Neutral Citation Number: [2020] EWHC 1840 (Ch)

Case No: HC-2014-000732

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

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 17/07/2020

Before :

DEPUTY MASTER BOWLES

- -

Between :

Nirav Shah	**Claimant**
- and -	
Ashok Shah	**Defendant/Part 20 Claimant**
-and-	
(1) Jaivant Shah	
(2) Bharat Shah	**Part 20 Defendants**
(3) Narendra Shah	

- -
- -

Thomas Roe QC and Chloe Shuffrey (instructed by **Kapoor & Co**) for the **Part 20 Claimant**
Gideon Roseman (instructed by **SNV Law**) for the **1st Part 20 Defendant**
Bharat Shah and Narendra Shah did not appear and were not represented.

Hearing dates: 11th, 12th and 13th December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

DEPUTY MASTER BOWLES

Deputy Master Bowles :

1. This judgment constitutes a further (and, it is to be hoped, final) stage in the working out of the rights and liabilities of the Part 20 Claimant (Ashok) and two of his brothers, Jaivant and Bharat, the first and second Part 20 Defendants, arising out of their joint business dealings transacted over many years.

2. The background and circumstances leading to this prolonged litigation are set out, in some detail, in a previous judgment ([2017] EWHC 2693 (Ch)) and are not repeated here.

3. That judgment, delivered after a seven day trial, in the summer of 2017, dealt with a large number of the accounting issues arising between the three brothers, but left a number of issues for further determination. One of those issues, left for further determination was as to the value to be placed upon a number of plots, identified, in my order of 1st November 2017, as plots 110, 111, 112 (and/or 113) Victoria View, Borewell Road, Palm Meadows, Phase 1, Whitefield, Bangalore, in respect of which value, Ashok was, by my order, to account as to one third, to each of Jaivant and Bharat.

4. The plots, themselves, (the Victoria View plots) are problematic. It is common ground between the valuers who have been instructed for each party that the layout plan, in respect of the plots, with which they have been provided, is not reflected on site and that the situation, on site, as at the date of their inspections, in early 2019, was completely different to that disclosed by that plan. The consequence, or one of them of this discrepancy is that it has been 'impossible/difficult' to identify the location, on the ground, of the plots, as shown on the layout plan and, thus, to clearly identify the plots, for purposes of valuation.

5. As a further consequence, it has been difficult to establish whether there has been construction on the plots and, if so, what part of the plots have been subject to such construction. Jaivant's valuer, Mr Somy Thomas, believes that most of the plots have been built upon. Ashok's valuer, Mr Gupta, is of the view that some part of the plots are unbuilt and vacant. Photographs, accompanying the parties' valuation reports, show substantial building on, or adjacent to, the believed position of the plots.

6. In regard to value, on the footing that Ashok is the legal owner of the plots, the valuers agree a value for the four plots of 92.5M rupees. In reaching that value, Mr Somy Thomas has treated the plots as vacant and free of encroachment, notwithstanding that his own inspections and observations have revealed that the plots have been subject to encroachment and that multi-level buildings have been constructed thereon. Correspondingly, Mr Gupta's valuation assumes that Ashok is the legal owner, that the plots are free of encumbrances and that there is a clear demarcation of the boundaries and extent of the plots. That is, of course, not the case.

7. If, as Ashok contends and, as explained later in this judgment, is now accepted by Jaivant, his only interest in the plots is as a party, with his wife, to indenture agreements for the purchase of the plots, entered into in 1994/1995 and never implemented, or completed, then the consensus view of the parties' valuers is that his bare rights under the indentures have no marketable value.

8. The Victoria View plots had not featured, to any extent, in the seven day trial. Rather, at an earlier interlocutory stage in the proceedings, I had, without opposition, made an order for the sale of the plots. That order had, however, not been implemented by the date that judgment was handed down, following the 2017 trial, and, as a consequence of that, the suggestion was made and implemented, by my order, that, rather than effecting a sale, Ashok should simply account to each of his two brothers for their agreed one third shares in the value of the Victoria View plots.

9. The problem that has arisen from that order has been a problem of definition; what was, in context, meant by the Victoria View plots and for the value of what, therefore, was Ashok to account to his brothers?

10. That problem emerged, or came into focus, when further directions for the determination of the issues outstanding between the parties, including the issue as to the value of the Victoria View plots, came to be given in March and June 2018.

11. Although, in his Schedule of Accounting, dated 28th April 2017, and in his witness statement in respect of the 2017 trial, Ashok had made it clear that his interest in the Victoria View plots arose under legal agreements that he had entered into; although those agreements, with an entity, or partnership, called Victorian View, had been disclosed, as part of the disclosure pertaining to the 2017 trial; and although the Schedule of Accounting had explained that the plots were undeveloped and subject to encroachments and legal disputes, the nature and quality of the rights arising under those agreements and the consequent value of those rights had not been explored, at all, at the 2017 trial.

12. The question which arose, when directions came to be given for the determination of the sums for which Ashok (who has always acknowledged that his rights in respect of the Victoria View plots, whatever they might be, were held on trust for himself and his brothers, as assets arising out of the brothers' joint business activities) was accountable to his brothers in respect of the Victoria View plots, was whether, on the true construction of my order of 1st November 2017, his obligation was to account for their respective shares in the value of the rights in the Victoria View plots which had been acquired under the agreements that Ashok had entered into, or whether, as contended by Jaivant, his obligation was to account to each of his brothers for one third of the unencumbered freehold value of the Victoria View plots, on the footing that, properly construed, the references, in the order, to the plots was a reference to the freehold interest in the plots, or on the alternative footing that Ashok was estopped from denying that that was the case.

13. That question of construction/estoppel was argued before me, on 12th September 2018, and determined, in favour of Ashok, in a judgment ([2018] EWHC 3213 (Ch)), handed down on 27th November 2018. The consequence of that judgment, as set out in my order of 29th November 2018, is that Ashok's obligation to account in respect of the Victoria View plots, pursuant to and in accordance with my order of 1st November 2017, is an obligation to account to Jaivant and Bharat for two thirds of the value of such interest as he actually has in the Victoria View plots.

14. Faced with that ruling, with Ashok's contention that, by reason of the problems pertaining to the plots, as referenced in his Schedule of Accounting, no steps had been taken to implement the agreements that he had entered into in respect of the plots and

with the consequent possibility that, in themselves, the rights held by Ashok might have no significant value, Jaivant applied and, by my order of 11th December 2018, was given permission to plead and to pursue an additional claim against Ashok for an account upon the basis of wilful default, or breach of trust, or fiduciary duty, arising out of his dealings, or the lack of them, in respect of the Victoria View plots. In the result, this trial has focused, almost entirely, on that claim.

15. The documents disclosed by Ashok reveal that, in 1995, he and his wife had entered into agreements, or indentures, with Victorian View, in respect of each of the plots, pursuant to which, for the payment of a specified and agreed consideration, Victorian View would sell the plot in question to Ashok and his wife. Victorian View, itself, is described in each agreement as being 'seised and possessed of the Immoveable Properties in Nallurhalli Village … by virtue of the various agreements entered into between the Owners of the property' and as having 'the authority to deal with or negotiate for the sale of … the property'.

16. The indentures, or agreements, further provided that on payment of the balance of the consideration, which was to be paid by instalments, Victorian View 'would cause the sale deed to be executed by the Owner, in favour of [Ashok and his wife] …' that Victorian View 'assured' Ashok and his wife that the unidentified Owner had good marketable title, that the plot, when conveyed, would be conveyed unencumbered, that Victorian View would cause copies of the title deeds to the plot in question to be delivered to Ashok and his wife at the time of registration of the sale deed and that vacant possession would be delivered on payment of the consideration.

17. While Jaivant's primary contention, as pleaded, was that Ashok, had, in fact, procured title under the indentures and was, in consequence, the legal, or beneficial, owner of the Victoria View plots and accountable to his brothers for two thirds of the full freehold value of the plots, he had, also, sought to plead and to contend (notwithstanding my ruling, as set out in paragraph 13 of this judgment, that Ashok was to account upon the basis of the actual value of his interest in the Victoria View plots) that Ashok was estopped from denying that he should account upon the basis that he is the absolute owner of the plots.

18. Jaivant's pleading, consequent upon my order granting him permission to amend, raised what is described in that pleading as a secondary claim, advanced upon the basis of Ashok's alleged wilful default and breach of trust, or fiduciary duty.

19. Jaivant's contention, by way of that secondary claim, is that if, as Ashok contends, he has never fulfilled the terms of the agreements, or indentures, never secured title to the plots and is not now in a position so to do, then those failures upon his part constitute a wilful default upon his part and a breach of his fiduciary duties, owed to his brothers as trustee of the rights that he acquired under the agreements, or indentures, such that he should, nonetheless, account to his brothers for their shares in the full value of the plots, on the basis that that is the value which should have been achieved for the plots if Ashok had fulfilled his obligations, as trustee, or fiduciary. As already stated, it is this secondary claim that Jaivant has, in the event, sought to advance at this trial.

20. That said, as matters stood at the commencement of the trial, the issues raised for my determination, upon the basis of Jaivant's pleading, were, firstly, as to the value of the

rights held by Ashok, on trust for himself and his two brothers, which issue embraced the question as to whether, as was alleged by Jaivant, Ashok was the legal, or beneficial, owner of the plots and accountable to his brothers as such; and, secondly, as to whether, if that was not the case and if, as Ashok contends, he has not taken any steps to fulfil his obligations under the indentures and, so, get in the land, whether his failure to take such steps amounts to a wilful default in his compliance with his fiduciary, or other, duties, as trustee of the rights arising under the indentures, such that he should be accountable to his brothers as if he had taken such steps and, in consequence, as Jaivant contends, accountable, therefore, to his brothers for two thirds of the full freehold value of the four plots.

21. Jaivant's pleading also raised for consideration the question as to whether it remained open to Jaivant to plead the estoppel referred to in paragraph 17 of this judgment, and, if so, whether that estoppel was made out.

22. Jaivant's original pleaded case, in respect of Ashok's ownership of the Victoria View plots, averred that Ashok and his wife, who is accepted on all parts as being no more than a nominee, were the legal, alternatively, beneficial owners of the plots. As to legal ownership, no express averment was made as to the existence in Ashok's, or his wife's, favour of any sale deed, or of any registration of such a deed, as contemplated in the indentures. What was said, rather, was that in his dealings with his brothers (in particular in holding out the plots as being an asset of the brothers with a value of 14M rupees in an agreement made between the brothers, in 2001, which was intended to regulate the winding up of their collective business activities (the 2001 agreement)), in his dealings with an entity called the Victorian View Layout Owners' Welfare Association (VVLOWA), and in his dealings with Jaivant and Bharat, in and in connection with these proceedings, Ashok had, repeatedly, held himself out/admitted his ownership of the plots, such that the court could infer, at the least, that Ashok had fulfilled his obligations, specifically as to payment, under each of the indentures and was, in consequence, the absolute, or beneficial owner, of the plots, under the trust arising out of a specifically enforceable contract for their purchase, and accountable upon that basis.

23. In the alternative, the pleading averred, as outlined above, that, by reason of his dealings with his brothers, both in respect of the 2001 agreement and in connection with these proceedings, Ashok was estopped by representation from denying his obligation to account as the absolute owner of the plots.

24. In the further alternative and in respect of his case on wilful default, or breach of trust, or fiduciary duty, Jaivant averred that, in the event that Ashok had not taken steps to secure his ownership of the plots and that his interest was only that arising from the indentures (referred to in his pleading as Estate Contracts), then Ashok's failures, in that regard, to instruct lawyers to deal with the situation; to inform Jaivant that any issue existed as to Ashok's title to the plots; to call upon Victorian View to cause the owner(s) of the plots to execute sale deeds in respect of the plots and to, itself, deliver up vacant possession of the plots; to serve any legal notice in respect of Victorian View's non-compliance with its obligations under the indentures; and, ultimately, to commence proceedings against Victorian View and the plot owners for specific performance, amounted, in all the circumstances, to a failure to act with reasonable care in respect of the safeguarding and securing of the brothers' interest in the plots, a reckless disregard of those interests and, consequentially, a wilful default, in breach of

trust, or fiduciary duty, by Ashok, in the fulfilment of his duties as trustee of the assets constituted by the so-called Estate Contracts.

25. By a late re-amendment, dated 6th December 2019, Jaivant was permitted to further aver, in the alternative to his plea as to payment, that Ashok had received the Victoria View plots as a result of what have been termed his brokerage and underwriting activities on behalf of Victorian View, that this amounted to a collateral agreement that the monetary consideration set out in the indentures was not payable and that, in consequence, whether by agreement, or estoppel, the terms as to monetary payment fell away, such that Ashok could have sought specific performance of the indentures, or asserted beneficial ownership notwithstanding any failure to make payment.

26. Although the application to amend was made late in the day, I took the view, given the lengthy history of this case, given the desirability, in that context, of allowing a full exploration of all outstanding factual issues and given that the only witness capable of dealing with the averment was Ashok and that Ashok was already to be cross-examined as to his dealings with the plots, that the just course, exceptionally, was to allow the amendment.

27. Ashok's response to the foregoing, by his Amended Points of Defence, was to plead, in summary, the following facts and matters.

28. In or around 1995, Ashok and his wife entered into indenture agreements with Victorian View in respect of each of the four plots. The four plots formed part of a development site, of which Victorian View was the putative developer. They did so with the full knowledge and agreement of Jaivant and as part of the collective business activities of what was, at that date and until 1997 (when, another brother, Narendra Shah, the third Part 20 Defendant, withdrew from the business) a business carried on by Ashok and his three brothers.

29. The terms of the indentures, which were, as is said to be customary in respect of these kinds of development in India, drawn up by Victorian View's lawyers, were as set out in paragraphs 15 and 16 of this judgment, but included further provisions to the effect that Victorian View's lawyers would prepare and register the sale deeds in respect of the plots and that it was the obligation of Victorian View to secure all 'permissions, sanctions' and 'no-objections' as might be necessary to secure completion of the purchase by Ashok and his wife of each of the four plots and to procure the conveyance of the plot to Ashok and his wife. The aggregate consideration to be paid in respect of the plots, by way of two instalments, was 1,184,920 rupees.

30. As is now common ground, that consideration has never been paid and, in consequence, Ashok avers that the interest in the plots, held on behalf of himself and his brothers, is no greater than that which was acquired under the indentures; namely a right, on payment of the consideration, to call on Victorian View to procure the transfer of the plots by their respective owners.

31. Although the terms of the indentures, as to payment and transfer, contemplated that instalments would be paid at dates in 1994 , in two cases, and 1995, in the others, and that sale deeds would be executed upon payment of the balance of the consideration, Ashok was told, by one of the partners, in Victorian View, Shri Syed Javeed Ahmed (Javeed), that, in reality, completion was likely to be delayed for several years, by

reason of the delays involved in converting the designation of the land from agricultural to non-agricultural. As appears later in this judgment, that change of designation, by way of what is termed a conversion order, is, save where land is termed gramathana, a fundamental part of the process whereby land can be sold to those, such as Ashok and his wife, who are not 'agriculturalists'. This potentially lengthy delay was made known by Ashok to Jaivant, who was always kept fully informed as to the progress, or the lack of it, in respect of the completion of the purchase of the plots.

32. In 2001, the three brothers, then involved in the business, decided to bring their joint activities to a close and entered into the 2001 agreement. The four plots were included in the list of business assets, under the heading, or reference, 'Bangalore (Deepak) plot' with an estimated overall valuation of 1.4M rupees. The reference to Deepak was a reference to a Deepak Shah, to whom Jaivant had, at an earlier stage, agreed to sell one of the plots. The estimated value, of 1.4M rupees (not, as pleaded by Jaivant, 14M rupees) was that which it was assessed that the plots could fetch, having regard to the then prevailing value of comparable plots, in the event that they, the brothers, were able to obtain good title and vacant possession.

33. In or around 2002/2003, Ashok was informed, by Siddartha Hundeja (referred to in the oral evidence as Mr Hindocha), one of the partners in Victorian View, that problems of trespass and encroachment existed in respect of the entire site and that this was affecting the ability of Victorian View to secure the execution of sale deeds by the plot owners, to secure the registration of such deeds and to deliver up vacant possession. Ashok was assured that Victorian View was taking steps to resolve these problems and, thereafter, to obtain title to the plots. Following discussion with Jaivant, it was agreed between Jaivant and Ashok that it would have to be left to Victorian View to procure title to the plots, as envisaged and agreed in the indentures.

34. Rather than the problems at the site being resolved and despite, it is said, the involvement of police and other authorities, the site has continued to be the subject of unlawful and forcible encroachment. Other persons claiming entitlement to plots, including those who have managed to procure registered conveyances are 'mired' in litigation in pursuit of their claims.

35. From 2009, Ashok was in regular contact with VVLOWA, an organisation the purpose of which was the resolution of the difficulties that were being experienced by persons, such as Ashok, who had acquired rights in the site, in securing their respective titles. Ashok was, however, advised by Mr Hindocha that VVLOWA's efforts were likely to be costly and futile and, for that reason and because VVLOWA was already taking such action as it could, irrespective of Ashok's membership, Ashok was discouraged from and did not take on membership.

36. In these circumstances and given that the contractual duty to secure the transfer of title to the plots, unencumbered and with vacant possession, fell upon Victorian View and given, further, Victorian View's assurances that they were taking action, Ashok and Jaivant agreed that, rather than instructing their own lawyers, or acting through VVLOWA, the commercially sensible approach, given the problems with the site, was to leave matters in the hands of Victorian View. Ashok continued to seek updates from Mr Hindocha and to keep Jaivant informed. Jaivant remained in agreement with Ashok, or was, at least, acquiescent in respect of this course of action.

37. At a date in the period 2008 to 2010, Jaivant informed Ashok that he might be able to sell the brothers' interest in the four plots. Ashok agreed to such a sale, if a buyer could be found. Copies of the indentures were provided to Jaivant, but no sale took place.

38. In the event, neither Victorian View, nor VVLOWA, have been able to resolve the problems in respect of the site. Ashok avers that no reasonable prospect exists of securing the further steps that are required to make title to the plots. In that context and for that reason, no consideration has been paid under the indentures.

39. In reflection of that pleaded contention, Ashok, by his solicitor's letter of 26th June 2014, in advance of these proceedings, while indicating his willingness to acquiesce in a sale of the plots, described the value of the plots as minimal.

40. As already stated an order for sale of the plots was made, by consent, in January 2017 and, again, as already stated, Ashok's position as to the plots, namely that they were held under the terms of the indentures and that they were undeveloped and subject to legal disputes and encroachments were set out, in Ashok's Schedule of Accounting, dated 28th April 2017 and in his witness statement of 26th May 2017.

41. In the light of the course adopted by Jaivant, at trial, it is not now necessary to go into all the details of Ashok's further response to Jaivant's pleaded primary case.

42. He denied that he was either the legal, or beneficial, owner of the four plots, or that he had paid the consideration under, or in respect of, the indentures, or that he had the benefit of a specifically enforceable right to a conveyance of each of the four plots and was, for that reason, beneficially entitled to the plots, whether under a constructive trust, or otherwise. He denied, further, the averment, made by the late re-amendment, that, irrespective of his, or his wife's payment of the monies payable under the indentures, it had been agreed with Victorian View that, by reason of the underwriting, or brokerage, activities carried on by Ashok, he was entitled to the plots.

43. In the latter regard and even if there had been some form of agreed waiver of payment, or collateral agreement that payment would not be sought, Ashok relied, both, upon the provisions of section 92 of the Evidence Act 1872 (India) (the 1872 Act), to the effect that, in the context of this case, evidence of an oral agreement was inadmissible to contradict, or vary, or subtract from the provisions of a written agreement, and upon the provisions of the Foreign Exchange Regulation Act 1973 (FERA), in force at the time that the indentures were entered into, as barring foreign citizens of Indian origin, such as Ashok and his wife, from purchasing property in India other than with monies brought into India via normal banking channels, or from funds held in a Non-Resident External Rupee, or Foreign Currency Non-Resident account maintained by the purchaser in India.

44. In respect of section 92 of the 1872 Act, Ashok's contention was that the Act precludes the court from admitting evidence of an oral agreement contradicting the terms of the indentures, or, consequently, from relying upon any such agreement. In respect of FERA, his contention was that the terms of the Act and the fact that the purchase of the plots would have been effected by a form of payment in kind, rather

than in a form mandated by the Act, would preclude an Indian court from ordering specific performance of the indentures, even if otherwise enforceable by Ashok.

45. Ashok's further contention was that, even if payment had been made in accordance with the indentures, far from the indentures giving rise to any specifically enforceable agreement, or giving rise to any beneficial interest in his favour, in respect of the plots, the indentures were ineffective to create any interest in favour of Ashok, or his wife, in the plots, because, at all material times, the plots had been comprised of agricultural land and because the ownership of such land by non-agriculturalists was forbidden by sections 79A and 79B of the Karnataka Land Reforms Act 1961 (the 1961 Act).

46. In regard to the 2001 agreement, Ashok denied that he ever asserted any interest in the plots, other than his interest, such as it is, under the indentures, or, as had been pleaded by Jaivant, that he had indicated any present intention, as at that date, of disposing of the plots. As to their value, in the agreement, he averred that the figure of 1.4M rupees was a figure that first emanated from Jaivant. In this regard and generally (and contrary to Jaivant's pleading, which is to the effect that his, Jaivant's, knowledge of the history of the plots, is derived, solely, from the materials generated in connection with this litigation), Ashok's case, as set out in his factual summary, is that Jaivant has both been fully informed of and involved in that history.

47. In regard to his dealings with VVLOWA, Ashok denied that those dealings, in any way, evidenced that his, or his wife's interest in the plots was anything other than such interest as he, or she, may have under the indentures, in the events that have occurred. In particular Ashok averred that, as explained in an email of 11th September 2009, any references to owners, or ownership, to be found in the email correspondence with VVLOWA, included and was intended to include persons, such as Ashok, whose interests were at 'various stages of incompletion', or persons who were 'unsure if they have a legal title'. Ashok averred, further and consequentially, that the fact that Ashok contemplated membership of VVLOWA affords no indication that Ashok held any interest in the plots greater than that to be derived solely from the uncompleted indentures.

48. In regard to Ashok's dealings with Jaivant and Bharat, in and in connection with these proceedings, Ashok averred that none of the documents relied upon by Jaivant assert, or aver, that Ashok was the owner of the four plots, or held any interest in excess of that to be derived from the uncompleted indentures and, further and in any event, that Jaivant was at all times aware of the limited nature of Ashok's interest in the four plots.

49. In regard to the references therein, to his having 'control' of the four plots, Ashok averred that he meant no more than that he was the accounting party in respect of the plots. In regard to the reference, in his Schedule of Accounting, to his holding the four plots on trust for himself and his brothers, he averred that the Schedule set out that his interest was his interest under the agreements entered into with Victorian View and that he meant no more than that it was that interest that he held on trust.

50. In agreeing, by way of the order of 10th January 2017, to the sale of the four plots, he averred that he agreed no more than the sale of such interest that he had in the plots, namely his bare interest under the indentures. In instructing, or in joining in the

instruction of, expert valuers to value the four plots, following the court's order of 1st November 2017, he averred that he was doing no more than taking the necessary steps to enable the court to determine the value of such interest as he actually had in the four plots.

51. In regard to Jaivant's case, as pleaded in estoppel, Ashok averred that the case, as so pleaded, was an abuse of process, in that, by my judgment of 27th November 2018, it has already been determined (subject to any finding of wilful default, or breach of trust, or fiduciary duty, pursuant to Jaivant's secondary case) that the effect and intent of my order of 1st November 2017 was that Ashok should account to his brothers, in respect of the four plots, upon the basis of the value of his actual interest in the plots and that Ashok was not estopped either by representation, or convention, from so doing, or from denying that his interest was that of an absolute owner. Ashok's further contention was that the facts and matters relied upon by Jaivant were incapable of giving rise to the estoppels alleged, that Jaivant had at all material times been aware of the nature of Ashok's interest in the plots and of the issues that had arisen in respect of the plots and that, in consequence, there could, in any event, have been no detrimental reliance upon any of those facts and matters.

52. In regard to Jaivant's secondary case, as summarised in paragraph 24 of this judgment, Ashok denied that his failure to instruct lawyers in respect of the plots constituted, in all the circumstances a breach of trust, or duty. He averred that no pleaded case was raised as to the steps that such lawyers would have taken, how they would have been funded and what difference their instruction would have made.

53. He averred, further, as already set out, that Jaivant was at all times aware of the situation in respect of the plots, that, in acting as I have summarised, in paragraphs 28 to 38 of this judgment, he had acted consistently with his duties as trustee of the brothers' interest in the plots, that there was no reason to think that any of the steps that Jaivant suggests should have been taken would have placed the brothers in any better position than is currently the case, or, in particular, that those steps would have resulted in his procuring title to and vacant possession of the four plots. Jaivant had given no explanation as to how the proposed steps would have been funded, or how the taking of those steps would, in the context last set out, have been a prudent use of money, or how, or why, in that context, Ashok was personally obligated to put his money to that use.

54. If, which he denied, Ashok was in breach of his duty as trustee, in respect of the plots, Ashok averred, further, that Jaivant, having been fully informed of and involved in the steps taken, or not taken, in respect of the plots, had acquiesced in, or consented to, the course that had been taken, in respect of the plots, such that he had disentitled himself from bringing any claim in respect of those matters.

55. By way of an application to amend made, only, on the opening day of the trial, Ashok sought to be allowed to argue, in respect of Jaivant's secondary case that, at least to the extent that the breaches of trust, or fiduciary duty, alleged occurred before 2nd September 2008 (i.e. six years prior to the issue of these proceedings), the claim was time barred.

56. I rejected that application. It is well understood that a plea of limitation must be pleaded out. In this case, no suggestion of limitation had ever been previously raised

and to seek to raise it, or plead it, on the day of trial, was far too late. The plea, if permitted, would have required the investigation and consideration of the dates at which particular alleged actionable omissions had taken place; something which had neither been pleaded or contemplated in the preparation of the case for trial. More fundamentally, Jaivant had prepared for trial in the legitimate belief that no issue of limitation arose and, in that circumstance and where, quite possibly, different positions would have been taken had limitation issues been earlier advanced, it was simply unfair to allow the late amendment.

57. In the event, therefore, the trial proceeded without that amendment. Evidence was heard over three days in December 2019 and, because of the weight and range of materials, I directed that written final submissions be lodged before the hearing of final oral submissions. Those oral submissions were to have been heard on 8th April 2020, but, because of the onset of the Covid-19 outbreak and the necessity for social distancing, arising therefrom, the parties agreed with the court that the claim should be determined without oral final submissions and upon the basis of the written submissions which had been lodged and any supplementary submissions filed in response to those written submissions. This judgment has been prepared on that basis and I am grateful to all concerned, counsel and solicitors, for the assistance with which|I have been provided, both by way of submissions and by way of the provision of additional materials, in the form of transcripts and notes of evidence.

58. As foreshadowed earlier in this judgment and notwithstanding the lengthy and detailed way in which Jaivant's primary case had been pleaded, it emerged, when Mr Roseman, Jaivant's counsel, submitted his skeleton argument and opened his case that the near totality of that primary case had been abandoned and that, in substance, the case that was being pursued was the secondary case, outlined in paragraphs 19 and 24 of this judgment and advanced, not on the footing that Ashok was the owner of the plots, but upon the footing that he had failed to take steps to get in the ownership of the plots.

59. Jaivant's case, as set out in paragraph 29 of his counsel's closing submissions, was that, having entered into the indentures, Ashok had done 'absolutely nothing' to get in the title to the four plots and that had he taken the steps set out in paragraph 24 of this judgment, or such of them as were necessary, he would have secured good title to the plots. As developed in his final submissions, that would have been achieved either by a simple request to Mr Hindocha to provide the registered sale deeds for each plot, as mandated by the terms of the indentures, or, if the need arose, by proceedings for specific performance.

60. It was no longer averred that Ashok was the legal, or the beneficial owner of the four plots, or that he had paid the monetary consideration, or fulfilled his other obligations under the indentures, or that his ownership, legal, or beneficial, should be inferred from the various alleged representations as to ownership that he had been said to have made, or that he held a specifically enforceable agreement in respect of each of the four plots. Nor, although desultory mention of the estoppel argument surfaced in the course of the trial, was that argument actively pursued either in opening or in final argument.

61. Jaivant's skeleton argument made mention of Ashok's obligations as the accounting party in respect of the plots and the burden arising from that fact and, like the estoppel

argument, was sporadically mentioned during the trial. That argument, however, was, again, not actively pursued in final submissions and, on any view, Ashok's obligation to account, as the person holding for the brothers such interest as he had in the four plots, is a qualitatively different thing from the affirmative case as to ownership that, up until trial, Jaivant had purported to pursue. The only substantive part of Jaivant's primary case that was retained at trial and in closing submissions has been the averment, discussed later in this judgment, that, under Ashok's arrangements with the Victorian View partnership, his obligation to make the monetary payments specified in the indentures had, by waiver, estoppel, or collateral agreement, ceased to have effect.

62. This radical and very largely unexplained shift of position by Jaivant carries, as I see it, significant implications. The first and obvious such implication is that it amounts to a concession, or acknowledgement, by Jaivant, that, despite all that has been said by Jaivant, as to Ashok's ownership of the four plots, Ashok has, in fact, been telling the truth, as to his ownership of the plots, or his lack of it, all the time.

63. It also raises some questions as to Jaivant's own veracity. In particular, the changed position does not sit well with Jaivant's averment, at paragraph 6(ii) of his Re-amended Points of Claim, that, when entering into the 2001 agreement, Ashok expressly informed his brothers that he owned the plots; nor with Jaivant's supposed belief, as set out in paragraph 13 of his witness statement, dated 29th July 2019, in respect of this limb of the proceedings, that Ashok had, in fact, sold the plots in 2012.

64. In the light of Jaivant's abandonment of both major elements of his primary case, it is not strictly necessary to say much, if anything, more about that case. I would note, however, two things.

65. Firstly, that had the point been pursued, I would have decided that the case that he had sought to advance on the basis of estoppel was not open to him. My judgment, of 27th November 2018, had determined that that part of my order of 1st November 2017, which dealt with the Victoria View plots was to be regarded as an order made by consent between the parties and reflected their agreement that Ashok should account to his brothers for the value of his actual interest in the plots and not the value of any other interest.

66. As explained in that judgment, at paragraphs 55 and 56, that agreement necessarily overrode any estoppel arising prior to the date of that agreement and, as explained, further, in paragraphs 57 and 58 of the judgment, there was nothing in the conduct of the parties, as now pleaded in paragraph 6(xi) of the Re-amended Points of Claim, to give rise to any subsequent conventional understanding, or assumption, that Ashok's actual interest in the plots was to be regarded as a freehold interest.

67. My order of 29th November 2018, accordingly, provided that Ashok should account to his two brothers on the footing of his actual interest in the plots. Save by way of his claim against Ashok, in wilful default, or breach of duty, as trustee, Jaivant could not go behind that order.

68. Secondly and, perhaps, more materially, there was nothing in the lengthy evidence given by Ashok in this trial to make me doubt the conclusion that Jaivant had been right, late in the day, to withdraw the contention that Ashok had, at any stage, become

the owner, whether legal, or beneficial, of the four plots, or that, at least in regard to his ownership of the plots, or the absence of that ownership, Ashok was telling me anything other than the truth.

69. Jaivant's secondary claim requires the consideration by the court of a number of separate but related matters.

70. Firstly, there is the factual question as to what Ashok actually did, as trustee of the rights embodied in the indentures, to get in the title to the land the subject of the indentures, or to maximise, in so far as he could, the value of those rights.

71. Jaivant's case, as already foreshadowed, is that Ashok did nothing. Ashok's case, in essence, is that, as the situation in respect of the plots emerged, the better and commercially sensible approach, given the difficulties in respect of the plots, was not to take any independent action but, rather, to leave matters in the hands of VVLOWA and Victorian View, in the hope that they, or one of them, would produce a resolution.

72. Secondly, there is the question of mixed law and fact as to whether, in the particular circumstances of this case, the steps, whatever they were, that Ashok took, in an attempt to get in the title to the four plots, or, otherwise maximise the value of the indentures, for the benefit of the trust, of which he was trustee were a sufficient fulfilment of his obligations, as trustee. That question, in the context of this case, has required the court to investigate, at this trial and as best it can with the available materials, the factual and legal circumstances which have obtained in respect of the land, or site, of which the four plots formed part, fat and following the date of the indentures. The court's conclusion, as to those matters, will, necessarily, inform the nature and viability of the steps that a trustee, in Ashok's position, was required to take in fulfilment of his duties as trustee and whether the approach adopted by Ashok was, in all the circumstances, an adequate, or sufficient fulfilment of his obligations.

73. That question will, as I see it, also bring into play, further questions as to the perceived value, or potential value, of the plots to which the indentures related, the funding which would have been required to take any measures that would, or might, be required to get in the title to the plots, or, in any other way, maximise the value of the indentures to the trust, together with the availability and sources of that funding. As part of that question, it will be necessary to determine whether, as Jaivant avers, Ashok was entitled to call for the title to the plots without any payment of the consideration shown in the individual indentures, or whether Ashok's and the trust's right to call for that title was dependent upon payment. That question bears both upon the value of the indentures to the trust and the funding, or resources, which would be required to get in the titles in question.

74. Thirdly, in the event that the court concludes that Ashok's obligations and duties as trustee had required him to act other than he did in respect of the plots and, consequentially, that his conduct placed him in breach of duty, the counter factual question arises as to the probable outcome, in respect of the four plots, had Ashok taken such further steps as his duty required and, specifically, those steps, as summarised in paragraph 24 of this judgment, that Jaivant avers that Ashok should have taken. In respect of that counter factual question, should it arise, the burden of establishing that any such steps would not have been effectual in bringing in the legal title, or in procuring a position for the trust better than that which now exists, rests, as

I see it, upon Ashok. If that burden is satisfied, then it is not in question but that no liability arises. A trustee is not liable for a loss that could not be prevented and would have arisen in any event. For the avoidance of doubt, it is on no part contended that there is now any prospect of enforcing the indentures and getting in the title to the plots.

75. Fourthly, given Ashok's plea that Jaivant was fully informed as to the problems with the indentures and with securing title to the plots to which the indentures related and that he agreed, or acquiesced, to the approach adopted by Ashok, the question arises as to the extent of Jaivant's knowledge, the extent to which he did agree to the approach taken by Ashok and, whether, having regard to his knowledge, agreement, or acquiescence, Jaivant is now estopped from criticising, or complaining as to Ashok's conduct as trustee and from bringing suit in respect of that conduct.

76. As a starting point, in respect of the second question, it is, I think, common ground that there is no substantive distinction, at least in the context of this case, between action, or inaction, which constitutes wilful default and gives rise to an obligation to account upon that basis, and action, or inaction, which constitutes a breach of trust, or fiduciary duty. That congruity emerges, clearly, from **Re Owens [1882] 47 L.T. 61 (CA)** and **Snell's Equity (33rd Ed.) at 20-024**.

77. Further, as I see it, given that the essence of Jaivant's secondary case is that, in all the circumstances, Ashok's various pleaded failures, can be, fairly, summarised, as set out in paragraph 6(ix) of his pleading, namely as a failure to act with reasonable care and skill in respect of the securing and/or safeguarding of the brothers' interest in the Victoria View plots and that it is that aggregate failure which demonstrated Ashok's alleged reckless disregard of the brothers' interest and constitutes the breach of duty and wilful default for which liability is sought, there is, again, a helpful degree of congruence, as between Ashok and Jaivant, as to the fundamental matter for determination.

78. The yardstick which Ashok submits, by counsel, that I should apply, in the determination of Ashok's potential liability, is the well understood yardstick, established in **Speight v Gaunt [1883] 9 App. Cas. 1**, namely, whether in relation to the trust's interest in the four plots, Ashok has exercised the same degree of care, or of diligence, as that which a person of ordinary prudence would have adopted, or exercised, in the management of his own affairs. I do not read Jaivant's final submissions as promoting, or espousing, any different standard, albeit that the point is, rightly, made that the standard to be adopted is not that of the particular trustee, in respect of his own dealings, but that of an ordinarily prudent person in the position of the trustee.

79. There is, likewise, a helpful and sensible measure of agreement between the parties as to the relationship between a trustee's conduct and the nature of the subject matter of the trust. It is not in doubt but that, where a trust asset is a chose in action (such as the indentures in this case) a trustee has, in principle, a duty to get in the asset the subject of the chose. It was, rightly, recognised, however, on behalf of Jaivant, that a trustee's obligation in relation to a trust asset is not absolute and will necessarily differ having regard to the value of the asset and, I would add, the circumstances faced by the trustee, in respect of the asset.

80. In the case of a low value asset, it would plainly be disproportionate for a trustee to expend substantial time, or resources, if that is what was necessary to get in, or protect the asset, particularly if there was a reasonably perceived uncertainty of result. Even if the asset is of potential value, if the circumstances are such that to secure, or protect, the asset, the trustee would be required to involve himself and the resources of the trust in a legal, or factual, quagmire, with no certainty, or even probability, of a successful outcome, then it is hard to see that a trustee's duty would necessitate that he take those steps. While these questions are, manifestly, intensely fact sensitive, it is unlikely that a person of ordinary prudence would act in that way in respect of his own affairs. A trustee is not and is not required to be a crusader for his trust and a trustee, who invests trust resources in a lost, or weak, cause, is as, or more, likely to be in breach of his trust than in compliance with his duties as trustee.

81. I do not read **Re Brogden (1888) 38 Ch D 546**, upon which reliance was placed by both parties, as tending to the opposite effect and as treating a trustee, who, acting prudently, elects not to take particular steps to get in a chose, as being in breach of his trust and liable, in consequence, for, in effect, the loss of the chose, or its value, save and unless he can prove that the particular steps would have served no purpose. I am satisfied that a fair reading of the judgments in **Re Brogden**, both at first instance, before North J and upon appeal, make clear that a trustee is only liable for breach of trust if there is demonstrated against him a lack of proper diligence in the exercise of his duty to get in the assets. It is only once that is established that it becomes for the trustee to show that, even with the appropriate measure of diligence, the loss complained of and in respect of which suit is brought would have occurred.

82. In regard to trust resources, or the funding of activities required to protect, or get in, assets of a trust, I am not aware of any obligation upon trustees to use their own funds, or resources, to take steps to preserve, or get in, the assets of a trust. **Lewin on Trusts (19th Ed.) at 34-022** states that where no funds are available, trustees are under no obligation to take proceedings at their own expense, unless the lack of funds arises out of the trustees' own breach of duty. In **Hobday v Peters (No. 3) 28 Beav. 603**, Sir John Romilly MR, in respect of an insurance policy assigned to trustees, decided that the trustees, who were without funds from the trust, were under no duty to pay the premiums.

83. I have already indicated, early in this judgment, the problems, of identification and encroachment which currently exist in respect of the plots, the fact that, as they stand, the indentures have no value and that the value of the plots, ignoring, in effect, the difficulties of identification and encroachment and assuming unencumbered legal ownership in Ashok, is some 92.5 M rupees, equating, in sterling terms to about £1M.

84. What is clear, however, and no longer in issue is that Ashok has never been the legal owner of the plots and the question for the court, or one of them, is whether, given the history and circumstances pertaining to the plots, there was ever any sensible chance that he could achieve that ownership, or the ownership of any interest greater than the bare contractual right embodied in the indentures.

85. To assist in the resolution of that question, I had the benefit of very detailed evidence from Indian lawyers, instructed by each party as experts, both of whom were conversant with the conveyancing laws and practices of the state of Karnataka (the Indian state in which the plots are situated), both of whom had carried out a detailed

investigation of the issues of and associated with title which have emerged in respect of the plots and of the site of which they form a part and both of whom were able to opine as to the steps that Ashok could have taken to bring in the title to the plots and the likely efficacy of those steps. Collectively, they produced seven reports for my assistance, as well as a joint report, and each expert was comprehensively cross examined.

86. A helpful starting point, in a consideration of their evidence and the conclusions to be formed in respect of their evidence, is the joint report, dated 10th December 2019 and prepared by the two instructed experts, Shona Malvi, for Jaivant, and Suparna Umashankar, for Ashok. Without any intended discourtesy, I shall refer to them as Shona and Suparna.

87. That joint report evidences a very high measure of agreement, as between Shona and Suparna, in respect of the subject plots and the lands, or site, of which they form a part.

88. Firstly and, now, uncontroversially, they confirm that no documents, evidence, or receipts have been provided such as to reflect either the payment of any consideration in respect of the plots, or the registration, in favour of Ashok, or his wife, of any deeds of sale in respect of the four plots. They confirm, further, that Ashok's and his wife's obligation to pay the final tranche of the consideration, under the indenture agreements, assuming that that consideration was payable, would, as a matter, I think of conveyancing practice, only arise against the registration of the relevant deeds of sale.

89. Secondly, they agree, also, that no suit for specific performance would have been entertained by an Indian, or Karnataka, court, unless Ashok and his wife had fulfilled all their obligations in respect of the indentures, including the provisions as to payment. That agreement must, however, be read, I think, as subject to Shona's contention, discussed later in this judgment, that if Victorian View, the counterparty to the indentures had agreed a waiver of payment with Ashok, then, in principle, specific performance would be available without payment of the contracted consideration. In the light of the express language of section 16(c) of the Specific Relief Act 1963, which governs specific performance in India, that agreement may also require modification, to reflect the availability of specific performance in favour of a person, or party, who is ready, willing and able to perform the contract.

90. Thirdly, they agree that, as appears from the indentures, themselves, Victorian View were never the owners of the four plots. The agreed consequence of that fact is that if Victorian View did not have authority from the owners of the land to sell the plots, or, if the owners denied that authority, specific performance could not have been granted. The absence of the land owners as parties to the indentures, or of the existence of any power of attorney granted to Victorian View, or one of its partners, authorising, on behalf of the landowners, the sale of the four plots, would have the effect (a) of precluding action against the landowners and (b), in a suit against Victorian View, of precluding specific performance.

91. Fourthly, that the documents which have been made available to the two experts, including, as set out below, documents produced by both parties, in litigation, commenced in 2012, between the original landowners of the area of the site out of

which the four plots purport to have been carved (referred to in these proceedings as the Schedule B land and as survey 57/2) and VVLOWA, do not disclose any powers of attorney at all in respect of the Schedule B/survey 57/2 land, or, therefore, in respect of the four plots.

92. In respect of that omission, both experts agree that the fact that Victorian View had acquired properly notarised powers of attorney in respect of other areas of land falling within the overall Victoria View site (which site is referred to in the proceedings as the Schedule A land) does not, in itself, evidence the existence of similar, albeit, unavailable, powers in respect of the Schedule B/survey 57/2 land. Shona, however, opines that the court could infer, from the existence and exercise of valid powers in respect of some of the plots on the Schedule A land, the likelihood that similar powers were provided to Victorian View in respect of the Schedule B lands, including, therefore, the four plots.

93. In further regard to powers of attorney, both experts agree that powers of attorney, executed by the owners of certain lands (referred to in these proceedings as survey 55/2,) forming part of the Schedule A land, had been used to purportedly convey lands forming part of the Schedule B/survey 57/2 land (including, so it would appear, one of the plots with which this court is concerned; namely plot H113, purportedly transferred to Suresh and Sharada Kachela, in February 1996, pursuant to a power of attorney executed in favour of Victorian View, or its partners, not by the owner(s) of the Schedule B/survey 57/2 land, but by the owner(s) of some, or all, of the survey 55/2 land).

94. Fifthly, Suparna and Shona agree that plots were 'sold' without obtaining the necessary conversion order required to re-designate agricultural land as development, or residential land. While Shona explained in cross examination that that was not intended to be a reference, specifically, to the four plots 'sold' to Ashok and his wife, both she and Suparna agree that, in the 2012 litigation referred to in paragraph 91, which related to the Schedule B land, as a whole, and which, therefore, embraced, or included, the four plots, the land was described as unconverted agricultural land. That description appears both in the landowners' plaint and in the judgment and, as agreed by Shona, in cross examination, emerges, also, from a deed of sale, dated 23rd February 2012, whereby the entirety of the Schedule B land was transferred to a Mr Reddy. Both Shona and Suparna, also, agree that references to RTCs (Right Tenancy and Crop), in the 2012 proceedings and in other documents pertaining to the Schedule B land, further indicate that that land remained unconverted agricultural land. There is, accordingly, no real doubt but that the four plots, when 'sold' to Ashok and his wife in 1994/5, were, at that date and right up until, at least, 2012, unconverted agricultural land.

95. Sixthly, in regard to the effect, or consequences, of a purported sale of agricultural land to a non-agricultural purchaser, such as Ashok and his wife, Suparna and Shona both agree that if Victorian View did not have the necessary power of attorney, such as authorise, or enable, a sale and if the land was unconverted agricultural land then specific performance of the indentures would have been unavailable.

96. The two experts did not, in terms, set out a joint position as to the effect, or consequences, of a purported sale of unconverted agricultural land to persons such as Ashok and his wife. They did, however, agree that sections 95 and 96 of the

Karnataka Land Revenue Act 1964 mandated that agricultural land had to be subject to conversion before it could be used for any other purpose and that there was power to evict occupants using non-converted land for non-agricultural purposes. They further agreed that, under sections 79A and B of the 1961 Act, agricultural lands in Karnataka can only be purchased by an 'agriculturalist' with an income from non-agricultural sources of less than 200,000 rupees and that any transfer in violation of those terms would be null and void.

97. It was in that context, as I understand it, that the experts had opined that the want of a conversion order would be a further bar to specific performance in the absence of a valid and, I would add, suitable power of attorney. The existence of a wide ranging power of attorney, of the kind which had undoubtedly been used in respect of areas of the Schedule A land, other than the Schedule B land, would, as Mr Roseman, correctly, submitted have enabled the necessary conversion orders to be achieved as part of the process of implementing an order for specific performance. The absence of such a power, however, over and above the consequent want of authority to effect a transfer, would also preclude Victorian View from carrying out the necessary steps to convert the land.

98. Without such a conversion, or the ability to achieve such a conversion, it is inconceivable, in the face of legislation, requiring conversion from agricultural land to non-agricultural land before the land be used for a non-agricultural purpose and rendering void any transfer of agricultural land, if transferred to a non-agriculturalist, that any court, in the jurisdiction in which that legislation applies, would make an order for specific performance of an agreement where the performance of that agreement would have the effect of flouting the legislation.

99. Both experts further agreed that their collective investigations had produced evidence that, in respect of some parts of the Schedule A land, purportedly sold to particular plot owners, the original landowners, whether on their own, or through those holding powers of attorney on their behalf, had taken steps, subsequent to those sales, to convert the land usage from agricultural to residential and then resold the same plots to other persons. Some of the original owners had purported to give already sold property to family members, or to sell it as agricultural land to other persons, or to enter into development agreements with builders. It is not my understanding that any of that evidence related to the Schedule B/ survey 57/2 land, other than that pertaining to plots H113 and H118, where, as already mentioned, Victorian View had purportedly acted under a power of attorney given to Victorian View by owners of land in survey 55/2, not forming any part of the Schedule B/survey 57/2 land.

100. The aggregate agreed consequence of this is that, in respect of a number of plots on the overall Schedule A land, there exist multiple title documents relating to the same land. The further agreed consequence is that a number of the original plot owners (including Mr and Mrs Kachela, who, as set out in paragraphs 93 of this judgment and in paragraph 99, above, secured a transfer of H113, one of the four plots in issue in these proceedings, in February 1996, pursuant to a power of attorney given not by the owners of the Schedule B land, but the owners of the survey 55/2 land) have brought or sought to bring both criminal and civil proceedings in respect of the issues of ownership and title which have arisen.

101. In regard to the Schedule B land, including, therefore, the four plots, the 2012 litigation, to which reference has already been made, was litigation between the original landowners of the Schedule B/survey 57/2 land and VVLOWA, in which the original landowners denied the existence of any valid sales of plots on that land to VVLOWA, or its members, and averred that the land remained agricultural land in their own hands and that it was VVLOWA, or those that it represented, which had encroached on their land.

102. Although, in the proceedings, VVLOWA asserted that plots had been sold to its members under a power of attorney granted to Victorian View, or one, or some of the partners in Victorian View, no such power of attorney was produced. In granting an injunction restraining VVLOWA, or its members, from interfering with the landowners' peaceful possession of the Schedule B land, albeit at the interlocutory stage and applying an American Cyanamid based test of balance of convenience, the judgment set out that the landowners' documentation 'had clearly demonstrated their right title and interest as well as possession' of the Schedule B/survey 57/2 land.

103. Taken overall, the joint opinion of the two experts was that the entire Victorian View site had, as set out in paragraph 3.2.8 of their joint report, been undertaken without observing the necessary legal procedures. Victorian View had not, as it should have done, procured all relevant title and other documents from the landowners with whom they were dealing. It had not obtained proper authorisation from the landowners in respect of the development. It had not secured the conversion of the land for residential use. It had not secured the necessary sanctions in respect of the layout plan. The layout itself was incomplete.

104. As foreshadowed in paragraph 92 of this judgment, Shona, but not Suparna, took the view, in the experts' joint report, that the existence of valid powers of attorney in respect of other parts of the Schedule A land, coupled with the assurances contained in the indentures that Victorian View had entered into appropriate agreements with the relevant landowners, raised, in that context, an inference that similar and similarly valid powers of attorney had existed in respect of the Schedule B land. The point is an important one, given the agreement between the experts that without the benefit of such a power of attorney, given in favour of Victorian View by the owners of the Schedule B land, there could be no question of Ashok having been able to procure an order for specific performance of the indentures and, thereby, of securing title to the four plots.

105. Shona's position, on this, in her September 2019 report was that it was likely and could not be ruled out that the owners of the Schedule B land had executed a general power of attorney in favour of the Victorian View partnership. When cross-examined she, very fairly, agreed, or conceded, however, that the most that she could really say, on the matter, was that the possibility of the existence of valid powers granted to Victorian View could not be ruled out.

106. In support of her position, Mr Roseman urged three matters.

107. Firstly, he submitted that, notwithstanding the decision of the court, in the 2012 proceedings, I could rely upon the assertions, in the material placed before the court in those proceedings and in correspondence with the governor of Karnataka, government officials and the press, that Victorian View had sold plots pursuant to a power of

attorney granted by the landowners, as evidence of the existence of that power, that plots, on the Schedule B land, had been sold pursuant to that power and that, as asserted by VVLOWA, in its various materials, that the landowners were now denying and suppressing the existence of the power that they had granted to Victorian View as part of what VVLOWA had termed a 'land grab' scheme, whereby land already sold could be sold anew.

108. Secondly, he argued that the fact that the Schedule B land had been sold in February 2012, very shortly after the issue of the proceedings against VVLOWA, in January 2012, provided support for VVLOWA's contentions, including its contention that a valid power had been granted to Victorian View, in respect of the Schedule B plots. That sale must, Mr Roseman submitted, have formed part of the 'land grab', since, in the shadow of the 2012 proceedings, no legitimate purchaser could, conceivably, have been prepared to purchase the land.

109. Thirdly, in detailed submissions, based, primarily, upon the email correspondence between Ashok and various officers of VVLOWA, he argued that I should conclude that Ashok had, as he put it, 'nobbled' the VVLOWA and, in some unexplained way persuaded that body to suppress the relevant power of attorney authorising Victorian View to transfer ownership of the four plots.

110. Despite the forceful way that Mr Roseman puts the matter in his written final submissions, I am not persuaded. The simple fact is that there is no affirmative evidence that a power of attorney was ever granted to Victorian View in respect of the Schedule B/survey 57/2 land.

111. The materials relied upon by VVLOWA, in the 2012 proceedings, do not establish the existence of a power of attorney over the Schedule B land. They do no more than assert the existence of a power and the belief of those represented by VVLOWA that, in accordance, no doubt, with assurances similar to those contained in the indentures in this case, such a power had been granted to Victorian View.

112. Given the overall circumstances pertaining to the Schedule A land, as set out in paragraphs 96 and 100 of this judgment, the existence of such assurances gives me no confidence at all that Victorian View had really acquired the appropriate power. Had such a power actually existed, in the hands of VVLOWA, it would, inevitably, have been produced in the 2012 proceedings. It is quite clear that, although VVLOWA's case relied upon the existence of the power of attorney, it was never before the court.

113. The fact that the Schedule B land was sold in February 2012 does not take the matter any further. It is quite impossible to conclude that the fact that that sale took place shortly after the commencement of the 2012 proceedings provides any significant evidence that the sale was part of a land grab scheme, involving the suppression by the landowners of the power of attorney previously granted to Victorian View. Such a conclusion would be wholly speculative.

114. The contention that VVLOWA, in apparent conspiracy with Ashok and for no given reason also, suppressed the power of attorney is, also, with respect, unrealistic. The obvious conclusion, from the fact that VVLOWA failed to produce the power of attorney before the court in the 2012 proceedings, is that VVLOWA has never had the

power of attorney, or a copy of it, and, correspondingly, that it has not been, 'nobbled', or persuaded, by Ashok to suppress it.

115. It is equally clear, given that the proceedings against VVLOWA were still ongoing, at the dates, in May and June 2019, when, in Mr Roseman's submission, VVLOWA, having been 'nobbled', had determined to suppress the power of attorney and given, further, that VVLOWA still, presumably, relied upon the power of attorney to defend, at the trial, listed for September 2019 (see joint experts' report at 3.3.2), the claim brought by the landowners, that the very last thing that VVLOWA would do, in that context, would be to suppress, or in any way deny, the existence of its own key document, or, indeed, any other documents supportive of its case.

116. Mr Roseman provides no reason at all why VVLOWA should behave in such a way and the reality, as it seems to me, is that the reason that there has been no disclosure by VVLOWA either of the relevant power, or any other documents supportive of the existence of a power and the reason why, despite the investigations of the experts, no such documents have emerged from other sources, is, quite simply, that no such documents exist.

117. Mr Roseman, also, provides no explanation as to why, if the landowners had granted the relevant power of attorney to Victorian View, Victorian View had chosen, as set out in paragraph 93 of this judgment, when purportedly transferring a number of plots, including H113, one of the four subject plots, to rely upon a power of attorney executed by the owners of land in survey 55/2. The obvious explanation for those facts is that no other power, relevant to the Schedule B/ survey 57/2 land existed.

118. In the result, I am quite satisfied that, despite the assurances contained in the indentures, Victorian View never had a valid power of attorney in respect of the Schedule B land and never, for that reason, had either the authority, or the capacity, to transfer the plots to Ashok.

119. As set out at paragraph 90 of this judgment, both experts agree that the absence of a valid power was, or would have been, fatal to any claim by Ashok for specific performance of the indentures.

120. As set out in paragraph 95 and for the reasons explained in paragraph 96, 97 and 98 of this judgment, they reiterated, or reinforced, that opinion, in respect of a case where the putative purchaser was, as in this case, not an agriculturalist and where there was neither a valid power, nor the necessary prior conversion of the designation of the relevant land from agricultural to residential. In such a case specific performance was not an available remedy.

121. For those reasons, also, at least up until the point when the Schedule B land and the four plots were converted from agricultural land to non-agricultural land; that is to say, at least up until May 2012, when judgment was given, in the VVLOWA litigation, at which date the land remained unconverted agricultural land, Ashok had no realistic prospect of securing specific performance.

122. Although not discussed by the two experts, in their joint report, a further potential obstacle to specific performance was discussed in evidence by the two experts, namely the contention, outlined in paragraphs 43 and 44 of this judgment that, if it

were the case that Ashok had been under no obligation to pay the monetary consideration under the indentures and that the arrangement between him and Victorian View was that the consideration for the plots was the payment in kind that he had provided by way of underwriting, or brokerage, services, then the indenture agreements would, when entered into, have been unenforceable, as being in breach of FERA and the regulations made under FERA (and, from 2000, contrary to the provisions of its successor statute, the Foreign Exchange Management Act 1999 (FEMA) and regulations made under that Act).

123. In dealing with this question and the other questions of Indian law, arising in this case, I remind myself that the task of the Indian law experts is to acquaint the court with the relevant Indian law. It is not, in general, the function of the experts, to opine upon the application of the law to the facts of the instant case.

124. That said, as to FERA and FEMA and the regulations made thereunder, there was, as I saw it, very little between the two experts.

125. Both accepted that the starting position, under section 31 (1) of FERA was that a non-Indian citizen could not buy land in India other than with the special or general permission of the Bank of India (the Bank). Both accepted, that, if the putative purchaser of land was a foreign citizen of Indian origin, then, other than in respect of agricultural land and provided that the 'entire consideration' was paid out of foreign exchange brought into India through normal banking channels, or from monies held in specified non-resident accounts, then the regulations made under FERA provided a general permission for the purchase to be made. Both accepted that, in the case of the purchase of agricultural land, or in the case where the mode of payment for the land was payment in kind and not, therefore, as specified in the regulations, that general permission would not apply and that special permission from the Bank would be required before the purchase could take place. Neither was able to give me any particular assistance as to the circumstances in which that special permission, if sought, might be obtained.

126. In the context of FERA, there was some debate between Shona and Suparna as to the impact or effect of section 47 of the Act. This is an anti-avoidance provision and prohibits persons from making contracts which have the effect of evading, or avoiding, the operation of the Act, or of regulations made under the Act. To mitigate, as I see it, the consequences of that primary provision, where the thing contracted to be done, such as the sale of agricultural land to a foreign citizen of Indian origin without the special permission of the Bank, would, without that permission, be proscribed, section 47(2) of the Act makes plain that a contract of sale of that nature would not be invalid if and provided that, in my example, it contained a term that the sale would not take place unless the relevant permission was granted and makes plain, further, that, even in the absence of such an express permission, a term will be implied to like effect.

127. In regard to FEMA and the regulations under that Act, having effect from 2000, the bar on the purchase of agricultural land in India by persons of Indian origin was maintained. No provision, however, was made for an exception in the event of the grant of permission by the Bank. In regard to non-agricultural land, while such land could be purchased, it could only be so purchased out of funds remitted from outside India, or from a regulated non-resident account.

128. Applying these provisions to this case, on the footing, not in contest, that Ashok and his wife are foreign citizens of Indian origin, their position, under FERA and the FERA regulations, in force at the date of the indentures, was that their agreements to purchase, being agreements to purchase agricultural land, were, on any view, subject to an implied term that the plot sales would not take place until permission had been granted by the Bank. Even if it were possible to achieve the conversion of the land to non-agricultural, by the exercise, in that regard, of a valid power of attorney, as explained in paragraph 97 of this judgment, the mode of alleged payment would still have required special permission to have been granted by the Bank before the sale could take place. Under FEMA and the regulations under FEMA, the simple position, after 2000, was that Ashok and his wife could not purchase agricultural land and even if the land could be converted to non-agricultural, they were still embargoed from making the purchase, other than by payment from remitted funds, or funds derived from a regulated account.

129. The further consequence of the foregoing, given that, as explained by Suparna, in her 10th December report, the Specific Relief Act 1963 precludes (no doubt for the like reasons as I have identified in paragraph 98 of this judgment) the enforcement of an agreement where the result of enforcement would be to give effect to a consequence barred by statute, is that, over and above the other problems relating to specific performance, already discussed, and, if, as contended by Jaivant, the consideration in respect of the indentures was a form of payment in kind, the position, between 1995 and 2000 would have been that no enforcement would have been directed, other than with the special permission of the Bank. An attempt to enforce, from 2000 onwards, would have been wholly precluded by the clear provisions of FEMA, which no longer made provision for such a special permission to be granted.

130. As earlier indicated, I was not given any real assistance by either Suparna, or Shona, as to whether, in reality, the Bank, if asked, would have granted special permission. It seems to me very unlikely that it would. I cannot envisage the Bank involving itself in small transactions of this nature. Further, a reading of both FERA and FEMA seems to me to indicate that a part of the purpose underlying the legislation was to protect agricultural land from purchase by non-Indian citizens, even those of Indian extraction, and, in the case of any land so sold, to ensure that the loss of land to such purchasers was compensated by an accretion to the state of appropriate foreign exchange. Neither of those purposes would be promoted by a grant of special permission in this case.

131. All of the foregoing suggests to me that the provisions of FERA and FEMA would, if the consideration for the plots had been as Jaivant contends, have been a further serious obstacle to specific performance in this case.

132. It is, of course, Ashok's case that the consideration, under the indentures, was the monetary consideration shown in the indentures, in which case, subject to payment being made in accordance with FERA and the regulations made under FERA, or, as the case might be, FEMA and subject to the prior conversion of the plots from agricultural to non-agricultural, as already discussed, FERA and FEMA would have given rise to no further difficulties in respect of the enforcement of the indentures. I will deal with this issue of fact and any relevant legal questions arising from it, later in this judgment.

133. In the course of Shona's evidence and cross-examination, attention was directed to a number of residential plots, which I will call the G plots, where deeds of sale had been registered. In respect of one, at least, of those plots the named purchaser, in favour of whom the deed had been granted, was a Mr Hindocha, one of the partners in Victorian View and with whom it is common ground that Ashok had had dealings in respect of the plots. The point was made that sale deeds in respect of these plots (which do not form part of the Schedule B land and in respect of which it is not in doubt but that a valid power of attorney had been granted) had been registered without benefit of a conversion order.

134. Examination of the documents pertaining to the G plots established that these plots had been designated gramathana. Gramathana land, as is helpfully explained, by Shona, in the experts' joint report, is land which is to be found within village limits and which, although often surrounded by agricultural land can, nonetheless, be used for residential purposes without the necessity of securing a conversion order. Land is designated gramathana by a local administrative body, the gram panchayat. It is not suggested on either part that the four plots had been so designated, were gramathana and were, therefore, exempt from the requirement of conversion before sale to a non-agriculturalist.

135. What was suggested and discussed, as between the experts, was the 'value', in title terms, of procuring and registering a deed of sale. The context was the existence of residential plots on the Schedule A land where sale deeds had been registered notwithstanding that the land remained unconverted agricultural land and where, in accordance with the Karnataka Land Reform Act, the purported transfers were void. A good example of such plots (and the only ones shown to exist on the Schedule B land) are the plots, including H113, purportedly transferred, without conversion (the Schedule B land being then unconverted agricultural land), in or about 1996, pursuant to the power of attorney given to Victorian View by the owners not of the Schedule B land but the owners of the survey 55/2 land.

136. Mr Roseman advanced the argument that Ashok, by obtaining sale deeds from Mr Hindocha, or Victorian View, in respect of the four plots (notwithstanding, of course, the fact that such a deed has already been registered by Mr and Mrs Kachela, in respect of H113) and by procuring their registration, could, thereby, have procured title, or some valuable measure of title, to the four plots.

137. I am wholly unpersuaded by that argument, which seems to me to be, manifestly, incorrect.

138. Mr Roseman sought to support his argument by reference to a decision of the High Court of Karnataka at Bengalaru, **Ramachar v The State of Karnataka AIR2006Kant124**, which struck down a circular, directed to sub-registrars responsible for the registration of deeds of sale, pursuant to which those sub-registrars were directed to refuse registration of the sales deed, as a matter of public policy, if the sub-registrar was not satisfied as to the validity of the transaction giving rise to the registration. The effect of the decision was to make clear that sub-registrars were not concerned, when registering a sales deed with the validity, or otherwise, of the underlying transaction, which had resulted in the production of a deed for registration.

139. That decision, however, as is made very clear in paragraphs 20 and 21 of the judgment of the court, does not, in any way, treat the registration of a sales deed as confirming, or endorsing, the validity of the transaction to which the registration relates and, therefore, the validity of the title to which the registered deed relates. The process of registration is no more than the step that concludes the transaction. The validity of the transaction remains completely at large.

140. Accordingly, while those familiar with land registration and registration of title, are, understandably, tempted to equate the registration of a sale deed with the registration of title and the recipient of a deed of sale with a registered proprietor, the reality is that such a person does not have, by dint solely of the registration of his deed, any title at all. That title is determined, in a system which is, in essence, one of unregistered conveyancing and as explained by Suparna, in cross examination, not simply by reference to the existence, or otherwise, of a deed of sale, but by the documents of title, underlying and validating the deed of sale and including, in addition to the documents establishing the root of title, such documents as revenue documents and conversion orders.

141. The clear consequence of the foregoing is that, contrary to Mr Roseman's submission and even if it had been possible for Ashok to procure, from Mr Hindocha, and register a sale deed, or deeds, in respect of the plots, such deeds would not, in themselves and without more, have afforded him any good title to the plots. To give title, the sale deed would have had to be properly effected by, or on behalf of the land owners, the land would have had to be made subject to a conversion order and, if the consideration for the plots was brokerage, the special permission discussed earlier in this judgment would have had to have been obtained.

142. It is, in my view highly unlikely that any of that could have been achieved. Most particularly, given, as I have found, that Victorian View had not acquired any valid power of attorney over the Schedule B land and the plots, I can see no evidential basis at all for the conclusion that Mr Hindocha, or Victorian View, would have, if so requested by Ashok, have had any prospect of procuring a valid transfer of the plots from the land owners, or, whether via a power of attorney, or otherwise, securing the necessary conversion order, let alone, if the need arose a special permission from the Bank.

143. The absence of any grant of a valid power of attorney to Victorian View seems to me to clearly evidence the fact that Victorian View was, in respect of the Schedule B land and the plots, operating behind the back of the land owners and without their authority, or approval, and that, in consequence and in that context, there was no realistic prospect, however hard that Ashok pressed for a sale deed, of one becoming available.

144. Mr Roseman placed substantial reliance upon two emails from Mr Hindocha, dated 12th and 13th February 2019, written to Jaivant, in response, as I understand it to a request by Jaivant that he provide witness evidence for this trial. In those emails, Mr Hindocha asserted that Ashok had been reminded many times to register the plots and that the failure to register the plots had been caused by a lack of diligence upon Ashok's part.

145. I attach very little weight to those emails, which seem to me to be, essentially, self-justificatory. The fact is that Ashok was never in a position to secure the registration of sale deeds in respect of the plots. It was Mr Hindocha and Victorian View who were on the spot and it was Mr Hindicha and Victorian View who had the obligation under the indentures to procure and register the sale deed and who should have had the facility, or ability so to do. The reality is that, because Victorian View had never obtained a power of attorney in respect of the Schedule B land and because Victorian View had acted, as I find, behind the back of the land owners, Victorian View was never in a position to fulfil its obligations. In that context, it seems clear to me that the emails are no more than an excuse, or cover up, designed to explain away Victorian View's failure of performance.

146. In the result and primarily because of Victorian View's over-arching failure to obtain a power of attorney from the owners of the Schedule B land, the reality of Ashok's position in respect of the indentures, albeit probably not known to him at the time when the indentures were entered into, was that there was no realistic prospect of securing specific performance of the indentures and no realistic prospect of, otherwise, procuring a valid, or any, registered sale deed in respect of the four plots.

147. The cumulative price payable for the four plots, under the terms of the indentures was 1,184,920 rupees. At the rates of exchange obtaining in 1994/5 that reflected a sterling value, for all four plots, in the order of £24,700. Whether, however, that is a true measure of their perceived market value, given the circumstances, discussed later in this judgment, in which the indentures were obtained, is something of an open question. What is clearer is that, at the date of the 2001 agreement, the value to the brothers of the plots, or their rights in the plots, was put at 1.4M rupees. At rates of exchange then obtaining, that valued the plots, at £21,500, which I take as reflecting the value of the plots on a paid up basis, whether by way of payment of cash, or kind. On no view, therefore, given the scale and context of the brothers' overall assets and liabilities, as disclosed in the 2001 agreement, were the plots, at that stage, perceived as significant assets of the brothers' business, or assets, in defence of which, they might think it reasonable to expend substantial amounts of their money.

148. The only other measure of value which is available is that to be derived from abortive sales of two of the plots to two friends of Jaivant, Deepak Shah (Deepak) and Ramesh Shah (Ramesh). Both of these gentlemen had lent money to Jaivant, in respect of the brothers' business, and it was Jaivant's evidence that, at least in part, those sales were effected as a means of dealing with the brothers' indebtedness to Deepak and Ramesh. In due course, both Deepak and Ramesh had recourse to proceedings against Jaivant. Those proceedings related, on their face, to unrepaid loans. However, in each case, Jaivant's unchallenged contention is that the settlement of those claims included an element of reimbursement arising out of their abortive purchases of two of the four Victoria View plots.

149. The court has no further documentary details in respect of the transaction with Deepak. However, in respect of Ramesh, a manuscript document exhibited to a witness statement of Ramesh, in county court proceedings, in 2009, in respect of the unpaid loans, sets out the payment that Ramesh was to pay for plot H112. That price was set at just over 1M rupees, reflecting at the then rate of exchange, a sterling price in the region of £19,475, with a deposit to be paid of £6,578. In contrast, the monetary consideration for plot H112, as derived from the indentures, was 285,604 rupees. The

difference between the two figures, some 727,000 rupees, would, had the sale concluded, produced, therefore, in sterling terms, at the date in 1995, when the sale to Ramesh was agreed, a profit of some £14,000. Given that all of the four plots are of very similar size and that the indenture prices are very similar, it would appear that had all the four plots been purchased and sold on, in the way suggested by the Ramesh transaction, then the overall profit to the brothers and the overall worth of the plots to the brothers, in 1995, would have been some £56,000. If, as asserted by Jaivant, the monetary consideration was not payable, then the value of the plots to the brothers would have been about £80,000.

150. It is convenient at this point to resolve the question as to whether the monetary consideration was payable or whether payment of the indenture sums had been waived, in consideration of the underwriting, or brokerage, services that Ashok had carried out to the benefit of Victorian View. Central to that question is Ashok's credibility.

151. Mr Roseman, perfectly fairly, reminds me that Ashok propounded a wholly dishonest defence in an earlier trial in this case, relating to a debt which had been owed by the brothers to a Mr Gudka and assigned to Jaivant's son, Nirav. As explained in some detail in my judgment in respect of the June 2017 trial (at paragraphs 23 to 26), that claim had been 'resurrected' against Ashok, in 2014, having lain dormant for very many years, as a means of imposing tactical pressure upon Ashok, who was, at that stage, pursuing Jaivant in respect of Jaivant's failure to account, properly, or at all, in respect of the sale, behind Ashok's back, of a major asset of the brothers; a flat close to the seafront in Mumbai. None of those facts remotely justified Ashok's conduct, which included the creation of false documents. It did, however, as set out in paragraph 34 of that judgment afford some explanation of his conduct and some 'background', when considering his credibility in other circumstances.

152. Mr Roseman, also and, again, perfectly fairly, reminds me that in another trial, in this case ([2019] EWHC 535 (Ch)), where Ashok sought to secure an indemnity from Jaivant, in respect of the interest that is accruing against Ashok, in respect of the Gudka debt, on the basis that that interest liability had accrued as a result of Jaivant's failure to account properly in respect of the flat in Mumbai and certain land in Surat, I had felt obliged to disbelieve Ashok's evidence of a meeting with Jaivant, in 2012, where it was said, by Ashok, that it had been agreed that all the brothers' debts, as shown in the 2001 agreement, including, therefore, the Gudka debt, should be repaid. I had, there, described that evidence as 'invented'.

153. In contrast to those two occasions, however, the fact is that in the 2017 trial, which, like this trial, concerns, not the Gudka debt and Ashok's liabilities in respect of that debt, but the brothers' business dealings, inter se, I had formed the view that, in large part, his evidence could be relied on and that, in the main, he sought to tell me the truth. In regard to the one area, where, on the basis of the documentary evidence then available, I felt obliged to disbelieve Ashok, subsequent events, by way of new evidence arising on appeal, proved me to be wrong.

154. The starting point, then, in respect of Ashok's evidence of his dealings in respect of the brothers' assets, is that Ashok has shown himself in the past to be an honest witness and the question is, whether, in this instance and in respect of these four plots, he has departed from that pattern of behaviour.

155. I do not think that, in substance, he has. I have, already, drawn attention to the fact that, in withdrawing his primary case, Jaivant has come to accept that, in essence, Ashok has told the truth about the indentures, in particular, that he had never completed the transactions and never become anything other than the owner of such rights as arise from the bare indentures. As already stated, I saw nothing in Ashok's evidence to make me think that that was anything other than the truth. Likewise, although, up until trial, Jaivant was contending that Ashok's dealings with VVLOWA were indicative of his ownership of the plots and that Ashok's explanation, that this was not so and that that entity was dealing with all persons who might have some 'interest' in Victoria View, was not true, when it came to trial, Jaivant's case reversed. As appears from Mr Roseman's final submissions, Jaivant now argued that the position explained by Ashok was correct and that membership of VVLOWA was not confined to those with a registered sale deed. The unstated implication, although not so expressed, was that Ashok had been telling the truth about that too.

156. Looking at Ashok's evidence, generally, I am clear that, in respect of its key aspects, his evidence bore the ring of truth. It may be, I think, that, under cross examination there was some gilding of the lily, in respect of his degree of persistence in seeking the requisite deeds of sale from Mr Hindocha. At heart, however, I have found myself able to accept his broad account of events.

157. Mr Roseman pressed Ashok, very properly, as to what Mr Roseman described as the evolution of his account; that is to say the fact that, as the issues in relation to the four plots have come to be the centre of focus, more detail has been forthcoming from Ashok. The rationale for that, however, is to be found, not in the invention by Ashok of 'new' evidence, but, precisely, in the fact that, for lengthy periods of this case the four plots have, simply, not been the focus of the parties' detailed attention and it has only been when these plots have become the focus of the litigation spotlight that it has become necessary, or relevant, to go into the kind of detail that emerged at trial.

158. Ashok, for example, was asked, in some detail, about the delays, as he perceived it, in the conversion of the plots from agricultural land and why these had not been raised in earlier written evidence. That was a perfectly fair question. What struck me, however, was not the fact that the conversion issue had not been detailed earlier in the evidence, but the quality of Ashok's response. I have found myself in no doubt at all but that Ashok's response, namely that these were matters that he had discussed, very regularly, with Mr Hindocha, that the delays, themselves, were a commonplace in dealing with sites of this nature and that, as with another site, Glenmorgan, with which he had dealt, it could be ten years before, as he put it, the paperwork was in place, was true.

159. In regard to the specific issue as to whether Ashok was to receive the plots without monetary payment, on account of his underwriting, or brokerage, services to Victorian View, I am satisfied that the arrangements between Victorian View and Ashok did not involve any waiver of monetary payment.

160. Mr Roseman placed significant reliance upon what he termed my findings, at paragraph 197 of my judgment, following the 2017 trial, and, also, upon the way that I had described those arrangements, when handing down judgment, on 27th November 2018, in respect of the construction/estoppel question explained, at paragraph 13 of this judgment.

161. In neither of those judgments, however, had I made any formal finding, or carried out any investigation of the circumstances whereby Ashok had entered into the indentures.

162. Paragraph 197 of my judgment, in respect of the 2017 trial, stated no more than that the four plots had come to Ashok as a result of his brokerage/underwriting activities. It did not go into the question of the nature of his rights in the plots, although, of course, those had been explained, earlier, in his Schedule of Accounting. Nor did it indicate, let alone determine, one way or the other whether the rights he had acquired were rights which entitled him to the plots only on payment of the monies identified in the indentures payment, or whether the consequence of his brokerage/underwriting activities was that he was entitled to the plots without further monetary payment.

163. In paragraph 6 of my judgment, handed down on 27th November 2018, I explained that Ashok had been granted 'rights in respect of the plots …as a result of and in 'payment' for brokerage and underwriting activities he had carried on for those interested in the sale, or development, of the site'. In so doing, I neither reached, nor stated any conclusion as to whether the rights granted required the payment of the monetary consideration falling due under the indentures. Nor, at that stage and as appears from paragraph 22 of the judgment, was there any suggestion made by Jaivant that Ashok's rights under the agreement were any larger than those disclosed by the indentures. Specifically, there was no suggestion at all that the monetary payments under the indentures had been waived in consideration of Ashok's underwriting/brokerage activities. That suggestion, I believe, was only first made at, or about, the time that Jaivant, late in the day, applied to re-amend his Points of Claim.

164. The provenance of paragraph 6 of my judgment was paragraph 8 of Ashok's witness statement, dated 1st August 2018. It was that paragraph which purported to explain that Ashok had been 'rewarded' by an allocation of plots to the brothers, on account of 'multiple sales of plots for the benefit of the developer'. That paragraph, itself, however, made it very clear that what was allocated was no more than the rights to the plots contained in the indentures. Nothing was said as to any waiver of the consideration payable under the indentures.

165. The fact is that there is no evidence of any such agreement and, so far as I can see, no evidence, either, from which such an agreement can be inferred. All I am given, by Jaivant, is an attack upon Ashok's credibility as to the circumstances in which the indentures came to be granted and a surmise (it can be no more) that, because Ashok's evidence as to those circumstances is suspect, the conclusion to be drawn is that he is hiding the waiver, or some collateral arrangement, amounting to a waiver.

166. I am not persuaded that, even if I distrusted Ashok's evidence, I should, or properly could, make the leap to the conclusion that Jaivant seeks. In the result, however, that question does not arise, because I feel able to accept Ashok's oral evidence as to the circumstances of the so-called allocation.

167. When asked about paragraph 8 of his witness statement and, specifically, about the reference to the allocation being a reward for multiple sales, Ashok was clear in his denial that that had been the case and maintained that denial in the face of lengthy questioning, including by the court. He was adamant that what had happened was that

he had taken indentures for Victorian View, at the prices for the plots stated in the indentures, that he had done so in the expectation that two of the plots would be sold to Deepak and Ramesh, at considerably larger prices than those shown in the indentures, and that the profit on those sales would have funded the purchase of the other two plots with some profit over. What became clear and what, I think, had led to a misunderstanding, on all parts, is that Ashok's concept of 'commission' was not that it was a payment provided by the developer but, rather, that, because the profit on two of the plots would have funded the purchase of the other two, those latter two could be regarded as 'commission'. In this analysis, the only 'payment' emanating from the developer might be that which would be reflected if the price payable by Ashok (and, he would say, Jaivant, as well) was lower than the price at which the plots were generally available.

168. It seemed clear to me that, while Ashok struggled in his exposition of the foregoing, he was adamant about the substance. In the event, I am satisfied that he was telling me the truth. Part of that truth was, of course, that there had been no waiver of the payments due under the indentures.

169. In accepting Ashok's evidence, including that as to the absence of a waiver, I am fortified by three matters. Firstly, Ashok's explanation is wholly consistent with the arrangements that were sought to be made with Ramesh Shah for the purchase of one of the plots. The profit on that sale would have, in itself, have paid for the purchase of two of the other plots. Had the sale to Deepak gone ahead at a similar price, that sale would have paid for the further plot and, in Ashok's terms and as Ashok said in evidence, they (the brothers) would have got 'two plots as 'commission' and some monetary benefit as well'.

170. Secondly, it is undeniable that all four indentures contain handwritten figures, in respect of the monetary consideration for each proposed purchase. If no payment was contemplated it is hard to see why those figures were included, or why a nominal figure was not included.

171. Thirdly and most significantly, Ashok's explanation accords, very closely indeed, with Jaivant's own explanation of the brothers' underwriting/ brokerage services, as set out in paragraph 5.2 of Jaivant's Amended Defence and Counterclaim, dated 29th October 2015, in the overall proceedings. That paragraph explained that what the brothers (not merely Ashok) called underwriting, in respect of property development in Bangalore, is precisely what Ashok has described in his evidence in this case; namely a situation where the brothers would 'agree to take some plots at an early stage of development at a certain price, then sell most of those plots, either taking profit or allowing the profit to cover their retention of some of the plots'. That is what Ashok had hoped to happen in this case.

172. In the result, I am satisfied that there was never any agreed waiver of payment, as between Ashok and Victorian View and that Ashok's evidence to the court as to his acquisition of the indentures and his intentions in respect of the indentures is true.

173. The consequence of that conclusion is that a number of legal questions raised and deployed at trial, as to the admissibility, in any Indian proceedings to enforce the indentures, of evidence as to any agreed waiver, or collateral contract, no longer arise.

Correspondingly, the difficulties which might have arisen in such proceedings, arising out of FERA and FEMA, also, no longer arise.

174. In light of the foregoing, I will deal only very shortly with the admissibility arguments.

175. The burden of those arguments was to the effect that, even if there had been an agreed waiver of monetary payment, evidence of that agreement would have been inadmissible before an Indian court, in the event that Ashok had brought proceedings for specific performance, with the consequence that, unless he had, in fact, paid the monetary consideration, or, as I read section 16(c) of the Specific Relief Act 1963, unless he was ready willing and able to perform his part of the indentures, including those as to payment, specific performance would have been unavailable. The supposed relevance of this, I think, was to establish that waiver, or no, specific performance would not have been as readily available to Ashok as Jaivant sought to contend.

176. The admissibility arguments turned, primarily, on section 92 of the 1872 Act, which would appear to reflect, in Indian law, some aspects of the parol evidence rule. Some reference was also made to section 115 of that Act, in respect of estoppel.

177. The structure of section 92 is to enact, subject to certain provisos, that, in respect of a written contract such as the indentures, 'no oral agreement or statement shall be admitted … for the purpose of contradicting, varying, adding to, or subtracting from, those terms'. That provision would, on its face, preclude evidence contradicting the terms of the indentures as to the payment of monetary consideration. The question, therefore, is whether any of the provisos to section 92 would authorise such contradictory evidence. The provisos which were relied upon by Jaivant, in this regard, were provisos (3) and (4). Separately, section 115 of the 1872 Act was relied upon in support of a submission that Victorian View would be estopped, in any proceedings, from denying that it had agreed to waive monetary payment under the indentures.

178. Proviso 3 allows the proof of a separate oral agreement constituting a condition precedent to the attaching of any obligation arising under the written contract. Proviso 4 allows the proof of the existence of a distinct subsequent oral agreement rescinding, or modifying, such a contract. Section 115 provides that when a person 'by his declaration act or omission' has 'intentionally caused or permitted another person to believe a thing to be true and to act upon that belief' then, in any proceedings, the first person shall not 'be allowed to deny the truth of that thing'.

179. Proviso 4 is plainly unavailable. There is no question of any subsequent oral agreement in this case. Proviso 3 is, also, in my view, inapplicable. A condition precedent is a condition that has to be fulfilled before something else, say a contract, or a condition of a contract, takes effect. An oral agreement that no consideration would be payable under the indentures, notwithstanding their terms, is not such a condition.

180. In regard to estoppel, it does not seem to me that section 115 of the 1872 Act is at all material. That section is concerned, as I read it, with estoppel by representation; that is to say estoppel as to facts. Any estoppel in this case would, as Shona, rightly,

agreed, in cross examination, be a promissory, or equitable estoppel; a promise by Victorian View that it would not enforce the terms as to monetary consideration.

181. The parties did not explore the Indian law as to promissory estoppel and, in the absence of contrary evidence, my assumption is that Indian and English law are the same. On that footing, that promise, if relied on by Ashok to his detriment (the detriment here being Victorian View resiling from its promise not to enforce payment) would be enforceable against Victorian View were Victorian View seeking payment. If, however, relied upon by Ashok, in a claim for specific performance and as a ground for seeking such performance without making the payment due under the indentures, then it seems to me that promissory estoppel would not come to Ashok's assistance. Promissory estoppel is a shield not a sword and, in consequence, could not be used in the enforcement of a claim for specific performance, as opposed to the defence of a monetary claim.

182. In the result and had I concluded that Ashok and Victorian View had agreed, orally, to a waiver of monetary payment, I would still have concluded that that waiver was inadmissible and unenforceable in a claim for specific performance, such that Ashok, to secure specific performance, would have had to establish either payment, or a readiness and willingness to make payment.

183. Reverting to the value of the plots to the brothers, the consequence of my conclusion as to waiver is that, the apparent potential value of the plots to the brothers, at the date of the indentures, was, as explained in paragraph 149 of this judgment, some £56,000. That value, however, would have been obtained by way of what were, in effect, sub-sales of the plots and, therefore, by a process of self-funding.

184. There was, as I see it, no contemplation, under the arrangements in respect of the plots, as explained by Ashok and by Jaivant (in his October 2015 Amended Defence and Counterclaim), that the brothers would have to advance any funds at all in purchasing the plots, since all the funding would come from the onward sales, and there has been no suggestion at all that Ashok had any available funding from the brothers' business activities, such as to enable him to make payment independently of those contemplated onward sales. As already set out, in paragraph 82 of this judgment, Ashok was under no obligation to use his own funds to make payment, nor, unless the absence of funds to pursue a claim for specific performance had arisen from his own default, was he under any duty to utilise his own funds in the pursuit of such a claim.

185. Against this background, I turn to consider the efforts made by Ashok to secure title to the plots, or otherwise maximise the value of the indentures for the benefit of the brothers.

186. I have already indicated that I accept, in broad terms, Ashok's account, or explanation, of the circumstances, as he saw them, which arose in respect of the plots and the steps, such as they were, which he took, in respect of the plots.

187. In what Mr Roseman regarded as the key period, namely in the three, or so, years following the entering into of indentures during which a claim for specific performance could have been advanced (the (Indian) Limitation Act 1963 imposes a limitation period of three years from the date fixed for performance; that date being,

in effect, three years from the date when the last instalment of monetary consideration should have been paid and the registered sale deed provided), Ashok was, as he explained in his evidence and as already set out in paragraph 158 of this judgment, in regular discussion with Mr Hindocha, in respect of the plots and in respect of the conversion of the plots from agricultural land. He told me that, in his discussions with Mr Hindocha, he would ask what was happening 'on the legal side' and when he was to receive the registered sale deeds. He was not surprised at the delay because there was always delay.

188. While, as already stated, I think that Ashok may have been overstating the position, in claiming that, on every occasion that he spoke to Mr Hindocha, he called for the sale deeds, I do not regard the discussions as being in doubt. Nor, given the extent of detail in Ashok's evidence, do I regard it as in doubt but that he was, at least in some of their discussions, chasing up the sale deeds. This was the period when, through Jaivant, Ashok was seeking to sell two of the plots to Ramesh and Deepak. In that context, it would be very surprising indeed if he was not pursuing the completion of the sales of the plots with Mr Hindocha and Victorian View.

189. The next salient date, in respect of the plots, is 2001, when, as part of the 2001 agreement, they are identified as assets of the brother's business, with the modest value of 1.4M rupees. While the provenance of that value is in issue, what is clear is that, at that date, there was a clear perception, or, perhaps, belief, that the indentures would be brought to completion, such that the plots could be sold off for profit.

190. It is shortly after that date, in, or about 2002, that Ashok asserts that he was first told by Mr Hindocha that there were 'encroachment' issues in respect of Victoria View. The context, as set out in paragraph 16 of Ashok's witness statement, dated 2nd August 2019, is that he was first told about these issues by Mr Hindocha in explanation of the subsisting delays in effecting completion of the purchase of the four plots. Mr Roseman queried this chronology, referencing an email from Mr Hindocha, in 2011, as being the first documentary evidence in respect of the so-called encroachment issues, suggesting, as I understand it, that those issues did not become 'live' until much later and that right up until 2009, some eight years after the plots had formed part of the subject matter of the 2001 agreement, Ashok had done absolutely nothing to get in the land.

191. I am not persuaded. It seems much more likely to me that the issues of encroachment were raised with Ashok when he says they were and that, as he says, they were raised in response to Ashok's continuing attempt to get some movement in respect of the completion of the purchase of the indentures. I can see no reason why Ashok, having earlier on, as I find, been pursuing the completion of the purchase of the plots and having treated them in 2001 as having some value should, thereafter, have done nothing at all until 2009, at which date there is no doubt but that Ashok was in communication with VVLOWA in respect of the problems at Victoria View.

192. It is much more likely that Mr Hindocha did raise the problems with the site in 2002, and did, as Ashok explains, in his August 2019 statement, encourage Ashok to leave matters in his, Mr Hindocha's, hands and that it is, for that reason, that Ashok, thereafter, left matters, largely, in abeyance for as long as he did. Whether, in truth, there was serious encroachment, at that stage, or whether encroachment was being used by Mr Hindocha as an excuse to explain away his failure to make and register

title (given, as already discussed, his lack of title), I cannot say. It is noteworthy, though, that VVLOWA was formed in 1999 and that, in 2007, that entity was writing to regional officials in Bangalore, stating, that, in the recent past the original vendors of plots on the site had been re-registering them in favour of third parties. Serious issues in respect of the plots plainly existed prior to 2007.

193. It is not in issue but that Ashok entered into discussions with VVLOWA in 2009. His evidence, which was not specifically challenged, is that he was approached by Ms Clare Patel, of VVLOWA, who was, as I understand it, contacting those who appeared to have an interest, or connection, with the various plots in order that they make common cause against those who were, in VVLOWA's terms, encroaching on Victoria View. I see no reason to disbelieve that evidence. While Ashok's evidence to me is that throughout the period from 2002 to 2009 he remained in contact with Mr Hindocha, the matter of completion having been left with Mr Hindocha, it does not seem to me to be at all likely that that contact was more than desultory. In Ashok's witness statement, of August 2018, he described himself as adopting a wait and see approach and there is a strong sense, in the evidence, that, had Ms Patel not contacted Ashok, in 2009, he would have gone on waiting.

194. As it was, there were quite considerable communications between Ashok and VVLOWA, in the period from 2009 and extending to 2012. Ashok's evidence is that he was invited to join VVLOWA and to make payments to VVLOWA, such as to assist in the provision of the funding which would be required to resolve the issues at Victoria View and that he, ultimately, declined to join.

195. Questioned on this by Mr Roseman, he explained, with a degree of candour, that, following discussion with Mr Hindocha, he had, as he put it, decided to be a member, but not a member; that is to say that he wanted to keep in touch to know what was happening, but did not want to involve himself financially. This squares with his written evidence, in August 2019, in which he explains that Mr Hindocha advised him that to involve himself with VVLOWA would be a futile waste of money and that, since VVLOWA would continue to seek to protect the plots anyway, he, Ashok, had nothing to gain by joining. As already stated, in giving that advice, Mr Hindocha, may well have had his own agenda. In accepting it, Ashok may well be accused of behaving cynically. This was, however, one of those areas of evidence, where I was wholly satisfied that Ashok was telling me the truth.

196. I am equally satisfied that Ashok was telling me the truth about a final line of activity, carried on, subsequent to, or parallel with, his involvement with VVLOWA, in what would appear to have been a last ditch effort to make something from the four plots and which emerged in the course of Ashok's cross examination by Mr Roseman.

197. A property consultancy in Bangalore, PNS, approached Ashok, in, or about, April 2012, on the footing that they might have had buyers for the four plots. Ashok sent copies of his indentures to PNS in June 2012 and, later, in September 2012, copied PNS into one of VVLOWA's emails concerning encroachments at Victoria View and informed PNS that he had a friend who had other plots with similar problems, but who had enlisted lawyers and the police in an attempt at resolution. Ashok explained that buyers existed who would buy rights, such as those contained in the indentures, even where there were problems, that he had provided PNS with the indentures in the hope of getting 'something moving' and that he had continued to speak to PNS,

because, as he put it, he was not going to cut off a potential purchaser of the indentures. In the end, however, nothing had happened.

198. Although Ashok told me that he had continued to communicate with Mr Hindocha about the plots right up until 2017, it comes as no surprise, given what has emerged from the very full investigation of Victoria View, carried on by the two experts and discussed, at length, between paragraphs 86 and 146 of this judgment, that nothing further was ever achieved.

199. That discussion and, in particular, the conclusions that I set out at paragraph 146 of this judgment is, in my view, determinative of this case. The reality of this matter is that the indentures in respect of the four plots were never capable of being brought to completion because Victorian View never had the authority, whether by power of attorney, or otherwise, to convey the plots, or to provide, as required by the indentures, Ashok with registered sale deeds.

200. Unbeknownst to Ashok, at least at the outset, the indentures never had any real value. The reason why Mr Hindocha, although chased for registered sale deeds, never provided them was because he had no ability to do so. Anything that he might have provided, as with, for example, the registered sale deeds provided, or procured, in respect of the plots referred to in paragraph 93 of this judgment, could only have been provided under the purported authority of a power of attorney which, in fact, would not have related to the plots in question and would, in consequence, have conveyed no title.

201. Correspondingly, in the absence of a valid power of attorney, granted to Victorian View, by the landowners, and in the absence of any contractual relationship with the landowners, specific performance was, as agreed by the two experts, never an available remedy.

202. The consequence of all of this is that, even if Ashok had carried out all the steps suggested, or identified, by Jaivant, as set out in paragraph 24 of this judgment, or any other steps that a trustee, acting properly in the fulfilment of his duties, as such, should have carried out, I have no doubt at all that such steps would have been completely ineffective and would not have resulted in Ashok procuring good title to the four plots for the benefit of the brothers' business.

203. I am satisfied, therefore, that, even on the assumption that Ashok's action, or inaction, amounted to a breach of trust, the answer to the counterfactual question, set out in paragraph 74 of this judgment, is that that breach has made no difference and that the burden, resting on Ashok, to establish that his breach of trust, if any, has caused no loss, has been fully made out.

204. In the light of that conclusion, it is not strictly necessary to reach a final determination, as to whether, in the context explained and discussed in this judgment, Ashok properly fulfilled his duty as trustee, or whether, if there has been a breach of duty, Jaivant has been complicit in that breach, by agreeing to, or acquiescing in, the approach that Ashok had adopted in respect of the four plots, such that he is estopped from pursuing any claim against Ashok for that breach.

205. Those matters, having been fully canvassed, however, I think it important, for all parties, that I set out my conclusions and my reasons for those conclusions.

206. In respect of the first question, Ashok's conduct must be viewed from the perspective available to him, at and following the date that he entered into the indentures. In so doing, one must, I think, set aside the fact, now known, that whatever actions Ashok took would have made no difference and, also, the fact, now known, that the four plots are now extremely valuable. That was a fact not known, or perceived, in 1995, nor, as the 2001 agreement demonstrates, in 2001. Further, as Mr Roseman, rightly, submitted, the question for consideration is not whether Ashok's conduct was consistent, in this instance, with the way that he, or the brothers, carried on their own business affairs, but whether, in the circumstances obtaining, he acted in the way that a person of ordinary prudence, acting in his own affairs, would have acted in those circumstances.

207. The circumstances obtaining at and following the date that the indentures were entered into were these: the purchase was of four plots of a value to the brothers, if sold on by appropriate sub-sales, of some £56000; the purchase was to be self-funded by the sub-sales and was not intended, or expected, to require the use of any of the brothers' own funds; no suggestion is made, by Jaivant, or at all, that such funds were, or could have been, available; the plots were of agricultural land and required conversion before a lawful purchase could be completed; Ashok's understanding, based upon what he was told by Mr Hindocha and his prior experience, was that this could be a lengthy process. The person with whom he was, primarily, dealing, Mr Hindocha, was someone who, on the evidence, he trusted and has continued to trust. It is also of note, I think, and easily overlooked that Ashok, like Jaivant, was based in London. He was not on the spot.

208. It seems to me that an ordinary prudent person in the like position and with the like knowledge and experience as Ashok would have acted very much as did Ashok.

209. In the first place he would have done, as Ashok did, namely keep regular contact with Mr Hindocha, enquire about the progress of conversion, what was happening on the 'legal side' and when he would receive the registered sale deeds. In light of his experience, the fact that the process was long drawn out would not, of itself, have rung warning bells, raised concern, or conveyed the need for other action.

210. The critical question, however, is how the prudent person would have acted as the delays continued. In particular, would such a person have moved from personal contact to some other form of action within the limitation period, or, indeed, taken legal advice, as to the limitation period and generally, at a much earlier stage even than that?

211. The answer, as it seems to me, turns upon the availability of funds. While, the brothers' mode of business was, I think, to rely upon contacts and connections and not to invoke lawyers, it is probable that a prudent person in Ashok's position and with a sufficient fund of trust monies to hand, would, when the period of delay had become measurable in years, have taken steps, not to litigate, as such, but to explore the measures available to enforce the indentures. The abortive dealings with Ramesh and Deepak had shown that there was a not insignificant value in the indentures and a well-funded trustee would I think have wanted to investigate the possibilities.

212. Ashok, however, was not a well-funded trustee and did not have the luxury of substantial funds. Although Jaivant's case, or part of it, is that Ashok should have secured legal advice and should, if need be, have issued proceedings for specific performance, Jaivant has been entirely silent as to the source of the funds that would have been required for that purpose. He has, at no point, suggested that such funds were, or could have been made available, if called for, or explained, in any way, from where such funds could, would, or should, have been acquired. Nor has he acknowledged that, without any funds emanating from the business, Ashok was under no obligation, as trustee, to use his own resources. His want of funds was not a consequence of any breach, by him, of his trust obligations, but a consequence of the self-funding vehicle used by the brothers in their business and of the fact that a failure by the vendor complete (and so to enable a sub-sale, or sales, to proceed) had the effect of depriving the brothers of the funds that would have arisen from the sub-sales.

213. Faced with a lack of funds and with no suggestion that such funds would be forthcoming, a prudent person, in Ashok's position would have had no option but to do as Ashok did, namely to continue to press for a completion and to place his trust, in that regard, in the person with whom he had been dealing.

214. Correspondingly, as matters progressed and when the so-called encroachment issues emerged, in 2002/3, the prudent and only course, given the passage of time and the lack of funding, was, as it seems to me, to continue to look to the party, Victorian View, which had the legal responsibility to get in and register a valid sale deed, to carry out its obligations. In that context and lacking alternatives, it was, likewise, the prudent and sensible course, to seek to keep, as Ashok sought to keep, good relations with Victorian View.

215. As already indicated, I am not wholly persuaded that, after 2002/2003, Ashok maintained more than desultory contact with Mr Hindocha, or that, had it not been that he was contacted by VVLOWA, in 2009, he would not have given up on the four plots as a lost cause. The reality, however, is that there was little, or nothing more that he, or any other person, however, prudent, could have done. When VVLOWA contacted him and when he became aware of their activities, his approach, albeit cynical, was to seek to take advantage of those activities, without funding those activities. Again, I do not think that a prudent person, with no cards to play, could have done anything more, or that Ashok can be criticised, as trustee, for acting in the way that he did.

216. Ashok's final attempt to secure some value from the indentures was his effort, in 2012, to get 'something moving' with PNS, by seeking, as I understand it, to sell the indentures for whatever he could get. Nothing came of this, but it is a useful indicator that Ashok was even at this late stage seeking to get some value for the brothers out of the indentures.

217. In the result, in the very unusual circumstances of this case and having particular regard to the lack of any trust resources, with which to carry on any legal investigation as to the possibilities in respect of enforcing the indentures, I am satisfied that Ashok's conduct in respect of the indentures did not constitute a breach of his duties as trustee, or, in the particular circumstances, amount to a want of due diligence.

218. For the avoidance of any doubt, however, I am equally satisfied, for the reasons, already, fully set out, that had such an investigation taken place it would have achieved nothing. At best, it would have informed Ashok of Victorian View's want of authority, at an early stage, and, consequently the impossibility of securing conversion of the four plots from agricultural to non-agricultural land and, thereafter, obtaining valid registered sale deeds and good title by legal means. At worst, it could have resulted in long drawn out, but ultimately unsuccessful litigation at serious cost to the brothers. In either case, it would have been ineffectual and a waste of resources.

219. The final question for consideration is Ashok's contention that Jaivant was fully informed of and, at the least, acquiescent in Ashok's decisions and actions and that, for that reason, Jaivant was, or would have been, if those decisions, or actions, had placed Ashok in breach of his trust, estopped from asserting a claim against Ashok arising from those matters.

220. In light of the decision of Wilberforce J, as he then was, in **Re Pauling's Settlement Trusts [1962] 1 WLR 86**, set out at **107**, cited, without disapproval, on appeal (**[1963] 1 Ch 303, at 339**), the issue to be determined is whether Jaivant can properly be said to have concurred in Ashok's conduct and, if so, whether it would, in all the circumstances be fair and equitable for him to be allowed, having concurred in the breach, to sue the trustee, or trustees, in respect of that breach. In this regard, I agree with Mr Roseman that concurrence requires more than an awareness of the conduct in question. There must also be shown an agreement, or approval, of that conduct.

221. Ashok's case is that Jaivant was fully aware of and concurred to the fullest extent in the actions and decisions taken in respect of the plots. Jaivant's case, at trial, was that he was kept in complete ignorance of what was happening in respect of the plots and that all he was ever told was that Ashok was handling matters.

222. I have not been able to accept that Jaivant was either as ignorant of, or as uninvolved in, the matters arising from the acquisition of the indentures as he now makes out. I have already indicated, at paragraph 156 of this judgment, that I accept, as true, Ashok's broad account of events. The necessary corollary of that finding is that, where Jaivant's and Ashok's accounts are at significant odds, I prefer Ashok's evidence; in this context, his evidence that Jaivant was made fully aware of the problems in securing valid registered sales deeds and that Jaivant concurred in the steps that Ashok took towards a resolution of those problems.

223. In view of the conclusions, which I have already reached and already set out, as to the overall merits of Jaivant's claim, I see no need to discuss Jaivant's credibility at any great length. It is to be noted, however, that, in contrast to Ashok, Jaivant's evidence, in respect of the brothers' business assets, at the 2017 trial was riddled with deliberate and calculated untruths. It is also to be noted that, in respect of this trial, Jaivant elected, until a very late stage, to advance claims against Ashok which were, ultimately, not pursued. That does not speak well as to his reliability. His evidence that he was 'shocked', when it was asserted, on behalf of Ashok, in March 2018, that Ashok's interest in the four plots was simply his interest in the indentures, likewise, does not sit well with the fact that, on his own evidence, he had been informed, by Mr Hindocha, in 2014, of the existence of problems in respect of the plots and of Ashok's failure to take steps to resolve those problems.

224. In regard, specifically, to Jaivant's knowledge and approval of Ashok's conduct, or dealings, in respect of the four plots, it is Ashok's evidence that Jaivant was fully involved in the acquisition of the indentures from the outset. When he referred, in evidence, to the reservation of the plots and to the attempted sales to Deepak and Ramesh, he, consistently, stated that 'we' (meaning himself and Jaivant) had reserved the plots and that 'we' were selling the plots. I did not regard that evidence as, at all, contrived. It was another area where Ashok's evidence carried a clear ring of truth.

225. That evidence is, also, consistent, again, with Jaivant's own pleaded explanation of the brothers' 'underwriting' activities in Bangalore, as set out in paragraph 5.2 of Jaivant's, October 2015, Amended Defence and Counterclaim. That paragraph referred, not to Ashok's underwriting activities in Bangalore, but to the brothers' activities in Bangalore. Contrary to the impression that Jaivant sought to give at trial, namely that Bangalore was nothing, really, to do with him, Jaivant's own pleading acknowledges that the brothers' dealings in Bangalore were mutual.

226. That mutual involvement is writ large, when regard is had to Jaivant's dealings with Deepak and Ramesh. In cross-examination, Jaivant acknowledged that those sub-sales were agreed, not by Ashok, but by both brothers. Subject to that Jaivant was, as it seems to me, the prime mover. Deepak and Ramesh were his connections and, as he accepted in cross examination, it was to him they turned when their agreements with the brothers were not fulfilled.

227. In regard to Ramesh, his witness statement, in the litigation that he commenced against Jaivant, in 2009, explained that he and his wife had bought the Victoria View plot 'through JV Shah (Jaivant) and given JV Shah the first payment … all the documents were kept by JV Shah'. It was Ramesh who disclosed the manuscript document, provided to him by Jaivant and discussed at paragraph 149 of this judgment, which identified the price that Ramesh was to pay and the deposit that he was to provide.

228. Jaivant accepted that he had given Ramesh the document. He professed no knowledge of its contents. He had, he said, simply, handed it over. Likewise, notwithstanding that it was Jaivant with whom both Deepak and Ramesh perceived themselves to be dealing, to whom they made complaint as to the non-delivery of the plots and with whom Jaivant, eventually, came to a settlement, Jaivant persisted in the assertion that, over what must have been very many years, he could secure no information as to the plots from Ashok and that Ashok left him completely in the dark.

229. Irrespective of the weight that I am able to give to Ashok's evidence, I find Jaivant's evidence, as last set out, completely implausible and incapable of belief.

230. It is, simply, not credible that, having been a party to the agreements made with Deepak and Ramesh, as to the sale of two of the plots, in circumstances where they were his connections and where, at least in part, the arrangements were related to the unrepaid borrowings that he had received from Deepak and Ramesh, Jaivant would have passed on Ashok's calculations as to the price of the plot to Ramesh without considering those calculations and without first having discussed and agreed that price with Ashok. I am quite satisfied that that matter must have been discussed and that Jaivant, in passing on Ashok's calculations, must have been in full agreement with Ashok as to the terms of the proposed sale.

231. I am equally satisfied, in the context last set out, that it is wholly implausible, when the delivery of the plots to Deepak and Ramesh turned out to be delayed and when Deepak and Ramesh pressed, or chased, Jaivant as to those very considerable delays, that Jaivant was, as he contends, refused any information by Ashok as to what was going on. No reason at all has been advanced as to why Ashok should behave in that way. The two brothers had, together, agreed to sell the two plots to Deepak and Ramesh. They remained, as Jaivant acknowledged on, at least, reasonable terms until 2009. All four plots, including the one which had been earmarked for Deepak, formed part of the discussions between the brothers, on the occasion of the 2001 agreement.

232. It is inconceivable, in these circumstances, that Jaivant was kept in the dark, as he now alleges. It is very much more likely, as I find, that he was both informed by Ashok of what was happening in Bangalore and, given that knowledge and the lack of any suggestion that he challenged the approach that Ashok was taking, in an effort to procure a resolution, that he approved that approach.

233. I do not think that the fact that there is a lack of written, or email, communication between Ashok and Jaivant, as to these matters, affects, or modifies, the foregoing conclusion. It is easy to forget that in the early part of the long period under discussion; that is to say between 1995 and, say, 2003, email was not the automatic medium of choice for all. It is easy to forget that both Ashok and Jaivant lived in north London and that, until 2001, the brothers had an office in north London. It is just as, if not more, likely, in this context, that discussions about these matters were face to face, or on the telephone, as that they should have been the subject of written communication.

234. Rather, I think that the true measure of the mutual approach adopted by Jaivant and Ashok, in respect of the four plots, is to be found in Ashok's evidence that, at some date between 2008 and 2010, Jaivant (in much the same way that Ashok, later, did with PNS) took steps to find buyers for the indentures, in the hope that something could be done to obtain some value from the indentures for the brothers.

235. Jaivant denied that he had acted in this way. I, however, prefer Ashok's evidence. I do not think that Ashok's evidence was a gratuitous lie and I accept what he said about this as true.

236. The regrettable fact is that Jaivant has lied to me both about the extent of his knowledge of the arrangements with Ramesh and about his communications with Ashok and his knowledge of what Ashok was doing in respect of the four plots. He has done so, as it seems to me, in order to disguise the fact that he was both aware of and agreed Ashok's actions and in the hope that he would, thereby, advance his prospects in the current proceedings.

237. In the result, I am satisfied that Jaivant concurred with Ashok in the approach that they took in respect of the four plots. I am further satisfied that, if that conduct, or any of it, constituted a breach of duty by Ashok, as trustee, it would not be fair or equitable, given that concurrence, to allow Jaivant to sue Ashok in respect of that breach.

238. The overall conclusions, therefore, that I have reached, in respect of Jaivant's claim, in wilful default and breach of trust, is that that claim fails and is to be dismissed.

Ashok has not acted in breach of trust. If he has, then Jaivant has concurred in that breach in such a way as to preclude him from suing for the breach. In any event and given, primarily, the absence of any valid power of attorney, in favour of Victorian View, in respect of the four plots, any steps that Ashok, as trustee, should have taken would have been ineffective to secure good title to the plots.

239. The court is, therefore, left with the original question raised by my orders of 1st November 2017 and 29th November 2018, namely the sum for which Ashok should account to Jaivant and Bharat in respect of his actual interest in the four plots. That interest, as now agreed, or accepted, is his bare contractual interest under the indentures and that interest is agreed as having, now, no marketable value. The amount, therefore, for which Ashok should account to his two brothers is nil.