Malcolm Cohen and Shane Crooks as Joint Administrators of the Estate of the Late James Donald Hanson v Arbitrage Research and Trading Ltd S.A

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	17 December 2021
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Court:	Royal Court

Text

[2021] JRC 319

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, **Esq.**, Deputy Bailiff, **and** Jurats Ramsden **and** Averty

Between
(1) Malcolm Cohen and Shane Crooks as Joint Administrators of the Estate of the Late James Donald Hanson
First Plaintiffs
(2) Creditforce Limited (a company incorporated in England and Wales)
Second Plaintiff
and
(1) Arbitrage Research and Trading Limited S.A

First Defendant
(2) Arbitrage Research Foundation
Second Defendant

and

(3) Joyce Bonney
Third Defendant
(4) William Stephen O'Leary
Fourth Defendant
(5) Barry Shelton
Fifth Defendant

Advocate J. W. Angus **for the Plaintiffs**.

Fourth Defendant – in person

Authorities

Curatorship of X [2002] JLR 259.

Charities (Jersey) Law 2014.

Anchor Trust Company Limited v Jersey Financial Services Commission [2005] JLR 428.

Re Esteem Settlement [2003] JLR 188.

MacKinnon v Regent Trust Company Limited [2005] JCA 066.

MacKinnon v Regent Trust Company [2004] JLR 477.

Hitch v Stone [2001] STC 214.

A v A [2007] EWHC 99 (Fam).

JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426

Trusts (Jersey) Law 1984.

Meaker v Picot [1972] JJ 2161.

Basnage — Royal Court from 1955 – *Barclays Bank Limited v Fraser*.

Barclays Bank v Mercantile Bank Limited [1962] 1 WLR 763 at 765.

Lewin (20th edition).

Crociani v Crociani [2017] JRC 146.

Target Holdings v Redfern [1996] AC 421.

Crociani v Crociani [2018] (1) JLR 468.

FM Capital Partners Limited v Marino and Others [2019] EWHC 725 (Comm).

Patel v Mirza [2017] AC 467.

Macon v Querée [2001] JLR 80.

Pell Frischmann v Bow Valley [2007] JRC 105A.

Partridge v Partridge [1894] 1 Ch 351.

Companies (Jersey) Law 1991.

Charities (Core Financial Information) (Jersey) Regulations 2018.

Companies.

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Deputy Bailiff

THE

Introduction

1 At the conclusion of a ten day trial (4 th October – 19 th October 2021), we reserved judgment.

2 The only parties who participated in the trial were the First and Second Plaintiffs, who were jointly represented, and the Fourth Defendant, Mr O'Leary.

3 The First and Second Defendants did not respond to these proceedings when they were served with them on 17 th April 2019, and the Third and Fifth Defendants wrote letters to the Court setting out their positions but chose not to actively contest the claims made by the Plaintiffs.

4 The First Plaintiff is the Estate of James Donald Hanson who died aged 78 on 29 th October 2014 (“Mr Hanson”). Mr Hanson was managing director of Arthur Andersen between 1982 and 1989 and retired as a partner in Arthur Andersen in 1997. At that stage, he was working in New York and, thereafter, returned to live in the United Kingdom.

5 In addition to having a busy professional life, Mr Hanson had a private life that was complicated in more than one dimension. One aspect of this complexity was his private financial affairs, which included his 99% ownership of the Second Plaintiff (“Creditforce”) – the other 1% was owned during his lifetime by his wife and the company is now wholly owned by his estate – a UK company incorporated in 1978.

6 This case concerns Creditforce and a company incorporated in Jersey on 31 st March 1994 as Weatherwise Offshore Holdings Limited, which was renamed Arbitrage Research and Trading Limited ("ARTL") in 2001 but, for convenience, we will refer to it as ARTL throughout.

7 ARTL became a substantial company with assets worth approximately £30 million.

8 As set out in our judgment, the main issues we needed to determine were:

(i) The beneficial ownership of the shares in ARTL;

(ii) The nature of the SR Charitable Trust ("the Trust"), which was purportedly settled in 2004. Who was the settlor of the Trust and was it a valid charitable trust or as alleged by the Plaintiffs, either a sham or a trust that was invalid as the purportedly charitable purposes for which the Trust was created potentially benefitted non-charitable purposes? Resolution of the identity of the settlor will indicate for whom the assets purportedly held on trust were held, if the Trust was in fact a sham or invalid for another reason.

(iii) Mr Hanson fell ill in late 2013 and died approximately a year later. During this period, Mr O'Leary, by then the sole trustee of the Trust, considered transferring the assets of the Trust to a foundation in St Kitts and Nevis and, ultimately, by a series to steps commencing on 3 rd July 2014, advanced the assets of the Trust to a Panamanian private interest foundation, namely the Arbitrage Research Foundation S.A. (the Second Defendant). It was necessary for the Court to consider whether or not these were bona fide transfers of the Trust assets. In consequence, Mr O'Leary arranged the migration of ARTL to Panama to continue as a Panamanian company. The Court also needed to determine whether, on the evidence available to it, if the Second Defendant was a charitable entity or was established to benefit Mr O'Leary and/or his family and the extent to which, if at all, it was controlled, or intended to be controlled, by Mr O'Leary.

(iv) Finally, having considered whether or not the Plaintiffs are prima facie entitled to declaratory relief and equitable compensation or damages, the Court needed to consider whether or not the Plaintiffs' claims are barred, as alleged by Mr O'Leary, by reason of illegality, laches or acquiescence.

9 There are many issues of fact that could not be resolved with certainty in this case owing to the death of Mr Hanson. He kept his cards close to his chest in relation to many aspects of his private life and only he would know the definitive answer to some of the questions that the Court needed to resolve.

10 Mr O'Leary was very much at the heart of the matters we have had to consider. He was one of the few in Mr Hanson's inner circle in whom Mr Hanson placed trust. Mr O'Leary was a

director of Creditforce from 2008 until April 2017 (when he was removed by the administrators of the Estate); a director of ARTL from September 2004 until 1 st April 2014 (shortly before its migration to Panama) and, from its inception, a trustee of the Trust and, from 2011 until its assets were transferred to Panama in 2014, the sole trustee of the Trust.

Declaratory relief

11 We will consider the issues of this case as they arise for the purpose of ease of reference.

12 First is the Court's jurisdiction to grant declaratory relief. With the exception of the claim for equitable compensation and / or damages, the relief sought by the Plaintiffs in these proceedings in the Re-Amended Order of Justice is declaratory relief.

13 It is long established that the Royal Court has power to grant such relief.

14 The extent of the Court's jurisdiction to grant declaratory relief was considered by Birt, Deputy Bailiff, giving the judgment of the Royal Court in the matter of the *Curatorship of X* [2002] JLR 259. Having considered the position in England, the Court said:

> ***"16. The position in England is to be contrasted with that in Scotland. It is clear from Chapter 8 of Zamir (written by Lord Clyde) that Scottish law has not been bedevilled by the reluctance to utilise the declaratory judgment shown by English judges. Thus at paragraph 8.01 on page 269 it is stated:-***
>
> ***8.01 "The process of declarator, whereby rights may be declared and fixed even in cases where they are not capable of immediate enforcement, has for a long time been recognised as a very valuable process.*** Lord Jeffrey regarded it as "the triumph and pride of our judicial system" and its advantages won the admiration and envy of Lord Brougham. It is a process "deeply rooted in the law of Scotland and in the practice of its Supreme Court" .
>
> ***17. A great merit of the action of declarator in Scotland is said to be its elasticity; the scope of its availability is potentially very wide. In particular the Scottish courts do not appear to have become involved in technical considerations of whether a right is future or hypothetical. They have adopted a much broader approach. That approach is conveniently summarised by Lord Clyde at paragraph 8.06 of Zamir as follows:-***
>
> ***8.06 "It has been observed that it is the function of the courts to decide only live, practical questions and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy that they should adopt in the ordering of their affairs.*** "The Courts are neither a debating club nor an advisory bureau". Hypothetical questions will not be entertained. The action "cannot be used for the mere purpose of declaring legal propositions when no practical question or

dispute lies beneath." It is a matter of the circumstances of each particular case whether there is or is not a live practical question. There must be a sufficient degree of reality and immediacy before a declarator will be granted. If the declarator will have a practical bearing upon the resolution of an actual dispute it will be competent. It is sufficient for the competency of a declarator that there be an actual consequence either pecuniary or "in facto praestando". This need not be an immediate practicality: a real possibility of the critical eventuality emerging may be sufficient."

18. We think that the broad and flexible approach summarised above is preferable to the more structured and technical approach which appears to hold sway in England, which is based partly upon historical considerations which have no application in Jersey. The principles of Scottish law described above offer a sensible and convenient approach to the question of when the Court should agree to give declaratory relief and we hold that they represent the correct approach under Jersey law. We do not think that the court in Jersey Hotels was purporting to hold definitively that the distinction between future and hypothetical rights went to the jurisdiction of the Royal Court to grant declaratory judgment but, if it did so hold, we respectfully disagree. In our judgment the Court should not become embroiled in a technical consideration of whether a matter can be categorised as a future or hypothetical right. The Court should adopt a broader approach and consider whether there is a live practical question with practical consequences when deciding whether to exercise its discretion to grant declaratory relief."

15 We adopt the approach advocated in the case of *X*. In our view, all the matters upon which the Plaintiffs sought declaratory relief are ' *live practical questions with practical consequences*' and we regard it as appropriate that we, if warranted on the facts, grant the declarations sought, or in such terms as the Court regards appropriate.

The relationship between Mr Hanson and Mr O'Leary

16 Having spent twenty years as a stockbroker in London, Mr O'Leary was employed from 1992 until 2001 by Bank Julius Baer in London as an investment manager. From 2002, he became managing director of Groupe Financiére Hottinger and Company Limited ("Hottinger"), a newly established wealth and investment management firm, where he was working until approximately 2017. Mr O'Leary met Mr Hanson towards the end of the 1970s and had what he described as a *'continuous professional relationship'* for in excess of thirty years. In evidence, he said that he saw or spoke to Mr Hanson almost every day and thought that Mr Hanson would have regarded him as his *'right hand man'*. The accounts given to us showed that Hottinger derived substantial professional fees from the advice they gave to ARTL and Creditforce through Mr O'Leary. Both Mr O'Leary and his wife were beneficiaries under Mr Hanson's Will when he died. Mr O'Leary was a director of Creditforce from 2008 until removed by the Joint Administrators. He was appointed director

of ARTL in 2004. But he was involved with both ARTL and Creditforce prior to that date. In about 2008, Mr O'Leary was granted a general Power of Attorney by Mr Hanson which gave him the ability to make decisions and enter transactions on behalf of Mr Hanson.

The acquisition of shares in ARTL by Miss Holt and Miss Ruddick as nominees for Mr Hanson and / or Creditforce

17 On 24 th December 1996, ARTL passed a Special Resolution adopting new Articles of Association, reclassified its share capital into A and B shares, with 5,000 of each class of share and issued (this was the only issue of shares) 1,010 B shares to Miss Richmond Holt for the consideration of £1,449,443. Miss Holt was Mr Hanson's girlfriend. Miss Holt was not a witness but, in relation to her shareholding, she completed a questionnaire after Mr Hanson's death on 1 st August 2016. She said *'I knew very little about Don's financial investments or even his financial situation'*. She said that *'long ago'* Mr Hanson had suggested that she become a shareholder in ARTL and had organised a loan for her to make this investment. This was a *'non-recourse loan'*, i.e. she was not liable to repay it.

18 At the time, Miss Holt was living in United States and remained living there until she moved to the United Kingdom with Mr Hanson after his retirement from Arthur Andersen in 1997.

19 The Plaintiffs' case is that Miss Holt purchased the shares in ARTL as nominee for Mr Hanson or Creditforce. Mr O'Leary did not accept this in his pleaded defence but now, in evidence and in an open offer of settlement written earlier this year, accepted that Miss Holt acquired the shares in ARTL as a nominee but says that she was a nominee for Mr Hanson and not Creditforce.

20 The reason for Miss Holt's selection as shareholder in ARTL is revealed by a document found on Mr Hanson's computer created on or before September 2002 which showed that, in order for Miss Holt to subscribe for the B shares in ARTL, Creditforce advanced cash and securities which, initially at least, remained under the control of Creditforce but were treated as being loaned to her. For some reason, it is not clear why, ARTL was required to guarantee this loan by way of a guarantee limited to the value of the same. The rationale behind the purchase, as indicated by a contemporaneous memorandum, was that it was important that ARTL, as a Jersey company, be more than 50% owned by a non-UK resident. The memorandum says:

> *"We have arranged to introduce a non-UK resident as a shareholder who will subscribe for B shares in [ARTL].* These B shares will have their own pool of assets which Creditforce has provided."
>
> *"Since Creditforce is not a non-resident this transaction was affected [sic] by Creditforce lending funds to a non-resident who purchased the B share portfolio from Creditforce Limited.* The amount was left as a loan from the non-resident to Creditforce Limited."

21 Miss Holt's acquisition of the B shares resulted in no economic benefit to her and she was subsequently, it appears, directed to sell the shares for £1 (even when they were worth several million pounds) to Miss Ruddick, another nominee, when Miss Holt ceased to be a US resident.

22 The evidence clearly indicated that Miss Holt was a nominee and, in our view, a nominee for Creditforce and not Mr Hanson. Creditforce provided the assets (even though it was majority owned by Mr Hanson) and the contemporaneous memorandum referred to above said *'At all times, the offshore investor is operating as nominee for Creditforce Limited and so far as Creditforce Limited is concerned this is regarded as a loan of its portfolio which it still manages and which it will still get back in total'*.

23 Whether or not the assets notionally loaned to Miss Holt to subscribe for the shares were ever transferred to ARTL is a moot point on the evidence. Mr Cohen, who gave evidence on behalf of the Joint Administrators, was unclear on this point. Mr O'Leary thought there had been a transfer of assets. However, whether or not such a transfer took place does not, in our view, alter our finding in relation to nomineeship.

24 Further, whether or not Creditforce was in fact *'repaid'* (as appeared to have been indicated by the evidence) by the combination of a notional attribution of the increase in the value of the portfolio lent to Creditforce and the repayment of part of the loan by Mr Hanson to Creditforce, matters drawn to our attention by Mr O'Leary, does not affect the fact that Miss Holt was, at all material times, the nominee of Creditforce and not Mr Hanson. Mr O'Leary drew to our attention to a December 1997 fax from Mr Hanson to Miss Bonney, an accountant who gave him advice (and to whom we shall return), saying that he was paying £592,093 into Creditforce's account on 31 st December 1997 and asking for confirmation that this would clear *'all short term loans and balances relating to the ARTL transaction and sales made on behalf of others'*.

25 Mr O'Leary said in evidence that the Plaintiffs' contention that Miss Holt was (and Miss Ruddick to whom we will now come) were nominees for Creditforce was driven by UK tax considerations and not the true facts. Whether or not that is the case is not a matter for this Court and not relevant to our findings. The facts are the facts. Miss Wuenschmann-Lyall, who gave evidence for the Plaintiffs and is a solicitor and a specialist in estate planning, probate and tax related matters and a co-author of various books on matters including inheritance tax, capital gains tax and revenue law, told us that whether or not the shares were held as nominee for Creditforce or Mr Hanson was irrelevant for UK tax purposes as HMRC would *'look through'* Creditforce to its beneficial owner, Mr Hanson. Whether or not this is correct is (again) not relevant to our findings but we recite it as it was the only other evidence we heard, apart from Mr O'Leary's, on the potential UK tax consequences of our findings on this issue.

26 On 23rd July1997, Miss Ruddick, another US resident, acquired the entirety of Miss Holt's B shares in ARTL for £1. The agreement, if any, effecting this transfer has not been found. We find that Miss Ruddick also held the shares as nominee for Creditforce. Miss Ruddick was selected as the transferee in order to, we find, maintain the UK tax benefit which flowed from the shares being owned by a non-UK resident.

27 Miss Ruddick was not a witness but responded to a subpoena made to the District Court in New York in 2017 on behalf of the Joint Administrators. Miss Ruddick's response is not particularly detailed or illuminating, particularly in view of the fact that she was used by Mr Hanson for a number of different purposes as we will consider below. In relation to the matters that concern us, she said that she cannot remember what happened so many years ago and, in relation to the shares in ARTL that she had received in 1997 and the ones that she subsequently received in 2001, she said:

> *"I gave away to charity something that had been basically given to me, even if it had a huge debt on it.* But I don't remember the details from so many years ago at all. If I have to guess, my guess would be that I signed a paper that had been prepared for me, not worrying if what I was giving away had any real value. However, I can't remember who prepared these papers or who advised me to do this."

Miss Ruddick was apparently a woman of ordinary means and not a sophisticated investor. However, a letter written on Mr Hanson's behalf to HMRC in October 2000 in relation to his historic tax affairs said, in respect of a particular transaction involving Russia, that *'this transaction was undertaken when Mr Hanson lived in New York and with an adviser he is not currently in contact with.* The name of the adviser was Susan Ruddick'.

28 The Plaintiffs say, and we agree, that it is completely implausible that Miss Ruddick ever gave Mr Hanson investment advice. However, there was a contemporaneous paper trail that Mr Hanson laid to this effect. On 6th January 1997, Mr Hanson wrote to Miss Ruddick confirming a profit split arrangement in respect of a particular investment. Mr Hanson asked Miss Ruddick to *'confirm the arrangement for your participation in the profits made on any Russian shares I purchased on your recommendation'*. Miss Ruddick countersigned and returned the letter. There was similar correspondence to this effect from 1995.

29 In 2001, Miss Ruddick acquired the issued A shares in ARTL. She did this by assuming responsibility for a debt in the sum of £1,802,865 owed by the previous holder of the entirety of the A shares, namely Weatherwise Guarantee Company Limited ("WGCL"), a Jersey company incorporated on the same day as ARTL. In this way, WGCL would be released from its obligations to pay the sum to ARTL and Miss Ruddick would assume this obligation in return for the issue of the 1,010 A shares.

30 The accounts for ARTL for the period ended 31st December 2001 show Miss Ruddick as a *'debtor'* of ARTL in the sum of £1,802,865. An undated but contemporaneous letter from Mr

Hanson to Barry Shelton at Anchor Trust (the Jersey service providers for ARTL) said *'ARTL is due £1,802,865 from WGCL and this is the only A share asset.* Susan buys the A shares from them for this amount but instead of paying them for them she takes on the indebtedness. If this is correct then let me know'. He went on to say 'I will arrange for Susan to pay this amount in the next few months'.

31 Miss Ruddick never paid this debt and there is no evidence that she had the means, let alone the desire, to do so. Indeed, Miss Ruddick sent a letter dated 14 th September 2001 to Mr Shelton which said that she understood ' *that repayment is at my discretion and will only be made at my instigation*'. It is said, and we accept, that the acquisition of the A shares, rather like the acquisition of the B shares, by Miss Ruddick, lacked any commercial rationale and that the acquisition of these shares was directed by Mr Hanson. There is evidence which appears to show that Miss Ruddick's debt to ARTL was repaid by a payment in the sum of £802,865 on 18 June 2002 by Mr Hanson to ARTL. This left £1 million outstanding. The Plaintiffs' say that they cannot locate any documents which show repayment of this sum.

32 Mr O'Leary said that in respect of the remaining £1 million due from Miss Ruddick, this was effectively cancelled by Mr Hanson effecting a loan in the sum of £1 million interest free from a company called Diantha Limited ("Diantha") to ARTL. Diantha was, according to Mr O'Leary, a company controlled by Mr Hanson for the benefit of him and his family and the accounts for ARTL showed, for example during the period ending April 2001, that Diantha was an unsecured creditor of ARTL in the sum of £1 million. The ARTL accounts for the year ended September 2004 showed that the Ruddick debt had been reduced from £1,802,865 down to £1 million after the receipt of the £802,865 from Mr Hanson; the accounts to 31 March 2006 showed the sum owed by Miss Ruddick at £1 million and owed to Diantha at £1 million, and the accounts for the period ended 31 March 2007 disclosed that both entries had been eliminated suggesting that one had cancelled the other out.

33 Joyce Bonney gave a statement in the English proceedings which referred to Diantha Limited. Miss Bonney is a Fellow of the Institute of the Chartered Accountants and has been since 1984. She met Mr Hanson in the late 1970s and acted as bookkeeper and accountant for Creditforce from 1978 until 2013. She knew Mr O'Leary well too.

34 She was the sole director of Diantha. She says that Diantha was established for Mr Hanson's family and friends and that in fact although, as shown by the accounts of Diantha, £1 million was lent to ARTL, this was repaid and the shareholders in Diantha received the proceeds. Mr O'Leary says that he does not accept that this is accurate and, indeed, Miss Bonney was recalling events, in her witness statement dated October 2015 which had occurred many years before.

35 We do not need to resolve this matter. The Plaintiffs' claim that the A shares acquired by Miss Ruddick in 2001 were acquired by her as nominee for Mr Hanson or Creditforce. We could see little, if any, evidence of the latter in the material that was placed before us. Mr

O'Leary initially did not admit/advanced no positive case as to the nomineeship in respect of the A shares in ARTL. In his open offer from earlier this year and at trial he argued that Miss Ruddick held the A shares as nominee for Mr Hanson.

36 We agree that Miss Ruddick's acquisition of the A shares lacks any commercial rationale and was directed by Mr Hanson, and we find that the A shares were held by Miss Ruddick as Mr Hanson's nominee.

37 Accordingly, we declare that at all material times prior to their settlement on the purported trust of the SR Charitable Trusts, the B shares in ARTL issued to Miss Holt and subsequently transferred to Miss Ruddick were held as nominee for Creditforce and the A shares issued to Miss Ruddick were held as nominee for Mr Hanson.

The circumstances giving rise to the settlement of SR Charitable Trust ("the Trust") and the identity of the Settlor.

38 On 3 rd September 2004, Miss Ruddick purported to settle the Trust. Her signature was witnessed by a notary public in New York. It is not known when she signed the Trust Instrument. In view of our findings and the fact that the Trust assets consisted of the 2,020 shares in ARTL, she settled the Trust as a nominee for Mr Hanson and Creditforce. At the time the sole director of Creditforce was Mr Hanson and, accordingly, the effective and economic Settlor of the Trust was Mr Hanson and not Miss Ruddick.

39 The costs of incorporating the Trust (£5,000) were met by Creditforce as shown by contemporaneous correspondence. At the time of the settlement, the management accounts for ARTL showed that it had a value of approximately £25 million.

40 The Plaintiffs' claim that the Trust, a charitable trust, is invalid for two reasons which we will consider in detail below. Mr O'Leary says that the Trust is a valid charitable trust.

41 Both Mr Hanson and Mr O'Leary played central roles in setting up the Trust. On 6 th August 2004, Mr Hanson sent Miss Ruddick instructions to send a letter to the directors of ARTL in Jersey requiring them to transfer her holding of shares in ARTL to the Trust. This she did. On 7 th September 2004, the then directors of ARTL confirmed that the shares had been transferred to the Trust and appointed Mr Shelton and Mr O'Leary as directors of ARTL. The former directors, Roy Dixon and Andrew Dixon, resigned from the conclusion of that meeting. Mr O'Leary claims that, at the time the Trust was settled in 2004, he believed Miss Ruddick was the true Settlor of the Trust. He said that he did not change his mind until he saw the discovery produced by the Plaintiffs – largely consisting of material from Mr Hanson's computer.

42 In evidence, Mr O'Leary said he was asked by Mr Hanson, on behalf of Miss Ruddick, to

investigate the setting up of an offshore charity. In evidence, Mr O'Leary was shown an email contemporaneous with the creation of the Trust dated 7 th September 2004 in which Mr Hanson had described, in an email to Mr Laffoley of Anchor Trust Company Ltd in respect of the cost of setting up the Trust, that Mr O'Leary was the *'project manager for this whole exercise'* i.e the Trust. Mr Hanson went on to say that ARTL would be happy to loan £5,000 but *'Lee O'Leary must be happy with the arrangement'*.

43 When it was put to him that this email showed that Mr Hanson viewed him as central to the establishment of the Trust, Mr O'Leary said *'I don't know.* Don used to have a few peculiar ways of addressing things and people…. so it's fanciful saying I was the project manager. I got information for him so he could make decisions at the time with Miss Ruddick in Canada'. Mr O'Leary accepted that he arranged for the £5,000 to be paid from Creditforce to fund the setting up of the Trust. Though he was not a director until 2008, Mr O'Leary said that he arranged this payment in his capacity as investment manager for Creditforce and that at that stage he had had a Power of Attorney from Mr Hanson for many years, first granted to him in about 2000.

44 Four days after the Trust was settled on 7 th September 2004, Mr Hanson sent what he said was an *'idiot's guide'* to Mr Roy Dixon. This said, *inter alia*, that Miss Ruddick had donated her entire holding of shares in ARTL to the new Trust, that Mr O'Leary and Miss Bonney were trustees of the Trust, that Miss Ruddick was now *'out of the picture'* (even though she had just purported to settle assets worth £25 million on trust); that the *'charitable trust will receive dividends / loans up from ART and do charitable giving with those funds'* and, *importantly, that Mr O'Leary was 'the architect and project manager of this exercise'*.

45 Mr O'Leary explained this reference to him being the *'architect'* of the setting up of the Trust as being *'banter'* between Mr Dixon and Mr Hanson and suggested that Mr Hanson may have been drinking alcohol which may explain the contents of the email. The Court had no hesitation in rejecting Mr O'Leary's account in this regard.

46 Mr O'Leary was plainly the architect of the Trust structure. It was he that Mr Hanson had entrusted to instruct Bedell Cristin Trust some months before to take advice on a potential structure. In his witness statement, Mr O'Leary claimed that in April 2004:

> *"I had been asked by Mr Hanson, acting in his capacity as investment adviser on behalf of Miss Ruddick, to research the formation of an offshore charitable trust into which Miss Ruddick could gift the ownership of her shares in ARTL.* The formation of charitable trusts was outside of my expertise and I therefore referred Miss Ruddick to Anchor Trust Company Limited ("Anchor Trust Company") which had been acting for ARTL since 2001…. In addition, I suggested that a second opinion should be obtained on behalf of Miss Ruddick and I accordingly approached Mr Dart and Bedell Cristin with whom I had previous professional contact."

47 This passage from Mr O'Leary's witness statement suggests that Miss Ruddick was intimately involved in setting up the Trust. In fact, she was not. Mr O'Leary never met her during this period and, notwithstanding the suggestion that he referred Miss Ruddick to Anchor Trust, there was no correspondence between Mr O'Leary and Miss Ruddick and indeed throughout the ten year life of the Trust that she purported to settle, there was never any contact between Miss Ruddick and Mr O'Leary at all – even though he was a trustee throughout the lifetime of the Trust and towards the end the sole trustee.

48 The written advice from Bedell Cristin Trust dated 14 th April 2004 set out various aspects of a Jersey law charitable trust and referred to the taxation treatment of the Trust in Jersey and outside Jersey. Mr Dart said that he would *'recommend very strongly that your client should seek UK tax advice as to any potential UK tax consequences arising from the establishment of the new structure.* In particular, I do not know whether your client might be treated as if he was the settlor of the new charitable trust, or as in some sense receiving the benefit of the distribution from the existing trust comprising the shares of the offshore company'.

49 There was *'no existing trust'* according to Mr O'Leary.

50 The Plaintiffs rely on the fact that the letter from Bedell Cristin Trust refers to Mr O'Leary's client as *'he'*. It does not seem to us that anything really turns on this and we accept Mr O'Leary's evidence that it is common when seeking generic advice on such issues to withhold the identity of the ultimate client. However, the reference later on in the letter to the fact that Mr O'Leary's *'client continues to be able to influence investment management'* does, in our view, suggest that Mr O'Leary was taking advice on behalf of Mr Hanson and certainly not, as he suggested, Miss Ruddick who had never given ARTL or Mr Hanson or Mr O'Leary any advice in relation to investment management.

51 As to how the trust ought to operate, Mr Dart said *'This would be relatively straightforward.* The offshore company will continue to run in much the same way as at present [i.e. ARTL]. From time to time, it will make distributions of profits to its shareholders, the trustees of the charitable trust. The trustees will then exercise their discretion to apply those profits in favour of appropriate charitable causes, and in doing so will be happy to take into consideration whatever suggestions or requests may be made by your client'. Setting up the trust, i.e. drafting the trust instrument, would cost £2,000 and the annual administration fee for the charitable trust underlying company would be £10,000 to £15,000. This would include the preparation of accounts for the trust and the company. We recite the estimates merely as an evidential comparator as against which to measure the fees ultimately incurred when the Trust migrated in 2014.

52 Mr O'Leary says that Mr Hanson preferred Anchor to administer the Trust as opposed to Bedell Cristin Trust, the trust company connected to Bedell Cristin, as Anchor were cheaper and, indeed, Mr Hanson had directed the transfer of the administration of ARTL from Mourant and Co Limited (Jersey) to Anchor in 2001.

53 In any event, Mr O'Leary understood from the meeting he had with Mr Dart and his subsequent advice that the legal, regulatory and trust and fiscal framework in Jersey in 2004 was ideally suited to the formation of a Jersey charitable trust. He was also attracted by the relatively relaxed regulatory regime that then existed in relation to charities as there was no, at that stage, regulator equivalent to the Charity Commissioner of the United Kingdom. This was to alter with the enactment of the Charities (Jersey) Law 2014 many years later.

54 As to the drafting of the Trust Instrument, it is clear that it was Mr Hanson who selected Anchor as trustee. The suggestion that Mr O'Leary makes in his witness statement that Anchor was *'selected by Miss Ruddick to assist in the formation of SR Charitable Trust'* is misleading. Although Miss Ruddick may have signed documents as directed, there is no evidence that she played any meaningful role in making any selections or other discretionary choices in respect of the formation of the Trust purportedly settled in her name.

55 The first trustees, namely Mr O'Leary, Miss Bonney and Anchor (represented by Mr Shelton), together with Mr Hanson, met in Jersey at about the time the Trust was executed in September 2004. Miss Ruddick was not there, nor is there any suggestion she participated remotely in the meeting. She did, as we have said, sign and witness the last page of the Trust executed in her name. Mr O'Leary said in his statement ' *For the avoidance of any doubt, I confirm that Miss Ruddick was presented to me, Miss Bonney, Mr Shelton and Anchor Trustees as the Settlor of the SR Charitable Trust and that this was supported by Miss Ruddick's having executed the 2004 Trust Deed of Settlement in her capacity as Settlor….*'.

56 We rejected this evidence. In our view, Mr O'Leary knew throughout that Miss Ruddick was in no sense the genuine settlor when the Trust was settled by her as nominee for Mr Hanson/Creditforce as we have held. None of the trustees, still less Mr Hanson, had any genuine belief that Miss Ruddick was the settlor of the Trust. This is demonstrated by both contemporaneous evidence and evidence of subsequent acts by Mr Hanson and the trustees.

57 The true position we regard as revealed by Miss Bonney's statement to the English High Court dated 20 th October 2015, in which she said at paragraph 16:

> ***"In late 2004 [Mr Hanson] asked me to become a trustee of a charitable trust to be established in Jersey.*** He did not provide an explanation as to the purpose of the Trust, and I did not ask for any details. I accepted the appointment as just another of the various jobs he asked me to do .
>
> ***…*** ..
>
> ***In September 2004 I signed the Settlement Deed that established [the***

> ***Trust].*** Although Susan Ruddick was named as 'Settlor', I have never met with or spoken to her. The only people I ever had contact with in respect of [the Trust] were [Mr Hanson, Mr O'Leary] and Anchor."

And at paragraph 22, Miss Bonney said:

> ***"However, it is firmly my recollection that, during the period of my involvement with [the Trust] it was always [Mr Hanson] who made decisions and gave instructions in respect of [the Trust's] establishment, management and administration."***

58 In response to the subpoena, Miss Ruddick has said that she has no recollection of setting up the Trust. The Plaintiffs rely on the fact that it is unlikely that Miss Ruddick would have no recollection of giving away, or purporting to give away, assets worth £25 million to a charitable trust if, in fact, she was either the real owner of the assets or the true settlor of the Trust.

59 In fact, by email dated 6 th August 2004, Mr Hanson instructed Miss Ruddick to send a letter drafted by him to the directors of ARTL transferring her shares to the Trust, care of Viberts lawyers. This is what she did.

60 At the same time as the Trust was settled and for reasons which are now obscure, Miss Ruddick asked ARTL to issue 1,980 shares in the company to Creditforce. Creditforce acquired these shares at par value, i.e. £1,980, even though they were worth many millions of pounds in terms of the assets of the company. The letters to the directors of ARTL instructing them to effect this transfer of shares to Creditforce were prepared by Mr Hanson and sent to Miss Ruddick by email. In consequence Creditforce, from September 2004, held 49.5% of the shares in ARTL.

61 In the statement that Mr O'Leary made to the English High Court, he said that when Miss Ruddick arranged for this transfer of shares, Miss Ruddick offered *'[Mr Hanson] through Creditforce a participation in ARTL's share capital in order for [Mr Hanson] and/or Creditforce to share in the success or failure of the fund going forward'*.

62 There is simply no evidence of this. There is no evidence that Miss Ruddick had any proper understanding of the transaction that she was facilitating. She was simply doing what Mr Hanson directed her to do.

63 Subsequently in 2005, Creditforce settled the 1,980 shares in ARTL on the trusts of the Trust. Accordingly, all 4,000 shares in ARTL were now held in the Trust. No other assets were purportedly settled on the Trust. Accordingly, 74.75% of the assets of the Trust (i.e. the shares in ARTL) were settled on trust by Creditforce and 25.25% by Mr Hanson in view of the findings we have made as to the identity of the true ownership of the assets held by Miss Holt and Miss Ruddick from time to time which were thereafter settled on trust.

The intention of the parties who created the Trust

64 The relevant intentions are those of the Settlor (i.e. Mr Hanson, both on his own behalf and as sole director of Creditforce through his nominee Miss Ruddick), Mr Shelton on behalf of Anchor, Mr O'Leary and Miss Bonney.

65 Mr O'Leary said in evidence that he put forward his name to be a trustee because he had worked with ARTL for many years and Mr Hanson needed someone to be a trustee. Mr O'Leary said he had always had an interest in charities and was a trustee of a several other trusts in the UK, including the Don Hanson Charitable Foundation. Notwithstanding the purportedly charitable terms of the Trust (which we examine in more detail below), there is strong evidence in the years subsequent to the settlement that Mr Hanson continued to regard both ARTL and the Trust as his assets. This evidence was recovered from Mr Hanson's personal records after his death.

66 Much of the relevant material was considered by Mr Stuart Wall in the evidence that he gave in his witness statement. Mr Wall, as Mr O'Leary did not wish to cross-examine him, gave evidence at the request of the Court and expanded upon his witness statement. Mr Wall is a clinical psychologist who gained a PhD in Clinical Psychology from Edinburgh University. He subsequently moved into property development, becoming the chairman of a provider of student accommodation with, at one stage, over £1 billion in assets under management. He met Mr Hanson in 1994. He was introduced to him by Miss Bonney. Mr Wall became very close friends with Mr Hanson and he described Mr Hanson as *"extremely intelligent"* with *"a brilliant mind"*.

67 Mr Wall was a member of the *'Neatly Board'* which was established by Mr Hanson in order to ensure that he died *'neatly'*. It was established nine years before, but in anticipation of, his death. The board was to assist Mr Hanson in planning for this event and to assist in managing his affairs if he were to become incapacitated. The Neatly Board consisted of Stephen Torkington, Andrew Fox, Mr Wall, Mr O'Leary and Miss Bonney. All are beneficiaries under Mr Hanson's Will and all save Miss Bonney are executors of Mr Hanson's Will. Mr Wall made it clear that although he was a beneficiary as to £500,000 under Mr Hanson's Will, he did not wish to receive such a legacy and said as much to Mr Hanson. However, Mr Hanson insisted that the Neatly Board receive compensation for the time that they have given assisting him in the administration of his affairs. Mr Wall said that his entitlement to a legacy did not influence his conduct and his decision to make a statement in this case was because, owing to the success he enjoyed in his business, the receipt of the legacy was financially immaterial to him.

68 The Neatly Board was formed in late 2004/early 2005. The first meeting took place in January 2005 at the offices of Mr Hanson's solicitors, Collyer Bristow. Prior to that meeting, Collyer Bristow produced documents setting out the extent of Mr Hanson's assets.

69 At page 15 and 16 of the *'Asset Overview'* which was dated December 2004 (i.e. shortly after the Trust was established), there was a reference to ARTL which said *'ART is a Jersey based trading company with ownership expected Sept 2004 to be 95% [this is an error and should have read 49%] Creditforce Limited and 51% a Jersey charitable trust which is being established by DH'*. This is further evidence that Mr Hanson regarded himself as settlor of the Trust.

70 Later in the document there was reference to Mr Hanson owning various investments *'through ART'*. Mr Wall concluded that Mr Hanson owned ARTL, whether directly or indirectly, and considered that to be the case. Mr Hanson handed out copies of an asset statement dated 31 st December 2004 showing ARTL as an asset of his valued at £22 million and generating returns for him in the region of £1 million per annum. The minutes showed that ARTL contained various investments including assets in Russia and Australia.

71 An *'action point'* set out in the minutes was listed to the effect that Mr O'Leary should *'prepare a Letter of Wishes from [Mr Hanson] concerning what had happened to the Jersey charitable trust in the event of his death – [Mr Hanson] wishes for it to be wound up'*.

72 So far as he was concerned, Mr Wall took this as an indication that Mr Hanson not only was settlor of the Trust, but felt able to direct that it be wound up after his death and distributed in such a way as he thought fit.

73 As to the Letter of Wishes, Mr O'Leary said in evidence that no such Letter of Wishes was drafted by him and that after the meeting referred to in the contemporaneous documentation from 2005 he saw Mr Hanson alone for a private conversation and explained to him that he could not provide such a Letter of Wishes because the Trust was a charitable one. Mr O'Leary accepted that there was no record of the conversation. He said there was no need for such a note – he had many private conversations with Mr Hanson. There was no reference to such a conversation in any of the witness statements that he provided or his pleadings.

74 Mr O'Leary was asked what Mr Hanson's reaction was to the news that Mr O'Leary was powerless to assist Mr Hanson in these circumstances. Mr O'Leary said that Mr Hanson had little comment on the advice that he had received from Mr O'Leary and must have realised that he (Mr Hanson) had made a mistake. This was one of many conversations with Mr Hanson that Mr O'Leary said took place, for the first time when giving evidence under cross-examination. We find that these conversations did not take place and were invented by Mr O'Leary for the purpose of the trial in order to support his story.

75 There was a further meeting of the Neatly Board on 5 th July 2006 attended by, *inter alia*, Mr Hanson and Mr O'Leary. By now, of course, ARTL was wholly owned by the Trust. Under the title *'Update on DH's financial position since the last meeting'*; Mr Hanson

reported to the board that *'the charitable trust subsidiary has gone up by £2 million'*. Mr O'Leary accepted in evidence that this showed that Mr Hanson still considered the assets to be his.

76 Mr O'Leary accepted that there was no record in these or other minutes of either he or, indeed, Miss Bonney, who was also present, saying to Mr Hanson that the Trust of which they were trustee was held irrevocably for charity and was no longer an asset of Mr Hanson. Furthermore, in wills drafted on behalf of Mr Hanson at this time, he also purported to devise legacies to, inter alia, members of the Neatly Board of a proportion of the assets from the Trust. Mr O'Leary accepted that there was no evidence of him telling Mr Hanson at the time that this was something that Mr Hanson could not do. Subsequently, in 2007, Mr Hanson's lawyers indicated that there should be a removal of any mention of the Trust from his Wills. However, a Letter of Wishes drafted in 2007 to be executed by Mr Hanson in relation to a Will he made in 2005 still provided that the members of the Neatly Board should each receive a sum equal to a proportion of the value of, it appears, payments and distributions made out of the Trust during the previous year.

77 It was clear from an email dated 1 st November 2007 that Mr Hanson still was of the view that the Trust was going to be wound up at the time of his death, and in the email to his lawyers to this effect he said *'Can we not cover the winding up of that Trust by its own trustees agreeing to do whatever is required in a separate document?* Let's talk to Lee [sic – i.e. Mr O'Leary] *about this*'. When asked about this document and the reference to himself and not the other trustees of the Trust, Mr O'Leary said that he was the *"lead trustee"* of the Trust because he was also a director of ARTL and the other trustees were not. Mr Wall said that Mr Hanson saw the Trust as one of the sources of his wealth which fell to be distributed among those whom he wished to benefit from his estate. Subsequent Wills, including Mr Hanson's last Will from 2012, did not contain any reference to the Trust.

78 Of equal significance is the use to which the assets settled into Trust, i.e. the assets of ARTL were put. Contrary to the advice of Mr Dart of Bedell Cristin Trust, there were no dividends paid to the trustees throughout the life of the Trust. Throughout the ten years of the life of the Trust, notwithstanding the fact that ARTL was worth about £30 million, the total value of the charitable distributions was £22,000. Those distributions were funded from assets available to the trustees at the outset, i.e. when the Trust was created, and in a handwritten note of Mr Hanson he said that the charitable distributions should be regarded as an *'expense of the Trust'*. There was no documentation created during the lifetime of the Trust suggesting that it had any general charitable purpose or exclusive charitable intent. At no stage was there any communication from trustees of the Trust inviting the directors of ARTL to declare a distribution.

79 However, there were a substantial number of transactions at company (i.e. ARTL) level which were drawn to our attention and which principally, if not exclusively, were designed to benefit Mr Hanson or entities owned by him.

80 Substantial evidence of these transactions was placed before us and we only identify a few examples for the purposes of this judgment. For example in 2009, Mr Hanson, with the cooperation of Mr O'Leary, arranged for ARTL to loan £3.65 million to Creditforce (the loan was repaid in September and October 2009) interest free and unsecured for the purpose of refinancing loans for Hinchcliffe Foote, a company 95% owned by Mr Hanson and 5% by his son. There is evidence of many other loans made by ARTL to Creditforce during the lifetime of the Trust. In his evidence, Mr O'Leary agreed that the £3.65 million could have been paid up to the trustees of the Trust by way of a dividend and used for charitable distributions.

81 In 2005, ARTL lent nearly £500,000 to Hinchcliffe Foote in order to finance an acquisition. ARTL was repaid the loan but without interest.

82 In 2007, ARTL loaned £2.6 million to Creditforce, possibly in order to fund an interest in Little Chef. There is no evidence located by the Joint Administrators of ARTL being repaid or interest being received on the loans made.

83 In relation to transactions between ARTL and Creditforce generally, the Joint Administrators (and Stuart Maddison, a director of Creditforce, who gave evidence and was cross-examined, although his evidence was not contested on this point) concluded the transactions demonstrated a lack of commercial rationale and/or were not conducted on an arm's length basis. Mr Maddison concluded that ARTL and Creditforce, notwithstanding that the former was purportedly owned by a charitable trust, were used by Mr Hanson at all times as his own private financing and acquisition vehicles with effectively interchangeable and correlative interests which were coterminous with those of Mr Hanson.

84 The most egregious transactions were the twenty-five payments made between August 2009 and December 2010 which Mr Hanson procured that ARTL paid to benefit his then girlfriend in refurbishing her home in England. The payments totalled £393,796.61.

85 When these payments were made, Mr O'Leary was one of the three directors of ARTL and the only one with a day-to-day knowledge of the nature of its investments, as the other two were Jersey based directors of the then service provider, Herald Trust.

86 When Mr Hanson's relationship with his then girlfriend, and recipient of these funds, Nicola Mercer soured, he threatened and appears to have initiated legal proceedings whereby he sought to reclaim these sums personally.

87 Mr O'Leary sought to explain and justify these payments from ARTL to the benefit of Ms Mercer on the footing that they were delayed remuneration for Mr Hanson for investment advice which he had provided over the years to ARTL. There was no contemporaneous documentation supporting this account, let alone a minute from the ARTL board stating that these sums represented remuneration to which Mr Hanson was entitled, nor was a contract

appointing Mr Hanson investment adviser to ARTL providing for remuneration produced, or even said to exist or have existed.

88 Mr O'Leary denied that he permitted Mr Hanson to use ARTL as his piggy bank. However, that is what he did in our view.

89 Mr O'Leary said that the £400,000 paid to Ms Mercer did not only match what Mr Hanson deserved to be paid by way of remuneration but, in fact, it was a small sum relative to the remuneration ' *he could have asked for or taken*' but *'never did'*. Mr O'Leary accepted that Mr Hanson had never declared these payments as remuneration to HMRC.

90 At one stage, Mr O'Leary, in the course of his cross-examination, described these payments to Ms Mercer in the following terms:

> ***"What happened was that Mr Hanson, as always, robbed Peter to pay Paul…"***

He later resiled from this description.

91 In our view this was a reasonably accurate description of what Mr Hanson was doing – robbing ARTL, which was supposed to be held for charitable purposes, to pay Ms Mercer substantial funds to refurbish her house. Mr O'Leary accepted that he knew that the payments were to benefit Ms Mercer and we took the view that Mr O'Leary's attempt to describe the payments as outstanding remuneration to Mr Hanson was simply an *ex post facto* justification for the payments, which was not consistent with the intention of either the ARTL board or, indeed, the recipient of these funds at the time. Further, it was drawn to Mr O'Leary's attention that he had sent instructions to New Quadrant Partners in February 2016, a tax advisory firm that he instructed whilst a director of Creditforce. One of the matters upon New Quadrant Partners were asked to advise was Creditforce's subscription for shares in ARTL. In his instructions, Mr O'Leary had said that, notwithstanding the work that Mr Hanson had done as investment adviser to ARTL, he had ' *never demanded any retainers or success fees from ARTL*'. Mr O'Leary had gone on to say *'On several occasions when I was a director of ARTL, I asked [Mr Hanson] if he wished to be remunerated on either a success basis or a time basis in respect of completed investment transactions, but [he] always declined'*. These instructions were plainly at odds with the story he told the Court.

92 We accepted the Plaintiffs' case that the reason Mr Hanson did not wish to receive remuneration from ARTL was because he was benefitting from many of the transactions that he procured ARTL to execute. Further, his account that these were payments to Mr Hanson by way of remuneration for investment management was inconsistent with what Mr O'Leary had said to Miss Wuenschmann-Lyall in 2015, to the effect that the payments to Ms Mercer were a non-recourse loan to Mr Hanson. In short, Mr O'Leary was simply making it up and we reject his evidence in this regard.

93 Mr O'Leary said that the absence of a dividend being declared in favour of the charitable trust and the absence of a distribution policy to charity could be explained by the fact that he was involved with Mr Hanson's UK trust which did give away monies to charity during the period in question. He said that he was chairman of that trust and distributions were usually in the sum of £200,000 a year. In our view, this argument did not assist Mr O'Leary. Indeed, it demonstrated that he had some understanding of the duties of the trustee of a charitable trust, but chose to ignore them when trustee of the Trust.

94 Throughout his years as trustee, Mr O'Leary claimed that he believed at all times that Miss Ruddick was the true settlor of the Trust. Yet he accepts that he never met her, did not know how to contact her, had not established how to contact her, nor did he ever attempt to identify what, if any, wishes she had in relation to the charitable trust that she had settled. He denied knowing that the true settlor was at all times Mr Hanson which as, indicated above, we reject. As to Mr Shelton and Anchor Trust Company Limited, reliance was placed by the Plaintiffs on the fact that Anchor ceased to be trustee of the Trust after the findings that were made against it in *Anchor Trust Company Limited v Jersey Financial Services Commission* [2005] JLR 428, when the Court upheld the decision of the regulator to, *inter alia*, revoke Anchor's licence to conduct trust and company business.

95 The findings relied upon by the Plaintiffs included specific findings relating to Mr Shelton, the Managing Director and principal shareholder of Anchor who was described as a *'dominant individual whose influence within the business appears to be largely negative from a compliance and risk management perspective'*. The inspector instructed by the Commission ascertained that there had been no due diligence or proper checks as to the source of funds in respect of various entities; that there was a ' *mindset of justification and unquestioning compliance with clients' instructions';* that any improvements made in Anchor's procedures were *'likely to be rendered ineffective by reason of Mr Shelton's influence with Anchor and his attitude towards compliance and risk management'*; and that Mr Shelton had authorised transactions despite the strong objections of his colleagues and, in doing so, rode roughshod over Anchor's due diligence procedures.

96 The Plaintiffs say that Anchor, and Mr Shelton in particular, were chosen (and Mr Shelton was surprisingly appointed as a continuing trustee in his personal capacity when Anchor was no longer able to act and remained a trustee until 2011) because Mr Hanson knew that they were the *'sort of outfit which would ask no questions about the true nature of the [Trust]'*. We were unable to make this finding; it is equally possible that Anchor was selected as trustee for the reason that they were inexpensive, as suggested by Mr O'Leary, or for other reasons.

97 As to the position of Mr Shelton, he has, as referred to above, indicated that he does not wish to participate in the proceedings and is *'neutral'* on whether the Royal Court should grant the declarations sought by the Plaintiffs. He says, in his letter to the Court, that Anchor became a trustee of the Trust in Autumn 2004, together with Mr O'Leary and Miss Bonney, and that he believed that the Trust Instrument originated from Viberts Jersey law firm. He

remembers signing the Trust Instrument and Mr Hanson, Miss Bonney and Mr O'Leary coming to Jersey for that purpose. He says that he believed that the Trust was a charitable trust.

98 Although he does not oppose the relief sought, Mr Shelton does say in his letter to the Court that he rejects any suggestion that either he or Anchor were selected as trustee in the expectation that they would be willing to engage in the role of a sham trustee or that Anchor or himself shared any *'shamming intent'* with Mr Hanson, Miss Bonney or Mr O'Leary, or that they were recklessly indifferent as to whether the Trust was a sham. He says that, at the time the Trust was established, both Anchor and he understood that Miss Ruddick had established the Trust and that it was a valid charitable trust. Plainly none of this has been tested by cross-examination and we gave such weight to this document as we thought appropriate in the circumstances.

99 As to Miss Bonney, we have already set out some of what she has said about the Trust in her witness statements made to the English High Court. She also has indicated that she does not wish to contest the making of the declaration sought by the Plaintiffs and specifically, in an agreement between the Plaintiffs and herself dated 28 November 2018, has agreed not to contest the declarations that, *inter alia*, prior to the settling of the purported Trust, all the shares in ARTL belonged beneficially to Creditforce and/or the Estate; that the Trust was not a charitable trust or its purposes were not exclusively charitable under Jersey law; and, in the alternative, that the Trust was a sham and that, in the circumstances, the trustees of the Trust held the shares in ARTL as bare nominees for Creditforce and/or the Estate.

100 However, in the covering letter dated 10 th April 2019 from Miss Bonney's solicitors indicating that Miss Bonney will not participate in the Jersey proceedings, they said that Miss Bonney *'has no knowledge as to whether the relevant Trust was a sham (although she does not accept the Plaintiffs' case that she had either a shamming intent or was derelict in her duties)'*. Miss Bonney remained a trustee until 2010, possibly later (see further below) and, after the death of Mr Hanson, all those involved in attempting to gather in the assets of the Estate spoke highly of Miss Bonney's integrity and determination to assist the independent experts involved in that process.

101 Having reviewed the evidence of the parties to the Trust, it is now necessary to consider the test that the Court must address in order to determine whether or not the Trust fails as a sham trust.

Sham: what must be proved

102 In the leading case of *Re Esteem Settlement* [2003] JLR 188, Birt, Deputy Bailiff, extensively summarised the relevant Jersey and English case law, together with academic commentaries thereon in paragraphs 41 to 58 inclusive of the judgment and held at

paragraph 59 that the parties alleging sham in that case needed to establish that the settlor and trustee of the trust (both were parties to the trust instrument which created a discretionary trust) *'intended that the assets would be held upon terms otherwise than as set out in the trust deed or, alternatively, [the trustee] went along with the [the settlor's] intention to that effect without knowing or caring what it had signed, and that both parties intended to give a false impression of the position to third parties or to the court'*.

103 Accordingly, in the case of a trust where the trustees are party to the trust instrument, they too must be parties, in the way described in *Esteem*, to the settlor's intention before the trust can be treated as a sham. In the case of a unilateral declaration of trust by a supposed settlor, the court will only be concerned with the intention of the declarant settlor. The effect of a finding of sham is that the assets are held on resulting trust for the settlor.

104 The approach of the Royal Court in *Esteem* was subsequently approved by the Jersey Court of Appeal in *MacKinnon v Regent Trust Company Limited* [2005] JCA 066. The decision in *Esteem*was also quoted with approval by the English High Court in *Shalson v Russo*, where Rimer J said at paragraph 190:

> ***"… I respectfully regard the approach adopted by the Royal Court in the Abacus case as correct.*** It is not only squarely in line with the guidance given by the Court of Appeal in Snook and Hitch, it also appears to me to be correct in principle. When a settlor creates a settlement he purports to divest himself of assets in favour of the trustee, and the trustee accepts them on the basis of the trusts of the settlement. The settlor may have an unspoken intention that the assets are in fact to be treated as his own and that the trustee will accede to his every request on demand. But unless that intention is from the outset shared by the trustee (or later becomes so shared), I fail to see how the settlement can be regarded as a sham. Once the assets are vested in the trustee, they will be held on the declared trusts, and he is entitled to regard them as so held and to ignore any demands from the settlor as to how to deal with them. I cannot understand on what basis a third party could claim, merely by reference to the unilateral intentions of the settlor, that the settlement was a sham and that the assets in fact remained the settlor's property. One might as well say that an apparently outright gift made by a donor can subsequently be held to be a sham on the basis of some unspoken intention by the donor not to part with the property in it. But if the donee accepted the gift on the footing that it was a genuine gift, the donor's undeclared intentions cannot turn an ostensibly valid disposition of his property into no disposition at all. To set that sort of case up the donee must also be shown to be a party to the alleged sham. In my judgment, in the case of a settlement executed by a settlor and a trustee, it is insufficient in considering whether or not it is a sham to look merely at the intentions of the settlor. It is essential also to look at those of the trustee."

105 Bailhache, Bailiff, in first instance decision in *MacKinnon v Regent Trust Company* [2004] JLR 477 said this in respect of this extract from the judgment of Rimer J:

> ***"22. It is true that Rimer, J. does not expressly refer to an intent to mislead or deceive. The judge does, however, "regard the approach adopted by the Royal Court in the Abacus case as correct" (ibid.). Furthermore, in my view, it is implicit from the above passages that the settlor and trustee must have a joint intention to present the declared trusts to a third party as genuine, or in other words must have intended to mislead or deceive. Applying a common sense approach to the matter, it is inherent in the establishment of a sham trust that the parties to the arrangement intend to mislead or deceive others. I do not think that Esteem was wrongly decided in this respect; in my judgment, such an intention is a necessary element of a sham trust."***

106 At paragraph 14 of the decision of the Court of Appeal in *MacKinnon*, Southwell JA said:

> *"**In** Abacus (CI) Ltd, Trustee of the Esteem Settlement: Grupo Torras SA et al v Sabah et al* (9th January 2001) Jersey Unreported [2001]JLR005 ***the Deputy Bailiff, had occasion to consider what were the necessary ingredients for a claim that trust deeds were shams, at paragraphs 42–60.*** He held that it must be shown that both settlor and trustee had a common intention that the true position should be otherwise than as set out in the trust deed which they both executed. I agree. The Deputy Bailiff went on in that passage to consider whether an intention of both settlor and trustee to mislead third parties or the Court, by giving the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create, is a necessary ingredient for such a claim. He held that this is a necessary ingredient. Again I agree."

Southwell JA went on to consider the decision of the English High Court in *Shalsom v Russo*, agreed with the decision of Rimer J, and having referred to that judgment including the extract at paragraph 104 above, said:

> ***"I agree with Rimer J.*** It is also clear from his judgment that in referring to the need for a common intention of settlor and trustee, he was including the need for an intention to give a false impression to third parties."

He also referred to the decision of Arden LJ in *Hitch v Stone* [2001] STC 214 at paragraphs 62 – 69, where she set out the principles which, were in her judgment, relevant in respect of sham transactions, including at paragraph 66:

> ***"…the test of intention is subjective.*** The parties must have intended to create different rights and obligations from those appearing from (save) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties."

107 On the facts of that case, the party alleging that the trusts in that case were shams was unable to allege the settlor held an intention to give a false impression to third parties and, accordingly, the claims in sham were properly struck out by the Bailiff in the Royal Court.

108 Accordingly, before there can be a finding of sham it is necessary for there to be proof of the settlor's intention in two separate particulars:

(1) An intention that the assets would be held upon terms otherwise than as set out in the trust; and

(2) An intention to give a false impression to third parties or to the court.

109 As to (1), the parties to the instrument other than the settlor must either share the settlor's intention, but is also sufficient for them go along with the settlor's intention without knowing or caring what they have signed at the time that the trust is created. However, as to the second aspect of the settlor's intention there needs to be evidence that all parties of the trust intended to give a false impression to third parties or the court. If *Esteem* was correctly decided, then it is not possible for the second part of the *'shamming intention'* to be committed recklessly.

110 This may give rise to an evidential difficulty for the party alleging sham in that they may be able to prove that the settlor intended that the arrangement between them and the trustee(s) was to be upon terms otherwise than set out in the trust and that, at the time of execution of the trust, the settlor intended to give a false impression as to what had been agreed to third parties or to the court. If the trustee(s) shared the settlor's first intention then it will not be difficult to prove, in most cases, that the trustee(s) also intended to mislead the third parties or the court. However, in respect of a reckless or negligently incurious trustee who executes the trust without caring about the terms of its contents, which state of mind is sufficient to prove the first aspect of the intention required, in that they have gone along with the settlor's intentions without knowing or caring about the terms of the trust, such a trustee must nonetheless be proved to have intended to have given a false impression of the position (i.e. the contents and effect of the trust) to third parties or to the court. To prove this latter element in the case of a reckless or incurious trustee may be difficult when such trustee has no proper idea of what the trust provided for.

111 In most cases this evidential problem will not arise, but we find it is of significance on the facts of this case where, unusually perhaps, there are four persons who were party to the Trust Instrument and we need to consider the state of mind of each at the moment the Trust was executed.

112 We remind ourselves that although evidence of the intention of the parties to the trust may be found by reference to conduct which postdates the execution of the Trust Instrument, a trust which is validly executed cannot become a sham trust merely because of subsequent slovenly conduct by the trustee or a state of affairs in which the wishes of the settlor dominate the actions of the trustee. Similarly, a trust that is a sham at the outset cannot be properly constituted, thereafter save perhaps (and we have not heard argument on this issue and express no concluded view) by the appointment of new trustees (see Sham

Transactions by Simpson and Stewart at paragraph 8.21, page 148).

113 In the course of argument it was contended by the Plaintiffs, that, in fact, developments in English case law ought to lead the Court to review the approach to proof of the second aspect of the requisite shamming intention. The Plaintiffs relied upon English authorities which, they argue, may result in a slightly different approach. In *A v A* [2007] EWHC 99 (Fam), Munby J considered an allegation of sham in divorce proceedings. Munby J said that it was appropriate for him *'first to survey the relevant legal landscape'*. This review included consideration of the decision of the Royal Court in the *Esteem* settlement. At paragraph 42, Munby J said:

> ***"42. It seems to me that as a matter of principle a trust which is not initially a sham cannot subsequently become a sham. The reason is that elaborated by Rimer J in the passage in*** *Shalson and others v Russo and others (Mimran and another, Part 20 claimants)* [2003] EWHC 1637 (Ch), [2005] Ch 281, ***at para [190] which I have just set out. Once a trust has been properly constituted, typically by the vesting of the trust property in the trustee(s) and by the execution of the deed setting out the trusts upon which the trust property is to be held by the trustee(s), the property cannot lose its character as trust property save in accordance with the terms of the trust itself, for example, by being paid to or applied for the benefit of a beneficiary in accordance with the terms of the trust deed. Any other application of the trust property is simply and necessarily a breach of trust; nothing less and nothing more***.
>
> ***43. A trustee who has bona fide accepted office as such cannot divest himself of his fiduciary obligations by his own improper acts. If therefore, a trustee who has entered into his responsibilities, and without having any intention of being party to a sham, subsequently purports, perhaps in agreement with the settlor, to treat the trust as a sham, the effect is not to create a sham where previously there was a valid trust. The only effect, even if the agreement is actually carried into execution, is to expose the trustee to a claim for breach of trust and, it may well be, to expose the settlor to a claim for knowing assistance in that breach of trust. Nor can it make any difference, where the trust has already been properly constituted, that a trustee may have entered into office – may indeed have been appointed a trustee in place of an honest trustee – for the very purpose and with the intention of treating the trust for the future as a sham. If, having been appointed trustee, he has the trust property under his control, he cannot be heard to dispute either the fact that it is trust property or the existence of his own fiduciary duty*** .
>
> ***……***
>
> ***45. I turn to consider the converse case. Can a trust which is initially a sham subsequently lose that character? I see no reason in principle why that should not be possible. The situation is best explained by an example.***

S has purportedly vested property in T1 as trustee of a trust which is in fact, consistently with their common intention, a sham from the outset. T1 now wishes to retire as "trustee." S, executing all the appropriate documents, purports to appoint T2 as T1's successor and to transfer the "trust property" into T2's name. Now if T2 knows that the "trust" is a sham and accepts appointment as "trustee" intending to perpetuate the sham, then nothing has changed. The "trust" was a sham whilst T1 was the "trustee" and remains a sham even though T1 has been replaced by T2. But what if T2 does not know that the "trust" was a sham, and accepts appointment believing the "trust" to be entirely genuine and intending to perform his fiduciary duties conscientiously and strictly in accordance with what he believes to be a genuine trust deed? I cannot see any reason why, in that situation, what was previously a sham should not become, even if only for the future, a genuine trust."

114 Returning to *Esteem*, Munby J said this:

"51. Singer J's judgment in Minwalla gave rise to further proceedings in the Royal Court of Jersey, where the relevant trusts were located. In *CI Law Trustees Limited and another v Minwalla and others* [2005] JRC 099, [2006] WTLR 807, ***the Bailiff pointed out at para [15] that Singer J appears not to have been referred to*** *Shalson v Russo* ***where, as the Bailiff correctly observed, the judgment of the Deputy Bailiff in*** *Re Esteem* ***had been cited and been regarded, as a matter of English law, as correct in principle. The Bailiff continued:***

"In *re Esteem Settlement*, ***this Court held that, in order for a trust deed to be a sham, both the settlor and the trustee must subjectively have a common intention that the trust deed is not to create the legal rights and obligations which it gives the appearance of creating; it is not sufficient that the settlor alone has such an intention***. *Re Esteem Settlement* ***has been followed in*** *MacKinnon v Regent Trust Company Limited* 2004 JLR 477, ***a decision which was upheld by the Jersey Court of Appeal at*** [2005] JCA 066, [2005] WTLR 1367."

52. In *Re Esteem* ***the Royal Court had in fact been referred to Wyatt. The Deputy Bailiff in*** *Re Esteem* ***explained matters as follows:***

"[58] … In our judgment the court in Wyatt was simply confirming that a party who goes along with a sham neither knowing or caring what he is signing (ie, who is reckless) is to be taken as having the necessary intention .

[59] It follows that in our judgment, in order to succeed, the plaintiffs will need to establish that, as well as Sheikh Fahad, Abacus intended that the assets would be held upon terms otherwise than as set out in the trust deed or, alternatively, went along with Sheikh Fahad's intention to that

effect without knowing or caring what it had signed, and that both parties intended to give a false impression of the position to third parties or to the court."

I agree with that analysis. What is required is a common intention, but reckless indifference will be taken to constitute the necessary intention."

115 We note that Munby J agreed with the analysis of Birt, Deputy Bailiff, in *Esteem* at paragraph 59 which we have already set out above. However, when Munby J refers to *'reckless indifference'* being *'taken to constitute the necessary intention'*, we regard such indifference as being sufficient to prove the first element of the settlor's intention, but not the second, i.e. the intention to give a false impression to third parties or to the court. However, it was submitted by the Plaintiffs that *'reckless indifference'* on the part of the trustee will be sufficient for the purposes of considering the trustee's state of mind when a party alleging sham has proved that the settlor intended to give a false impression to third parties or to the court. It was said on behalf of the Plaintiff that an *'utterly incurious trustee'* will be taken to have the settlor's intention in this regard.

116 Finally, we were referred to the decision of the Chancery Division of the High Court in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426. In paragraph 150 of the judgment of the High Court, reference was made to the analysis of Munby in *A v A*. The judge, Birss J, noted that Munby J had considered the Royal Court decision in *Esteem* and Birss J said that he agreed with Munby J's analysis and adopted it. He then went on to highlight various points which he said arose from the decision in *A v A*, which included:

"iii. For a sham there must be common intention (paragraph 52);

iv. Reckless indifference will be taken to constitute a common intention. That is the way to interpret the point made in Midland Bank about a person 'going along with' the shammer neither knowing or caring about what he or she is signing (para 49–52);…."

117 On the facts in *Pugachev* a professional trustee as director of the corporate trustee could not have been said to not know or care about what he was signing because he had drafted the trust instrument. The plaintiffs' case was that the trustee, on the facts, had no intention independent of the settlor, Mr Pugachev. In evidence, the trustee specifically denied that he intended Mr Pugachev to have complete control over the assets in the trust. The judge rejected that evidence. The judge thought that it was a significant factor that the trustee did not query the settlor's intentions. The judge said this at paragraphs 434 and 435:

"434. The claimants' case is that Mr Patterson had no intention independent of Mr Pugachev. In my judgment that is the true and fair way of looking at it. Mr Patterson is an experienced professional. For a person in Mr Patterson's position, the obvious inference from the circumstances as a whole was that Mr Pugachev's intentions were what I have found them

to be, including in particular that they were a pretence to disguise control, that Victor was part of the pretence and that control was to be maintained via the role of Protector .

435. Mr Patterson says he did not know what Mr Pugachev's intentions actually were. That may be so, but I do not accept that Mr Patterson did in fact infer that Mr Pugachev wanted to relinquish control. If Mr Patterson had wanted to find out what the settlor's actual intentions were, he could have asked, but he did not. Mr Patterson did nothing to suggest to Mr Pugachev's team that the new deed might not have the effect of leaving Mr Pugachev in ultimate control as Protector. If he had raised it then I am sure there would have been a negative reaction. If he had turned his mind to raising it, then Mr Patterson would have realised that that is what would be likely to happen. The best that can be said is that Mr Patterson prepared and signed these deeds entirely recklessly as to the settlor's true intentions. His involvement directing the trustee cannot add anything to the involvement of Mr Liechti and Ms Dozortseva, who were not independent of Mr Pugachev either."

118 The decision of the High Court in *Pugachev* is of assistance in confirming the Court's view that for the purposes of identifying the intentions of Anchor it is permissible and appropriate to consider the state of mind of Mr Shelton as he was the directing mind and will of the relevant trust company, as well as the key representative of the trust company when it came to this particular trusteeship (see paragraphs 154 and 426 of the judgment of Birss J). At paragraph 154, Birss J said:

> ***"Therefore to ascertain the intention of those trustees one needs to consider the principles for the attribution of intention to companies… The intention may or may not be that of the de jure directors.*** The intention is that of a natural person or persons who manage and control the relevant actions of the company, in other words the directing mind(s) in respect of the relevant act or admission…. Who those persons are in a given case will be a question of fact."

119 The decision of the High Court in *Pugachev* has been considered in various commentaries and the Court had regard to the article by Brightwell and Richardson (2018) 24 Trusts and Trustees 398, 403–404. Brightwell and Richardson made the following observations in relation to the judge's findings in respect of the allegation of sham:

> ***"The judge focused on Mr Patterson, the private-client lawyer who set the trusts up and was involved in their administration.*** While Birss J came close to rejecting Mr Patterson's evidence that he did not regard Mr Pugachev as the absolute owner of the assets, the judge did not find him to be dishonest. Instead Birss J concluded that Mr Patterson simply 'had no intention independent of Mr Pugachev' and that, at best, 'Mr Patterson prepared and signed these deeds entirely recklessly as to the settlor's true intentions'. Yet the judge was also

clear that the facts differed from a case like *Midland Bank v Wyatt*, ***where the trustee gave no thought to the contents of the trust: clearly, Mr Patterson must have known what he was signing, because it was he who prepared the documents.*** Indeed, Birss J reviewed the advice given by Mr Patterson to Mr Pugachev's subordinates on the draft terms of the trust deed and on the extent to which the terms could be amended later by the trustees (with the protector's consent) pursuant to the power of amendment. This rather seems to suggest not only that Mr Patterson was aware of Mr Pugachev's intentions when he settled the trust but also (assuming they intended the power of amendment to operate as it appears on its face to do) that Mr Patterson quite deliberately intended to create a trust that was subject to change. This does not support a finding that Mr Patterson lacked an independent intention regarding the trusts' effect. While it has been held that reckless indifference on the part of one party can be sufficient for a finding of a common intention to create a sham, in that the trustee goes along with the settlor's intention without knowing or caring what it signed, it is also clear that ***the parties must also have dishonestly intended to mislead third parties in some way.”***

120 It is difficult to see how Mr Patterson, the representative of the trustee, could have been found to be indifferent to the contents of the trust when he spent so much time advising upon it.

121 In their conclusion the authors say:

> ***“Birss J did not claim to be making new law but to be applying principles concerning sham trusts which are now clearly established.*** We would suggest that it is desirable that the law of sham and the principles concerning the construction of trusts remain homogenous in different common-law jurisdictions.”

Although Jersey is not a common law jurisdiction, a uniform approach to the invalidity of a trust on the grounds of sham is a desirable one.

122 Notwithstanding the submissions made to us by the Plaintiffs and the suggestions as to a possible refinement of what needs to be proved by parties contending that a trust that is a sham following the decisions in *A v A* and *Pugachev*, in our view the approach in Jersey still is, and indeed ought to be, that set out in paragraph 59 of *Esteem*, as endorsed by the Court of Appeal in *MacKinnon* which is binding upon us. It is, in our view, difficult to infer an intention to mislead third parties from mere indifference to the terms of a trust instrument. It is necessary for such an intention to be subsequently proved. Further, as Bailhache, Bailiff, said at first instance in *MacKinnon* at paragraph 46 of his judgment:

> ***“Third parties and beneficiaries, dealing with trustees, are entitled to rely upon the sanctity and validity of a trust instrument, subject of course to any established vitiating cause of action.*** Legal certainty is important in this field as in many others.”

Sham: application of the test in this case

123 It is now necessary to apply these principles to the facts as we have already found them to be in this case. In respect of the true settlor, Mr Hanson and Mr O'Leary, we have no doubt that the Trust was set up to shelter assets which Mr Hanson regarded as his from the incidence of UK taxation. The reference to the £20,000 available to be distributed to charity when the Trust was set up as being an *'expense'* of the Trust is illuminating. Neither Mr Hanson nor Mr O'Leary ever intended for this Trust to be a genuine charitable trust and, at the time of its creation, they also shared a common intention to mislead HMRC as to the nature of the transaction they had entered into.

124 The position of Mr Shelton and Miss Bonney is different. In view of the general criticisms of Mr Shelton that were made by the Court in the judgment to which we have already referred, the fact that he was already familiar with Mr Hanson and his methods and consequently would have had no doubt known that Mr Hanson regarded himself as the owner of ARTL (which was already administered by Anchor) he would have known that Miss Ruddick was in no way truly connected to the Trust nor was she its settlor, we find that he was recklessly indifferent to the terms of the Trust, notwithstanding the fact that he instructed Viberts to prepare a purportedly charitable trust.

125 As to Miss Bonney, we have already summarised the evidence in relation to her execution of the Trust. She simply did what Mr Hanson asked her and there is no suggestion that she read the Trust nor properly attempted to understand it. She was a qualified accountant and ought to have understood the transaction that she was entering and the obligations of a Trustee. She, too, was recklessly indifferent to the terms of the Trust.

126 We heard other evidence about Miss Bonney's general character to which we have alluded in general terms but not summarised.

127 Miss Wuenschmann-Lyall gave evidence about her attempts to find out about ARTL and the Trust between the time that she was instructed by the then executors of the Estate in late 2004 until the end of her involvement in approximately June 2015.

128 In evidence, she drew a contrast between the obstructive approach of Mr O'Leary and Mr Fox on the one hand, and the assistance she derived from Mr Torkington, Mr Wall and especially Miss Bonney on the other. She described Miss Bonney as *'very, very helpful'*. When Miss Bonney was told of Mr O'Leary's attitude, her reaction was described by Miss Wuenschmann-Lyall as follows:

> ***"I think she was quite shocked by the non-disclosure and by potentially also her exposure.*** Very concerned about it. And she was actually very helpful.

She dug through her old papers, she gave all the information she had relating to ART and the [Trust]. And she was – she was actually incredibly helpful."

129 Miss Wuenschmann-Lyall went on to say that Miss Bonney came across as being a very honest person and, when she was asked whether or not she was someone who would deliberately mislead a third party, she said *'I don't think so'*. Miss Wuenschmann-Lyall went on to say that Miss Bonney had had a close relationship with Mr Hanson. Miss Wuenschmann-Lyall said:

> ***"She sort of viewed him as a paternal figure, and that she completely trusted him, and that she was shocked that she was misled by him as much she did, because, again, she'd – I think she prepared the accounts for ART and she, again, very much like Mr Pitchford, she was given information by Mr Hanson and she acted upon information given, which of course was only the information Mr Hanson wanted to give her."***

130 Miss Bonney was described by Miss Wuenschmann-Lyall as being 'shocked' at the 2014 transactions when they were discovered by Miss Bonney in 2015. In an email to Miss Wuenschmann-Lyall at the time, said *'I sincerely hope that I have got all of this completely wrong'*.

131 Mr Wall knew Miss Bonney for years and he also spoke to her advantage when he gave evidence. Mr Wall said *'You couldn't ask for a more honest and honourable accountant…. She is a totally honourable and trustworthy person…. She was – she is a lady of the highest integrity…. She had the utmost respect for Mr Hanson and she spoke of him in glowing terms'*. He concluded his description of Miss Bonney by saying *'I would find it inconceivable that she would do anything knowingly dishonest'*.

132 In the circumstances and notwithstanding the fact that both Miss Bonney and Mr Shelton were confidantes of Mr Hanson and both appear to have either known or been indifferent to Miss Ruddick's status as the purported settlor, there is not sufficient evidence to find that they intended to give a false impression to third parties or the Court as to the nature of the Trust. Accordingly, the Plaintiffs' claim in sham fails.

133 If, as contended by the Plaintiffs, it is sufficient for Miss Bonney and Mr Shelton to have been recklessly indifferent to the intentions of the settlor as to the misleading of third parties then, having regard to our finding that they both went along with Mr Hanson's intentions in respect of the contents of the Trust without knowing or caring what they signed, i.e. they were recklessly indifferent to his intentions without sharing them, then we would have held that the claim in sham succeeded.

134 In view of our conclusions on the claim that the Trust is a sham, we do not deal here with Mr O'Leary's defences of illegality, laches and acquiescence, which we consider toward the end of this judgment.

The invalidity of the Trust owing to its terms

135 It is argued that the Trust is formally invalid as it is a trust for purposes some of which may not be charitable under the law of Jersey.

136 The argument arises principally from the definition of *'charitable purposes'* within the Trust, which is defined as *'any purpose which is charitable under either the law of Jersey or under the law of the jurisdiction where such purpose is being or is to be carried out'* (our emphasis). It is said that the effect of the emphasised wording is that the assets of the Trust could be applied for purposes which are charitable under the law of another jurisdiction, but not charitable under Jersey law.

137 It is only permissible for a trust to be set up for non-charitable purposes where an enforcer has been appointed to enforce the purposes which are not charitable. There is no enforcer in this case.

138 If this argument succeeds then the assets of the Trust, i.e. the shares of ARTL, were held at all times by the trustees as bare trustee for the settlor, i.e. Mr Hanson and Creditforce.

139 As Mr O'Leary was unrepresented, we convened the Attorney General to assist the Court during the trial, both in his capacity as guardian of the charitable interest and as guardian of the general public interest as *partie publique*. We are grateful to him for the submissions that he advanced at short notice.

140 It is appropriate to review the relevant terms of the Trust before considering the case law and statutory provisions that were drawn to our attention.

141 In many respects, the terms of the Trust are the standard terms that one would expect to see in a trust created for charitable purposes. The definition of *'charity'* is unexceptional, namely *'Any trust foundation, association, company or other body (incorporated or unincorporated) established exclusively for purposes recognised to be charitable'*.

142 Clause 4 deals with the Trust's of income and capital and says:

> ***"The Trustees shall stand possessed of the Trust Fund and the income thereof upon the trusts following, that is to say:***
>
> ***(a) Upon trust at their discretion to pay or apply the whole or such part of the income and capital of the Trust Fund as the Trustees may in their absolute discretion think fit to such charity or charities and/or to pay or apply the same to or for such one or more charitable purpose in such***

shares and proportions if more than one and generally in such manner as the Trustees shall in their absolute discretion think fit."

143 The Trust is established under the laws of Jersey. Clause 5 of the Trust deals with the power to transfer property to another charitable trust and says:

"Notwithstanding the trusts and provisions hereinbefore declared and contained the Trustees may at any time or times if in their absolute discretion they shall so think fit pay or transfer the whole or any part or parts of the capital or income of the Trust Fund to the trustees for the time being of any other trust wheresoever established or existing and whether governed by the law of the Island of Jersey or by the law of any other state or territory provided that such other trust shall be established for wholly charitable purposes or otherwise for the benefit of a charity or charities."

144 The Plaintiffs' argued that the terms of clause 5 gave rise to a separate invalidity argument that they were entitled to pursue in this case, to which we will return.

145 Clause 11 contains an anti-Bartlett provision entitled *'Overseeing Management of Companies':*

"Where the Trustees hold an interest in any entity or association incorporated or unincorporated in any part of the world which interest being held for the purpose of investment or for the purpose of carrying on trade the Trustees shall act in such a manner as they shall see fit in their absolute discretion and notwithstanding any rule of law, equity or otherwise to the contrary the Trustees shall not be bound to concern themselves in any way whatsoever in the management or conduct of the investment or business of any such entity or association as aforesaid unless and until the Trustees shall have notice of any act of dishonesty or misfeasance on the part of any of the managers or persons in control of any such entity or association as aforesaid and the Trustees shall be at liberty to leave the conduct of its business (including the payment or non-payment of dividends) wholly to such directors without requiring to be supplied with any information concerning the Company or its affairs beyond that to which every shareholder would be entitled."

146 Clause 27 deals with the power to vary:

"The Trustees shall have power by instrument signed by or on behalf of the Trustees to vary or amend any of the provisions, trusts and powers of this Settlement provided that no variation or amendment shall be valid to the extent that the Settlement would cease to have only charitable objects."

147 The Trust was irrevocable, so on its face the settlor had demonstrated an irrevocable intention to settle the Trust for charitable purposes.

148 As stated, the Plaintiffs' submission is that the assets of the Trust may only be applied for *'charitable purposes'* which may include, owing to the definition of charitable purposes, putting the fund to the use of objects which are not charitable under Jersey law.

149 There is no definition of *'charity'* or 'charitable' in the Trusts (Jersey) Law 1984 ("the Law"). Our attention was drawn to *Meaker v Picot* [1972] JJ 2161, where the Royal Court considered a purportedly charitable Will trust containing the following provision, namely:

> ***"To pay the remaining 9/10ths of my Residuary Trust Funds both as to Capital and Income for the benefit of such Charitable Institutions and / or Associations, including religious institutions, and educational establishments in Jersey and the United Kingdom and shall be designated by my Trustees in their sole and absolute discretion, my Trustees to have full powers to distribute such 9/10ths share of my Residuary Trust Fund within a period of ten years from my death."***

150 It was argued that the trust failed because the objects of the clause in question were not necessarily charitable. This arose principally because of the comma after the term *'religious institutions'* which, because of its placing, envisaged payments being made to educational establishments which were not necessarily charitable. The court said:

> ***"The issue before the Court is whether the objects of clause 7ii are exclusively charitable under the Law of Jersey so as to bring the trust within the description of a charitable trust.*** If they are, the rest does not fail for uncertainty; if they are not, then it does so fail."

151 It was recognised as being a fundamental principle of the laws of both England and Jersey that the testator must dispose of his property and cannot leave a disposal of his estate to others. Accordingly, a gift to trustees upon trust to dispose of the same as they think fit it is too uncertain to be carried out and is therefore void. Where the testator designates with sufficient precision a class of persons or objects to be benefitted, then he may delegate to his trustees a selection of individual persons or objects within the defined class. But the Court said:

> ***"In particular, a gift to trustees to be applied by them to such charitable purposes as they may select will not fail for uncertainty…"***

152 The Court went on to review relevant English and Jersey case law and, importantly, so far as the law of Jersey is concerned, Basnage and an unreported decision of the Royal Court from 1955 – *Barclays Bank Limited v Fraser*. The Court noted that under the laws of England and Jersey in order to bring a testamentary class within the ambit of a charitable

trust, it must be shown that there was a clear intention on the part of the testator to devote the whole of a property to charitable purposes. The Court quoted the judgment of Lord Denning MR from *Barclays Bank v Mercantile Bank Limited* [1962] 1 WLR 763 at 765:

> ***"The question is this: would the trustees be at liberty under the words of that gift to apply the funds to a purpose or an object which is not charitable?*** If they were bound to apply it to a charitable purpose or object, then the gift is good."

153 It was agreed that under the laws of both England and Jersey, the existence or non-existence of a general charitable intention is a matter of construction in the words of the gift:

> ***"The established rule is that no gift is to be deemed charitable unless the testator has in express terms, or by necessary implication, signified a clear intention to devote the property to charitable purposes."***

154 The Royal Court determined that, to be a charitable purpose under Jersey law, the charity must be:

> (1) For a purpose enforceable by the court;
>
> (2) Within the express terms or the 'spirit and intendment' of the Charitable Uses Act 1601, *'for a purpose falling within the so-called four divisions of charity derived from the Statute of Elizabeth'*; and
>
> (3) For the public benefit.

155 At page 2177, the Court said:

> ***"As we have already indicated, in order to hold the gift in the sub-clause valid, the Court must be satisfied of two things*** .
>
> ***First, there must be a clear charitable intention.*** As Halsbury states at para.562 (at 267)—
>
> ***"The established rule is that no gift is to be deemed charitable unless the testator has in express terms, or by necessary implication, signified a clear intention to devote the property to charitable purposes."***
>
> ***Secondly, to constitute a good charitable trust the application of the funds for charitable purposes must be obligatory.*** This rule has particular relevance where the gift is, or appears to be, for alternative or subsidiary or cumulative purposes .
>
> ***As Halsbury states at para.563 (at 269–271)—***

> ***"If the trustees are allowed an alternative as to whether the purposes to which they apply the subject-matter of a gift are to be charitable or something else, the trust cannot be maintained.*** So gifts for 'charitable or other purposes', 'Charitable or public purposes', 'Charitable or benevolent purposes', or gifts expressed in other alternative terms admitting non-charitable objects are not charitable, for they may be executed without any part of the property being applied to charitable purposes. The fact that the trustees have actually decided in favour of a charitable purpose does not make the gift good; for the question must be decided as at the date of the death of the testator. In cases of this description, where no clear intention appears to devote some portion of the property to charity, there can be no apportionment."
>
> ***It was not disputed that if in the sub-clause the six words—***
>
> ***"including Religious Institutions and Educational Establishments"***
>
> ***had been omitted, the gift—***
>
> ***"for the benefit of such Charitable Institutions and/or Associations … in Jersey and the United Kingdom as shall be designated by my Trustees in their sole and absolute discretion …"***
>
> ***would have constituted a valid charitable trust, because by the use of the word "charitable" the testator would have shown in express terms a clear intention to devote the remaining nine-tenths of his Residuary Trust Fund to charitable purposes.*** What then is the effect of the inclusion of the six words?"

156 The Royal Court then went on to consider the references to 'religious institutions' and 'educational establishments' and held that both were capable of being charitable objects. The court concluded at page 2195:

> ***"We are in no doubt, therefore, that "Religious Institutions" was intended to be embraced by the phrase "Charitable Institutions and/or Associations", and therefore to mean such "Religious Institutions" as were also charitable*** .
>
> ***If the "comma" after "Religious Institutions" had been omitted or placed instead after "Educational Establishments", we would have had no hesitation, again applying the rules of grammatical construction, in deciding that the word "including" embraced not only "Religious Institutions", but also "Educational Establishments".*** However, the comma is there and cannot be ignored. What then is the result?"

157 The Court concluded at page 2197:

> ***"Not without reluctance, we have come to the conclusion that we must***

adopt a disjunctive construction in this case, and treat "Educational Establishments" as a separate class of object. The main reason for our decision lies in the insertion of a comma after "Religious Institutions", combined with the absence of a comma after "Educational Establishments" .

If the wording of the sub-clause had been—

"to such Charitable Institutions and/or Associations and Educational Establishments …"

we might have felt able to adopt a conjunctive construction, with the result that only those educational establishments which were also charitable would have been entitled to benefit. On the other hand, we would have to consider whether there was not a significant difference between those cases already mentioned, such as a gift for "charitable and deserving objects", where there were two adjectives but only one norm, and the case of the *Att.* Gen. v. Natl. Provncl. & Union Bank of England ***(already cited, in which the gift was "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects"), where there was a noun inserted after each adjective.*** We think it could be argued that the insertion of a separate noun envisages a separate class of objects. For example, it would probably have been easy to find an exclusively charitable intention if the sub-clause had been worded—

"for the benefit of such Charitable, including Religious, and Educational Institutions and/or Associations and/or Establishments …" .

However, that may be, we find that by inserting a comma after "Religious Institutions" and by not at the same time inserting a comma after "Educational Establishments", the testator has effectively excluded the latter object from within the umbrella of "Charitable Institutions".

158 On page 2199, the Royal Court observed:

"We accept that it is not enough to say that because an object is capable of being non-charitable, a gift to such an object cannot be the subject of a charitable trust. The question is whether the word or words used to describe such an object bear in the will in question the wider meaning of both charitable and non-charitable, or the narrower meaning of charitable only. In some cases, it may be possible, by considering the special circumstances which surrounded the testator when he made his will, to adopt the narrower meaning. Such a case was *In re Smith* ***(already cited), where, because of the special circumstances surrounding the testator at the time he made his will, it was found possible to give "hospitals" the meaning of "voluntary hospitals", which were clearly charitable institutions*** .

In this case we can find no such special circumstances. It is, of course, true that, as we have already observed, it is difficult to believe that the testator meant

his gift to educational establishments to include non-charitable institutions, when he so clearly did not so intend that as regards religious institutions. But this can only be conjecture, and conjecture cannot entitle us to negative what seems to us to be the true construction of the language actually used."

159 Accordingly, the Royal Court concluded that the bequest did not create a valid charitable trust and was therefore void for uncertainty, and clause 7ii of the Will was cancelled and annulled.

160 The Attorney General drew to our attention Article 11 of the Law which has the effect of altering the perhaps rather drastic effect of the decision in *Meaker v Picot* or at least, doing so in appropriate cases. Article 11 provides:

> ***"11. Validity of a Jersey trust***
>
> ***(1) Subject to paragraphs (2) and (3), a trust shall be valid and enforceable in accordance with its terms*** .
>
> ***(2) Subject to Article 12, a trust shall be invalid –***
>
> ***(a) to the extent that –***
>
> ***(i) it purports to do anything the doing of which is contrary to the law of Jersey*** ,
>
> ***(ii) it purports to confer any right or power or impose any obligation the exercise or carrying out of which is contrary to the law of Jersey*** ,
>
> ***(iii) it purports to apply directly to immovable property situated in Jersey, or***
>
> ***(iv) it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose;***
>
> ***(b) to the extent that the court declares that –***
>
> ***(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty*** ,
>
> ***(ii) the trust is immoral or contrary to public policy, or***
>
> ***(iii) the terms of the trust are so uncertain***

that its performance is rendered impossible.[25]

(3) Where a trust is created for 2 or more purposes of which some are lawful and others are unlawful –

(a) if those purposes cannot be separated the trust shall be invalid;

(b) where those purposes can be separated the court may declare that the trust is valid as to the purposes which are lawful .

(4) Where a trust is partially invalid the court may declare what property is trust property, and what property is not trust property .

(5) Where paragraph (2)(a)(iii) applies, any person in whom the title to such immovable property is vested shall not be, and shall not be deemed to be, a trustee of such immovable property .

(6) Property as to which a trust is wholly or partially invalid shall, subject to paragraph (5) and subject to any order of the court, be held by the trustee in trust for the settlor absolutely or if the settlor is dead for his or her personal representative .

(7) In paragraph (6) "settlor" means the particular person who provided the property as to which the trust is wholly or partially invalid .

(8) An application to the court under this Article may be made by any person referred to in Article 51(3)."

161 The starting point is that (Article 11(1) — subject to paragraphs 2 and 3 of Article 11) a trust will be valid and enforceable in accordance with its terms.

162 Specifically, under Article 11(2)(a)(iv), a trust shall be invalid to the extent that *'It is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose'*. Accordingly, a trust for the purposes of charity must be exclusively charitable if there are no beneficiaries.

163 However, there is a *'saving'* provision created in Article 11(3). If the purposes can be *'separated'* the court may declare that the trust is valid as to the purposes which are lawful.

164 In this case (although the Plaintiffs' argue to the contrary), the valid and invalid purposes

are clearly severable and can be separated. The Attorney General agreed with the Plaintiffs that a purpose which is charitable under the law of another jurisdiction, where the purpose is to be carried out, may not be a valid charitable purpose under Jersey law. It was agreed that the Court, when exercising its discretion under Article 11(3), might determine that certain assets of the Trust (pursuant to Article 11(4)) would remain Trust property and the balance would revert to the settlor or, if they are dead, to their personal representative under Article 11(6). We proceeded on the footing that the Attorney General had made an application (as he is entitled to do) under Article 11(8) for a declaration that the Trust was valid as to its purposes which are lawful. Neither the Attorney General nor counsel for the Plaintiffs was able to identify any case law indicating that the Court had given consideration to its powers under Article 11(3) hitherto. Counsel for the Plaintiffs gave various examples as to matters that might be charitable under foreign law but not (assuming the concept of charity was recognised in that jurisdiction) charitable under Jersey law. One example given was the upkeep or maintenance of the defence of the realm may be a charitable purpose, but it was said that it would not be charitable as a matter of Jersey law for the assets of the Trust to be expended on the upkeep of a foreign army.

165 We do not set out the Plaintiffs' argument that the Trust is separately invalid owing to the terms of clause 5. We do not accept the argument that the construction that the Plaintiffs' advocate placed on clause 5 created any difficulty in terms of the validity of the Trust that was separate or additional to that arising from the definition of *'charitable purposes'*. In any event, any such difficulty would, as counsel for the Plaintiffs accepted, be potentially curable by the Court exercising its powers under Article 11(3).

166 We took the view that when exercising its discretion under Article 11(3) of the Law to *'save'* a potentially charitable trust, the Court would usually wish to do so if, as we envisage in most cases, there was evidence of a genuine charitable intention when the trust was settled. In such cases, the Court would wish to do its utmost to ensure that the assets in question were devoted to charitable purposes. Further, even the absence of evidence of such genuine intention on the part of the settlor, if there was evidence that the trust had been used for such purposes to the benefit of charitable causes, then the Court would wish to exercise its powers so as to ensure that such purposes could continue to be supported.

167 However, in this case there was evidence of neither of these things. Indeed, far from there being an intention to benefit charity, Mr Hanson regarded this property as part of his own Estate and wanted the Trust, which was a vehicle to conceal his wealth from HMRC, to be wound up on his death. Further, if the Trust was to be reconstituted, its only property now would be an action against Mr O'Leary and others in respect of misappropriation of its assets. It would probably be for the Attorney General to pursue such a claim at public expense. Finally, owing to the terms of Mr Hanson's Will, if the Plaintiffs are successful in their claims and the Trust is not rescued or saved by the Court, then all and any such recoveries will benefit the Don Hanson Charitable Foundation which is a genuine UK based charity, as the foundation is the residuary beneficiary of the Estate. We were told the net value of the Estate, including any sums recovered in these proceedings, will (whether such sums are secured by the Estate or Creditforce, which is 100% owned by the Estate),

go to the Foundation.

168 Accordingly, we were in no doubt that it was not appropriate in the exercise of our discretion to declare that the Trust is valid as to its purposes which are lawful. Accordingly, the Trust fails.

The effect of our decision as to the invalidity of the Trust

169 The effect of that decision is that the trustees, and from 2011 to 2014 when the Trust was terminated, that meant Mr O'Leary alone, held the assets of the Trust on bare trust for Mr Hanson (now the Estate of Mr Hanson) and Creditforce.

170 In those circumstances, it is necessary for the Court to determine the duties of Mr O'Leary as bare trustee.

171 Lewin (20th edition at 1–028) says that:

> ***"A bare trustee holds property in trust for a single beneficiary absolutely and indefeasibly, and is a mere passive repository for the beneficial owner, having no duties other than duty to transfer the property to the beneficial owner or as he directs."***

172 A contrast is drawn with a trustee holding property on special trusts that has active duties to perform. However, Lewin goes on to say:

> ***"On closer examination, however, a distinction cannot satisfactorily be drawn between bare and special trusts on the basis that a person holding property on trust for another absolutely and indefeasibly is always a mere passive repository for the beneficial owner while a trustee holding property on special act has active duties to perform.*** The description of a bare trustee as a mere passive repository for the beneficial owner with no active duties to perform other than a duty of transfer requires at least some qualification in its application to cases where a beneficiary has an absolute and indefeasible interest."

173 In this case the trustee in question, Mr O'Leary for these purposes, was not, on his account or indeed on any view, under the impression that he held the Trust as bare trustee for Mr Hanson for approximately ten years, let alone in those circumstances under a duty merely to transfer the property to Mr Hanson when required.

174 He claimed that he was a trustee of a bona fide charitable trust with various duties imposed upon him although, on any view, he had an incomplete understanding of those

duties.

175 The Plaintiffs' contend that the bare trustee owes all the duties set out in Article 21 of the Law. These include duties to:

(i) act with due diligence, as would a prudent person, to the best of their ability and skill;

(ii) observe the utmost good faith;

(iii) so far as is reasonable, preserve and enhance the value of the trust property;

(iv) except as approved by the Court, not to profit or cause others to profit from their trusteeship; and

(v) keep accurate accounts and records of their trusteeship.

176 The Plaintiffs say that not only did Mr O'Leary owe these duties, but he breached all of them. Further, in breaching those duties by in particular converting the Trust property to his own use, the claims against him are imprescriptible pursuant to Article 57 of the Law. We will return to this particular matter at the end of the judgment when we consider Mr O'Leary's pleaded defences.

177 In our view, the duties of the bare trustee will depend upon the nature of the relationship between trustee and beneficiary. In most circumstances, the duty of the bare trustee will be one of nomineeship with the duties being limited to comply with any directions given; retain the property and return it when directed, in our view, act in good faith.

178 However in circumstances where Mr O'Leary acted, or purported to act, as a trustee for ten years and held the property on a trust which meets the test set out in Article 2 of the Law in that he held the property, namely the shares in ARTL, for the benefit of Mr Hanson and Creditforce for the purpose of preserving those assets for, *inter alia*, the benefit of such persons, then it is appropriate to hold that Mr O'Leary did owe the Article 21 duties to Mr Hanson and Creditforce.

The deterioration in Mr Hanson's health in 2013 and 2014

179 That Mr Hanson's health deteriorated before his death is not in doubt. However, the extent of his decline and its implication for his business and those who advised him is the subject of dispute.

180 The contemporaneous documentation provides no assistance. We heard evidence on the issue from Mr Wall and Mr O'Leary.

181 Both men knew Mr Hanson exceptionally well. Both were amongst the five individuals, of whom four survive, (Mr Torkington is now dead) who comprised the Neatly Board. They were the only members of the Neatly Board who gave evidence. The witness statements from Miss Bonney are silent on the decline in Mr Hanson's health and there was no evidence on the matter before us from Mr Fox, or at least none in the electronic disclosure that was drawn to our attention.

182 Mr Wall says that for almost a year prior Mr Hanson's death in October 2014, he was ' *in a serious state of mental and physical decline*'. Mr Hanson spent the last four Christmases of his life with Mr Wall and his family at their home. In November 2012, Mr Hanson had a bad fall outside Mr Wall's house which left him shaken and confused. At Christmas 2012, when he was staying with the Wall family, Mr Hanson walked into the wrong bedroom and spent the night in the wrong bed. Mr Wall had to organise a driver to take him back to London as Mr Hanson felt unable to return by train. By the following Christmas, 2013, Mr Wall says that Mr Hanson's mental health *'deteriorated quite rapidly'*. He began to forget to turn up at board meetings and, on one occasion in March 2014, forgot to turn up for a flight. However he was, it seems, attempting to carry on doing business and Mr O'Leary said that at one point in 2014 he even went on a business trip to Mongolia.

183 The cause of the decline, a brain tumour, was subsequently revealed by a diagnosis on 4 July 2014. Mr Wall was with Mr Hanson when Mr Hanson received the diagnosis. This was followed by a *'period of rapid decline'* in Mr Hanson's health which was very sad to witness according to Mr Wall. Mr Hanson became increasingly unable to look after himself. Mr Wall spent a lot of time caring for Mr Hanson and, in mid-July, he was admitted to the Cromwell Hospital in London. During this time, he attended a Neatly Board telephone conference and was *'rambling'* and *'completely incoherent'* on the call. By the middle of August 2014, he was *'approaching complete incapacity'*. Mr Wall and others said that members of the board should activate the Enduring Power of Attorney which Mr Hanson had granted to the members of the board in 2005. Mr O'Leary dissented from this proposal. Mr O'Leary said that when he saw Mr Hanson he was *'on good form and able to express himself clearly'*. Mr Wall said this was entirely untrue.

184 A few days before Mr Hanson died, by which time he had lost all ability to communicate, at a Neatly Board meeting Mr Wall again tried to impress on his fellow board members the need to activate the Enduring Power of Attorney. Mr O'Leary responded that he had seen Mr Hanson in hospital only that morning and that he had given Mr Hanson instructions for a new Will. According to Mr Wall, Mr O'Leary's account was entirely untrue – at the time, Mr Hanson was sedated, on oxygen, and could barely open his eyes.

185 It was only later that Mr Wall learnt that the real reason that Mr O'Leary felt that there was no need to activate the Enduring Power of Attorney is that Mr O'Leary already possessed a Lasting Power of Attorney executed years previously by Mr Hanson which gave him complete power over Mr Hanson and his assets, without the need for reference to Mr

Hanson or the Neatly Board.

186 In July or August 2014, when Mr Wall was with Mr Hanson in his home in Grosvenor Square in London, he had a conversation with Mr Hanson at a time when the latter was ' *significantly diminished mentally and physically'* but was lucid. Mr Hanson was distressed. Mr O'Leary and Mr Fox were in the room next door but could not hear Mr Wall and Mr Hanson. In evidence, Mr Wall said that the conversation took place on the last night that Mr Hanson was in his flat. Mr Hanson asked Mr Wall to come into the room. Mr Wall said Mr Hanson was *'very weak and feeble at this time'* and just after Mr O'Leary left the room he said *'You spend a lifetime building up a career and you see it all going and wittering away in your last days, but there's nothing I can do about it'*. Mr Wall attributed this comment to Mr Hanson's concerns about the activities of Mr O'Leary and, it appears, Mr Fox. Towards the end of his evidence Mr Wall said:

> *"I trusted Mr O'Leary.* I'd trusted each one on the board. I still trust Steve Torkington, deceased, right to the end, and Joyce Bonney now. I don't Fox, I don't O'Leary. I think they played a game and they played a game with our – wrongly – and they played a game against Don's wishes and for their own gain."

187 Mr O'Leary gives a different account. He said that Mr Hanson was putting his business and personal affairs in order in the months leading up to his death. Mr O'Leary said that Mr Hanson was still busy working until the time of his diagnosis in July 2014. He accepted that he was very ill and in hospital in the last few weeks of his life.

188 Bearing in mind Mr O'Leary's evidence that he saw Mr Hanson every day he must, in our view, have noticed a deterioration in his health.

189 We regarded Mr Wall to be a credible witness. He came across as bitter that Mr Hanson had been so badly let down by Mr O'Leary and Mr Fox. We accepted his evidence on this issue and preferred his evidence to Mr O'Leary's as to the decline in Mr Hanson's health.

Mr O'Leary's decision to transfer the Trust and its assets from Jersey in 2013

190 It was Mr O'Leary's evidence that at all material times he thought he was managing, as trustee, a charitable trust on behalf of Miss Ruddick, the settlor. However, in 2014 he transferred, as the sole remaining Trustee of the Trust, the shares in ARTL to a Panamanian Foundation.

191 Mr O'Leary said there were three reasons that he wanted to terminate the trusteeship. First, the poor conduct of the then administrators, Herald Trust. Secondly, his wish to retire as trustee of the Trust. In evidence, Mr O'Leary said he also wanted to retire from working generally. Thirdly, the concerns he had about his personal tax position. In respect of Herald, and its associated company Herald Management Services Limited, they provided

professional services to ARTL and the Trust from about 2005 onwards. Mr O'Leary said in his 2015 witness statement prepared for the English High Court that following the resignation of Miss Bonney and Mr Shelton from their trusteeships in 2010 and 2011 respectively, he became increasingly concerned about the adequacy of the services provided to the Trust and ARTL by the two Herald companies. In particular, he was concerned at Herald's failure to arrange for a Jersey based trustee to be appointed as co-trustee. Although Mr O'Leary was well placed to obtain discovery of the correspondence between himself and Herald, even though some of it may have, as he said, taken place on the Hottinger email account to which he no longer has access, he failed to do so. It would not, in our view, have been difficult for him to obtain that correspondence for the purpose of this significant trial in his capacity as a trustee of the Trust and former director of ARTL. Nonetheless, we accepted his evidence, notwithstanding the challenge made by the Plaintiffs, that he was dissatisfied with the performance of Herald for various legitimate, so far as he was concerned, reasons.

192 As to his suggestion that he was looking to *'retire in a couple of years'* as recorded in his 2015 witness statement and repeated in evidence, we were not convinced by Mr O'Leary's account. On his account, running the Trust and ARTL took very little of his time and, particularly with Mr Hanson in physical and mental decline, Mr O'Leary was the only person who knew the background to the Trust and its genesis. He was not considering retiring from his other roles at the time and was disappointed when he was removed as a director of Creditforce (a much more demanding role) in 2018 and as a trustee of the Don Hanson Charitable Fund at about the same time. Both removals were at the behest of the Joint Administrators.

193 We were also unconvinced by his account that he felt the need to retire owing to concerns about his tax position. In his pleaded Answer and in his evidence, Mr O'Leary said that he was disappointed that Herald had failed to obtain tax advice about his status as a UK resident and sole trustee of the Trust. We found this suggestion surprising as Mr O'Leary would have had, as he accepted, ready access to UK tax advice from a UK based tax adviser had he wanted it and he would have known that he would not necessarily be able to secure such advice from a Jersey regulated trust and company business which was not holding itself out as providing such advice. Indeed, when pressed on this issue, Mr O'Leary accepted that he was not suggesting that Herald should have either given or obtained UK tax advice in relation to his personal position and that it was for him to obtain his own UK tax advice. In fact, ultimately such advice was only obtained a long time after Mr O'Leary purported to become concerned about the need for it (in 2012). Mr O'Leary said that he decided to discuss his concerns with a Mr Terry Moore, a director of Jeeves Group, a Liechtenstein fiduciary and corporate services provider.

194 Ultimately, he took tax advice from a Mr Bunker of Berwin, Leighton, Paisner LLP ("BLP") which advice was received (to the effect that there was no tax difficulty presented by Mr O'Leary's trusteeship as a matter of UK tax law) in January 2014. It appeared in fact, from the evidence, that such advice was taken by Mr O'Leary from Mr Bunker as it was a requirement of the Jeeves Group. Mr O'Leary accepted that he was the personal client of

BLP. Again, there was no discovery of the instructions given to BLP and, in our view, there ought to have been. Accordingly, of the three reasons that Mr O'Leary gave for taking advice on changing the trusteeship of the Trust, we accepted one and rejected two. Our conclusion is supported by perhaps the only contemporaneous documentation mentioning Mr O'Leary's wish to retire, namely an email from Mr Bunker to Herald, copied to Mr O'Leary, on 17 th November 2013, in which he said:

> *"The rationale for the change in plan is simply that the existing trust seems to have been beset with administrative difficulties.* It is the wish of Mr O'Leary to donate the shares from [the Trust] to a New Foundation which the Jeeves Group will administer. Mr O'Leary is excluded from benefit to make it absolutely clear that he cannot benefit. It seems that all Mr O'Leary needs to do is to effect the donation and then [the Trust] can be terminated."

195 It is of interest that this exchange does not mention Mr Hanson, nor was it copied to Mr Hanson, and there was no mention of the *"new foundation"* being a charitable entity.

196 Another curious aspect to the advice that Mr O'Leary chose to take was that he at no stage took advice from a specialist in charitable trusts. The Trust was, according to him, a charitable trust with assets approaching £30 million at the time. Mr O'Leary's first port of call (although this was not revealed in his witness statement or pleadings) was Castellan Consulting LLP of London. At Castellan, Mr O'Leary saw a Mr Ian Jones. Mr O'Leary accepted that none of the advisors whom he approached were based in Jersey, had an office in Jersey or were qualified to advise on Jersey law or structures. He also accepted that he knew a dozen professional trust companies in Jersey at the time but did not approach any to see if they would be prepared to assume the trusteeship of the Trust. Castellan describe themselves as experts in asset and wealth protection. Although one cannot place too weight on such matters, the two photographs in the online Castellan brochure advertising its services were of a fortress and a large wall of safety deposit boxes. Castellan did not hold itself out as having any expertise in advising or acting for trustees of charitable trusts. Their expertise appears to have lain in wealth and asset protection. Although Mr O'Leary was not cross-examined on the matter, we note from his October 2015 witness statement filed with the English High Court that he describes Castellan as *'a company with which I am associated'*. An invoice in the sum of £60,000 was issued by Mr Jones to Mr O'Leary care of Creditforce in December 2014. Accordingly, we have the picture of Mr O'Leary asking Castellan to invoice Creditforce for fees that Mr O'Leary was owed. For one reason or another, Mr O'Leary then arranged for this transaction to be cancelled. It is not at all clear from Mr O'Leary's evidence what consultancy services he was purporting to provide to Castellan at the time. In fact it seems that Castellan was invoicing Creditforce on behalf of Mr O'Leary for professional services rendered by Mr O'Leary to Creditforce in the two year period ended 31 st December 2014. This would appear to show that Mr O'Leary had a not insignificant personal financial interest or connection with Castellan. During the trial, we were asked and agreed not to sit for two hours so that Mr O'Leary could spend some time remotely, with Mr Jones who at the time was seriously ill.

197 No email or other communications between Mr Jones of Castellan and Mr O'Leary or Mr Moore, who was introduced to Mr O'Leary by Mr Jones, was produced.

198 We did see one exchange by email between Mr Bunker of BLP and Mr Jones of Castellan dated 31 July 2013. Mr Jones wrote to Mr Bunker saying that Mr Moore had contacted him yesterday to confirm that they *'sorted out the correct vehicle in Liechtenstein'* and that ' *the client has this as a priority and is very keen to move forward*'. He added *'the client will need to go to Lichtenstein at some stage but is only worth arranging once things are nearing a transfer stage'*. Mr Bunker replied to say that he was on his way to Vaduz and *'have the papers with me'*.

199 Mr O'Leary accepted that 'the client' was him. He also accepted that the *'transfer stage'* was a transfer of the assets, i.e. the shares in ARTL.

200 Initially, Mr O'Leary denied that he was the client of Jeeves Group personally. In fact he was, and did not become a client as either trustee of the Trust or director of ARTL. He was the personal client of Jeeves Group and signed their general terms and conditions of business as such. Accordingly, he was entitled to disclosure of the relevant file of advice and correspondence from Jeeves Group but did not seek it, let alone produce it in these proceedings.

201 Furthermore, an unhelpful letter was written, presumably on instruction, by Mr O'Leary's then advocates, Dickinson Gleeson, which we agree was designed, bearing in mind the terms in which it was couched, to prevent disclosure of documentation to Mr O'Leary. Mr O'Leary was asked about this letter and similar letters in evidence. In his affidavit sworn in these proceedings for the purpose of discharging his ongoing discovery obligations, Mr O'Leary said in respect of the third parties with whom he had dealings whilst he was a trustee of the Trust and/or director of ARTL, he had sought to 'assist the Plaintiffs' by instructing his advocates to write to each of inter alia Herald, Jeeves Group and Salamander Trust Company (the latter two of which he was the personal client) to seek their assistance. Those letters were sent on 3 rd July 2020. Each was in similar terms. The letter to Jeeves Group, care of Terry Moore in Liechtenstein, summarised Mr O'Leary's case and then said:

> *"Mr O'Leary has taken the view that because (a) the [Trust] has terminated (see clause 5 of the Instrument of Advancement), (b) he is therefore not either a trustee thereof or a shareholder of ARTL and (c) he ceased to be a director of ARTL over six years ago, he no longer has any legal right or entitlement to call for any documents relating to the [Trust] or ARTL.* He does not see how such documents could be said to be in his legal power or control.
>
> *The [Plaintiffs] have taken a different view and have issued a specific discovery summons against Mr O'Leary by which they seek to compel him to disclose documents that might be held by any of Herald, Jeeves Group, Anglosaxon and*

[Salamander] in relation to the [Trust] and ARTL.

Whilst Mr O'Leary's position remains as stated in the second paragraph of this section… he is determined that he should contact you in order to determine:-

Whether you might be willing to give Mr O'Leary (through us) access to any documents (including electronically stored documents and data) relating to the [Trust] in order that Mr O'Leary may disclose them in the Proceedings; and

The types of documents which you may hold in relation to the [Trust] and ARTL."

202 Unsurprisingly, these letters appear to have met with a resounding silence and certainly no disclosure. The letters failed to make the obvious points that Mr O'Leary was the client of Jeeves Group and Salamander and, indeed, BLP and was entitled to call for their files and produce copies of all relevant material in these proceedings. This he failed to do and when Mr O'Leary in giving evidence attempted to blame his lawyers for the contents of the letters drafted on his behalf, we conclude that he instructed his lawyers to send communications on his behalf which almost guaranteed that no disclosure would have been forthcoming. The fact that Mr O'Leary was the client of Jeeves Group and the client of Salamander was missing from the correspondence. Instead, in the letter to Jeeves Group, it was said that Mr O'Leary had "in 2013 and 2014 liaised with inter alia the Jeeves Group…..". Not only did he instruct Jeeves Group as a sole client but he also, as explained in his evidence, paid huge fees to Jeeves Group and the other advisers who helped him.

203 In any event, although the contemporaneous instructions from Mr O'Leary to Jeeves Group have not been disclosed, let alone the advice they gave, Mr O'Leary said that in September 2013 he was notified that:

"Because of the wording of the deed forming [the Trust] and complexities in effecting a transfer, the lawyers acting for Jeeves Group advised that it would be better for them to establish a new structure and have the assets of the Trust donated to that structure. Then the Trust would be wound up".

204 The Jeeves Group recommended St Kitts, where the Jeeves Group maintained an associated office, as the jurisdiction for this new entity. Mr O'Leary was unable in evidence to either identify or refer to advice or other evidence identifying the purported difficulties with the wording of the Trust which necessitated it being wound up. This is particularly surprising in view of the advice subsequently received from an expert in the law of St Kitts. Mr O'Leary was also unable to explain what he meant by *'complexities in effecting a transfer'*, i.e. a transfer of the Trust from one jurisdiction to another. The Jeeves Group then proceeded to form a St Kitts Foundation which was called the St Kitts Arbitrage Research Foundation or, for the purpose of the trial, known as the St Kitts ARF.

205 We were shown an email from Herald to Mr Bunker acknowledging a letter from Mr

O'Leary authorising them to liaise with BLP in relation to the transfer of the trusteeship to Jeeves Group through their administration entity, LexAdmin Trust Reg. Herald recommended that, as the Trust was drawn under Jersey law, the deed of retirement and appointment would be drafted by Jersey lawyers. They said the cost would be £800 to £1,200. Herald went on to say that ARTL, although it had limited cash, had a portfolio of investments with *'total assets of approximately £38 million'*. Herald said that the company was *'old'*, established in 1994, and the initial funding for the structure appeared to have been *"quite complex"*. There were ' *due diligence queries involving rationale and source of wealth / source of funds issues which had not been resolved*'.

206 This email was sent just twelve days before the St Kitts ARF was incorporated. Herald said that their transfer and closure fee would be approximately £2,000. Interestingly, the email from Herald appears to state that Miss Bonney (and Mr Shelton) were still trustees of the Trust and, indeed, they would need to retire too. We recorded at paragraph 10 herein that Mr O'Leary was sole trustee of the Trust from 2011 onwards. That was the agreed position as between the parties in this case. However, it was clear from considering the witness statements that Miss Bonney had made in the English proceedings that she may have been confused as to when she retired. In her statement dated October 2015 she said that for many years after 2005 she did not receive any correspondence in relation to the Trust. She said that in October 2013 she was asked by Mr O'Leary to retire as trustee and sent an email to him on 30th October 2013 attaching a letter of retirement. Her second witness statement from late October 2015 showed that she was party to three resolutions of the Trust in respect of charitable donations in 2006 and 2007. Mr O'Leary said in submission after he had given evidence that in 2010 Miss Bonney expressed a wish to retire and did retire at that time, although he could produce no paperwork to that effect, and that when he received the letter of resignation from her in 2013, he dated it 2010. As this evidence of backdating emerged towards the end of the trial, little was or could be made of it by the Plaintiffs.

207 In his witness statement prepared for the trial dated 4 th June 2021, Mr O'Leary said that he discussed with Mr Hanson the advice and recommendations made by BLP and Jeeves Group, including the recommendation to establish a new structure in St Kitts to be administered by the Jeeves Group. Mr O'Leary said:

> *"I would say that Mr Hanson appreciated that I was by then the sole trustee of [the Trust] and a director of ARTL, and that these were decisions for me to make and implement regarding the future of ARTL and the [Trust], but Mr Hanson also appeared to be content with the course of action which I presented to him."*

208 This account contrasted with the documentary evidence. Unlike the documents relating to the formation of the Trust in 2004, there were no emails sent to, copied to or sent by Mr Hanson. Furthermore, prior to the witness statement and prior to trial, Mr O'Leary had rejected the suggestion that Mr Hanson was involved in the events of 2013 and 2014 which led to the transfer of the Trust and ARTL from Jersey. For example, in Mr O'Leary's October 2015 witness statement he said:

> *"It is completely incorrect for the claimants to suggest that there is or was any connection between Don's health and the due and proper administration of the [Trust] because there is and was no such connection.* At no stage during the whole process was Don involved."

209 In Mr O'Leary's third affidavit sworn in these proceedings on 10 th July 2020, he confirms the relevant paragraph of his 2015 witness statement and says:

> *"As I have said at paragraph 4.34 of my 2015 Witness Statement and as admitted in paragraph 233 of my Answer, Don was not involved in my efforts to resolve the tax issues and retire as trustee of the [Trust] in 2013 and 2014.* He was neither a trustee nor a beneficiary of the [Trust]. Nor was he a director or shareholder of ARTL. He therefore had no status to make such decisions. Don was, however, generally aware of what was going on as he had….acted on a long term basis as an ad hoc investment adviser to ARTL and I had informed Don of what was happening. By way of example, I refer to the attached email chain covering the period 4 to 7 October 2013."

210 Mr O'Leary went on to refer to an email to Mr Hanson sent on 6 th October 2013 in which he said:

> *"Perhaps we can catch up tomorrow on… ART as this is a very important week for resolving ART's position."*

211 Mr O'Leary said that he had a *'clear recollection'* that Mr Hanson knew about the work being undertaken by the Jeeves Group, including the failed attempt to transfer ARTL to the St Kitts ARF and subsequent steps taken to establish the Panamanian Foundation.

212 He went so far as to say:

> *"I specifically recall letting Don know that I had entered into the Instrument of Advancement and Termination.* I believe that I also told him about my meeting in Switzerland in October 2014 to deal with the transfer of the ARTL shares."

213 This latter would have been a conversation that would have taken place as Mr Hanson was literally on his death bed.

214 What Mr O'Leary says now is that there was no formal involvement of Mr Hanson in the process of relocating the Trust and the assets of the Trust, which explains why he is not copied into any documentation or identified in any way in correspondence with third parties, but he was generally kept abreast by way of undocumented oral communications. There is no contemporaneous evidence of such communications in relation to the transfer of assets from a structure that Mr Hanson had quite deliberately set up. The only evidence that Mr

Hanson may have had knowledge of the transaction was ARTL's cash movements statement. Mr O'Leary accepted that this was not correspondence between himself and Mr Hanson, but a monthly statement of cash flowing in and out of ARTL. The November 2013 statement sent to Mr Hanson showed *inter alia* an entry of £350,000 entitled *'reconstruction costs'*. Mr O'Leary said that this was the term that he used for the costs associated with the transfer of the Trust and ARTL. The only evidence as to Mr Hanson's reaction to this statement is an email which he appears to have sent to himself but meant to have sent to Giles Heseltine, who was a director of Creditforce and who had supplied the ARTL cashflows to him. Mr Hanson simply asked a question, namely:

> *"Giles, what are the ART reconstruction costs of 350,000 in November?"*

215 In the same email he also went on to ask about two other items of expenditure. No response has been identified or recovered and this evidence does not advance Mr O'Leary's case that Mr Hanson knew exactly what was going on, indeed it may suggest the opposite.

216 In addition to the 2015 witness statement to which we have referred, Mr O'Leary subsequently replied to the questionnaire dated 11 th March 2016 from the Joint Administrators which referred to his 2015 witness statement. The question was:

> *"Please explain why you did not discuss the transfer to ARF [that is the Panamanian Foundation] with either Mr Hanson or Miss Ruddick, in particular having regard to the fact that Mr Hanson had previously expressed the wish that the [Trust] be wound up on his death."*

217 Mr O'Leary replied:

> *"I confirm that I did not discuss, with either the Deceased or Ms Ruddick the advancement of the [Trust] assets to [Panama] as described in paragraph 4.32 of my First Witness Statement, because neither the Deceased or Ms Ruddick had any involvement with the advancement so described."*

218 In evidence, Mr O'Leary said this was ' *bad phraseology on my part*'.

219 In view of the contrast between the evidence as to how the Trust was set up in 2004, and the way in which the Trust was dissolved by Mr O'Leary in 2014, the absence of any documentary evidence supporting his account that he told Mr Hanson of what he was doing in 2013/2014; the evidence of what Mr O'Leary said to the High Court on this very issue in 2015 and his conduct, which we consider below, after Mr Hanson's death as described by Mr Wall and Miss Wuenschmann-Lyall, we concluded that Mr O'Leary did not tell Mr Hanson anything about the St Kitts Foundation or the Panamanian Foundation at the time that he was setting them up and taking advice upon them – taking advice on his own behalf as the client of BLP, the Jeeves Group and, subsequently, Salamander Trust.

The terms and effects of the St Kitts Foundation

220 Mr O'Leary flew to Liechtenstein on 9 th October 2013 and there, and over subsequent weeks, signed the documentation necessary to set up the St Kitts Foundation, which we have referred to as the St Kitts ARF above. We heard evidence from both Mr O'Leary and an expert, Dustin Delany, an attorney qualified in the law of St Christopher and Nevis (commonly referred to as St Kitts and Nevis). It was agreed by both parties, including Mr O'Leary in his pleading, that the construction and effect of the St Kitts documentation was a matter of St Kitts law.

221 Mr O'Leary indicated that he did not wish to cross-examine Mr Delany but, nonetheless, the Court elected to require him to give evidence as to the principal parts of his opinions as set out in his expert report.

222 Although Mr O'Leary received the documentation relevant to the formation of the St Kitts Foundation in August 2018, he did not disclose them in these proceedings in discovery in February 2020 until he made supplementary discovery in July 2020 as he said that he did not consider them to be relevant when first making disclosure.

223 On 9 th October 2013, whilst in in Liechtenstein, Mr O'Leary signed a document as the *'Founder'* giving instructions for the formation of a foundation pursuant to the St Kitts Foundations Act 2003. He entered the proposed name as the Arbitrage Research Foundation. The words *'arbitrage'* and *'research'* were also in manuscript. He accepted that he would have read the form before signing it. The amount to be placed at the disposal of Pelican Trust Company St Kitts to form a foundation was left blank. But the text stated that the foundation would be formed by Pelican Trust Company for the *'ultimate beneficial ownership of the founder'*. The founder was Mr O'Leary.

224 Mr O'Leary also signed the form knowing that the box had been ticked indicating that the purpose of the foundation was ' *the defrayal of the cost of upbringing and education, out fitting and financial advancement with respect to the livelihood generally of family members or other Beneficiaries as well as the pursuit of similar purposes*'. The "Board of Councillors" to be appointed was Bryan Jeeves, his son, Alexander Jeeves, and Pelican Directors Limited. The form indicated that there would be separate by-laws for the foundation and that the foundation would be governed by the laws of St Christopher and Nevis.

225 Mr O'Leary's case in evidence was that although he signed the form he did not tick the boxes as they were pre-prepared for him. He said that he *'didn't know'* whether or not the instructions he had given were compatible with the formation of a wholly charitable trust. Plainly they were not as they indicated that the foundation was to be ultimately beneficially owned by Mr O'Leary. The most favourable observation that could be made about the completion of this form is that Mr O'Leary had a reckless disregard for the fact that he was

purporting to resettle charitable assets on a fresh charitable trust. Mr O'Leary accepted that he was responsible for the contents of this form.

226 Mr O'Leary was reminded that on his account he was settling a Trust then worth £18 million for charitable purposes but, when invited to explain why he did not say to Mr Jeeves or Mr Moore, who were among the four individuals with him when he signed this document, ' *I'm sorry, where's the mention of charity here?* I can't see it', he was unable to answer the question beyond saying 'I don't know'.

227 The foundation was registered with the Financial Services Regulatory Commission in St Kitts on 14 th October 2013 and the Commission certified that the Statement of Founder and Articles of Foundation for the Arbitrage Research Foundation were effective from the date of establishment of the foundation on 14 th October 2013. The "Statement of the Founder" merely stated that Pelican Trust Company registered a foundation in the name of ARF with the said three Councillors already identified, and declared that the attached Articles of the foundation were binding upon it. Those Articles identified the founder as Pelican Trust Company Limited, but it was accepted that the beneficial founder was Mr O'Leary. Indeed, the recited purpose of the foundation was identical to the instruction form signed by Mr O'Leary, i.e. to benefit the founding members or other beneficiaries of the foundation. The section dealing with *'By-laws and appointment of beneficiaries' said that the Councillors "shall issue by-laws designating the beneficiaries and determining the extent and nature of their beneficial interests"*. In addition, the Foundation Council was authorised to delegate powers to *"Guardians"*. There were no *'Guardians'* appointed. The beneficiaries were blandly defined as 'those persons, groups, organisations and institutions named by the Councillors in the by-laws who receive the distributions of the Foundation'. Under the clause dealing with the Councillors it was provided that the *'founder shall retain the right to amend the Board of Councillors during his lifetime'*. The by-laws are dated 14 th October 2013.

228 Although there is no provision in the by-laws for a protector, on 3 rd February 2014 all members of the council signed *'Protector Regulations'* for the St Kitts ARF appointing Mr O'Leary protector with extremely wide powers as follows:

> ***"The Protector shall have the following powers:***
>
> ***Advising and supervising of the Foundation Council*** .
>
> ***Access to all the files of the Foundation and information on the Foundation's assets*** .
>
> ***Consent to changes in the Foundation's by-laws and regulations (including these Protector Regulations)*** .
>
> ***Consent to changes in the Foundation Council*** .
>
> ***Authorise any distribution to a Beneficiary."***

229 In the event of the death of the protector, there was provision for a *'Successor Protector'*, namely Mr O'Leary's wife, Ann.

230 Mr O'Leary signed a Letter of Wishes on 9 th October 2013 addressed to the foundation describing himself as the founder. He said that his wishes for the administration of the foundation were that the Trust should be the principal beneficiary of the foundation. He reserved the right to alter his wishes from time to time. He accepted that the Letter of Wishes made no sense as the plan was for the Trust to cease to exist as soon as the foundation was created.

231 The only mention of charity was in the by-laws of the St Kitts ARF which could be altered from time to time by the Councillors, subject to the consent of the protector, i.e. Mr O'Leary. The by-laws were defective in that they were purportedly issued by the founder, i.e. Mr O'Leary (and, indeed, signed by him) whereas pursuant to the Articles of the St Kitts ARF, it was for the Councillors to issue the by-laws and not the founder. In any event, these by-laws were read and approved by Mr O'Leary on 23 rd January 2014. The class of beneficiaries was declared to be *'charity or charities'*, but the foundation Councillors under Article 3 of the by-laws had the power to remove or add to the beneficial class at any time in the exercise of their discretion.

232 Finally, Mr O'Leary, as founder, approved the fee schedule of Pelican, indicating their annual fees were anticipated to be $7,500.

233 Mr Delany, when he gave evidence, took the Court through the relevant constitutional documents of the St Kitts ARF. He said the story started with the instructions and he said that the ultimate beneficial owner was Mr O'Leary, and the Pelican Trust Company was the nominee founder. The true founder was economic owner of the corpus of the foundation – Mr O'Leary. In his view, the foundation appeared to have been set up to benefit Mr O'Leary and his family; there was no mention of charitable purpose.

234 He said it was common for the Articles not to identify the beneficiaries and he also noted that the purpose for the Trust set out in the Articles was in the same terms as the original form completed by the founder. It was only the Statement of the Founder (signed by Pelican) and the Articles that would be made public in St Kitts.

235 As to the Letter of Wishes, Mr Delany said this was atypical for a St Kitts foundation, but it was further evidence that Mr O'Leary was the founder.

236 Mr Delany was also confused, as were we, by the reference to *'Protector Regulations'*. He said that that is *'something that is not used with respect to a foundation.* They are talking trust language here'. He also questioned the validity of the regulations as they purported to

be issued under Article 12 of the Articles, whereas Article 12 refers to the ability to appoint auditors. He added that the document appointed Mr O'Leary as the protector and give Mr O'Leary what he described as *'extreme, almost concerning powers… over the foundation'*. He said:

> *"Here we really see an attempt from Mr O'Leary to control every aspect of this foundation, or every meaningful aspect of this foundation, through powers that even if it was an incorrect reference to a protector versus a guardian, the foundation legislation does not allow a guardian to have this wide range of power."*

237 Notwithstanding doubts about the validity of the protector appointment, Mr Delany confirmed that the foundation was properly set up and was able to accept assets. He also said that normally a person who wished to set up a charitable entity in St Kitts would use a trust and not a foundation. This would be the appropriate mechanism under the relevant St Kitts' legislation, and the Trusts Act provides for a *'charitable trust'*.

238 Having looked at the documentation as a whole, Mr Delany concluded that the St Kitts Foundation was established for family advancement as opposed to charitable purposes.

239 We agree with this conclusion.

240 Mr O'Leary protested that the St Kitts' material was irrelevant because the foundation, although set up, was *'never used'* owing to, he said, the illness of Mr Jeeves senior and the need to approach another adviser. However, the material was relied on by the Plaintiffs, correctly in our view, as illustrating the fact that Mr O'Leary, having decided to dissolve what he said he believed to be a charitable trust which he had helped set up, did not attempt to set up a genuinely charitable structure to replace it. The Plaintiffs relied on the contents of the constitutional documents for the St Kitts foundation as they were unable to obtain any of the documentation relevant to the constitution of the Panamanian Foundation which was subsequently set up by Mr O'Leary, with the exception of the Charter which we consider below. Mr O'Leary agreed that at the time he set up the St Kitts foundation, with the assistance of the Jeeves Group, he believed that it would come into effect. He accepted that he knew that he was appointed protector. When asked what he was told about the role of the protector, he said that Messrs Jeeves had told him that a protectorship gave him *'control of the council'*.

The Panamanian Foundation

241 The Plaintiffs say that the Court should infer that, absent the discovery of the Panamanian documents (with the exception of the Charter), the proper inference to be drawn is that the constitutional documentation for the Panamanian Foundation would be similar, if not identical, to those of the St Kitts ARF. We were unable to accept that that was an inference

that could properly be drawn. Accordingly, such findings as we are able to make in relation to the nature of the Panamanian Foundation arise from the documentation that is available, i.e. the Charter; the expert evidence we heard from Gisela Porras, a Panamanian lawyer, who we regarded as an impressive witness, and the factual matrix which forms the background to the creation of a Panamanian Foundation, which includes the contents of the St Kitts ARF documentation.

242 On 26 th November 2013, BLP, on the instructions of Mr O'Leary, produced a draft deed terminating the Trust entitled ' *Instrument of Advancement*'. Ultimately it was amended to identify the donee of the assets of the Trust as the Panamanian Foundation. The Instrument recited that Mr O'Leary was the trustee of the Trust and that, by clause 4 thereof, the trustee may, at his discretion, apply the funds to charity or charities and that the foundation was a *'wholly charitable foundation established under the laws of Panama'*. The Instrument does not contain a governing law clause and provided that in exercise of the power of advancement the trustee *'hereby advances and declares that the whole of the incoming capital of the Trust Fund shall be immediately be paid to the Foundation absolutely freed and discharged from the trusts of the Settlement'*. The Instrument concluded: "This being done and there be no remaining assets held under the terms of the Settlement the Settlement shall come to an end."

243 The Instrument of Advancement was executed by Mr O'Leary on 3 rd July 2014 and executed on behalf of the foundation by Michael Gassner, to whom Mr O'Leary was referred by Mr Moore when (he says) Mr Jeeves senior fell ill. Mr Gassner was a principal of Salamander Trust. Mr O'Leary relies on the terms of the Instrument of Advancement as showing that he intended to transfer the assets to a charitable trust. However, no reputable English or Jersey lawyer, having regard to the terms of the Trust, would have drafted an Instrument which permitted the assets of the Trust to be devised to anything other than a charitable entity in accordance with clause 4. Mr O'Leary also relies upon one piece of disclosure he did make from the files of BLP, namely the tax advice from Mr Bunker dated 22 January 2014, to which we have already referred. The instructions to Mr Bunker have not been disclosed but in his advice in addition to advising Mr O'Leary that he did not have any liability to UK tax by virtue of being a trustee of the Trust, Mr Bunker also said:

> *"The Trust has been terminated by the appointment of the assets of the Trust to Arbitrage Research Foundation a wholly charitable foundation established under the laws of the island of St Kitts.* It is my understanding that throughout of its existence no distributions whatsoever have been made to any person by the Trust."

244 Most of this paragraph was, one way or the other, incorrect because at this time the Trust had not been terminated, still less the assets transferred to the St Kitts Foundation, and distributions (albeit few) had in fact been made by the Trust. Nonetheless, for what it is worth, Mr O'Leary relies on this as some evidence that he intended to ensure the assets made their way to a charitable structure.

245 Accompanying the letter was a document entitled *'SR Charitable Trust'* for which Mr O'Leary accepts that he was responsible as the contents could have only been provided to Mr Bunker by him. This sets out various aspects of the Trust's history, directors and ownership of the shares in ARTL. The document said that ARTL had been operating since 1994 and that it had *'a substantial portfolio of investments with total assets of approximately £30 million.* The bookkeeping and financial records are up to date'.

246 On 1 st April 2014, Mr O'Leary resigned as a director of ARTL and Messrs Jeeves were appointed directors in his stead (Herald Trust resigned at about the same time). For a brief period, Anglo Saxon Trust Limited, a Jersey regulated business, became administrator and corporate company secretary of ARTL. There was no disclosure from Anglo Saxon Trust and, in any event, their role was short lived.

247 It was about this time that Mr O'Leary said that he was notified that Bryan Jeeves had become very ill. At this point Mr Moore of Jeeves Group agreed to become a director of ARTL and recommended that Michael Gassner of Salamander Trust Company Zurich should also become a director of ARTL. Mr O'Leary had not previously heard of Mr Gassner and relied upon the recommendation of Mr Moore. Mr O'Leary appears to have done little, if any, and on any view certainly insufficient due diligence on Mr Gassner or Salamander Trust Company. Bearing in mind he was dealing with a company with declared assets of £30 million for which he had been responsible for in excess of a decade, he should have taken far more care than he did of the assets entrusted to him. Mr O'Leary says that *'Much of the work undertaken by Jeeves Group and BLP in 2013 and early 2014 was still of value'*, but new trustees and administrators of the assets were needed.

248 Mr O'Leary says that as Salamander Trust had no presence in St Kitts, they recommended that the new structure be located in Panama where Salamander has *'previous experience'*. Mr O'Leary became a client of Salamander and met Mr Gassner in London in his office and again in Switzerland on more than one occasion. As to the Panamanian foundation that was set up, Mr O'Leary said that he was assured it was a charitable entity.

249 Mr O'Leary says his *'final responsibility as a trustee'* of the Trust was to execute the Instrument of Advancement on 3 rd July 2014. From that date, he says, the Trust was wound up and he ceased to be a trustee.

250 On any view, Mr O'Leary said nothing about these matters at the meeting of the Neatly Board that took place approximately a week later, at which time Mr Hanson was seriously ill.

251 The resolution of the sole member of ARTL, resolving that it should continue overseas, was executed on 17 th May 2015 by Mr Gassner and a Mr Kaddech on behalf of the foundation. An application needed to be made to the JFSC for approval of the migration of

the company to Panama. The effect of migration is that the company ceased to be a Jersey company.

252 The regulations of the Foundation would have been made at the same time as the Charter for the Foundation (which is publicly available) was created. Mr O'Leary said he tried to get a copy of the regulations of the foundation in 2018 on a trip to Zurich. At that stage, Mr Moore was still on the foundation council but Mr O'Leary said that the regulations could not be found and that Mr Gassner may have *'removed them or altered them in some way'*.

253 Mr O'Leary said he was not troubled by the fact that Mr Moore, who had been a Foundation Councillor, selected by Mr O'Leary, at that stage for over four years, did not have a copy of the regulations. He accepted that a prudent charitable trustee would have been concerned to see and retain a copy of the constitutional documents relevant to the Panamanian Foundation at the time of their retirement as trustee of the Trust.

254 Ms Porras gave evidence that the Foundation was governed by its founding charter and regulations but only the former was publicly available. The Foundation was a Private Interest Foundation which is an entity which may hold shares and other investments but cannot be a trading company. The relevant Panamanian legislation provides that the founding charter needs to set out, *inter alia*, the name of the foundation, the initial assets, the address of the members of the foundation council, the domicile of the foundation, the name of the resident (in Panama) agent, the objectives of the foundation, the duration of the foundation, and the liquidation procedure in the event of dissolution. The Foundation was called the Arbitrage Research Foundation and was incorporated on 14 th October 2014. Ms Porras said:

> *"I cannot conclude that the ARF was a charitable institution.* Moreover I see no basis to suggest that it might have been, given that there is nothing in its charter of incorporation that suggests any connection with charity."

255 As to the Charter, the core constitutional document for the Foundation, Ms Porras took the Court through the contents of the same. She confirmed that a PIF is commonly used as an asset protection vehicle in Panama and, in the event of the insolvency of the founder, the assets held in the foundation are immune from action by the founder's trustee and bankruptcy. This even applies if the founder is a beneficiary identified by the regulations. The foundation is administered by a council which is similar to a board of directors.

256 Although trusts are known to the law of Panama, foundations are more commonly used as they may be controlled by the persons who are beneficially entitled to the assets, whereas trust activities can only be provided by a licensed entity or licensed individual.

257 The procedure for setting up a charity is, in Panama, completely different from the

procedure for setting up a foundation. Charities are set up as ASFLs (from the Spanish, 'Asociaciones Sin Fines de Lucro') which are recognised and granted corporate personality by the State. Generally, a PIF is not used for charitable purposes and is not the appropriate vehicle for setting up a charity. However, Ms Porras said that if a PIF were to be used for such purposes then she would expect the charter of incorporation to be explicit and transparent about that purpose. She said *'The charter of incorporation of PIFs used solely for charity would need to be very specific about it when describing its objectives (as required by Art 5 of the PIF Law)'*. Ms Porras said that there was *'no way to confuse'* a charity from a PIF. The charter of the foundation in this case said the foundation was established with the purpose of *'preserving, investing, administering and disposing of its capital and income of profits derived from its investments, and that of making distributions to its beneficiaries as may be determined from time to time'*. Ms Porras said that this was standard wording and 'not at all' consistent with it being a charitable entity.

258 Ms Porras said that, although it is common for the charter to conceal the true purpose of the foundation which would only be revealed by the regulations, she said that she had *'never seen it'* in the case of a charity.

259 The Charter went on to provide that the council should have at least three members and under the title *'Beneficiaries'* it was provided that the designation of the beneficiary or beneficiaries shall be provided for in the regulations, and such regulations shall set forth the manner in which the property of the foundation is to be distributed to any one or more of the beneficiaries. The terms of the Charter in this regard were also inconsistent with its being a foundation for charitable purposes.

260 The founder was identified as a Panamanian company, namely Primus Founder SA. Ms Porras said it was very common to have a nominee founder and that she had acted as a founder of many foundations on behalf of clients. The true founder would only be known to the law firm that was setting up the structure. Generally, Ms Porras said that the beneficial founder would have full information in respect of what is occurring within the foundation and would direct council members, particularly if they were nominees, on how to manage or distribute or dispose of the *"patrimony of the foundation"*.

261 She also said that the ultimate beneficial founder would have a right to access the regulations, particularly because they should have signed them. The Foundation was dissolved in December 2020 and the dissolution documents are publicly available. Ms Porras said that a meeting took place at 8:00am on 10 th December 2020 with the company, ARTL, (a company which had continued in Panama in 2014) being dissolved at the same time. The company was dissolved by its directors, adopting a dissolution agreement proposed by the company's shareholders. The document recording the dissolution of the company said that the company had settled all of its obligations and the remaining assets had been distributed amongst the shareholders, i.e. any assets had been distributed to the Foundation. Ms Porras said that in those circumstances, pursuant to the terms of the Foundation regulations, the assets would have been distributed to the

beneficiaries identified in the Foundation regulations.

262 Although the company and Foundation were dissolved by nominees, the documentation recorded that the directors of the company at the date of dissolution were Terence Moore, who was described as ' *Director/President*', Harald Quaderer, *'Director/Secretary'*, and Helmuth Tschutscher, *'Director/Treasurer'*. Ms Porras said that the founder would generally be consulted before dissolution and that the company could be reinstated by its shareholders under the relevant Panamanian legislation.

263 The documentation recording the dissolution of the Foundation confirmed that Terence Moore and Harald Quaderer were members of the foundation council and were represented by persons in Panama for the purpose of the meeting. Accordingly, at the date of the dissolution of the foundation and ARTL, Mr Moore was a member of the foundation council and a director of the company respectively. Mr O'Leary accepted in evidence that he had no idea whether the original council members, Mr Gassner, Mr Kaddech and Dr Biedermann (two men he never met), had any knowledge or experience of administering a charity worth £30 million, particularly in circumstances where they resided in Europe and the Foundation was in Panama.

264 We found it surprising that after Mr O'Leary and Mr Hanson had built up ARTL over the course of ten years, during which time ARTL was controlled at company level by Mr O'Leary and its sole shareholder, the Trust, controlled at trustee level by Mr O'Leary, that he should effectively give it away to people whom he did not know in circumstances where there was so little documentation.

265 Further, although Mr Moore and Mr Gassner and the Jeeves Group (together with relatively minor input from BLP and Castellan) seemed to have done relatively little work in setting up two relatively simple structures, the fees that were charged to ARTL were huge. In evidence, Mr O'Leary said *'Basically people like Jeeves Group and other advisers and international advisers generally charge to do restructuring….*usually I'm told it's higher than 12% of the assets under management. I managed to negotiate that down…'.

266 Mr O'Leary claimed that he had done well in negotiating the fees to 6% of the £30 million structure, resulted in ARTL having to pay £1.8 million for this exercise. To pay £1.8 million to move a charitable trust from jurisdiction A to jurisdiction B, in circumstances where, in its ten year lifetime it had made precisely £22,000 by way of distributions to charity, seems to us to be remarkable. That such huge fees were charged for doing so little work seems to reflect, in our view, on the bona fides of those who Mr O'Leary selected to advise and execute these transactions.

267 What of Mr Moore and Mr Gassner? Mr Moore, according to Mr O'Leary, is refusing to answer Mr O'Leary's calls and emails and, according to Mr O'Leary, dissolved the Foundation without any notice or reference to Mr O'Leary. We think that this was unlikely to

be the truth. As to Mr Gassner, he was sentenced, we are told, to three years imprisonment for offences of dishonesty in Liechtenstein in approximately 2019 and, according to Mr O'Leary in evidence, he is still in prison.

268 The Plaintiffs say that it is no coincidence that the Foundation and ARTL were dissolved a matter of days after a mediation, which Mr Moore knew about, between the parties failed. Whether or not this is correct does not seem to us to matter very much.

269 Although Mr O'Leary painted a picture of being unable to obtain access to any documentation in relation to the Foundation once it had been incorporated in 2014, and entirely unable, for example, to secure a copy of the regulations which we find he probably approved, he did at least in relation to the fees of defending this litigation, continue to benefit from the assets that he had allegedly provided to a charitable entity. In reliance on the indemnity provisions in the Instrument of Advancement, pursuant to which the Foundation agreed to indemnify him in respect of claims arising from his trusteeship, even though the indemnity provided that it extended only to liabilities in respect of which the trustee would have been entitled to reimbursement out of the Trust fund as trustee, Mr O'Leary managed to obtain, he told the Court, approximately £1 million from Mr Moore. It was not Mr Moore that turned off the tap. Mr O'Leary stopped claiming when his then advocates were threatened by the Plaintiffs' advocates that they may be liable to repay to the Foundation the funds they had received. According to Mr O'Leary his advocates said *'I am sorry, we can't risk having any more fees from you, unless we know where the money comes from and it has to come from you personally'*.

Did Mr O'Leary breach his duties as bare trustee by transferring the assets of the Trust to the Panamanian Foundation and thereby terminating the Trust?

270 We unhesitatingly answer this question in the affirmative. We have set out the duties that Mr O'Leary owed to the Trust above. We have no doubt that Mr O'Leary acted dishonestly and, therefore, fraudulently when he breached his duties as bare trustee. In particular, he:

(i) concealed his actions from Mr Hanson and Creditforce;

(ii) took advantage of Mr Hanson's declining health to carry out the transactions;

(iii) instructed experts who he knew had no experience or skills in looking after charity money – instead selecting advisers who specialised in asset protection;

(iv) failed to keep a proper paper trail of communications with the advisers and advice that they gave in order to, in our view, conceal his actions;

(v) lied to and misled the professionals who were instructed to assist the executors after Mr Hanson's death;

(vi) concealed his activities from the Neatly Board; and

(vii) deliberately set up an entity, first in St Kitts and then in Panama, which he knew that he could benefit from personally, owing to their terms. Neither entity was exclusively charitable and, indeed the proper entity to set up in St Kitts would have been a charitable trust (not a foundation) and the proper entity to set up in Panama would not have been the Private Investment Foundation that Mr O'Leary selected on the advice of an adviser who is now serving a sentence of imprisonment for dishonesty.

The effect of our findings

271 In consequence of our findings, Mr O'Leary did not execute the Instrument of Advancement, either in good faith or intra vires the Trust. He purported to execute the power under clause 4 to dispose of the Trust property in favour of charity. He did not do so as the Foundation was not a charitable trust. In any event, the 2014 appointment was a fraud on a power as Mr O'Leary exercised the power in order to benefit himself and his relatives, not charity. Accordingly, the exercise of the Power of Appointment and the 2014 Instrument of Advancement are void and of no effect and we so declare. In the circumstances the purported resolution of the board of ARTL on 13 October 2014 (a day before Mr Hanson died), by the then directors, Mr Gassner and Mr Moore (with Mr O'Leary purportedly in attendance as *'trustee of the SR Charitable Trust'* which he had, by then, claimed to have dissolved), is also void, in that it purported to transfer the shares in ARTL from Mr O'Leary as trustee of the Trust to the Panamanian Foundation.

Mr O'Leary's conduct after the death of Mr Hanson

272 We touch on this only briefly. We heard evidence from Miss Wuenschmann-Lyall who we found to be an impressive witness.

273 She was instructed in November 2014, shortly after the death of Mr Hanson, by the then executors of the Estate to deal with matters, particularly tax, relating to the Estate. She was not the only person instructed to assist with the Estate. After she was instructed, a Mrs Chris Erwood, who specialised in offshore taxation matters, was instructed, as was a Mr Andrew Gotch, who was instructed to make disclosure to HMRC of potentially undeclared matters.

274 Owing to the concerns that Miss Wuenschmann-Lyall had at the time, she made extremely detailed contemporaneous notes of various meetings which made her, in our view, a reliable witness. She made handwritten notes of all the meetings that she attended and then typed them up immediately after each meeting. She said that she was given to understand that Mr Hanson was also a meticulous record keeper. Shortly after she was instructed, she became aware of tensions between executors. Things escalated rapidly — by the summer Mr Torkington and Mr Wall were applying to the High Court for the Joint Administrators to be appointed. She first met the executors (Mr Torkington, Mr Wall, Mr Fox and Mr O'Leary) together in early December 2014. At that meeting, she repeated advice

she had already given that HMRC would scrutinise every detail of the documentation filed in respect of the Estate and would likely assign someone from the High Net Worth team to investigate.

275 Subsequently, she had meetings with the executors including Mr O'Leary and documentation was provided to her, including Mr O'Leary providing Mr Hanson's bank statements for the last seven years. Mr Torkington said that he had been trying to obtain a back-up of Mr Hanson's computer, but had experienced significant resistance from Mr O'Leary. Mr Torkington told her that Mr O'Leary had control of Mr Hanson's personal computer and had only reluctantly handed a storage device to Mr Torkington for provision to Miss Wuenschmann-Lyall. Upon review of the bank statements, it became clear to Miss Wuenschmann-Lyall that Mr Hanson had made substantial lifetime gifts that needed to be reported to HMRC in their form IHT400. The lifetime gifts ran to several million pounds. In January 2015, Miss Wuenschmann-Lyall was given a folder of documents pertaining to the dispute that Mr Hanson had had in 2013 with Ms Mercer. Reviewing these documents showed that Mr Hanson had made payments totalling £400,000 to Ms Mercer. Miss Wuenschmann-Lyall was unable to reconcile this information with any of the material that she had been given hitherto. Mr Hanson had paid this money from his resources but it had not come from any source of wealth that she had been told about. She was surprised by this. She wanted a complete back up of Mr Hanson's computer. This was blocked by Mr O'Leary who caused the password to Mr Hanson's email account to be changed, thus preventing an extraction of Mr Hanson's email account. Miss Wuenschmann-Lyall said that Mr O'Leary *'appeared determined to do whatever he felt necessary in order to prevent me and the Executors from getting access to the documentation that we needed to do our jobs'*.

276 Mr O'Leary's actions caused great consternation to the other executors. Ultimately, in February 2015, Mr O'Leary did inform others of the new password so Mr Hanson's records could be backed up and reviewed. At a meeting with Mr O'Leary and the other executors on 12 th February 2015 (Miss Bonney was also in attendance), Miss Wuenschmann-Lyall reiterated the importance of disclosure to HMRC, particularly in view of the discovery of the payments to Ms Mercer and asked for any information they had concerning the source of payments made to Ms Mercer for refurbishment of her property and urged Mr O'Leary to disclose the new password for Mr Hanson's email accounts. Mr O'Leary became *'quite agitated'* in response to her questions and he said that he was *'unable to disclose the source of payments to Miss Mercer on account of him having a conflict of interest'*. This was the first time that Mr O'Leary confirmed that he knew about the payments to Ms Mercer.

277 At the end of the meeting, Mr Fox and Mr O'Leary took Miss Wuenschmann-Lyall to the corner of the meeting room, saying they wanted to speak with her *'quietly'*. They explained that Mr Hanson had also made a payment of $200,000 to a trust, which they described as the Tatyana Trust. Mr Fox and Mr O'Leary promised to give her more information about this trust. On 15 th and 16 th February, Mr O'Leary did provide Miss Wuenschmann-Lyall with a new password for Mr Hanson's email account, details in relation to the Tatyana Trust and details of missing payments made to Ms Mercer for the refurbishment of her property. He still did not provide her with details as to where the payments to Ms Mercer had come from.

He repeated that he was *'conflicted here as the payments came from an account on behalf of Don and not his own account'*. It was clear to Miss Wuenschmann-Lyall that Mr O'Leary knew the source of the payments but simply was not willing to identify it. By now she felt that Mr O'Leary knew much more about the Mercer payments than he was prepared to say and he was unwilling to give her any further detail.

278 Finally, on 25 th February, Mr O'Leary said that the payments came from an offshore company which, he said *'had folded'* in 2012. The loan had then been written off. It had taken Miss Wuenschmann-Lyall three months to discover the existence of ARTL and, when she did, Mr O'Leary lied to her saying that it had *'folded'* in 2012. Of course, ARTL had continued in existence in Jersey until 2015 when it migrated to Panama. We find that Mr O'Leary lied to Miss Wuenschmann-Lyall because he knew that discovery of the existence of ARTL would lead to discovery of its migration and the Panamanian Foundation. This is precisely what happened. On 26 th February 2015, Mr Torkington sent her an email which alerted her to two entities that she had never previously encountered – ARTL and the Trust. Mr Pitchford, who knew Mr Hanson's financial affairs reasonably well, said that ARTL was *'another enterprise funded by Don which at one stage had many millions in funds'.* Mr Pitchford said 'Don advised that, as it was offshore I didn't need to know about it'.

279 Miss Wuenschmann-Lyall renewed her request for information and, over the days that followed, she had several exchanges of emails with Miss Bonney in which she cast some light on her understanding of ARTL and the Trust. She said that so far as she could recall the Trust, at one point, was the owner of ARTL and that *'Mr O'Leary knew all about ARTL and the [Trust] as he remained a trustee of the [Trust] and a director of ARTL'* and that when she last did the accounts for ARTL in 2005 (she was replaced by Mr O'Leary by Mr Hanson), *'it had assets of some £25m I think???'*. This material from Miss Bonney confirmed Miss Wuenschmann-Lyall's suspicion as to a close link between ARTL, the Trust and Mr Hanson. Mr O'Leary provided her with limited additional information.

280 Miss Bonney did further digging and on 3 rd March 2015 wrote to Mr Torkington (who forwarded the email to Miss Wuenschmann-Lyall), saying that she had found the annual returns for ART for various years including *'the most interesting of all in 2015'*. She said:

> *"It comes as a big surprise to me to see that the [Trust] owned all the shares, and even more of a surprise that I am still mentioned in 2014!* That the fact that all the shares in ART seem to have been sold to a company in Panama in 2015 is pretty awesome!! I sincerely hope that I have got all of this completely wrong."

281 There was an executors' meeting on 6 th March 2015 that Miss Wuenschmann-Lyall was unable to attend. Mr Torkington told her that Mr O'Leary left the meeting abruptly when he was asked questions about the Trust and ARTL.

282 Miss Wuenschmann-Lyall sent Mr O'Leary a number of questions concerning ARTL and

the Trust on 13 th May 2015 and he replied saying that they should meet at his offices at Hottinger on 18 th March. This they did. In respect of the payments to Ms Mercer, Mr O'Leary gave a different account from the one he had previously given (that this was a non-recourse loan made to Mr Hanson), to the effect that there had been no loan made to Mr Hanson and these funds were, in fact, paid to Mr Hanson in lieu of consultancy fees.

283 Mr O'Leary, according to the contemporaneous note made by Miss Wuenschmann-Lyall, *'confirmed that the Trust is now in Panama and that this had been planned for a while'*. She had now also heard of Susan Ruddick and she asked who Susan Ruddick was. Mr O'Leary said that she was *'an old friend'* and that she had been *'gifted out'* in June last year. This was obviously a meaningless phrase and, in any event, untrue. Miss Wuenschmann-Lyall said she was *'at a loss to understand how a settlor could be 'gifted out' of a charitable trust, or what was meant by that'*.

284 Later in the meeting, Mr O'Leary told Miss Wuenschmann-Lyall that if she kept looking into ARTL and the Trust then things would *'become unpleasant'* for her which she took to be a threat. We found that it was a threat. It was at this stage that Miss Wuenschmann-Lyall recommended that Mr Gotch and Mrs Erwood should be appointed to assist her.

285 On 7 th April 2015, Miss Wuenschmann-Lyall met with Mr O'Leary again, saying that she needed to get to the bottom of the matters relating to the Trust and ARTL. Mr O'Leary said that he had nothing further to add and that she would be better talking to the directors of ARTL in Switzerland and expressed the view that *'the directors of ARTL were unlikely to tell me much'*.

286 This was at a time when the Trust and ARTL had only just been transferred from Jersey and Mr O'Leary's stance was, in our view, extremely unhelpful and, indeed, we find a close similarity between conduct in 2015 and the letter that he caused his advocates to send to his advisers in 2020 effectively discouraging them from providing this Court with documents that ought to have been disclosed.

287 From this point on, Mr Fox and Mr O'Leary effectively stopped cooperating with Miss Wuenschmann-Lyall and, indeed, Mr Gotch and Mrs Erwood. They failed to attend meetings, cancelled meetings that they had agreed to attend and were unhelpful in correspondence. Miss Wuenschmann-Lyall concluded that Mr O'Leary was *'deliberately evasive, obstructive and difficult'*.

288 She concluded *'With the benefit of hindsight, and with the knowledge of the allegations which the Plaintiffs now make against Mr O'Leary, his obstructive conduct in 2015 is explained in view of what it would seem he has done with the assets of the [Trust] by transferring them to an entity incorporated in Panama'*.

289 Miss Wuenschmann-Lyall reviewed the back up on Mr Hanson's computer and various matters came to light in respect of ARTL and the Trust which we have already touched upon in this judgment, in particular the statements showing that Mr Hanson treated ARTL as an asset of his over a number of years.

290 Mr O'Leary contended that the Plaintiffs' claims were driven, to some extent, by UK taxation considerations in that certain findings that the Court may make would result in less tax being chargeable to the Estate. Such foreign taxation considerations are irrelevant to the allegations made and the facts that we have found. However, one of the contentions that was made was that there will be a taxation advantage to the Estate if the settlor of the Trust is identified as Creditforce and not Mr Hanson. Miss Wuenschmann-Lyall said that that was not the case. She explained that because Mr Hanson was the beneficial owner during his lifetime as to 99% of the shares in Creditforce, HMRC would simply look through the company to its participators and that would have been, in effect, Mr Hanson. Accordingly, the identity of the settlor of the Trust, whether Mr Hanson to Creditforce was tax neutral from a UK perspective.

Equitable compensation

291 In view of our findings, Mr O'Leary is liable to make good to the Plaintiffs the value which the ARTL shares would have had if they had not, in breach of trust, been transferred to the Panamanian Foundation.

292 We note that there is no limitation or prescription period applying to the Plaintiffs' claim in these circumstances as Mr O'Leary was party to a fraud and, in any event, he, in addition, converted Trust property to his use by transferring the Trust to a non-charitable trust and personally benefitting from it to the tune of at least £1 million. Accordingly, pursuant to Article 57(1) of the Law, no period of limitation or prescription applies.

293 We agree with the Plaintiffs that the base measure of the loss must be the value of ARTL at the date of misappropriation.

294 Mr O'Leary, in evidence, said that value of ARTL in 2014 was £18 million. He produced no evidence to this effect. As noted above, Mr O'Leary told Mr Bunker that ARTL was worth £30 million in 2014. Article 30 of the Law provides that a trustee who is liable for breach of trust should be liable for either an account of profits or *'the loss or depreciation in value of the trust property resulting from such a breach'*.

295 In *Crociani v Crociani* [2017] JRC 146, Commissioner Clyde-Smith cited with approval the judgment of Lord Browne-Wilkinson in *Target Holdings v Redfern* [1996] AC 421, which also concerned a bare trust. Lord Browne-Wilkinson's dicta on equitable compensation is comprehensive:

> ***"The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law.*** Thus, in relation to a traditional trust where the fund is held in trust for a number of beneficiaries having different, usually successive, equitable interests, (e.g. A for life with remainder to B), the right of each beneficiary is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession. Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called "the trust estate" what ought to have been there .
>
> ***The equitable rights of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there.*** In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate: see *Nocton v Lord Ashburton* [1914] AC 932, 952, 958, ***per viscount Haldane L.C.*** If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed: *Caffrey v Darby* (1801) 6 Ves.488; *Clough v Bond* (1838) 3 M. & C. 490. ***Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred: see Underhill and Hayton, Law of Trusts & Trustees 14th ed.*** (1987), pp.734–736; *In re Dawson, decd.; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 N.S.W.R. 211; *Bartlett v Barclays Bank Trust Co. Ltd. (Nos. 1 and 2)* [1980] Ch. 515. ***Thus the common law rules of remoteness of damage and causation do not apply.*** However there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred but for the breach: see also *In re Miller's Deed Trusts* (1978) 75 L.S.G. 454; *Nestle v National Westminster Bank Plc.* [1933] 1 W.L.R. 1260."

296 Accordingly, the liability of Mr O'Leary is to pay sufficient compensation to the trust estate (in this case, the Plaintiffs) to put it back to what it would have been had the breach not been committed. The Plaintiffs accept that, if appropriate in calculating the equitable compensation, credit needs to be given to Mr O'Leary in respect of any recoveries that Mr O'Leary may himself effect from the Panamanian Foundation.

297 In this case, the Plaintiffs say that the Court should, having identified an appropriate base value for ARTL in 2014, then award compounded interest to reflect the increase in the net asset value of ARTL which would have taken place had the portfolio remained in the Trust.

298 A similar issue arose in *Crociani v Crociani* [2018] (1) JLR 468 when the Court was considering the issue of reconstitution of the trust fund. The Court ordered an inquiry as to what the value of a portfolio transferred away from the trust in 2011 would have been at the date of the handing out of the substantive judgment just over six years later.

299 We adopt Commissioner Clyde-Smith's exposition of the law as at paragraph 35 as follows:

> ***"35. It seems to us fundamental, and it was not in dispute, that in carrying out this hypothetical exercise as to how the portfolio would have performed between May 2011 and September 2017, we must assume that the trustees of the Grand Trust over the relevant period, whoever they may have been, would have performed all of their duties in relation to the Grand Trust. The plaintiffs, as beneficiaries, are entitled to no less than that. The point is made in Equity: Doctrines and Remedies by Meagher, Gummow and Lehane at paragraph 23–425:-***
>
> ***"It seems to be inherent in the compensatory principle at the heart of equitable compensation that a court's hypothesis of what would have happened had the defendant not committed the particular breach of which complaint is made should extend further to assume that the defendant would have performed all the defendant's duties in relation to the relevant trust or fiduciary relationship.*** …
>
> ***Nevertheless, it would seem contrary to principle to proceed on the basis that the defendant would have properly performed fewer than all the defendant's duties.*** These duties are not merely a narrowly defined set of fiduciary duties, nor duties which are imposed by equity rather than duties assumed by the fiduciary or imposed by legislation. In the case of a trustee, it is submitted, a court ought to suppose that the trustee:
>
> > ***(a) would have complied with (i) the terms of the trust, and (ii) with any applicable legislation; and***
> >
> > ***(b) would have (i) performed the trustee's obligations and (ii) exercised the trustee's discretions within the bounds set by fiduciary doctrine and to the level of care and diligence required by equity (or, where there are statutory duties of care owed by trustees, by statute) and (iii) complied with any other equitable obligations, such as obligations of good faith and to exercise powers only for proper purposes."***
>
> ***36. Under Jersey law, those duties are set out in Article 21 of the Trusts (Jersey) Law 1984 as follows:-***
>
> ***"21. Duties of trustee***

(1) A trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions –

(a) act

(i) with due diligence ,

(ii) as would a prudent person ,

(iii) to the best of the trustee's ability and skill; and

(b) observe the utmost good faith."

This is consistent with the general principle under English law expressed in the well-known case of *Speight v Gaunt* [1883] 9 App. Cas. 1.HL:-

"…[As] a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own."

37. We will refer therefore to "a prudent trustee" as a trustee who is fulfilling all of the duties of a trustee. We note however that a higher standard of care applies to a trustee such as a trust corporation carrying on a specialised business of trust management – see *Bartlett v Barclays Bank Trust Co. Limited* [1980] Ch. 515 ***at 531, cited with approval by the Jersey Court of Appeal in*** *Midland Bank Trust Company (Jersey) Limited v FPS* [1995] JLR 352 ***at page 381*** .

38. As Meagher, Gummow and Lehane say at paragraph 23–395, the decision as to what would have happened if there had been no breach of trust is not a simple question of fact and must be reached by means of a structured exercise. They go on to say at paragraph 23–400:-

"In considering the structure of the hypothetical inquiry, it is well to remember that the purpose of the inquiry is to permit a comparison between the facts as they ought to have been and the facts as they are, in order to identify any loss suffered by the trust fund or a fiduciary's principal by reason of the relevant breach of duty, and if so in what amount. That purpose is frustrated if too much weight is placed on the hypothesis of what would have happened without the particular breach."

39. There are a number of presumptions to assist the Court in this hypothetical exercise. The first is encapsulated in this extract from the judgment of Parker LJ in the English Court of Appeal decision of *Browning v Brachers* [2005] EWCA Civ 763 ***at paragraphs 204 and 205:-***

"[204] In the well-known case of *Armory v Delamirie* (1772) 1 Stra 505 ***the claimant, a chimney-sweeper's boy, found a jewel, and took it to the shop***

of the defendant (a goldsmith) to find out what it was worth. The defendant handed it to an apprentice, who, under the pretence of weighing it, told the defendant that it was worth three halfpence. The defendant offered the claimant that sum, but the claimant refused to take it and demanded the return of the jewel; whereupon the apprentice returned only the empty socket. The claimant sued the defendant in trover. The trial of the action took place before Pratt CJ and a jury. The Chief Justice ruled that the claimant was entitled to maintain an action against the defendant in trover. The significance of the case, however, lies in the direction which the Chief Justice gave to the jury as to the measure of damages. In the course of the trial, the jury had heard evidence from witnesses in the trade as to the value of a jewel of the finest quality of the right size to fit the socket. The brief report of the case concludes as follows:

'…. The Chief justice directed the jury that unless the defendant produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did' .

[205] It has been recognised in subsequent authorities that in so directing the jury the Chief Justice was applying a general principle to the effect that, in a case where the defendant has wrongfully deprived the claimant of property of value (be it an item of physical property or a chose in action), the court will, save to the extent that it is persuaded otherwise by the defendant, assess the value of the missing property on a basis which is generous to the Claimant."

…… .

41. The second presumption is that where there are a number of realistic possibilities as to what might have been done with an asset, the presumption is made that it would have been used in the most beneficial way. In the English Court of Appeal case of *Wallersteiner v Moir (No 2)* ***QB 373, Lord Denning MR said this in the context of determining whether to award compound interest for breach of fiduciary duty:-***

"In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest. That was done by Sir William Page Wood V.-C. (afterwards Lord Hatherley) in one of the leading cases on the subject , *Atwool v Merryweather* [1867] L.R. 5 Eq. 464n., 468–469. ***But the question arises: should it be simple interest or compound interest?*** On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf. *Armory v Delamirie* (1723) 1 Stra. 505."

300 We have applied these principles in this case, although we have done so cautiously to take into account that Mr O'Leary was unrepresented. In this regard we asked the advocate for the Plaintiffs to put forth the arguments on quantum that Mr O'Leary would have argued had he been represented. He did so and we have, in fairness to Mr O'Leary, adopted many of those submissions in calculating the compensation payable.

301 We agree that as the Plaintiffs and the Court have no visibility as to what the value of ARTL was between its misappropriation in 2014 and dissolution in December 2020, then it is appropriate to establish the value of ARTL at the date of misappropriation having regard to the available evidence. The Plaintiffs have undertaken a thorough review of all information relating to the net assets and underlying value of ARTL, including its subsidiary companies, namely a Jersey company called ART2 Limited and an English company called Grosvenor Research Trading and Investments Limited (of which Mr O'Leary was also a director). Documents identified included ARTL's management accounts, a statement of ARTL's holdings held with Bank of Julius Baer as of June 2014, and documents detailing monthly movements in holdings of shares and cash within ARTL from March 2012 to August 2014. The 2012 management accounts gave a value of £38,675,336. This include various loans to ART2 Limited which was dissolved in 2013. There was also an outstanding loan to GRTIL in excess of £7 million which was only recoverable, it appears, to the extent of £4 million approximately.

302 The Plaintiffs have adjusted the value of ARTL in 2012 by reference to the extent of which the loans receivable were considered not recoverable, giving an adjusted net asset value as at 31 March 2012 of £25,696,820. Further adjustments to reflect the true value of the investments referred to in the 2012 management accounts resulted in a reduction of £3,028,643, giving a total of £22,668,177. However, from 2012 to 2014, there were various realised gains on disposals, unrealised gains and other transactions leading to a valuation of ARTL of £24,561,582 at the date of misappropriation.

303 An alternative basis for the estimate of the 2014 value of ARTL involves taking the management accounts from 2004 to 2012 inclusive, plotting the average growth or decline in the value of ARTL over this period and applying that percentage of growth to the value of ARTL as reflected in the 2012 management accounts. The average performance of ARTL over these years was growth of 5.3% per annum. This would yield a figure at the date of misappropriation of £33,003,219, after taking account of the non-recoverable loan from ARTL2 of £9,794,062. The principal claim for the Plaintiffs for £33,003,219 in equitable compensation plus interest which, at 5.3% per annum compounded, would give rise to a total claim for compensation of £47,176,908.

304 We decided to adopt the lower figure at paragraph 303 above as we regarded it as more reliable and fairer to Mr O'Leary, notwithstanding the fact that the Court would have been entitled to adopt the presumptions referred to *Armoury v Delamirie*.

305 Furthermore, we were told that, in slightly curious circumstances so it seems to us, Mr

Gassner wrote to Mr O'Leary and the other director of GRTIL in May 2017, to the effect that ARTL had received instructions from its owner, the Foundation, as *'part of their ongoing charitable policy going forward'* to the effect that the GRTIL should be wound up and its assets transferred to a UK registered charity. This occurred, we were told, and assets with the value of £2 million transferred to the Don Hanson Charitable Foundation.

306 Accordingly, we think it appropriate for the Plaintiffs to give credit for this sum, because even though the sum was not received by the Plaintiffs, it did benefit the ultimate beneficiary of these proceedings, to the extent that assets are recovered. Accordingly, the base figure for equitable compensation is £22,561,582, to which we agree that compound interest at 5.3% per annum to 30 November 2021 should be added, which yields a total sum by way of compensation payable by Mr O'Leary of £32,666,771.

307 We note that compound interest is a standard order in cases of fraud committed by a trustee, as recently confirmed by the High Court of England and Wales in *FM Capital Partners Limited v Marino and Others* [2019] EWHC 725 (Comm).

Mr O'Leary's pleaded defences

308 It is axiomatic from our findings that we have rejected these pleaded defences but, nonetheless, we set them out.

Ex turpi causa non oritur actio

309 Mr O'Leary alleges that the Plaintiffs are not entitled to the relief they seek as neither of them have *"clean hands"*. Mr O'Leary's case, in short, is that the Trust was a thoroughly rotten structure designed to mislead HMRC and the Plaintiffs are standing in the shoes of Mr Hanson, who set the structure up (with the help of Mr O'Leary) and, accordingly, are disentitled to any relief. The Plaintiffs, say that although they are alleging that Mr Hanson was party to a sham, their main purpose is to recoup the assets of the Trust, make good the effects of the invalidity of the Trust by paying taxes due and distributing the balance to a residuary beneficiary which is a genuine charity. The Plaintiff says that any illegality, if a feature of this case, is not to be regarded as offensive to public policy, so that the Plaintiffs are prevented from making the claims they advance in these proceedings. Further, they say that it would be offensive to public policy to allow a person who had misappropriated assets from a trust to retain the benefits of those assets.

310 Reference was made to the decision of the Supreme Court in *Patel v Mirza* [2017] AC 467. Lord Toulson, giving the principal judgment, said:

> ***"120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of***

public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate .

121. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal."

311 In this Court, in *Macon v Querée* [2001] JLR 80, Commissioner Page said at paragraph 65, to similar effect:

"It becomes a question of degree whether the misconduct is sufficiently serious to preclude the plaintiff from invoking the Court's equitable jurisdiction."

312 In this case, the Plaintiffs are seeking to set aside transactions, not profit from them. Notwithstanding the conduct of Mr Hanson (and, indeed, Mr O'Leary), we do not take the view that there is sufficient evidence of unconscionable behaviour in this case to prevent the Plaintiffs from enforcing their claims. Indeed, it would be quite wrong for them to be prevented from doing so.

Laches

313 That the doctrine of laches forms part of Jersey law was affirmed in *Pell Frischmann v Bow Valley* [2007] JRC 105A. In that case, it was observed that the customary law of Jersey was well accustomed to administering *equité* and would recognise the maxim that a person must not be indolent in seeking equitable relief, which extends to the declarations sought in this case and equitable compensation.

314 In *Partridge v Partridge* [1894] 1 Ch 351, North J said that:

> ***"Laches, or lasches, is an old French word for slacknesse [sic], or negligence, or not doing."***

315 Snell's Equity says:

> ***"This maxim must be treated with caution.*** It can be seen as underpinning, in a general sense, the doctrine of laches, which acts as a bar to equitable relief. That doctrine is not based, however, on a mere fact of delay. Something more than mere delay, more even than extremely lengthy delay, is required before B will be denied equitable rights under the doctrine of laches, as the question is whether the lapse of time has given rise to circumstances ***that now mean it would not be inequitable to deny relief to B.*** The principal example occurs where, perhaps as a result of having relied on a mistaken belief that B has no relevant right, A would now suffer an irreversible detriment, as a result of B's delay, if B were permitted relief. The doctrine will therefore apply if the delay has resulted in the destruction or loss of evidence by which B's claim might have been resisted, or if B can be said to have released or abandoned any right."

316 In this case Mr O'Leary, in his Answer, says that delay on the part of the Plaintiffs has caused him prejudice as a consequence of which two witnesses, namely Mr Hanson and Mr Torkington, have died. This, in our view, really does not amount to prejudice at all. From what we can tell, Mr Torkington would have been a witness hostile to Mr O'Leary. As to Mr Hanson, his death was a precondition for this matter being investigated and it was under the cover of Mr Hanson's terminal illness, as we have found, that Mr O'Leary misconducted himself in the way that we have held. Accordingly, the defence in laches is hopeless.

Acquiescence / estoppel

317 Mr O'Leary's pleading appears to argue that the Plaintiffs are not entitled to the relief they seek as a result of the acquiescence of Mr Hanson and Creditforce in the disposal of the ARTL shares on the charitable trusts of the Trust, in the knowledge that the trustees had an unrestricted right to manage those assets and that the trustees, in reliance on the same, distributed Trust property for charitable purposes, on the footing that the Trust was a valid charitable trust and thereafter Mr O'Leary validly settled the shares in ARTL on the charitable trusts of the Panamanian Foundation.

318 Further, it appears to be argued that Mr Hanson acquiesced in the transfer of the shares in Trust carried out by Mr O'Leary in 2014 and that the Plaintiffs are thereby estopped from advancing their claims.

319 The difficulty with these claims is that they are fact dependent and the factual basis for

each claim does not exist. As to the creation of the Trust, the Court has found that neither Mr Hanson nor Mr O'Leary intended the Trust to be a charitable trust or the assets of ARTL to be applied for charitable purposes – indeed they were not, save as to £22,000 over the course of ten years.

320 As to the second assertion, the Court has rejected the evidence of Mr O'Leary that Mr Hanson knew of the transactions that he arranged in 2013 and 2014 resulting in the Trust assets migrating to Panama and the shares in the company being owned by a Panamanian Foundation.

321 Accordingly, there is no evidential foundation for the claim that the Plaintiffs have acquiesced and no evidence that any person in the position of a beneficiary (i.e. Mr Hanson and Creditforce) acquiesced in the breach of trust which we have found that Mr O'Leary committed.

Article 45 relief

322 Finally, Mr O'Leary sought relief from personal liability under Article 45 of the Trusts Law which provides as follows:

> ***"45 Power to relieve trustee from personal liability***
>
> ***(1) The court may relieve a trustee either wholly or partly from personal liability for a breach of trust where it appears to the court that –***
>
> > ***(a) the trustee is or may be personally liable for the breach of trust;***
> >
> > ***(b) the trustee has acted honestly and reasonably;***
> >
> > ***(c) the trustee ought fairly to be excused –***
> >
> > > ***(i) for the breach of trust, or***
> > >
> > > ***(ii) for omitting to obtain the directions of the court in the matter in which such breach arose*** .
>
> ***(2) Paragraph (1) shall apply whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Law."***

323 As we found that Mr O'Leary acted neither honestly nor reasonably, the question of Article 45 relief does not arise.

Summary of relief ordered by the Court

324 Accordingly, we grant and make:

(1) The declaration at paragraph 37 above.

(2) A declaration in accordance with our findings at paragraph 169 that the Trust was not a valid trust as its purposes were not exclusively charitable as a matter of Jersey law and, accordingly, the Trust is void and the assets of the Trust, namely the shares in ARTL, were at all times held by Mr O'Leary as bare trustee (in accordance with our further finding at paragraph 63) as to 25.25% for Mr Hanson and 74.75% for Creditforce.

(3) A declaration in accordance with paragraph 271 that the Instrument of Advancement and the October 2014 resolution of the ARTL board are void and of no effect and that, in consequence, the Panamanian Foundation and any successors in title hold the shares of ARTL as bare trustees as to 25.25% for the Estate of Mr Hanson and 74.75% for Creditforce.

(4) A declaration that Mr O'Leary is liable by way of equitable compensation for breach of trust to make good to the Plaintiffs the value that the ARTL shares would have had had they not been transferred by him in breach of trust in the sum of £32,666,771 in accordance with paragraph 307 herein.

325 We decline to grant the declaration that the continuation of ARTL in Panama is void and that ARTL remains a company incorporated under the provisions of the Companies (Jersey) Law 1991 as we have no power under the provisions of the 1991 Law to make such an order. In particular, we have no power to reinstate ARTL to the register of Jersey limited companies pursuant to Article 213(1) of the 1991 Law.

326 We will hear further argument as to costs in due course and any other consequential relief that the Plaintiffs seek.

Postscript

327 It is to be noted that the Trust in this case was set up and administered prior to the implementation of the Charities (Jersey) Law 2014 in 2018. Under the 2014 Law, a Jersey charity must be registered and meet the statutory “charity test.”

328 The Guidance Notes issued by the Commissioner under the 2014 Law are comprehensive and extensive. Registered charities need to continue to meet the requirements of the 2014 Law after registration.

329 Further, a registered charity must send an annual return to the Commissioner, containing such information as is specified in the Law. Under the Charities (Core Financial

Information) (Jersey) Regulations 2018, this includes the charity's income, expenditure, value of assets and other material that needs also to be supplied annually and also on registration.

330 Accordingly, the sort of conduct carried out by Mr Hanson and Mr O'Leary under the guise of establishing a Jersey charity in this case will now not be possible.