in our view, explicable only on the basis that the Nolans were content both with the reduction in their promised holding of ordinary shares in return for the refund calculated by Mr Walsh and with receiving no deferred shares. But what the Nolans did not know, and had no way of knowing, in February 2006 was that their reduced ordinary shareholding was also an impaired shareholding, in that they had been deprived by BWL (through PTCL) of their preemption rights, or that their ordinary shares had not been purchased at cost. It is trite law that an aggrieved party cannot acquiesce in ignorance of the full facts. Accordingly we reject any argument that the Nolans lost their right to complain on the grounds of acquiescence about BHL's breaches of trust in these two respects.

293 Finally, it seems to us that the Nolans cannot complain, at least in the context of the first Elision investment, that there was a breach of trust in respect of the £63,757.75 that Mr Walsh promised to refund and which was, in due course, applied to the second Elision investment.

294 We conclude that for the reasons set out above there was a breach on the part of BHL of the *Quistclose* trust in favour of the Nolans, but only to the extent of £1,485,827.25 (£1,649,585, less £100,000 and £63,757.75).

(c) Assistance in that breach of trust

295 We have summarised in para.45 above the payments effected by PTCL out of the accounts of BHL and BSL in the days and weeks following the Nolans' investment. It follows that each of those payments represented an assistance by PTCL in that breach of trust.

(d) Whether that assistance was dishonest

296 It was Minerva's case that there was no dishonesty on PTCL's part because Mr English and his colleagues considered that the payment of £1,649,585 received by BHL from the NFP on 31 st March, 2005, represented the purchase price for shares in Elision under a share sale contract and that this sum accordingly became part of BHL's general assets. More particularly, PTCL did not consider that these funds were to be used only for the specific purpose of funding BWL's purchase of Peggy Fordham's shares in Elision. If Officer B and Mr English had genuinely thought in March and April 2005 that there had been a simple, bipartite sale and purchase agreement in respect of the Elision shares, and if an honest trust officer in their place would have had no other reason to make any further enquiry of Mr Walsh or the Nolans, we would have been minded to accede to that submission. It is, therefore, necessary to examine with care what the situation was that PTCL, in the person of Officer B and Mr English, faced in March and April 2005.

297 At the conclusion of his evidence in chief Mr English said as follows:

> *"Q. At the time of the various transactions we're concerned with, did you ever have cause to doubt Mr Walsh's honesty?*
>
> *A. No, I didn't. He was a reputable client who I'd only heard sort of good things about from the people I was working with and I'd taken over from.*
>
> *Q. And did you carry out any checks in relation to Mr Walsh?*
>
> *A. Yes, I did. As well as the cursory review of the files that you're taking over, just to check what the client looks like, passport, where they live, address verification, references, I would have undertaken latterly World Check searches. But I certainly would have looked him up on Google, just to see if I could find anything, as I did with all of my clients to see if I could anything interesting, what they were doing, et cetera.*
>
> *Q. And were you ever made aware of anything suspicious about Mr Walsh?*
>
> *A. Not during the transactions in question, no.*
>
> *Q. And did you consider those transactions to be bona fide and above board?*
>
> *A. I did, yes."*

Early in his cross-examination he confirmed that it was not until late 2007 and into 2008, when the Nolans' claim against Mr Walsh was developing, that concerns arose with regard to Mr Walsh, such that the Buchanan Group companies were put on Minerva's watch list. Turning to the first Elision investment itself, Mr English's statement as to Officer B's approach read as follows:

> *"I do not believe that Officer B would have sanctioned the transfer of funds out of BHL unless satisfied on the basis of what [Mr] Walsh had explained to her that there was no reason why the monies would not be at BHL's disposal in the usual way."*

And of his own role he said:

> *"I did not consider that it was incumbent on me to confirm [Mr] Walsh's explanations with the Nolans.* [Mr] Walsh's explanations were reasonable and I considered it to be reasonable and appropriate to rely on [Mr] Walsh's account of what these funds represented and of how they were to be treated in accordance with [the] similar explanation from Officer B"

In contrast, it was the Nolans' case that PTCL had every reason to disbelieve Mr Walsh from the word go.

298 We start with Officer B since she was in the office when the NFP made their investment and because it was upon her explanation of events that Mr English, in part at least, relied. Her explanation to Mr English was, we find, that the NFP was the source of the £1,649,585 paid into BHL's account on 31 st March, 2005, and that the purpose of the Nolans' investment was the purchase of shares in Elision. In the absence at trial of any inward receipt and of any evidence from Officer B, we do not know if the source of the monies was apparent to her from the inward receipt itself (if such document came into existence at all). If it was not apparent from the inward receipt, or if no inward receipt was ever created, we infer that Officer B must have contacted Mr Walsh and asked him, and that she would have done so on 31 st March, 2005, in response to Ms Cappin's email of that day. As for the purpose of the Nolans' investment, again we deduce that Officer B must have been informed by Mr Walsh that the purpose of the payment was the purchase of shares in Elision.

299 On 24 th March, 2005, however, a week before the Nolans' investment, Mr Walsh had informed Officer B (in the words of her note of his telephone call) that

> *"£1.6 million will be coming in from one of his IoM companies (he will confirm which one) to fund £1.3 million needed for Peggy Fordham share purchase."*

Officer B had further recorded that PTCL was to *"Monitor receipt of funds"*. The £1,600,000 can only, in our view, be a reference to the NFP's £1,649,585. It is unclear from the evidence whether Mr English saw Officer B's note at the time; certainly it was his evidence that no alarm bells rang with him. But Officer B must have realised that what Mr Walsh had

told her on 24 th March was inconsistent with what happened a week later when she learned that the £1,649,585 had come not from one of Mr Walsh's Isle of Man companies but from the Nolans. This, in our view, was an important inconsistency which would have rung alarm bells with an honest trust officer in Officer B's position, mindful of PTCL's regulatory obligations. More particularly, this inconsistency would have alerted an honest trust officer to the need, in accordance with Mr Cordwell's summary of those regulatory obligations, for more detailed and more searching enquiries in order definitively to establish both the source and the purpose of the investment. It would also have alerted an honest trust officer to the need to embargo any disbursement from the £1,649,585 unless and until those enquiries had been satisfactorily concluded. Although Mr Walsh would necessarily have been the first person to approach (as indeed Officer B appears to have done), an honest trust officer would not, in our view, have taken his explanation at face value given that he had already lied about the source of the funds. On the contrary an honest trust officer, having established from Mr Walsh that the £1,649,585 had come from the Nolans, would have insisted on confirming Mr Walsh's version of events by making enquiries directly of the Nolans. If Mr Walsh had objected to such an approach, as we suspect he would, an honest trust officer would have refused to be deterred by any such objection; indeed an honest trust officer would rightly have regarded such an objection as suspicious in itself. And at the end of the day Mr Walsh would have been compelled to accede to the honest trust officer's demands, if only because the latter held the trump card of being in control of NFP's temporarily embargoed investment. As an additional precaution, an honest trust officer would have taken immediate steps to warn other members of PTCL of the position, lest Mr Walsh contact a different employee and persuade such employee to do his bidding in ignorance of the true position. Finally, we record Minerva's contention that imposing these various obligations on PTCL was all going much too far. We disagree.

300 Had Officer B made the enquiries of the Nolans that an honest trust officer should have made, it would immediately have become apparent that the arrangement between Joan and Mr Walsh was not as simple as Mr Walsh had suggested and that in particular the NFP's investment was for the specific purpose of buying the Peggy Fordham shares at cost and did not, therefore, form part of BHL's general assets. In those circumstances an honest trust officer would have ensured that the temporary embargo on any disbursement of the Nolans' investment was made permanent, other than for the purposes of BWL purchasing the Peggy Fordham shares at cost.

301 It follows that what Officer B actually did on receipt of the Nolans' investment fell short of what an honest trust officer would have done in two important respects. Firstly, she did not make the enquiry of the Nolans that she should have made and secondly she did not embargo the disbursement of the NFP's investment in the meantime (or, in due course, permanently). For these reasons we conclude that Officer B's conduct in relation to the first Elision investment was commercially unacceptable and that she was guilty of dishonestly assisting in BHL's breach of trust. We are conscious that in reaching that conclusion we have not had the benefit of any explanation from Officer B, but it was for Minerva to decide whom to call to give evidence to rebut the allegations pleaded in the Order of Justice, for instance at para.52, which in summary made allegations against PTCL along the general lines of our conclusions in para.299 above. That said, we recognise that the extent of

Officer B's assistance was comparatively minor, the only payment effected by her to a third party being the €50,000 paid by BHL to an Irish solicitor on 1 st April, 2005.

302 We now turn to the position of Mr English. By the date on which he had returned to the office, namely Monday 4 April, no further payments had been made out of the NFP's investment. It was not until Wednesday 6 April, the day upon which Mr English spoke to Mr Walsh on the telephone, that the next payment (of £30,000 to Kellykay) was made out of the Nolans' monies. It was during this conversation that, according to Mr English's note, Mr Walsh *"would not go into further detail"* about the first Elision transaction *"but mentioned that he would explain it in more detail to"* Officer B. No evidence was put before us to suggest that a more detailed explanation was in fact ever given to Officer B. But leaving that point aside, it is difficult to see why an honest man in the position of Mr Walsh should apparently have been reluctant to share details of the first Elision investment with Mr English. If the investment was all above board, why should Mr Walsh not have been happy to put Mr English, as well as Officer B, fully in the picture?

303 More importantly, on 11 th April, 2005, (the day on which Mr English effected payment from BSL's account to Arjent of £283,934.23 and three days after he had effected payment from BHL's account of £40,000 to Mr Walsh personally) he emailed Mr Walsh as follows:

> *"On 28 June 2004 BHL received the sum of £149,744.54 which following consultation with you we recorded as a loan from yourself.*
>
> *We have now received correspondence suggesting that a Mr Rodney [Brouard] advanced the sum of £125,000 of this money to BHL and he now wishes us to provide him with evidence of a holding of 50,000 Entara Limited shares held to his order in respect of this transfer.*
>
> *After the deduction of Rodney [Brouard's] monies from the £149,744.54 received by BHL on 28 June 2004, a balance of £24,744.54 remains.* Please confirm that this amount is correctly recorded as funds received from yourself as the Stan [Brouard] group have simply mentioned that they represent Asomeone else's money that Jo Hanley sorted out"."

(The first reference to Mr Brouard's £125,000 in the documents put before us appears to be in a letter from Mr English to Mr Kinch dated 15 th March, 2005.)

304 Mr Santos-Costa understandably put it to Mr English in cross-examination that this was another example of Mr Walsh giving inconsistent accounts of where monies received by one of the Buchanan Group companies had come from or, to put the point more bluntly, that Mr Walsh had lied to PTCL. The cross-examination included the following:

> *"Q. … So you clearly have evidence that Mr Walsh is not telling you the truth, don't you?*
>
> *A. Well, it I didn't see it like that at the time.*

Q. How did you see it, Mr English? How did you see this?

A. I was trying to reconcile a number of matters on this client, in terms of monies that had been received. There was no doubt or concern as to Mr Walsh at the time. Officer B, David Lloyd had been comfortable with him. There was nothing expressed to me which had flagged anything other than that he was a good client. And it was sorting out one of many issues at the time.

….

MR SANTOS COSTA: Didn't it occur to you at the very least to say to Mr Walsh: why did you tell us one thing when, in fact, the truth was quite different?

A. (Pause). I'm not sure how we resolved this in the end, but, ultimately, he ultimately Mr Brouard received his nominee declaration for what he'd paid over. But I'm not sure how we got there or the date that that was actually resolved."

That final answer of Mr English did not, of course, respond to the question he had been asked. But we accept Mr English's evidence that so far as he was concerned this matter of the Rodney Brouard investment was simply one of a number of matters that he had to reconcile with Mr Walsh. Mr Preston submitted that this was an entirely reasonable approach for Mr English to have adopted, given the standing and reputation of Mr Walsh at the time and the perception of his superiors within PTCL that Mr Walsh was an honest and successful businessman.

305 We disagree with Mr Preston's submission. In our view an honest trust officer in Mr English's position would have taken a more serious view of this misinformation emanating from Mr Walsh (especially if he had also been aware of what Mr Walsh had said to Officer B on 24 March in relation to the £1,600,000, as he should and would have been if Officer B had in turn, as an honest trust officer, warned other staff of PTCL of the earlier discrepancy). In particular an honest trust officer in Mr English's position, whether or not he was aware of the earlier discrepancy in respect of the £1,600,000 itself, would have recognised that what Mr Walsh had said about the £149,744.54 was a lie. An honest trust officer would thereupon, we find, have taken essentially the same steps as set out in para.299 above in order to comply with PTCL's regulatory obligations, as follows.

Again, if Mr English had made the necessary enquiries of the Nolans directly, the answer would have been as set out above, namely that the NFP's investment was for the specific purpose of buying the Peggy Fordham shares at cost and did not, therefore, form part of BHL's general assets.

(a) He would have demanded a full explanation from Mr Walsh regarding the Brouard discrepancy (or both apparent discrepancies).

(b) Pending a satisfactory explanation from Mr Walsh of the Brouard discrepancy (or of both discrepancies), he would not have accepted at face value anything said by Mr Walsh about the source of monies paid by third parties or about the purpose of any

such payments.

(c) He would, notwithstanding Mr Walsh's reluctance to go into the details of the first Elision investment on 6 April, have insisted on receiving such details from Mr Walsh.

(d) He would also have insisted on Mr Walsh providing him with contact details for the Nolans so that he could make enquiries of them directly in order to obtain their confirmation (or otherwise) of the details of the first Elision transaction.

(e) He would have imposed an immediate embargo on any further disbursement of the NFP's investment (assuming that Officer B had failed to do so already).

(f) He would have reported the matter to the appropriate personnel within PTCL.

306 For the sake of completeness, there is the matter of Mr English's email to Mr Walsh of 12th April, 2005, suggesting a formal loan agreement and Mr Walsh's reply of 22 April in which he declined the suggestion. We accept Mr Santos-Costa's submission that this was yet another example of Mr English meekly submitting to Mr Walsh's wishes, but given the conclusions that we have already reached this later exchange takes matters no further.

307 It follows that we reject Mr English's assertion that he was entitled to treat as reasonable, and to rely upon, Mr Walsh's explanations of the first Elision deal. Likewise we reject his assertion that it was not incumbent on him to confirm Mr Walsh's explanations with the Nolans themselves. In failing to make the necessary enquiries of the Nolans, and in failing to embargo any further payments out of the NFP's investment, his conduct, like that of Officer B, was commercially unacceptable and he was guilty of dishonestly assisting in BHL's breach of trust.

308 The pity is, of course, that if PTCL had responded in late March or early April 2005 in relation to the first Elision investment in the way that it should have done as set out above, Mr Walsh's frauds would have been nipped in the bud. What Mr Santos-Costa described, justifiably in our view, as a favourite ruse on the part of Mr Walsh to disguise the source of monies coming from third parties would have been exposed at the outset. Joan would, we have no doubt, have realised that Mr Walsh was, at the very least, a man who could not be relied upon to put PTCL (or the Buchanan Group companies) fully and accurately in the picture as to the purpose of the Nolans' investments. In those circumstances she would have contacted PTCL direct in relation to any further investments that the Nolan family might have been minded to make through Mr Walsh. And PTCL would have learned that anything that Mr Walsh said about the purpose of investments by third parties was to be treated with the utmost caution and not to be taken at face value.

Conclusion

309 In our judgment

(a) there was a *Quistclose*, but not *Halley*, trust in favour of the Nolans in respect of the £1,649,545 paid by the NFP to BHL for the first Elision investment;

(b) there was a breach of that trust by BHL as to the sum of £1,485,827.25;

(c) PTCL assisted in that breach of trust; and

(d) PTCL's assistance in that breach of trust was dishonest.

(2) Columba

310 The Columba investment was made on 20 th October, 2005, when Serene transferred the sum of €1,748,000 into the account of BHL at RBS.

(a) The existence of a trust

311 It was Minerva's case that the agreement in relation to Columba was, as PTCL believed it to be, a contract for the sale of a 25% shareholding in that company. In his cross-examination of Joan, Mr Preston drew attention to the absence of any documentation regarding the terms of the agreement which the Nolans alleged was made between her and Mr Walsh regarding the Columba investment. Whilst we recognise the force of this point, Mr Preston did not suggest to Joan that her version of events was inaccurate or unreliable. We accept Joan's evidence on this issue. Accordingly we conclude that there were four main elements of the agreement between Mr Walsh and Joan, namely

(i) that Mr Walsh/BHL had paid €7,000,000 for Columba;

(ii) that this figure represented a fair market valuation of Columba for the purposes of any investment by the Nolans;

(iii) that he was selling a 25% share at cost price; and

(iv) that he would invest the monies paid by the Nolans in Columba.

(i) A Halley constructive trust

312 The evidence regarding the activities of Columba was even more sparse than that regarding Elision. But such evidence as there was persuades us that Columba was a functioning company. It had been established by a group of individuals in 2000 and had been carrying on business since its foundation. We have already recorded that according to the Corporate Profile document it had 20 employees and, prior to its acquisition by Mr Walsh, seven shareholders. In those circumstances we conclude that it is impossible to describe the agreement between Joan and Mr Walsh for the purchase of 25% of Columba as an instrument of fraud and nothing else. Again, the shares in Columba cannot properly be described as a scam.

313 In their final submissions the Nolans relied heavily on the representations which, as we have found, Mr Walsh made to Joan. We take the point made by Minerva that to focus simply on the €6 paid by BHL for the shares in Columba is misleading. So, for example, we accept Mr English's evidence that the Buchanan Group companies had to pay the wages, salaries and outgoings of Columba for some time after the acquisition. But the fact remains that Mr Walsh's assertion that he (or more accurately BHL) had paid €7,000,000 for Columba was manifestly untrue, and he knew it to be untrue. Likewise we find that, as submitted by the Nolans, Mr Walsh never had any intention of investing the Nolans' monies in Columba itself. These fraudulent misrepresentations on Mr Walsh's part do not, however, assist the Nolans in the context of a *Halley* trust, for the same reasons as we have already discussed in para.274 above in relation to the first Elision investment.

314 The Nolans also contended that the Nominee Declaration was worthless and that all they received was *"a piece of paper"*. This was a reference to PTCL's ignoring the rights of the Nolans as shareholders in Columba as described in paras.260 and 261 above. We do not accept this contention. The matters on which the Nolans rely for this purpose all occurred after they had received the Nominee Declaration and after the payment of the €1,748,000.

315 Accordingly we conclude that the Nolans cannot establish a *Halley* trust in respect of the Columba investment.

(ii) A Quistclose trust

316 As with the first Elision investment, we note that in the English proceedings the English Plaintiffs did not assert a *Quistclose* trust in relation to Columba; the only basis on which they claimed to be entitled to rescind the Columba investment was that it was induced by Mr Walsh's fraudulent misrepresentations. In this regard we simply repeat our comments in para.276 above.

317 The immediate point which the Nolans faced is that Joan had received the Nominee Declaration on or about 22 nd September, 2005, some four weeks before Serene paid the €1,748,000. Therefore, contended Minerva, the €1,748,000 constituted simply the payment by Serene of the price for the 202,839 shares which Joan had already received, so that no *Quistclose* trust could arise. If the agreement between Mr Walsh and Joan had been limited simply to the purchase of the 202,839 shares in Columba, we would have found this contention to be compelling.

318 But the Nolans argued that since Joan's agreement with Mr Walsh had also required that the €1,748,000 be invested in Columba, there was still room for a *Quistclose* trust even though Joan had already received the Nominee Declaration. Minerva's response was to contend that no contract was entered into between the Nolans and BHL to the effect that the €1,748,000 had to be invested in Columba, that Serene did not communicate this additional

element to BHL and that no one from BHL (or PTCL) had knowledge of it.

319 In our view the Nolans' submissions on this point are correct. Mr Walsh's agreement with Joan that the Nolans' €1,748,000 should be invested in Columba was sufficient to create a *Quistclose* trust to that effect in favour of Serene. Accordingly Serene's investment did not, contrary to Minerva's submission, form part of the general assets of BHL. As for Minerva's point about the knowledge and intentions of Serene, we repeat our conclusion that Joan's knowledge and intentions are to be imputed to Serene. Similarly, in answer to Minerva's point that BHL did not have knowledge of the existence of a *Quistclose* trust, we repeat our conclusion that Mr Walsh's knowledge and intentions are to be imputed to BHL.

(b) Breach of that trust

320 The first and obvious point made by Minerva was that the Nolans received the shares in Columba in accordance with Joan's agreement with Mr Walsh, so that there had been no breach of trust. Mr Preston put this point to Joan in cross-examination:

> *"Q. … I said in respect to Elision you'd got precisely what you'd bargained for.* And it's the same with Columba, isn't it? You'd got exactly what you'd bargained for?
>
> *A. We got shares in a company where Mr Walsh paid 6 euros for, whereas he told us he paid 7 million for it. We got the share certificate.*
>
> *Q. You'd received the shares you'd bargained for because otherwise you wouldn't have paid the money over after you received the nominee declaration.*
>
> *A. (Pause). Yes. We received the share certificate for 25 per cent of Columba and we paid the money over on 20 October."*

We accept that this would be a complete answer to the Nolans' claim insofar as simply the shareholding in Columba is concerned. But, as we have found, the trust in the Nolans' favour was not limited to the acquisition of a shareholding in Columba. The trust included the additional requirement that the Nolans' money should be invested in Columba itself. That did not happen. We conclude, therefore, that on this ground there was a breach by BHL of the *Quistclose* trust in Serene's favour.

321 The Nolans also contended that they did not get what they bargained for because their interest as shareholders in Columba was disregarded. As we have recorded in para.260 above, the board meeting of BHL at which it was resolved to nominate Mr Monaghan as BHL's representative to attend the Annual General Meeting of Columba took place on 21 st October, 2005, a month after the Nominee Declaration in respect of the Columba shares had been sent to Joan and a day after Serene had paid the €1,748,000 to BHL, but before Serene's monies had been paid away. This episode, however, had no link to the breach of trust which consisted of not investing Serene's monies in Columba. As for Mr English's

failure to mention the Nolans' 25% shareholding to BDO, that did not happen until July 2006, long after Serene's investment had been paid away. Accordingly we reject the Nolans' submission of a breach of trust based on the deprivation of their rights as shareholders in Columba.

(c) Assistance in that breach of trust

322 We have summarised in paras.54 and 55 above the payments made by PTCL out of the accounts of BHL (and BSL) in the two months following Serene's investment. It follows that each of those payments represented an assistance by PTCL in that breach of trust.

(d) Whether that assistance was dishonest

323 The essence of Minerva's case on this issue was that, as Mr English said in evidence, the €1,748,000 was paid away because it represented the proceeds of the sale of the Columba shares and was therefore available for the Buchanan Group to utilise as it thought fit. In his final submissions Mr Santos-Costa focussed on three particular aspects in support of his contention that PTCL had not acted honestly, namely

We take each point in turn, dealing at the same time with Minerva's case.

(i) the terms of the deal between Joan and Mr Walsh;

(ii) the absence of any inward payment document in respect of the €1,748,000; and

(iii) PTCL's ignoring the rights of the Nolans as shareholders in Columba.

(i) The terms of the deal between Joan and Mr Walsh

324 Mr English knew of the terms of the agreement dated 15 May 2005 by which BHL acquired Columba; indeed he drafted the minutes of the meeting on 12 May which had authorised BHL to make the purchase. He was on holiday at the time when the Nominee Declaration was sent to Joan in September 2005. On his return he noticed that there had been no meeting to authorise the making of the Nominee Declaration, so he attended to that omission. His evidence in cross-examination was then as follows:

"Q. When we looked at your witness statement yesterday, Mr English, you said in your witness statement that it was your job to exercise independent thought in relation to whether or not transactions entered into by the companies you administered were proper transactions, were transactions that the company should be entering into; yes?

A. I did, yes.

COMMISSIONER HUNT: I think the word is "reasonable", isn't it?

MR SANTOS COSTA: Reasonable, sir, yes.

….

MR SANTOS COSTA: …

How could you personally assess whether this particular transaction was reasonable when you simply issued a declaration of trust for 25 per cent shareholding in a company without having any idea of the terms by which that shareholding was purchased?

A. Well, I don't recall. As I've said, I don't recall having any idea of the terms, but it wasn't me who entered into that initial part of the transaction. That was my colleagues.

Q. Well, when you came back and found out that 25 per cent of the company had gone didn't you think to ask on what basis it had gone, who had bought it, for how much, when?

A. I'm sure I did ask. We knew who had bought it."

Mr English confirmed that he knew that the €1,748,000 was for the purchase of the Columba shares as a result of a telephone conversation with Mr Walsh. He said that he could not recall anyone at all expressing surprise that 25% of a company that BHL had purchased for £6 was being sold for €1,748,000, that he did not think that that was an extraordinary thing to happen and that he did not believe that the transaction was a scam. The cross-examination continued as follows:

"MR SANTOS COSTA: Do you know of anything that changed between May 2005, when you purchased this company, and September 2005 when you sold a quarter of it to the Nolans to make this company suddenly become worth more than a million times what you paid for it?

A. No. The Arkaga personnel would have been appointed to the Boards and would have taken on the management. That's probably the only change that I would have known.

Q. And you made no enquiries at all as to why such a large sum would be paid for such a worthless company?

A. It wasn't understood that the company was worthless at all. As I said, I wasn't surprised at the time. It was no doubt discussed with Mr Walsh and Arkaga Limited. It didn't come across as a surprise."

This lack of surprise was shared by Mr Nicolle; to him the €1,748,000 was "just a purchase price. It was a transaction."

325 We accept, albeit with considerable hesitation, the evidence of both Mr English and Mr

Nicolle that their reaction to the sale to Joan was as they claimed, but we are bound to say that we find this lack of surprise on both their parts to be wholly astonishing. We take Mr Preston's point that it was on Kellykay's advice that BHL had purchased the shares in Columba in the first place. But on any view the disparity between what Mr Walsh had paid for Columba in May 2005 and the amount paid by the Nolans for a 25% share in Columba only a few months later was mind-boggling. We have no doubt that any trust officer in the position of Mr English or Mr Nicolle who was genuinely giving his own independent consideration to the deal with the Nolans would have shared that astonishment. An honest trust officer in the position of Mr English would at the very least have queried whether, to use Mr Preston's words, the transaction was *"bona fide and honest or otherwise"*. The fact that both Mr English and Mr Nicolle did not share the view that Mr Walsh's deal with the Nolans was extraordinary only goes to show, as Mr Santos-Costa submitted, that neither of them in fact gave the deal any thought or any independent consideration at all. Indeed when asked by the Court what the independent consideration was that Mr English brought to bear on the sale to the Nolans, Mr Preston's answer was that Mr English considered the documentation and came to a view that it was in the best interests of BHL, adding that that was an end to it so far as BHL was concerned. Likewise Mr Nicolle effectively accepted that he had made no independent judgment on the sale to the Nolans because he was *"really sort of ratifying matters after the event because these events had taken place."*

This, of course, is entirely consistent with the conclusions we have already expressed earlier in this judgment to the effect that both those individuals simply did Mr Walsh's bidding.

(ii) The absence of any inward payment document in respect of the €1,748,000

326 We have already noted the absence of any inward receipt in respect of the €1,748,000. It was Mr English's evidence that he was unaware that it was Serene who paid the €1,748,000. As he explained:

> *"It was known that Mr Walsh would have phoned and explained that monies for the Columba transaction were being received in the sum of 1.748.* And we knew that the nominee declaration had already been issued to Joan Nolan. So it was presumed that the monies had been remitted by the person who had received the nominee declaration."

In short, PTCL was content that it knew that Joan was the source of the funds. In our view, however, an honest trust officer in the position of Mr English would not have been content to leave the matter there, particularly in circumstances where, as we have described in the context of the first Elision investment, he would have known that Mr Walsh had been less than reliable in the past about the source and purpose of funds coming into the Buchanan Group companies. We consider that an honest trust officer would, in order to comply with PTCL's regulatory obligations, have taken steps to obtain from the bank the identity of the payer of the €1,748,000; an honest trust officer would not have presumed that it was Joan personally who had remitted the money. Any such enquiry would have revealed that the payer was Serene. That in turn would, we have no doubt, have triggered an enquiry by Mr

English of Mr Walsh in terms similar to the email which he sent on 30 th June, 2006, in relation to the payment that day by Serene of £500,000. In that email he said:–

> *"I can confirm that we have received the sum of GBP 500,000 today from Ravenscliffe Limited reference Serene.*
>
> *To meet our legal requirements could you confirm who Ravenscliffe are and what the funds represent?"*

And Mr Walsh would, we find, have responded as he in fact did on 30 th June, 2006, by saying that Serene was the Nolans' investment company. That in turn would, in our view, have led an honest trust officer to enquire of the Nolans, in the person of Joan, what the purpose of the €1,748,000 payment was, especially given the extraordinary terms of the deal which we have just discussed, if only to confirm that it was indeed no more than the purchase price for the shares covered by the Nominee Declaration.

327 Such an enquiry of Joan would have revealed that her agreement with Mr Walsh included the additional requirement that Serene's €1,748,000 was to be invested in Columba. This in turn would have put PTCL on notice that the €1,748,000 was not at the free disposal of BHL. An honest trust officer would, of course, not then have effected the payments out of BHL's (or BSL's) accounts which PTCL did at Mr Walsh's request. It follows that Mr English failed to make the necessary enquiries of Mr Walsh and, more importantly, of the Nolans, in relation to the Columba investment that an honest trust officer would have made and failed to embargo Serene's funds as he should have done.

(iii) PTCL's ignoring the rights of the Nolans as shareholders in Columba

328 We have already concluded that this point does not avail the Nolans in relation to their argument that there was a breach of trust. Nor, as it seems to us, does it directly assist them in the present context. Although the board meeting at which BHL deliberately (as we have found) ignored the rights of the Nolans in nominating Mr Monaghan to attend the Annual General Meeting of Columba and to sign the consent to short notice of that meeting took place the day after the receipt of the €1,748,000, that dishonesty was unconnected with the acts of assistance on which the Nolans rely, namely the payments made from BHL's and BSL's account following receipt of their monies. It does, however, reinforce our overall conclusion as to the dishonesty of both Mr English and Mr Nicolle.

329 For the reasons we have set out above, we conclude that the conduct of Mr English (and through him of PTCL) in relation to the Columba investment was commercially unacceptable and that he, and through him PTCL, were guilty of dishonestly assisting BHL's breach of the *Quistclose* trust in Serene's favour.

Conclusion

330 In our judgment:–

(a) there was a *Quistclose*, but not a *Halley*, trust in favour of Serene in respect of the €1,748,000 paid to BHL for investment in Columba;

(b) there was a breach of that trust by BHL;

(c) PTCL assisted in that breach of trust; and

(d) PTCL's assistance in that breach of trust was dishonest.

(3) Echemus

331 The Echemus investment was made on 16 th January, 2006, when Serene transferred the sum of £2,000,000 into the London bank account of BSL at BoS.

(a) The existence of a trust

332 The principal difference between Echemus and the two preceding investments is that where Echemus is concerned the Nolans were, according to thrust of Joan's evidence, not promised any particular shareholding; rather her agreement with Mr Walsh was simply for a one third investment in Echemus in return for the payment of £2,000,000, which would be used as a cash injection into Echemus. Conversely Minerva contended that the Echemus investment was *"a straightforward share sale contract"*. We accept Joan's evidence in this regard and reject Minerva's contention. In particular we conclude that the agreement was for the Nolans' money to be injected into Echemus.

(i) A Halley constructive trust

333 It is important to bear in mind that at the time of Joan's discussions with Mr Walsh about Echemus between October 2005 and January 2006, the company had yet to come into existence. What they were both discussing was simply a project. So what the Nolans must establish if they are to succeed under this head is that the Echemus project itself was an instrument of fraud and nothing else, in other words that it was a scam. We are not persuaded that this was the position. Although the project ultimately did not go ahead, the company was in due course formed, an inaugural board meeting took place, a bank account was set up and draft term sheets produced in relation to the proposed capital structure of the company. In those circumstances we cannot conclude that Echemus was a scam.

334 In their closing submissions the Nolans summarised their case on this issue as follows:–

"The Plaintiffs' £2 million never got anywhere near Echemus, and the Plaintiffs

> *never received anything in return for their £2 million, not even an ostensible declaration of trust.* The evidence is clear that Mr Walsh never intended the Echemus transaction as agreed with Miss Nolan to have any effect at all. As far as *he was concerned, his dealings with Miss Nolan were a straight scheme to trick the Plaintiffs into sending their money."*

We accept that Mr Walsh never intended to inject the Nolans' money into Echemus. We also accept that he never intended to inject £4,000,000 into Echemus himself, not least because he simply did not have access to that sort of free cash. Again, however, all this seems to us to be an attempt to rely on Mr Walsh's misrepresentations and for the reasons we have already discussed above in the context of the first Elision investment, this point cannot assist the Nolans. Accordingly the Nolans have not, in our judgment, established a *Halley* trust in relation to Echemus.

(ii) A Quistclose trust

335 Conversely we have no difficulty in concluding that in principle the Nolans are correct in asserting that a *Quistclose* trust came into existence in their favour in respect of the Echemus investment. In this regard we cannot improve on the passage from the judgment of Tomlinson J. in the Commercial Court in London to which we have already referred in para.129 above. We too regard the suggestion that the Nolans (via Serene) would have been prepared to pay £2,000,000 to BSL simply by way of overall funding for the business of BSL, out of which payments could be made as Mr Walsh saw fit, as wholly implausible. In our judgment the £2,000,000 which Serene paid by way of an investment in, and a cash injection into, Echemus was impressed with a trust for that purpose in BSL's hands.

336 We reject Minerva's contention that the £2,000,000 was to be regarded simply as the payment of the purchase price for a one third shareholding in Echemus. Although a one third shareholding would have been the outcome of the agreement between Joan and Mr Walsh if the Echemus project had gone ahead, the essence of the agreement between them was, as we have already recorded, that the Nolans would make a cash injection of £2,000,000 into Echemus. On a proper analysis their agreement was not, we conclude, a simple contract of sale and purchase, so we also reject Minerva's contention that there could be no *Quistclose* trust on that ground.

337 Finally, as with Columba we reject Minerva's point about the knowledge and intentions of Serene; we repeat our conclusion that Joan's knowledge and intentions are to be imputed to Serene. Similarly, in answer to Minerva's point that BSL did not have knowledge of the existence of a *Quistclose* trust, we again repeat our conclusion that Mr Walsh's knowledge and intentions are to be imputed to BSL.

(b) Breach of that trust

338 Clearly there was a breach of that *Quistclose* trust on the part of BSL. No part of the £2,000,000 was invested in Echemus.

(c) Assistance in that breach of trust

339 We have summarised in para.62 above the payments made by PTCL out of the account of BSL in January 2006 on Mr Walsh's instructions. Each of those payments constituted an assistance by PTCL in that breach of trust.

(d) Whether that assistance was dishonest

340 It was Minerva's case that PTCL's assistance was not dishonest because Mr English believed that the £2,000,000 had come from Mr Walsh himself and that Serene was, therefore, one of Mr Walsh's companies. As Mr English described in his statement, from August 2005 onwards BSL's BoS account had been in breach of its overdraft limit of £4,200,000. In December 2005, Mr Walsh advised him by telephone that he would be making £2,000,000 of additional monies available from the proceeds of the sale of shares he held in NYSE Inc ("NYSE"), the corporation which owns the New York Stock Exchange. In particular, Mr Walsh advised Mr English that £2,000,000 would be paid into the BoS account on or around 16 January 2006 (that, of course, being the date on which Serene's £2,000,000 in fact arrived) from one of his Isle of Man companies. Mr English had previously been informed by Mr Kinch that Mr Walsh held shares in NYSE. Mr Walsh's comment in the December 2005 telephone call was also consistent with a letter from Mr Kinch to Addleshaw Goddard, emailed to Mr English on 23 January 2006, in which Mr Kinch observed, in the context of a draft of the BoS facility letter, that he had removed the reference to the Investment Securities on the understanding that these were NYSE shares which had already been disposed of. Mr Kinch also copied Mr English into an email sent to Mr Walsh on 25 January 2006 in which he referred to the NYSE shares as having already been sold and £2,000,000 received. Mr English understood Mr Kinch's references in these emails to the disposal of the NYSE shares for £2,000,000 to be references to the £2,000,000 received by BSL on 16 January 2006.

341 Mr English also mentioned the following factors.

Finally Mr English had been copied into in an email of 2 November 2005 in which Mr Michael Fox of Elision had said in relation to Echemus:

> *"£6m was probably going to be held by the trust on behalf of the Nolans but you will have to confirm this with Gerard."*

We accept, however, that Mr English did not, as he said in evidence, link the reference in this email to £6,000,000 probably coming from the Nolans to the £2,000,000 received in January.

(i) The BoS account into which the £2,000,000 was paid was a loan account, the details of which he would not have expected to be available to third parties.

(ii) He would have expected any monies intended for investment in Echemus to be transferred into the HSBC account of the company itself, which was not in the event set up until March 2006.

(iii) As of 16 January 2006 there had, to Mr English's knowledge, been no soliciting for investment monies, no prospectus had been issued or circulated and he was not expecting that any monies would be received for the Echemus project in January 2006.

342 We accept that Mr English's state of mind was as he described, not least because it is reflected in the inward receipt which he initialled. Accordingly we reject the Nolans' submission that Mr English actually knew in January 2006 that Serene was a Nolan company.

343 Although Mr English's belief that the £2,000,000 had come from Mr Walsh, and that Serene was one of Mr Walsh's companies, in one sense arose from the matters to which we have referred in the preceding paragraphs, it ultimately stemmed from Mr English's failure to make any enquiry as to who Serene was or whose money the £2,000,000 was. As he explained when questioned by the Court:

"COMMISSIONER HUNT: You've told us that Mr Walsh never directly

told you that Serene was his company but you effectively put two and two together from the sale of the New York shares and the arrival of the GBP 2 million.

A. Yes.

COMMISSIONER HUNT: But if he never told you directly, how can

you be sure that that comes from the New York sale of the Stock Exchange shares? How do you know where the money has come from?

A. Well, it fitted with the GBP 2 million that he said would be being made available. Broadly the same timescale, within the first two weeks of 2006. And I would have seen Serene on the inward [receipt] and recorded that and just presumed that that was one and the same. I should have done some further research with the benefit of hindsight.

COMMISSIONER HUNT: Well, even without the benefit of hindsight

you didn't think … that you needed to do any further investigation as to where those monies had come from?

A. No, because I had no reason to doubt Mr Walsh at the time. He said that 2

million was would be received and it duly was."

344 It was the Nolans' alternative submission that Mr English ought not to have believed what Mr Walsh told him, or put two and two together as he said that he did. We accept that alternative submission. In our view Mr English's approach is not one which would have been adopted by an honest trust officer in his position, for three reasons. Firstly, as we have already set out, an honest trust officer in his position would already have established in the context of the Columba investment that Serene was a Nolan family company. Secondly, an honest trust officer who had received the email of 2 November would have been on notice of a possible investment in Echemus on the part of the Nolans and would have been put on enquiry as to the source of the £2,000,000 which in due course arrived. Thirdly and quite separately, even if he had not already known that Serene was a Nolan company, an honest trust officer would not, in our view, simply have relied on the various factors which Mr English described to infer that the £2,000,000 must have come from Mr Walsh, especially given Mr Walsh's track record as someone who could not be relied upon for accurate information as to the source of funds coming into the Buchanan Group companies. On the contrary, an honest trust officer would have enquired of Mr Walsh who Serene was. And again Mr Walsh would, we conclude, have responded to any such enquiry in the same way as he in fact did on 30 June by saying that Serene was the Nolans' investment company.

345 Having established that Serene was a Nolan company and not a company owned by Mr Walsh, an honest trust officer would clearly then have needed to establish the purpose of the £2,000,000 investment. That is an enquiry which, in our view, an honest trust officer would in the circumstances have made of Joan, either immediately or after first speaking to Mr Walsh; an honest trust officer would not have confined the enquiry merely to Mr Walsh. Any such enquiry of Joan would have established that the £2,000,000 was for investment in the Echemus project. An honest trust officer armed with that knowledge would obviously have realised that the £2,000,000 was not freely available for BSL to disburse as it liked, or as Mr Walsh instructed. An honest trust officer would not, therefore, have authorised the payments in January 2006 by which the £2,000,000 was dissipated other than on Echemus. It follows, we conclude, that in authorising the January payments PTCL, through Mr English, was guilty of commercially unacceptable conduct and, therefore, of dishonestly assisting in BSL's breach of trust.

346 Finally we record that the Nolans also relied on a draft term sheet for the Echemus project attached to an email of 30 March 2006 from Mr Kinch to, among others, Mr English, which identified that 2,000 A shares would be issued to the Nolans on completion and 4,000 shares would be issued to Arkaga. We accept, although only with some hesitation, Mr English's evidence that he did not connect this suggested allocation of 2,000 shares with the payment of £2,000,000 in January. But by 30 March the £2,000,000 had long since been disbursed so this point could not assist the Nolans in any event. For the same reason the Nolans' reliance on the fact that Mr English was informed by Mr Walsh on 30 June 2006 that Serene was a Nolan company, and their reliance on the later correspondence to which we have already referred, is misconceived. While we accept that these matters are relevant in our overall assessment of, in particular, Mr English's conduct, Serene's £2,000,000 had

been paid away by the end of January 2006; any knowledge which Mr English acquired thereafter is irrelevant in the context of the Echemus investment itself.

Conclusion

347 In our judgment

(a) there was a *Quistclose*, but not a *Halley*, trust in favour of Serene in respect of the £2,000,000 paid to BSL for investment in Echemus;

(b) there was a breach of that trust by BSL;

(c) PTCL assisted in that breach of trust; and

(d) that assistance was dishonest.

(4) First German nursing homes

348 The first German nursing homes investment was made on 3 March 2006 when the NTRBS transferred the sum of €4,250,000 into the account of BHL in Jersey. Serene was subsequently substituted for the NTRBS.

(a) The existence of a trust

349 Again our first task is to decide what the terms were of the agreement between Joan and Mr Walsh. It was Minerva's case that the €4,250,000 paid on 3 March 2006, in conjunction with the further €2,400,000 in respect of the second nursing homes investment, represented the combined purchase price for a 50% shareholding in ARIL. However, although Minerva put to Joan that there was no documentary evidence of the terms of the agreement, it did not directly challenge her version of events. Again we accept the evidence of Joan in relation to this investment. Accordingly we find that the three main elements of her agreement with Mr Walsh were that

(i) the Nolans and Mr Walsh would each invest €4,250,000 million cash, to participate 50:50 in the acquisition of two German nursing homes;

(ii) the parties' joint investment of €8,500,000 represented the 20% cash contribution needed to purchase the homes on the basis of 80% bank borrowings; and

(iii) the parties' shares in ARIL would reflect the size of their respective investments.

(i) A Halley constructive trust

350 ARIL was established as a Jersey company in March 2006. In August of the same year Joan received a share certificate for 5,000 shares, representing 50% of the issued share capital. Arkaga GmbH was subsequently incorporated as a wholly-owned subsidiary of ARIL. Arkaga GmbH purchased the two nursing homes, which had a net income stream of €970,000 per annum. On that basis alone, we do not see how the first German nursing homes scheme could be described as an instrument of fraud and nothing else. Again, the shares in ARIL were not a scam.

351 We accept that the nursing homes were purchased on different terms from those agreed between Joan and Mr Walsh. Indeed we have no doubt that one, if not the main, reason why the investment failed to produce the expected return was because the nursing homes were purchased with 103%, not 80% (or 90%), bank borrowings. Finally, we accept Mr Santos-Costa's submission that there is no evidence that Mr Walsh ever intended actually to match the Nolans' cash investment, or indeed had the resources to do so. For these reasons we conclude that Mr Walsh's objective was indeed, as the Nolans claimed, simply to get hold of their money. Again, however, we do not see how this state of affairs can establish that the first German nursing homes scheme was an instrument of fraud and nothing else. Clearly Mr Walsh was guilty of misrepresentation, but for the reasons we have already set out, that is not enough to establish a *Halley* trust.

352 We therefore conclude that the Nolans have failed to establish a *Halley* trust in respect of the first German nursing homes investment.

(ii) A Quistclose trust

353 It was the Nolans' case that by virtue of the agreement between Joan and Mr Walsh the €4,250,000 was held on a *Quistclose* trust to be repaid to the NTRBS unless and until

Conversely it was Minerva's case that there could be no *Quistclose* trust because the Nolans' €4,250,000 (together with the sum €2,400,000 paid on 30 June 2006) represented simply the purchase price for a 50% shareholding in ARIL.

(1) Mr Walsh matched that contribution;

(2) debt funding was acquired to meet the remaining 80% of the purchase price; and

(3) the Nolans' €4,250,000 was used together with Mr Walsh's matching contribution, and 80% funding, to acquire the German nursing homes.

354 Since, as we have already said, we accept Joan's evidence as to the terms of her agreement with Mr Walsh, it follows that there was, in our view, a *Quistclose* trust in favour of the NTRBS on the terms for which the Nolan family contended. The arrangement was not simply a contract for the sale and purchase of a 50% interest in ARIL. As Minerva now accepts, the knowledge of Joan suffices as the knowledge of the NTRBS. And as with

Columba and Echemus, the knowledge of Mr Walsh is to be imputed to BHL.

(b) Breach of that trust

355 Clearly there was a breach of that trust by BHL. Although Joan received a certificate for 5,000 shares in ARIL (albeit in the name of Nolan Transport), Mr Walsh did not match the Nolans' cash contribution and the two nursing homes were purchased by Arkaga GmbH with bank borrowings in excess of 80% (or 90%) of the purchase price.

(c) Assistance in that breach of trust

356 We have summarised in paras.75 to 77 above the payments made by PTCL out of the accounts of BHL (and BSL) in the months following the Nolans' investment. It follows that each of those payments represented an assistance by PTCL in that breach of trust.

(d) Whether that assistance was dishonest

357 Although Mr English's note of his conversation with Mr Walsh on 4 March 2006 mentioned *"Purchasing share in various assets eg Agirx"*, he clearly did become aware at some stage (although it is not clear when) that Nolan Transport was to obtain a shareholding in ARIL, with the precise percentage to be confirmed in due course. Accordingly he considered that the funds received from the Nolans were freely available for use by BHL without restriction. He asserted that he was unaware of any stipulation that the respective shareholdings of BHL and Nolan Transport would reflect each party's contribution to the investment, or that funding from the bank was to be limited to 80% (or 90%) of the total cost of the project. He emphasised that the German nursing homes project was devised and developed by Kellykay rather than by BHL. It was not until 17 August 2006 that Mr Walsh informed him that half of the shares in ARIL were to be allocated to Nolan Transport. Finally, although he knew that the transaction was highly leveraged, he was unaware of the exact level of borrowing that had been undertaken by Arkaga GmbH. In summary, he viewed this investment by the Nolans as not *"that much different"* from their previous investments, in respect of which there had been no issues up to that time.

358 One particular matter which Mr Santos-Costa investigated arose out of an email sent by Mr Hayes on 17 August 2006 (the day before BHL resolved to approve the sale of 50% of ARIL to the Nolans) to Mr English and Mr Nicolle, and copied to Mr Walsh. In this email Mr Hayes told Mr English that he had been speaking to the bank and that he had confirmed that he would provide them with *"Arkaga Group Consolidated Accounts"* to *"firm our credit rating as soon as possible"*. He added that these accounts should also be provided for the benefit of the trustees in order to evaluate the various investments. Mr English's reaction was to email Mr Walsh on 22 August as follows:–

> *"You will have received the below email from David Hayes.*

It now seems apparent that the consolidated group accounts will be necessary for the Bank, and David has chased this up on a couple of occasions now since our meeting.

Whilst not ignoring David, we will not provide the full accounting information to him until you indicate to us what information you are happy for us to release.

I can work on amending the accounts and ledgers to remove the reference to the Nolan's if this is preferable?"

Mr Walsh replied the same day, in the form of two separate emails sent a minute apart. The first said:

"Yes, I promised this to the Bank before Christmas"

The second read:

"Work slowly and remove Nolan references."

Mr English obliged; he removed references to the Nolans and, for good measure, to other third parties as well.

359 When asked by Mr Santos-Costa why he would not provide full accounting information without Mr Walsh's say so, Mr English's evidence was as follows:

"A. Because, as mentioned earlier, Mr Hayes still had not the trust of Mr Walsh at this time, as far as I was aware. Mr Walsh hadn't confirmed that he was okay to receive that —that sort of information. And, as such, I was referring to Mr Walsh first.

COMMISSIONER HUNT: Why would Mr Walsh employ somebody

whom he didn't trust?

A. I'm not sure. That was the message that I received from him though."

Mr English went on to explain that although both he and Mr Walsh had referred only to removing references to the Nolans, in fact he had meant all third party investors and that was how he read Mr Walsh's email. The cross-examination continued:–

"MR SANTOS COSTA: Wasn't the specific reference to removing the

Nolans because Mr Walsh didn't want the Bank of Scotland to find out that they had purchased a 50 per cent share in ARIL, Mr English?

A. Not that I was aware of at the time, no.

Q. Because, as I have put to you before, if the bank knew that the Nolans had purchased a 50 per cent interest in ARIL that would detrimentally affect the loan

facility that they had offered and the deal would be blown. And that's why Mr Walsh wanted references to the Nolans removed, isn't it?

A. I'm not sure that that's the case.

Q. You're not sure that that's the case?

A. I don't believe it is, no."

360 The Nolans submitted that Mr English's conduct in this regard was not that of an honest man. Why, they asked, would an honest man in Mr English's position suggest the removal of references to the Nolans in circumstances where detailed information is required by the bank which is financing Arkaga GmbH's purchase of the nursing homes in Germany, and Mr English knows that the Nolans are at that time a 50% shareholder in that property acquisition? And why, we ask rhetorically, was it Mr English who suggested that a solution to the problem of Mr Hayes was to remove references to the Nolans? We accept the Nolans' submission. In our view Mr English's conduct in this regard was dishonest. But this episode occurred long after the Nolans' first German nursing homes investment monies had been wholly disbursed, so it cannot be directly relevant to this investment. And by late August 2006 most of the second German nursing homes investment had already been disbursed as well. Accordingly Mr English's removal of references to the Nolans is relevant only in that it reinforces our overall conclusion as to his dishonesty.

361 Mr English's evidence in cross-examination about the two German nursing homes investments concluded as follows:–

"Q. Mr English, I put it to you that either you deliberately assisted Mr Walsh in his fraud in relation to the German nursing home transactions or, alternatively, you went through the whole transaction with your eyes shut. Which was it?

A. It was neither of those."

We find it impossible to believe that Mr English did not link the requirement for a 10% deposit in the Investment Plan with the Nolans' investment. Nor were we persuaded by Minerva's argument that the sum paid by the Nolans was not exactly 10% of the cost of the two nursing homes; the sums were so similar that this submission smacked to us of desperation. It follows, in our view, that Mr English must have realised in March 2006, and not just in August of that year, that the Nolans' investment was linked to the German nursing homes transaction, notwithstanding what Mr Walsh had told him on 4 March.

362 Even, however, if the conclusion in the preceding paragraph were incorrect, we need to consider what an honest trust officer in Mr English's position would have done in early March 2006 knowing, as Mr English on his own admission knew, that the €4,249,989.96 had come from the Nolans. For the reasons which we have already set out earlier in this judgment, an honest trust officer who had made proper enquiries in relation to Columba would have established that part of the agreement between Joan and Mr Walsh was that

the €1,748,000 paid by Serene was to be invested in Columba and so was not free to be used as Mr Walsh or PTCL thought fit. Similarly an honest trust officer who had made proper enquiries in relation to Echemus would have established that the £2,000,000 paid by Serene was to be invested in the Echemus scheme and so again was not free to be used as Mr Walsh or PTCL thought fit. In those circumstances, and given the previous history of inaccurate information from Mr Walsh generally, it seems to us that an honest trust officer in Mr English's place would not have taken what Mr Walsh said to him on 4 March 2006 at face value. On the contrary the immediate assumption of an honest trust officer would have been that in all likelihood the €4,249,989.96 had likewise been paid for some specific purpose, the precise nature of which would have to be established with Joan, and that in the meanwhile it would not be commercially acceptable to disburse any of the investment.

363 We are fortified in that conclusion by two further factors. First, €4,249,989.96 was on any view a substantial sum of money. The only company mentioned as a possible investment by Mr Walsh, namely AGIRx, was a company in which BHL had subscribed for £300,000 worth of shares; no evidence was put before us of the extent of other shareholdings within the Buchanan Group companies which could have been put towards the Nolans' €4,249,989.96. (In this important respect this payment was, contrary to Mr English's assertion, very different from the first Elision and Columba investments where the investments had been identified in advance.) Secondly, an honest trust officer would, in our view, have spotted at least the possibility of a link between the Nolans' €4,249,989.96 (which was clearly €4,250,000 less bank charges) and the 10% deposit required under the Investment Plan (as, indeed, we have found that Mr English did). Both these factors would have alerted an honest trust officer to the need to enquire of Joan precisely why the Nolans' €4,249,989.96 had been paid to BHL.

364 The proper enquiry of Joan would, of course, have revealed the full details of her agreement with Mr Walsh (and at the same time contradicted Mr Walsh's version of the agreement as relayed to Mr English), whereupon an honest trust officer would have continued the embargo on the use of the €4,249,989.96 save on the terms agreed between Joan and Mr Walsh. It follows that by failing to make the enquiries which an honest trust officer would have made, and by failing to embargo the disbursement of the €4,249,989.96 pending the outcome of those enquiries, Mr English did not act honestly.

365 We record for the sake of completeness that the Nolans also sought to rely as evidence of dishonesty on the BoS facility, the suggestion put to Mr English being that the issue of the 5,000 shares constituted a breach of the change of control provisions in the facility. Given, however, that the relevant facility letter, as Minerva pointed out, was not signed and did not become effective until 30 August 2006, we reject the Nolans' contention that the issue of the 50% shareholding to them some 12 days earlier on 18 August was in any way a breach of the terms of the facility letter.

366 Accordingly we conclude that the conduct of Mr English (and through him of PTCL) was commercially unacceptable and that he, and PTCL, were guilty of dishonestly assisting in

BHL's breach of the Quistclose trust in favour of the NTRBS.

367 Finally, however, there is the matter of the English Claimants' application to the Commercial Court in 2010 for orders that Serene had since 27 October 2006 been, and remained, the owner of 100% of ARIL, and that BHL should take such steps as necessary to procure the transfer to Serene of the 50% shareholding which was not presently in their beneficial ownership. By that time the Nolans were well aware that there had been a breach by BHL of the Quistclose trust in their favour. Burton J. acceded to Serene's application and in due course the remaining 50% of the shares in ARIL was transferred to the Nolans. Minerva contended that the Nolans had thereby affirmed any breach of trust on the part of BHL. The effect of affirming the breach of trust, Minerva continued, was that the Nolans could no longer complain of any breach of trust on the part of BHL, and if they could not complain of any breach of trust on the part of BHL, an essential element of their claim against PTCL for dishonest assistance fell away.

368 Mr Santos-Costa's response was essentially two-fold. Firstly he submitted that all the Nolans had done was to affirm the contract between Mr Walsh and Joan, and in particular the provision that the parties' shareholdings in ARIL should reflect their capital contributions; they had not affirmed the breach of trust. Mr Santos-Costa accepted therefore, that having obtained 100% of ARIL on the basis that they were the only party to have made any capital contribution at all, the Nolans could not now complain that Mr Walsh had failed to pay his promised €4,250,000. But, he contended, what the Nolans had not done was to affirm the loss of their own €4,250,000 or the breach of trust associated with the loss of that €4,250,000. Secondly, he relied on the fact that in the course of argument Burton J. had recognised that the application for summary judgment was being made without prejudice to the rest of the English Claimants' case.

369 We take first the Nolans' without prejudice point, which we regard as clearly misconceived. The fact that a party describes a particular action as being without prejudice does not have the effect of depriving that action of the legal consequences that would otherwise follow from it, even if the judge happens himself to use the words *"without prejudice"* when describing the party's case in argument. Accordingly we reject Mr Santos-Costa's second point.

370 Reverting, therefore, to Mr Santos-Costa's primary point, the immediate hurdle is that the terms of the contract (which he accepts that the Nolans affirmed) were the same as the terms of the Quistclose trust (which he says they did not). Mr Preston also suggested that if the Nolans were allowed to succeed in their dishonest assistance claim, the overall result would be that the Nolans would effect a double recovery. They would recover their own €4,250,000 contribution but would at the same time retain 100% of the shares in ARIL, or perhaps now more accurately 100% of Arkaga GmbH.

371 In the final analysis the question, it seems to us, is whether by making their successful summary judgment application Serene (and the Nolans) unequivocally chose to affirm their

first German nursing homes investment, so as to preclude themselves from thereafter relying on BHL's breach of trust and any dishonest assistance by PTCL in that breach of trust. We have not found this an easy issue to decide, but on balance we conclude that they did not. It seems to us that although the terms of the contract dictated the terms of the trust, what the Nolans were affirming was their contractual right to 100% of ARIL, not BHL's breach of trust in dissipating the Nolans' €4,249,989.96. And so far as the double recovery point is concerned, the correct answer, we think, is not that the Nolans are precluded from recovering at all. Rather it is that the Nolans would have to give credit for the value of their shareholding in Arkaga GmbH in calculating the damages to which they would be entitled for PTCL's dishonest assistance. But since Arkaga GmbH is worth nothing, there will be nothing to deduct. Accordingly we reject Minerva's submission that Serene have lost their right to claim in respect of the first German nursing homes investment.

Conclusion

372 In our judgment

(a) there was a *Quistclose*, but not a *Halley*, trust in favour of Serene in respect of the €4,250,000 paid by the NTRBS to BHL for the first German nursing homes investment;

(b) there was a breach of that trust by BHL;

(c) PTCL assisted in that breach of trust; and

(d) that assistance by PTCL was dishonest.

(5) Second German nursing homes

373 The second German nursing homes investment was made on 30 June 2006 when the NTRBS transferred the sum of €2,400,000 into BHL's RBS euro account. Again Serene was subsequently substituted for the NTRBS.

(a) The existence of a trust

374 It was Minerva's case that the €2,400,000 paid by the NTRBS was simply a further contribution towards the purchase price for a 50% shareholding in ARIL. Conversely it was the Nolans' case, based principally on Joan's evidence, that the agreement between Joan and Mr Walsh was that the €2,400,000 was intended as their 50% contribution towards the cost of acquiring eight further German nursing homes.

375 Again we have no hesitation in preferring Joan's evidence of the agreement between her and Mr Walsh. That conclusion is also supported by the approach adopted by the

Buchanan Group companies in the English proceedings. As Burton J. pointed out in his judgment, although in their letter of 9 April 2008 Edwin Coe had asserted that the €2,400,000 was to be aggregated with the first German nursing homes investment as the purchase price for the shares in ARIL, para.190 of the Defence of the English Defendants had abjured that assertion.

376 Firstly and most obviously, and as we have already commented, we have no doubt that Mr Walsh was the main architect of the Defence in the English proceedings. If Mr Walsh, who was the only person other than Joan with first-hand knowledge of the terms of their agreement, was not prepared to plead in the Defence that the Nolans' €2,400,000 was part of the purchase price for the 50% shareholding in ARIL, that seems to us a compelling reason for rejecting Minerva's version that it was.

377 Secondly, in his evidence Mr Nicolle sought to deal with the difficulty which para.190 presented to Minerva given that he had signed the statement of truth on behalf of BHL. His evidence in cross-examination was that para.190 was one of the paragraphs in the draft which he had asked Edwin Coe to amend and that the amendment he had asked them to make would have brought that paragraph into line with Minerva's case that the second German nursing homes investment was part of the purchase price for the 50% shareholding in ARIL, but that Edwin Coe had failed to incorporate the required amendment in the Defence as served. He added that he had read the email requesting the amendment again since August 2008. At the conclusion of his re-examination he was shown an email of 26 August sent by Mr English to Edwin Coe, attaching the signature pages to the Defence duly signed by Mr Nicolle *"subject to the amendments as agreed"*. The email continued:–

> *"nb Please also note that the second sentence of para. 190 will also need to be amended / deleted reference the payment for 50%."*

Mr Nicolle confirmed that this email was the email to which he had referred earlier. When, however, the Court pointed out that this email seemed to be directed towards the figure of 50%, not to the distinction between the first and second German nursing homes investments, Mr Nicolle asserted that there would have been another document dealing with the issue of whether the second German nursing homes investment was also part of the price for the shares in ARIL. No such further document was produced to us.

378 We found Mr Nicolle's evidence on this issue confusing and unsatisfactory, and we do not accept his explanation in relation to para.190 of the Defence. Accordingly we find that the terms of the agreement between Mr Walsh and Joan were that:–

> (i) the Nolans would invest a further €2,400,000 to fund the purchase of eight further German nursing homes; and
>
> (ii) that the Nolans' contribution would be matched by an equivalent cash payment by Mr Walsh, so that the Nolans and Mr Walsh participated 50:50 in the further acquisition.

(i) A Halley constructive trust

379 Although the further eight German nursing homes may have existed, Mr Walsh's assertions in his telephone calls with Joan in May and June of 2006 that he had now acquired the properties was clearly untrue. Indeed we have seen no evidence to suggest that Mr Walsh ever had any real intention that they should be purchased at all, let alone on the basis that he would match the Nolans' contribution with an equivalent investment of his own. Again there was no evidence that he had a spare €2,400,000 to invest even if he had wanted to. In those circumstances we conclude that in this instance the Nolans have satisfied us that the second German nursing homes investment was indeed an instrument of fraud and nothing else. It seems to us, echoing the words of the Vanuatu Court of Appeal in *Barrett* that this "was no different from outright theft in the guise of a contract" on Mr Walsh's part. Accordingly we find that there was a Halley trust in their favour.

380 Knowledge on the part of the transferor is not a relevant concept in the context of a Halley trust but if it were, the knowledge of Joan would, as with the first German nursing homes investment, be imputed to the NTRBS. As with Columba, Echemus and the first German nursing homes investments, the knowledge of Mr Walsh is to be imputed to BHL.

(ii) A Quistclose trust

381 On the basis of the finding in the preceding paragraph, the issue of a Quistclose trust does not arise. But in case we are wrong in finding that there was a Halley trust, we go on to consider the alternative of a *Quistclose* trust. Since we accept Joan's version of her agreement with Mr Walsh, it seems to us that for the reasons given by Burton J. at para.19 of his judgment there was a *Quistclose* trust in favour of the NTRBS, which required the €2,400,000 to be used only for the purposes of investment in further German nursing homes. Since the €2,400,000 was not paid as part of the price for the 50% shareholding in ARIL, we reject Minerva's sale and purchase argument and their contention that the €2,400,000 was consequently at the free disposal of ARIL.

382 As with the first German nursing homes investment, the knowledge of Joan suffices as the knowledge of the NTRBS and the knowledge of Mr Walsh is to be imputed to BHL.

383 In those circumstances we can deal more shortly with the Nolans' contention that they had another string to their bow in the form of the judgment of Burton J. in the English proceedings, in which he had found that the second German nursing homes investment was held on a *Quistclose* trust. They submitted that in the light of that decision this issue was *chose jugée*, binding on the parties to this action. Both parties accepted that the Jersey law of *chose jugée* was the same as the English law of *res judicata*.

384 In response to the obvious initial point that it was the Buchanan Group companies, not

Minerva, who were the defendants to the English proceedings, Mr Santos-Costa submitted that the modern version of the *chose jugée/res judicata* doctrine did not require a strict identity either of parties or of issues such as to give rise to an estoppel. The true question was whether the current assertion of a position contrary to the previous finding of a competent court would amount to an abuse of process. In support of this proposition he referred to the Isle of Man decision of *In the matter of Epitome Investments Limited* [1996] 98 JLR 579. The headnote to that decision reads as follows:–

> *"The petitioner sought an order to rectify the share register of a company and to register himself as the holder of shares.*
>
> *In divorce proceedings in England in 1995, a county court had held that the petitioner's father was and always had been both the legal and the beneficial owner of the company, since its two issued shares had always been held irrevocably in trust for him, and that the petitioner had no interest in the company.* The decision was upheld by the Court of Appeal.
>
> *In 1996, also in England, in proceedings connected with the bankruptcy of the petitioner's father, the court confirmed that there was no new evidence to change the conclusion of the Court of Appeal that the company was owned by the father.*
>
> *The father's trustee in bankruptcy submitted in the present case that an issue estoppel had arisen, precluding the petitioner from attempting to argue what had already been decided.*
>
> *Held, ordering the petition to be struck out:*
>
> *The case was one of issue estoppel.* Although both sets of proceedings had taken place in a different country and between different parties, there was no real or practical difference between the issues already decided and those to be litigated in the present action. Those issues had been finally determined against the petitioner on the merits in courts of competent jurisdiction, in proceedings which were not trivial in character, and no new evidence had become available since then. His petition would therefore be struck out as vexatious and an abuse of process."

Since it was PTCL personnel who were responsible ministerially for the receipt of NTRBS' monies on behalf of BHL, the Nolans argued that it would be an abuse for Minerva now to be able to argue, contrary to the decision of Burton J., that no Quistclose trust arose.

385 Minerva accepted that a summary judgment constituted a final judgment for the purposes of the *chose jugée/res judicata* doctrine. Neither party suggested that the proceedings before Burton J. were trivial in character. But Minerva contended that the doctrine did not apply to the judgment of Burton J. because it was not one of the Defendants in the English proceedings, because those proceedings were undefended and because this Court has had the benefit of evidence which was not before the Commercial Court.

386 Had this been a live issue, we would have concluded that the doctrine of *chose jugée* did not avail the Nolans. Whilst we are not persuaded by the first two grounds relied on by Minerva, we do think that there is force in the contention that the evidence in the present proceedings is more extensive than that presented to Burton J. Whether that evidence is more or less favourable to the Nolans seems to us to be immaterial and neither party argued to the contrary. In those circumstances it would not, in our judgment, be an abuse of process for Minerva to be allowed to argue the *Quistclose* trust point anew.

(b) Breach of that trust

387 Since the €2,400,000 paid by the NTRBS was not returned to them by BHL, there was a breach by BHL of the *Halley* trust. In the alternative scenario of a *Quistclose* trust, there was a breach of such trust by BHL because no further German nursing homes were in fact purchased with the NTRBS' monies.

(c) Assistance in that breach of trust

388 We have summarised in paras.81 and 82 above the payments effected by PTCL out of the accounts of BHL (and BSL) in the months following the investment by the NTRBS. It follows that each of those payments represented an assistance by PTCL in that breach of the *Halley* or *Quistclose* trust.

(d) Whether that assistance was dishonest

389 According to his statement, Mr English's understanding was that the transfer on 30 June, like that on 3 March, was to be treated as an unsecured loan and that the exact percentage of Nolan Transport's shareholding would be agreed and allocated at a later date. So far as he was concerned, the second transfer was intended, in essence, as a further contribution from Nolan Transport to the German property acquisition transaction, so that the two transfers by Nolan Transport to BHL amounted to a single combined purchase price for a shareholding in ARIL. Accordingly the funds received were freely available for BHL's use without restriction. He asserted that he had no knowledge as to any representation made by Mr Walsh regarding the purchase of eight additional nursing homes. His evidence in cross-examination was as follows:–

> *"Q. Before you paid this 2.4 million euros away on Mr Walsh's instructions, given the position that your company was in with regard to the German nursing home project did you not think to ask Mr Walsh what on earth he thought he was doing instructing you to pay monies that had been paid specifically to invest in the German nursing home project away into his personal overdraft?* Did it not cross your mind to simply ask the question: what on earth is going on here?
>
> *A. The investment your terminology of investment was it an investment you're*

saying investment as if it's an investment into the German nursing homes as opposed to a sale of shares. It related to the German investment and was recorded in the same sense as a loan pending allocation of shares, which was done so in August.

Again, and as with the first German nursing homes investment, we accept that Mr English did think in the summer of 2006 that the €2,400,000 represented a further contribution towards the purchase price for the 50% shareholding in ARIL.

390 But yet again, of course, that is not the end of the story. In deciding what an honest trust officer in Mr English's position would have done, what we have said in para.361 above in relation to the first German nursing homes investment applies here also. Indeed as of 30 June 2006 an honest trust officer in Mr English's position who had made proper enquiries in relation to the previous investments by the Nolans would have established that:–

(i) the £1,649,585 paid by the NFP in respect of the first Elision investment had been paid on the terms set out in para.273 above;

(ii) the €1,748,000 paid by Serene in respect of Columba was to be invested in that company;

(iii) the £2,000,000 paid by Serene in respect of Echemus was to be invested in the Echemus scheme; and

(iv) the €4,250,000 paid by the NTRBS in respect of the first German nursing homes investment had been paid on the terms set out in para.349 above, so that in each instance the monies were not at the free disposal of Mr Walsh or of the Buchanan Group companies. In those circumstances we have no doubt that an honest trust officer would again not have taken at face value any suggestion on the part of Mr Walsh that the €2,399,980.56 was simply a further contribution towards the price of the 50% shareholding in ARIL. On the contrary, an honest trust officer would have realised the need to enquire of Joan what the true position was and in the meanwhile would have placed an embargo on any disbursement of the NTRBS' investment. Having made that enquiry of Joan, an honest trust officer would have appreciated that Mr Walsh's explanation had yet again been untrue and that the €2,399,980.56 could only be expended on the purchase of further German nursing homes. Finally, therefore, an honest trust officer would then have refused to sanction the payments out of that €2,399,980.56 instructed by Mr Walsh.

391 It follows that by failing to make the necessary enquiries of Joan, and in effecting the payments which Mr Walsh instructed rather than placing an embargo on any disbursement of the NTRBS' investment, Mr English's conduct was commercially unacceptable and that he, and through him PTCL, were guilty of dishonestly assisting in BHL's breach of trust.

392 Finally, and again for the sake of completeness, we record that the Nolans sought to rely

as evidence of dishonesty in relation to both the German nursing homes investments on certain payments made by Arkaga GmbH to AHL between September 2007 and April 2008 (long after, we note, that the Nolans' investments had been paid away) amounting to €664,000 which, they alleged, represented monies being siphoned off from the German company to AHL, so as to bypass the Nolans as 50% shareholders in ARIL. To this argument Minerva had three responses, namely:

We now deal shortly with each of these objections.

(i) that the questions on this issue, which had been asked of Mr Nicolle, ought to have been asked of Mr English;

(ii) that the payments in question had not been pleaded; and

(iii) that such evidence as Mr Nicolle was able to give suggested that there was a legitimate explanation for the payments.

(i) The questions on this issue ought to have been asked of Mr English

393 In its closing submissions Minerva developed this point as follows:–

> *"… the Plaintiffs put these questions only to Mr Nicolle and not to Mr English.* This is more than a merely technical problem for the Plaintiffs. Mr English was the member of PTCL personnel who had conduct of the Buchanan Group companies' administration on 3 March 2006 and 30 June 2006, the times of the alleged breaches of trust by BHL (and PTCL's alleged dishonest assistance therein), and Mr Nicolle did not have awareness of BHL's activities on a day-to-day basis as at these times. Accordingly, the honesty or otherwise of PTCL as at these times turns entirely on Mr English's state of knowledge. If the Plaintiffs seek to rely on the matters relating to the payments made by Arkaga GmbH to AHL from September 2007 until April 2008 as evidence of the dishonesty of Mr English (and therefore PTCL) in assisting in the 2006 breaches of trust, or indeed as evidence that the conscience of Mr English (and therefore that of BHL) was affected by knowledge of facts giving rise to a trust over the relevant funds in BHL's hands, then they must put their case on that evidence to Mr English himself."

394 In support of this submission Minerva relied on *Browne v Dunn* (1894) 6 R. 67, *Markem Corp v Zipher Ltd* [2005] R.P.C. 31 and *Rahme v Smith & Williamson Trust Corporation Ltd* [2009] EWHC 911. The effect of this trilogy of cases is conveniently summarised in the following passage from the judgment of Morgan J. in the *Rahme* case (at para.90):–

> ***"Every counsel should know the general rule that it is not open to counsel to invite the court to reject the evidence of a witness as deliberately untrue when the witness was not challenged in that way.*** It was not suggested to Mr Haddad in cross-examination that he was giving evidence which was

> deliberately untrue but yet I was invited by counsel to reject his evidence on that basis. The need for cross-examination which specifically challenges the truthfulness of the witness' account is clearly established and is described in ***Phipson on Evidence, 16th ed., at para. 12–12 and is the subject of a very helpful consideration in the judgment of the Court of Appeal (delivered by Jacob LJ) in*** *Markem Corp v Zipher Ltd* ***…, discussing the decision of the House of Lords in*** *Browne v Dunn* ***… and the Australian case of*** *Allied Pastoral Holdings v Federal Commissioner of Taxation* ***… Whilst this approach may be open to some very limited exceptions, there is no possible exception relevant in the present case.*** In view of the failure to put to Mr Haddad that his evidence was a concoction, it is not open to me to consider that possibility. It would be completely unfair to Mr Haddad to make such a finding against him. Similarly, it would be completely unfair to him even to hint at what I might have thought if my hands had not been tied in this respect by the failure to challenge his evidence in this respect. I will therefore proceed on the basis that Mr Haddad's evidence was honestly given."

Mr Santos-Costa accepted that this statement also represented the law of Jersey.

395 We are not in the least surprised that the Nolans should have wished to investigate in cross-examination these substantial payments from Arkaga GmbH to AHL over a period of only some eight months. It also seems to us that it was entirely legitimate for Mr Santos-Costa to have questioned Mr Nicolle about them given that he was Mr English's superior at PTCL. But we do see considerable force in Minerva's submission that questions should also, indeed primarily, have been asked of Mr English about this issue since it was Mr English who had the day-to-day conduct of the affairs of the Buchanan Group companies and that it was Mr English who was in the firing line so far as the events of 2006 were concerned. In his final submissions Mr Santos-Costa made clear, rightly in our view, that he was not relying on these payments as evidence of Mr English's dishonesty but only as evidence of the dishonesty of Mr Nicolle.

(ii) The payments in question had not been pleaded

396 The Defendants are correct that the payments in question had not been pleaded by the Nolans, a point made by Mr Preston at the time. In our view they should have been. That said, some but not all of the documents on which Mr Santos-Costa relied on were in the trial bundles. We would not therefore have been minded to exclude the evidence about these payments on this ground alone.

(iii) Such evidence as Mr Nicolle was able to give suggested that there was a legitimate explanation for the payments

397 We have to say that we did not find Mr Nicolle's explanation of these substantial payments persuasive, even allowing for the fact that he was not in day to day charge of the

administration of the Buchanan Group companies, or of Arkaga GmbH. On the basis of the evidence which we heard, we are left with considerable suspicions about the justification for these payments. That said, we do not consider that there was sufficient evidence to establish that these payments must have been dishonest or, therefore, that Mr Nicolle was dishonest with regard to them.

Conclusion

398 In our judgment

(a) there was a *Halley*, alternatively a *Quistclose*, trust in respect of the €2,400,000 paid by the NTRBS for the second German nursing homes investment;

(b) there was a breach of that trust by BHL;

(c) PTCL assisted in that breach of trust; and

(d) that assistance by PTCL was dishonest.

(6) Big Ferries

399 The Big Ferries investment was made on 30 June 2006, when Ravenscliffe transferred the sum of £500,000 to BHL's account at RBS, of which £250,000 was from Bilberry.

(a) The existence of a trust

400 We accept Joan's evidence with regard to the agreement between her and Mr Walsh. Accordingly we find that the essential terms of the agreement were as the Nolans contended, namely that they would contribute £250,000 to be used to fund a feasibility study into the Swansea-Cork route, to be returned less expenditure if the project did not proceed.

(i) A Halley constructive trust

401 Given that the Big Ferries project had its origins in proposals made to the Nolans, which the Nolans passed on to Mr Walsh, we see no reason to think that the Big Ferries project itself was an instrument of fraud and nothing else. Again we accept that there is no evidence that Mr Walsh ever intended to put any of his own money into the project, even if he had any money to do so. We also accept that there is no evidence that a feasibility study was ever undertaken but we do not see that those matters alter the position. We are not satisfied that the Big Ferries project was a scam. Accordingly we conclude that the Nolans have failed to establish a Halley trust in respect of their Big Ferries investment.

(ii) A Quistclose trust

402 As with the Echemus investment which we have discussed earlier in this judgment, we adopt the reasoning of Tomlinson J. to which we have already referred. We reject as wholly implausible any suggestion that Bilberry's payment of £250,000 to BHL could to be treated as by way of overall funding for the business of BSL, out of which payments could simply be made as Mr Walsh saw fit. In our judgment the £250,000 which the Nolans (via Bilberry) paid as an investment in the Big Ferries project was impressed with a trust for that purpose in BHL's hands.

403 As with previous investments we reject Minerva's point about the knowledge and intentions of Bilberry; we repeat our conclusion that Joan's knowledge and intentions are to be imputed to Bilberry. Similarly, in answer to Minerva's point that PTCL did not have knowledge of the existence of a trust, we again repeat our conclusion that Mr Walsh's knowledge and intentions are to be imputed to BHL.

(b) Breach of that trust

404 Since no part of Bilberry's £250,000 was spent on any feasibility study, or indeed on the Big Ferries project in any shape or form, it follows that BHL was in breach of that *Quistclose* trust.

(c) Assistance in that breach of trust

405 We have summarised in paras.81 and 82 above the payments effected by PTCL out of the accounts of BHL (and BSL) in the months following Bilberry's investment. It follows that each of those payments represented an assistance by PTCL in that breach of trust.

(d) Whether that assistance was dishonest

406 Minerva's primary submission on this issue (and on the same issue in the context of the Irish Bio-Ethanol investment) was, as set out at para.177 of their closing submissions, that:–

> *"Mr English's account … as to what he knew at the times of the alleged dishonest assistance in the alleged breaches of trust in mid-2006, must be accepted by the Court since it has not been challenged by the Plaintiffs in cross-examination.* A party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point, particularly if that party seeks to submit that the witness has acted dishonestly and/or given evidence dishonestly".

In support of this submission the Defendants again relied on the same trilogy of cases to which we have already referred in para.394 above.

407 Minerva rightly pointed out in its closing submissions that the Nolans did not expressly challenge the paragraphs of Mr English's witness statement in which he dealt with the Big Ferries and Irish Bio-Ethanol investments. Nor did Mr Santos-Costa put to Mr English any positive case in relation to the receipt of the £500,000 by BHL on 30 June 2006, or in relation to BHL's dissipation of those funds shortly thereafter. In particular, he did not put to Mr English (or to any of the Defendants' witnesses) any case that these funds were held by BHL on trust for Serene and Bilberry and that PTCL's assistance of BHL's breaches of those trusts was dishonest. Mr Santos-Costa did touch on BHL's receipt of the sum of £500,000 on 30 June 2006 in cross-examination of Mr English as part of a line of questioning relating to the Columba claim, and again in relation to the Echemus claim, but these questions related solely to Mr Walsh's identification of Serene as a Nolan company. Minerva rightly, as it seems to us, described these questions as tangential, at best. Having concluded his cross-examination of Mr English on the German nursing homes investments, the reality is that Mr Santos-Costa moved immediately to the second Elision investment, bypassing the Big Ferries and Irish Bio-Ethanol investments altogether.

408 Finally, towards the conclusion of his cross-examination of Mr English and in response to an enquiry by the Court, Mr Santos-Costa confirmed that he was content to stand on his questions in relation to the Big Ferries and Irish Bio-Ethanol matters and to make submissions about those matters accordingly. And although Mr Santos-Costa asked certain further questions in cross-examination of Mr English when the hearing resumed the following week, none of the additional questions referred to Big Ferries or Irish Bio-Ethanol.

409 Mr Santos-Costa accepted that he had not put to Mr English any allegations of dishonesty arising immediately out of what he had been told by Mr Walsh about the £500,000 representing the Big Ferries and Irish Bio-Ethanol investments, and that he had not challenged why Mr English had done what he did at the time. But he made the point that he had cross-examined Mr English (indeed he had done so at length) in relation to the later correspondence in which there had been a discussion as to the whereabouts of the £500,000. Mr Santos-Costa made clear that he relied *"entirely"* on that cross-examination.

410 Mr Santos-Costa alternatively contended that he could bring himself within the exception to the rule summarised by Morgan J. in the *Rahme* case, that exception being as set out by Lord Herschell in *Browne v. Dunn* as follows (at pp.70–71):

> ***"My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.*** Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a

> witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakeably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

411 We reject the Nolans's submission that Mr Santos-Costa's cross-examination of Mr English about the correspondence in late 2006 onwards, in particular concerning the whereabouts of the £500,000, can make up for the failure to cross-examine Mr English about his actions and motives in the summer of that year when the £500,000 was being disbursed. Of course the later correspondence is of assistance in casting light on what happened earlier, and why, but in the final analysis whether Mr English was dishonest in relation to that later correspondence is a separate issue from his alleged dishonesty at the time when the £500,000 was disbursed. This argument does not, therefore, avail the Nolans.

412 We turn, therefore, to the Nolans' alternative submission that they can rely on the exception explained by Lord Herschell. Mr Santos-Costa contended that in this case there had been *"plenty of impeachment"* of Mr English. As he commented:–

> *"We've made it perfectly clear that it is our case that he has acted not as an honest person throughout and has, in fact, lied throughout."*

Unfortunately we did not have the benefit of submissions by either counsel as to the breadth of Lord Herschell's exception, with particular reference to the words:–

> *"he has had full notice beforehand that there is an intention to impeach the credibility of the story he is telling".*

It is certainly correct that the whole thrust of Mr Santos-Costa's cross-examination of Mr English was to the effect that Mr English had acted dishonestly throughout the history of the Nolan's eight investments and that he was perpetuating that dishonesty by lying in the witness box. But for the purposes of Lord Herschell's test is *"the story* [Mr English] *is telling"* the story of the eight investments as a whole, or the story of the Big Ferries investment in isolation? We also bear in mind Morgan J.'s description in Rahme of any possible exceptions to the general rule being *"very limited".*

413 Taking the argument in stages, let us assume that Mr Santos-Costa had just spent, say, an hour asking questions challenging Mr English's dishonesty generally but without

addressing any of the eight investments individually. We have no doubt Mr Santos-Costa could not then have brought himself within Lord Herschell's exception simply on the basis that he had put to Mr English that he had acted as a dishonest person throughout and had lied throughout. But if the rule required Mr Santos-Costa to go further than merely impeaching Mr English's honesty generally, we see no ground for distinguishing between any of the eight investments. Either Mr Santos-Costa was required to cross-examine Mr English about each of them, or he was not required to cross-examine about any of them. He cannot satisfy the rule by cross-examining about six of the investments but not about the other two. Accordingly we conclude that the Nolans cannot bring themselves within Lord Herschell's exception.

414 It was the evidence of Mr English, in summary, that:–

Accordingly as of 30 th June, 2006, he considered that the £500,000 (including Bilberry's £250,000) was at the free disposal of BHL. In the light of our ruling we accept that account, which does not demonstrate any dishonesty on the part of Mr English. Accordingly the Nolans have failed to prove that PTCL's assistance in BHL's breach of trust was dishonest.

(i) he did not on 30 th June, 2006, know anything about the Big Ferries or Irish Bio-Ethanol projects since these were both being developed by Kellykay;

(ii) he did not on 30 th June, 2006, know who Ravenscliffe/Serene were or what the £500,000 paid into BHL's account on that day was for;

(iii) he relied on what Mr Walsh told him on 30 th June, namely that Serene was a Nolan company and that the £500,000 represented part of the Nolans' contribution to the German property venture;

(iv) it was not until 17 th August, when he received Mr Walsh's reply to his email of the same day, that he became aware that (contrary to what Mr Walsh had said on 30 th June) the £500,000 was for the Big Ferries and Irish Bio-Ethanol projects, from which he inferred that £250,000 was intended for each project; and

(v) it was not until he received Bilberry's letter of 18 th January, 2007, that he was aware even of the existence of Bilberry.

Conclusion

415 In our judgment

(a) there was a Quistclose, but not a *Halley*, trust in respect of the £250,000 paid by Bilberry;

(b) there was a breach of that trust by BHL;

(c) PTCL assisted in that breach of trust; but

(d) the Nolans have not established that that assistance was dishonest.

(7) Irish Bio-Ethanol

416 The Irish Bio-Ethanol investment was likewise made on 30 th June, 2006, when Ravenscliffe transferred the sum of £500,000 into BHL's account with RBS, of which £250,000 was from Serene for this investment.

(a) The existence of a trust

417 As with previous investments, we accept Joan's evidence with regard to the agreement between her and Mr Walsh. Accordingly we find that the essential terms of the agreement were as the Nolans contended, namely that they would invest £250,000 to be used to turn the Irish Bio-Ethanol scheme into a live business (which in turn depended on obtaining the requisite Government licence), to be returned in full if the project did not proceed.

(i) A Halley constructive trust

418 We conclude on the totality of the evidence that the Irish Bio-Ethanol project existed and was regarded as having some prospect of coming to fruition. The stumbling block proved to be the failure to obtain the requisite exclusive licence. Again we accept that there is no evidence that Mr Walsh ever had the means, or the intention, of matching the Nolans' investment. But in all the circumstances we do not think that the Irish Bio-Ethanol project can properly be regarded as an instrument of fraud and nothing else; we are not persuaded that it was a scam. Accordingly we conclude that the Nolans have failed to establish a Halley trust in respect of their Irish Bio-Ethanol investment.

(ii) A Quistclose trust

419 As with the Big Ferries, we adopt the reasoning of Tomlinson J. and conclude that there was a *Quistclose* trust in Serene's favour in respect of their £250,000 investment, requiring that those monies should be utilised in getting the Irish Bio-Ethanol scheme on its feet.

420 Although the agreement between Joan and Mr Walsh required that Serene's investment should be returned if the project did not succeed, we do not see how that additional requirement could be part of any *Quistclose* trust. If the £250,000 was properly invested in the Irish Bio-Ethanol scheme, there would be nothing left in BHL's hands of Serene's monies and therefore nothing of Serene's monies for BHL to return. The *Quistclose* trust would have been fulfilled. Any obligation on the part of BHL to return Serene's investment if the Irish Bio-Ethanol scheme did not proceed could only be a personal obligation.

421 As for Minerva's points about the knowledge of Serene and BHL respectively, we repeat our conclusion that the knowledge of Joan is to be imputed to Serene and that of Mr Walsh to BHL.

(b) Breach of that trust

422 It was Mr English' unchallenged evidence that of Serene's investment £174,095.46 was paid to Irish Bio-Ethanol on 12 th July, 2006, by way of a loan; otherwise no part of Serene's investment found its way into Irish Bio-Ethanol. Clearly there was a breach of trust by BHL in respect of that part of Serene's investment that did not reach Irish Bio-Ethanol.

423 But what of the loan? The loan was not investigated in the testimony of any of the witnesses and no further details of this loan emerged in the evidence. Mr Santos-Costa accepted that Mr English's evidence showed that the £174,095.46 went into the hands of the intended recipient. But he contended that this was not sufficient to discharge the *Quistclose* trust. In particular he argued that a loan to Irish Bio-Ethanol did not constitute an injection of funds into the scheme; only a gift of the money to Irish Bio-Ethanol would suffice for the purposes of the *Quistclose* trust. We do not accept that submission. In the absence of any further information about the terms upon which the £174,095.46 was lent, we see no reason why an injection of that sum by way of loan should not be regarded as a partial satisfaction of the trust. Accordingly we conclude that BHL was in breach of the *Quistclose* trust, but only to the extent of the remaining £75,904.54.

(c) Assistance in that breach of trust

424 We have summarised in paras.81 and 82 above the payments effected by PTCL out of the accounts of BHL (and BSL) in the months following Serene's investment. It follows that each of those payments (with the exception of the loan) represented an assistance by PTCL in that breach of trust.

(d) Whether that assistance was dishonest

425 What we have said in para 414 above applies also to the Irish Bio-Ethanol investment. Accordingly the Nolans have failed to prove that PTCL's assistance in any breach of trust by BHL was dishonest.

Conclusion

426 In our judgment

(a) there was a *Quistclose*, but not a *Halley*, trust in respect of the £250,000 paid by Serene;

(b) there was a breach of that trust by BHL but only in respect of the £75,904.54 not invested in the Irish Bio-Ethanol scheme;

(c) PTCL assisted in that breach of trust; but

(d) the Nolans have not established that that assistance was dishonest.

(8) Second Elision

427 The second Elision investment was made on 22 nd September, 2006, when Serene transferred the sum of £1,107,489.25 into the account of BHL at RBS. To that sum must be added the £63,757.75 refund due from the first Elision investment, making a total of £1,171,247.

(a) The existence of a trust

428 It is clear from Joan's own evidence, and as Minerva submitted, that the agreement between her and Mr Walsh was simply that the Nolans would pay a further £1,171,247 (inclusive of the refund of £63,757.75) for an additional 144,446 shares in Elision. This is confirmed both by what Sally said to Mr English on 22 nd September, 2006, namely that the transfer was for the purchase of shares, and by Mr Taylor's letter of 10 th October, 2007, on behalf of Serene in which he described the £1,171,247 as being paid “in respect of the purchase of 144,446 shares in Elision”. Although there is no suggestion in the evidence that either Joan or Mr Walsh spelt out that their agreement was for the sale of unencumbered Elision shares, clearly that was, on an objective construction, the effect of their agreement.

(i) A Halley constructive trust

429 In their closing submissions the Nolans contended that there was a Halley trust because Mr Walsh had told Joan that the shares were available as a result of his exercising his preemption rights, in which Joan was pro rata entitled to share. This was untrue, said the Nolans, because BSL had already obtained all the non-Arkaga held shares in Elision in January 2006 (in disregard of the Nolans' preemption rights), following which any preemption rights had been extinguished. We reject this contention on two grounds. Firstly, even if Mr Walsh was guilty of misrepresenting the source of the shares which the Nolans were to acquire, that would not, as we have already said earlier in this judgment, give rise to a *Halley* trust. Secondly, there is, in our view, no evidence to support any suggestion that Joan was misled. As she confirmed in cross-examination, she knew that the shares which the Nolans were purchasing formed part of the shares which BSL had bought in January 2006.

430 We add for the sake of completeness that we were equally unpersuaded by Minerva's contention in their closing submissions that the arrangement between Mr Walsh and Joan in the summer of 2006 represented an agreed alternative method by which the Nolans could acquire the shares which they would have been entitled to purchase had their preemption rights not been *"accidentally overlooked"* in early 2006. This suggestion was not put to Joan in cross-examination and we find no evidence to support the argument that Joan approached the acquisition of the additional shares in Elision on this basis.

431 In his final submissions, however, Mr Santos-Costa also contended that a Halley trust came into existence because Mr Walsh and BSL had no unencumbered Elision shares which could be sold to the Nolans.

432 The starting point for the purposes of this submission was the charge in favour of BoS granted by BSL as chargor ("the BSL charge"), again dated 27 th January, 2006, (the same day as BWL's charge to BoS to which we have referred in the context of the first Elision investment). By clause 2.1 of the BSL charge, BSL charged in favour of BoS by way of a first fixed charge its entire right, title and interest in and to *"the Shares"* (described as *"the Charged Assets"*). By clause 2.2.2, BSL undertook not, without the prior written consent of BoS, *"to sell, transfer, assign or otherwise dispose of any of the Charged Assets"*. Clause 3.2 provided as follows:–

> *"3.2. If at any time the Chargor holds any shares other than the Original Shares it will, promptly upon acquiring any interest in such shares, notify BoS of such acquisition. All of such additional shares shall stand charged in favour of BoS by way of first fixed charge …"*

433 Clause 21.1 contained the following definitions:–

> *"'EGL' means Elision Group Limited …;*
>
> *'EGL Shares' means the shares held by the Chargor in EGL described in the Schedule;*
>
> *….*
>
> *'Original Shares' means the Entara shares and the EGL shares;*
>
> *….*
>
> *'Shares' means the Original Shares together with any other shares in the capital of any Company held by the Chargor from time to time."*

The Schedule included as "The Original Shares" 1,173,334 deferred shares and 811,492 ordinary shares in Elision.

434 We now move to Mr Kinch's email of 12 th October, 2006, which we have quoted in para.97 above, and in particular to the advice in the second paragraph. The schedule attached to Mr Kinch's email was headed *"Share Capital Information"*. It listed the shareholdings of, among others, BWL and BSL in Elision. Having first set out the deferred and ordinary shares charged to BoS, the schedule had a heading *"Balance of ordinary shares not charged to BoS"*, under which there was an entry for BSL of 197,010 shares. At the foot of the schedule was a note which read:–

> *"If 144,446 of the unencumbered ordinary shares held by [BSL] are to be kept outside the new charge to Bank of Scotland, the Bank's consent will be needed as they are currently expecting a charge over all the ordinary shares other than the 311,379 shares held for Joan Nolan."*

435 The Nolans challenged the accuracy of the advice in Mr Kinch's email. Mr Santos-Costa contended that on a true construction of the BSL charge all of BSL's shares in Elision were charged to BoS, so that BSL had no unencumbered shares to sell to Serene in August/September 2006. Alternatively the Nolans argued that even taking Edwin Coe's email at face value, there was no evidence that BoS had ever agreed to its not taking security over any further shares that might be transferred to the Nolans. Either way, therefore, as at August/September 2006 neither Mr Walsh nor BSL was in a position to transfer the promised 144,446 (unencumbered) shares to the Nolans. In those circumstances, the Nolans submitted, a Halley trust came into existence as soon as Serene transferred the £1,107,489.25 to BHL. Mr Walsh's agreement with Joan was simply a scam on his part.

436 We consider that the Nolans' submission based upon the true construction of the BSL charge is clearly correct, and that Mr Kinch's advice to the contrary was wrong. The 144,446 shares which Mr Walsh agreed to sell to the Nolans were identified by him as forming part of the 811,492 Elision shares for which BSL had subscribed. Those 811,492 shares were specifically identified in the Schedule to the BSL charge as constituting part of *"the Original Shares"*. Accordingly they were also part of *"the Shares"* charged by BSL to BoS under clause 2.1. For good measure, of course, by clause 2.2.2 BSL was prevented from disposing of any part of that holding of 811,492 ordinary shares.

437 Although the knowledge of Mr Walsh is, it seems to us, irrelevant in this particular context, we would add that we have no doubt that he was well aware in August/ September when he agreed to sell to Joan 144,446 out of the 811,492 shares that those shares were charged to BoS. He also knew that the charge prohibited BSL from disposing of them to the Nolans. Whatever else Mr Walsh may have been, he was no fool. He knew the business of the Buchanan Group companies better than anyone and that business included the BSL charge. In short he knew that BSL had nothing with which it could satisfy its obligation to transfer 144,446 unencumbered shares to the Nolans.

438 In his evidence Mr English suggested that the 144,446 shares could have come from the holding of 197,010 shares that BSL had acquired by the conversion of loan stock and

which did not appear in the Schedule to the BSL charge. (This was not, of course, what Mr Walsh himself had in mind.) These were the shares which Mr Kinch's schedule had described as not charged to BoS. The problem with this suggestion is that on the wording of the BSL charge itself, and in particular of clause 3.2, the charge in favour of BoS would bite on any such additional shares as soon as they came into the hands of BSL by virtue of the conversion of the loan stock. Following the conversion of the loan stock, the 197,010 shares and the Original Shares would both be equally subject to the charge. It follows that as a matter of law this alternative source of the 144,446 shares does not avail Minerva.

439 In case, however, that conclusion is incorrect, we proceed to consider the remainder of Mr Kinch's advice, and in particular the suggestion that even if the 144,446 shares were initially unencumbered the consent of the BoS would be required to *"not getting security"* over the shares once they were transferred to the Nolans. It is clear to us from Mr Kinch's wording in his email of 12 th October, 2007, namely that *"we would need [BoS] to agree"* to not taking security, and in his schedule that *"the Bank's consent will be needed"*, that the consent of BoS had not, so far as he was aware, been obtained by that date. Indeed we have seen nothing to suggest that by August/September 2006 the consent of BoS had even been sought, let alone obtained, by anyone. Even, therefore, on Mr Kinch's approach, BSL did not in August/September 2006 have 144,446 unencumbered shares in Elision to transfer to the Nolans.

440 As with the previous investments, the knowledge of Joan is to be imputed to Serene and the knowledge of Mr Walsh is to be imputed to BHL.

441 In short, for the reasons set out above we are persuaded that the second Elision investment was indeed a scam on Mr Walsh's part; whatever view one takes of the effect of the BSL charge, BSL had nothing to deliver to the Nolans in exchange for Serene's £1,171,247. We therefore conclude that the Nolans have established a Halley trust in respect of this investment.

(ii) A Quistclose trust

442 Since the agreement between Mr Walsh and Joan constituted, in our judgment, a simple contract for the sale and purchase of the 144,446 additional shares which were already in the name of BSL, it follows that the Nolans would not have been able to establish a *Quistclose* trust.

(b) Breach of that trust

443 Since no part of Serene's investment was ever repaid, there was a breach of that Halley trust by BHL. As, however, we have recognised in para.175 above, acquiescence could, at least in theory, apply in the context of a Halley trust. We therefore now address Minerva's

submission that the Nolans in fact received what they had bargained for, in the form of a Nominee Declaration for precisely the amount of Elision shares agreed. When Mr Preston put this point to Joan in cross-examination, she said:

> *"No, that's not correct.* We were paying we were buying the [BSL] shares, the 17.8 per cent of the [BSL] shares which is the 811,492 shares that [BSL] bought from Elision in January 2006. And in January 2006 they also pledged those same shares in total to Bank of Scotland and then what you're saying is that Mr Walsh sold me 144,446 shares of [BSL] that were already pledged to the bank."

The question therefore arises whether the position regarding the status of the 144,446 shares had changed between August/September 2006 and October 2007.

444 We record that in their closing submissions Minerva asserted:–

> *"In any event, it is not in dispute that the Bank of Scotland did in fact consent to not taking security over the 144,446 Elision shares which were issued to Serene under the declaration of trust on 26 October 2007."*

This assertion was incorrect. The Nolans flatly refuted the suggestion that BoS had given its consent and, as we set out in this judgment, we saw no evidence that BoS had ever done so, or indeed ever been asked to do so.

445 Since the BSL charge continued to be in force in October 2007, the legal position had not changed since August/September 2006. We conclude, therefore, that BSL had no unencumbered Elision shares to sell in October 2007, just as it had had no unencumbered Elision shares to sell in August/September 2006. On this simple ground we reject Minerva's submission that the Nolans got what they paid for, so any acquiescence argument must fail.

446 In case, however, our construction of the BSL charge is incorrect, and the position was as set out by Mr Kinch in his email of 12 th October, we proceed to examine the position in October 2007 regarding consent from BoS. On his own admission Mr English had seen no document in October 2007 to suggest that BoS consented to its charge not extending to the 144,446 shares, nor had Mr Nicolle. Nor was any such document adduced at the trial. In his final submissions Mr Preston, having referred to various passages in Mr English's evidence where Mr English had repeatedly spoken of his reliance on Kellykay/AL, drew attention to an email dated 26 th October from Ms Jackie Samson of PTCL to Mr Stuart Smith and Mr Kinch entitled *"Nominee Declarations"*, which read:–

> *"On behalf of Rob English I attach copies of the nominee declarations regarding Serene Investments Limited for your review prior to issuing.*
>
> *The originals will be sent by courier to Serene Investments Limited on Monday"*

and to Mr Stuart-Smith's reply of the same day, copied to Mr Kinch:–

"These both seem fine."

So, contended Mr Preston, in circumstances where Mr Stuart-Smith and Mr Chipperfield of Kellykay were aware of Mr Kinch's advice that BoS' consent was needed, and Kellykay then approved the issue of the Nominee Declarations, it was reasonable to infer that whatever consent was necessary had indeed been provided. Otherwise, he continued, one would have expected there to have been some concern raised when these Nominee Declarations were sent to the individuals who were actually in negotiation with BoS at the time, and were copied to the lawyer involved. There was no record of Mr Kinch expressing any concern about the course of action that was being undertaken, or of his drawing attention to any lack of the necessary consent. Mr Preston accepted that he could not point to any document constituting the consent but he submitted that it was safe to infer from the surrounding circumstances that the necessary consent was in fact given. Whilst we recognise the force of Mr Preston's submission based on the two emails, we have no doubt that if BoS had given its consent, there would be a record somewhere to that effect, if only in the files of PTCL and of BoS itself, and that that record would have been adduced in evidence. In those circumstances we conclude that BoS had not, at the time of the Nominee Declaration, given the necessary consent.

447 It follows that the 144,446 shares covered by the Nominee Declaration were, we conclude, never unencumbered, with the result that the Nolans never did receive what they had bargained for. Finally, we would only add that even if the 144,446 shares had been unencumbered, there is no evidence to suggest that Serene (or the Nolans) agreed to accept the shares in lieu of the monies which Serene had paid and had already demanded back. It is correct that Mr Taylor never returned the Nominee Declaration that had been sent to him on 29 th October, 2007; conversely he never indicated to BSL that Serene was accepting the Nominee Declaration in lieu of the return of its investment which he had demanded in his letter of 10 th October. Accordingly we find that there was in any event no acquiescence on Serene's part and our conclusion that there was a breach of that Halley trust by BHL stands.

(c) Assistance in that breach of trust

448 We have summarised in para.98 above the payments effected by PTCL out of the accounts of BHL and BSL following Serene's investment. It follows that each of those payments represented an assistance by PTCL in that breach of trust.

(d) Whether that assistance was dishonest

449 It was Minerva's case that PTCL was not dishonest because so far as it was concerned the sum of £1,107,489.25 received by BHL from Serene on 22 nd September, 2006, represented the purchase price under a contract for the sale of further shares in Elision and that accordingly the sum of £1,107,489.25 became part of BHL's general assets. More particularly, PTCL was not aware, as at September 2006, of any facts which would have

put an honest person on notice that BHL was in breach of trust in making payments out of the RBS account. The matters relating to the issuing of the declaration of trust in October 2007, even if they amounted to evidence of dishonesty (which they did not), could not be relevant to the question of PTCL's state of mind as at September 2006 when the acts alleged to amount to the breaches of trust were committed.

450 We accept Minerva's submission that what Mr English did in October 2007 in terms of the Nominee Declaration is not directly relevant to why he did what he did in September 2006, and in particular whether he acted dishonestly in September 2006. On the other hand the events of October 2007 cannot simply be ignored. We therefore address them first before reverting to September 2006.

451 In the light of the factual background which we have outlined in para.97 above, the link between Serene's letter of 10 th October, 2007, requiring the return of its second Elision investment and the board meeting of AHL on 11 th October is, in our view, clear. The only reason why AHL resolved on 11 th October to issue a declaration of trust in favour of the Nolans in relation to the second Elision shares was because Serene had asked for its money back in its letter of the previous day and Serene's money had already been spent. We have no hesitation in rejecting Mr Nicolle's evidence to the contrary.

452 Mr Nicolle acknowledged that he was familiar with the BSL charge, which both he and Mr English had signed. In relation to Mr Kinch's email of 12 th October (albeit that he did not recall seeing the email), Mr Nicolle's evidence was as follows:–

> *"A. … Well, as I've said, there had been numerous discussions over many months between different people regarding the letters from Serene and the issue of the declarations of trust.* There had been investigations regarding the Entara matter and this matter. So this was a culmination of an effort to reach that point. So whether this e mail just confirming something was after the event or we'd known about it before but it was just a piece of correspondence to tidy up matters, I don't know."

When asked by reference to Mr Kinch's email whether it was his understanding that things had actually been sorted out by the time of the meeting on 11 th October, Mr Nicolle responded:–

> *"A. I can't say that I knew that, no.* What I'm saying is that we knew that well, as I understand it, and recall, we would know that the shares were available as being unencumbered in the first part of this from Mr Kinch. The fact that the bank needed to provide a waiver, I probably wouldn't have known on the 11th until this e mail arrived. But the conversations regarding the fact that the shares that had been dealt with from the convertible loan stock were available for issue, I think was known before these e mails arrived, in terms of the waiver part of that conversation. So I think there had been conversations with persons from Arkaga Limited and my colleague, Mr English, to resolve certain of those facts. And this

was the culmination of a number of discussions."

453 In his witness statement Mr English said of the Nominee Declaration as follows:–

> *"I understood that [AL] had obtained the consent of BOS to this arrangement.* The arrangement was further confirmed by way of a Group Disclosure Letter dated 15/07/08 as part of the arrangements relating to the July 2008 revolving credit facility of £84.1 million."

As for the oral evidence of Mr English, at the conclusion of his cross-examination in relation to Edwin Coe's email of 12 October and the issuing of the Nominee Declaration on 26 th October, there was the following exchange with the Court:–

> *"COMMISSIONER HUNT: Did you not feel, as the company that was*
>
> *actually selling the shares, did you not feel the need to have some written confirmation that the bank agreed to not get in their security before issuing a nominee declaration?*
>
> *A. I didn't. I think I was content to rely on [Kellykay's] work, who were acting on our behalf at that time."*

Again, the evidence of Mr Nicolle was to the same effect. Against that factual background, we return to Minerva's submission.

454 The thrust of Minerva's case regarding the events of October 2007 was that Mr English had been entitled to issue the Nominee Declaration on 26 th October (and the directors of BSL had been entitled to pass a board resolution to issue such a Declaration) because it was Kellykay, rather than the Buchanan Group companies themselves, whose role it was to negotiate on the companies' behalf with BoS in relation to such matters as the bank's security. In this regard Minerva was at pains to emphasise that PTCL generally, and Mr English in particular, were entitled to rely on the financial advice of Kellykay pursuant to the services agreement. Although the services agreement did indeed say that Kellykay was to provide financial information and advice regarding investments, it did not, or at least not in terms, empower Kellykay to negotiate banking arrangements on behalf of the Buchanan Group companies. However, on the basis of the evidence before us, and in particular that of Mr English, we accept that that was what happened in practice. Minerva also contended that PTCL and Mr English were entitled to rely on the legal advice of Mr Kinch.

455 We have no hesitation in concluding that an honest trust officer in Mr English's position would not have dealt with the Nominee Declaration in the same cavalier fashion as Mr English did in October 2007. We note that Mr English did not in his evidence suggest that he had even asked Kellykay whether it had received the necessary confirmation from BoS; so far as he was concerned it was enough that Kellykay had asked him to issue the Nominee Declaration. An honest trust officer, recognising that it was the company which he was administering that was ultimately responsible for the validity (or otherwise) of the

Nominee Declaration, would have insisted on seeing something in writing from BoS confirming that the bank were prepared to forego any security over the 144,446 shares before issuing the Nominee Declaration, if only for his or her own protection. After all, if the Nominee Declaration proved to be invalid by virtue of the bank's security, it would be BSL, not Kellykay, which would be facing the consequences. And such documentary confirmation, if it existed, could have been emailed to Mr English at the press of a computer key. Nor, of course, was Mr Nicolle in any better position than Mr English. By failing to recognise that he should have insisted on a sight of the bank's consent, Mr English did not, we conclude, act in a commercially acceptable or honest fashion.

456 For the sake of completeness we address Mr English's reliance on the so-called Group Disclosure Letter. The first and obvious point is that since this letter is dated 15 th July, 2008, we see no basis on which it could be relevant to his state of mind in October 2007. Secondly, there is absolutely nothing on the face of the letter to support Mr English's conclusion. Mr Preston summarised the steps in the argument as follows:–

We regard this argument as too far-fetched to bear serious consideration. Accordingly we dismiss altogether any suggestion that Minerva's case on this issue is in any way improved by the Group Disclosure Letter.

(i) the Arkaga Group structure chart attached to the letter (but which was missing from the documents put before us) would have identified 144,446 shares in Elision as being held for the Nolans;

(ii) the chart would have made clear that AHL regarded those shareholdings as lying outside the terms of the charge; and

(iii) BoS did not then respond saying that it disagreed with that position.

457 Finally, therefore, we return to the position in September 2006. On 19 th September, three days before the receipt of Serene's investment, Mr Walsh had, we find, resorted to his familiar ruse of laying the ground, in advance of a payment by the Nolans, by lying to Mr English about the source of the monies which were to come into a Buchanan Group company. On this occasion the lie was that the monies coming from the Isle of Man would be *"from the sale of various investments"*; Mr Walsh clearly intended Mr English to believe that these were his investments. This time, however, his plan was thwarted by Sally's telephone call to Mr English on Friday 22 nd September, in which she specifically mentioned that the investment was for the purchase of Elision shares. Mr English's reaction was to telephone Mr Walsh to tell him that BHL had received monies for the Nolans for the purchase of Elision shares; there is no suggestion that Mr English challenged Mr Walsh about the provenance of these funds which he had given three days before. Mr Walsh told him that he would *"confirm the amount of shares to be allocated on his return to the office next Tuesday"*, i.e. 26 th September. He never did so. Nor did Mr English apparently ever chase him for this information, at least not until many months later. In the meanwhile, he disbursed Serene's investment on Mr Walsh's instructions.

458 Mr Santos-Costa, in his cross-examination of Mr English, took him to the BSL charge. When asked, given that charge, how BSL was going to provide the Elision shares to the Nolans, Mr English answered that the shares were to be provided from the loan stock that was not listed in the schedule to the BSL charge and which he did not believe to be part of the charge. The cross-examination continued:–

> *"MR SANTOS COSTA: When you received the telephone call from*
>
> *Sally Nolan that she was phoning on behalf of Joan Nolan depositing GBP 1.1 million for the purchase of the Elision Group shares, why didn't you mention that all the existing shares had been charged to the Bank of Scotland at that time?*
>
> *A. It wasn't something that had entered my head at the time. That was a short telephone call that I'd had with Sally Nolan. And once the monies were received I spoke to Mr Walsh as to its allocation.*
>
> *Q. But you signed a document knowing perfectly well that BSL has charged all of its shares in Elision Group to the [BoS]. This is a document that you signed, that you read, presumably, did you?*
>
> A. I would have done.
>
> *Q. And that clearly indicates that all of the Elision shares are pledged to the bank.* And then you happily receive GBP 1.1 million from the Nolans, Joan Nolan, for the purpose of purchasing Elision shares, knowing perfectly well that you have none to sell.
>
> *A. I didn't think I knew perfectly well that there was none to sell, otherwise I wouldn't have transacted on that basis.*
>
> ….
>
> *Q. But you didn't have any to allocate. So how were you actually going to physically get them before you allocate them?*
>
> *A. The loan stock had been exercised. So there were shares held.*
>
> Q. But they're all charged?
>
> *A. Well, in my view in my head at the time I didn't believe that they were charged.*
>
> *Q. Shall we look at the charging document again?*
>
> ….
>
> *'Shares' means original shares together with any other shares in the capital of any company held by the chargor from time to time".*

….

A. Well, according to that wording, it would mean all shares, from time to time.

Q. Correct. Yes. Indeed. And then original shares means the Entara shares and the EGL shares. So all of the Elision shares, yes, are charged?

A. According to that. But, as I said, I didn't believe there the loan stock was subject to the charge, because when we exercised that option we didn't seek the consent of the bank. And that if it should have been sought, it was an oversight. And the bank did not revert to me on that position at all."

459 We find it very difficult to believe Mr English's evidence on this point. But again we need to consider how an honest trust officer in Mr English's position in September and October 2006 would have acted, knowing, as Mr English did, that Serene's investment was for the purchase of further shares in Elision. In our view the immediate reaction of an honest trust officer would have been that, at the very least, this arrangement potentially created a real problem. An honest trust officer who, like Mr English, had read the BSL charge would have realised that there appeared to be no unencumbered shares which BSL could provide to the Nolans, even following the conversion of the loan stock the previous month. In those circumstances the first thing that an honest trust officer would have done would have been to make the appropriate enquiries to determine whether BSL was in a position to fulfil the agreement which Mr Walsh had made with Joan, or not.

460 The obvious person for the honest trust officer to ask, either via Kellykay or directly, was Mr Kinch. Had the honest trust officer made that enquiry of Mr Kinch in September 2006, we conclude that Mr Kinch would have replied to the same effect as he later did on 12 th October, 2007. Although an important part of the advice contained in that email was, in our view, wrong for the reasons we have explained above, obviously we would not criticise the honest trust officer for acting on the basis of that advice. But on any view it would have been clear from Mr Kinch's response that unless and until BSL obtained the consent of BoS to its not taking a charge over whatever shares were to be transferred to the Nolans, BSL had no way of ever fulfilling the agreement which Mr Walsh had made. An honest trust officer would, no doubt, then have set about trying to obtain that necessary consent, again either directly or via Kellykay. Whether BoS would ever have been prepared to grant its consent, we cannot tell and the question is in any event immaterial.

461 More importantly, however, we find that an honest trust officer would not, pending the obtaining of BoS' consent, have effected any payment out from Serene's investment. On the contrary, an honest trust officer would have recognised that even in the context of what he believed to be a simple sale and purchase contract, it would not be commercially acceptable to pay away any of Serene's investment unless and until he knew that BSL had unencumbered shares which it could in due course transfer to Serene. Nor does it matter for these purposes that the honest trust officer would not have known (as Mr English did not know) in September 2006 how many Elision shares Mr Walsh had agreed to transfer; as matters stood in September 2006 BSL did not have a single unencumbered share to

transfer.

462 Since Mr English paid away Serene's investment in September and October 2006 without obtaining the necessary consent from BoS, it follows that his conduct (and through him that of PTCL) was commercially unacceptable and that he and PTCL were guilty of dishonestly assisting in BHL's breach of the Halley trust in Serene's favour.

Conclusion

463 In our judgment

(a) there was a *Halley*, but not a *Quistclose*, trust in respect of the £1,171,247 paid by Serene (inclusive of the refund from the first Elision investment);

(b) there was a breach of that trust by BHL;

(c) PTCL assisted in that breach of trust; and

(d) that assistance by PTCL was dishonest.

Events after September 2006

464 We have set out the relevant events and correspondence earlier in this judgment. Joan in her oral evidence described the Buchanan group companies and PTCL/Minerva as *being "very, very evasive"* in the first half of 2007. In our view that is an entirely accurate description. It took Mr English almost two and a half months to make any substantive response to Mr Taylor's two letters of 18 th January, 2007, and, when he did respond, his letter of 30 th March, 2007, (drafted, he said in evidence by Mr Nicolle and him) was exceedingly, and in our view deliberately, unhelpful. Mr English accepted in cross-examination that his letter *"could have been better worded"*. (We accept Mr English's evidence that he was out of the office for a prolonged period from early February 2007 onwards following the birth of his first child, but that does not excuse PTCL's/Minerva's failure to organise someone else to respond to Mr Taylor's letters.) Not surprisingly Joan was incensed by the letter of 30 th March. Thereafter Mr Taylor's email of 2 nd April, Reddy Charlton McKnight's letters of 31 st May and Mr Taylor's letters of 25 th June, 2007, produced no substantive response from the Buchanan Group until Mr Nicolle's letter of 24 th September that year. Whilst we accept that Minerva may have felt the need to discuss these letters with Mr Walsh and/or Kellykay, the delay in responding had more, we conclude, to do with Minerva's desire to keep the Nolans in the dark for as long as possible. Furthermore Mr English himself referred to his *"avoidance tactics"* in his email of 14 th February, 2007. In our opinion avoidance tactics were precisely what PTCL/Minerva were deploying.

465 One particularly egregious example of such mendacious avoidance tactics was Mr

English's email to Mr Kinch of 9th February, 2007, in which he had instructed Mr Kinch to draft a letter to Serene and Bilberry to the effect that shareholdings could not simply be transferred at that stage *"as there are preemption rights in place etc etc"*. One of the shareholdings which Serene had asked to be transferred was the second Elision investment. But by February 2007 the Elision shares were not subject to any preemption rights, as Mr English well knew and as Mr Kinch pointed out in his email of 3rd April. It was therefore dishonest of Mr English to have given Mr Kinch the instructions which he did in relation to the second Elision investment, albeit this particular act of dishonesty did not bear fruit.

466 But the Nolans went further. They contended, in short, that during this period Mr English and Mr Nicolle had been guilty, with others, of systematic dishonesty, specifically by falsely representing that the bulk of the Nolans' investment monies in Echemus, Big Ferries and Irish Bio-Ethanol remained in the coffers of the Buchanan Group companies. This systematic dishonesty supported, they submitted, their claim that PTCL had acted dishonestly in the earlier period between March 2005 and September 2006 when the Nolans were investing their monies in the Buchanan Group companies and PTCL was effecting the payment away of those monies. We have no hesitation in upholding the Nolans' submissions in this regard, for the following reasons.

467 The first suggestion that the Buchanan Group companies were retaining any of the monies from the Nolans' investments seems to have been at the meeting on 5th June, 2007, when Mr Walsh told Joan, Richard and Mr Doyle that he had €3,000,000 on deposit belonging to the Nolans. That conclusion is consistent with Joan's letter to Mr Handley of 4th July, 2007, in which she referred to her meeting with Mr Walsh and spoke of the Nolans being aware of funds being *"retained on deposit account"*, and with Mr Handley's email of 10th July in which, following his meeting with Joan four days earlier, he had recorded his understanding that the monies invested in Echemus, Big Ferries and Irish Bio-Ethanol had *"simply been held on deposit in Jersey"*.

468 Next, and more importantly for present purposes, came Mr English's conversation with Joan on 26th June, 2007. We have already set out Joan's note of this conversation earlier in this judgment. When Mr Preston challenged the accuracy of this note in his cross-examination of Joan, she responded:–

> *"It is absolutely accurate of my conversation with Mr English because I wrote down what he told me at the time.* And that's exactly what he told me, what I wrote…. I wrote it down exactly as he told me. And it is absolutely accurate.
>
> ….
>
> *No. I'm definitely not mistaken about what Mr English told me. And this note is accurate."*
>
> In his cross-examination Mr Preston put three points to Joan, namely

Joan denied each of these suggestions, emphasising:–

> *"He told me the funds are sitting in Buchanan Holdings.* I had no reason to write anything other than what Mr English told me [during] the conversation."

> (1) that no licence was required for Echemus and that Mr English had not said anything about a licence relating to Echemus;
>
> (2) that Mr English did not tell her that monies were sitting in BHL in relation to either Echemus or the other two investments; and
>
> (3) what Mr English in fact said was that the monies were recorded as loans in BHL, awaiting an allocation of shares in each company to be confirmed to him by Mr Walsh.

469 In his written statement Mr English made no reference to this telephone conversation. When cross-examined by Mr Santos-Costa, his evidence was that:

> *"Sitting in the books of Buchanan Holdings would have been the terminology I would have used.* And the shares had not been allocated yet is the essence of the conversation on those issues."

The cross-examination continued:–

> *"Q. So you accept that this is an accurate record of the conversation that you had with Joan Nolan, do you?*
>
> *A. I would not have said I was unaware of what to do with the funds.* That implies that the way I read 1, 2 and 3 it's implying that monies are sitting in Buchanan Holdings, as in they're held by Buchanan Holdings and have not been allocated so have not been spent. So that I would put on record is not what I meant when I had that conversation with Joan Nolan. That is not the interpretation that I put on the discussion with her.
>
> *COMMISSIONER HUNT: So you say that you would have said it was*
>
> *sitting in the books of Buchanan Holdings?*
>
> *A. Of Buchanan Holdings, yes, as a loan pending allocation of the shares."*

When asked why that version of their conversation had not been put to Joan, he was unable to say. The true answer, of course, is that Mr English had not previously mentioned his version of his discussion with Joan even to Minerva's lawyers.

470 Having considered carefully Joan's note of the conversation, the evidence of both Joan and Mr English as summarised above and the demeanour of both witnesses when giving their evidence, we have no hesitation in accepting that Joan's version of the conversation is

correct in all material respects. Our reasons (some of which overlap) for reaching that conclusion are as follows.

Since Mr English knew that all the monies in respect of the Nolans' investments in Echemus, Big Ferries and Irish Bio-Ethanol had been spent, we conclude that Mr English deliberately lied to Joan in their conversation of 26 th June, 2007, when he said otherwise.

(i) We accept Joan's evidence that her note was a typed up version of notes which she took at the time of the conversation.

(ii) We see no reason to suppose that her notes were inaccurate. On the contrary we think that she did indeed write down the words which Mr English used to her.

(iii) Mr English had no note of his own to support his version of the conversation.

(iv) There was a significant discrepancy between the questions put to Joan in cross-examination (which can only have been based on information which Mr English supplied to Minerva's lawyers) and the evidence which he gave in the witness box. In particular there was no suggestion in Mr Preston's questioning of Joan that Mr English had used the expression *"sitting in the books of"* BHL; the only suggestion had been that Mr English had said that the three sums were *"recorded as loans".*

(v) Had Mr English used the expressions *"sitting in the books of"* BHL or *"recorded as loans"*, we have no doubt that that would have rung alarm bells in Joan's mind at a time when the Nolans were, as she said in her evidence *"very nervous … because we still didn't know where our money was".*

(vi) If Mr English had used the expressions he claimed, Joan would not, in our view, have described the conversation as, in the concluding words of her note, *"all very amicable".*

471 We now come to Mr Nicolle's letter of 24 th September, 2007, in which he said:–

"Consequently, we are not in a position to immediately return all of the money from Serene and Bilberry that was invested in these 3 projects as a proportion of it has been correctly and appropriately expended in pursuing each of the 3 projects to their current positions."

According to Mr English this letter was drafted by personnel at Kellykay and was run through Edwin Coe before coming to Minerva for issue on behalf of BHL; we accept that that was the position. His evidence about the passage quoted above was as follows:–

"Q. It does suggest when it says "we can't return all of the money" that the balance is still held, doesn't it? That's what it implies.

A. I suppose you could read into that. You could take that reading from it."

472 In his evidence in chief Mr Nicolle said that he believed the contents of his letter to be true. In cross-examination Mr Santos-Costa concentrated on the sentence:–

> *"This [audit] will provide independent confirmation of the amount paid out and we will send you a copy of them as soon as they are available so that we can agree the basis, quantum and timing for the return of the balance of the monies invested by Serene and Bilberry."*

He put it to Mr Nicolle that the use of the expression *"the return of the balance of the monies"* suggested that that balance had not been spent. Mr Nicolle's response was:–

> *"Yes, I would say if reading that you would infer that; but when writing it I didn't really think of it in those terms."*

Later his evidence continued as follows:–

> *"COMMISSIONER HUNT: Just looking at that penultimate paragraph:–*
>
> > *"Consequently, we're not in a position …"*
>
> *How did you intend that that should be read by the person to whom you sent this letter, Mr Nicolle?*
>
> *A. I can't say now exactly.* I was just reading the whole body of the letter. My interpretation of what I was intending to say or the intention I would have had to say was that once these expenses had been resolved been the parties, certain of which were not known to me, that the intention was to repay the balance of monies to Serene or Bilberry in whatever proportion was appropriate once that had been established.
>
> *COMMISSIONER HUNT: Would the reader reading again, just*
>
> *concentrating on that paragraph not be left with the impression that the proportion which had not been expended in pursuing each of the three projects remained unexpended?*
>
> *….*
>
> *A. (Pause). Well, I clearly, it could be read on that basis, but that was not the intention of sending it. And I can't say that I thought that that's what I was saying when I sent it. So I wasn't, on my part, trying to make it any sort of trickery in the letter. It was purely sent; and my understanding was that once these matters had been resolved, as between the parties, the Nolans and others, that the plan was to make this repayment once those calculations had be undertaken. So if there was any if it maybe read in a different context then that was not the intention when the letter was written well, not on my part."*

473 In his final submissions Mr Preston went so far as to submit that the Nolans ought to have read the letter of 24 th September, 2007, and subsequent letters, as suggesting that the

Echemus, Big Ferries and Irish Bio-Ethanol investments were not being held in the bank accounts of the Buchanan Group companies. We see no possible basis for that assertion. We have no doubt that the letter of 24 th September was carefully drafted to lead the Nolans to believe that the unused balance of the Echemus, Big Ferries and Irish Bio-Ethanol investments had not been used at all, and that that unused balance remained in the bank accounts of the Buchanan Group companies ready for immediate repayment once the issue of any deductible expenses had been resolved. The same applies to the subsequent correspondence, culminating most clearly in Edwin Coe's letter of 8 th January, 2008. We reject Mr Nicolle's evidence to the contrary; in our view he realised that the letter of 24 th September, 2007, could only be read, and would only be read, in the way we have suggested and he signed it on that basis. It follows, we conclude, that it was dishonest of Mr Nicolle to have signed and sent the letter.

474 Next there is Edwin Coe's letter of 1 st November, 2007, in which they said:–

> *"In the letter from [BHL] to DFK Chancery Trust dated 24 September 2007 there was an undertaking … to repay the unused balance of the sums you provided in connection with the three specific projects."*

Mr English's evidence on this letter in cross-examination was as follows:–

> *"Q. … You will agree with me, will you not, Mr English, that this letter suggests that that 1.903 million is available for transfer back to the Nolans in their account with the Royal Bank of Scotland; yes?*
>
> *A. It does suggest that it's available because they will make arrangements to request the repayment.*
>
> *Q. Yes. And it is, in fact, in very similar terms to Mr Nicolle's letter [of 24 September] that we saw earlier, is it not?*
>
> *A. Broadly, it is consistent with the same story."*

The following day, however, his evidence was somewhat different; he rejected the suggestion that the sentence from Edwin Coe's letter was misleading, although he did say that the letter could have been written with more clarity.

475 Mr Nicolle confirmed in his oral evidence that he had approved the wording of Edwin Coe's letter. In cross-examination Mr Nicolle's explanation of the words *"unused balance"* was that the balance had not been used on the projects in question, not that the balance remained in the companies' accounts. His cross-examination continued as follows:–

> *"Q. … [W]hat you were doing, Mr Nicolle, was you were deliberately misleading Serene, to tell them that there was an unused balance, namely 1.9 million, still held by the company, ready for repayment, in order to fob them off in the vain hope that Mr Walsh would somehow find some money in order to pay them.* That's what you were doing, weren't you?

A. Well, I don't see it like that. No.

….

Q. And this was a deliberately crafted letter, Mr Nicolle, which clearly is designed to mislead Serene as to the true position, isn't it?

A. No, it's not. It was quite clear that we were trying to get to a point where we could agree a balance net of expenses for the GBP 1.9 million repayment, amongst other matters that were included in the letter. And that was, as I understood it, my intention. That was the intention. And the intention was to repay that money once that was agreed."

Again we have no hesitation in rejecting Mr Nicolle's denials. We have no doubt that Edwin Coe's letter was deliberately drafted (on instructions) to give precisely the impression that Mr Santos-Costa suggested to Mr Nicolle in cross-examination; equally we have no doubt that Mr Nicolle read and understood the letter in the same way. By approving the letter as worded, therefore, Mr Nicolle again acted dishonestly.

476 Finally we come to Edwin Coe's letter of 8th January, 2008, in which they said:–

"Our clients are holding funds in relation to three projects which were agreed with your clients. They have not been used for purposes other than for which they were provided."

It was Mr English's evidence that although Edwin Coe were instructed by all the English Defendants (except Bankhill), this letter was sent on the instructions of the other companies within the Arkaga Group, not on the instructions of the Jersey companies, and that he only saw it the day after it had been sent. He did, however, accept that the passage above was *"not a true statement"* and when asked if he thought that it was an important statement in the context of what was going on he responded *"I suppose it is, yes"*. There is no evidence that Mr English did anything to correct the untrue statement in the letter; on his own evidence he certainly was not outraged by it, seemingly on the basis that the letter was, to use Mr Whitton's words in his email of 9th January, 2008, a *"holding response".*

477 Mr Nicolle likewise accepted that the passage quoted in the preceding paragraph was not true. His explanation was that he too did not see the letter until the day after it had been sent and that he did not regard the reference in the letter to *"our clients"* as extending to the Buchanan Group companies. He continued:–

"I don't recall what I thought at the time. I … know it was received on 9 January. I don't know when I actually physically saw it. But I can't say in my consciousness that I thought that. I didn't really read it. Maybe I didn't read it correctly or didn't concentrate on it sufficiently. But at the time it didn't I didn't think to say not to send it or to retract it or in any other way. So that's something that I didn't do.

Maybe I should have done and probably I should have done, but I didn't at the time."

478 We accept that Minerva did not provide to Edwin Coe the instructions upon which the letter of 8th January was based and that Mr Nicolle and Mr English did not see the letter until after it had been sent. But on their own admissions neither Mr Nicolle nor Mr English did anything to correct what they now accept, and must have realised at the time, was the untrue statement in that letter, notwithstanding that the Buchanan Group companies were included among the clients by whom Edwin Coe were instructed. If Mr English or Mr Nicolle had genuinely wished to dissociate themselves and the Buchanan Group companies from what Edwin Coe had said, they would at the very least have informed Edwin Coe that the statement was untrue. The truth, of course, is that they were prepared to allow Edwin Coe's letter to stand because it represented the party line that Minerva and the Buchanan Group companies had been maintaining ever since Mr English's conversation with Joan the previous June. In failing to take any steps to put right the untrue statement in Edwin Coe's letter, we find both Mr English and Mr Nicolle again acted dishonestly.

479 We have not overlooked Minerva's contention that, contrary to the theme underlying Mr Santos-Costa's questions of Mr English (and of Mr Nicolle) regarding this period of 2007 to 2008, there was headroom within the BoS facility which would have allowed the payment of £1,900,000 to Serene, so that Mr English's (and presumably Mr Nicolle's) confidence that repayment could be made was entirely justifiable. In support of this contention Minerva relied principally on Kellykay's presentation to BoS of September 2007. We seriously doubt whether there was in fact any such headroom as Minerva suggested; if there had been, we would have expected Mr Walsh to arrange for the payment of the £1,900,000 rather than see his entire business empire collapse. But even if Mr English was confident that Mr Walsh could raise £1,900,000 from the BoS facility, that is immaterial. What he and Mr Nicolle had been representing was not that the £1,900,000 could be repaid from other sources but that that sum was sitting in the bank accounts of the Buchanan Group companies, which was an entirely different matter.

480 In summary, we found the evidence of both Mr English and Mr Nicolle in relation to the events and correspondence during this period to be wholly unconvincing. We find that they were both dishonest in what they said, or allowed to be said on their behalf, to the Nolans at the time, and in refusing to acknowledge this dishonesty in their testimony they both lied to the Court. We acknowledge that this dishonesty on their part was committed some-time after the Nolans' investments had been paid away but we reject any suggestion that it is therefore irrelevant. Why should Mr English and Mr Nicolle have been dishonest in 2007 and 2008 if they and PTCL/Minerva had nothing to hide? The reality is, as we find, that they were dishonest during this period for two separate, but linked, reasons.

481 Firstly, they were hoping that Mr Walsh would, even at this late stage, be able to put together sufficient funds to buy off the Nolans and they were prepared to say whatever would assist Mr Walsh in buying time to achieve that objective. What better way of buying

time was there than to reassure the Nolans that at least the balance of their investments in Echemus, Big Ferries and Irish Bio-Ethanol was sitting in the bank accounts of the Buchanan Group companies, available for repayment? Secondly, by 2007 at the latest it had dawned on Mr English and Mr Nicolle that the propriety of their conduct, at least as regards these three investments, would not stand scrutiny by the Nolans. The best, if only, hope of avoiding such unwelcome scrutiny would be for Mr Walsh to succeed in doing a deal with the Nolans which would buy them off. In short, Mr English and Mr Nicolle were engaged in, or party to, an attempted cover-up of the dishonesty of which we have found that PTCL, and in particular Mr English, were guilty at the time of each of the Nolans' investments (with the exception of Big Ferries and Irish Bio-Ethanol).

Prescription

482 Minerva's case may be summarised as follows.

(i) The starting point is Article 57 of the Trusts (Jersey) Law 1984 (“the 1984 Law”). Since Article 57(1) does not apply to claims for dishonest assistance, ordinary limitation provisions apply.

(ii) In Jersey the analogous limitation period is that applicable to tortious claims for deceit, or knowingly procuring a breach of contract, namely three years from the date of accrual of the cause of action under Article 2(1) of the Law Reform (Miscellaneous Provisions)(Jersey) Law 1960 (“the 1960 Law”).

(iii) The relevant causes of action against the Defendants in dishonest assistance accrued in 2005 or 2006 and were accordingly time-barred by the time that proceedings were issued on 28 th January, 2011.

(iv) The principle of *empêchement de fait* does not assist the Nolans because by no later than the end of 2007 they knew all the facts necessary to found their claims for dishonest assistance.

483 The Nolans' submissions were as follows:–

Mr Santos-Costa accepted in his final oral submissions that points (4) and (5) were essentially two sides of the same coin. We agree and treat them as such.

(i) The limitation period under Jersey law is ten years for all personal actions save to the extent that they have already been held to be subject to a different period (such as actions in tort) or that some other period is, by analogy, more clearly applicable.

(ii) An action for dishonest assistance is not a claim in tort and there is no other limitation period which is clearly more applicable.

(iii) Alternatively Article 57(1) of the 1984 law applies to claims for dishonest

assistance, so that no limitation period applies.

(iv) In any event the Nolans were under an *empêchement de fait* until they had obtained discovery of documents pursuant to the Mareva injunction granted by this Court on 15 th April, 2009.

(v) Following the decision of the Royal Court in *Attorney-General v Sangan* (1897) 24 PC 193, prescription cannot be claimed by a party who has himself caused delay. Minerva was such a party, by virtue of its untrue explanations in the 2007 and 2008 correspondence.

484 We first address the issues of law, before turning to *empêchement de fait*.

(1) The law

485 It seems to us that logically we must first consider Article 57(1) of the 1984 Law, since if the Nolans are correct that that article applies to claims for dishonest assistance, Minerva's prescription argument falls at the first hurdle. Article 57(1) provides as follows:–

> ***"No period of limitation or prescription shall apply to an action brought against a trustee B***
>
> ***(a) in respect of any fraud to which the trustee was a party or to which the trustee was privy; or***
>
> ***(b) to recover from the trustee trust property B***
>
> > ***(i) in the trustee's possession*** ,
> >
> > ***(ii) under the trustee's control, or***
> >
> > ***(iii) previously received by the trustee and converted to the trustee's use.***

The Nolans also relied on the definition of a trustee in Article 2 of the 1984 Law, as follows:–

> ***"A trust exists where a person (known as the trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right) —***
>
> > ***(a) for the benefit of any person (known as the beneficiary) whether or not ascertained or yet in existence;***
> >
> > ***(b) for any purpose which is not for the benefit only of the trustee; or***

(c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b).”

Article 57(1) is in similar terms to s.21(1) of the English Limitation Act 1980 (“the 1980 Act”), which provides:–

“No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action B

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.”

486. It was common ground between the parties that on the facts of the present case the issue to which Article 57(1) gives rise is whether it applies only to express trustees and other cases where the defendant has assumed the duties of trustee (so-called category 1 trustees), or extends to those guilty of dishonest assistance. In para.100 of the Reply the Nolans raised an allegation that the Minerva companies had constituted themselves category 1 trustees. Minerva objected to this allegation and in due course it was struck out by consent. Accordingly the only live issue is whether a person guilty of dishonest assistance is a *“trustee”* for the purposes of Article 57(1). If that person is, then he or she will not have the protection of any limitation period.

487. The starting point for any consideration of the effect of Article 57(1) must be the decision of the Royal Court in *Bagus*. That case arose out of an application to re-amend the Order of Justice so as to plead a cause of action in knowing receipt. The question for the Royal Court was whether there was an arguable defence to such a claim based on prescription; if there was, leave to re-amend should not be granted because of the rule that an amendment dates back to the date of the original Order of Justice. The Royal Court refused leave to re-amend.

488. The Bailiff started by considering s.21 of the 1980 Act. He recorded (at para.20) the argument of the respondents that s.21(1) did not apply to claims for knowing receipt. He then continued:–

“Underlying this assertion is the fact that, in English law, the expression “constructive trustee” covers two completely different types of situation. The first is where the defendant acquired the property as a trustee or other fiduciary in an unimpeached arrangement before the conduct complained of when he abused the trust and confidence reposed in him; the second is where the wrongful conduct of the defendant in asserting his interests leads to ***an equitable obligation being placed upon him.*** This distinction has been touched upon in a number of cases but has perhaps been most clearly

articulated by Millett, L.J. in the case of (*Paragon Fin.* plc. v. D.B. [Thakerar] & Co. [1999] 1 All E.R. at 408–414)."

The second type of constructive trustee is usually described as a category 2 trustee.

489 Having referred to the authorities of *Taylor v Davies* [1920] A.C. 636 and *Halton International Inc. v Guernoy Ltd* [2006] EWCA Civ 801 relied on by the respondents, the Bailiff turned to the decision of the Court of Final Appeal in Hong Kong in *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCFA 17. In that case there was a claim against the defendant for dishonest assistance. The defendant argued that the claim was time-barred on the basis of s.20(1) of the Limitation Ordinance of Hong Kong, which was in identical terms to s.21(1) of the 1980 Act. The plaintiffs argued that a dishonest assister was a constructive trustee and accordingly fell within s.20(1). This argument was unanimously rejected by the Court of Final Appeal. The Bailiff quoted the headnote from *Peconic*:–

> ***"(1) An allegedly dishonest assister was not a fiduciary and was entitled to plead the Limitation Ordinance.*** The principle of the Ordinance was that limitations were denied to fiduciaries; strangers to a trust who made themselves liable through dishonest interference were only described as constructive trustees as a formula for liability to equitable relief …
>
> ***(2) The words in respect of any fraud … to which the trustee was a party or privy' in s.20(1)(a) referred to an action in which a beneficiary was suing a trustee for a breach of trust and did not include claims against dishonest assisters and other non-fiduciaries …"***

490 In his judgment in *Peconic*, with which all the other members of the Court of Final Appeal agreed, Lord Hoffman NPJ said as follows:–

> ***"19. The language of s.20, like most of the Ordinance, is taken word for word from the UK Limitation Act 1939. It was obviously intended to have the same meaning. One therefore has to ask whether Danny Lau would have been a constructive trustee within the meaning of the corresponding section of the 1939 Act (s.19). On a literal reading he would, because a stranger to a trust who dishonestly assists in its breach is traditionally described as a constructive trustee. For the purposes of limitation, however, there are two kinds of constructive trustees. The distinction between them has been explained by judges on numerous occasions, from Sir William Grant in*** *Beckford v. Wade* (1805) 17 Ves Jun 87 , ***95–96 to Mr Richard Sheldon QC (sitting as a deputy High Court judge) in*** *Cattley v. Pollard* [2007] Ch 353, ***360–376. First, there are persons who, without any express trust, have assumed fiduciary obligations in relation to trust property; for example as purchaser on behalf of another, trustee de son tort, company director or agent holding the property for a trustee. I shall call them fiduciaries. They are treated in the same way as express***

trustees and no limitation period applies to their fraudulent breaches of trust. Then there are strangers to the trust who have not assumed any prior fiduciary liability but make themselves liable by dishonest acts of interference. I shall call them non-fiduciaries. They are also called constructive trustees but this, as Ungoed-Thomas J said in *Selangor Rubber Estates Ltd v. Cradock (No.3)* [1968] 1 WLR 1555, 1582***is a fiction: 'nothing more than a formula for equitable relief'. They are not constructive trustees within the meaning of the law of limitation***.

20. This distinction was drawn at a time when there was no statutory basis for the limitation of equitable remedies. Common law periods were, in appropriate cases, applied by analogy and trustees were unable to raise a limitation defence even for an innocent breach of trust. This last rule was felt to be too harsh and the law was changed by s.8 of the Trustee Act 1888, which was subsequently replaced by s.19 of the 1939 Act. This confined the rule to fraudulent breaches of trust and cases in which the trustee held the trust property or its proceeds or had converted them to his use.

21. In *Taylor v. Davies* [1920] AC 636 ***it was argued that an Ontario statute in terms identical to s.8 of the 1888 Act had not only given express trustees and fiduciaries the right to rely on limitation in all but the excepted cases but had taken away the previous right of non-fiduciaries to rely upon limitation even in the cases in which fiduciaries could not. This was said to follow from the definition of trustees to include constructive trustees. The argument was rejected by the Privy Council. Lord Cave said:***

> ***'If this contention be correct, then the section, which was presumably passed for the relief of trustees, has seriously altered for the worse the position of a constructive trustee… It does not appear to their Lordships that the section has this effect.*** The expressions Atrust property@ and Aretained by the trustee@ properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. In other words, they refer to cases where a trust ***arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction."***

22. This was an authoritative statement on the construction of the 1888 Act and although the 1939 Act amended as well as consolidated the previous law, it is hard to believe that the slight changes of language in s.19 were intended to introduce a fundamental change. In Paragon Finance plc v. DB Thakerar & Co. [1999] 1 All ER 400 , ***412–414 Millett LJ offered what he called 'formidable arguments' against such a construction which I find entirely convincing***.

23. In my opinion, therefore, non fiduciaries do not come within the definition of trustees in s19 of the 1939 Act or s.20 of the Ordinance. It is necessary however to deal with a different submission, which is that by some process of attraction, one category of non fiduciaries, namely persons who dishonestly assist a trustee in a fraudulent breach of trust, should be treated in the same way as the trustee and not allowed a limitation defence.

24. This argument has the high authority of some dicta of Lord Esher MR and Bowen and *Kay LJJ in Soar v. Ashwell* [1893 2 QB 390] . ***These remarks have been subjected to minute analysis in the cases and academic writings but I am willing to accept that they support the proposition that dishonest assisters cannot rely on a limitation defence.*** Nevertheless, I think that they are wrong in principle and unsupported by authority. The principle is not that the limitation defence is denied to people who were dishonest. It plainly applies to claims based on ordinary common law fraud. The principle is that the limitation period is denied to fiduciaries. But dishonest assisters are not fiduciaries. It might be surprising, as Millett LJ said in the Paragon Finance case (at p.414), if a person primarily liable was entitled to plead the Limitation Act when someone who assisted him could not. But there seems no reason in fairness or logic why the reverse should not be true. And in any case*Royal Brunei Airlines Sdn Bhd. v Tan* [1995] 2 AC 378***shows that the liability of a dishonest assister is independent of the dishonesty of the trustee or other fiduciary.*** Mr Scott placed some reliance upon Millett LJ's observation that 'a principled system of limitation would also treat a claim against an accessory as barred when the claim against the principal was barred and not before': see Paragon Finance, ibid. That showed, he said, that if the fraudulent trustee is never entitled to plead limitation, the dishonest assister should not be entitled to do so. But I do not think that Millett LJ could have meant this, which would be contrary to most of his reasoning in*Dubai Aluminium Co Ltd v. Salaam* [2003] 2 AC 366, 344***that a dishonest assister is not a fiduciary and can plead the Limitation Act***.

25. It remains to consider the alternative argument that, as a matter of construction, a claim against the dishonest assister may be within s.20 because it is 'in respect of', in the sense of being accessory to, the actual trustee's fraudulent breach of trust. It is true that in certain contexts the words 'in respect of' may have a very wide meaning and the possibility of such a meaning being given to the words in s.20 was tentatively considered by *Danckwerts J in G L Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216, 1222 . ***But I think that in the context of s.20 of the Ordinance it simply means that the beneficiary must be claiming against the trustee on the ground that he has committed a fraudulent breach of trust.*** If it had been intended to include claims against dishonest assisters or other non fiduciaries on the ground that they were accessories to the breach of trust, the language would have been a good deal clearer."

491 Reverting to *Bagus*, the Bailiff then referred to the speech of Lord Millett in *Dubai Aluminium and to Statec Corporation v Alford* [2008] EWHC 32 and said as follows (at para.30):–

> ***"I accept that the cases have not invariably spoken with one voice but, in light of the authorities referred to above, I consider that the overwhelming likelihood is that English law considers that class 2 constructive trustees, which include dishonest assisters and those guilty of knowing receipt, are not trustees for the purposes of s.21(1) of the Limitation Act 1980 and that, accordingly, claims against them are subject to the ordinary limitation provisions and become prescribed after the appropriate period."***

492 Finally the Bailiff summarised the points made by the advocate for the appellant, referred to *United Capital Corporation Ltd v Bender* [2006] JLR 242 and concluded as follows (at para.45):–

> ***"In brief summary, my reasons for considering that the defence of prescription by the defendant is arguable are as follows:***
>
> > ***(i) Jersey law is similar to English law in relation to constructive trusts and would undoubtedly recognise the two different types or classes of constructive trustee described in the English cases and by Lord Hoffmann in Peconic.***
> >
> > ***(ii) I accept that the wording of art. 57(1) is not identical to s.21(1) but it is very similar.*** The Jersey provision was clearly based on the English provision and I do not consider that the minor differences in wording ***necessarily lead to the conclusion for which Advocate Blakeley [for the appellant] contends.***
> >
> > ***(iii) These two aspects provide a strong basis for considering that the reasoning of the English courts in relation to the interpretation of s.21(1) may be equally applicable to art.57(1).***
> >
> > ***(iv) Advocate Blakeley placed some reliance upon the fact that, unlike s.21(1), art.57(1) does not refer to claims by a 'beneficiary'.*** As he mentioned, this was one of the grounds specifically referred to by Millett, L.J. in Paragon. However, the provision which was the subject of the decision of the Privy Council in *Taylor v. Davies* ***did not refer to claims by a 'beneficiary' and yet the Privy Council held that the provision did not apply to class 2 constructive trustees.*** That is quite a strong argument against Mr Blakeley's point. Furthermore, art.57(2) does refer to claims by a beneficiary and also refers back to art.57(1), thus implying that para.(1) is dealing with the same type of claim as para.(2) .
> >
> > ***(v) The construction contended for by Advocate Blakeley would***

lead to surprising results. Many breaches of trust are not fraudulent. A claim for knowing receipt can arise following a breach of trust carried out by the original trustee which was not fraudulent. In those circumstances, the claim against the original trustee who actually committed the breach would be time barred after three years in accordance with art.57(2), whereas the claim against the person who had received the property from the original trustee with knowledge of the breach of trust would not be prescribed. A claim for knowing receipt is a personal claim and there is no defence of change of position. Accordingly, the knowing receiver would be liable even if he had paid the money away. It seems illogical that a secondary party in this way should face a claim unlimited in time whereas the original trustee who committed the breach would have the protection of a limitation period.

(vi) The wording of art.33 of the 1984 Law is arguably wide enough to cover an entirely innocent volunteer recipient. If the plaintiff's arguments are correct, such a person would never have any right to a limitation defence whereas the original trustee who had committed the breach would if the breach were not fraudulent."

493 By the time, however, that the present case was being argued before us in 2013, the position in England had changed. In April 2012 the Court of Appeal delivered its judgment in *Central Bank of Nigeria v Williams* [2013] QB 499, [2012] EWCA Civ 415. As applied to the trust claims in the *Central Bank of Nigeria* case, s.21 gave rise to two questions. The first was whether a stranger to a trust who was liable to account (as the Central Bank was alleged to be) on the footing of dishonest assistance in a breach of trust or knowing receipt of trust assets was a trustee for the purposes of s.21(1)(a). If the answer to that question was no, then the second question was whether an action ***"in respect of"*** any fraud or fraudulent breach of trust to which the trustee was a party or privy included an action against a party such as the Central Bank which was not itself a trustee.

494 Both questions were argued before Supperstone J. at first instance. He held that the Central Bank could not be described as a trustee, but that it was at least arguable that s.21(1)(a) was not confined to actions against the trustee and extended to an action against the Central Bank arising out of its participation in the trustee's fraud. Before the Court of Appeal (Sir Andrew Morritt C., Black and Tomlinson L.JJ.), Dr Williams conceded the first question, as a result of which only the second question was argued; the Court decided that question in favour of Dr Williams and affirmed the judge's decision. The Chancellor (with whom Tomlinson L.J. agreed) analysed the legislative history of s.21(1) of the 1980 Act. In particular he concluded (at para.28) that since s.19 of the Limitation Act 1939, which was reproduced in s.21 without any relevant changes, was an amending Act, it did not follow that the distinction between category 1 and category 2 trustees to which the Privy Council referred in *Taylor v Davies* had been imported into the 1939 Act. On the contrary, the references in s.19(1)(a) and (b) were wide enough to include both categories of trustee. He did not, therefore, agree with the analysis or conclusion of Lord Hoffman in *Peconic*. Black

L.J. also agreed with the Chancellor, albeit (at para.61) not without much hesitation.

495 In his final submissions in September 2013 Mr Preston contended that as a matter of English law the reasoning of Lord Hoffmann in *Peconic* and that of Mr Sheldon Q.C. in *Cattley v Pollard* [2007] Ch 353, [2006] EWHC 3130 (Ch) was to be preferred to the reasoning of the Court of Appeal in *Central Bank of Nigeria*. More importantly, however, he submitted that the decision in Bagus continued to represent the law of Jersey. Mr Santos-Costa, on the other hand, contended that the selfsame analysis in *Bagus* of the position in English law, if it had been conducted after the Court of Appeal decision in *Central Bank of Nigeria*, would have led to the opposite conclusion and it was that opposite conclusion which should be applied in the present case.

496 On 23 rd November, 2013, the draft judgment of this Court was distributed to the parties in accordance with Practice Direction RC 10/01 and arrangements were made for the judgment to be handed down on 4 th December, 2013. By that time the Supreme Court had heard an appeal in the *Central Bank of Nigeria* case but judgment had not yet been given. In our draft judgment we expressed the view that we should regard *Bagus* as continuing to represent the law of Jersey. Accordingly we concluded that Article 57(1) did not prevent Minerva from relying on whatever period of prescription would otherwise apply to the Nolans' claims. Finally, we observed that for the reasons set out later in this judgment this point was academic on the facts of the present case; it would have made no practical difference if this Court had decided not to follow *Bagus* but to adopt the reasoning in *Central Bank of Nigeria*. Our draft judgment was not in fact handed down on 4 th December, 2013, because the Court acceded to a joint application by the parties for an adjournment. Following further abortive hearings on 15 th, 16 th and 22 nd January, 2014, this case was relisted for 6 th March, 2014, with a view to our judgment being handed down on that day. Meanwhile the Supreme Court gave judgment in the *Central Bank of Nigeria case* [2014] UKSA 10 on 19 th February, 2014.

497 Before the Supreme Court Leading Counsel for Dr Williams partially withdrew his concession on the first issue. He still accepted that a person liable to account on the footing of dishonest assistance in another's breach of trust was not a trustee but he said that a person liable to account on the footing of knowing receipt was a trustee. The Supreme Court acceded to this change of approach; as Lord Sumption, who delivered the first judgment, recorded (at para.5), a proper understanding of s.21 requires an examination of both the questions set out at para.493 above. The Supreme Court decided by a majority (Lord Mance dissenting) that the answer to the first question was no; s.21 on its true construction applies only to true trustees, not to constructive trustees in the position of the *Central Bank* (see, e.g., para.6). Indeed Lord Neuberger concluded that a dishonest assister was not even a constructive trustee (para.90). The Court also decided by a majority (Lords Mance and Clarke dissenting) that the answer to the second question was no, on the basis that s.21(1)(a) is concerned only with actions against trustees on account of their own fraud or fraudulent breach of trust (see, e.g., para.32). In short, the result of the decision of the Supreme Court is that the law of Jersey in relation to Article 57(1) and that of England in

relation to s.21(1) are now realigned.

498 In the light of the decision of the Supreme Court, both parties were given the opportunity of making further submissions to us on the issue of the application of Article 57(1) to the facts of the present case. Minerva availed itself of this opportunity; the Nolans did not. Minerva simply argued that to the extent that the English law position was relevant at all, there should be no amendment to the Court's draft judgment. We consider that the decision of the Supreme Court reinforces the view expressed in our draft judgment that we should regard *Bagus* as continuing to represent the law of Jersey. It follows that Minerva is not a trustee for the purposes of Article 57(1). Nor, we add for the sake of completeness, is the Nolans' claim against Minerva a claim "in respect of any fraud to which the trustee was a party or to which the trustee was privy" within the meaning of Article 57(1)(a). It follows that Article 57(1) does not prevent Minerva from relying on whatever period of prescription would otherwise apply to the Nolans' claims.

499 We turn, therefore, to the question of what the relevant period of prescription is. Both parties were agreed that the starting point for this discussion was the decision of the Royal Court in *Esteem*, where the Court said as follows (at para.252):–

> ***"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"

and (at para.257):–

> ***"We think that the time has come to hold that the 10-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."***

It was Mr Santos-Costa's submission that there was no other prescriptive period which was by analogy, clearly more applicable, so that the period applicable in the present case was ten years. He also relied on the decision of the Royal Court in *Re Northwind Yachts Ltd.* [2005] JLR 137 in which the then Deputy Bailiff had expressed the view, albeit without full argument, that the ten year period applied to claims against a director of a company for breach of fiduciary duty.

500 Mr Preston, on the other hand, contended that an action for dishonest assistance in a breach of trust was analogous to an economic tort, so that the prescriptive period was three years pursuant to Article 2(1) of the 1960 Law. In his final submissions, he developed Minerva's contention as follows.

In summary, the nature of a dishonest assistance claim is so close to that of accessory

liability in the context of economic torts that it would be perverse to attempt to characterise the novel (as a matter of Jersey law) cause of action for dishonest assistance by mechanically applying the canons of Jersey customary law, instead of reaching for the clear analogy which is available in other jurisdictions. Dishonest assistance has been imported into Jersey law from England where it is seen as analogous to accessory liability in the form of economic torts. Jersey law should see this analogy as part of what has been imported and should determine the prescriptive period applicable to this novel claim accordingly.

(a) In English law, if s.21(1) were not to apply to a claim for dishonest assistance, the question of what limitation period would apply would be answered by s.36 of the 1980 Act which, in the case of equitable claims, enables the court to apply the limitation period in respect of an analogous common law claim. There is, however, no equivalent in Jersey of s.36.

(b) Nevertheless in deciding whether, in the words of the decision in *Esteem*, "some other period is, by analogy, clearly more applicable" as a matter of Jersey law, the Royal Court should adopt the principles set out in the judgment of Mr Jules Sher Q.C. in *Coulthard v Disco Mix Club Ltd.* [2000] 1 W.L.R. 707. Having quoted (at p.729E-H) from the speech of Lord Westbury in *Knox v Gye* (1872) L.R. 5 H.L. 656, at pp.674–67, Mr Sher said as follows (at p.730A):–

> ***"Two things emerge from these passages.*** First, where the court of equity was simply exercising a concurrent jurisdiction giving the same relief as was available in a court of law the statute of limitation would be applied. But, secondly, even if the relief afforded by the court of equity was wider than that available at law the court of equity would apply the statute by analogy where there was 'correspondence' between the remedies available at law or in equity."

(c) Likewise Mr Richard Sheldon Q.C. was correct to accede in *Cattley* (at p.375G) to the agreed position of counsel and to conclude (at p.376A):–

> ***"I consider it clear that the dishonest assistance claims are analogous to claims for deceit or knowingly procuring a breach of contract."***

(d) The concession by counsel in *Cattley* was also consistent with the decision of the Privy Council in *Royal Brunei Airlines*, where Lord Nicholls said (at p.387A-C):–

> ***"The rationale is not far to seek.*** Beneficiaries are entitled to expect that those who become trustees will fulfil their obligations. They are also entitled to expect, and this is only a short step further, that those who become trustees will be permitted to fulfil their obligations without deliberate intervention from third parties. They are entitled to expect that third parties will refrain from intentionally intruding in the trustee-beneficiary relationship and thereby hindering a beneficiary from receiving his entitlement in accordance with the terms of the trust instrument. There

> is here a close analogy with breach of contract. A person who knowingly procures a breach of contract, or knowingly interferes with the due performance of a contract, is liable to the innocent party. The underlying rationale is the same."

(e) In *Peconic*, the Court of Final Appeal upheld the decision of the Court of Appeal, which appears to have been that s.4 of the Limitation Ordinance applied to the claim. S.4 deals with limitation periods for actions in tort and contract and provides for a six year limitation period in both cases. Accordingly the Court of Appeal and the Final Court of Appeal in *Peconic* must have treated the dishonest assistance claim as analogous to a claim in tort.

501 Jersey law does not have the historical divide between equity and the common law which arose in England. Accordingly analogies based on that historical divide are, we think, unhelpful in the context of the test in *Esteem* that "some other period is, by analogy, clearly more applicable". In particular we reject the Nolans' argument that there can only be an analogy if two causes of action are based on the same facts and give rise to concurrent remedies. According to *Esteem*, what has to be analogous is the period, not the cause of action. In applying the *Esteem* test, we find the observations of Mr Sheldon Q.C. in *Cattley*, the judgment of the Privy Council in *Royal Brunei* and the decision in *Peconic* compelling. Conversely we do not find the case of *Northwind* to be of any assistance in this context. Accordingly we accept Minerva's submission that as a matter of Jersey law the prescriptive period applicable to actions for dishonest assistance in a breach of trust is, by analogy with economic torts, three years, not ten.

(2) Empêchement de fait

502 The parties are agreed that the relevant test is to be derived from the decisions of the Court of Appeal in *Public Services Committee v Maynard* [1996] JLR 343 and *Boyd v Pickersgill* [1999] JLR 284.

503 In the *Public Services Committee* case the headnote reads:–

> ***"Prescription would not run against a plaintiff (or indeed a potential plaintiff) if he could show at trial that he had been prevented from pursuing his legal rights by an empêchement de fait, or practical impossibility, under the maxim contra non valentem agere nulla curit praescriptio, which clearly applied to actions both in contract and in tort.*** Although ignorance of the necessary facts was alone insufficient to invoke the maxim, it could be part of ***the necessary impediment, which in modern conditions could arise from a variety of circumstances."***

504 In *Boyd*, Beloff J.A. said as follows (at p.291):–

> ***"In my view, the epithet "practical" deployed in Maynard softens rather than strengthens the concept of impossibility.*** It requires a consideration of what is in fact, not in theory, possible. While ignorance of a cause of action does not per se trigger a suspension of the limitation period, it may, in appropriate circumstances, constitute or create a relevant impediment. The issue before us is of what those circumstances may consist.
>
> ***The test, as it seems to me, is whether ignorance of the cause of action is reasonable in all the circumstances, reasonable, that is, both in respect of the facts giving rise to the cause of action and that a cause of action arises in such circumstances."***

Sumption J.A. added (at p.295):–

> ***"What ignorance the law regards as reasonable is a matter of legal policy, the precise limits of which will need to be explored from case to case.*** I am satisfied that the law regards ignorance as reasonable as a matter of legal policy where there was no means by which the particular plaintiff could reasonably have been expected to discover the facts on which her cause of action was based."

505 In their opening submissions Minerva summarised the issue as follows:–

> *"The question of whether and, if so, up until when the [Nolans] were subject to any empêchement de fait is a question of fact.* The issue is whether [they] knew the existence of all the facts necessary to found the pleaded causes of action in dishonest assistance. If [they] did know of these facts prior to 28 January 2008 (i.e. three years prior to 28 January 2011 when [they] issued the present proceedings), then the [Nolans] may not rely on the principle of empêchement de fait."

We accept that summary. Although technically it seems to us that we must consider each of the Nolans' eight investments separately, neither party suggested that any distinction was to be drawn between them. We agree.

506 In support of its submission that the Nolans had acquired the necessary knowledge by the end of January 2008, Minerva relied in particular on the following:–

Joan accepted that she was aware of the contents of all these letters; some were discussed with her before they were sent, others she saw after they had been sent.

> (i) Joan's self-confessed alarm when the Nolans received Mr Handley's valuations on 29 th August, 2007, and realised that they had been cheated;
>
> (ii) Mr Taylor's letters of 17 th and 19 th September, 2007, to Mr English, which we have quoted at paras.116 and 117 above, and in particular the reference to Minerva

being in the position of *"a constructive trustee"*. This strongly suggested that the Nolans were aware, even at this early stage, that they might have a possible cause of action against Minerva on the basis of accessory liability;

(iii) Mr Taylor's letter of 5 th October, 2007, to Mr Nicolle, which we have quoted at para.119 above, again threatening legal action;

(iv) Mr Taylor's letters of 10 th October, 2007, which we have mentioned in para.119 above, which suggested that the Nolans were already aware of facts which would have enabled them to formulate a claim against Minerva in respect of its alleged accessory liability in breach of trust and/or fiduciary duty; and

(v) Blake Lapthorn's letter of 7 th December, 2007, to Mr Walsh, from which we have quoted in para.121 above. This letter confirmed that the Nolan family was in fact contemplating bringing an action against entities beyond the Buchanan Group companies and Mr Walsh, impliedly including Minerva as the provider of administrative services to the Buchanan Group companies.

507 In summary, Mr Preston submitted that Mr Taylor's reference on 17 th September, 2007, to Minerva being potentially a constructive trustee must have been a suggestion that PTCL had dishonestly assisted in a breach of trust. On the facts, PTCL could only have been a constructive trustee on the basis of knowing receipt or dishonest assistance. Since Mr Taylor cannot have thought that PTCL ever received the funds in question, because he was aware that PTCL was simply the provider of directors and administrative services to the Buchanan Group companies, his reference to constructive trusteeship must necessarily have been a reference to a possible claim in dishonest assistance. Mr Preston accepted that it was *"probably right to say"* that Mr Taylor was unlikely to have known what precisely had happened to the money that had been paid over where the Nolans had received shares in return, but he would certainly have been aware that the money was not there and available in the Buchanan Group companies. He would certainly have had enough information at that stage, having made the allegation, to have been able to bring proceedings along the lines he had threatened.

508 In our view Mr Preston was inviting us to read too much into the letters on which he relied, and in particular too much into Mr Taylor's use of the words *"constructive trustee"*. The focus of the correspondence from the Nolans' side in 2007 was to obtain from the Buchanan Group companies the promised share certificates or a refund of their investments; Minerva's role was not in the forefront of their minds. Although the Nolans and Mr Taylor may well have had in mind the possibility of legal proceedings as early as the autumn of 2007, at that stage it was the Buchanan Group companies who were primarily in the frame as the prospective defendants. All that is a far cry from the Nolan family having sufficient information to make a formal claim against Minerva for dishonest assistance. As Joan said in her cross-examination, as of September 2007:–

"… we hadn't a clue what they had done with our money. It was only when we got the Jersey disclosure order, when we saw their records, that we understood

what had happened. But we hadn't a clue where our money was in these companies, in Jersey or what had been done with it at this time."

We accept that evidence. Although the Nolans knew by January 2008 that they had lost the money which they had invested, it was not until 2010, when they saw the documents disclosed by Minerva in response to the Jersey injunction, that they knew the part that PTCL had played in the dissipation of their investments. We conclude, therefore, that it was not until 2010 that the Nolan family acquired knowledge of all the facts necessary to found an action in dishonest assistance.

509 In addition, as Minerva's summary of this issue recognised, we also need to consider the position from the more formal point of view of pleading the Nolans' case. Para.704 of the Code of Conduct of the English Bar provides as follows:–

> ***"A barrister must not … draft any statement of case, witness statement, affidavit, notice of appeal or other document containing:***
>
> ***….***
>
> ***(c) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud."***

This statement reflects the decision of the House of Lords in *Medcalf v Mardell* [2003] 1 AC 120, [2002] UKHL 27, the headnote to which reads:–

> ***"… the Code of Conduct of the Bar did not require that counsel should, when making allegations of fraud in pleadings and other documents, have before him 'reasonably credible material' in the form of evidence which was admissible in court to support the allegations; but that, at the preparatory stage, it was sufficient if the material before counsel was of such a character as to lead responsible counsel exercising an objective professional judgment to conclude that serious allegations could properly be based upon it."***

Finally, any pleading of fraud must be properly particularised in accordance with the principles set out by Lord Millett in the *Three Rivers* case to which we have already referred in para.143 above. Mr Preston accepted that the same rules of pleading applied in Jersey. This Court agrees.

510 We do not see how any Jersey advocate, even if instructed by the Nolans to do so, could have drafted an Order of Justice alleging dishonest assistance on the part of Minerva in the Buchanan Group companies' breaches of trust unless and until he had had a sight of the documents disclosed in response to the Jersey injunction. Prior to seeing such documentation he would not have had reasonably credible material establishing a prima facie case of fraud at all; still less would he have had the material properly to particularise such an allegation. We accede to Mr Santos-Costa's submission that dishonest assistance

in a breach of trust could not have been pleaded prior to 2010.

511 For these reasons we find that the Nolan family was under an *empêchement* until after 28th January, 2008. It follows that none of the Nolans' claims is prescribed.

Damages

512 The Nolans' damages claims as particularised in their Schedule dated 8th January, 2013, are for the sums which they invested, namely:–

(1) First Elision:	£1,649,585
(2) Columba:	€1,748,000
(3) Echemus:	£2,000,000
(4) First German nursing homes:	€4,250,000
(5) Second German nursing homes:	€2,400,000
(6) Big Ferries:	£250,000
(7) Irish Bio-Ethanol:	£250,000
(8) Second Elision:	£1,107,489.25
Totals	£5,257,074.25 + €8,398,000

513 In their opening submissions the Nolans contended, in reliance on the *United Capital Corporation v Bender* decision, that a person guilty of dishonest assistance is liable to account to the victim as if he were a conventional trustee. By Article 30(2) of the 1984 Law:–

> ***"A trustee who is liable for a breach of trust shall be liable for B***
>
> ***(a) the loss or depreciation in value of the trust property resulting from such breach …"***

So, the Nolans, submitted, the measure of their damages against Minerva is the amount of the monies which they invested with the Buchanan Group companies and then lost by reason of PTCL's dishonest assistance. Minerva did not argue otherwise. We accept the Nolans' submission.

514 Accordingly we conclude that the damages recoverable by the Nolans (or, in respect of Big Ferries and Irish Bio-Ethanol, which the Nolans would have been entitled to recover) from Minerva by way of equitable compensation are as follows.

(i) First Elision: since the shares in Elision/AHL are worthless, the NFP has lost the entirety of its investment but there is to be deducted from that investment the £100,000 paid by way of a deposit for the Peggy Fordham shares and the £63,757.75 refund applied to the second Elision investment. The NFP is therefore entitled to damages in the sum of £1,485,827.25 under this head.

(ii) Columba: again, the Nolans' shares in Columba proved to be worthless and no part of the €41,208 for which Columba was sold found its way to the Nolans. Accordingly Serene is entitled to recover by way of damages the entirety of its investment, namely €1,748,000.

(iii) Echemus: no part of Serene's £2,000,000 was paid into Echemus. Edwin Coe's letter of 1 st November, 2007, to which we have referred in para.120 above, asserted that the Buchanan Group companies were entitled to deduct a total of £596,851.50 by way of expenses in respect of the Echemus, Big Ferries and Irish Bio-Ethanol projects. We find, however, that the agreement between Mr Walsh and Joan in respect of Echemus did not, either expressly or by implication, allow the Buchanan Group companies to deduct any expenses from Serene's £2,000,000. Furthermore, it was Mr English's evidence that Kellykay was responsible for the calculation of the figure in Edwin Coe's letter and that despite his requests he never received from Kellykay the details of the expenses that he would have wanted to see. No details of any such expenses, let alone any supporting documentation, were put before us. In those circumstances we are not satisfied in any event on the evidence that there are any expenses to be deducted in respect of Echemus. Serene is therefore entitled to recover by way of damages the entirety of its investment, namely £2,000,000.

(iv) First German nursing homes: since Arkaga GmbH is, as we have found, worthless, so is Serene's investment in that company. Again, therefore, Serene is entitled to recover by way of damages the entirety of the NTRBS' investment, namely €4,250,000.

(v) Second German nursing homes: Serene is entitled to recover by way of damages the entirety of the NTRBS' investment, namely €2,400,000.

(vi) Big Ferries: no part of Bilberry's £250,000 was expended on the Big Ferries project. Although the agreement between Joan and Mr Walsh in respect of this project did, as we have found in para.400 above, allow for the deduction of expenses if the project did not proceed, in the absence of any evidence of any such expenses we would have declined to make any deduction. Accordingly if Bilberry had been entitled to recover in respect of this investment, the damages would have been £250,000.

(vii) Irish Bio-Ethanol: of Serene's investment of £250,000, £174,095.46 was injected into Irish Bio-Ethanol. Since the agreement between Joan and Mr Walsh in respect of

this investment was, as we have found in para.417 above, that the investment should be returned in full if the project did not proceed, there would have been no expenses to be deducted. And even if their agreement had allowed for such deduction, in the absence of any evidence as to such expenses we would have declined to make any deduction. Accordingly if Serene had been entitled to recover in respect of this investment, the damages would have been £75,904.54.

(viii) Second Elision: what we have said in respect of the first Elision investment applies here also. Serene is therefore entitled to damages in the sum of £1,171,247 (inclusive of the first Elision refund) under this head.

515 In each instance the Plaintiffs also claim compound interest at the Bank of England's base lending rate plus 1%. We will hear counsel on all issues of interest when this judgment is handed down.

Conclusion

516 There will be judgment as follows:–

in each instance against the 1st Defendant, Minerva Trust.

(i) for the 1st to 13th Plaintiffs (as the members of the NFP) in the sum of £1,485,827.25; and

(ii) for the 14th Plaintiff, Serene, in the sums of €8,398,000 and £3,171,247,

517 We dismiss:–

(i) the claim of Bilberry in respect of Big Ferries;

(ii) the claim of Serene in respect of Irish Bio-Ethanol; and

(iii) all the Plaintiffs' remaining claims against all the Defendants other than Minerva Trust, namely

(a) all the Plaintiffs' claims against the 2nd to 4th Defendants, Mr Cordwell, Mr Nicolle and Mr Morgan, for dishonest assistance; and

(b) all the Plaintiffs' claims against all the Defendants for breach of statutory duty.

518 As with the matter of interest, we will hear counsel on all issues of costs (including the costs of interlocutory hearings, where relevant) when this judgment is handed down.

519 Finally, the Court would wish to repeat its thanks to both Advocate Santos-Costa and Advocate Preston, and to their legal teams, for their assistance throughout this case both in terms of the preparation of the documents and in the expeditious conduct of the hearings.