Z v Y; B; C; D

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	11 September 2014
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Text

[2014] JRC 170

ROYAL COURT

(Family)

Before:

W. J. Bailhache, **Q.C., Deputy**Bailiff, **and**Jurats Marett-Crosby**and**Blampied

Between
Z
Petitioner
and
(1) Y
(2) B
(3) C
(4) D
Respondents

Advocate M. J. Haines **for the Petitioner**.

Advocate N. S. H. Benest **for the First Respondent**.

Advocate S. A. Franckel **for the Fourth Respondent**.

Authorities

Control of Borrowing (Jersey) Order 1958.

Housing (Jersey) Law 1949.

McKinnon v Regent Trust Company Limited and others [2005] JLR 198 .

Snook v London and W Riding Invs Ltd [1967] 2QB .

Re Vandervell's Trust (No. 2) [1974] Ch 269 .

Trusts (Jersey) Law 1984.

Fiduciary Management Limited v Sheridan 2002/34 .

Re Esteem [2002] JLR 53 .

J v H [2014] JRC 140A .

Matrimonial Causes (Jersey) Law 1949.

Matrimonial — further consideration of assets for division between the petitioner and the first respondent.

Bailiff

THE DEPUTY

1 The Petitioner is aged 47 and the First Respondent is aged 46. In or about 1991 they commenced a relationship and they started co-habiting in that year. Two children were born of the union, the first in 1997 and the second in 2003. On 27th August, 2005, the parties married. There is agreement that before the date of the marriage, the First Respondent had raised with the Petitioner the possibility of the two of them entering a pre-nuptial agreement, but the Petitioner refused. On the day before the marriage the First, Second, Third and Fourth Respondents entered into an agreement purporting to record the true ownership of shares in a number of companies in which the First Respondent was the registered shareholder. In effect, this was an agreement to transfer shares in some of those companies out of the name of the First Respondent into the names of the Second, Third and Fourth Respondents. On 30th June, 2009, the Petitioner and First Respondent separated, and the

Petitioner moved out of the matrimonial home the following day. A decree nisi was granted in August 2011. Outstanding ancillary matters are to be dealt with by this Court at a hearing which has been fixed to commence on 27th October, 2014.

2 In this preliminary hearing, we are concerned with the extent to which one particular asset falls within the pot of assets to be considered for division between the Petitioner and the First Respondent at the hearing in October. In shorthand, we describe that asset as the Chateau Valeuse development.

3 We note in passing from a consent order dated 15th July, 2014, that all the other contentious issues as to what was or was not within the matrimonial pot of assets have now been agreed and accordingly the Second and Third Respondents have been released from these proceedings. In summary, although the legal interests in the properties and shares suggest otherwise, the First Respondent is agreed to have the whole value of three flats owned by Gloster Hotel Limited, and the balance of the escrow account from the sale of Flat 15, Gloster House, less the sum of £175,000; and £120,000 in the property 10 Kings Park. The Petitioner has acknowledged the interest of the Third and Fourth Respondents in the former matrimonial home ("FMH"). The Petitioner has expressly disavowed any interest in the Hotel Suisse development, and before us has expressly disavowed any interest in Apartments 2, 5 and 6 in the Chateau Valeuse development.

4 On 3rd July, 2006, the First Respondent and a close friend Mr Gary Moustras ("Mr Moustras") entered into a preliminary agreement with Mr and Mrs Jordan for the purchase of the Chateau Valeuse Hotel in St Brelade's Bay. This preliminary sale agreement was executed by them in their personal names. The purchase was for the purposes of development of that site into residential accommodation for onward sale. The preliminary agreement was conditional upon obtaining appropriate planning approvals, and on 14th August that year, Messrs Naish Waddington, architects, applied for planning permission on their behalf. The original agreement was extended as obtaining planning permission was taking longer to obtain than anticipated, on payment of a deposit of £105,000, £50,000 in November 2006 and £55,000 on 30th March, 2007. This deposit was paid by the First Respondent.

5 Chatval Limited ("CL") was incorporated on 28th March, 2007. Although it appears that very positive indications had been given by the Planning department, formal planning Planning permission had still not been obtained. The First Respondent and Mr Moustras were both directors of CL, and also each held one of the two shares issued in that company.

6 On 1st May, 2007, planning permission was formally obtained for 21 units of accommodation on the land. CL purchased the site three days later on 4th May, 2007, for a consideration of £2.1 million.

7 Amongst the company papers for CL is a declaration of trust in respect of his one share,

signed in favour of the Fourth Respondent by the First Respondent and given a date of 29th March, 2007. It was subsequently cancelled, but on 4th October, 2007, the First Respondent transferred the share in question to the Fourth Respondent as the minutes of a board meeting held on 4th October, 2007, demonstrate. Those minutes also record the First Respondent as having resigned as a director of CL on that day, although he remained secretary of the company; and the minutes record that both the Fourth Respondent and Mr Moustras transferred their respective shares in CL on the same day to the company Chatval Holdings Limited ("CHL"), a company which was incorporated on 27th July, 2007, at the instance of the Fourth Respondent and Mr Moustras, who are recorded in the annual returns for the company in the immediate subsequent years as holding one share each of the two issued shares.

8 Similar inaugural minutes exist for a company called Chatval Developments Limited ("CDL"), which was incorporated on 26th June, 2007. Again, this appears to be owned beneficially by the Fourth Respondent and Mr Moustras, according to the annual returns filed for that company.

9 Subsequently CDL developed the freehold site formerly known as the Chateau Valeuse, owned by CL. The accounts which were prepared some time later show that it did so with the benefit of monies advanced from CL which had cash as a result of the issue of shares to CHL which had borrowed monies for this purpose. It will be necessary to review later in this judgment the arrangements for the various borrowings and for security taken from time to time. Once the development had been completed, the further shares were issued, and the Articles of Association were amended to create blocks of shares giving exclusive rights of occupancy over particular flats, parking spaces or stores constructed at the premises. Such flats were then placed on the market for sale and either sold to third parties or subsequently transferred to Mr Moustras or his nominees or to the Fourth and Third Respondents in respect of three of the flats, and to the Fourth Respondent only in respect of Apartment 14.

10 We add that for the avoidance of doubt Mr Moustras' shareholding has no relevance to the present proceedings.

11 Those are the facts about which there is no apparent dispute. What remains in dispute is what is to be made of these arrangements in the context of the main issue which we have to decide which is to determine what if any part of the Chateau Valeuse development should be regarded as forming part of the matrimonial pot for division between the spouses.

The Petitioner's claims

12 The Petitioner has amended her Points of Claim on more than one occasion but in the most recent document filed on 31st July, 2014, the first claim is that the First Respondent transferred or purported to transfer his 50% interest in CL to the Fourth Respondent for free in October 2007. This is said to amount to financial misconduct, because his motive and

intention was to hide his interest in the Chateau Valeuse development from the Petitioner so as to prevent this asset from subsequently being available for division in ancillary relief proceedings should there be any. We note that in order to determine whether that is or is not the case, it is necessary to enquire into the probability of the First Respondent believing that his marriage was likely to come to an end because, obviously, if he considered his marriage was rock solid, there was commensurately less reason to think that he would wish to hide his interests away from the Petitioner.

13 The second claim that is made by the Petitioner is that the transfer of the 50% interest in CL to the Fourth Respondent was a sham, and that both the First and Fourth Respondents knew it. It is contended that the First and Fourth Respondents had a joint common intention to frustrate any ancillary relief claims of the Petitioner. It was contended that the transfer of the First Respondent's interest in CL was not a transfer at all, because both the First and Fourth Respondents intended that the interest would remain in the beneficial ownership of the First Respondent and the share was therefore held subject to his order or instructions. For reasons into which it will be necessary to go in more detail later, the Petitioner makes further claims that the effect of the arrangements made is that the Fourth Respondent holds Apartment No. 14, parking spaces and stores, ("Apartment No. 14") or the sum of £950,000 on resulting trust or constructive trust for the First Respondent.

14 We record that the Petitioner maintained the claims in this way notwithstanding an invitation to Advocate Haines at an earlier directions hearing to consider putting the claim in this way:–

> *"The First Respondent owned in the summer of 2007 a 50% beneficial interest in the Chateau Valeuse development by his beneficial ownership of 50% of CL, the owner of the freehold land.* That interest was then worth £950,000.
>
> *In the autumn of 2007 the First Respondent transferred his beneficial interest in CL to the Fourth Respondent or to CHL, a company 50% beneficially owned by the Fourth Respondent.* He received no consideration or value for it. The CL property *was subsequently developed and the flats represented by blocks of shares in CL were sold or transferred by CHL, either to Mr Moustras or to the Fourth Respondent whether jointly with his wife or in the case of Apartment 14 to the Fourth Respondent alone.*
>
> *The Petitioner claims that the value of the First Respondent's interest in CL before the transfer to CHL forms part of the matrimonial pot either because the Fourth Respondent in equity is obliged to account to the First Respondent for such sum representing that interest or because the First Respondent should be treated as having engaged in financial misconduct in his disposal of his share in CL to the Fourth Respondent for no consideration."*

15 We also record that Advocate Haines on behalf of the Petitioner expressly disavowed any suggestion that the transaction involving the transfer of the single share in CL from the First Respondent to the Fourth Respondent should be set aside. He took that step no doubt for

the practical reason that CL is not a party to the present proceedings and because the shareholders in CL, which now include a number of individuals who are completely independent of the current dispute would no doubt have strong feelings about the suggestion that there was some defect in the title which led to blocks of shares being registered in their names. But it is not obvious how one can at the same time aver that the transfer was a sham and yet should not be set aside. It seems to us that the necessary corollary of this approach is that Advocate Haines must be taken to be contending that the Fourth Respondent took all the steps that he did thereafter as trustee or nominee on behalf of the First Respondent, and that the First Respondent approved and ratified the taking of those steps. We will have to consider later in this judgment the extent to which such an assertion is credible on the facts and acceptable as a matter of law.

16 The Petitioner's Points of Claim are framed in a slightly different way in the approach set out in her affidavit dated 17th February, 2014. In that affidavit she certainly maintains that the transfer of the First Respondent's half interest in the Chateau Valeuse Development was a sham, and she maintains the allegations of financial misconduct. She also says, however, at paragraph 3 of that affidavit:–

> *"Secondly, and in the alternative, that his parents or D alone hold his half interest for him as his nominee on trust and at his direction."*

17 At paragraph 8 of that affidavit, she says:–

> *"The relief that I seek from the Royal Court is a finding that either his half interest in the Chateau Valeuse development is legally and/or beneficially owned by the first respondent, or is held for him by his nominees on trust, or that the disposal of his half interest in the Chateau Valeuse development, at the value at the date of the final hearing of the ancillary relief proceedings, be brought back into account for division between the parties when the Royal Court comes to adjudicate on the actual division in the ancillary relief proceedings."*

18 It is apparent that those claims go rather wider than the formulation set out in the amended Points of Claim. In particular, the prayer for relief was formally amended on 31st July, 2014, to remove the prayer for an order that the First Respondent had a 50% interest in the Chateau Valeuse development.

The First Respondent's position

19 The amended Points of Claim were filed shortly before the hearing and in the circumstances the First Respondent did not file any amended defence to them. However, he had sworn an affidavit on 14th June, 2014, in which he set out his position in relation to the Chateau Valeuse development. In that affidavit he accepted that in January 2006 he became interested with Mr Moustras in the Chateau Valeuse Hotel and the two of them struck a deal with the vendors in the early part of 2006 for the purchase of that hotel, subject

to contract. Originally it was to be an acquisition by share transfer of the shares of Chateau de la Valeuse Limited, but in the event the agreement as settled, conditional upon planning approvals, was for the conveyance of the site to the First Respondent and Mr Moustras or to a nominee company of their choice. The First Respondent explained that there were a number of other negotiations in relation to the site, all of which took time, as did the acquisition of a planning consent. On 9th February, 2007, he completed the purchase of another site called “Collingwood” of which he had become aware at the end of 2006. He asserted in his witness statement dated 16th June, 2014, that when CL was incorporated at the end of March 2007 he already knew he was going to step away from the development and instead pursue the Collingwood development. He had discussed with his father that the latter would take over his interest as he could not afford to do both projects. As to the shareholding in CL, he said at paragraph 119 of his affidavit:–

> *“Furthermore I was relaxed about having the shareholding that would ultimately become my father's put in my name.* This was after all how we had always operated and I had no reason to be concerned and I knew it would all be sorted out before the development actually started … indeed the change in shareholding was not actually undertaken until October 2007 when the additional loans of £4.2M and £2.1M were being taken.”

20 The First Respondent went on to describe the arrangements for the incorporation of CDL and CHL. He asserted that there were two reasons why he did not proceed with the Chateau Valeuse development — the first that he was going through difficulties in his personal life in relation to the Petitioner's problems, and secondly and most importantly, that he could not have afforded to do both the Chateau Valeuse development and the Collingwood development.

21 In cross examination, the First Respondent asserted that he had made an exit from the Chateau Valeuse development in February 2007. Indeed he said he reached an agreement with his father before he acquired Collingwood.

22 This explanation of the First Respondent was slightly different (as to the date on which he came out of the Chateau Valeuse development) from that which is contained in his affidavit of 2nd December, 2013. In that affidavit, at paragraph 151, he described the purchase of Chateau Valeuse with Mr Moustras and he continued at paragraph 152 in this way:–

> *“[The Petitioner] has sought to suggest that there is something remiss about the fact that I came out of Chatval Limited and the Chateau Valeuse project in October 2007.* In reality, there were two reasons why I came out of the project when I did …”

23 In December 2013, the First Respondent gave two of the reasons which he advanced at the hearing in his witness statement — stress in his home life and the Collingwood development opportunity, but he also said then that he thought the Collingwood development would achieve a similar profit to the Chateau Valeuse. That, perhaps

unsurprisingly, has not in our view proved to be so.

24 The First Respondent's present explanation also differs slightly from that which he set out in his Reply to the Petitioner's formal questions, filed on 5th April, 2012, when his asserted position at paragraph 1(b) in relation to CL was this:–

> *"The Respondent was a Director and Shareholder with other members of his family until he relinquished his interest in the Company in October 2007."*

25 The First and Fourth Respondents have filed a joint skeleton argument, and they therefore adopt the same position in relation to the Petitioner's claims. They deny that the Court should make any finding of financial misconduct on the facts and assert that in any event, even if there were to be a finding of financial misconduct, that would not provide a mechanism by which the Court should make any order against the Fourth Respondent for the return of funds for property to the matrimonial pot.

26 The First and Fourth Respondents also deny that there was any trust relationship on the facts of the case, and accordingly assert that there is no basis in equity for an order against the Fourth Respondent for the return either of Apartment 14 or the sum of £950,000 to the matrimonial pot. They deny in particular that the First Respondent ever had any intention of putting assets beyond the reach of the Petitioner, and furthermore they deny that even if he did, the Fourth Respondent either knew about or shared that intention.

27 Before turning to the evidence in detail, we make the following comments:–

(i) The Court bundles have been very inconveniently put together. The documents are not in date order. Furthermore, it is clear that documents have been disclosed at different times. Unfortunately the bundling has been completed on the basis of the various affidavits. This might be helpful if the argument were about the extent of disclosure but it is not. The argument is about whether a particular asset should or should not form part of the matrimonial pot. The result of putting together the documents in the form which has been adopted is that there is no coherence of subject matter, and different documents relating to the same subject are to be found littered across the different lever arch files. It has made sensible pre-reading of documents prior to trial difficult if not impossible.

(ii) The documents which are disclosed are often apparently office copies of the originals. It is not always obvious if the documents in the bundles were drafts or were ever completed, and if completed, at what dates they were completed. Again this has not assisted in a review of the evidence in the case.

(iii) Mr Paul Wilson, an employee or perhaps partner in Messrs Crill Canavan at the relevant time, who was clearly involved in many of the arrangements in question, was not called to give evidence. Mr Paul Harben, who was a partner in Messrs Crill Canavan at the relevant time did depose an affidavit, but was not available for cross-

examination at the hearing because he was out of the Island on a sabbatical. Some of the file notes of meetings which he attended, which we believe to be either his or Mr. Wilson's file notes, are either illegible or incomprehensible. The absence of his live evidence before us has not assisted our task.

(iv) It is absolutely apparent that the registered shareholdings in the different companies forming part of the wider Y family structure in 2005 did not reflect the true beneficial ownership of those companies. Indeed, both the First and Fourth Respondents took advice from Crill Canavan in advance of the marriage of the Petitioner and the First Respondent. Similarly, leaving aside the issue as to whether Jersey law recognises equitable interests at all, the Y family clearly did not consider that the registered title to the former matrimonial home (in the name of the First Respondent) reflected the equitable interests in that property, which should, it is said, have included the interests of the Third and Fourth Respondents. In those circumstances, it seems to us that the request by the First Respondent in 2005 for a pre-nuptial agreement, which according to the Petitioner was made in a short conversation, was entirely reasonable. The refusal of that request by the Petitioner was in our judgment also entirely reasonable, having regard to her lack of knowledge of the family finances generally and the way in which they were structured. She was entitled to assume at that time that if an asset were in the name of her future husband, it belonged to him. We were struck by the fact that at that time she did not even have a bank account which demonstrates that the financial responsibilities in the marriage lay with the First Respondent. Accordingly, no blame or obloquy attaches to either Petitioner or First Respondent for the making of the suggestion of a pre-nuptial agreement, or for its rejection. That does not make the evidence around the pre-nuptial agreement discussions irrelevant, however, because it demonstrates that the First Respondent was concerned about assets being registered in his name.

(v) If, therefore, transfers of shareholdings were made at or immediately before the marriage which left the share register as an accurate reflection of the equitable interests in the companies, that would seem to be an entirely reasonable explanation in the circumstances described above. However, it is apparent from the evidence that was given that no party contends that this was in fact the result of the share transfers made in relation to the Gloster Hotel Limited. The fact that the share register did not reflect the equitable interests in that company after the 2005 transfers had been made shows that we have to have regard to all the circumstances when we come to look at the equitable interests in CL, CHL and CDL at the relevant times.

The evidence of the Petitioner

28 The case for the Petitioner broadly rests on the proposition that the transfer of a single share in CL on 4th October, 2007, was a valuable asset given away by the First Respondent, and in one form or another, a remedy ought to be available to ensure that the value of that asset given away reappears in the matrimonial pot of assets for division. The case for the First and Fourth Respondents was that the First Respondent, having made all the running with Mr Moustras during 2006, found in the early part of 2007 that a better investment opportunity had arisen with the property Collingwood, that he could not afford to

carry out both developments, and that accordingly he had agreed with the Fourth Respondent that he would withdraw from the Chateau Valeuse development and that the Fourth Respondent would take his place as a 50% partner in the development with Mr Moustras; and by implication that there was no transfer of value at that time. It is that assertion that we now test against all the evidence that we have seen and read.

29 We found the evidence of the Petitioner to be basically consistent with the documents we have reviewed and that she was a credible witness. She was candid about the problems which she faced both before the marriage and for the years that followed. We accepted also that she was broadly accurate in relation to her comments as to the problems which the First Respondent had. He did not really dispute them. The issue of the Petitioner's problems and her conduct was raised before us for only one reason. That was the assertion by the First Respondent and indeed others that the reason that he withdrew from the Chateau Valeuse development, so he claimed, in January/February 2007 was that he feared he would be unable to commit both to that development and to the Collingwood development because he feared that he would be liable to child care responsibilities at short notice. We do not accept that explanation for the reasons which we will consider shortly, and we mention the issue of the Petitioner's conduct only to dismiss it as having no relevance to what we have to decide in this case.

30 As will be apparent, we have relied extensively in this judgment on contemporaneous documents. Where those are unclear, and we have had to have regard to the evidence of the Petitioner, First and Fourth Respondents and that evidence conflicts, we are inclined to prefer the evidence of the Petitioner, although we add that such conflicts were generally not significant. We noted, for example, that when he was giving evidence, even the First Respondent accepted that the main reason he would not do both Collingwood and Chateau Valeuse projects was the issue of finance, and that home stress and pressure was a factor but not the main reason.

Security

31 CL opened a bank account with Barclays Plc. The mandate has clearly been changed with manuscript annotations, but it is unclear when those changes were made. The mandate describes the company as having been incorporated two days before in fact it was, and gives the main trading address as the former matrimonial home with the First Respondent as the contact name. The mandate indicates that a loan account is required for property development, and under the heading *"Source of Funds"* which requires specification of the beneficial owners, there is this entry:–

> *"Lending from bank.* Existing client D and Y, Mr Moustras. Hotelier [illegible] developer."

32 Under Section 3, the First Respondent is entered as a director but there has been a manuscript amendment at some point which describes him as signatory. Mr Moustras is

described as a director and the Fourth Respondent's name also appears, added apparently at the same time as the manuscript amendment to the entry for the First Respondent, and he is initially described as a director. This is the subject of an apparent manuscript amendment with the word *"shareholder"* replacing it. From the signatures in Section 5, it appears as though the manuscript amendments to the standing of the First Respondent were made on 27th March, 2007, when the Fourth Respondent appears to have signed the document unless those amendments were made later — we heard no evidence on the point.

33 On 11th April, 2007, Barclays wrote to the directors of CL with an offer letter in respect of a loan facility of £2.1 million, the purpose of which was to assist with the purchase of the Chateau Valeuse Hotel. The repayment of the obligations was to be secured by a personal guarantee for £856,000 given by the Fourth Respondent which would be supported by an unregistered promissory note over Apartments 14, 15, 17 and 18 Gloster Hotel; a joint and several guarantee for £1.2 million given by Mr and Mrs Thomas Moustras, the parents of Mr Moustras, supported by an unregistered promissory note in that amount taken over Numbers 1, 4 and 7 Magnolia Villas and Flat 9 Magnolia House; an unregistered bond for £2.1 million over Chateau Valeuse Hotel; and a security interest over a treasury deposit in the sum of £344,000 "held in the name of Barclays Private Clients International Limited re Y."

34 The offer letter was signed by Mr Dennis Tulip, manager of the Bank, who gave evidence before us, but was not asked questions in relation to this document, and accordingly we have no explanation as to why it is framed as it is. At all events, Mr Tulip wrote to the company again on 1st May, 2007, to vary the terms and conditions of the offer letter to provide for security in this way — a guarantee in the sum of £856,000 given by Gloster Hotel Limited, supported by an unregistered promissory note in that amount over the same freehold property at Gloster Hotel; a joint and several guarantee in the sum of £1.2 million given by Mr and Mrs Thomas Moustras, secured over the same property at Magnolia Villas and Magnolia House; an unregistered bond for the sum of £2.1 million taken in respect of the Chateau Valeuse Hotel; and a security interest agreement over a treasury deposit in the sum of £344,000 held in the name of Barclays Private Clients International Limited re D.

35 It appears to be on the basis of this facility that the purchase of the Chateau Valeuse Hotel was completed by CL on 4th May, 2007.

36 CHL also opened a bank account with Barclays. Once again the company's registered address is given as the former matrimonial home, and the First Respondent is the contact name. The company is described as being the holding company for the property and development of the Hotel Chateau Valeuse. We assume that this document was prepared by employees of Barclays, because under the heading *"Source of Funds"* which requires the source of any initial deposits into the account and details of the beneficial owners, there appears the entry *"Lending from ourselves.* Messrs Y our existing clients. Mr Moustras [illegible] hotelier and developer." Under Section 3, dealing with connected parties, Mr Moustras, the First Respondent and the Fourth Respondent all appear, although their

status is not set out until the customer declaration at Section 5 where Mr Moustras and the Fourth Respondent are described as directors and the First Respondent is described as a signatory.

37 The inaugural minutes dated 27th July, 2007, of CHL authorise the opening of the bank account with Barclays and indicate that the bank is authorised to accept the signatures of the Chairman (the Fourth Respondent) and Mr Moustras, jointly, and there is no mention of the First Respondent even though the mandate shows the First Respondent as a signatory. These inaugural minutes have been signed by the Fourth Respondent.

38 On 24th September, 2007, on behalf of Barclays, Mr Tulip wrote to CHL to make an offer of a loan facility of £4.2 million. The purpose of the facility was to cover the cost of demolition of the hotel and the development of a block of luxury apartments on the site. The security was required to be:–

(i) An unregistered promissory note for £2.1 million subscribed by CHL supported by a guarantee in the same figure provided by CL securing those liabilities.

(ii) An unregistered promissory note for £4.2 million subscribed by CHL and guaranteed by CL, with an authority to register against the Chateau Valeuse Hotel.

(iii) An unregistered promissory note for £1.2 million subscribed by CHL and guaranteed by Mr and Mrs Thomas Moustras, to be registered if necessary against No's 3, 4 and 7 Magnolia Villas and Flat 24 Magnolia House.

(iv) An unregistered promissory note in the sum of £856,000 subscribed by CHL and guaranteed by Gloster Hotel Limited, which if registered would attach to Apartments 14, 15, 17 and 18 Gloster Hotel.

(v) A security interest agreement over a treasury deposit in the sum of £344,000 held *"in the name of Barclays Private Clients International Limited re D*

39 This facility letter appears to have been accepted, and we have seen a quantity of documentation, including certified copies of minutes dated 4th October, 2007, in respect of both CHL and CL, signed by Mr Moustras and by the Fourth Respondent which support the conclusion that this security was taken by the bank at that time. We have also seen a certified copy of a minute of the directors meeting of Gloster Hotel Limited, dated the same day and apparently signed by the First and Fourth Respondents acknowledging that company's guarantee of the obligations of CHL in the sum of £856,000.

40 Mr Tulip sent a second offer of a loan facility to CHL of £2.1 million the same day, the purpose of which was to acquire the hotel site. The security required was the same. The aggregate facilities thus seem to have been £6.3 million.

41 Finally we note that CDL also opened a bank account with Barclays. The directors are shown as Mr Moustras and the Fourth Respondent, and the First Respondent be shown as a signatory. The registered office of the company is the former matrimonial home, and again the First Respondent is named as the contact for the company. Under the heading *"Source of Funds"* the entry appears *"Loan from Barclays.* Both Messrs Y are account holders + well known to the bank. Mr Moustras is a local hotelier and developer also known". The purpose of the account is described as a trading account for property development. Mr Moustras and the Fourth Respondent are described as directors and the First Respondent as a signatory. The inaugural minutes of the company are in similar terms to those of CHL, but they do not contain any recognition of the appointment of bankers in accordance with the mandate just described.

Company incorporations

42 The application to incorporate CL was submitted by Messrs Crill Canavan on 26th March, 2007. The application for consent to issue shares under the Control of Borrowing (Jersey) Order 1958 as amended states the beneficial owners of the proposed company to be the First Respondent and Mr Moustras. The activity of the proposed company is given as holding residential real estate, and the declaration is to the effect that the information contained is true to the best of the deponent's knowledge and belief. The form has then been signed by Mr Geoffrey Crill, then a partner in Messrs Crill Canavan.

43 The commercial department of that firm raised with Mr Harben at approximately 9am on 26th March, 2007, the question as to whether the incorporation documents could be submitted to the Jersey Financial Services Commission, and requesting confirmation that neither *"Y and Gary"* had been declared en désastre. The question was put to Mr Harben as to whether it would be sufficient to obtain this confirmation over the telephone. Mr Harben's response at 9:01 am that day was that the purpose of the company was to buy a hotel, demolish and covert into flats. He gave the confirmation on behalf of the First Respondent that he had not been declared en désastre and it was said that Mr Moustras could give a confirmation for himself over the telephone.

44 There is then shown to us an internal email within Messrs Crill Canavan requesting an assistant to telephone the First Respondent and Mr Moustras to obtain information about their personal details — date and place of birth etc. Manuscript annotations to that email show that someone in Messrs Crill Canavan was told that the Fourth Respondent and Mr Moustras would be appointed directors and that the First Respondent would be the secretary.

45 On the strength of that information, CL was incorporated on 28th March, 2007.

46 This documentation would seem to suggest that Mr Crill, Mr Harben and the two employees of Messrs Crill Canavan assisting Mr Harben were all of the view that the

beneficial owners of CL at the time of incorporation would be the First Respondent and Mr Moustras. In reaching this conclusion we have considered a file note taken by Mr Paul Wilson of Messrs Crill Canavan on 11th May, 2007. The document is headed *"telephone attendance"* but it seems apparent that it must have been a meeting note. The client is described as Chatval Limited, and those attending the meeting are said to be the First Respondent, Mr Moustras with PRH (whom we take to be Mr Harben) also present for part of it. The meeting notes, which are not entirely legible, contain the following passage:–

> *"D to be player not Y and so need to transfer Y's share to D.*
>
> *Was D all along but Y alone[?]* for, simply, dealing[?] purposes with seller".

47 This file note seems to suggest that the First Respondent would be director and secretary, as well as shareholder but in the latter capacity would hold for the Fourth Respondent. The meeting note is not entirely clear because it also suggests that Mr Moustras would be both director, shareholder and secretary. The meeting note appears to be inaccurate where it discloses that *"D has given client to tune of £1.2 m just like Mr/s M"* because neither set of parents had made any such gift, although they had assisted in the provision of security for the relevant bank loans.

48 The meeting on that day appears to have been about the drawing up of a shareholders agreement and/or a *"contributions"* agreement. In the absence of both Mr Harben and Mr Wilson as witnesses before us, we have not found this particularly helpful as a meeting note. However there is nothing to suggest that this information was available to Messrs Crill Canavan at the time CL was incorporated and indeed we assume that as professional men, Mr Crill and Mr Harben would not have submitted an application form to the Jersey Financial Services Commission otherwise than in accordance with the instructions given to them by their clients, and setting out information which they believed to be true. That being so, we have to assume that if the First and Fourth Respondents had agreed that the Fourth Respondent would replace the First Respondent in the Chateau Valeuse development in January and/or February 2007, then the First Respondent whether on his own or with the Fourth Respondent must have misled his lawyers as to the ownership of CL which was to be incorporated.

Housing (Jersey) Law 1949

49 Messrs Crill Canavan dealt with the application for permission under the Housing (Jersey) Law 1949 for the acquisition of the Chateau Valeuse Hotel by CL for a consideration of £2.1 million. The application was made on 27th March, 2007, and consent was granted that day. In the usual way, the consent was based on the information contained in the application. Condition 3 provides as follows:–

> *"That for so long as the purchasing company shall continue to own the land or any part thereof, no change shall, without the consent of the Minister be made voluntarily, "inter vivos" in the beneficial shareholdings in the company which*

are as follows:–

Y 50%

Mr Kyriacos Thomas Moustras 50%".

50 The application was submitted by Mr Harben of Messrs Crill Canavan on 23rd March, 2007, that confirms that the beneficial owners of CL are the First Respondent and Mr Moustras who would own 50% of the company each.

51 Other paperwork in relation to the housing consent shows that on 8th August 2008 an application for a revised consent was submitted by Messrs Crill Canavan. The letter draws attention to the condition on the original consent that the beneficial ownership of the shares in CL may not change without the consent of the Minister, and continues:–

> *"It is now proposed that the shares in Chatval Limited will be held through Chatval Holdings Limited with Messrs YY and Moustras remaining the beneficial owners thereof and that following construction of a new development on the site those shares would be sold to the purchasers of the 15 apartments, parking spaces, garages and stores which will comprise the development.* I therefore seek consent to effect such a transfer of shares following completion of the development."

52 Pursuant to that letter the Population Office issued a consent with a revised Condition 3 setting out that the shares in CL were to be held as to 100% by CHL which itself was wholly owned by the First Respondent and Mr Moustras in equal shares. A new Condition 4 provides that at the end of the development any freestanding units of dwelling accommodation shall be sold out of the company.

53 Thus we have the position as at August 2008 that representations were made to the Population Office to the effect that the First Respondent remained beneficially entitled to 50% of CL through his shareholding in CHL. This would appear to be a mistake by the lawyers. CHL was never owned — at least on the face of it — by the First Respondent, and therefore the representation that there was no change in the beneficial ownership by the interposing of CHL in the change of ownership of shares in CL must mean either that CHL was never beneficially owned by the Fourth Respondent, as the document submitted to the Jersey Financial Services Commission would seem to indicate or that the August 2008 representations to the Population Office were incorrect; or perhaps that actually it did not matter very much who owned the shares in either CL or CHL because the First and Fourth Respondents would sort it out between them when they considered it was necessary to do so.

54 The Housing consent issued to CL to acquire the property only became consistent with the account of the First and Fourth Respondents in January 2009 when by email on the 29th of that month Messrs Crill Canavan advised the Population Office that CL was beneficially

owned as to 50% not by the First Respondent but by the Fourth Respondent. An application for a revised consent was made on 18th February, 2009, and on 5th March, 2009, the revised consent was duly issued showing CHL to be the owner of the shares in CL and CHL itself to be 50% owned by the Fourth Respondent and 50% owned by Mr Moustras.

55 When the First Respondent gave evidence before us, he accepted that he was shown on 27th March, 2007, as beneficially owning 50% of CL. His explanation on this point was that it was important that he was seen to be involved in the deal because completion with Mr and Mrs Jordan, the vendors of the Chateau Valeuse hotel, had not yet taken place and he did not want them to have an excuse for walking away from the agreement which had been signed in July 2006. We did not find this explanation to be convincing. The agreement of sale with Mr and Mrs Jordan provided that the purchasers could nominate a company to take the conveyance for them, and there was no reasonable basis therefore on which the vendors could object if the purchase was taken by a company which was 50% beneficially owned by the Fourth Respondent instead of the First Respondent. If that difficulty had arisen, then the purchasers could quite easily have reverted to the position which was in fact represented to the Population Office, and the vendors could then have had no objection.

56 In relation to the application to the Jersey Financial Services Commission, the First Respondent asserted that the family had always taken advice from their lawyers and although the application form signed by Mr Crill was false as to the information it contained on beneficial ownership, there was no malice, and certainly no intent to mislead.

57 When Mr Moustras gave his evidence, he said that in relation to the housing consent, the arrangements were a mistake on the part of the lawyers.

Dealings with other third parties

58 In the course of the hearing we were shown a number of documents reflecting dealings between CL and/or CHL and third parties other than the company's lawyers and accountants. In these documents it was almost invariably the case that the Y interest was expressed to be that of the First rather than the Fourth Respondent. Thus the agreement dated 16th March, 2007, with Mr and Mrs Chinn, neighbours to the Chateau Valeuse, was entered by Mr Moustras and the First Respondent, among others, but not by the Fourth Respondent. Indeed the First Respondent held himself out to estate agents and banks as being a partner in the development. As late as August 2009, Broadlands Estates notified the lawyers that they had negotiated a sale of Apartment 7 *"on behalf of our mutual client Mr Gary Moustras and Y"*. When he came to give his evidence, the First Respondent's explanation for this was that this was a prestigious development and his father was quite happy that he should be seen to have the credit for it, presumably on the basis that it would be good for his reputation in the Island. As far as the First Respondent was concerned, there was no reason to tell everyone that he was no longer involved.

59 In summary therefore, up until early 2009, there was no doubt that to the outside world the First Respondent had an interest in the Chateau Valeuse development. It was he, not the Fourth Respondent, who with Mr Moustras, purchased the property from Mr and Mrs Jordan; who had obtained the necessary planning consents; who had retained architects, and he who had been involved in the development. He agreed in his evidence that it was difficult to identify who owned what and when. When the Fourth Respondent gave his evidence, he agreed on a question from Advocate Haines, that he had not been able to produce any document that went to establish his beneficial interest in the Chateau Valeuse development in early 2007 when, according to both him and the First Respondent, he acquired the First Respondent's interest.

The evidence of the lawyers and accountant

60 As we have indicated, Mr Harben was not in the Island and not available therefore to give evidence before us. It had been agreed that cross-examination could take place on his affidavit on commission before the Viscount, but in the event, that opportunity was not taken up by the Petitioner. In the circumstances we are left with the affidavit sworn by Mr Harben which has been part of the evidence before us and we have to make of it what we can.

61 According to Mr Harben, having reviewed the files on which his firm had worked, the Fourth Respondent was always in the background in relation to joint ventures with the First Respondent, who always appeared to be in charge of them. On the other hand, when the Fourth Respondent was in a joint venture with his son B, the Second Respondent, it was usually the case that he fronted that venture. Understandably, Mr Harben is not always very clear about who owned what part of what venture. For example his evidence in relation to Gloster Hotel is this:–

> *"This was fronted by [the First Respondent].* There are one or two conversations between myself and [the Fourth Respondent] recorded on file and the plans for the development are in [the Fourth Respondent's] name. In relation to the sale of the flats at the Gloster, these were generally dealt with through [the First Respondent]."

62 Mr Harben said that he had written to Messrs Benest and Syvret on 9th October, 2013, and he quoted from that letter, which says this:–

> *"In summary, however, almost all of the Y family transactions were financed by D.* When D originally came to the Island, Geoffrey Crill acted for the family but as I understand he did not having housing qualifications and the first property acquisition was therefore in Y's name. From that point, D, whilst funding the deals, did not like to hold the shares in the property holding companies acquired and for this reason, Y was almost always inserted as the beneficial owner.
>
> *In 2005, Y and D approached us to draft an agreement to amend the*

shareholdings to reflect their correct ownerships. This made perfect sense as it would be wholly unfair for all the companies to be deemed to form matrimonial assets when D, C and B had an interest in many of them. It was the same with T *[the former matrimonial home] which had always been considered to be a jointly held property notwithstanding the title was in Y's name.*

Whilst I will review the files to give you the evidence you require, I can categorically confirm that the dealings in relation to Clifton and the Suisse were with D and B and the Gloster and T files were with Y and D jointly. I am perfectly happy that the 2005 agreement correctly and fairly identified who owned what. The only caveat to this was Gloster, which I had always felt was a D/Y joint venture. There is a file note of my raising this with D and Y and the response I had was that D was owed money by the children so presumably they wanted the Gloster shares to be put in D/C's name as an effective repayment of what Y owed."

63 This affidavit has been sworn as being true and it is of course true that the letter which is exhibited to the affidavit contained the summary to which Mr Harben referred. We note without comment that there is no statement that the contents of the letter are true, although we have no reason to doubt that it reflects Mr Harben's views.

64 As to the Chateau Valeuse development, Mr Harben said this:–

"Y came out of Chateau Valeuse very early on and I remember D taking over."

65 There is nothing helpful otherwise in his affidavit about the Chateau Valeuse development. Given that the affidavit was sworn in June 2014, this is surprising. One would have expected him to refer to various file notes from the files of Messrs Crill Canavan, or to meetings which took place with the First and Fourth Respondents and Mr Moustras, and/or with the accountant Mr Thérézien. One might have expected him to elucidate what he meant by *"very early on"* in the extract which we have mentioned. One might have expected him to comment upon why the Collas Crill (the successor firm to Crill Canavan) invoice for the purchase by CL of the Chateau Valeuse Hotel is addressed to the company for the attention of the First Respondent and Mr Moustras, or on how it was he came to submit the application to the Population Office with the description of the First Respondent as a 50% beneficial owner in CL; or how it was he came to authorise the application for the incorporation of CL, which was signed by Mr Crill, but which contained the information that the First Respondent was to be the 50% beneficial owner of the company once incorporated. We have in our papers a file note of a discussion between Mr Harben and a member of the commercial department of Messrs Crill Canavan on 27th March, 2007, confirming that beneficial ownership is to be with the First Respondent and Mr Moustras, when Mr Harben apparently insisted that if the application was said to involve the Fourth Respondent, it should be changed. In the circumstances we have not found Mr Harben's evidence to be very helpful, but it does not in our view support the assertions of the First and Fourth Respondents as to the beneficial ownership of CL in the first quarter of 2007.

66 We now turn to the evidence of Mr Dennis Thérézien, an accountant with Messrs ICN Toole & Co. We note that Mr Thérézien wrote to Barclays in July 2007, presumably on instructions, to say this:

> *"Y*
>
> *We confirm that we act as accountants and tax agents for Y and for companies of which he is the beneficial owner or in which he has a beneficial interest.*
>
> *We have been asked by Y to confirm the level of income that is likely to be available to him by way of remuneration, fees or drawings from for [sic] the forthcoming year from those companies.* From the information available to us, we would estimate that his income for the next 12 months will be approximately £150,000 made up as follows:
>
> > *1) £50,000 from Gloster Hotel Limited (from rental income arising to the company);*
> >
> > *2) £60,000 from Chatval Developments Limited (project management fees for a new property development);*
> >
> > *3) £40,000 from CDS Holdings Limited (project management fees for new [sic] a property development);*
>
> …" (emphasis added)

67 So here we have a statement that the First Respondent has a beneficial interest up to full beneficial ownership of Gloster Hotel Limited and CDL despite the fact that legal title in the relevant shares in each of those companies was vested in the name of the Fourth (and in relation to Gloster also the Third) Respondents. The statement in relation to CDS Holdings Limited appears to be accurate and is uncontentious.

68 The only other documents produced from Mr Thérézien for 2007 show an email from the commercial department of Messrs Crill Canavan to him on 16th October in relation to the tax form (461A) for CL. That email confirmed that Crill Canavan was not the registered office address and perhaps the form *"was sent directly to T where D lives"*. There seems therefore to be a suggestion as at 16th October, 2007, that the right person for the purposes of contact in relation to CL at that date was the Fourth Respondent.

69 A meeting took place on 5th February, 2008, between Mr Thérézien, Mr Harben and Mr Wilson. Notes of the meeting appear to have been taken by Mr Wilson (but possibly Mr Harben). It is clear that consideration was given to the development, as demolition was taking place by CDL at that time. It was important that CL was not responsible for the contractual arrangements so it would be a clean company at a later stage for the purposes of the sale of flats — CDL would do the development work and have the relationships with third parties, and CL would pay money to CDL for this purpose, which it had received from

CHL in return for the issue of shares.

70 The notes show that "in exchange for CHL [illegible] over bank indebtedness CHL acquired the two shares from CL for £x. Wd like to avoid [?] CGT gain".

71 The notes reveal a discussion took place on the value of shares and the conclusion appears at the foot of page 3 of the file note to be that *"two shares [?]* at £2 m each."

72 There does not appear to have been much discussion about the ownership of CHL or CL, but there is this reference:–

> *"Nice if CHL owned by GM and CH as [illegible] its parents looking after children?* Possibly?"

73 A meeting took place on 7th February, 2008. It was attended by Mr Thérézien, Mr Harben, Mr Wilson, Mr Moustras and the First and Fourth Respondents. The notes of the meeting are on Crill Canavan notepaper and the handwriting appears to be that of Mr Wilson. It suggests that the advice was being given on that occasion to CHL. The note continues:–

> *"2. GM syg that CL has traded — [illegible] for a year & so not clean therefore. Unfortunate. Dennis to do a/cs for this.*
>
> *3. Discussion poss liability at end of day if co goes up swanny. GM keen not to expose 3Ps etc.*
>
> *4. CH again syg not want company to be owned [?] by him nor be dir, getting £5k pm as sec [?] and that's it from CDL.*
>
> *[5] Nice if can say CHL paying [?]* for £4m & so this on debt for £2.1m & £1.9m as loan afterwards."

74 There is a note then of some discussion as to whether that arrangement might work, we think as regards tax purposes.

75 The note then continues:–

> *"10. CH wants arm's length.*
>
> *11. GM not want to involve dad ……. & not want to open it all up again with him taking on shares.*
>
> *12. Need to check facility documents.*
>
> *13. …*

14. It's about beneficial ownership, not legal ownership. That remains as is; so GM not to be [illegible] co nor D of [illegible] company."

76 What is striking about the meeting note is that the discussion as recorded shows the professionals to be concerned about tax issues; and the First Respondent and Mr Moustras, for different reasons, to be concerned about the appearance of ownership in the shares.

77 Following the meeting, on 11th February Mr Wilson wrote to Mr Thérézien to summarise the Barclays loan arrangements on 4th October, 2007. The Schedule attached to that letter contains the statement in relation to CL that the shareholders were CHL from 4th October, 2007. The reference then follows that:–

"Gary Moustras and Y (under a declaration of trust for D) had been the initial shareholders.

Y had transferred his share to D on 4th October 2007.

Gary Moustras and D had then transferred their shares to Chat Val Holdings Limited on 4th October, 2007."

And there is a footnote that the actions which took place on that date occurred prior to the entering into of the loan documentation.

78 So there we have a statement as at 11th February, 2008, that there had been some transfers of shares in CL on 4th October, 2007.

79 Following this meeting Mr Thérézien sent an email on 15th February to Advocate Wilson. In it he acknowledges Mr Wilson's letter of 11th February and suggests some steps that need to happen *"in order to reflect the intentions of the parties"*. It is unclear whether he is referring to the intentions of the parties from the outset or the intentions of the parties as at February 2008. The steps involved, inter alia:–

(i) Beneficial ownership of CL on incorporation to be with the Fourth Respondent and Mr and Mrs Thomas Moustras;

(ii) Beneficial ownership of CHL on incorporation to be with the First Respondent and Mr Moustras;

(iii) The beneficial ownership of CDL on incorporation to be with the First Respondent and Mr Moustras;

(iv) The Fourth Respondent and Mr and Mrs Thomas Moustras to sell their beneficial interest in CL to CHL for £4 million on 4th October, 2007, payable by the assignment of the debt due by CL to Barclays in the sum of £2.1 million to CHL and a loan note of

£1.9 million to be subscribed by CHL in favour of the Fourth Respondent and Mr and Mrs Thomas Moustras at a commercial rate of interest.

(v) A subscription agreement between CL and CHL whereby CL would issue shares to CHL in exchange for funding which would finance the development of its property.

80 This email arrived at Advocate Wilson's office at a time when both he and Mr Harben were due to be away and it was therefore a proposal that was placed in abeyance. It is clear that the email bore no relationship to the other documents which had been executed at this time. In his evidence before us, Mr Thérézien said that he had sent this email having reviewed his notes of the position back in 2007, and he thought he had simply made a mistake.

81 We do not think that this is a convincing explanation. On the contrary, we think that the arrangements which were being discussed in February 2008 were arrangements designed to save considerable amounts of tax, perhaps reflecting also a lack of knowledge on the part of Mr Thérézien as to where the beneficial ownerships of the different companies truly lay. At all events, we found both the email and the explanation of it to be unconvincing.

82 The other relevant document which is of interest is the comment on this email which appears in an internal email of Crill Canavan sent by the property department to Mr Wilson on 19th August, 2008. The reference is to Mr Thérézien's email of 15th February and the question is whether the structure which was outlined was put in place. The reason for that request was a need to know the share structure correctly to draft the new articles for the purposes of dealing with any sales. A handwritten note, which may be by Mr Wilson, is as follows:–

"ATT LP 20/8

Fluid — not as DT states but will be cheques [?] pre deal. Will keep her posted."

83 At this point we record that in our view if there were ever a case in which it would be appropriate to challenge assertions as to where the beneficial ownership of companies lay, this is it. The First and Fourth Respondents and their advisers have brought this position entirely upon themselves. That is an important finding for the purposes of any hearing as to costs at a later stage.

2009 arrangements

84 The approach of Messrs Crill Canavan to the question of ownership is interestingly revealed in an exchange of emails between Mr Wilson and Mr Harben on 26th January, 2009. At 10:35 that morning, Mr Harben indicated to Mr Wilson that Mr Moustras would be coming in that afternoon, and he would like to have the books. The interchange between Mr Harben and Mr Wilson then followed:–

"Wilson to Harben 11:18 am — "Could this be a good chance for us to speak to Gary about Dennis' ideas or not?"

Harben to Wilson 12:05 pm — "OK — should I get Y in too?"

Wilson to Harben 12:11 pm — "Cd do — and D too?"

Harben to Wilson 12:15 pm — "Done — will be more like 4.15 — do you want to po here first — before 4?"

85 So at this stage, the fluidity to which Mr Wilson referred the previous August clearly still applied; the tax issues were to be discussed with Mr Moustras; Mr Harben then thinks that the First Respondent ideally ought to be in on the discussion; and there is a question then as to whether the Fourth Respondent, as if an afterthought to these arrangements, should be introduced as well.

86 In February 2009 a number of interlinking relevant threads emerged. First of all, there was a refinancing with Lloyds Bank Plc of the CHL loan. This required a review of security arrangements and indeed of share ownership. Secondly, 2008 had seen a development of the property such that sale arrangements were expected to come on in early course. Thirdly, there was a political proposal to introduce changes in the relevant legislation concerning stamp duty such that transfers of shares in property owning companies would attract a stamp duty in the same way as was payable on a conveyance of the property directly. It was clear at this time that both Mr Moustras and the Fourth Respondent wanted to acquire at least one flat prior to the change in the stamp duty law coming into effect. Acquiring such flats from CHL by share transfer could be done without payment of the relevant stamp duty as long as the transfer took place before the new duty came into force. Putting these strands together made it essential that the share structure should be settled.

87 The arrangements then made were these:–

(i) On 20th April, 2009, blocks of shares in CL were issued representing particular flats in the development. The majority of these blocks of shares were issued to CHL.

(ii) Blocks of shares representing rights to the ownership of Apartment 3, parking spaces 17 and 36, and store 4, and Apartment 12, parking spaces 4, 16 and 37 and store 12 were allocated to Mr Moustras.

(iii) Blocks of shares giving rights to occupancy in respect of Apartment 14, parking spaces 3, 20 and 33 and store 13 were issued to the Fourth Respondent.

(iv) The same day, CHL subscribed to a business loan agreement with Lloyds TSB Offshore Limited ("Lloyds") in the sum of £8,500,000. The loan was repayable two years after it was first drawn. The security was an unregistered guarantee from CL, secured over the freehold of Chateau Valeuse, a security interest agreement in the

CL shares issued to Mr Moustras; a security interest agreement in the CL shares issued to the Fourth Respondent; a security interest agreement over the CL shares issued to CHL; a guarantee in the sum of £856,000 from Gloster Hotel Limited; a security interest agreement over a Treasury deposit in the sum of £344,000 held by Barclays in relation to the Fourth Respondent; a guarantee from Mr and Mrs Thomas Moustras in the sum of £1.2 million secured over 3, 4 and 7 Magnolia Villas and Flat 24 Magnolia House; and finally a joint and several guarantee from Mr Moustras and the Fourth Respondent in the sum of £8,500,000 in respect of the obligations of CHL.

88 At this stage therefore there is no doubt that the Fourth Respondent was firmly committed to this development by virtue of his personal guarantee.

The 2012 arrangements

89 A number of preliminary agreements of sale of flats in the Chateau Valeuse development had been entered by August 2009, to be completed by a sale of blocks of shares in CL by CHL. On completion, the net proceeds of sale were paid to Lloyds but these were insufficient to discharge the whole indebtedness which was due for repayment in 2011. It was renewed from time to time, but in 2012, CHL decided that it was necessary to review the loan arrangements. The way the Fourth Respondent and Mr Moustras dealt with the matter was to approach Standard Bank Jersey Limited ("Standard Bank") and Barclays Bank Plc respectively for loans to enable them to purchase the unsold flats from CHL. This enabled the discharge of the loans due by CHL to Lloyds, and resulted in the beneficial ownership of the flats so transferred vesting in Mr Moustras and the Fourth Respondent and Third Respondent. The arrangements for Mr Moustras are of no consequence for the purposes of this litigation, but as far as the Third and Fourth Respondents are concerned, they became the owners of Apartments 2, 5 and 6, with the relevant parking spaces and stores attached thereto, subject to a borrowing from Standard Bank in the sum of £1,350,000.

90 We are confident that the three flats retained by the Third and Fourth Respondents in this way are worth considerably more than the loan from Standard Bank and we assume that the same is true of the flats transferred to Mr Moustras. The equity in those flats so transferred in 2012 plus the flats transferred in April 2009 seems to us to represent the profits from the development and it appears that Mr Moustras and the Fourth Respondent must have agreed between them the allocation of particular flats representing the agreed profit share.

Discussion

91 There was obviously a case for asserting — as the Petitioner did originally assert — that in reality the Fourth Respondent always held his interest in the Chateau Valeuse development either for the First Respondent beneficially or upon the same terms as

previous developments carried out by the two of them, namely in effect joint ventures. If that line were to be pursued, then it would be necessary to bring into account for the purposes of the matrimonial proceedings the whole or 50% of the unsold flats at Chateau Valeuse. There are a number of reasons why this would not be an unreasonable conclusion to reach:–

(i) There was clearly an awareness from the date of the marriage that it might be necessary for the First Respondent to distance himself from pre-marriage assets including those which were his — at least some of the shareholding in Gloster Hotels Limited is an example — and there was of course the pre-nuptial agreement request.

(ii) The track record of the working partnerships between the First and Fourth Respondents suggest every reason why the profits would be shared. They worked in joint venture, the latter providing capital and financial know-how, the former engaging in the management of the development.

(iii) £5,000 per month was paid to the First Respondent during the course of the development but according to the company's draft accounts does not appear to have been paid by way of remuneration. The fact that the same sum of money was paid to Mr Moustras suggests that it was a payment on account of profits and indeed that was the suggestion of Mr Thérézien, as the exposure to taxation would be deferred. Thus the £5,000 per month was offset against the Fourth Respondent's loan account and then treated as a gift by him to the First Respondent.

(iv) The fact that at its inception, the Chateau Valeuse project was that of the First Respondent and Mr Moustras.

(v) The First Defendant was named as the beneficial owner of 50% of CL on incorporation and presented as such both to the Population Office and to banks and other third parties.

(vi) The First Defendant remained the owner of 50% of CL until October 2007.

(vii) The file notes of the meetings in February 2008, referring to the First Respondent's statement that he wanted to be kept at arm's length — if it were the position that he was not interested in the development at all, then the rhetorical question would be whether anyone cared what he wanted. It was beside the point. The same file note refers to distinguishing between legal and beneficial ownerships.

(viii) The bank mandates on opening accounts with Barclays for all three companies refer to both the First and Fourth Respondents.

(ix) The file note from Mr Wilson that the lawyers should *“keep it [the shareholding] fluid”* again suggests that the profits of the development were to be shared, and therefore it really did not matter much who was registered as the legal owner.

(x) The fact that nothing was written down by the First and Fourth Respondents as to the beneficial ownership of the various companies again strongly suggests that this

was because it simply was not important. The profits would be split equally.

(xi) The fact that the First Respondent's beneficial interest in Gloster Hotels Limited did not prevent that company giving a guarantee up to £856,000 of the CHL bank loans.

92 These are all indicators that there was a reasonable case which could have been run to suggest that the First Respondent never did lose his share of the Chateau Valeuse project. It is right that we record there are reasons going the other way, which would certainly include these:–

(i) The mere fact of the share transfer in CL in October 2007.

(ii) The repayment to the First Respondent of the money he had invested by way of deposit and architects' fees.

(iii) The security arrangements for financing the development seem to justify the assertion that he could not afford it, and that his father was the key player for the bank.

(iv) The robust evidence of the Fourth Respondent that the development was his, if one accepted it. Similarly the evidence of Mr Moustras.

(v) The Crill Canavan file note in May 2007 that the First Respondent told them that the development was *"D all along".*

(vi) The incorporation of CHL and CDL with the Fourth Respondent as the named beneficial owner.

(vii) The evidence of Mr Moustras, if one accepted it, that the First Respondent did not actually do much in relation to the development. Mr Moustras asserted that he did 90% of the work.

(viii) The subsequent guarantee given personally by the Fourth Respondent of the obligations of CHL in the sum of £8.5 million. On the one hand this was given at a time where the development carried maximum risk because of the banking crisis and consequent effect on prices and confidence, and on the other hand it is true that by that time the company was fairly fully committed and the Fourth Respondent would have faced a stark choice on the one hand as to the loss of money already invested as against on the other the assurance of funds to complete the development and see the flats sold.

93 If it had been maintained, this is a question which would have had to have been determined on the balance of probabilities and we record the main arguments only to indicate that it would have been a close call. The Court has not had to reach a conclusion on the matter, and has not done so because in the amended formal pleadings and in the oral submissions it has become clear that the Petitioner does not bring a claim in respect of any of the apartments left at Chateau Valeuse other than Apartment 14, and does not bring

a claim to any share of profits other than a claim to £950,000 which is calculated on a wholly different basis. We do not criticise the Petitioner for making the pragmatic choice that she has.

Sham

94 We take first Advocate Haines' submission that the transfer of the share in CL in October 2007 was a sham and we say immediately that we think there are serious difficulties with this submission. As the Court of Appeal indicated in *McKinnon v Regent Trust Company Limited and others* [2005] JLR 198, the classic definition of a sham is to be found in the judgment of Lord Justice Diplock in *Snook v London and W Riding Invs Ltd* [1967] 2QB at page 802:–

> ***"As regards the contention of the Plaintiff that the transactions between himself, auto finance and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word.*** I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co -v- Maclure* and *Stoneleigh Finance Limited -v- Philips*) ***that for acts of documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.*** No unexpressed intentions of a "shamer" affect the rights of a party whom he deceived."

95. At paragraph 21 of his judgment in McKinnon [supra] Southwell JA said this:–

> ***"In my judgment, the position in Jersey law is clear.*** In order to succeed in showing that the three settlements are shams, [the plaintiff] must establish that:–
>
> > ***(i) Both [the settlor] and [the first trustee] intended that the true position would not be as set out in the settlement deeds, but that either the settlements were invalid and of no effect, or that the assets of the settlements were held for [the settlor] absolutely, so that the assets were simply held to her order; and***
> >
> > ***(ii) Both [the settlor] and [the first trustee] intended to give a false impression to a third party or parties (including the other beneficiaries and the courts) that the assets had***

been donated into the settlements and were held on the terms of the deeds."

96. So that is the legal test we apply in connection with the submission that the arrangements for the transfer of the share in CL in October 2007 were a sham.

97. It is important to emphasise that Advocate Haines made no attack on the subsequent transfer of the CL share from the Fourth Respondent to CHL. The reason for this was that he had not made CL a party to the proceedings, nor had he sought to join the shareholders of blocks of shares in CL giving rights of occupancy to the different flats once those had been completed.

98. However, this only serves to emphasise the problems in attacking the transfer of the one share by the First Respondent to the Fourth Respondent. The fact is that CL is still not a party to the proceedings and its participation would be just as necessary, because it is affected by the transfer just as it would be affected by the transfer from the Fourth Respondent to CHL. Furthermore, while there might have been good reason to assert a partnership between the First and Fourth Respondents there does not seem to be any evidence to support the view that everything the Fourth Respondent did after October 2007 was done as nominee for the First Respondent and it seems to us that we cannot effectively substitute the First Respondent for the Fourth Respondent on the transfer of the share to CHL, and on the same terms, as Advocate Haines invited us to do.

99. We also add that the nature of an attack that a particular document is a sham is that while the document holds itself out as one thing, it is in reality something else. If that were to be established, the remedy would be to undo the document and either to disregard it as having no effect or to describe it in different terms. However, we cannot see how we can apply that approach to the transfer of the share. We clearly cannot undo the transfer as if it never took place, because that would mean that there was no basis for the transfer of share to CHL, and no basis for the subsequent sale of shares representing the blocks of flats. Nor do we think that we can conclude that the share transfer form could be viewed only as a transfer of the legal interest in the share and not the beneficial interest in the share. The transfer of beneficial interest is not the prime focus of a share transfer form. Unless there is evidence to the contrary, a share transfer form transfers legal and equitable title to that share but to the extent they can be divided, the share transfer form is only concerned with the transfer of legal title, and the beneficial title can be disposed of by some other document. These seem to us to be insuperable objections to the assertions in sham. We have no doubt that the transfer of the share in CL from the First Respondent to the Fourth Respondent was intended to transfer legal title to that share.

100. We add that in the context of the review of evidence in connection with this share transfer, it was suggested by Advocate Haines that the minutes were backdated. We have seen no real evidence that that is so and on the balance of probabilities are not satisfied that the minutes were backdated. It seems to us to be very likely that all the documents that needed to be executed in relation to

the Barclays lending made available in October 2007 were executed at the same time, and that would include the minutes of the meeting of directors of CL to approve the transfer of shares first from the First Respondent to the Fourth Respondent and subsequently from the Fourth Respondent and Mr Moustras to CHL.

101. For these reasons we reject the arguments in sham.

Resulting Trust

102. The Petition claims that the First Respondent holds Apartment No 14 or the sum of £950,000 on resulting trust in favour of the First Respondent on similar factual grounds as are advanced in relation to sham. The essence of the argument is that the First Respondent knew that his marriage was under stress, that his wife had refused to enter a pre-nuptial agreement, that the Chateau Valeuse development would be a valuable financial asset and that he had deliberately decided to place the asset outside the matrimonial pot. It was asserted that the Fourth Respondent knew that all this was true, and that the Fourth Respondent already had substantial assets and had no need for the First Respondent's interest in CL. He was a volunteer and the transfer was made for no legitimate or adequate consideration.

103. Advocate Haines relies upon the decision of the English Court of Appeal in *Re Vandervell's Trust (No 2)* [1974] Ch 269, upholding a decision of McGarry J at first instance. The passage cited in his skeleton argument came from the decision at first instance. At page *** McGarry J said this:–

> ***"… (3) Before any doctrine of resulting trust can come into play, there must at least be some effective transaction which transfers or creates some interest in property.***
>
> ***(4) Where A effectually transfers to B (or creates in his favour) any interest in any property, whether legal or equitable, a resulting trust for A may arise in two distinct classes of case.*** For simplicity, I shall confine my statement to cases in which the transfer or creation is made without B providing any valuable consideration, and where no presumption of advancement can arise; and I shall state the position for transfers without specific mention of the creation of new interests."

104. We interpose here to say that the facts of this case appear to fall within this class of cases — there has been a transfer of a share without the transferee providing any valuable consideration and, secondly, there is no presumption of advancement not least because the transferee is the father of the transferor. Indeed in this case, the transferor has children of his own and if any presumption of advancement were to apply, it would apply towards them rather than towards his father. McGarry J continues:–

"(a) The first class of case is where the transfer to B is not made on any trust. If, of course, it appears from the transfer that B is intended to hold on certain trusts, that would be decisive, and the case is not within this ***category; and similarly if it appears that B is intended to take beneficially.*** But in other cases there is a rebuttable presumption that B holds on a resulting trust for A. The question is not one of the automatic consequences of a dispositive failure by A, but one of presumption: the property has been carried to B and from the absence of consideration and any presumption of advancement B is presumed not only to hold the entire interest on trust, but also to hold the beneficial interest for A absolutely. The presumption thus establishes both that B is to take on trust and also what that trust is. Such a resulting trusts may be called "presumed resulting trusts."

(b) The second class of case is where the transfer to B is made on trusts which leave some or all of the beneficial interest undisposed of. Here B automatically holds on a resulting trust for A to the extent that the beneficial interest has not been carried to him or others. The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to disclose of what is vested in him. Since ex hypothesi the transfer is on trust, the resulting trust does not establish the trust be merely carries back to A the beneficial interest that has not been disposed of. Such a result in trusts may be called "automatic resulting trusts"".

105. It appears to us that the facts of the instant case do not fall within paragraph (b) above. There is no evidence that the First Respondent left some of the beneficial interest in the share in CL undisposed of. The whole of that share was transferred in terms of its legal title, and, if there ever had been any equitable title apart from the legal title, then it seems to us that would have existed as a form of partnership between the First and Fourth Respondents, and to that extent there was no difference created by the transfer of the share to a person who was already his partner unless it were to be said that the partnership was being brought to an end. Here the First Respondent asserts that there never was a partnership. Both he and his father claim that the interest in the Chateau Valeuse development was the First Defendant's interest until a date in 2007, and subsequently it became the Fourth Respondent's interest. The Petitioner does not assert there was any such partnership and indeed from the amended pleadings expressly disavows it. It seems to us to follow that there is no beneficial interest in the share in CL as transferred by the First Respondent to the Fourth Respondent on 4th October, 2007, which is undisposed of.

106. Nor do we think the matter falls within paragraph (a) of this summary of McGarry J as to the creation of resulting trusts. It is certainly the case that no intention for the Fourth Respondent to hold the share on trust has been indicated. The difficulty with the analysis here, however, is that it appears to us that McGarry J considered that if there were no consideration and no presumption of advancement then there was a presumed resulting trust — not because this was a consequence of the dispositive failure by the First

Respondent in this case as transferor, but simply because there was no legal basis for asserting that what once belonged to him now belonged to his father.

107. In Jersey of course we do not have the same requirements for consideration — it is sufficient that there should be a cause for the validity of a transfer of property. The natural love and affection which a son has for his father would be sufficient; an understanding that the son had a benefit which he wishes to pass on to his father because he was not able to exploit it for himself would be sufficient.

108. Where there is an ostensibly valid legal transfer, there would need to be some special reason why the Court would determine to set it aside and hold that the property was subject to a resulting trust in favour of the transferor. It appears to us we do not need to resolve the issue here, however. The fact is that the company CL is not a party to this litigation, and neither is CHL nor any of the subsequent holders of the shares in CL. Those shares have been issued on the back of a resolution by CHL that this is the desired outcome. In other words, bone fide purchasers for value — equity's darling — would be adversely affected if we were to hold that the Fourth Respondent never had title to transfer his share to CHL, because he held that share on resulting trust for the First Respondent. It appears to us that this technical objection again is insuperable. Accordingly the claim in resulting trust is rejected.

109. The Petitioner claims that a resulting trust exists in relation to the sum of £950,000. It is impossible to see how this claim could be constructed on the facts that we have heard. There is no suggestion that £950,000 was ever paid by the First Respondent to the Fourth Respondent, and therefore there can be no resulting trust in relation to that sum of money such as would enable us to require the Fourth Respondent to return it. This claim too is rejected.

Constructive trust

110. The Petitioner asserts in the amended points of claim the same basic facts to establish a constructive trust as are asserted to establish the resulting trust. In particular it is asserted that the Fourth Respondent also knew both that the development would be a very valuable financial asset and that the First Respondent wanted to frustrate any ancillary relief claims of the Petitioner. Accordingly it is asserted that the conduct of the First and Fourth Respondent in relation to the transfer of the First Respondent's interest in CL was unconscionable and that as a result the Fourth Respondent held either Apartment 14 or the sum of £950,000 on constructive trust for the First Respondent.

111. Many of the objections in relation to the submissions about sham and resulting trust apply also to the arguments about constructive trust. The difference is that it is here contended that the constructive trust arises because the Petitioner can, as it were, trace the alleged unconscionable activities of the First and Fourth Respondents into Apartment No. 14.

112. Apart from any other difficulties, it appears to us that there are two insuperable objections to this part of the claim. The first is that it is based upon the proposition that the First Respondent and Fourth Respondent acted together in an unconscionable manner in October 2007 to put the First Respondent's interest in the Chateau Valeuse development beyond the reach of the Petitioner in an anticipated matrimonial case. If that contention were to be accepted, it would not apply only to the sum of £950,000 nor would it apply to Apartment No 14 alone. It would obviously apply to the whole of the interest of the First Respondent in the development at 4th October, 2007. If that interest was nothing, as the First and Fourth Respondents contend, then it follows that there is no subject matter to the constructive trust. If the interest is something, then there is no obvious basis for it to apply to Apartment No 14 but to be disapplied to the net equity in Apartments 2, 5 and 6 which are registered in the name of the Third and Fourth Respondents. Yet the Petitioner disavows any claim to those apartments. For this reason alone, such inconsistency cannot result in the Court declaring a constructive trust in relation to Apartment No 14 or the sum of £950,000.

113. Before we come to the second reason, we turn to the law.

114. Article 33 of the Trusts (Jersey) Law 1984, as amended, provides as follows:

"(1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be a trustee of that profit, gain, or advantage.

(2) Paragraph (1) shall not apply to a bone fide purchase of property for value and without notice of a breach of trust.

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

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

115 The first difficulty arises because the Fourth Respondent is not obviously a person who has received a profit or advantage from a breach of trust. If any trust were owed, it is owed to the First Respondent, and that trust would seem to be trust arising out of a shared agreement that the assets of the Chateau Valeuse development should be put beyond the reach of the Petitioner in any divorce proceedings. So far it can hardly be said that there has been any breach of such a trust. Indeed as far as the Petitioner is concerned, so far it appears to be a trust or arrangement which is working only too well. However, Article 33 is expressly not to be construed as excluding other circumstances in which a person may be

or become a constructive trustee.

116 In *Fiduciary Management Limited v Sheridan* [2002] JRC 34, the Royal Court considered the law of constructive trusts. Collins, Commissioner, said this at paragraph 92:–

> ***"While there is no exclusive definition within the confines of which the concept of the constructive trust is to be found to have been expressed, the Court considers that assistance is best found for the purposes of the present case from two passages from the judgment of Millet J (now Lord Millett) in*** *Lonhro Plc -v- Fayed (No. 2)* [1992] 1 WLR 1 :
>
> ***"It is, as Lonhro submits, the independent jurisdiction of equity as court of conscious to grant relief for every species of fraud and other unconscionable conduct.*** When appropriate, the court will grant a proprietary remedy to restore to the plaintiff property of which he has been wrongly deprived or to prevent the defendant from retaining any benefit which he has obtained by his own wrong. It is not possible, and it would not be desirable, to attempt an exhaustive classification of the situations in which it would do so."
>
> ***Equity will intervene by way of a constructive trust not only to compel a defendant to disgorge his property to him, but also to require a defendant to disgorge property which he should have acquired, if at all, for the Plaintiff in the latter category of case the defendant's wrong lies not in the acquisition of that property, which may or may not have been unlawful, but in his subsequent denial of the plaintiff's beneficial interest.*** For such to be the case, however, the defendant must either have acquired property which, but for his wrongdoing would have belonged to the plaintiff or he must have acquired the property in circumstances in which he cannot conscientiously retain it as against the plaintiff."

117 Of course it is right to recognise that the Court's judgment there expressly determines that the concept of the constructive trust as there expressed is best found for the purposes of that case. Nonetheless we note that if we were to follow the same route, it would be difficult to conclude that a constructive trust existed here — the Petitioner does not have at present any beneficial interest in the share in CL, nor in the shares in CHL, nor in the properties which have been acquired by the Third and Fourth Respondents or by the Fourth Respondent respectively namely the apartments in that development. What she has is a right to assert a claim in matrimonial proceedings against the First Respondent and to require that in those proceedings the full value of the First Respondent's property is taken into account. It therefore cannot be said that the Fourth Respondent has by any wrongdoing acquired property which would have belonged to the Petitioner, nor can it be said that he has acquired property in circumstances in which he cannot conscientiously retain it as against the Petitioner. We do not say there could never be circumstances in which such a claim in constructive trust could be maintained in matrimonial proceedings, but we do not think this is the appropriate answer in the present case. The property which the Fourth Respondent has acquired represents value received out of a property development in

respect of which he took the risk, at least substantially, albeit that risk was shared to some degree with the First Respondent in the sense that Gloster Hotels Limited put up a guarantee in the sum of £856,000. A claim in constructive trust sounds in equity and it would be unfair to the Fourth Respondent in our judgment if we were to uphold it.

118 As will be apparent when we come to consider the last claim, namely that of financial misconduct by the First Respondent, we do consider that the First Respondent had decided to ensure that his interest in the share in CL was taken out of reach of the Petitioner and put into the name of the Fourth Respondent without any payment or value to swell his own estate, and that the governing purpose of this was a general policy to give him protection in relation to matrimonial proceedings which he anticipated would be coming at some point. We do not accept his evidence that even in 2007 he was not fearful that the marriage would fail. Our view is that the Fourth Respondent knew this was a general policy but that he did not act fraudulently or unconscionably. We take that view having regard to all the documents which we have read but in particular because:–

(i) The Fourth Respondent was aware of the First Respondent's request for a pre-nuptial agreement, and that it had been refused.

(ii) The Fourth Respondent was aware of the arrangements made to transfer the different shareholdings in the various companies out of the name of the First Respondent prior to or around the date of the marriage.

(iii) The Fourth Respondent was particularly aware that the arrangements then made for the transfer of the Gloster Hotel shares did not in fact represent the equity which existed in those shares, because the First Respondent's interest in those shares was concealed.

(iv) The Fourth Respondent was present at the meeting in February 2008 when the arrangements — fluid as they were — were to be reconstructed as necessary and is not recorded as having made any objection.

(v) Nonetheless, he relied on his professional advisers.

119 Nonetheless we do not think it is unconscionable for the Fourth Respondent to retain the asset in question. He did after all put up the bulk of the security and he did retain the bulk of the risk. We do not think the First Respondent could have obtained the necessary finance on his own. Furthermore the Fourth Respondent continues to pay outgoings in relation to the apartments at Chateau Valeuse which he has obtained with his wife, either jointly or on his own.

120 Our findings on the facts is that the First and Fourth Respondents did intend that the Fourth Respondent should obtain the legal and beneficial interest in the Chateau Valeuse development as at 4th October, 2007, and also that they did intend to ensure that the value of that interest to which the First Respondent was entitled at that date should be passed to

the Fourth Respondent without compensation for the value of that interest. We do not find that there was any express trust in relation to that value. We think the First Respondent no doubt relied — as the Fourth Respondent had previously relied — on family support and had a general awareness that at the end of the day that value would be made good to him. As the Fourth Respondent put it in his evidence to us, he and his sons knew who was entitled to what assets.

121 It has been suggested by Advocate Haines that the Court can in effect authorise a tracing into Apartment 14 of the value given up by the First Respondent in making the transfer of the share in CL to the Fourth Respondent. The basis on which this proposition was advanced was that:–

We regret that we do not find that this is anything like sufficient a basis to justify such a finding. Even assuming for this purpose that the rules on proprietary and equitable tracing are the same in Jersey as in England — see *Re Esteem* [2002] JLR 53 at paragraphs 102–106 — the difference in time and quality of asset is such that to effect such tracing would not accord with the commercial realities of what was actually taking place.

(i) The share had a value of £950,000 at the date of transfer in October 2007;

(ii) Apartment 14 was purchased by the Fourth Respondent for £950,000 around April 2009;

(iii) No money changed hands but the loan account due by CHL to the Fourth Respondent was reduced.

122 For these reasons, the claim in constructive trust is denied.

Financial misconduct

123 The First and Fourth Respondents contend that the First Respondent's interest in the Chateau Valeuse Development passed to the Fourth Respondent by an arrangement made between them prior to the purchase of Collingwood by the First Respondent in February 2007. The reasons that are given for this are that the First Respondent asserted he could not afford financially to carry out both developments, he could make a better profit out of Collingwood, and that he was concerned that he could not manage both developments, given the health concerns about the Petitioner. Apart from the evidence of the two respondents and of Mr Moustras, the only evidence to support this contention is the Crill Canavan file note of a conversation between Mr Wilson and the First Respondent on 11th May, 2007, that the development *"was D all along"*. All the other documentary evidence suggests otherwise. As to the evidence of the First Respondent and the Fourth Respondent, we reject it, on the balance of probabilities, to the extent that they assert that there was an agreement in January or February 2007 for the transfer of the First Respondent's interest in the development to the Fourth Respondent. We note that

Collingwood was purchased with borrowed money and it was not necessary to seek additional finance until 2009. Indeed, both developments appear to have been financed entirely from borrowed money. The evidence therefore inclines against the view that there was financial pressure, although we accept that the Fourth Respondent's resources were necessary to secure bank financing. We considered the First Respondent's answers on why the shares in Gloster Hotel Limited were transferred out of his name into the joint names of his parents to have been unsatisfactory. We do not accept that the reason for such a transfer was to make it easier to arrange borrowings from banks, as he asserted. Nor do we accept the evidence of the Fourth Respondent that he took the shares back in Gloster Hotel Limited because the First Respondent owed him some money. On the contrary, all the evidence is that the First Respondent continued to receive the rentals from the flats which had been developed at the Gloster Hotel Limited premises.

124 It was significant to us that both First and Fourth Respondents asserted that the transfer of shares was made to reflect the true ownership of the various companies in 2005 when in fact that was not the case in relation to Gloster Hotel Limited.

125 We also do not accept that the Fourth Respondent was as unaware of the matrimonial difficulties which existed between the Petitioner and the First Respondent, as he asserted. It was almost as if it was suggested the Petitioner and First Respondent lived a long way away from the First Respondent's parents and they lived separate lives — but they did not. They lived absolutely next door, within the same property, and the First Respondent and Fourth Respondent were regularly in business together, and regularly had discussions either in the former matrimonial home or in the Fourth Respondent's share of that home next door.

126 We have considered the declaration of trust in CL which was apparently executed by the First Respondent as at 27th March, 2007, and subsequently cancelled. We do not know when this document was created. We do not fully understand why Mr Wilson should have referred to the holding of a share in CL for the Fourth Respondent in February 2008 when internal emails within Crill Canavan show that that firm did not always have the company books until they were passed to Mr Thérézien in 2010; nor how the Declaration can carry a date of 27th March, 2007, when the incorporation documents then show the First Defendant to be a 50% beneficial owner. In the absence of the evidence directly of anyone at from Messrs Crill Canavan on this subject, we simply do not feel comfortable about drawing any conclusions from this apparent declaration of trust. Neither the First nor the Fourth Defendant seemed to know much about it.

127 The burden of proof lies on the First and Fourth Respondents to show that the beneficial interest in the one share in CL did not vest in the First Respondent in the summer of 2007, and we are not satisfied on the balance of probabilities that that burden has been discharged. Accordingly we think the right approach is to adopt the date on which the legal interest was transferred as being also the date upon which the beneficial interest was transferred, namely October 4th 2007.

128 The transfer was made without consideration. In our view, the share clearly had a value at that date. The question is what that value was. At the time of the purchase of the Chateau Valeuse in May 2007, the share probably had a value notwithstanding that the entire purchase price of the freehold was funded by a loan from Barclays. The value can be reflected in the fact that a stamp duty had to be paid on the purchase, and that architects fees and planning fees had been incurred in the applications submitted. Further work was clearly done during the course of the summer. The Labesse valuation for Barclays in the summer of 2007 shows that there was already considered to be an increase in value at that date. We think that by October 2007 there was further value, and we acknowledge that there is a probability that the hotel was acquired at a good price in any event in May 2007 — Mr Moustras thought so, and the concern that the First Respondent had that the sale would not be completed notwithstanding the execution of a preliminary purchase agreement the previous year also suggests that Mr Moustras and the First Respondent knew that they had a good deal. Ultimately, however, in our view the conclusive consideration is that the First and Fourth Respondents and Mr Moustras agreed that the value of the two shares in CL held by CHL on 4th October, 2007, was £4 million. This comprised the consideration for the sale of the two shares of the Fourth Respondent and Mr Moustras of £1.9 million and the cost of taking over the indebtedness of CL to Barclays in the sum of £2.1 million. If that consideration was fixed by reference to tax considerations, the First Respondent was party to those discussions as was the Fourth Respondent and we see no reason why they should not be bound by the adoption of that figure. One does not have one set of accounts for the Comptroller of Income Tax and another set of accounts for other purposes. Furthermore, Mr Thérézien agreed in his evidence that there was a transfer of value of one share in CL on 4th October, 2007, by the First to the Fourth Respondent, that value being £950,000.

129 Accordingly, we accept the submission of the Petitioner that in effect the First Respondent transferred his beneficial interest in a valuable share worth £950,000 to his father on 4thOctober, 2007, without any payment in return, and that the governing purpose of doing so was to avoid having that asset in his own name when he expected matrimonial proceedings to come. He could after all have sold his share to CHL directly and be shown as the holder of the loan account in the sum of £950,000 instead of his father. Whatever commercial reasons might have existed at that date for the transfer of shares into CHL or for the security arrangements in respect of the loan from Barclays, there is no basis for a transfer of value to take place as between the First and Fourth Respondents without consideration.

130 We therefore have to consider whether this amounts to financial misconduct, which ought to be taken into account.

131 In *J v H* [2014] JRC 140A, this Court set out its views as to the proper construction of the language of Article 28(1) of the Matrimonial Causes (Jersey) Law 1949 as amended insofar as concerns the phrase “including the conduct of the parties to the marriage insofar as it may be inequitable to disregard it”. These were set out at paragraphs 13 to 40 inclusive. At

paragraph 41 under the heading ***"Financial Misconduct"***, the Court said this:–

> ***"In our view there is a distinction to be drawn between financial misconduct during the course of the marriage where it is alleged that one spouse has been profligate or has gambled with the family assets and financial misconduct after the parties have separated, where one spouse deliberately squanders assets in the belief it will not adversely affect his or her entitlement or seeks to pressurise the other by inhibiting or denying access to the wherewithal to live or obtain necessary advice.*** Examples in the latter category — which is not closed as there will without doubt be others — are akin to litigation misconduct and in the Court's discretion may well be taken into account for it may be thought inequitable not to do so. However financial misconduct during the marriage prior to separation seems to us to be just another form of bad conduct which would not, unless gross and obvious, be ***taken into account.*** The Court should not be any more astute to enquire into a husband's gambling than it is to investigate a wife's profligacy with excessive spending on designer dresses or children's toys. It seems to us that gambling only becomes relevant in terms of conduct which is not gross or obvious, if it leads to consideration of a secured provision."

132 The context of those remarks was that the wife contended that her former husband was a spender and not a saver. There was criticism of his conduct in that respect. The Court's remarks were there firmly directed at what was allegedly financial misconduct during the course of the marriage.

133 Here the allegation of financial misconduct is also misconduct during the course of the marriage, but it is misconduct which goes directly to the exercise of the Court's discretion in allocating the matrimonial assets to one spouse or the other. Advocate Benest suggested that the gulp/gasp test was the right test for financial misconduct and she made no concessions that even if the situation was as the Petitioner contended, this amounted to financial misconduct, nor that even if it did, it was misconduct of such seriousness that the Court should take it into account.

134 There is no doubt that if a spouse deliberately seeks to put assets out of the reach of his former spouse during the course of the matrimonial litigation, that could amount to litigation misconduct. It could then also be financial misconduct, because it is litigation misconduct of a financial kind. In our view there is very little difference between that misconduct and financial misconduct, which would amount to litigation misconduct if the litigation had commenced, and which has as its purpose the same objective but is carried out during the course of the marriage prior to separation. In both cases the vice is the same. The spouse who seeks to put assets out of the reach of the other spouse if matrimonial proceedings are taken does just as much damage to the integrity, fairness and effectiveness of the matrimonial proceedings, whether the action is taken during the marriage or after it. If that spouse can legitimately expect to see that value or asset later returned to him, that is specially wrong. The Court is, as it were, being deceived as to the assets of the parties on

which its adjudication is to take place. We have no hesitation in saying that in this context the intention of the spouse against whom the allegations are made is critical.

135 In this case, the Court has found that the First Respondent had an interest in the Chateau Valeuse development well past the incorporation of CL and the acquisition of title by that company to the Chateau Valeuse Hotel. It is contended by all parties before us that he no longer has that interest, and we have found that the effective date for relinquishing that interest was 4th October, 2007. At that time, we have found as a fact that the First Respondent made the transfer to the Fourth Respondent in order to hide the asset from his wife's gaze, should matrimonial proceedings be commenced. In doing so, he disposed of a valuable asset for no consideration but in our view without any doubt that at some future date the benefits of it might be returned to him in one shape or another.

136 We regard this as financial misconduct which the Court ought to take into account when the substantive hearing takes place in October, and that the First Respondent should notionally be credited with having in his hands the value so transferred, namely the sum of £950,000. That is likely to have an impact on how the remaining matrimonial assets are apportioned. We make that order accordingly.