Neutral Citation Number: [2025] EWHC 2280 (Ch)

Claim No: BL-2022-001936

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (Ch D)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 5 September 2025

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

GABLE INSURANCE AG **(incorporated in Liechtenstein) (in liquidation)**	**Claimant**
- and -	
(1) MR WILLIAM DEWSALL **(2) MR MICHAEL HIRSCHFIELD** **(3) MRS JUDITH DEWSALL** **(4) HORATIO RISK CONSULTING LLP**	**Defendants**

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STEPHEN AULD KC, IMRAN BENSON AND JADE FOWLER (instructed by **Rosling King LLP**) appeared for the **Claimant**
The **First Defendant** appeared in person
DUNCAN HEATH (instructed by **Clarke Mairs Law Limited**) appeared for the **Second Defendant**
DANIEL FEETHAM KC (instructed by **Madison Legal Limited**) appeared for the **Third Defendant**
The **Fourth Defendant** did not appear and was not represented

Hearing dates: 14-18 July 2025 and 21-25 July 2025

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Approved Judgment

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 5 September 2025 at 10:30am

DEPUTY JUDGE ROBIN VOS:

Introduction

1. The claims in this action relate to the alleged dishonest misappropriation by the first defendant, Mr Dewsall, between 2010-2018, of a net amount of approximately £12m belonging to the claimant, Gable Insurance AG ("GIAG"), a company which was placed into bankruptcy in November 2016 but which, at the time, was the largest insurance company in Liechtenstein.

2. The second defendant, Mr Hirschfield, is said to have assisted, or facilitated, the misappropriations during his time as a director of GIAG (6 February 2014 – 10 October 2016) in breach of his duties as a director.

3. GIAG believes that some of the misappropriations can be traced into improvements to Mr Dewsall's family home, Weald Hall, beneficially owned by his wife, the third defendant, Mrs Dewsall, and to the part repayment of a loan taken out to purchase Weald Hall, entitling GIAG to a proprietary interest in Weald Hall. Weald Hall has in fact now been sold and the net proceeds of sale of approximately £850,000 are held in Court pending the outcome of these proceedings.

4. No personal claims have been brought against Mrs Dewsall. She was only added as a party as a result of the proprietary claims in respect of Weald Hall.

5. The fourth defendant, Horatio Risk Consulting LLP ("Horatio") is a limited liability partnership established by Mr and Mrs Dewsall at around the time GIAG went into liquidation. It is said to have received approximately £280,000 of the funds which GIAG believes have been misappropriated.

6. Mr Dewsall had legal representatives until the end of 2024. Since then, he has been representing himself. Perhaps not surprisingly, he was unable to deal at the hearing with much of the detail of what is a complex claim.

7. Many of the points made by Mr Heath, representing Mr Hirschfield, apply equally to Mr Dewsall. It is however important to note (as emphasised by Mr Heath) that Mr Dewsall and Mr Hirschfield are in different positions and that the claims against them need to be considered separately.

8. Shortly before the hearing, a bankruptcy order was made against Mr Dewsall. However, Mr Dewsall did not seek a stay of these proceedings and the bankruptcy order has not therefore had any impact on them.

9. During the course of these proceedings, freezing orders have been made against Mr Dewsall and Mrs Dewsall (amongst others). I do not need to go into the detail of those freezing orders as they are not relevant to the issues I have to decide. I mention them only because actions taken by Mr Dewsall said to be in breach of the freezing orders are relied on by GIAG as showing a propensity for dishonesty.

10. Similarly, the circumstances surrounding the obtaining and implementation of a search order made by the Court in these proceedings in July 2024 are relied on as evidence of concealment and dishonesty on the part of Mr Dewsall.

11. I should mention in passing that, on 11 July 2025, the Court of Appeal handed down its judgment in respect of Mrs Dewsall's appeal against various orders in these proceedings made by Caroline Shea KC, sitting as a Deputy Judge of the High Court, in February and March 2025. Other than the question as to whether Mrs Dewsall should be permitted to rely on forensic accountancy evidence (in respect of which I gave permission at the pre-trial review), none of the decisions made by the Court of Appeal have any impact on the issues to be determined at trial.

Background facts

12. Many of the facts giving rise to the claims in these proceedings are undisputed. It is helpful to summarise the background here.

13. Mr Dewsall has been involved in the insurance industry for many years. In 1999, he established an underwriting agency in England called Hogarth Underwriting Agency Limited ("Hogarth"). At all material times, Mr Dewsall was the sole shareholder and director of Hogarth.

14. Hogarth was not itself an insurance company and it placed business with other insurers. It was regulated in the UK by what is now the Finance Conduct Authority ("FCA").

15. Mr Hirschfield is an English accountant. In 2005, he was working for an investment business called Corvus Capital Inc as its Chief Financial Officer. Corvus specialised in establishing companies listed on the Alternative Investment Market ("AIM") and then acquiring businesses through a reverse takeover.

16. Corvus approached Mr Dewsall in 2005 with a proposal to establish a European insurance business. This resulted in the establishment of GIAG in Liechtenstein which was in turn owned by a Cayman Islands company, Gable Holdings Inc. ("GHI"), which was listed on AIM. Mr Dewsall was the largest individual shareholder of GHI. His shareholding fluctuated but was in the region of 20%.

17. As part of these arrangements, it was agreed that Hogarth would provide underwriting, claims handling, marketing and other administrative support services to GIAG. Under the terms of this agreement, Hogarth operated trust accounts on behalf of GIAG to receive premiums and pay claims, commissions and other insurance related costs. The money in the trust accounts belonged beneficially to GIAG. Hogarth also had its own corporate bank accounts which held its own money.

18. Mr Dewsall was the CEO of the Gable Group and was a member of the board of directors of both GHI and GIAG.

19. These initial arrangements gave rise to a conflict of interest for Mr Dewsall as he was, on the one hand, the CEO and a director of GIAG but also had sole control and ownership of Hogarth which was, to a large extent, carrying on GIAG's business on its behalf in accordance with the claims handling and underwriting agreement which was put in place and, under the terms of which, Hogarth was entitled to be paid for its services. However, given that this was all part of the way in which the Gable Group and its business was established, it must in my view be inferred that all relevant parties were aware of, and approved, this conflict of interest.

20. There is little doubt that, as the Chief Executive of the Gable Group, Mr Dewsall had day-to-day control over the operation and management of GIAG. He was not however the only member of the board of directors of that company during the relevant period (2010-2016). Other members of the board of directors were as follows:

Name	Date	Comments
Jost Pilgrim	2010-23 September 2016	A banker by background. Also a director of GHI from May 2014-September 2016
Lance Ranger	2010-14 October 2013	Employee of Attendus Trust which provided some administrative services to GIAG (and to Mr Dewsall personally). Mr Ranger was also a member of the board of directors of GHI during this period and was Chairman of the board of GHI for a period of time
Mr Hirschfield	6 February 2014-10 October 2016	

21. The directors who served on the board of GHI between 2010-2016 were as follows:

Name	Date	Comments
Mr Dewsall	2010-2016	
Blaise Craven	2010-2016	The evidence shows that Mr Craven was a close associate of Mr Dewsall and effectively did what he was told. He had little relevant experience and was the Chair of the Audit Committee for a number of years despite having no accountancy expertise
Lance Ranger	2010-September 2013	Chair of the board during this period
Lucas Slob	2010-May 2014	Mr Slob was another employee of Attendus Trust

Name	Date	Comments
Michael Sofaer	February 2011-February 2015	Mr Sofaer was a hedge fund investor. He became Chairman of the board in 2013 when Mr Ranger retired
Mr Hirschfield	September 2013-October 2016	
Jost Pilgrim	May 2014-September 2016	Mr Pilgrim became Chairman of the board in 2015 when Mr Sofaer retired
Andrew Trott	February 2015-July 2016	Mr Trott was a lawyer with an insurance background who provided advice both to Hogarth and to Gable
Julian Connerty	July 2015-August 2016	Mr Connerty was also a lawyer with an insurance background
Kevin Alcock	December 2015-September 2016	Mr Alcock was a chartered accountant and management consultant as well as being a non-executive director of various financial services businesses. He became Chairman of the Audit Committee

22. It can therefore be seen that, although Mr Dewsall had effective day-to-day control over GIAG's business there were, throughout the period, a number of non-executive directors on the boards of GHI and GIAG.

23. At the outset, although Mr Hirschfield worked for Corvus, he did not have any significant involvement with the Gable Group. His only role was through his service company, Kitwell Consultants Limited (Kitwell"), which acted as assistant company

secretary to GHI to assist with issues relating to GHI's listing on AIM and was paid a fee for doing so.

24. GIAG's business grew significantly over the years, writing business in a number of European countries as well as the UK. Its premium income increased from £10m in 2009 to £91m in 2015.

25. In 2010, which is the beginning of the period for which GIAG's claims relating to misappropriations are made, the arrangements between GIAG and Hogarth were restructured. GHI established a new subsidiary, Gable Services (London) Limited ("GSLL") which agreed to provide certain office facilities to Hogarth and administration services to GIAG. GSLL was entitled to a monthly fee which was initially £68,000 but then increased to £78,000 in September 2014 and further increased to £92,000 in January 2015. It was also entitled to an additional fee to ensure that it achieved a pre-tax profit in each financial year of not less than 5% of its turnover.

26. This is all set out in a facilities agreement between GSLL and GIAG dated 28 November 2013 (but expressed to take effect from 1 January 2013). I infer from the GHI financial statements for 2010 that GSLL was providing similar services to GIAG between 2010-2013 although there is no evidence of the terms on which such services were provided.

27. As part of the 2010 changes, a new underwriting and claims handling agreement was put in place between GIAG and Hogarth. This agreement was dated 29 June 2010 but was expressed to take effect from 23 December 2005, superseding and replacing the previous agreements.

28. The 2010 agreement was similar to the previous agreements except that it no longer included the office, administrative and commercial support services now being provided by GSLL. One significant difference however was that Hogarth's remuneration for its services, instead of being based on expenses, was changed so that Hogarth was entitled to a commission of 5% of premiums paid on UK construction liability insurance.

29. As before, the only payments which Hogarth was permitted to make out of the trust accounts were the payment of claims and other insurance costs (such as reinsurance premiums or insurance premium tax) and the payment of Hogarth's commission or commissions due to third party brokers.

30. Between 2010-2013 almost £12m was paid out of the Hogarth trust accounts to the Hogarth corporate accounts. It is clear from the Gable Group financial statements that this significantly exceeded Hogarth's entitlement to commission during the period. Beyond this there is however little evidence as to the extent to which the payments were ones which were permitted under the terms of the underwriting and claims handling agreement (for example the payment of claims) or were payments made for other purposes.

31. The arrangement between GIAG and Hogarth was exclusive in the sense that Hogarth was required to refer all opportunities to GIAG. However, if GIAG declined any proposal, Hogarth was permitted to place such business with another insurer. There is an issue as to whether Hogarth in fact placed business with other insurers and/or received any income for doing so. I address this below.

32. Under the terms of these arrangements, activities took place both in Liechtenstein and in London. GIAG had a number of members of staff in Liechtenstein dealing principally with accounting and bookkeeping. The insurance business itself was run on behalf of GIAG by Hogarth from London where Hogarth and GSLL shared an office with GSLL occupying a physically separate space in the office to Hogarth.

33. There was however clearly some crossover between Gable and Hogarth. Mr Dewsall of course worked for both Hogarth and GIAG. In addition, a number of other individuals had both Gable and Hogarth email addresses. On top of this, an internal accountant at Hogarth, Phil Foot, was a signatory on some of the Gable Group bank accounts.

34. Mr Hirschfield became more involved with Gable in 2012 after the previous Chief Financial Officer of the Gable Group had been dismissed for theft. Through his service company, Kitwell, Mr Hirschfield agreed to act as Head of Gable Group Finance. Following Mr Hirschfield's appointment, he was involved in preparing group financial

statements for 2012. This coincided with EY being appointed as auditors to the Gable Group.

35. At around this time (the first half of 2013), GIAG's external actuaries (Grant Thornton) produced a report indicating that the provision in GIAG's accounts for its insurance liabilities was £15.2m below the best estimate of such liabilities. Making this additional provision would have rendered GIAG's balance sheet insolvent and would mean that it did not comply with the required regulatory insolvency capital requirements.

36. This was discussed with the Liechtenstein regulator (the FMA) in June 2013 which required GIAG to put together a three year recovery plan. Mr Hirschfield was significantly involved in preparing the three year plan which was approved by the FMA in summer 2013.

37. Mr Hirschfield was appointed as the Finance Director of the Gable Group in September 2013 to help implement the three year plan as well as continuing his role in relation to the preparation for the Gable Group accounts. The implementation of the three year plan included a requirement to improve corporate governance. Mr Hirschfield took a number of measures in relation to this including:

    37.1 improving the accounting systems and records;

    37.2 recruiting a Financial Controller (David Coles);

    37.3 recruiting an internal actuary;

    37.4 putting in place a new suite of agreements between GIAG on the one hand and GSL, GHI and Hogarth on the other;

    37.5 implementing weekly finance committee meetings; and

    37.6 creating a terms of reference for the audit committee.

38. I have already mentioned the 2013 agreement between GIAG and GSLL. The agreement between GIAG and GHI involved GHI providing certain services to GIAG in return for a monthly payment of £120,000 (subsequently increased to £125,000 in January 2015).

39. The new underwriting and claims handling agreement between GIAG and Hogarth was similar to the 2010 agreement except that, in addition to the 5% commission, Hogarth was also entitled to a fee and reimbursement of expenses relating to any marketing activities.

40. In addition, a new clause (11.6) was inserted which was clearly intended to deal with Mr Dewsall's conflict of interest due to his position as CEO of the Gable Group and the sole shareholder of Hogarth. This clause noted that Hogarth should not be making profits in excess of what might be expected in the context of an arm's length relationship and provided that, to the extent that Hogarth's pre-tax profits relating to its business with the Gable Group exceeded £100,000 in any financial year, Hogarth would issue a credit note to GIAG for the excess.

41. Another important difference between the 2013 agreement and the 2010 agreement is that Hogarth was no longer entitled to pay its own commissions out of the trust accounts although it was expressly provided that the premiums to be paid into the trust accounts would be net of any relevant commissions.

42. The agreement was dated 28 November 2013 although was expressed to take effect from 1 January 2013.

43. It is notable that the previous practice of making substantial payments out of the Hogarth trust accounts to the Hogarth corporate accounts largely ceased after 2013 with only just under £400,000 being transferred between 2014 and the date GIAG went into bankruptcy in November 2016. It can, in my view be inferred that this was as a result of the new agreement put in place between GIAG and Hogarth and the other improvements to corporate governance introduced by Mr Hirschfield after his appointment.

44. Throughout the period from 2010-2018, significant payments were made to or for the benefit of Mr Dewsall. These came primarily from the Hogarth corporate accounts although there were also payments made directly by GIAG, GHI and GSLL.

45. Although Mr Hirschfield was a signatory on some Gable Group bank accounts, he was not actually involved in making or authorising any payments, which were carried out by Mr Dewsall with the assistance of Mr Foot.

46. Mr Hirschfield would however help ensure that any payments made out of the Gable Group were allocated correctly if the bookkeepers were unsure as to how a particular payment should be dealt with. If a payment made out of Gable Group funds was for the personal benefit of Mr Dewsall or if payments were made to Hogarth in excess of the amounts to which Hogarth was entitled, these amounts would be treated as a debt due from Hogarth to the relevant Gable Group company.

47. The debts due from Hogarth to the Gable Group were discussed by Mr Hirschfield with EY in the course of preparing the 2012 Gable Group accounts. It is clear that EY had concerns about the recoverability of the loans, a concern which Mr Hirschfield shared. As a result of this, it was agreed that Mr Dewsall should give a personal guarantee in respect of these loans which he signed in 2013 prior to the 2012 accounts being signed off by EY.

48. The guarantee was very brief. Mr Hirschfield's evidence, which I accept, is that the form of the guarantee was provided to him by the audit partner in London at EY. No legal advice was taken at the time in relation to the form of the guarantee.

49. Mr Dewsall signed and updated the guarantee in 2014 (presumably in the context of the 2013 audit). However, the only material difference between this guarantee and the previous guarantee is that the new guarantee made it clear that it only covered the loans due from Hogarth to the Gable Group and not the amounts held in the Hogarth trust accounts.

50. Mr Hirschfield had greater visibility over payments being made from GSLL given that the company was operated from London and so endeavoured to ensure that no payments were made directly from GSLL for Mr Dewsall's personal benefit and that, if this happened, GSLL was reimbursed. This can be seen from the fact that three payments relating to Weald Hall made from GSLL in 2014 were reimbursed by Hogarth shortly after the payments were made.

51. In order to assist with the solvency concerns identified in 2013, GHI raised £10.75m by way of an issue of shares in 2013.

52. Nonetheless, GIAG's solvency position deteriorated, partly as a result of the rapid expansion of its business. Steps were taken to deal with this in 2015 through a combination of reinsurance and an issue of £4m of convertible loan notes in December 2015 (of which Mr Dewsall contributed £1m).

53. However, despite this, in the events which happened, GIAG did not meet the relevant solvency capital requirements. In addition, at the start of 2016, new solvency regulations were introduced which required greater regulatory capital.

54. The Gable Group investigated various solutions to these issues and ongoing discussions took place with the FMA in Liechtenstein.

55. On 8 July 2016, the FMA issued an administrative order prohibiting GIAG from making any payments to associated companies, direct shareholders or companies associated with such shareholders (which would include payments to GHI, GSLL and Hogarth) other than customary market fees for services provided. It was also ordered to take steps to recover any amounts owing by GHI and GSLL.

56. Prompted by the solvency concerns, the Gable Group audit committee met on 24 August 2016 to review the Hogarth debts. The result of this was that the audit committee instructed Mr Hirschfield to ensure that no payments were made to Hogarth by any of the Gable Group companies other than the £100,000 monthly service and marketing fee which had been agreed under the terms of the 2013 agreement without the express authorisation of the audit committee which would require a valid invoice and supporting documentation.

57. In response to GIAG's deteriorating financial situation, the lack of any solution to the solvency issue and concerns that GIAG was continuing to write new policies contrary to the terms of the order made on 8 July 2016, the FMA made a further order on 7 September 2016 making broadly similar provisions prohibiting payments to associated companies. Again, market standard fees for services provided to Gable continued to be

permitted but only on condition that the FMA should give express prior consent to the payment of such fees.

58. This was followed by an order made by the FMA on 10 October 2016 appointing PricewaterhouseCoopers as administrator of GIAG. PwC opened bankruptcy proceedings at the Liechtenstein Court on 17 November 2016 and, on that date, a firm of Liechtenstein lawyers, Batliner Wanger Batliner ("BWB") was appointed as the trustee in bankruptcy.

59. Mr Dewsall makes significant criticisms of the FMA decisions and the way BWB have handled the bankruptcy. He views the present claims as an attempt to apportion blame. I make no comment on these allegations however as they are not relevant to the questions I have to determine.

60. Following the administration/bankruptcy of GIAG, GSLL and Hogarth continued to operate. It appears that GSLL continued to provide some services to the administrators and that Mr Hirschfield was involved as, on 26 October 2016, Mr Hirschfield wrote on behalf of GSLL to the administrators requesting a payment to GSLL to cover its costs.

61. The evidence shows that, following the bankruptcy of GIAG, Hogarth was now placing business with a Bermuda insurer, Argo.

62. Mr Dewsall's evidence is that Horatio was established at this time in order to provide Mr Dewsall's services to Argo to enable him to assist Argo with the business which was now being directed its way and in respect of which Horatio received a fee from Argo of £50,000 a month.

63. Following the collapse of GIAG, the FMA brought an action against Mr Dewsall and Mr Hirschfield. They were each fined CHF30,000 although this was reduced on appeal to CHF5,000. Criminal proceedings in Liechtenstein have also been brought against Mr Hirschfield and Mr Dewsall. These proceedings have not been concluded and remain outstanding.

64. In England, Mr Alcock (who, together with various associated entities, was a significant investor in GHI and who was also on the board of GHI between 2015-2016) and a

number of other investors brought an action in deceit against Mr Dewsall in 2019 (the "Deceit Claim").

65. Those proceedings were settled by Mr Dewsall making a payment in the region of £2m to the claimants but without any admission of liability. GIAG was given permission to use witness statements prepared in those proceedings by Mr Alcock and by an accountant acting for Hogarth, Gary Wyatt in these proceedings (as to which, see further below).

66. Before leaving this background section, I should say a little about Mrs Dewsall and Weald Hall.

67. Mr and Mrs Dewsall first met in 2006 and started living together in 2007. They married in 2017.

68. Weald Hall was purchased in October 2012 with the assistance of a mortgage of £1.7m from Investec. The purchase price was £3.15m. At the time Weald Hall was purchased, Mr Dewsall executed a declaration of trust in favour of Mrs Dewsall so that she was the beneficial owner of the property from the outset.

69. It is common ground that significant payments have been made by Hogarth which relate to Weald Hall. The precise amount is disputed but, in round figures, the total is somewhere between £1.5m - £1.7m. This includes a payment of £600,000 made in February 2014 to repay part of the Investec mortgage. The remaining payments relate to improvements, furnishings or maintenance.

70. As mentioned above, three of the payments relating to Weald Hall originally came from GSLL. However, these were subsequently reimbursed to GSLL by Hogarth.

The issues and the pleadings

71. The primary claim against Mr Dewsall and Mr Hirschfield is that they acted in breach of their Liechtenstein law duties as directors of GIAG in arranging for, permitting or failing to prevent GIAG's funds to be used for the personal benefit of Mr Dewsall. Based on the expert evidence, I will make findings in relation to the law in Liechtenstein

on breaches of director's duties although it is fair to say that there is no real disagreement as to the principles to be applied.

72. It will be necessary to make findings as to whether Mr Dewsall and/or Mr Hirschfield acted in breach of their duties and, if so, the extent to which those breaches caused loss which can be recovered.

73. As well as the ongoing payments made for the benefit of Mr Dewsall, there are three categories of payment which I will need to consider separately:

    73.1 payments said to be made by GIAG in breach of the September 2016 FMA Order;

    73.2 two instances where Mr Dewsall is said to have diverted funds which should have been paid to GIAG; and

    73.3 a payment of £1.4 million which was made by Mr Dewsall to the Gable Group and then returned to him shortly afterwards.

74. It should be noted that liability for breach of duty will arise whether or not Mr Dewsall or Mr Hirschfield acted dishonestly. However, as the claim has been pleaded on the basis that both Mr Hirschfield and Mr Dewsall were dishonest, I will consider this aspect. As pointed out by GIAG, it may, in particular, be relevant to Mr Dewsall as liability for fraudulent breach of duty will survive his bankruptcy.

75. In their pleadings, both Mr Dewsall and Mr Hirschfield took the position that GIAG was out of time for bringing a claim under Liechtenstein law based on a breach of director's duties. Mr Hirschfield now accepts that this claim has been brought in time.

76. At the trial, Mr Dewsall was not clear whether he would continue to rely on this point. However, he made no submissions in relation to it, despite the point having specifically been raised by the Court. In my view, Mr Dewsall is therefore no longer relying on the Liechtenstein limitation period as a defence. In any event, as I mentioned briefly below, I consider that a limitation defence under Liechtenstein law would not succeed.

77. Turning to the English law claims, the first is a claim against Mr Dewsall for breach of trust in respect of the payments said to be made out of the Hogarth trust accounts which were not authorised by the claims handling and underwriting agreements. The key issue here is the extent to which Mr Dewsall, as a director of Hogarth, can be liable for a breach of trust by Hogarth as trustee.

78. Turning to dishonest assistance, the claim is against both Mr Dewsall and Mr Hirschfield and relates to the payments out of the Hogarth trust accounts and payments made by GIAG to GHI and GSLL after the September 2016 FMA Order. Mr Hirschfield takes issue with whether such claim can be made based on a breach of Liechtenstein law duties. Assuming it can, it will be necessary to consider the extent to which Mr Dewsall or Mr Hirschfield assisted any breach (without themselves being in breach of their duties) and, if they did so, whether they acted dishonestly.

79. Mr Dewsall is said to be liable as a knowing recipient of all of the funds which he received or which were used for his benefit, the breach of which he had knowledge being either Hogarth's breach of trust in respect of payments out of the Hogarth trust accounts or Mr Dewsall's own breach of duty as a director of GIAG.

80. This claim will only be relevant to the extent that Mr Dewsall is not already liable for the sums claimed as a result of any breach of duty by him. The main issue which is likely to arise (to the extent it is relevant) is whether Mr Dewsall knew that the funds he received or which were used for his benefit represented the traceable proceeds of any breach of duty or breach of trust.

81. In relation to Mr Hirschfield, the claim in knowing receipt is limited to payments received by Mr Hirschfield which were potentially funded from payments made by GIAG which may have been in breach of the September 2016 FMA Order. The claim will therefore only be relevant if Mr Hirschfield was not in breach of his duties in respect of those payments. The issue will be whether Mr Hirschfield knew that his receipt was traceable to a breach of duty by Mr Dewsall.

82. It will also be necessary to consider whether such a claim can be maintained based on a breach of Liechtenstein law duties.

83. As far as Horatio is concerned, GIAG only maintains a claim based on knowing receipt and so the same point arises. Horatio will only be liable if GIAG can show Horatio knew that the funds it received were traceable to a breach of duty by Mr Dewsall.

84. Although GIAG has pleaded that Mr Dewsall and Mr Hirschfield were also in breach of their English law duties as directors, it did not pursue that claim at trial and I do not therefore address it in this judgment.

85. In relation to the English Law claims, Mr Dewsall and Mr Hirschfield rely on limitation defences under s 21 and s 32 Limitation Act 1980. In relation to s 21, there is a legal issue as to whether the limitation period is removed in respect of a claim for dishonest assistance or knowing receipt where the claim is made against as a director who acted in breach of their duties.

86. As far as s 32 Limitation Act 1980 is concerned, there is a question as to what has been concealed but the main issue is whether GIAG could, with reasonable diligence, have discovered any facts which are said to have been concealed sooner than it did.

87. Turning to the claim based on tracing GIAG's funds into Weald Hall, there are two significant legal issues to deal with. The first is the extent to which tracing is possible where funds have been used to improve/maintain a property rather than to purchase the property. The second is whether, in circumstances where traceable proceeds have been used to pay off a debt secured on the property, the remedy of subrogation is available so that GIAG is entitled to a charge over the property if the only claim is proprietary.

88. Separately, there is a factual issue as to whether GIAG is able to show that the funds used in relation to Weald Hall are in fact the traceable proceeds of any breach of trust or breach of duty and do not come from some other source.

Witnesses

Factual witnesses

89. GIAG called two witnesses of fact. The first was Hansjörg Lingg, a partner at BWB, the trustee in bankruptcy of GIAG. Mr Lingg was clearly an honest witness and his evidence should, in my view, be accepted. Towards the end of his evidence, there were

one or two points where he was not as forthcoming as he might have been, for example, in response to questions relating to evidence of the debts owed by Hogarth to the Gable Group. This did not however cast any doubt in my mind on the credibility of his other evidence. Mr Lingg referred on occasion to an interpreter but it was clear that he had a good grasp of English, and I have no concerns on that front.

90. GIAG's second witness was Ingrid Boldt. Ms Boldt was also an honest witness. However, there was much that she could not remember and, based on the documentary evidence, some of the evidence she gave (for example in relation to the £1.4 million payment by Mr Dewsall) could not be correct. For the most part, she gave evidence through an interpreter and did not always appear to understand the questions being put to her. All of this has affected the weight which I can give to Ms Boldt's evidence. However, it is fair to say that the evidence given by Ms Boldt was not, in any event, central to the issues which I have to decide.

91. As I have mentioned, GIAG was also given permission to rely on witness statements made by Kevin Alcock and Gary Wyatt, in the Deceit Claim. Hearsay notices were given and these individuals were not called to give evidence. GIAG's reason for this is that it would be disproportionate.

92. In Mr Wyatt's case, that may be fair enough as his witness statement only covered two pages and its only relevance was the extent to which Mr Hirschfield may have been involved in helping to prepare Hogarth's accounts. Whilst I note the comments Mr Wyatt makes, I cannot give them a great deal of weight as this was not the focus of his witness statement and Mr Wyatt was not of course available to be cross-examined in more detail about those comments.

93. Mr Alcock's witness statement is a different matter. This is over 40 pages long and contains some serious allegations against Mr Dewsall. In the absence of cross-examination, I am unable to give much weight to the assertions made by Mr Alcock in his witness statement. I suspect that this will not come as a surprise to GIAG given Mr Auld's suggestion in closing that the Court might find Mr Alcock's witness statement a useful cross-check in relation to findings that might be made based on other evidence.

94. Each of the three individual defendants also gave evidence but none of the defendants called any other witnesses. GIAG invites the Court to draw adverse inferences from the fact that no other witnesses were called. However, no submissions were made as to what relevant evidence any other witnesses might have or how that evidence would supplement the evidence being given by Mr Dewsall and Mr Hirschfield (for example from others involved in the management of Hogarth and/or GIAG). In these circumstances, I decline to draw any adverse inferences from the lack of any other witnesses on behalf of the defendants.

95. Mr Dewsall was very combative in his evidence. He frequently failed to answer the questions put to him and instead embarked on lengthy explanations as to why, in his view, the Gable Group and the relationship with Hogarth had been properly and appropriately managed. When faced with questions which could potentially elicit an unhelpful answer, his stock answer was that he left all of the detail to the accountants and so could not answer the question.

96. More worryingly, on a number of occasions, Mr Dewsall gave answers to questions which clearly could not be correct. One example of this related to a simple question about the purpose of clause 11.6 of the 2013 agreement between GIAG and Hogarth. Mr Dewsall refused to accept that the purpose of the clause was to deal with the conflict of interest which existed as a result of Mr Dewsall both being the Chief Executive of GIAG and the owner of Hogarth.

97. Given the terms of the clause, that is, in my view, the only possible explanation for its existence. In fairness to Mr Dewsall, when asked about this again later in his evidence on the following day, he did accept that this was the purpose of the clause. However, the fact that he did not acknowledge this straight away when first asked about it is damaging to the credibility of his evidence.

98. Similarly, when asked whether he considered that a payment from the Hogarth trust accounts to the Hogarth corporate accounts with an onward payment then being made to Mr Dewsall (or for his benefit) would be a breach of clause 7 of the agreement between GIAG and Hogarth, Mr Dewsall's response was that he did not believe that

this had ever happened. However, it is clear from a schedule produced by GIAG that this in fact happened on numerous occasions.

99. In the light of all of this, it is in my view right to treat Mr Dewsall's evidence with caution where it is not supported by the documentary evidence.

100. Mr Hirschfield made two witness statements in these proceedings. The second witness statement commented in some detail on the report prepared by GIAG's forensic accountancy expert. GIAG objected to this section of Mr Hirschfield's second witness statement. It was, however, agreed at the start of the trial that this would be held over until closing submissions.

101. In the event, Mr Auld did not make any further objection to the witness statement in his closing submissions. No doubt the reason for this is that the points made by Mr Hirschfield in his second witness statement were essentially the same as the points made by Mr Hirschfield's own forensic accountancy expert, in somewhat more detail, in his report and so, although technically inadmissible, has no real impact.

102. Mr Hirschfield was much more measured in his evidence than Mr Dewsall. For the most part, he was a straightforward witness, giving concise answers to the questions asked but also supplementing this with an appropriate level of explanation of the background to particular actions and events.

103. There were however some occasions where there was potential for straying into difficult territory where he sidestepped the questions being asked and fell back on the core elements of his defence that everything had been properly recorded or that he had no ability to stop payments being made. Having said this, my general impression is that Mr Hirschfield's evidence should be accepted at face value.

104. Mrs Dewsall was a somewhat nervous witness. It was clear that she had very little involvement in financial matters and so was not able to answer many of the questions put to her. In addition, some of her answers did not make sense taking into account the questions asked. However, this appeared to be more as a result of misunderstanding or lack of financial awareness rather than evasiveness. Nonetheless, it does however affect the weight which can be given to Mrs Dewsall's evidence.

Expert witnesses

105. Expert evidence on Liechtenstein Law was obtained by GIAG from Hilmar Hoch, a senior lawyer in Liechtenstein and the Chief Justice of the Constitutional Court of Liechtenstein. Mr Dewsall did not provide any Liechtenstein law evidence. However, Mr Hirschfeld obtained an expert report from Florian Zechberger, a lawyer with around 20 years experience who is currently the managing partner of a law firm in Liechtenstein.

106. Unfortunately, Mr Zechberger was unavailable to be cross-examined. However, there were few areas where the experts disagreed and I have been able to make findings based on the reports produced by the experts together with the evidence given by Mr Hoch in cross-examination. Mr Hoch knew his subject and was clearly doing his best to assist the Court in an impartial manner.

107. Expert accountancy evidence was given by Mr Roger Isaacs on behalf of GIAG, Mr Jeffrey Davidson on behalf of Mr Hirschfield and Mr Philip Allister on behalf of Mrs Dewsall. There was no expert evidence put forward by Mr Dewsall.

108. There is a significant difference of opinion between Mr Isaacs and Mr Davidson as to the correct approach the Court should take in determining whether there have been any misappropriations. However, whilst both of them justify their own approach, they each recognise that this is ultimately a matter for the Court to determine.

109. There is also significant disagreement between Mr Isaacs and Mr Davidson as to the categorisation of payments as either business or personal. Again, however, they both recognise that this is a question of fact for the Court to determine based on the evidence.

110. In contrast, whilst Mr Allister supports Mr Davidson's approach to the question of identifying misappropriations, there is no real difference of opinion between Mr Isaacs and Mr Allister as to the extent to which the payments in question relate to Weald Hall. As both accept, any differences are matters of fact for the Court to determine.

111. Mr Allister notes that the existence of unidentified payments into Hogarth's accounts may prevent the tracing of any misappropriated funds into Weald Hall but, once more, both experts recognise that this is a point for the Court to determine.

112. Whilst I have no hesitation in accepting Mr Allister's evidence, there is therefore little he says which assists the court in reaching a conclusion on the relevant issues.

113. Mr Isaacs was straightforward in the answers to the questions put to him. It was however clear that his report was heavily influenced by the way in which GIAG's claim has been pleaded and his defence of that approach must be seen in that light. It may partly be as a result of this that the justifications given by Mr Isaacs in cross-examination for the approach which he had taken were not all that convincing with the result that he accepted that one of the justifications he put forward could not be sustained and should be withdrawn.

114. Initially, Mr Davidson had a tendency to given long narrative answers, apparently with a view to reinforcing his position rather than answering specific questions. However, with occasional lapses, this improved after it was drawn to his attention. Some of his answers were evasive where a direct answer might be seen as undermining his position (for example as to whether he had found any evidence of a commercial justification for payments being made to Horatio).

115. Overall, Mr Davidson was more persuasive than Mr Isaacs in defending his own position and explaining why Mr Isaacs' approach was not the right one. Having said this, it is of course a legal question for the Court to determine the right approach to be taken to the question as to whether any misappropriations have taken place.

116. Mr Davidson was frank about disciplinary action which had been taken against him by ICAEW and also action taken against him by the Charity Commission which has led to him being barred from acting as a charity trustee. Whilst neither of these incidents reflect well on Mr Davidson there is no evidence that they have affected his expert opinion in this matter and there is, in my view, no reason why they should reduce the weight which can be given to his report.

117. After the hearing, Mr Auld referred me to the comments made about Mr Davidson by Trower J in *JSC Commercial Bank Privatbank v Kolomoisky* [2025] EWHC 1987 (Ch) at [311-314], in a judgment handed down after the hearing concluded. Whilst I note those comments, it does not change my view of Mr Davidson's evidence in this case. In particular, I would note that, whilst Mr Davidson did not himself disclose details of the actions taken against him by ICAEW and the Charity Commission, he did not suggest that he was a member of ICAEW.

Breach of Liechtenstein law director's duties

Liechtenstein law

118. The experts are broadly agreed as to the duties of a director under Liechtenstein law and the circumstances in which they may be liable for breach of those duties. I therefore summarise below the principles to be applied:

118.1 There is a general duty of care to promote the company's business. The duty of care should not however be applied too strictly.

118.2 There is no breach of duty if a director is not influenced by outside interests and can reasonably be expected to have acted for the benefit of the company on the basis of adequate information.

118.3 The required standard of care is that of an average director of an insurance company in similar circumstances.

118.4 Directors must observe the principles of prudent management and administration. They do not have to monitor every single activity but must have an overview of the company's business activities and strategic direction.

118.5 There is a duty to prevent the use of the company's funds for unauthorised purposes which requires the directors to create a framework that protects the company's resources from misallocation or misuse. This involves critical general oversight over financial activities and not the monitoring of each individual transaction.

118.6 The duty to ensure appropriate accounting and bookkeeping requires a director to be able to obtain a comprehensive picture of the company's economic and financial situation at all times.

118.7 A director must act free of any conflict of interest, including those arising from transactions between the company and themselves.

118.8 There is also a duty to carefully select, instruct and monitor third parties to whom the management of the company is entrusted.

119. Liability arises if the breach is intentional or negligent. A breach of duty is treated as a breach of contract and gives rise to contractual liability.

120. If there is a culpable breach of duty by more than one director, each of them is liable for the whole of the damage.

121. The directors of GIAG were obliged to ensure compliance with the orders made by the FMA. However, a breach of the order does not automatically lead to liability as all the other requirements for liability must also be proved.

122. In terms of causation, the test is whether the damage would have occurred if there had been no breach of duty. The breach need not however be the sole cause of the damage, with all factors contributing to the damage being treated as equally significant. However, the breach of duty must typically and foreseeably lead to the damage in question.

123. GIAG has the burden of proving that it has suffered a loss which has been caused by a breach of duty. This means that GIAG must show that the actions of Mr Dewsall and/or Mr Hirschfield fell below the standard of an average director of an insurance company. If it is able to do so, the burden shifts to the director to show that they did not act intentionally or negligently.

124. As Mr Hoch pointed out in his oral evidence, once it is shown that a director has acted in breach of duty, it would only be in an exceptional case (he gave the example of incapacity) that the director would be able to show that they were not negligent.

125. Where there has been a culpable breach of duty, the company is able to recover the entire financial loss. It is up to the company to prove and quantify the amount of the damage.

Limitation under Liechtenstein law

126. Given that Mr Dewsall was somewhat equivocal in his position in relation to Liechtenstein limitation periods, I should mention this briefly.

127. The normal limitation period is three years from the time when the injured party becomes aware of the damage and the identity of the injuring party. If it was established that GIAG had this information at the time it was placed into administration or bankruptcy, the limitation period would run from October/November 2016 and would expire in October/November 2019. The claim was brought in November 2022 and so would be outside the limitation period.

128. The limitation period is extended to ten years if the breach is intentional. In addition, the limitation period is suspended where the claimant asserts a claim in criminal proceedings and such claim has not been rejected.

129. Criminal proceedings were brought against Mr Dewsall and Mr Hirschfield in September 2017. GIAG asserted a civil claim in those proceedings on 3 April 2019 (and so within the normal three year limitation period). It is Mr Hoch's view that the criminal proceedings and the civil claim were sufficiently similar to suspend the limitation period.

130. Mr Zechberger notes that there is an alternative view to the effect that the civil claim will only suspend the limitation period if the civil law claim can be derived from the criminal charges which have been brought. He suggests that this is not the case as the criminal charges related to the protection of GIAG's creditors as opposed to GIAG itself. Although Mr Zechberger concludes that this approach is "justifiable and correct", he concedes that the Liechtenstein courts will probably follow Mr Hoch's approach.

131. In the light of this, it seems to me that Mr Hirschfield was correct to accept that the limitation period has been suspended and that the claim has therefore been brought within the relevant limitation period. Given that finding, it follows that the claim against Mr Dewsall has been brought within the relevant time limit.

Breach of duty, misappropriation and the approach of the parties

132. GIAG's primary claim relates to what it calls the "excessive payments". Its approach involves looking at all payments received by or for the benefit of Mr Dewsall or Mr Hirschfield out of any of the Gable Group or Hogarth bank accounts and then giving credit for amounts due to Mr Dewsall and to Mr Hirschfield by way of salary, bonus and expenses and also giving credit for the £100,000 profit which Hogarth was entitled to retain each year under the terms of the 2013 agreement between GIAG and Hogarth. Anything in excess of this is said to be a misappropriation.

133. In its pleadings and in Mr Isaacs' expert report, credit is also given for the amounts due to GSLL under the agreement between GIAG and GSLL. When Mr Hirschfield's accountancy expert, Mr Davidson, pointed out that, if credit is to be given for the amounts due from GIAG to GSLL, credit should also be given for the amounts due from GIAG to GHI under the terms of the agreement between those two companies, the response of Mr Isaacs (and GIAG) was to accept that there was an inconsistency but, instead of making an allowance for the sums due to GHI, the allowance previously given for the sums due to GSLL was withdrawn.

134. There is some logic to this. The basis for GIAG's approach is that, as Hogarth has no customers other than GIAG (a point which is disputed), all of the money within the Gable Group and Hogarth derives from GIAG and so the simplest way of working out what has been misappropriated is to treat all of the Gable entities and Hogarth as one and to simply see what has come out of them in excess of any entitlements. On this basis, it is arguably correct to ignore payments passing between Gable Group companies as this has no bearing on the entitlement of Mr Dewsall or Mr Hirschfield to receive payments or benefits.

135. In addition, GIAG says that, if this approach is not taken, it would enable Mr Dewsall to funnel GIAG funds through GSLL, GHI and Hogarth, all of which were under his

control, to create a smokescreen of legitimacy and to obscure the true purpose and effect of the payments.

136. A further objection made by GIAG to taking any other approach is that, given the passage of time and the lack of reliable accounting records, the true nature of transactions between Gable Group companies and/or Hogarth cannot be known.

137. In support of GIAG's approach, Mr Auld referred to the decision of the Privy Council in *Federal Republic of Brazil v Durant International Corpn* [2015] UKPC 35 ("*Durant*"). In that case, there had been a misappropriation of funds from Brazil by way of the payment of bribes. The question was whether the funds which had been misappropriated could be traced into accounts held by the defendants. The Privy Council observed [at 38] that:

> "The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a co-ordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry. The board agrees with Sir Richard Scott V-C's observation in Foskett v McKeown [1998] Ch 265, 283 that the availability of equitable remedies ought to depend on the substance of the transaction in question and not on the strict order in which associated events occur."

138. Based on this, Mr Auld submits that it is proper for the Court to look at the economic reality rather than allowing wrongdoers to escape liability by routing funds through other entities under their control.

139. Mr Heath however notes that the comments of the Privy Council were dealing with the question of tracing rather than an investigation as to whether there had been a misappropriation in the first place and does not therefore provide any support for GIAG's approach.

140. In any event, Mr Heath submits that *Durant* does not suggest that apparently lawful contracts can be disregarded unless they have been put in place from the outset as part of a sophisticated and co-ordinated camouflage. In this case (as accepted by Mr Auld in closing submissions) the agreements between GIAG and GSLL/GHI/Hogarth were genuine commercial arrangements. There is no suggestion that they were put in place as part of a co-ordinated scheme to enable Mr Dewsall and/or Mr Hirschfield to extract funds from GIAG for their personal benefit.

141. The position taken by Mr Dewsall and Mr Hirschfield is that GIAG and Mr Isaacs have got things the wrong way round by starting with what payments have been made to or for the benefit of Mr Dewsall or Mr Hirschfield. Instead, they say that the starting point should be to look at what has gone out of GIAG (or the funds held for its benefit in the Hogarth trust accounts) and to identify whether those payments were legitimate (or were paid in breach of duty). Only then can the payments to or for the benefit of Mr Dewsall or Mr Hirschfield be analysed in order to determine whether they were paid out of funds belonging to GIAG and are therefore misappropriations to the extent that they exceed any funds to which Mr Dewsall or Mr Hirschfield were entitled (for example by way of salary).

142. Applying this approach, Mr Dewsall's and Mr Hirschfield's position is that all of the payments made by GIAG were legitimate. In the case of payments to GSLL and GHI, both experts agree that the amounts to which those companies were entitled under the terms of the agreements with GIAG exceeded the amounts paid by GIAG.

143. In relation to Hogarth, it is accepted that Hogarth received more than it was entitled to under its agreement with GIAG either directly from GIAG or from the Hogarth trust accounts. However, it is submitted that the excess was properly accounted for by way of the Hogarth loan. Similarly, any amounts received by (or for the benefit of) Mr Dewsall from GIAG or from the Hogarth trust accounts in excess of his entitlements were also added to the Hogarth loan and therefore represented legitimate payments.

144. On the basis that all payments to GSLL, GHI and Hogarth were proper payments, Mr Heath submits that the funds no longer belonged to GIAG and so whatever those

companies chose to do with the money which they had received could not be a misappropriation as far as GIAG is concerned.

145. In my view, on the facts of this case, the approach adopted by Mr Dewsall and Mr Hirschfield (and Mr Davidson) is to be preferred. As Mr Heath submits, GIAG's approach involves ignoring genuine commercial agreements where there is no suggestion that the agreements were put in place with the intention of facilitating the misappropriation of GIAG's funds.

146. On this basis, it is difficult to see how (for example) the payment of the monthly fee due from GIAG to GSLL can be a misappropriation from GIAG. Of course, if GSLL uses its money for an unauthorised purpose, that may be a misappropriation from GSLL but it cannot, in my judgment, be a misappropriation from GIAG. The position might be different if an agreement was put in place between GIAG and GSLL which provided for payments in return for services which everybody knew were never going to be provided and where the real purpose was to provide funds to GSLL which it could then use to confer personal benefits on Mr Dewsall. However, that is not the case here.

147. Mr Isaacs acknowledges in the joint experts report with Mr Davidson that his approach allows a payment for the benefit of Mr Dewsall made by GSLL "to be included as an alleged misappropriation despite it having been made by GSLL from funds to which GSLL was entitled". There is however no explanation as to how this justifies treating the payment by GSLL as a misappropriation from GIAG.

148. In addition, as Mr Heath points out, GIAG's approach takes no account of the fact that, during the relevant period, £14.5 million was invested into GHI by way of a subscription for shares in 2013 and a subscription for loan notes in 2015. GIAG's underlying premise that all of the payments to or for the benefit of Mr Dewsall and/or Mr Hirschfield must have been funded from GIAG's money is not therefore correct.

149. Payments from GHI to Hogarth, to Mr Dewsall, Mr Hirschfield or other recipients for the benefit of Mr Dewsall or Mr Hirschfield may well have been funded out of these investments and not out of money provided by GIAG. Again, it is possible that such payments may have involved misappropriations from GHI, but they would not be misappropriations from GIAG.

150. I appreciate that my conclusion might be seen as giving wrongdoers the ability to misappropriate funds with impunity. However, as I have said, this is not the case where agreements are put in place as part of a co-ordinated scheme to misappropriate funds. In this case, if funds have been misappropriated from entities other than GIAG, it is up to the liquidators of those entities to bring the necessary claims. It is not a reason for artificially treating funds as having been misappropriated from GIAG.

151. In its closing submissions, GIAG notes that the bank accounts of the various companies have been used interchangeably and without any real formality. One example given is the fact that Mr Dewsall's salary has been paid variously from the HUAL trust accounts, the HUAL corporate accounts, GIAG's bank account and GHI's bank account.

152. However, it is difficult to see how this justifies treating a payment made to or for the benefit of Mr Dewsall or Mr Hirschfield from an entity other than GIAG out of funds legitimately paid to that entity as a misappropriation from GIAG. As GIAG acknowledges, it is likely that, in relation to the salary payments, appropriate adjustments will have been made to intercompany balances to reflect where the true liability for Mr Dewsall's salary lay.

153. I should note at this point that GIAG suggests that the audited GHI consolidated financial statements for the Gable Group cannot be taken as an accurate reflection of the true financial position. Three points put forward in support of this are:

    153.1 GIAG says that Gable's accounting records are unreliable. For example, payments out of the Hogarth trust accounts are shown in the ledgers as payments to GSLL when they were in fact payments to Mr Dewsall. However, as Mr Davidson points out, if this was not corrected, the Hogarth trust account balances would not reconcile with the accounting records. Both Mr Davidson and Mr Isaacs agree that the auditors would have checked this and that the balances do in fact reconcile (subject to normal tolerances). It must therefore be inferred from this that, although the ledger descriptions may have been inaccurate, the payments were ultimately properly accounted for.

    153.2 The documentary evidence suggests that, in relation to the 2015 accounts, an asset in the form of an amount due from a broker called Belmonte may have

been manipulated by Mr Dewsall persuading Belmonte to sign a confirmation which included amounts which it had been agreed would be written off. This was not however put to Mr Dewsall in cross-examination which makes it more difficult for the Court to draw inferences from the documentary evidence. In any event, whilst this could show a propensity to mislead the auditors, I note that it relates to the existence of an asset (important for solvency/regulatory purposes) and does not relate to the day-to-day accounting for payments in and out of bank accounts.

153.3 A further situation where the auditors are said to have been misled involves the entitlement of GIAG to a success fee connected to a litigation funding policy relating to a case known as the Grail litigation. The allegation is that Mr Hirschfield and Mr Dewsall knew, approximately a year before the auditors were told, that there was a likelihood that the success fee would not be recovered. For the reasons explained below, I reject this. In addition, this again relates to the existence (or otherwise) of an asset and not to the day-to-day accounting for transactions.

154. Although it is of course possible that auditors may be misled, there is, in my view, no real evidence in this case that the audited accounts do not contain a fair reflection of the transactions taking place between the Gable Group and Hogarth.

155. As far as the excessive payments are concerned, both parties acknowledge in their closing submissions that, if the approach advocated by Mr Dewsall and Mr Hirschfield is accepted (as I have) the focus turns to the Hogarth loan (being the loan due from Hogarth to GIAG and not any loans due from Hogarth to GSLL or GHI) as, in substance, this represents the payments made by GIAG (from its own bank accounts or from the Hogarth trust accounts) to Hogarth or to or for the benefit of Mr Dewsall or Mr Hirschfield in excess of their entitlements.

156. The question which needs to be addressed therefore is whether Mr Dewsall and/or Mr Hirschfield were in breach of their duties to GIAG in allowing the Hogarth loan to come into existence, to remain in existence and to continue to increase over the relevant

period. However, before going on to consider this, I need to deal with a point raised by Mr Heath in relation to GIAG's pleadings.

157. Mr Heath submits that it is not open to GIAG to challenge the Hogarth loan as it is nowhere mentioned in its pleadings. He observes that GIAG could have pleaded breaches of duty in connection with the Hogarth loan but has failed to do so.

158. Mr Heath notes that, in his defence, Mr Hirschfield refers to the Hogarth loan and to the guarantee which was put in place to support the loan. He submits that, at the very least, if GIAG wished to challenge the propriety of the loan, it should have served a reply (which it did not).

159. As a result of all of this, Mr Heath suggests that Mr Hirschfield has been ambushed by allegations such as failure to prevent the Hogarth loan building up as well as criticisms relating to the guarantee and that he has therefore been unable to deal with these issues in his own pleadings and evidence.

160. Whilst I acknowledge that GIAG's pleadings should ideally have been more detailed, I do not accept the criticisms made by Mr Heath.

161. Paragraph 28 of the Re-amended Particulars of Claim states:

> "Large amounts of GIAG's money were paid to or for the direct or indirect benefit of the defendants or to or for persons unknown. They were made by direct payment from GIAG's accounts (either the Trust Accounts or GIAG's Name Accounts) … or via a payment to the [Hogarth] Corporate Accounts …"

162. In response to this, Mr Hirschfield pleads in his amended Defence (paragraph 40.4.3.3):

> "Where payments transferred to [Hogarth] exceeded the amounts due under the 2013 [Hogarth] Agreement, they were accounted for as a recoverable balance from [Hogarth]. When Mr Hirschfield was appointed, this recoverable balance stood at approximately £2 million. Mr Hirschfield discussed this balance with the auditor, EY. To address this issue, EY drafted a letter of guarantee dated 28 June 2013 from Mr Dewsall pursuant to which he guaranteed in full the repayment of debts of [Hogarth] to GIAG and all Gable Group companies."

163. Mr Hirschfield addresses the Hogarth loan further in his First Witness Statement (paragraphs 45 and 47-50). Those paragraphs explain why, in Mr Hirschfield's view, it was proper to account for the excessive payments in this way.

164. Mr Hirschfield has not therefore been ambushed or put at a disadvantage. He was clearly aware that the Hogarth loan was an issue. For example, had he wanted to back up his assertions that everything was being done with the full knowledge and approval of EY by calling somebody from EY to give evidence, he could have done so. It is perhaps unsurprising that he did not consider it necessary to do so given that GIAG has the burden of proof.

165. As a general point, given the conclusion I have reached, I do not need to consider breach of duty generally in relation to the payments made by GIAG to GSLL and GHI given the agreement of the experts that those companies received less than they were entitled to. On this basis, there can be no loss.

166. For the avoidance of doubt, I will however still need to consider whether there is any liability as a result of breach of duty in respect of:

166.1 the payments made by GIAG to GHI/GSLL after the FMA's September 2016 order;

166.2 the payments said to have been diverted away from GIAG by Mr Dewsall; and

166.3 the £1.4m paid to Mr Dewsall in July 2016.

167. I also do not need to deal in general terms with specific payments made by GIAG (out of its own accounts or the Hogarth trust accounts) to Hogarth or directly to or for the benefit of Mr Dewsall or Mr Hirschfield as, to the extent that these exceed any entitlements, they will be reflected in the Hogarth loan.

168. In passing, I note that, given my conclusion, there is a separate point as to whether there is any breach of duty by Mr Dewsall or Mr Hirschfield in failing to ensure that Hogarth issued a credit note in any year in which its profits exceeded £100,000 as required by the 2013 claims handling and underwriting agreement. Mr Davidson suggest this could have been relevant in 2015 where a credit of about £350,000 might have been due.

However, this has not been pursued by GIAG in its closing submissions as a separate claim, it was not explored with the witnesses and no submissions have been made by any of the parties in relation to it.

169. I therefore turn now to consider whether there have been any breaches of duty by Mr Dewsall or Mr Hirschfield in relation to the Hogarth loan.

Breach of duty – the Hogarth loan

170. Based on the Gable Group Consolidated Financial Statements, Hogarth did not owe anything to any of the Gable Group Companies at the end of 2010 and 2011. The amounts owed by Hogarth to GIAG at the end of the subsequent financial years was as follows:

Year	**Amount owed to GIAG**
2012	Nil
2013	£1,855,946
2014	£2,026,399
2015	£2,682,359

171. By 30 June 2016, Hogarth owed GIAG £3,239,721.

172. Although, in 2012, Hogarth did not owe any money to GIAG, it did owe approximately £2m to GHI/GSLL.

173. It is clear that the Hogarth loan was somewhat informal. There was no loan agreement and therefore no fixed terms for repayment. The financial statements for the Gable Group refer to a "balance outstanding" from Hogarth rather than a loan.

174. The financial statements for the years ended 2012 and 2013 say nothing about the terms on which the relevant amounts remained outstanding. The financial statements for 2014 and 2015 noted that the outstanding balance was interest free.

175. The 2012 financial statements do not refer to the fact that Mr Dewsall had guaranteed the payment of the amounts due from Hogarth to the Gable Group, despite the guarantee having been given before the 2012 financial statements were signed off by the auditors. This is, however, referred to in the financial statements from 2013 onwards.

176. It is worth noting that, in 2010, Hogarth owed almost £4m to GIAG. This was set off (and therefore effectively repaid) against a similar amount due from GIAG to Hogarth which arose in the context of the 2010 underwriting and claims handling agreement put in place between GIAG and Hogarth. This shows that the practice of payments made by GIAG (whether directly or from Hogarth's trust accounts) to or for the benefit of Mr Dewsall or to Hogarth in excess of their entitlements being recorded as a debt due from Hogarth to GIAG had been in existence for many years, even prior to 2010.

177. Although it is not a point raised by any of the parties, I note that one potential issue with the approach advocated by Mr Hirschfield and Mr Dewsall (which I have accepted) is that, based on the accounting records, there were no potential misappropriations between 2010-2012 as Hogarth is not shown as owing any money to GIAG before 2013.

178. This is however arguably consistent with the figures provided by GIAG. For example, of a total amount of just over £16m said to be paid to or for the benefit of Mr Dewsall and Mr Hirschfield (before giving credit for any entitlements), approximately £4m relates to the period prior to 2013 and £12m relates to the period from 2013 onwards.

179. Taking into account the fact that this does not allow for any payments to which Mr Dewsall and/or Mr Hirschfield were entitled and bearing in mind that GIAG have now accepted that just over £3m of these payments in fact related to business expenses and there is a further £4.5m where there is, as yet, no agreement as to whether the payments relate to business expenses or personal expenses it is plausible that there were no payments prior to 2013 in excess of entitlements. I do not therefore consider this to be an objection to the application of the approach which I have adopted.

180. I also note that there are a number of instances which GIAG have identified between July 2010-January 2014 where personal expenses of Mr Dewsall paid out of the Hogarth corporate accounts were clearly funded by transfers from the Hogarth trust accounts. By way of example, on 9 November 2010, £62,500 was transferred from the Hogarth trust account to the Hogarth corporate account. On the same day, just over £50,000 was sent from the Hogarth corporate account to Tauro Properties, a company owned by Mr Dewsall which held a property in Spain.

181. Similarly, on 4 May 2011, £20,000 was transferred from the Hogarth trust account to the Hogarth corporate account. On the same day, £20,000 was sent from the Hogarth corporate account to Mint 3, another company owned by Mr Dewsall. There are 28 other examples of transfers from the Hogarth trust account to the Hogarth corporate account followed by transfers out of the Hogarth corporate account either on the same day or shortly afterwards to or for the benefit of Mr Dewsall.

182. The final example of such a payment was a transfer from the Hogarth trust account to the Hogarth corporate account on 2 January 2014 of £26,000. On the same day, a payment of just under £20,000 was made from the Hogarth corporate account to Haileybury School, the purpose of which was to pay school fees on behalf of Mr Hirschfield. I will come back to this later in this judgment.

183. Between 2010-2012, the total of the payments to or for the benefit of Mr Dewsall from the Hogarth corporate accounts which had been funded by transfers from the Hogarth trust accounts in this way was about £450,000. However, in the absence of other evidence, it is impossible to infer from this that the payments to Hogarth during this period (when a total of around £8 million was transferred from the Hogarth trust accounts to the Hogarth corporate accounts) were in excess of its entitlements given the clear evidence that no loans built up during this period but that there had been loans both before and after this period.

184. The question therefore is whether Mr Dewsall and/or Mr Hirschfield were in breach of their duties as directors of GIAG in allowing a significant debt to build up between Hogarth and GIAG from 2013 onwards. In considering this, I need to look at each of Mr Dewsall and Mr Hirschfield separately.

Mr Dewsall

185. GIAG's case is that the excessive payments (and by extension, the payments making up the Hogarth loan), were not for the proper business purposes and needs of GIAG and were therefore in breach of Mr Dewsall's duties as a director of GIAG. Indeed, GIAG goes further and says that, in the case of Mr Dewsall, the payments were knowingly improper in circumstances where he had effective control of all of the relevant companies and extracted much more than was due.

186. Whilst accepting that a debt exists from Hogarth to GIAG, in the sense that it is recorded as such in the Gable Group financial statements, Mr Auld, submits that, in reality, the loan is fictitious given that it is undocumented, interest free, that Mr Dewsall was unable to provide any legitimate reason for the excessive payments to Hogarth and that there are no GIAG board minutes formally considering the loan and any conflict of interest. Instead, Mr Auld suggests, the debt is simply an accounting explanation for the transfer of significant sums of money from GIAG to Hogarth, (or to or for the benefit of Mr Dewsall) in excess of their entitlements.

187. For similar reasons, Mr Auld argues that Mr Dewsall cannot rely on the fact that the Hogarth loan may have been authorised by the GIAG board in order to avoid liability for breach of duty given that there is no evidence of any formal consideration of the loan and any conflict of interest, even though all of the board members might have known about it.

188. In any event, Mr Auld notes that Mr Hoch's, evidence is that, even if something (such as the Hogarth loan in this case) is apparently authorised by the company, it is nonetheless necessary to look at all of the surrounding circumstances, including the impact on the company and whether proper formalities have been observed in determining whether there has been a breach of duty.

189. Mr Auld also draws attention to issues relating to the recoverability of the Hogarth loan. It is common ground that Hogarth had little in the way of tangible assets. It was only solvent on a balance sheet basis as a result of an unidentified debtor of around £5.4m. The identity of the debtor is a matter of some contention. Mr Dewsall has made conflicting statements about this in the past. His position under cross-examination was that he did not know who the debtor was.

190. This is, in my view, implausible, given the importance of this asset to the solvency of Hogarth which was regulated by the FCA. It appears that the FCA was told that the debt was due from "Old Hogarth/WAD". There is no evidence as to what "Old Hogarth" is or was but "WAD" is clearly a reference to Mr Dewsall.

191. Mr Hirschfield's evidence is that he assumed the debt was due from Mr Dewsall. This would, of course, be consistent with the fact that, as the evidence clearly shows, the

funds within Hogarth have been used to make payments to Mr Dewsall or for his benefit, to a very significant extent. Although it is not directly relevant to the issues I have to decide, my tentative conclusion, based on the evidence I have, is that it is more likely than not that the debtor was Mr Dewsall. This is the case even though, as Mr Auld pointed out, if Mr Dewsall is in fact the debtor, this may well have required some sort of disclosure in the Hogarth financial statements and/or to the FCA.

192. Whatever the true position, it is clear that Mr Hirschfield and EY, when discussing the 2012 accounts, concluded that there were serious issues as to the recoverability of the Hogarth loan, hence EY's insistence that Mr Dewsall should give a guarantee.

193. Mr Dewsall's defence is that all of the payments to Hogarth have been properly accounted for, that any conflict of interest was recognised when the agreements between GIAG and Hogarth were put in place and that everything was transparent to the boards of GIAG and GHI, to the auditors and to the regulators given the clear disclosures in the Gable Group financial statements.

194. Mr Dewsall also suggests that it is implausible that he would breach his duties to GIAG in circumstances where he would be damaging his own interests as the largest individual shareholder of the Gable Group.

195. In addition, Mr Dewsall notes that the 2013 Hogarth agreement provides for alternative dispute resolution and arbitration. Mr Dewsall suggested in his defence that GIAG could not maintain its claims without having invoked these provisions. However, in his submissions, he accepted that this was not the case but instead makes the point that GIAG never challenged any of the payments being made to Hogarth or to or for the benefit of Mr Dewsall under the terms of these provisions, which suggests that all of the payments were properly due.

196. Having considered all of the evidence, I have no hesitation in concluding that Mr Dewsall acted in breach of his Liechtenstein law duties as a director of GIAG in relation to the payments and transactions represented by the Hogarth loan.

197. Mr Dewsall does not deny that he was in effective day-to-day control of GHI, GIAG, GSLL and Hogarth. Nor does he deny that, in that capacity, he authorised or procured the excessive payments which contributed to the Hogarth loan.

198. Although, in his defence and in his oral evidence, Mr Dewsall asserts that all of the payments were within the contractual entitlements of himself or Hogarth, he refers in his second witness statement to some of the payments being treated as a loan from GIAG to Hogarth. He also explained in his oral evidence that, although he considered that Hogarth could repay the debt to GIAG, "Hogarth is me" which is why he was willing to sign the guarantee that EY had asked for.

199. It must therefore be the case that Mr Dewsall was aware of the loans that were building up as a result of payments being made to Hogarth or to or for the benefit of Mr Dewsall in excess of their entitlements. Some support for this inference is also to be gained from the fact that this appears to have been a long standing practice as evidenced by the loans of almost £4 million due from Hogarth to GIAG that had built up by 2010.

200. Mr Dewsall was not able to identify any legitimate business purpose for GIAG in making the payments representing the Hogarth loan. In his witness statement in the Deceit Claim, he had suggested that Hogarth needed the money for working capital. However, in cross-examination, Mr Dewsall was unable to provide any explanation as to why this should be the case.

201. Indeed, the use of GIAG funds to make loans to Hogarth seems all the more surprising given Mr Dewsall's observation in his defence that the three year plan agreed between GIAG and the FMA required GIAG not to pay any dividends, to transfer retained earnings to a non-distributable capital account and to seek to raise new capital.

202. In the light of all of this, there can be little doubt that Mr Hirschfield was right when he accepted in his oral evidence that there was no commercial benefit to GIAG in making the Hogarth loan.

203. Although Mr Dewsall had given a guarantee and was confident that he would be able to honour the guarantee, (given that he owned shares in GHI that were at one point worth £21m), this fails to take account of the fact that one situation (as has happened)

in which his guarantee was likely to be called upon is if the Gable Group got into financial difficulties, which, of course, would be likely to have a significant impact on the value of his shareholding. In any event, the making of an unsecured, interest free loan to a company which, on the face of it, could not repay the loan clearly put GIAG's assets at risk at a time when it was supposed to be strengthening its solvency position.

204. In addition, Mr Dewsall had a clear conflict of interest, given his capacity as CEO of the Gable Group as well as the sole shareholder and director of Hogarth. Although that conflict had been recognised when the 2013 claims handling and underwriting agreements had been put in place and the directors of GIAG and GHI had signed off accounts which clearly noted the existence of the Hogarth loan in the section dealing with related party transactions, there is no evidence that the boards of either of these companies were specifically asked to consider the issue in the light of the conflict of interest.

205. Indeed, Mr Hirschfield's evidence was only that the other director of GIAG, Jost Pilgrim, would have been aware of the existence of the loans and therefore implicitly approved them. The fact that Mr Dewsall, during cross-examination, argued forcefully that he was not in a position of conflict of interest says much about the way in which Hogarth and GIAG operated their businesses.

206. Whilst I accept that the practice of making payments to or for the benefit of Mr Dewsall or to Hogarth was not concealed and, in one sense, was properly accounted for in a way which was approved by the auditors, this does not, of itself, prevent there being a breach of duty by Mr Dewsall, As both experts agreed, the auditor's primary concern would be to ensure that they were satisfied that the loan was recoverable.

207. In my view, it is also not possible to rely on the Hogarth loan being "authorised". I accept that all of the GIAG directors were aware of the Hogarth loan. However, the lack of any board minutes coupled with Mr Hirschfield's evidence lead to the conclusion that the GIAG board, (and, in particular, the members of the GIAG board other than Mr Dewsall) were never asked to consider whether, bearing in mind the conflict of interest and GIAG's solvency issues, it should be making significant interest free loans to a company wholly owned by its chief executive.

208. Even if it could be said that the Hogarth loan had been authorised (given that the GIAG board (and the board of its holding company, GHI) were aware of the loan and raised no objection) this would not, in my view, prevent a breach of duty by Mr Dewsall in circumstances where, as I have said, the loan was entirely informal, arose from payments where it could only be ascertained after the event whether they exceeded any entitlement of Hogarth and/or Mr Dewsall, was interest free, provided no benefit to GIAG and put its assets at risk at a time when it was vital that it improved its solvency position.

209. Bearing all of this in mind, judged by the standard of the average director of an insurance company, procuring or authorising the payments which resulted in the Hogarth loan is a breach of the general duty to promote the success of GIAG's business. I note that this general duty of care should not be applied too strictly but the fact that there was no business justification for the payments is sufficient in my view to overcome this hurdle.

210. I also consider that these transactions were a breach by Mr Dewsall of his duty to prevent the use of GIAG's funds for unauthorised purposes and to create a framework that protects the company's resources from misallocation or misuse. Although there is no duty to monitor each individual transaction, the fact that Mr Dewsall had effective control on a day-to-day basis over both GIAG and Hogarth resulted in a situation where GIAG's resources could be misallocated or misused.

211. In addition, it is possible that Mr Dewsall may have been in breach of his duty to avoid conflicts of interest. However, there was no evidence as to the position under Liechtenstein law where a conflict of interest has been recognised by the company, as is the case here. I do not therefore rely on this as a separate breach of duty although, as mentioned above, the fact that Mr Dewsall was in a position of conflict in relation to the Hogarth loan and that there is no evidence that this was specifically considered by the GIAG board (unlike the position, for example, in relation to the 2013 Underwriting and Claims Handling Agreement) is a relevant factor.

212. Given the circumstances, there is no doubt that GIAG suffered loss (to the extent that the Hogarth loan has not been recovered) as a result of Mr Dewsall's actions and that the loss would not have occurred but for the breaches of duty.

Mr Dewsall's breach of duty - dishonesty

213. GIAG's pleaded case is that what it refers to as the excessive payments (which include those giving rise to the Hogarth loan) were knowingly improper and, with an eye to the limitation position in Liechtenstein, involved the deliberate and intentional infliction of damage on GIAG. In more general terms, GIAG says that the misappropriations were a fraud on GIAG committed by Mr Dewsall.

214. Although GIAG's closing submissions repeat the allegation that the claims relate to a "straightforward fraud", it is not clear in its submissions relating to the Hogarth loan whether the alleged breaches of duty are said to be fraudulent.

215. In one sense, this does not matter as liability for breach of Mr Dewsall's duties as a director does not depend on whether the breaches were fraudulent. However, as I have mentioned, it may affect the position after Mr Dewsall's bankruptcy and so, given the way that the case has been pleaded, I will address the point in the light of the test for dishonesty set out by the Supreme Court in *Ivey v Genting Casinos (UK) Limited* [2018] AC 391 at [74-75].

216. In broad terms, as I have said, Mr Dewsall's position is that everything was properly accounted for as a result of any excess payments being treated as a loan due from Hogarth to GIAG, that this had been approved by the auditors, by the GIAG board and the GHI board, and was completely transparent as it was noted in the Gable Group financial statements.

217. Although, in his defence and at times in his oral evidence, Mr Dewsall maintained that everything Hogarth received it was contractually entitled to under the terms of the Hogarth agreement, I am satisfied, for the reasons set out above, that Mr Dewsall knew that the sums being paid to Hogarth and/or to Mr Dewsall himself (or for his benefit) exceeded the relevant entitlements and that the balance was treated as a debt due from Hogarth to GIAG.

218. Mr Dewsall of course knew that the purpose of the excess payments was to provide benefits to himself. It is not clear whether the auditors were specifically told that the payments comprising the Hogarth loan were being used to provide benefits to Mr Dewsall. However, I accept Mr Hirschfield's evidence that, as the auditors would have access to the ledgers for the Gable Group (including the Hogarth trust accounts), it is more likely than not that they would have known that personal benefits were being provided to Mr Dewsall.

219. Based on Mr Hirschfield's evidence, it can in my view also be inferred that the other director of GIAG, Mr Pilgrim, was also aware that the excess payments were being used to provide benefits to Mr Dewsall. It must be borne in mind that Mr Pilgrim had been a director of GIAG since the Gable business was established in 2005. Mr Pilgrim was a banker. Mr Hirschfield's evidence is that Mr Pilgrim frequently attended the Gable offices. Given his long standing association with Mr Dewsall and the business, it would be very surprising if he was not aware how the Hogarth loan had come about.

220. It is clear from Mr Dewsall's own evidence that, once money was in the Hogarth corporate accounts, he considered that he could do what he liked with it, as it was his company. However, I accept Mr Dewsall's evidence that he expected the Hogarth loan to be repaid. This is supported by the fact that he was prepared to give a personal guarantee of the debts due from Hogarth to the Gable Group.

221. Although the extraction of cash in this way clearly fell well below the standards to be expected of a director of a listed insurance business, in circumstances where Mr Dewsall believed that what he was doing had been authorised by the relevant boards and disclosed to the auditor and where he had guaranteed repayment of the loans, it is in my view impossible to say that his actions were dishonest, applying the objective standards of ordinary decent people.

222. GIAG suggests that Mr Dewsall had deliberately surrounded himself with individuals such as Blaise Craven who would do his bidding (and they include in this, Mr Coles, Mr Fairman (another long term close associate of Mr Dewsall involved with both Hogarth and Gable), Mr Trott and Mr Foot). However, no criticism is made of other individuals sitting on the boards of GIAG and GHI in 2013 when the loans due from

Hogarth to GIAG started to come into being including Mr Sofaer, Mr Ranger, Mr Slob and Mr Pilgrim. Whilst GIAG note that Mr Ranger and Mr Slob both worked for Attendus Trust, which not only provided services to the Gable Group, but also to Mr Dewsall personally, there is no evidence (and no suggestion from GIAG) that they would simply go along with anything Mr Dewsall asked them to do.

223. GIAG also rely on a range of matters which they say demonstrate that Mr Dewsall has a propensity for dishonesty.

224. The first matter relates to certain transactions with a broker called Belmonte which I have summarised briefly above. As I say there, I cannot place any significant weight on this as it is not something which was explored with Mr Dewsall in cross-examination.

225. The next point relied on by GIAG is the payments made out of GIAG after the FMA's September 2016 order. As I explain below, I accept that some of these payments were dishonest in the sense that Mr Dewsall must have known that the payments were in breach of the order.

226. GIAG also refer to the diversion of funds from GIAG which I examine further below. Again, my conclusion is that these diversions were dishonest.

227. These two matters however took place in the context of the collapse of GIAG. Although I accept that they demonstrate a capacity for dishonesty in Mr Dewsall, they do not, in my view, cause me to question my conclusions in relation to the Hogarth loan.

228. GIAG also relies on other matters which have occurred during the course of these proceedings including in relation to the freezing orders and the disclosure of evidence.

229. As far as the freezing orders are concerned, there can be little doubt that Mr Dewsall failed to disclose assets. The evidence for this is set out in the witness statement supporting the freezing order applications. By way of example, Mr Dewsall did not disclose his interest in the Spanish property held by Tauro Properties as well as other significant assets.

230. In addition to this, it is clear that after the making of the first freezing order (and undertakings given by Mr and Mrs Dewsall), Mr Dewsall arranged for the proceeds of various assets totalling over £400,000 to be paid into Mrs Dewsall's bank account. At least some of the deposits related to assets belonging to Mr Dewsall which he had sold and which were paid into Mrs Dewsall's bank account in breach of the freezing order/undertakings.

231. In cross-examination, Mr Dewsall claimed that he was not trying to dissipate assets but was just trying to get some money to live on. What Mr Dewsall did not appear to appreciate is that he was doing anything wrong in trying to sidestep the restrictions imposed by the freezing order and the undertakings which he had given.

232. As far as disclosure of evidence is concerned, there are a number of issues referred to by GIAG both in relation to physical and electronic documents to which Mr Dewsall may have had access, as well as conduct of Mr Dewsall in relation to the execution of a search order made by the Court in July 2024. As GIAG recognises, the Court cannot be expected to go through all the details but suffice it to say that, based on the documentary evidence and Mr Dewsall's evidence in cross-examination, I am satisfied that, at the very least, he made misleading statements about the evidence to which he had access, that he has deliberately tried to prevent access to evidence and was obstructive in the execution of the search order.

233. Having said this, whilst Mr Dewsall's conduct in relation to these matters is reprehensible, it does not tip the balance in relation to the conclusions I have come to as to Mr Dewsall's state of mind in connection with the Hogarth loan as those conclusions are based primarily on what the documentary evidence clearly shows was a long standing practice of excess payments being treated as a debt due from Hogarth to GIAG and the clear evidence of this being discussed with the auditors and disclosed in the financial statements.

234. There is one other matter which GIAG submits shows dishonesty on the part of Mr Dewsall. This relates to a payment by GIAG of €11,600 to Mr Dewsall's company, Tauro Properties SL which, as I have mentioned, owned Mr and Mrs Dewsall's villa in Spain. The payment was made in February 2014. Mr Birchler, an accountant with

Gable in Liechtenstein, had apparently been told by Mr Hirschfield that the payment was a cost relating to a Spanish broker. He queried this with Mr Hirschfield who told him that Mr Foot had explained that it was a commission of some sort but that, beyond that, Mr Hirschfield had no idea what the payment related to.

235. Mr Birchler therefore emailed Mr Foot to ask him directly what the payment related to. Mr Hirschfield was copied in on the email. He emailed Mr Foot with a copy to Mr Dewsall asking Mr Foot if it was an introduction fee for potential new business. Mr Dewsall responded, confirming that it was.

236. In his oral evidence, Mr Dewsall had no explanation for this other than to say that Gable was writing a significant amount of business in Spain and therefore it could conceivably have been an introduction fee.

237. However, given that there is no suggestion that Tauro Properties did anything other than own Mr and Mrs Dewsall's property in Spain and, in particular, that it had anything to do with Gable or the insurance business, Mr Dewsall must, in my view, have known that the payment cannot have represented an introduction fee. The only plausible explanation was that it was a payment to meet a personal expense related to Mr Dewsall. Clearly, on the basis of this finding, Mr Dewsall's confirmation that the payment was an introduction fee is dishonest.

238. I infer that, as this payment was presumably recorded as an introduction fee, it will not have been added to the Hogarth loan. The payment of the sum is therefore a dishonest breach of duty by Mr Dewsall. However, based on its closing submissions, no separate claim is made by GIAG in respect of this sum.

239. It does of course reinforce the conclusion that Mr Dewsall was willing to act dishonestly if it suited him. However, for the reasons set out at paragraph [232] above, it does not change my view that the breaches of duty in relation to the Hogarth loan were not dishonest.

240. Despite my general conclusion that Mr Dewsall was not dishonest in his breach of duty in respect of the Hogarth loan, there is one category of payments in respect of which Mr Dewsall was, in my view, dishonest.

241. This relates to payments out of the Hogarth trust accounts to the extent that they have contributed to the Hogarth loan. This does not therefore include the payments which were made out of the Hogarth trust accounts in 2017/18 (which I deal with separately below) as the Hogarth loan only goes up to 2016.

242. As I have explained, most of the payments out of the Hogarth trust accounts were made prior to 2014. As no Hogarth loan was in existence before 2013, this category of payments therefore relates primarily to payments out of the Hogarth trust accounts in 2013. In that year, approximately £4.7m was paid out of the Hogarth trust accounts to the Hogarth corporate accounts. The total amount to which Hogarth was entitled by way of commission and expenses during 2013 was £1.676m. The payments out of the Hogarth trust accounts therefore exceeded Hogarth's entitlement by approximately £3m. This of course takes no account of anything to which Hogarth was entitled and which was paid direct by GIAG.

243. During 2013, the amount of the Hogarth loan which accrued was in the region of £1.8m. It is therefore clear that not all of the excess payments out of the Hogarth trust accounts to Hogarth represented excessive payments which contributed to the Hogarth loan. Beyond this, there is no evidence as to the relationship between the payments out of the Hogarth trust accounts to Hogarth and the amount of the Hogarth loan.

244. It was clear from Mr Dewsall's oral evidence that he was aware of the restrictions in the Underwriting and Claims Handling Agreements between Hogarth and GIAG on the payment of funds out of the Hogarth trust accounts.

245. It follows from this that Mr Dewsall must have known that any payments out of the Hogarth trust accounts to which Hogarth was not entitled would be a breach of his duty to GIAG.

246. Based on Mr Dewsall's state of mind, his actions in procuring or authorising payments out of the Hogarth trust accounts in excess of any entitlements and in breach of the 2013 agreement would, objectively, be considered dishonest by ordinary decent people.

247. Although the breach would, in some senses, be remedied by being reflected as a debt due from Hogarth to GIAG this does not, in my view, mean that the breach would not

be dishonest in the first place given the important purpose of the trust accounts in maintaining funds securely for GIAG's insurance creditors and the fact that the excess payments out were known to be a breach of duty. The key difference between these payments and the other payments making up the Hogarth loan is that these payments were a deliberate breach of duty whereas direct payments from GIAG were not.

248. On the basis of the evidence before me, it is impossible to quantify the amount of these payments. Should it be relevant, this will need to be done as a separate exercise.

249. Having concluded that Mr Dewsall was in breach of his list of Liechtenstein law duties as a director of GIAG in respect of the Hogarth loan, I turn now to consider the position of Mr Hirschfield.

Mr Hirschfield

250. Mr Hirschfield only became a director of GIAG in February 2014 and no claims are made against him in respect of any period before this.

251. The core of GIAG's case against Mr Hirschfield in respect of breach of duty is that, following his appointment as a director in February 2014, he should have prevented the Hogarth loan from continuing to increase as a result of payments to Hogarth or to (or for the benefit of) Mr Dewsall in excess of their entitlements. It is also said that Mr Hirschfield should have done more to ensure the recoverability of the Hogarth loan including, in particular, in ensuring the validity and enforceability of Mr Dewsall's guarantee or, alternatively, should have taken steps to obtain repayment of the loan.

252. Mr Hirschfield's defence is that there was a longstanding practice of treating such payments as debts due from Hogarth to GIAG, that the Hogarth loan had been authorised by the GIAG and GHI boards and that this method of dealing with the excessive payments had been discussed with, and approved by, the auditors. Mr Hirschfield also says that, even if he had taken any further action suggested by GIAG, it has failed to show that such action would have prevented the excessive payments from being made.

253. Mr Hirschfield was appointed as Finance Director of the Gable Group in September 2013, having been involved in helping prepare the Gable Group financial statements for 2012. A significant part of his responsibility involved the implementation of the three year plan which had been agreed with the FMA in the summer of 2013.

254. Although, as I have explained, Mr Hirschfield suggested that he had a relatively restricted role, it is clear from his oral evidence that he had all the normal responsibilities of a finance director even though, at the outset, he was only spending half his time on Gable Group matters. He accepts that, in this capacity, he was responsible for the accounting and finance function of the Group.

255. In the light of Mr Hirschfield's evidence, it is common ground (and clear from the evidence) that Mr Hirschfield did not have any role in making any of the excessive payments. This is why GIAG's case now focuses on alleged failure to prevent such payments being made.

256. As set out above (paragraph [37]), following his appointment, Mr Hirschfield introduced a number of measures to improve the corporate governance of the Gable Group, including the new claims handling and underwriting agreement between GIAG and Hogarth which specifically recognised Mr Dewsall's inherent conflict of interest and included some provisions to mitigate the conflict.

257. I have already noted that the practice of making payments from the Hogarth trust accounts to the Hogarth corporate accounts largely came to an end after 2013. GIAG acknowledges that it is right to infer that this was a result of changes introduced by Mr Hirschfield.

258. In addition, as Mr Hirschfield notes, there were three payments made from GSLL for Mr Dewsall's benefit which Mr Hirschfield challenged and which, as a result, were repaid to GSLL by Hogarth.

259. It is also clear that Mr Hirschfield put in place arrangements to ensure that the excessive payments were properly accounted for as a debt due from Hogarth to GIAG. He gave evidence for example that he instructed the bookkeepers of GIAG to look out for unusual payments.

260. This coincides with the evidence of Ms Boldt who confirmed that any payments which could not be properly identified were posted to a suspense account and would then be allocated based on the instructions of Mr Hirschfield or, if the payment came out of a Hogarth trust account, on the instructions of Mr Foot. There is however a wider question as to whether the payments should have been made at all and not just whether they were properly accounted for.

261. Mr Hirschfield accepts that he knew that Hogarth was receiving significantly more than it was entitled to and that it was using these funds to provide benefits to Mr Dewsall. Mr Hirschfield also accepts that the excess payments to Hogarth provided no commercial benefit to GIAG.

262. In the light of this, it is perhaps surprising that Mr Hirschfield did not raise the issue of the Hogarth loan and the excessive payments with the other independent member of the GIAG board, Mr Pilgrim and/or with the GHI board.

263. As mentioned above, the focus of the three year plan agreed with the FMA was to bring GIAG's solvency up to the required standard. As part of this, as we have seen, it was proposed that GIAG would not pay any dividends and would transfer retained profits to a non-distributable capital account and, at the same time, would seek additional investment.

264. Whilst I accept that Mr Hirschfield had, before he was appointed as a director of GIAG, discussed the Hogarth loan with EY, the fact that the accounting treatment and recoverability was accepted by the auditor does not in my view mean that the Hogarth loan cannot constitute a breach of Mr Hirschfield's duties as a director.

265. Similarly, the fact that the GIAG board (and, indeed, the GHI board) were aware of the Hogarth loan and, by inference, had therefore authorised it, also does not mean that Mr Hirschfield could not be in breach of his duties as a director of GIAG.

266. Given the known solvency issues faced by GIAG, the inherent conflict of interest faced by Mr Dewsall and the lack of any benefit in the arrangements to GIAG, an average director of an insurance company would, in my view, have formally raised this with the board so that consideration could be given as to whether these arrangements continued

to be appropriate. This is the case despite the longstanding nature of the arrangements given the recent solvency concerns.

267. Mr Hirschfield's failure to do this in my judgment constitutes a breach of his Liechtenstein law duties as a director of GIAG to safeguard and promote the success of the company and to prevent GIAG's funds from being used for unauthorised purposes. As I have already explained in relation to Mr Dewsall, the fact that the board of GIAG may have implicitly authorised the Hogarth loan does not result in such a loan having an authorised purpose where there is no commercial benefit to GIAG in making the loan.

268. In cross-examination, Mr Hirschfield suggested that a possible benefit of the Hogarth loan was to keep Mr Dewsall on side or motivated. It is not clear whether this is something which was specifically in Mr Hirschfield's mind at the time. Mr Heath, in his closing submissions, suggested on behalf of Mr Hirschfield that this comment may simply have been a way of explaining a possible benefit after the event.

269. Whatever the explanation, what it does demonstrate is that it was important that the issue should formally be drawn to the attention of the GIAG board so that the independent members of the GIAG board (Mr Hirschfield and Mr Pilgrim) or the GHI board could have a proper discussion as to the appropriateness of the arrangements continuing and, if Mr Dewsall needed to be motivated, whether this was the best way of doing so.

270. In relation to the recoverability of the loan and the guarantee, I accept Mr Hirschfield's evidence that Mr Dewsall had assured him that the guarantee would be honoured. It is also clear that EY were satisfied that, as a result of the guarantee, the Hogarth loan was recoverable. It is not clear from the evidence precisely what investigations took place as to Mr Dewsall's ability to repay the loan. However, I do not think any criticism can be made of Mr Hirschfield in this respect given that EY were satisfied with the position.

271. Having said this, it would have been clear to Mr Hirschfield that making an unsecured loan to Hogarth (even with a guarantee from Mr Dewsall), put the assets of GIAG at some risk compared with the alternative of holding cash. Mr Hirschfield agreed in cross-examination that "cash is king" and that repayment of the excessive payments

would have been preferable. These are all matters which could have been considered by the board of GIAG, had Mr Hirschfield raised the issue.

272. GIAG sought to criticise Mr Hirschfield for not having taken legal advice in respect of the guarantee, particularly in the light of the fact that its original position was that Mr Hirschfield had himself drafted the guarantee. I am however satisfied based on the evidence that, although Mr Hirschfield prepared the document which Mr Dewsall signed, the wording was given to him by EY. It was also, in my view, reasonable for Mr Hirschfield to rely on EY as having sufficient expertise to be able to provide suitable wording.

273. Having established that Mr Hirschfield was in breach of his duties in failing to ensure that the continued practice of making payments to Hogarth in excess of its entitlement was properly considered by the independent members of the GIAG board, it is necessary to consider whether the loss which has undoubtedly been suffered by GIAG would have occurred but for this failure.

274. Mr Hirschfield's position is that it would have made no difference and that Mr Dewsall would have continued procuring payments from GIAG to Hogarth unless he was removed from the bank mandate. In support of this, he refers to the response to the restrictions imposed by the audit committee on 24 August 2016 which resolved that the only payments which should be made to Hogarth were the monthly service and marketing fee of £100,000. Other payments could only be made with the express authority of the audit committee on presentation of a valid invoice and supporting documentation.

275. Mr Hirschfield notes that, based on a schedule produced by GIAG, a number of payments were made by Gable Group companies to Hogarth, Horatio or Mr Dewsall between 14 October 2016 – 23 February 2017. However, these payments were all made after GIAG was placed into administration and after Mr Hirschfield resigned as a director of GIAG. It does not therefore seem to me that any inferences can be drawn from these payments as to the likelihood of Mr Dewsall complying with restrictions which might have been put in place in 2014.

276. Separately, I note from a review of GIAG's bank statements that, between 24 August 2016 and 21 November 2016, five round sum payments totalling £650,000 (ignoring bank charges) were made by GIAG to Hogarth. One of these payments represented the monthly fee for September of £100,000.

277. These payments were not highlighted by any of the parties during the hearing. They were not therefore put to any of the witnesses and no submissions were made in relation to them. It is impossible to say whether any invoices were provided in respect of the payments and, if so, whether the audit committee approved the payments.

278. In the light of this, it is again, in my view, impossible to draw any reliable inferences from these payments particularly in circumstances where they were made at a time when GIAG was facing imminent collapse which was clearly not the case in 2014.

279. The response of the audit committee in 2016, having been made aware of the circumstances behind the Hogarth loan and Mr Dewsall's guarantee does however provide an indication of the likely response of the independent members of the GIAG board (both of whom were in attendance at the audit committee hearing) had the issue been raised by Mr Hirschfield in 2014.

280. It can be inferred that the GIAG board would have had similar concerns to those of the audit committee and that it is more likely than not that they would have put a stop to the excessive payments from GIAG to Hogarth. It is of course possible that the GIAG board would have referred the matter to the GHI board/audit committee but there is no reason to suppose that their response would have been any different.

281. In terms of the outcome, it is reasonable to infer that, given that the payments to Hogarth out of the Hogarth trust accounts effectively ceased in 2014 as a result of Mr Hirschfield's intervention and the fact that Mr Dewsall was willing to arrange for Hogarth to repay benefits which he had received from GSLL when these were raised by Hirschfield, Mr Dewsall would have accepted the imposition of proper financial controls to ensure that Hogarth did not receive sums from GIAG in excess of its entitlements.

282. Indeed, it is hard to see how he could properly have argued against this. Had Mr Dewsall continued to arrange for funds to be paid from GIAG to Hogarth in excess of its entitlements, it would of course have been open to the GIAG board to take further steps to prevent this happening by requiring additional authorisation for any payments out of GIAG's bank account to Hogarth.

283. Based on these inferences, my conclusion is that GIAG would not have suffered the losses which it did in relation to the Hogarth loan in the absence of Mr Hirschfield's breach of duty.

284. There is however a question as to whether the losses relate to the entirety of the Hogarth loan which had reached £3,239,720.94 by the end of June 2016 or only that part of it which accrued after he was appointed as a director in February 2014. In my view it is the latter.

285. Whilst there is evidence to support an inference that future excess payments to Hogarth would have ceased had the issue been raised, there is no evidence to suggest that the board of GIAG would have required immediate repayment of the Hogarth loan which was outstanding at that point. This suggests that any loss in respect of the existing loan was not caused by any breach of duty by Mr Hirschfield.

286. It is also not clear to me that, in circumstances where the recording of excess payments to Hogarth or to or for the benefit of Mr Dewsall was a longstanding practice, it was a breach of Mr Hirschfield's duties not to take any steps to obtain repayment of the existing loan.

287. To the extent that funds had been used for an unauthorised purpose, this had already happened. An average director might well be more concerned to put a stop to the existing practice than to immediately recover the past payments given that the auditor was comfortable that the loan was recoverable.

288. Mr Hirschfield's liability should therefore be reduced by the amount of the loan outstanding from Hogarth to GIAG at the date he was appointed as a director of GIAG. I have not been provided with a figure showing the amount of the loan at that date.

However, at the end of 2013, the amount outstanding was £1,855,946 which reduces the liability to £1,383,775.

Mr Hirschfield's breach of duty – dishonesty

289. As with Mr Dewsall, GIAG's pleaded case is that Mr Hirschfield knowingly acted improperly in permitting the excessive payments to be made. Although liability for breach of duty does not depend on whether Mr Hirschfield was dishonest given that he accepts that no Liechtenstein limitation defence is available and, unlike in the case of Mr Dewsall, there is no bankruptcy which could potentially make this issue relevant, I will address the point in case it becomes relevant.

290. It is quite clear to me that Mr Hirschfield did not act dishonestly in relation to the excessive payments. As everybody accepts, the practice of treating excessive payments as a loan due from Hogarth was a longstanding arrangement put in place long before Mr Hirschfield's involvement. He made many improvements to the governance of the Gable Group and its relationship with Hogarth.

291. Unlike Mr Dewsall, Mr Hirschfield was not dishonest in relation to any payments out of the Hogarth trust accounts after he became a director as it is clear that, at his instigation, these payments largely came to an end. Mr Heath suggests that, of the payments which were made after Mr Hirschfield became a director, almost all of them were for proper business expenses. I make no finding as to this although, if it is right, it would of course support my conclusion that there was no dishonesty on the part of Mr Hirschfield.

292. The only criticism that can be made of Mr Hirschfield is that, in the light of GIAG's solvency position and the lack of any commercial benefit to GIAG in making unsecured loans to Hogarth, he should have raised the issue for proper consideration by the independent members of the GIAG board, as I have explained. His failure to do so was clearly not dishonest but was based on an incorrect conclusion that there was no need to do so as the GIAG and GHI boards and the auditors knew what was going on. Whilst this fell below the relevant standard, it was not dishonest.

293. As with Mr Dewsall, GIAG draws attention to a number of issues which they say demonstrate a propensity for dishonesty. However, I do not consider that any of the points made in relation to Mr Hirschfield are made out.

294. The first point is that Mr Dewsall agreed to help out Mr Hirschfield in relation to the payment of school fees in early 2014. As it turns out, the payment was in fact made by Hogarth rather than Mr Dewsall personally. GIAG suggests that this implicates Mr Hirschfield as he directly benefitted from the excessive payments.

295. Mr Hirschfield however maintains that he believed that the payment was being made by Mr Dewsall. GIAG's response is that this cannot be right as Mr Hirschfield sent an email to Mr Foot at Hogarth asking if the payment had been made. The suggestion is that Mr Hirschfield must have known that the payment was coming from Hogarth and that he was lying when he said that he thought the payment was coming from Mr Dewsall.

296. Mr Hirschfield's explanation is that Mr Foot organised payments not only on behalf of Hogarth but also on behalf of Mr Dewsall personally. This is supported by Mrs Dewsall who gave evidence in cross-examination to the same effect. It is also supported by the documentary evidence which shows at least one example of Mr Foot arranging a payment for Mr Dewsall personally. I am satisfied that Mr Hirschfield genuinely believed that the payment was coming from Mr Dewsall.

297. The next point relates to the payment to Tauro Properties mentioned above (paragraphs [234-237]) in relation to Mr Dewsall. As can be seen from the email exchange, Mr Hirschfield asks if the payment is an introduction fee. His evidence is that he did not know Tauro Properties was a personal company of Mr Dewsall which is why he asked the question given that he knew that GIAG was doing business in Spain. I accept this explanation. It is clear that Mr Hirschfield was simply asking the question based on information which had previously been provided by Mr Foot and was not in any way trying to treat the payment as something which it was not.

298. There was also criticism of the payments out of the Hogarth trust accounts. Again, I have discussed this above in relation to Mr Dewsall. It is clear that the vast majority of the payments out of the Hogarth trust accounts were made before Mr Hirschfield

became a director of GIAG and that it is Mr Hirschfield who can be credited with stopping any improper payments out of the trust accounts.

299. It is true that there are a few payments out of the trust accounts to Hogarth after Mr Hirschfield became a director but given the small number of payments and the relatively small amounts, it must in my view be inferred that these were either legitimate payments or were mistakes and do not provide any evidence of dishonesty on the part of Mr Hirschfield.

300. Again, as with Mr Dewsall, GIAG relies on the payments made by GIAG after the September 2016 FMA Order. I discuss these further below but my conclusion is that there was no dishonesty on the part of Mr Hirschfield.

301. The final matter relates to the Grail litigation which I mention above (at paragraph [153.3]). As explained, this related to the recoverability of a success fee in connection with a litigation funding policy.

302. The 2013 financial statements included the success fee as an asset, valuing it at £7.9 million. At a GHI finance committee meeting in February 2015, Mr Hirschfield was requested to get a confirmation in respect of Grail for the purposes of the 2014 financial statements.

303. Mr Coles asked Grail's lawyers, First Class Legal, to provide the confirmation but Mrs Gordon at First Class Legal refused to do so saying that any amount showing in Gable's accounts in respect of the success fee should be written off. The exchange was not copied to Mr Hirschfield. He denies ever seeing this email or being aware of it.

304. In May 2015, Mrs Gordon confirmed to Mr Hirschfield that a Court hearing has been scheduled for September/October 2015 to determine how much Grail was entitled to, having been successful in its claim but notes that any information is confidential. Mr Hirschfield therefore suggests some wording which simply says that nothing has changed from the previous year. Mrs Gordon's response to this is to ask what is currently in the accounts. Mr Hirschfield sidesteps this by saying that he does not need a specific figure, just that nothing has changed since the previous year. Ms Gordon confirms this but asserts that Gable is not entitled to any success fee.

305. The documents show that Mr Dewsall spoke to Mr Gordon at First Class Legal, as a result of which Mr Gordon signed a document containing the wording which Mr Hirschfield had asked for. In his evidence, Mr Hirschfield suggested that in fact he had spoken to Mr Gordon. However, I infer from the documentary evidence that he is mistaken in this recollection and that it was Mr Dewsall who spoke to Mr Gordon.

306. The minutes of the audit committee meeting on 26 May 2015 note that there had been no change in circumstances since 2013 but there is no mention of the issues raised by First Class Legal. Mr Hirschfield's explanation for this is that GIAG had previously received letters from First Class Legal and from Grail confirming that a success fee was due, that the figure for the receivables in the previous year's accounts were based on these letters and that Mr Gordon had confirmed that Mrs Gordon had got things wrong and, as a result, the letter was signed confirming that nothing had changed.

307. Although I do not have (or at least was not directed to) the letters from First Class Legal and from Grail confirming the entitlement to the success fee, their existence was not challenged by GIAG. On this basis, I accept Mr Hirschfield's explanation as there is no evidence to suggest that anything had changed in respect of GIAG's entitlement to a success fee. The more likely explanation is that Mrs Gordon had indeed misunderstood the position and that this was corrected by Mr Gordon.

308. Mr Hirschfield explained in his evidence that the reason GIAG did not in fact receive a success fee was that, prior to the hearing scheduled for October 2015 to assess the amount of damages payable to Grail, Grail entered into a settlement under which it accepted significantly less than it had originally been claiming with the result that no success fee was in fact paid. This was not communicated to GIAG until April 2016.

309. In these circumstances, it cannot be said that Mr Hirschfield (or Mr Dewsall) acted dishonestly in relation to this episode nor that they knowingly misled the auditors.

310. Having decided that both Mr Dewsall and Mr Hirschfield are liable to GIAG in respect of the Hogarth loan as a result of their breaches of duty, I now need to consider the other alleged breaches of duty.

Payment of £1.4 million in July 2016

311. GIAG seeks repayment of a sum of £1.4m which it says was paid by GIAG to GHI on 6 July 2016 and then from GHI to Mr Dewsall on 11 July 2016. It submits that Mr Dewsall and Mr Hirschfield were in breach of their duties as directors of GIAG in permitting this sum to be paid away by GIAG.

312. The history of this payment is that Mr Dewsall offered to make a capital contribution to GIAG as part of a rescue plan to be put to the FMA. It is said by Mr Dewsall and Mr Hirschfield that the contribution was conditional on the FMA approving the rescue plan and, in particular, confirming that the result would be that GIAG met the relevant solvency test. The documentary evidence, in particular the minutes of the GIAG shareholders meeting on 30 June 2016 to approve the capital increase, confirms this.

313. Mr Dewsall paid the £1.4m on 30 June 2016. There is some dispute as to whether the payment was received by GIAG as the bank records are not clear. In her evidence, Ms Boldt confirmed that it was received by GIAG although her evidence was somewhat confused since she appeared to be talking about a transaction which took place in December/January 2015 and not in July 2016.

314. On the balance of probabilities, I accept however that the £1.4m was received by GIAG on 30 June 2016 as it is clear that this same amount was then paid by GIAG to GHI on 6 July 2016.

315. Neither the pleadings nor the submissions made by GIAG deal with the conditionality of the payment of the £1.4m. It is therefore hard to understand the basis on which GIAG suggest that there has been a breach of Mr Dewsall's and Mr Hirschfield's duties as directors of GIAG in transferring the money to GHI (which then transferred it back to Mr Dewsall) once the FMA had made it clear that it would not accept the rescue proposal.

316. In my view, it is clear that Mr Dewsall was entitled to have the money returned to him and there can therefore be no breach of duty either by him or by Mr Hirschfield in arranging this. It was also not put to either Mr Dewsall or Mr Hirschfield in cross-examination.

Diverted payments – Mr Dewsall

317. GIAG alleges that Mr Dewsall arranged for two payments to be diverted from GIAG. The first is a payment of £250,000 which was paid by an entity called iPrism to Hogarth and then immediately paid to Mr Dewsall.

318. In cross-examination, Mr Dewsall suggested that the payment was a commission due to Hogarth/Mr Dewsall for facilitating the move of iPrism's business from GIAG to Argo (which, as mentioned above, took over much of GIAG's business after it collapsed).

319. However, the payment made by iPrism was on 15 April 2016, approximately six months before GIAG was placed into administration.

320. When challenged on this, Mr Dewsall instead suggested that the business had been placed with Argo as GIAG was unable to write the particular type of business in question.

321. Given the inconsistency, I cannot accept Mr Dewsall's explanation. In addition, I note that, in his Defence, Mr Dewsall denies that the sums received from iPrism were paid to Mr Dewsall for his personal benefit. Clearly this is not correct (or at the least, is highly misleading) given that the sum received by Hogarth was paid to Mr Dewsall on the same day.

322. In my view, this supports the conclusion that Mr Dewsall's explanations cannot be trusted and that the more likely explanation is that the sum was due to GIAG and that Mr Dewsall arranged for iPrism to make the payment to Hogarth with the intention that it should then be paid on to him.

323. Given this finding, it is clear that Mr Dewsall's actions constituted a dishonest breach of his duties as a director of GIAG.

324. The second alleged diversion relates to amounts due from Risk Alliance UK. The evidence shows that the original amount due was £455,226.46 but that a discount of £130,000 was given for "run off fees" leaving an amount due of £325,226.46. A cheque for this amount was made out to "Gable" on 1 November 2016. This was paid into

GSLL's bank account on 19 January 2017. Out of this, payments were made to Horatio of £200,000 on 26 January 2017 and £70,000 on 23 February 2017.

325. In cross-examination, Mr Dewsall had no explanation for these transactions. He accepted that the amounts due from Risk Alliance UK represented premium income. It is clear therefore that it should have been paid to GIAG, either directly or into the Hogarth trust accounts.

326. Mr Dewsall denied having any involvement in the cheque being paid into GSLL's bank account rather than GIAG. In my view, this is not credible given that it is clear that, even at this stage (after GIAG had been placed into bankruptcy), Mr Dewsall remained in control of GSLL. When taken together with the fact that the majority of these funds were paid to Horatio (and therefore for the benefit of Mr and Mrs Dewsall) in pretty short order, the only plausible inference is that Mr Dewsall indeed arranged for these funds, which he knew belonged to GIAG, to be paid to GSLL.

327. Once again, based on this finding, there is no doubt that this represented a dishonest breach of his duties as a director of GIAG.

Payments made after the FMA Order of 7 September 2016

328. Five payments were made by GIAG to GHI/GSLL after the FMA Order on 7 September 2016. The order prohibited payments from GIAG to associated companies other than normal fees for services provided as long as the FMA had given its express prior consent to the payment of such fees in individual cases.

329. The payments identified by GIAG are three payments to GSLL, being a payment of £50,000 on 9 September 2016, £92,000 on 3 October 2016 and £943,857 on 7 October 2016. The remaining two payments are a payment of £125,000 to GHI on 4 October 2016 and a further payment of £100,000 on 17 November 2016.

330. GIAG say that all of these payments were made in breach of the FMA's Order and therefore constituted a breach by Mr Dewsall and Mr Hirschfield of their duties as directors of GIAG.

331. Looking first at Mr Hirschfield, he was no longer a director when the payment of £100,000 was made to GHI on 17 November 2016. He cannot therefore have any liability in respect of this.

332. As far as the other payments are concerned, apart from the payment of £943,857 to GSLL on 7 October 2016, as Mr Heath points out, there is no evidence that Mr Hirschfield had anything to do with these payments or even knew about them. Given the clear evidence that it was Mr Dewsall and not Mr Hirschfield who arranged for payments to be made from GIAG and that Mr Hirschfield only became aware of them after the event, I accept Mr Hirschfield's evidence that he was not aware of these payments and that he was not therefore in breach of his duties as a director of GIAG even if they were made in breach of the FMA Order.

333. I note that, in its pleadings, GIAG asserts that Mr Hirschfield must promptly have learned about the payments even if he did not know about them in advance. However, the evidence is that, where a payment was made by GIAG, the book-keepers in Liechtenstein would allocate these payments and that, if there was any uncertainty, Mr Hirschfield would be asked about them at some point in the future but not straightaway. Given how close the payments were to the date on which GIAG was placed into administration and Mr Hirschfield resigned as a director, it would not be surprising if these payments had not come to Mr Hirschfield's attention.

334. Mr Hirschfield however clearly did know about the payment of £943,857. The payment relates to an invoice dated 1 July 2016 issued by GSLL to GIAG. The invoice is for additional charges payable under clause 4.4.2 of the Service Agreement dated 28 November 2013 between GSLL and GIAG.

335. As explained above, this allows GSLL to charge an additional fee to ensure that its gross profit is at least 5% of its turnover. Mr Hirschfield explained that this was to ensure that GSLL did not fall foul of any transfer pricing issues for UK tax purposes. The invoice attached a calculation showing that, for 2014, GSLL was entitled to an additional fee of £99,836 and for 2015 was entitled to an additional fee of £844,021, the total being £943,857.

336. Mr Hirschfield emailed Mr Dewsall on 6 October 2016 (four days before PwC were appointed as administrators of GIAG and Mr Hirschfield resigned as a director) saying that he had been going through his in-tray and had come across the invoice dated 1 July 2016. He asked Mr Dewsall "can this be approved now?". It appears that Mr Dewsall thought it could as the relevant sum was paid by GIAG to GSLL on 7 October 2016.

337. In cross-examination, Mr Hirschfield could not recall sending the email on 6 October 2016 to Mr Dewsall. He suggested that his question about whether the invoice could be approved was a reference to getting the FMA to approve it in accordance with the 7 September 2016 Order. This is however surprising given that, in his defence, Mr Hirschfield states that his understanding was that the payment would be in accordance with GIAG's existing contractual obligations to GSLL and that such payments were authorised by the FMA.

338. This is consistent with his evidence in cross-examination where he explained that the Order was in German but that the individual of the FMA who gave the Order to Mr Hirschfield and Mr Dewsall explained that contractual payments for services rendered were permitted. Admittedly, in his oral evidence, Mr Hirschfield only referred to the monthly fees but, in the light of what Mr Hirschfield says in his defence and in his first witness statement, I do not think that he intended to limit the contractual payments which he believed the FMA had approved to the monthly payments.

339. Unlike Mr Hirschfield, I do not interpret his question to Mr Dewsall in his email of 6 October 2016 as an invitation to ask the FMA to approve the payment. Had Mr Hirschfield intended this rather than simply asking Mr Dewsall if he was willing to approve the payment, it would be much more likely that Mr Hirschfield would have said this expressly given the importance of complying with the FMA Order. The more likely explanation is that, as Mr Hirschfield has consistently maintained, he thought that contractual payments were authorised and that he was, instead, asking Mr Dewsall if he could approve the payment.

340. There is however a question as to whether the additional fee was properly due to GSLL. This is for two reasons. The first is that, on 31 December 2015, GSLL issued a credit note to GIAG for £390,000 said to be an "adjustment to management services provided

during 2014, transfer pricing adjustment". It was therefore clearly intended to eliminate any additional fee which would otherwise be due to GSLL in accordance with clause 4.4.2 of the Service Agreement. Although Mr Hirschfield was asked about the credit note in cross-examination, he did not give a direct answer.

341. One odd thing about the credit note is that it is for a sum of £390,000 whereas the calculation forming part of the 1 July 2016 invoice gives rise to an amount due for 2014 of just under £100,000. There is no explanation for this inconsistency.

342. A similar credit note was also issued on 31 December 2015 by Gable Holdings Inc. This also purportedly related to an adjustment to the charge for management services provided during 2014 in relation to transfer pricing and was for an amount of £550,000. However, the Service Agreement between GHI and GIAG does not contain any provision for a transfer pricing adjustment, unlike the agreement between GIAG and GSLL. This is not surprising given that GHI was a Cayman company rather than an English company and presumably was not therefore within the scope of UK tax.

343. Possibly coincidentally, the sum of these two credit notes is £940,000 which is, of course, very similar to the amount of the invoice of 1 July 2016 of just over £943,000.

344. The second point is that the GIAG financial statements for the year ended 31 December 2015 which were presented to the FMA noted that there were no sums due from GIAG to affiliated companies. After some discussion (and some misunderstanding as to whether the question related to sums due from GSLL to GIAG or from GIAG to GSLL), Mr Hirschfield also agreed that the GSLL accounts for the year ended 2015 showed that GSLL was not in fact owed any money by GIAG.

345. In the light of this and with reference to the credit notes, it was put to Mr Hirschfield that there was no proper basis for the payment of the £943,857. Mr Hirschfield however did not directly answer the question and instead repeated his explanation about the need for transfer pricing adjustments.

346. In the light of all of this, whilst I accept that Mr Hirschfield did not believe that the FMA's approval was required for payments which were contractually due from GIAG to associated companies for services rendered, he was, in my view, in breach of his

duties as a director of GIAG in failing to check whether the amount was properly due to GSLL.

347. The credit notes had apparently only been issued a few months earlier and it is therefore unlikely that he would simply have forgotten about them. This inference is supported by his failure to comment on the credit notes when they were put to him in cross-examination.

348. In addition, the 2015 financial statements for GSLL which showed no sum as owing to GIAG were only signed in September 2016, around a month before the invoice for £943,857 turned up in Mr Hirschfield's in-tray. Although Mr Hirschfield noted that he only signed those financial statements as company secretary and that the balance sheet was signed by Mr Dewsall, he confirmed that he was aware of the contents and agreed with their accuracy.

349. In the light of these discrepancies, an average director of an insurance company (let alone the finance director) would have wanted to examine the position. Mr Hirschfield's failure to do so was a breach of his duties.

350. Based on the documentary evidence, the only possible conclusion is that, as at 31 December 2015, GSLL was not owed any fees by GIAG whether as a result of transfer pricing adjustments or otherwise. If such fees were owed, they would have been shown in the accounts of GSLL. It is not plausible that everybody simply forgot about the transfer pricing adjustment given that this was clearly addressed on 31 December 2015 in the credit notes. Given the similarity in the total figures, the most likely explanation is that the two credit notes dated 31 December 2015 were intended to cancel out any transfer pricing adjustment which might otherwise have been due from GIAG to GSLL. This would make sense in the light of the desire at that time to shore up the solvency of GIAG.

351. Mr Hirschfield is therefore liable to GIAG for the sum of £943,857 as a result of a breach of his duty to observe the principles of diligent management and administration of GIAG and to prevent GIAG's funds from being used for unauthorised purposes.

352. Based on my findings, there is, in my judgment, no basis for any allegation of dishonesty on the part of Mr Hirschfield in respect of the payment of the £943,857.

353. Turning to Mr Dewsall, his defence is that all of the payments represented contractual obligations of GIAG which Mr Dewsall understood to have been authorised by the FMA. Mr Dewsall does not expand on this in his witness statements. In cross-examination he could not recall whether permission had been obtained from the FMA for the payments but insisted that the purpose of the payments was to enable contractual obligations to be fulfilled to third parties who might otherwise make claims against the Gable Group.

354. This seems to be pure fabrication as the evidence clearly shows that a significant part of the sums paid to GHI and GIAG were then paid variously to Hogarth, Horatio, Mr Dewsall himself (although it appears that the payments to Mr Dewsall represented salary to which he was entitled) and to the lawyer who was representing Mr Dewsall and Mr Hirschfield in relation to Liechtenstein matters, Dr Stefan Becker.

355. Nonetheless, given the evidence of Mr Hirschfield and, bearing in mind that Mr Dewsall and Mr Hirschfield were together when the FMA Order was handed to them, I accept the statement in Mr Dewsall's original defence that he believed that contractual payments were authorised by the FMA.

356. Two payments can be clearly identified as contractual payments. These are the payment of £92,000 paid to GSLL on 3 October 2016 and the payment of £125,000 paid to GHI on 4 October 2016. I accept therefore that there was no breach of duty on the part of Mr Dewsall in relation to these payments.

357. There is no evidence that the payment of £50,000 to GSLL on 9 September 2016 represents a contractual obligation or was authorised by the FMA. On that basis, there was a clear breach of duty by Mr Dewsall in arranging for this payment to be made. Based on the fact that, as is not disputed, Mr Dewsall was in effective day to day control of GIAG, I infer that all of the payments (other than the payment made on 17 November 2016 – see below) were made with his knowledge or approval.

358. As far as the payment of £100,000 which is said to have been made to GHI by GIAG on 17 November 2016 is concerned, I note that this was paid after PwC was appointed as administrator and on the day that GIAG entered into bankruptcy. There is evidence of PwC as administrator approving a payment from GIAG to GSLL of £78,000 towards the end of October 2016 which was then paid to GSLL on 4 November 2016.

359. It might therefore be surprising that Mr Dewsall had authority to transfer funds out of a GIAG bank account at this time. I am not therefore satisfied on the evidence that the payment was made by or with the authority of Mr Dewsall and without authority from PwC as administrator. I do not therefore consider that GIAG has shown that this payment was made in breach of Mr Dewsall's duties as a director of GIAG.

360. In relation to the payment of £943,857 to GSLL, Mr Dewsall suggested in cross-examination that this might have represented a payment made to GSLL in order to enable it to meet a claim under an insurance policy. Given GSLL's role within the group as a service company which had nothing to do with the operation of GIAG's insurance business, this suggestion is not plausible.

361. In any event, if it were correct, Mr Dewsall could not have believed that the FMA had authorised the payment as his understanding is that it was only contractual obligations of GIAG which could be paid. There is no evidence of any contract between GIAG and GSLL relating to the payment of insurance claims.

362. Given the inconsistency in his evidence, I cannot accept that Mr Dewsall believed that the £943,857 was a payment which was a genuine contractual liability of GIAG to GSLL. It follows that Mr Dewsall was in breach of his duties as a director of GIAG in authorising the payment given that the payment was made in breach of the FMA Order.

363. I should note that Mr Dewsall expressed strong disagreement with the terms of the FMA Order and that he believes that the actions of the FMA were unjustified and led to the collapse of GIAG. However, as Mr Hoch observed, a more appropriate response would be to challenge the terms of the Order rather than simply make payments in breach of the Order. Mr Dewsall's view as to the correctness or otherwise of the FMA's decision does not therefore, in my judgment, mean that Mr Dewsall's breach of duty is not culpable for Liechtenstein law purposes.

364. Even if the statements made in Mr Dewsall's defence that he believed that the payment was a contractual obligation is correct, he is in a similar position to Mr Hirschfield. He was the Chief Executive of the Gable Group and had signed the accounts of GSLL only a month earlier which showed that no amount was due from GIAG to GSLL. Given Mr Dewsall's position within the Group, it can also be inferred that he must have been aware of the credit notes which had been issued on 31 December 2015.

365. Like Mr Hirschfield, he should therefore at the very least have considered these inconsistencies and investigated whether the amount was in fact due from GIAG to GSLL. Had he done so he would, for the reasons explained above, in my view have concluded that it was not.

366. In conclusion, Mr Dewsall was in breach of his director's duties in respect of the payments of £50,000 on 9 September 2016 and £943,857 on 7 October 2016. His breaches were dishonest as he did not believe that the payments were authorised by the FMA Order. The payments were not contractually due and so the loss to GIAG is £993,857.

Payments out of the Hogarth trust accounts after GIAG's bankruptcy

367. This part of the claim against Mr Dewsall relates to a number of payments made from the Hogarth trust accounts to the Hogarth corporate accounts between July 2017 – February 2018 totalling £148,984.06 (it appears that there were no payments out of the Hogarth trust accounts to Hogarth after GIAG was placed into administration on 10 October 2016 until July 2017).

368. The claim is against Mr Dewsall alone as Mr Hirschfield was not of course a director of GIAG in 2017/18.

369. It is not clear on what basis the claim is made. It is not identified as a separate claim in the re-amended particulars of claim. The only mention of these payments in GIAG's skeleton argument is part of a more general section suggesting that the fact that payments were made out of the Hogarth trust accounts which were not authorised by the Underwriting and Claims Handling Agreements demonstrated a propensity for dishonesty.

370. Whilst GIAG's closing submissions state that this amount is claimed from Mr Dewsall, there is again no explanation as to the basis for the claim.

371. I infer however that GIAG has included this in its closing submissions in case the Court concludes (as I have) that the amount of the excess of payments is linked to the Hogarth loan rather than the amounts actually paid to or for the benefit of Mr Dewsall. This is because the figures for the loan only include payments up to the end of June 2016. Any payments in 2017 or 2018 do not therefore form part of the Hogarth loan.

372. In my view, the claim is simply part of the claim to what is defined as the excessive payments based on a breach of Mr Dewsall's Liechtenstein law duties as a director of GIAG. If the payments had been made prior to the end of June 2016, they would no doubt have been accounted for as additions to the Hogarth loan assuming the payments were not authorised payments to which Hogarth was entitled. This does seem to me to be a legitimate part of GIAG's claim based on breach of director's duties in the same way as that the claim in relation to excessive payments can be maintained by reference to the Hogarth loan.

373. When these payments were put to Mr Dewsall in cross-examination, he was not able to say much about them although at one point suggested that the money was commission which was owed to Hogarth, accepting that he did not really know whether this was the case or not.

374. As Mr Auld notes, it is implausible that the payments could represent commissions due given that GIAG had not been writing any business since October 2016. In addition, a review of the bank statements for the relevant trust accounts shows that the payments out of the trust accounts to Hogarth effectively drain the remaining balances held in those accounts until they are exhausted and the accounts are closed in early 2018.

375. Although perhaps surprising, it is also clear from Mr Lingg's evidence that the trustee in bankruptcy did not have control over the trust accounts and did not even have the bank statements. Hogarth (and therefore Mr Dewsall) therefore remained in control of the trust accounts.

376. I accept that the only plausible inference from all of this is that Mr Dewsall arranged for the funds to be taken out of the trust accounts and paid to Hogarth in the knowledge that there was no legitimate reason for those payments. This was a clear breach of his Liechtenstein law duties as a director of GIAG.

377. Mr Dewsall is therefore liable to GIAG for the sum of £148,984.06 as a result of a dishonest breach of his duties as a director of GIAG. It is a breach of the duty to safeguard and promote the success of the company and the duty to prevent GIAG's funds from being used for unauthorised purposes. Given that Mr Dewsall knew that the payments were improper, his conduct clearly fell below the standard of the average director of an insurance company and was dishonest. It is equally clear that the loss to GIAG would not have occurred but for Mr Dewsall's breach of duty.

378. Having dealt with the alleged breaches of the Liechtenstein law director's duties of Mr Hirschfield and Mr Dewsall, I now need to consider the English law claims which have been made against them and whether they add anything to the liabilities which I have already found to exist.

English law claims

379. It is acknowledged by GIAG that, if its claim against Mr Dewsall and Mr Hirschfield in respect of breach of their Liechtenstein law duties as directors of GIAG is successful, the English law claims add little (if anything) to that claim. As can be seen, the breach of duty claim has been successful to the extent of the Hogarth loan but not in respect of everything which has been categorised by GIAG as an excessive payment. It has also been successful in relation to some of the sums paid by GIAG to GSLL/GHI after the September 2016 Order, the diversion of funds from iPrism and Risk Alliance UK and the 2017/18 payments from the trust accounts to Hogarth.

380. I will however consider as briefly as possible whether the English law claims add anything to the successful breach of duty claims.

Breach of trust

381. This claim is against Mr Dewsall alone and relates to the payments out of the Hogarth corporate accounts which were in breach of the provisions of the claims handling and underwriting agreements between GIAG and Hogarth.

382. The initial claim in the pleadings relates to all sums which were paid out of the Hogarth trust accounts in breach of the provisions of those agreements. However, it is apparent from the summary of the relief claimed that the claim is limited to the payments out of the trust accounts which constitute excessive payments (i.e. payments to Hogarth or to or for the benefit of Mr Dewsall in excess of their entitlements).

383. Based on the approach I have taken of assessing the excessive payments by reference to the Hogarth loan, Mr Dewsall is already liable for these amounts as a result of his breach of duty. There is therefore little to be gained from considering this further.

384. I should however mention that, the way the case is put, although it is Hogarth that is the trustee in relation to the Hogarth trust accounts, it is said that GIAG is entitled to claim against Mr Dewsall as the director of Hogarth.

385. In support of this, GIAG refers to the decision of the Court of Appeal in *McGaughey v Universities Superannuation Scheme Limited* [2023] EWCA Civ 873 where the principles relating to so-called "dog-leg claims" were considered. The conclusion at [90] was somewhat equivocal, apparently approving the comment in *Lewin* (paragraph 43-067) that:

> "Where the trustee company is a one trust, no asset company, created solely for the purpose of administering the trust in question, it is not unarguable that the company's claims against the directors may be held on trust, opening up the possibility of a dog-leg claim."

386. I would simply observe that, on any basis, even if GIAG was Hogarth's only customer, Hogarth is not a "one trust, no asset company, created solely for the purposes of administering the [Hogarth trust accounts]". That was part of its function but was only incidental to its main business of acting as a claims handling and underwriting agent.

387. My preliminary view therefore (accepting that the point has not really been argued) is that a claim based on breach of trust against Mr Dewsall in respect of the Hogarth trust accounts cannot succeed, even if it were relevant.

Dishonest assistance

388. Claims are made against both Mr Dewsall and Mr Hirschfield based on dishonest assistance in relation to a breach of trust. The claim is said to relate to two aspects. The first is the breach of trust by Hogarth in permitting excessive payments to be made out of the Hogarth trust accounts. The second relates to the payments made by GIAG to GHI and GSLL after the September 2016 FMA Order. This is based on the breach of duty by Mr Dewsall and/or Mr Hirschfield in authorising or permitting those payments, such breach of duty being treated as a breach of trust for this purpose.

389. As far as Mr Hirschfield is concerned, I have found that he was not dishonest. He cannot therefore be liable for dishonest assistance, even in respect of the payments where Mr Dewsall was in breach of duty but Mr Hirschfield was not.

390. In relation to Mr Dewsall, he is liable as a result of his breach of duty and there is therefore no need to rely on dishonest assistance.

391. There is therefore no need for me to consider in this context the arguments made on behalf of GIAG and Mr Hirschfield concerning issues relating to governing law (and whether an English law claim can be brought based on a Liechtenstein law breach of duty) or in relation to limitation issues under the Limitation Act 1980 although I do refer to this further below.

Knowing receipt

392. As far as Mr Dewsall is concerned, the claim relates to all of the excessive payments and the funds which are said to have been diverted from GIAG.

393. It is however impossible to see how this can give rise to any recovery which is not covered by the claims relating to breach of duty. If Mr Dewsall was in breach of his duties as a director of GIAG, he will be liable. If he was not in breach of duty, there cannot be a claim in knowing receipt as the funds received cannot be traced back to any

breach of duty. As far as Mr Dewsall is concerned, my conclusion is that the claim in knowing receipt is irrelevant.

394. Turning to Mr Hirschfield, the claim against him based on knowing receipt relates to sums which were received by him from GSLL between 24 October 2016 and 20 December 2016 totalling £92,062.45. It is not disputed that these sums represent remuneration, including a termination payment.

395. It is clear from reviewing GSLL's bank statements that all of these payments were funded either out of the £943,857 paid by GIAG to GSLL, in respect of which I have found Mr Hirschfield liable as a result of a breach of duty or out of two other payments made to GSLL on 8 November 2016 and 15 November 2016, neither of which are payments which are said to have been made by GIAG in breach of duty.

396. On this basis, the claim against Mr Hirschfield based on knowing receipt is either irrelevant or cannot succeed and so, once more, there is no need for me to address in relation to this part of the claim the governing law or limitation issues raised by GIAG, Mr Dewsall and Mr Hirschfield.

Claim in knowing receipt against Horatio

397. This claim relates to three payments totalling £280,000 made to Horatio by GSLL on 16 January 2017, 26 January 2017 and 23 February 2017.

398. The second and third payments (totalling £270,000) were funded out of the cheque from Risk Alliance UK which was paid into GSLL's bank account on 19 January 2017.

399. The first payment of £10,000 on 16 January 2017 could be said to have been funded out of the £943,857 paid by GIAG to GSLL in breach of Mr Dewsall's duties on 7 October 2016 or out of the two later credits to GSLL's bank account in November 2016 which are not alleged to be in breach of any duty.

400. As there is no other claim against Horatio, I do need to consider these claims, bearing in mind that Horatio has taken no part at all in these proceedings and has not filed a defence.

401. GIAG refers to the decision of the Court of Appeal in *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 at [700g] for the principles relating to knowing receipt. The claimant must show:

401.1 a disposal of its assets in breach of fiduciary duty;

401.2 the beneficial receipt by their defendant of assets which are traceable as representing the assets of the claimant; and

401.3 knowledge on the part of the defendant that the assets it has received are traceable to a breach of fiduciary duty.

402. As far as governing law is concerned, GIAG notes that a claim in knowing receipt falls within regulation (EC) No.864/2007 of 11.07.2007 on the law applicable to non-contractual obligations (Rome II) (*Asturion Foundation v Alibrahim* [2023] EWHC 3305 (Ch) at [288]–[290]. They also note that there is some debate as to whether a claim based on knowing receipt falls within article 4 or article 10 of Rome II.

403. I agree with GIAG that, in this particular case, for practical purposes, it makes no difference which article applies. The misappropriation of the £943,857 was made out of GIAG's English bank account and was paid into an English bank account of GSLL which is an English company. The misappropriation of the funds from Risk Alliance UK was made by way of a cheque drawn on a UK bank account and paid into GSLL's UK bank account. Horatio is an English limited liability partnership.

404. In the circumstances, any damage or unjust enrichment must be taken to have occurred in England. In any event, the circumstances are manifestly more closely connected with England than any other country.

405. There is an issue as to whether a claim based on knowing receipt can be brought where the underlying breach of duty is a duty owed under foreign law and which may not therefore be a "fiduciary duty". In this case, as we have seen, Liechtenstein law categorises a breach of duty by a director in a similar way to a contractual claim.

406. However, the conclusion of Adam Johnson J in *Asturion* at [296] (based on the decision in *Kuwait Oil Tanker Co SAK v Al Bader (No3)* [2000] 2 All ER (Comm) 271) is that

a relationship which exists under foreign law should be examined to determine whether the duties which are owed would be characterised as fiduciary duties under English law. In the absence of any argument to the contrary, it seems to me that this approach is correct for the reasons given by Adam Johnson J.

407. Looking at the extent of the duties owed under Liechtenstein law, the similarity to the duties owed by a director under English law can immediately be seen. I have no doubt that, looking at these duties from an English law perspective, they should be categorised as fiduciary duties so that a claim in knowing receipt is permissible.

408. As to the claim itself, it is clear that there has been a disposal of GIAG's assets in breach of fiduciary duty (being the £943,857 paid from GIAG to GSLL and the diversion of the cheque from Risk Alliance UK). I have also found that Mr Dewsall was knowingly in breach of his duties in respect of both of those misappropriations. As he is one of the members of Horatio, his knowledge can be imputed to Horatio and it must therefore have known of the breach of duty.

409. The only serious question is whether the payments received by Horatio represent the traceable proceeds of the assets belonging to GIAG.

410. In relation to the later two payments, this is clear as they were funded out of the proceeds of the Risk Alliance UK cheque.

411. As far as the initial £10,000 is concerned, as I have said, this could have come from the £943,857 or out of later credits to GSLL's account. In circumstances where GSLL was controlled by Mr Dewsall and his knowledge must be imputed to GSLL, GSLL is, in my view, to be treated as a wrongdoer for tracing purposes with the result that the payment of £10,000 to Horatio on 16 January 2017 can be treated as having derived from the £943,857 paid by GIAG to GSLL rather than the two later credits to that account (see paragraph [530] below).

412. Although there is a question as to where the £10,000 paid to Horatio derived from, it is my view that Mr Dewsall's (and therefore Horatio's) state of knowledge that it could have come from the receipt of £943,857 which was paid in breach of duty is sufficient to make it unconscionable for Horatio to retain the benefit of the receipt (see *Bank of*

Credit and Commerce International (Overseas) Limited v Akindele [2001] Ch 437 at [455E]).

413. Accordingly, I accept that, in principle, the claim against Horatio in knowing receipt succeeds in the sum of £280,000.

414. Mr Hirschfield and Mr Dewsall have raised limitation defences in respect of the English law claims made against them. However, Horatio has not participated in these proceedings and has not filed a defence. It is not therefore necessary for GIAG to overcome any limitation issues in relation to the claim against Horatio as the point has not been raised by Horatio by way of defence.

Limitation – deliberate concealment

415. Although, given my findings above, I do not need to address limitation under English law, it may be helpful for me to make a finding of fact in relation to the question (relevant to s 32 Limitation Act 1980) as to whether, if there has been deliberate concealment, GIAG could with diligence, have discovered the relevant facts.

416. The evidence from Mr Lingg, was that it was principally the lack of the bank statements for GHI, GSLL and Hogarth, which prevented the claim being brought sooner than it was. These documents were obtained in 2022 from Mr Alcock who had presumably obtained them in connection with the Deceit Claim. Mr Lingg could not shed any light on how Mr Alcock had obtained the bank statements.

417. As far as deliberate concealment is concerned, it is clear that both BWB and their agents, Enstar, asked Mr Dewsall to provide the bank statements on a number of occasions and he failed to do so. There is no direct evidence as to whether he had the intention to conceal the relevant facts but, given my findings as to his conduct, this would be a fair inference.

418. GIAG accept that Mr Hirschfield was never asked to provide the bank statements. It can only succeed on the basis of deliberate concealment against Mr Hirschfield if they can show that he considered whether to inform GIAG of the relevant facts and decided not to (*Canada Square Operations Limited v Potter* [2023] UKSC 41 at [108]). There

is no pleaded case against Mr Hirschfield in relation to this and no evidence that he concealed anything in this way. It is not a point that was put to him in cross-examination. In my view, any limitation argument on the part of GIAG in relation to Mr Hirschfield based on deliberate concealment is hopeless.

419. Assuming however that GIAG can establish deliberate concealment against Mr Dewsall or, to the extent that the claim is based on fraud (for example dishonest assistance), the question is whether GIAG could, with reasonable diligence, have obtained the bank statements sooner than it did and, in particular, before 27 March 2018 (being six years before the English law claims were introduced by an amendment to the particulars of claim).

420. The parties are agreed that reasonable diligence means that the claimant could have discovered the fraud/concealment without taking exceptional measures, which they could not reasonably have been expected to take (*Paragon Finance v D B Thakerar & Co* [1999] 1 All ER 400).

421. In his evidence, Mr Lingg accepted that he was aware that any claims against directors should be pursued as soon as possible and that getting hold of the relevant books and records was urgent. It was, he says, for this reason that the trustee in bankruptcy first asked Mr Dewsall to provide the relevant information in December 2016.

422. Mr Lingg also accepted that obtaining a court order requiring disclosure of information is common in cross-border liquidation/bankruptcy situations. However, he had no explanation as to why the trustee in bankruptcy did not do this, other than the fact that it continued to ask Mr Dewsall for the information.

423. A specific request to Mr Dewsall for copies of the relevant bank statements (amongst other documents) was made on 8 March 2017. Although Mr Lingg's evidence is that this was followed up their behalf by Enstar, the correspondence to which he refers relates to certain sums said to be due from Hogarth to GIAG and does not mention anything about bank statements or documents.

424. Indeed, BWB do not seem to have followed up with Mr Dewsall/Hogarth in relation to the bank statements until 4 January 2018. Mr Dewsall replied to this letter on 11

January 2018 but did not provide the information. BWB apparently did nothing further to try and obtain any relevant documents until July 2018 when they met with the liquidators of Hogarth.

425. It is apparent that BWB took very little action to try and obtain the relevant bank statements from Mr Dewsall. The only explanation given by Mr Lingg for the failure to do anything more was that the trustee in bankruptcy and its team (including the team from Enstar which was assisting in the UK) were very busy attending to other matters relating to the bankruptcy including, of course, the run-off of the insurance business.

426. This is understandable but it does not explain why nothing was done to try and obtain the relevant documents from Mr Dewsall between March 2017 and January 2018, nor why no advice was taken in England as to what action might be taken to force Mr Dewsall to provide such information. Indeed, Mr Lingg acknowledged that the trustee in bankruptcy only approached English lawyers for the first time in 2021.

427. In the light of all of this, it cannot in my view be said that GIAG could not, with reasonable diligence, have obtained the GHI, GSLL and Hogarth bank statements prior to 27 March 2018. Had BWB consulted English lawyers sooner, it seems likely the bank statements could have been obtained. It is apparent that Mr Alcock was able to do so. To this extent, GIAG would not therefore be able to rely on s 32 Limitation Act 1980 in order to overcome a limitation defence.

Weald Hall - Tracing

428. It is important to remember that GIAG does not make any personal claim against Mrs Dewsall. Instead, GIAG claims a proprietary interest in Weald Hall including a charge over Weald Hall as a result of tracing funds misappropriated from GIAG.

429. The proprietary interests claimed by GIAG are said to arise firstly due to its entitlement to be subrogated to a charge over Weald Hall as a result of £600,000 of funds held by Hogarth being used to part repay a secured loan of £1.7m made by Investec when Weald Hall was purchased. In addition, GIAG says that other misappropriated funds held by Hogarth can be traced to payments made for the improvement or maintenance of Weald Hall which in turn entitle it to a proprietary interest in the property.

430. The general principles relating to tracing were set out by Lord Millet in *Foskett v McKeown* [2001] 1 AC 102. The key points are as follows:

430.1 Tracing is not a claim or a remedy but is the process by which a claimant demonstrates what has happened to their property. The process is one of identifying a new asset as a substitute for the old.

430.2 The completion of the tracing exercise may be preliminary to a personal or proprietary claim or to the enforcement of a legal or equitable right.

430.3 A claimant will normally be able to maintain the same claim to the substituted asset as they could have maintained to the original asset.

430.4 A beneficiary of a trust has a continuing beneficial interest, not only in the trust's property but also in its traceable proceeds. This interest binds everybody except a bona fide purchaser for value without notice.

430.5 That transmission of a claimant's property rights from one asset to its traceable proceeds is part of the law of property, not the law of unjust enrichment. These property rights are determined by fixed rules and settled principles and are not discretionary.

431. Before considering the extent to which GIAG may have an equitable proprietary interest in funds held by Hogarth and whether, as a practical matter, it can be shown that any payments made in respect of Weald Hall represent the traceable proceeds of such funds, I will first consider the extent to which tracing into repairs or improvements to a property allow a claimant to assert an equitable proprietary interest in the property and whether the use of funds to pay off a secured debt entitle a claimant to be subrogated to the security held by the previous creditor, as these are matters of some controversy.

432. Mr Feetham, on behalf of Mrs Dewsall, submits that, where misappropriated funds are spent on repairs or improvements to a property, the property itself is not a substituted asset for tracing purposes and so, in the context of a purely proprietary claim, cannot give the claimant a proprietary interest (or entitlement to an equitable lien) in respect of the property.

433. It is accepted by Mr Feetham that a claimant may be entitled to a charge or lien over the property in order to secure a trustee's personal liability for breach of trust (see Lewin on Trusts (20th edition) paragraph [44-106] and *Foskett* at page [125A-C]). He also accepts that if the value of the property owned by a wrongdoing trustee is increased by the improvements, the trustee can be required to account for the value of the improvements (*Foskett* at [125C]). However, he emphasises that, in this case, no personal claim (for breach of trust or otherwise) has been made against Mrs. Dewsall.

434. In relation to increases in value, Mr. Feetham suggests that it would also be possible to bring a claim against Mrs Dewsall in unjust enrichment which would in turn justify the recognition of an equitable proprietary interest (by way of lien for the amount of the expenditure) in the property (see Lewin on Trusts paragraph [44-106]). However, again, no claim in unjust enrichment has been made.

435. Mr. Feetham draws support for his position from the authors of Lewin, who conclude at paragraph [44-107] that *re Diplock* is "binding authority against the application of the proprietary remedy in relation to improvements to land …". I consider the decision of the Court of Appeal in *re Diplock* [1948] Ch 465 further below.

436. GIAG bases its assertion that it is entitled to a proprietary interest in Weald Hall as a result of the improvements on various (obiter) comments in *Foskett*. In particular, reference is made to the same passage as is relied on by Mr Feetham (see paragraph [433] above). This was a comment made by Lord Hope at [125A-C] and reads as follows:

> "Of the other analogies which were suggested in the course of the argument to illustrate the extent of the equitable remedy, the closest to the circumstances of this case seemed to me to be those relating to the expenditure by a trustee of money held on trust on the improvement of his own property such as his dwelling house. This was the analogy discussed by Sir Richard Scott V-C and by Hobhouse LJ [1998] Ch 265, 282 and 289-290. There is no doubt that an equitable right will be available to the beneficiaries to have back the money which was misappropriated for his own benefit by the trustee. But that right does not extend to giving them an equitable right to a pro rata share in the value of the house. If the value of the property is increased by the improvements which were paid for in whole or in part out of the

> money which the trustee misappropriated, he must account to the trust for the value of the improvements. This is by the application of the principle that a trustee must not be allowed to profit from his own breach of trust. But unless it can be demonstrated that he has obtained a profit as a result of the expenditure, his liability is to pay back the money which he has misapplied."

437. I note however that this comment was made in the context of a decision whether the beneficiaries were entitled only to the amount expended by the defaulting trustee or whether they could recover a proportionate share of the proceeds of the property (in that case an insurance policy) in respect of which the trust money was spent. There was no dispute that the property was, to some extent, the traceable proceeds of the funds used to pay the premiums.

438. It is fair to say that the question as to whether a proprietary claim is available based on tracing in these circumstances is, at best, uncertain. The authors of Goff & Jones on The Law of Unjust Enrichment (10th edition) at [7-44] suggest that "the situation where a claimant's money is used to repair or improve a defendant's existing property is in need of a judicial rethink …".

439. The issue was considered by the Court of Appeal in *re Diplock*. In his will, Mr Diplock directed his executors to apply his residuary estate for charitable objects. As a result, they distributed a large part of residue to various charities, some of which used the money to alter or improve properties which they owned. The will was, however, successfully challenged by the next of kin, with the result that the charitable gifts were not valid. The next of kin sought to trace into the properties held by the charities which had used the money for alterations or improvements.

440. The Court concluded that they could not do so for reasons which were explained at pages [546-548]. The reasons can be summarized as follows:

440.1 It does not necessarily follow that the money used for the alterations or improvements is present in the adapted property, as it is perfectly possible that the property may have gone down in value rather than increased in value.

440.2 If the property belonging to the charity and the money spent on the improvements or alterations are to be treated as a mixed fund, there would be

difficulties in identifying the precise property contributed by the charity to the mixed fund, for example, where only one part of a property had been altered or a building had been erected on a small part of the land owned by the charity. This could make it difficult to determine the value of any altered or improved property. It might also be unfair for the next of kin to have a charge over the whole of the property owned by the charity.

440.3 It also might be said to be unfair for the charity to be put in a position where, in effect, it only has a charge for the value of the land which it has contributed to the mixed fund (or, perhaps more accurately now, an entitlement to a proportionate share of the property based on the value of their contribution to the mixed fund).

441. I will say more about the decision in *re Diplock* after I have reviewed the other authorities. Suffice it to say for the moment that I do not consider it to be authority for the proposition that there are no circumstances in which money can be traced into a property where the money has been used to improve that property.

442. *Boscawen v Bajwa* [1996] 1 WLR 328 was a decision of the Court of Appeal. Millet LJ (as he then was) gave the leading judgment. The case concerned the question as to whether Abbey National was entitled to a charge over a property by way of subrogation to the rights of the Halifax Building Society in circumstances where it had advanced funds which had been used to repay a loan made by the Halifax Building Society.

443. As part of a general explanation of the process of tracing and the remedies which might be available where tracing was successful, Millet LJ, noted, at [335A-B] that:

> "If the plaintiff's money has been applied by the defendant, for example, not in the acquisition of a landed property but in its improvement, then the Court may treat the land as charged with the payment to the plaintiff of a sum representing the amount by which the value of the defendant's land has been enhanced by the use of the plaintiff's money."

444. This comment is obiter. As can be seen, however, it suggests that a proprietary remedy may be available to the extent that the value of the land has been increased by the improvements. It is implicit in this that it is possible to trace a claimant's money into

property where the money has been used to pay for improvements to that property, but only to the extent of any increase in value.

445. Although the decision in *re Diplock* is not mentioned, it could be said that this is consistent with the conclusion of the Court of Appeal in that case as the remedy is given only where the property has increased in value whereas the Court of Appeal in *re Diplock* speculated that the property may not have increased in value.

446. I have already referred to the observations made by Lord Hope in *Foskett* at [125A-C]. In the same case, Lord Steyn (dissenting and also obiter) approved the observation made by Sir Richard Scott V-C in the Court of Appeal [1998] Ch 265 at 282] that:

> "If a trustee used trust money to improve or maintain his house, the beneficiaries would, in my view, be entitled to a charge on the house to recover their money. But unless it appeared that the improvements had increased the value of the house there would be no basis for a claim to a pro rata share in the house and no reason for the imposition of a constructive trust. There would, in such a case, be no benefit acquired by the use of the trust money for which the trustee would be accountable."

447. The suggestion here is that the claimant would be entitled to a charge (presumably a lien) to recover the money which had been spent on improvements or maintenance but would only be able to claim a proportionate share of the house to the extent of any increase in value. It should be noted that this observation was dealing with a situation where the wrongdoing trustee improves their own property. It is also suggested by the authors of Lewin at [44-102; footnote 375]) that Sir Richard Scott, V- C was dealing with a personal claim based on unauthorized profits rather than a proprietary claim based on tracing.

448. Lord Browne-Wilkinson, also suggested in *Foskett* that tracing may be available where money has been spent on maintenance or improvement of a property. He said at [109E-F]:

> "The question of tracing which does arise is whether the rules of tracing are those regulating tracing through a mixed fund or those regulating the position when moneys of one person have been innocently expended on the property of another. In the former case (mixing of funds) it is established law that the mixed

> fund belongs proportionately to those whose moneys were mixed. In the latter case it is equally clear that money expended on maintaining or improving the property of another normally gives rise, at the most, to a proprietary lien to recover the moneys so expended. In certain cases the rules of tracing in such a case may give rise to no proprietary interest at all if to give such interest would be unfair: see *in re Diplock; Diplock v Wintle* [1948] Ch 465, 548."

449. As can be seen, Lord Brown, Wilkinson, was of the view that a proprietary lien may be available even where money has been innocently spent on the property of another (and not just where the defaulting trustee has spent the money on their own property) He appears to take the view that the decision in Diplock would only prevent a proprietary remedy where it would be unfair to give a proprietary interest to the claimant.

450. As I have said, *Foskett* itself related to the proceeds of an insurance policy. A wrongdoing trustee used misappropriated trust money to pay some of the premiums in relation to an insurance policy on his life which was held for the benefit of his children.

451. The question was whether the claimant was only entitled to a lien for the misappropriated money which had been used to fund two of the premiums (by analogy with the remedy said to be available where funds are spent on improving a property) or whether the claimant was entitled to a pro rata share of the policy proceeds calculated by reference to the proportion of the total premiums which had been paid out of misappropriated trust money (similar to a case where a wrongdoing trustee mixes misappropriated funds with their own money).

452. The majority decided that the claimant was entitled to a proportion of the policy proceeds and not just a lien for the premiums paid. The decision provides no binding authority in relation to the question of whether the use of misappropriated funds to improve or maintain a property belonging to another can, through the process of tracing, entitle a claimant to a proprietary interest in the property, although clearly there was an assumption that this was possible in certain circumstances.

453. All of these authorities were considered by HHJ Kramer in *HCS (North East) Limited v Tahir* [2022] EWHC 2407 (Comm). In that case, the wrongdoer was Mr Tahir. He used approximately £760,000 of misappropriated funds in improving a property

originally belonging to his father-in-law, but which, on the father-in-law's death, came into the ownership of his wife and children. At the relevant time, Mr Tahir was the legal owner of the property in his capacity as his father-in-law's executor. It appears that Mr Tahir was not represented and his only defence to the proprietary claim based on tracing was that there had in fact been no misappropriation. The tracing issue was not therefore fully argued.

454. Nonetheless, HHJ Kramer considered the authorities in some detail. He noted various criticisms of the decision in *re Diplock* made by the authors of Goff and Jones (at paragraph [7-40]) and concluded at [29], as I have, that *re Diplock* is not authority for the proposition that it is never possible to trace into improved property in the hands of volunteers, but simply decides that this cannot be done where no substitute property can be identified or because, to do so, would be unfair.

455. It is, in my view, difficult to see, in the light of the comments made by Lord Millet in *Foskett*, that the objections, based on unfairness, in *re Diplock* can be maintained. Lord Millet said at [127E-F]:

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

456. HHJ Kramer goes on at [30] to distinguish *re Diplock* on the basis that, unlike in that case, Mr Tahir was the legal owner of the property and was himself a wrongdoer. In addition, there was clear evidence that the improvements had increased the value of the property as well as valuation evidence showing the extent of the increase in value.

457. In effect, HHJ Kramer was giving effect to the principles explained (albeit obiter) by Millet LJ in *Boscawen* (see paragraph [442] above]).

458. In common with HHJ Kramer, I read the first objection of the Court of Appeal in *re Diplock* as relating very much to the facts of that case. This can be seen by the fact that the objection starts with the observation that "it by no means necessarily follows that

the money can be said to be present in the adapted property". There is a clear inference that, if it can be shown that the property has increased in value, it may well be possible to say that funds spent are present in the property, as least to the extent of any increase in value of the property.

459. It is true that the comments in *Foskett* go further and suggest that the claimant is entitled to a lien on the property to recover any money which has been spent on maintenance or improvement of the property, even where the funds have been innocently spent on property belonging to someone other than the wrongdoer. These comments are however all obiter and do not refer to any authorities supporting them other than the comments made by Sir Richard Scott VC in the same case in the Court of Appeal. In particular, there is no mention of *re Diplock*.

460. As I have noted, it is clear that Sir Richard Scott V-C was looking at the position on the basis of the potential liability of the defaulting trustee for a breach of trust from which he personally stood to benefit and that, as a result, he was accountable to the claimants for that benefit. The question he asked himself at [282D-E] was:

> "What was the benefit acquired by Mr Murphy out of his use of the purchasers' money to pay the 1988 premium that equity would regard as held upon trust for the purchasers?"

461. That was the context in which Sir Richard Scott VC considered the analogy of trust money used to improve or maintain the wrongdoing trustee's house, and which led him to conclude that the claimants would not be entitled to a proportionate share of the house, except to the extent that it had increased in value, so that there was a benefit for which the trustee would be accountable.

462. The various comments made in *Foskett* are not therefore, in my view, helpful in answering the question as to whether an equitable proprietary interest in a property belonging to someone other than the defaulting fiduciary can be claimed as a result of tracing into funds used to improve, repair or maintain the property.

463. The authors of Lewin suggest at [44-107; footnote 387] that the dictum of Millett LJ in *Boscawen* at [335A] which I have referred to (see paragraph [443] above) was to illustrate the proposition that tracing can be relevant otherwise than for the purpose of

a proprietary remedy and that his comments must have been with a view to a remedy based on unjust enrichment given that the case was about the remedy of subrogation based on unjust enrichment.

464. It is possible that this is right although, if it is, it is surprising that Millett LJ did not make himself clearer. However, even if it is, if the object of tracing is to find a substitute asset, it seems entirely consistent with that principle that, where funds are spent on improvements, alterations, repairs or maintenance to a property, tracing should be available to the extent that it can be shown that the value of the property has increased as a result. In these circumstances (and to that extent), the property is clearly a substitute asset.

465. On the other hand, even where it can be shown that misappropriated funds have been spent on the improvement, alteration, maintenance or repair of a property, it is difficult to see on what principled basis that property can be seen as a substitute asset for the funds which have been expended if the value of the property has not increased. This is precisely the situation where the Court of Appeal in re *Diplock* considered at [547] that tracing was not possible as "the money would have disappeared leaving no monetary trace behind". The position is exactly the same as if the funds had been dissipated. In these circumstances, the only remedy is a personal claim, as Mr Feetham suggests.

466. In this context, I accept that a claimant may be entitled to a lien over a property in order to secure a claim for breach of trust (including a claim for an account of profits) where a wrongdoing trustee has spent misappropriated funds on their own property. However, as Mr Feetham submits, this is a proprietary remedy which is given in response to a personal claim. Had Mr Dewsall been the owner of Weald Hall, GIAG could therefore have claimed a lien over the property.

467. Based on my conclusions, GIAG cannot succeed in its proprietary claim based on tracing in respect of the funds which are said to have been used to pay expenses relating to Weald Hall as it has not been suggested that those payments have led to any increase in value in Weald Hall and, even if they have, there is no evidence as to the extent of any increase in value. This is simply not part of GIAG's case. In addition, as noted by

Mr Feetham, no personal claim has been made against Mrs Dewsall and so a proprietary remedy cannot be justified on that basis.

468. There is however a separate issue as to whether GIAG is entitled to a proprietary interest by way of subrogation as a result of the use of funds to pay off part of the Investec loan which was secured over Weald Hall.

Tracing and subrogation

469. GIAG's claim is to a charge over Weald Hall as a result of the repayment of £600,000 of the £1.7m Investec loan in February 2014 using funds from Hogarth. The remedy sought is by way of subrogation. GIAG suggests that, as the Investec loan represented 54% of the purchase price of £3.15m and £600,000 is 35% of the amount of the £1.7m loan, GIAG should be treated as having a 19% interest in Weald Hall (35% of 54% = 19%).

470. On the face of it, the claim is therefore both for a charge over Weald Hall by way of subrogation and also an equitable proprietary interest in Weald Hall itself equal to 19% of the property.

471. Leaving aside GIAG's ability to trace any misappropriated funds into the repayment of the Investec loan (which I will deal with later), Mrs Dewsall maintains that the repayment of a loan taken out to purchase a property (even if secured over the property) does not give a claimant a proprietary interest in the property unless backwards tracing is possible which, in this case, she says it is not.

472. As far as the subrogation is concerned, Mrs Dewsall's position is that, for subrogation to be available to vindicate a proprietary right, that proprietary interest must first be established. As backwards tracing is not possible (see above), there can be no subrogation (and therefore no charge). In the absence of a proprietary interest, Mrs Dewsall submits that, based on the more recent authorities, subrogation based on repayment of a loan secured over a property is only available as a remedy where a personal claim for unjust enrichment has been made. In this case, of course, no personal claims have been brought against Mrs Dewsall.

Backwards tracing

473. It is fair to say that GIAG did not put its claim in relation to the repayment of the Investec loan on the basis of backwards tracing. It is not mentioned in the re-amended particulars of claim, nor in GIAG's skeleton argument.

474. It is not controversial that backwards tracing is possible but only where there is a close casual and transactional link between a debt being incurred and the use of misappropriated funds to discharge it (see *Lewin* at [44-114] and *Durant* at [34-40]). To put it another way, the claimant must "establish a co-ordination between the depletion of the trust fund and acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the Court attributing the value of the interest acquired to the misuse of the trust fund." (*Durant* at [40]).

475. Although Mr Feetham questioned GIAG's ability to do so given the lack of any pleading on this point, Mrs Dewsall was cross-examined on her expectations in relation to the repayment of the Investec loan. Her evidence, consistent with her witness statement, was that Mr Dewsall had promised to pay off the loan in due course as the purpose of putting Weald Hall in Mrs Dewsall's name was to give her some financial security.

476. Mrs Dewsall denies however that she had any knowledge or expectation that it would be paid off using misappropriated funds as she and Mr Dewsall did not discuss his finances. I accept this evidence. It was clear from Mrs Dewsall's cross-examination that she had little involvement in financial matters and cannot have known when or how the Investec loan would be repaid.

477. In fact, it is arguable that Mr Dewsall's intentions are more relevant than those of Mrs Dewsall given that he was the legal owner of the property and the loan was in his name so that he was the person responsible for repayment of the loan. This issue was not however put to him in cross-examination.

478. As Mr Feetham points out, GIAG does not suggest that the funds contributed by Mr Dewsall to the purchase of the property in 2012 (a little under £1.5m) represented funds which had been misappropriated from GIAG. There is also no suggestion that the

balance of the Investec loan (which GIAG notes was eventually repaid in full) was repaid out of misappropriated funds. It cannot therefore be inferred in my view that either Mrs Dewsall or Mr Dewsall intended the Investec loan to be repaid out of misappropriated funds.

479. The necessary close casual and transactional link or co-ordination between the acquisition of Weald Hall with the assistance of the Investec loan and the subsequent part repayment of that loan, some 16 months later is lacking. To the extent that GIAG's claim to have a proprietary interest in Weald Hall based on the repayment of the Investec loan is based on backwards tracing, that claim fails.

Subrogation

480. As GIAG cannot claim a proprietary interest in Weald Hall as a result of backwards tracing, I need to consider whether it is nonetheless entitled to a charge over Weald Hall by way of subrogation in the context of a claim which is made only on a proprietary basis as a result of tracing misappropriated funds into the repayment of the Investec loan.

481. In *Banque Financière de la Cité v Parc (Battersea) Limited* [1999] 1 AC 221 ("*Parc*"), Lord Hoffman observed at [231D] that "the subject of subrogation is bedevilled by problems of terminology and classification which are calculated to cause confusion." It is certainly true that the availability of subrogation as a remedy following tracing in the circumstances of the purely proprietary claim which is made by GIAG is not straightforward.

482. Looking at some of the earlier authorities, the position appears to be clear. Lord Hutton in *Parc* for example refers to the decision of the Privy Council in *Ghana Commercial Bank v Chandiram* [1960] AC 732, where Lord Jenkins stated (at page [745]) that:

> "It is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit: see *Butler v Rice*".

483. Similarly, in *Burston Finance Limited v Speirway Limited* [1974] 1 WLR 1648, Walton J explained subrogation at [1652 B-D] as follows:

> "What is the basis of the doctrine of subrogation? It is simply that, where A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor... It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and, for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been dis-charged, in whole or in part, by the money so provided by him, but of course only to the extent to which his money has, in fact, discharged their claims."

484. In both of those cases, a lender had advanced funds expecting to end up with a charge over the property in question, but, for different reasons, the charge was invalid. As Walton J explains, it is clear that, in this situation, the new lender is entitled to a proprietary remedy by way of subrogation.

485. *Chandiram* was a case where a new lender paid off an existing secured lender. *Burston* was slightly different in that funds were advanced to purchase the properties in question. In these circumstances, the proprietary interest to which the lender becomes entitled is the unpaid vendors' lien, on the basis that the loan has been used to fund the purchase price, which has been paid to the vendor.

486. *Boscawen* was a case where funds advanced by lender A had been used to repay a secured loan made by lender B. Again, lender A intended to have a valid charge over the property. The facts were somewhat complicated which led to an issue as to whether the funds advanced by lender A could be traced to the repayment to lender B. Millett LJ held that they could.

487. It is however clear that, in reaching his conclusion that lender A was entitled to a proprietary remedy by way of subrogation, Millet LJ applied the principles of unjust enrichment. He notes for example at [235C] that subrogation "is available in a wide variety of different factual situations, in which it is required in order to reverse the defendant's unjust enrichment".

488. Millet LJ's adoption of principles relating to unjust enrichment can also be seen from his rejection of the appellant's reliance on a passage from *re Diplock* at [549-550] on

the basis that "today, considerations of this kind would be regarded as relevant to a change of position defence rather than as going to liability". He also notes at [340F-G] that "the passage is not without its difficulties and is in need of reappraisal in the light of the significant developments in the law of restitution which have taken place in the last 50 years".

489. The appellants in *Boscawen* referred at [338B-C] in their submissions to a comment of Lord Diplock in *Orakpo v Manson Investments Limited* [1978] AC 95 at [105] where he said:

> "The mere fact that money lent has been expended upon discharging a secured liability of the borrower does not give rise to any implication of subrogation unless the contract under which the money was borrowed provides that the money is to be applied for this purpose: *Wylie v Carlyon* [1922] 1 Ch 51".

490. Millet LJ rejected the appellants' submission based on this extract that, in order for subrogation to be available, the claimant must show an intention that their money should be used to discharge the security in question and that they intended to obtain the benefit of the security by subrogation, noting that the cases the appellant relied on were cases where it was shown that the claimant intended to make an unsecured loan.

491. Nonetheless, it appears that Millet LJ accepted that "something more" was required than the use of a loan to discharge a secured liability (see *Paul v Speirway Ltd* [1976) Ch 220, 230, per Oliver J) as he concluded that the relevant intention was that of the solicitors who (in breach of duty) had used the funds of lender A to repay lender B, that the intention of the solicitors must be taken to have been to keep lender B's charge alive for the benefit of lender A pending completion and that "this is sufficient to bring the doctrine of subrogation into play". He also considered it relevant that lender A "intended to retain the beneficial interest in its money unless and until that interest was replaced by a first legal mortgage on the property".

492. Returning to the decision of the House of Lords in *Parc*, the facts were, once again, quite complex. Company A had obtained a bank loan secured over a property. Another member of the group, company B, had a second charge over the property as security for another debt. The bank loan was subsequently refinanced. However, instead of the

new bank making a direct loan to company A, due to regulatory issues, it made a loan to the group's general manager, who in turn passed the money to company A, which repaid the bank loan.

493. The general manager had signed a letter in favour of the new lender (referred to in the decision as the "postponement letter") which stated that none of the companies in the group would demand any repayment of loans made to company A until the new lender had been repaid in full. In fact, company A and company B were unaware of this letter.

494. The claim was made on the basis of unjust enrichment. The new lender had originally sought to be subrogated to the security of the original lender in order to prevent company B from being unjustly enriched. By the time the matter reached the House of Lords, the new lender accepted that any subrogation would not give it priority over the original lender (whose loan had not been fully repaid) but that the subrogation should be limited to giving it priority over company B, which would give effect to the terms of the postponement letter.

495. In a unanimous decision, the House of Lords accepted that subrogation was available as a remedy in respect of the unjust enrichment claim. However, it could be said that this was not a true subrogation as the new lender only sought a restitutionary remedy against company B; it did not seek to be put in the same position as a holder of the charge to which the original lender was entitled.

496. Nonetheless, it is clear that the House of Lords considered that subrogation should now be treated "by and large within the now sizeable corner marked out for restitution" (see Lord Steyn at [228D-E]; see also Lord Hoffman at [234C- D] and [236F]).

497. As was made clear in *Parc*, one result of subrogation being a remedy for unjust enrichment is that it is not necessary to show that the claimant intended to have security over the property in question (Lord Hoffman at [234B-G]).

498. Another consequence (explored by the Supreme Court in *Menelaou v Bank of Cyprus Plc* [2016] AC 176 - as to which, see further below) is that it is not necessary for the claimant to have a proprietary interest in the funds used to repay the loan or to contribute

to the purchase as long as the defendant has been enriched at the expense of the claimant.

499. The impact of the decision in *Parc* can be seen from the comments made by Lord Sumption (with whom the other Judges of the Supreme Court agreed) in *Swynson Limited v Lowick Rose LLP* [2018] AC 313. The facts of that case were very different, dealing with a claim for subrogation to a cause of action. However, in discussing equitable subrogation, Lord Sumption noted at [18] that "equitable subrogation is a remedy available to give effect to a proprietary right".

500. After referring to *Burston*, Lord Sumption observed that, in *Parc*, the House of Lords "reinterpreted the existing authorities so as to recognise that, subject to special defences, equitable subrogation served to prevent or reverse the unjust enrichment of the defendant at the plaintiff's expense.". He did not however refer to the decision of the Court of Appeal in *Menelaou*, to which I now turn.

501. In *Menelaou*, the Bank of Cyprus had made loans to Mr and Mrs Menalau which were secured on their house. It was agreed that they would sell the house, repay part of the loans and use the balance to purchase a house for the daughter, over which the bank would be granted a charge, to secure the parents' remaining loans.

502. Rather than paying funds back to the bank and the bank making a new advance, it was agreed that the funds would remain with the solicitors who were acting for the parents, the daughter and the bank.

503. The transactions duly took place but the charge given by the daughter was invalid. The daughter claimed to have the charge removed from the register. The bank counterclaimed on the basis of unjust enrichment that it was entitled to be subrogated to the unpaid vendor's lien. All of the Judges of the Supreme Court agreed that the bank was entitled to be subrogated to the unpaid vendor's lien. Four of them did so on the basis of unjust enrichment. However, Lord Carnwarth did so on the basis of what he described as a "strict application of the traditional rules of subrogation".

504. There was therefore some disagreement as to the extent to which subrogation should be justified only on the basis of unjust enrichment. Lord Clarke concluded at [50] that

"the analyses in *Banque Financière* ... have rationalised the older cases through the prism of unjust enrichment.". Lord Neuberger reached his decision on the basis of unjust enrichment but was attracted to the view that "the bank's case... could be justified on the alternative basis of an orthodox proprietary claim rather than on unjust enrichment".

505. As far as the orthodox analysis was concerned, the key issue was whether the bank had a sufficient proprietary interest in the funds used to purchase the new house given that those funds had been retained by the parents' solicitors and had not been returned to the bank. His provisional view was that the bank did have a proprietary interest in those funds.

506. Lord Carnwarth at [108A] however was "less convinced with respect of the case for 'rationalising' the older cases 'through the prism of unjust enrichment'". He did however go on to observe at [108C] that:

> "Subrogation to a vendor's lien is a claim to a property right, but it is, as Lord Clarke JSC acknowledges, a less than straightforward concept. It should not be extended, nor should the established rules be distorted, without good reason."

507. The other Judges of the Supreme Court (Lord Kerr and Lord Wilson) both agreed with Lord Clarke and Lord Neuberger. Although Lord Neuberger, as I have said, was attracted to subrogation on the basis of an orthodox proprietary claim rather than on unjust enrichment, given their reference to the judgments of both Lord Clarke and Lord Neuberger, they must, I think, be taken to have been agreeing that subrogation should be permitted on the basis of unjust enrichment.

508. In any event, the decision of Lord Carnwarth cannot, in my view, be taken as authority for anything other than the established principle explained by Walton J in *Bursten* (see paragraph [483] above) that a lender who advances money on the understanding that he is to have security for the money he has advanced is entitled to be subrogated to the unpaid vendor's lien if, for some reason, that security turns out not to be forthcoming or is invalid. As Lord Carnwarth says at [108], the principles relating to subrogation to a vendor's lien "should not be extended" without good reason.

509. I should note that I was also referred by Mr Feetham to two other cases, both decided by the Court of Appeal in 2002, *Karasiewicz v Eagle Star Insurance Co Ltd* [2002] EWCA Civ 940 and *Halifax Plc v Omar* [2002] EWCA Civ 121. However, these are both straightforward examples of situations where a lender, expecting to receive security for their loan, was entitled to be subrogated to the unpaid vendor's lien (in the case of *Halifax*) or the security of the previous lender (in the case of *Eagle Star*). It is however notable that both cases were decided on the basis of unjust enrichment which is perhaps not a surprise given that both cases were decided shortly after the decision of the House of Lords in *Parc*.

510. Mr Feetham's submission is that, in the light of *Boscawen* and *Parc*, where a claimant seeks subrogation on the basis that his money has been used to discharge a secured debt owed by another, they must make their claim based on unjust enrichment. In support of this, he also refers to *Goff and Jones* paragraph [8-145] where the authors note (referring to *Parc*, *Menelaou* and *Boscawen* (amongst other cases)) that:

> "Many recent cases hold that if assets have been misappropriated, and traceably used to pay secured debts owed to a third party, then the party entitled to the misappropriated assets may be entitled to the equitable remedy of subrogation to the paid-off creditor's extinguished security interest and associated rights. The English cases have now rationalised this as a remedy to reverse the unjust enrichment that would otherwise accrue to the discharged debtor(s) and other parties with subordinate interests in the property subject to the security interest".

511. It is apparent from the cases that I have referred to that the direction of travel is clearly in favour of subrogation in these circumstances being based on a claim for unjust enrichment. This provides a principled basis for deciding whether subrogation should be available and, as Mr Feetham notes, provides potential defences including change of position as well as limitation defences.

512. It is also more consistent with the underlying principle of tracing, which is a search for a substitute asset given that, in the absence of the availability of backwards tracing, the property itself is not a substitute asset where a loan secured over a property has been

repaid, even if the loan was originally taken out to assist with the purchase of the property.

513. However, even if a more traditional or orthodox view is taken (so that a claim in unjust enrichment is not a necessary precursor (either with or without tracing) to the remedy of subrogation) the authorities which do not rely on unjust enrichment, all have a common feature, which is that the claimant had an expectation of receiving some sort of security over the property even if it may not have been the specific security against a particular person in respect of which subrogation was sought.

514. This was, for example, the case in *Chandiram* even though it was said at [745] that "where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit: see *Butler v Rice* [1910] 2 Ch 277, 282, 283". In *Butler v Rice* itself, the claimant intended to have security over the property in question.

515. In my view, it is clear from these decisions that the significance of the presumption referred to in *Chandiram* is that it operates in favour of the person who has paid off the secured loan even in circumstances where that person intended to take a different security over the property to the one in respect of which subrogation is sought.

516. These principles clearly apply in the case of *Menelaou*, the key authority referred to by GIAG in support of its submission that it is entitled to be subrogated to a charge over Weald Hall as the lender intended to have security over the property purchased by the daughter. GIAG also refers to *Parc* but, as we have seen, this is a decision where the claim was made on the basis of unjust enrichment, no doubt precisely because the claimant did not expect to receive any security over the property itself.

517. Applying these principles to the present case, reliance on tracing alone cannot entitle GIAG to be subrogated to Investec's security even if the traceable proceeds of misappropriated funds have been used to repay the loan. This is because GIAG had no expectation of any form of security over the property. Neither did Hogarth or Mr or Mrs Dewsall. There cannot therefore be a presumption that there is any intention on the part of any participant that the security of the lender whose loan is repaid should be

kept alive for the benefit of GIAG. If there is such a presumption, on the facts of this case, it is rebutted.

518. In these circumstances, I accept Mr Feetham's submission that, had GIAG wanted to rely on subrogation, it would have been necessary for it to bring a claim in unjust enrichment against Mrs Dewsall. As it has not done so, the proprietary claim based on tracing to a charge over Weald Hall as a result of the part repayment of the Investec loan, cannot succeed.

519. As an aside, I would note that, even if GIAG were able to succeed, the authors of Snell's Equity suggest at [30-063] that the charge would only be for the amount of the loan which has been repaid (in this case £600,000) and would not entitle GIAG to a proportionate share of the value of Weald Hall. I make no comment on this as the point was not specifically addressed by the parties in their submissions.

Whether the funds used to make payments relating to Weald Hall are the traceable proceeds of any misappropriations

520. Given my conclusion that GIAG is not entitled to a proprietary interest in Weald Hall (or its proceeds) by way of subrogation or as a result of payments made for improvements, repairs or maintenance in respect of Weald Hall, I do not strictly need to address the question as to whether tracing is in fact possible on the facts of this claim. For completeness, I will however do so briefly.

521. All of the payments relating to Weald Hall came from the Hogarth corporate accounts (three of the payments in fact came from GSLL but those payments were then refunded to GSLL out of the Hogarth corporate accounts). GIAG's case is that the Hogarth corporate accounts contained the misappropriated funds and that, even if they also contained funds belonging to Hogarth, it is up to Mrs Dewsall to demonstrate that the funds used belonged to Hogarth rather than being the funds which had been misappropriated from GIAG.

522. To the extent that a situation has been created where the link between GIAG's money and the payments in respect of Weald Hall is unclear, GIAG relies on *Sinclair Investments (UK) Limited v Versailles Trade Finance Limited* [2011] EWCA Civ 347

at [138] and *Durant* at [38] in support of its submission that tracing is nonetheless possible.

523. GIAG has not however sought to undertake a forensic tracing exercise demonstrating that funds misappropriated from GIAG were in the Hogarth corporate accounts at the time the payments in respect of Weald Hall were made. This is because their case has primarily been put on the basis that the identification of the funds which have been misappropriated should be undertaken by looking at what has been received by Mr Dewsall (or by other people, for his benefit) and then deducting from those amounts anything which GIAG considers to be something to which he (or Hogarth) was entitled.

524. On this basis, Mr Feetham submits that GIAG has not shown that the funds used for the various payments relating to Weald Hall represent the traceable proceeds of any money misappropriated from GIAG. He notes that the Hogarth corporate accounts will have contained funds to which Hogarth was legitimately entitled. He also refers to four payments which have come from BNP Paribas totalling about £1.37 million, the origin of which has not been identified and which could, he says, therefore represent funds to which Hogarth (as opposed to GIAG) was entitled.

525. On top of this, Mr Feetham maintains that, as there is no suggestion that the Hogarth loan is a sham or that it should be set aside, GIAG has no proprietary interest in any sums held by Hogarth which represent the Hogarth loan, even in circumstances where the loan may have been made in breach of the duties of Mr Dewsall and/or Mr Hirschfield as directors of GIAG. In support of this, Mr Feetham relies on the decision in *Madoff Securities International Limited v Raven* [2013] EWHC 3147 (Comm) at [368-369] which in turn relied on the decision of the House of Lords in *Criterion Properties Plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 at [4].

526. However, as Mr Auld points out, both of these authorities were considered by Miles J in *London Capital & Finance Plc v Thomson* [2024] EWHC 2894 (Ch). Miles J rejected at [1969] the submission that these authorities established the proposition that a claimant may not bring an equitable proprietary claim based on payments under a contract unless the contract has been set aside.

527. Miles J's conclusion was primarily based on the principles established in *Byers v Saudi National Bank* [2023] UKSC 51 which makes it clear that, where a director transfers property in breach of fiduciary duty, a trust arises under which the company is the beneficiary and retains an equitable interest in the property which arises at, or immediately before, the transfer. A recipient with notice will take subject to the company's claim (the analysis of Miles J as set out in full at [1962-1980]). As a result, there is no need for a contract to be set aside before an equitable proprietary claim can be made. I respectfully agree with this analysis and will not repeat it.

528. In this case, I have found that the Hogarth loan was a breach of the duties of both Mr Dewsall and Mr Hirschfield as directors of GIAG. As Mr Dewsall was the sole owner and director of Hogarth, Hogarth must be taken to have notice of the breach of duty and is therefore a wrongdoer for tracing purposes. On this basis, GIAG has (and retained) an equitable proprietary interest in any funds held in the Hogarth corporate accounts which represent the Hogarth loan.

529. GIAG however still faces the problem of showing that the payments in relation to Weald Hall are attributable to the misappropriated funds represented by the Hogarth loan.

530. As (contrary to Mr Feetham's submission) I have found that Hogarth is a "wrongdoer" for this purpose and is not an innocent third party (where the rule in *Devaynes v Noble: Clayton's Case* (1816) 1 Mer 572 (or some other fair approach) might apply), the burden of proof is on Mrs Dewsall to show that the funds used represented Hogarth's own money rather than any funds which had been misappropriated by GIAG. This is clear from *Sinclair* at [138-140].

531. Admittedly it is Hogarth, not Mrs Dewsall which mixed the misappropriated funds with its own money. However, as Lord Millett made clear in *Foskett* at [132 C-D and 132 F-G], an innocent volunteer who receives funds from a wrongdoer cannot be in any better position as far as tracing is concerned than the wrongdoer. This is the reason why, in my view, the onus is on Mrs Dewsall to show that the funds used for the Weald Hall payments did not derive from the Hogarth loan rather than GIAG having to prove a positive case in relation to this.

532. On the facts, any payments relating to Weald Hall before 1 January 2013 cannot result from the Hogarth loan as there was no money due from Hogarth to GIAG prior to 2013. However, the Hogarth loan was £1.8 million by the end of 2013 and continued to increase thereafter. Most of the payments relating to Weald Hall were made in 2013 although there were some payments made after that date.

533. It is therefore, in my view, reasonable to infer that the payments relating to improvements, repairs or maintenance derived from the misappropriated funds represented by the Hogarth loan to the extent that those payments were made between 1 January 2013 – 30 June 2016 (the latest date we have in respect of the Hogarth loan). Mrs Dewsall has not provided any evidence to the contrary.

534. Any payments in respect of Weald Hall between 1 July 2016 – 19 July 2017 cannot, based on my findings, derive from misappropriated funds as there was no increase in the Hogarth loan after 30 June 2016.

535. As can be seen above, there were further misappropriations from 19 July 2017 – February 2018 representing the funds paid from the Hogarth trust accounts to the Hogarth corporate accounts during that period. Again, in the absence of any evidence to the contrary, it can in my view be inferred that any payments relating to Weald Hall during this period also derive from the misappropriated funds.

536. I note however that all of the payments made during this period relate to the wages of Mr Gilmore. There is a dispute as to whether this was a legitimate business expense on the basis that Mr Gilmore was Mr Dewsall's driver or whether he in fact spent time working at Weald Hall, principally as a gardener. Based on Mrs Dewsall's evidence, it appears that he was primarily employed by Hogarth as a driver but also did some work in the garden at Weald Hall if he had some spare time. I accept this evidence.

537. As Mr Gilmore's primary role was as a driver and as there is no realistic basis to split his remuneration between his duties as a driver and the work he performed at Weald Hall, I do not consider that any payments to Mr Gilmore can realistically be traced into Weald Hall, even if it were permissible to acquire an equitable proprietary interest through payments made for maintenance of a property.

538. Turning to the payment made to pay off part of the Investec loan in February 2014, the position is more difficult. As Mr Feetham submits, it is clear from the bank statements for the relevant Hogarth corporate accounts that this payment was funded at a time when the bank account contained funds deriving from two sources. The first is legitimate payments to Hogarth by GIAG of monthly commissions/expenses. The other source of funds in Hogarth's bank account at the time represented two credits from BNP Paribas totalling almost £1.1 million.

539. There were two other credits to the Hogarth bank account from BNP Paribas in April and June 2014 comprising approximately a further £300,000. The origin of these funds is unknown. Based on the reference on the bank statements, Mr Allister accepted that the money came from an account in the name of Hogarth with BNP Paribas. Mr Feetham, however, disputes this on the basis that the reference, in his view, is to the payee not the payor.

540. It is, however, clear from Mr Dewsall's evidence that the receipts from BNP Paribas cannot represent funds to which Hogarth was entitled separately from its relationship with GIAG. Although there is some dispute as to whether Hogarth had any income independent of the funds to which it was entitled from GIAG, it is clear that, if it did, such income was not significant. Mr Dewsall's own evidence was that 99% of Hogarth's income came from GIAG.

541. In this case, the payments from BNP Paribas total almost £1.4 million in a year when the total commission income from GIAG was approximately £1.8 million. In my view it is therefore more likely than not that the receipts from BNP Paribas related in some way to the GIAG business and were not an independent source of income for Hogarth.

542. Having said this, it is impossible to say that the whole of the payment of £600,000 used to repay part of the Investec loan represents misappropriations represented by the Hogarth loan as the Hogarth loan only increased by approximately £200,000 during 2014. Other payments relating to Weald Hall in 2014 identified by GIAG total in excess of £100,000. The total funds identified by GIAG as being paid to or for the benefit of Mr Dewsall in 2014 (whether relating to Weald Hall or otherwise) were in excess of £1.4 million.

543. Taking all of this into account, I consider that it is more likely than not that the £600,000 used to repay the Investec loan was Hogarth's own money and is not represented by funds misappropriated from GIAG and treated as part of the Hogarth loan.

544. There is one other point raised by Mr Feetham which I should address. He submits that, in circumstances where Hogarth has not been made a party to the proceedings, the Court should not make a finding to the effect that property held by Hogarth was property in which GIAG had an interest.

545. However, as Mr Auld points out, the claim is against Mrs Dewsall, not against Hogarth, and relates to funds which are no longer held by Hogarth, having been used to meet payments relating to Weald Hall. On one view, it might therefore be said that any finding of the Court that the payments relating to Weald Hall represent the traceable proceeds of funds in which GIAG had an interest is irrelevant to Hogarth.

546. On the other hand, if Hogarth were able to show that the payments relating to Weald Hall were in fact paid out of its own money (and not out of funds in which GIAG had an interest), it could be affected by any order made in these proceedings. This could be relevant, for example, if the liquidators of Hogarth were to allege that the funds used to make payments relating to Weald Hall had been misappropriated from Hogarth by Mr Dewsall.

547. However, as Hogarth is not a party to these proceedings, it is not bound by the conclusions reached. The order of the Court will determine property rights as between GIAG and Mrs Dewsall but there is no suggestion that any order that the Court might make would be an order *in rem* which would bind all the world. In any event, Hogarth always has the ability under CPR 40.9 to apply for any order or judgment in these proceedings to be set aside.

548. For all of these reasons, I do not accept that the absence of Hogarth as a party means that the Court is unable to determine the entitlement to the proceeds of Weald Hall as between GIAG and Mrs Dewsall.

549. Although it is not a point taken by Mr Feetham on behalf of Mrs Dewsall, there is some suggestion that tracing is simply not possible in circumstances where the original

breach is not a breach of English law fiduciary duties but is a breach of Mr Dewsall's duties as a director of GIAG under Liechtenstein law.

550. It remains the case that, for tracing to be available, there must be a fiduciary relationship (*Agip (Africa) Limited v Jackson* [1991] CH 547 at [566H]). However, where English law applies to the claim (as it does to a proprietary claim relating to UK real estate – *Dicey, Morris and Collins*, The Conflict of Laws (16th edition) at [24R-068]), a relationship governed by a foreign law can, as we have seen (see paragraph [406] above), nevertheless be characterised as fiduciary.

551. I have already concluded that, in this case, the relationship between GIAG and its directors would be characterised as a fiduciary relationship under English law (see paragraph [407] above). I am therefore satisfied that the pre-condition for tracing of the existence of a fiduciary relationship is met in this case.

552. As to specific items where there is a dispute between Mrs Dewsall and GIAG as to whether they related to Weald Hall, my conclusions are as follows:

552.1 Mr Gilmore - see above.

552.2 APM Electrical paid on 11 December 2014 – on the balance of probabilities, this relates to Weald Hall. There is no reason why the invoice would have been sent to Mrs Dewsall if it did not relate to Weald Hall.

553. Based on the report from Mrs Dewsall's expert, I do not understand any of the other payments which are said to relate to Weald Hall to be in dispute. I note, however, that, to the extent that any of the payments in question relate to the salary of Ms Jennifer Green, GIAG accepts that this does not relate to Weald Hall as she was Mr Dewsall's personal assistant.

Conclusion

554. Mr Dewsall is liable to GIAG for the following in respect of breaches of his Liechtenstein law duties as a director of GIAG:

Excessive payments	£3,239,721.00
Diversions	£575,226.46
Post-FMA Order payments	£993,857.00
2017/18 payments from Hogarth trust accounts	£148,984.06
Total	**£4,957,788.52**

555. Mr Hirschfield is liable to GIAG for the following in respect of breaches of his Liechtenstein law duties as a director of GIAG:

Excessive payments	£1,383,775.00
Post-FMA Order payments	£943,857.00
Total	**£2,327,632.00**

556. Interest is payable on the amounts due from Mr Dewsall and Mr Hirschfield. The expert evidence shows that the rate of interest payable in Liechtenstein is simple interest of 5% from the date of the misappropriation. I accept it is appropriate for interest up to judgment to be calculated on that basis. In the case of the Hogarth loan, the individual items giving rise to the loan cannot be determined and so interest should be calculated from the end of each calendar year and from 30 June 2016 based on the amount outstanding at those dates.

557. Horatio is liable to GIAG in knowing receipt for £280,000. Although this is an English law claim, given the close connection with the Liechtenstein law claims against Mr Dewsall, I award interest at 5% on the same basis as set out above.

558. Clearly the claims against Mr Dewsall, Mr Hirschfield and Horatio overlap and GIAG cannot recover the same losses from all three defendants.

559. GIAG's claim against Mrs Dewsall to an equitable proprietary interest (including a charge or lien) in respect of Weald Hall (or its net proceeds of sale) fails so that the net proceeds of sale belong, in their entirety to Mrs Dewsall.