Neutral Citation Number: [2020] EWHC 2753 (Ch)

CASE NO: D30BM70

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN BIRMINGHAM

BUSINESS LIST (CH.D)

Judgment handed down on 16 October 2020

B E T W E E N:

(1) PRAVIN PATEL

(2) NALINI PATEL **Claimants**

- and -

(1) BARLOWS SOLICITORS (a firm)

(2) PAUL STANLEY AND PAUL BARBER (as joint trustees in bankruptcy of Drupad Chorera)

(3) MR NIRMAL TANNA **Defendants**

BEFORE HIS HONOUR JUDGE MITHANI QC, SITTING AS A JUDGE OF THE HIGH COURT, at the Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street Birmingham, B4 6DS

Mr Sam Laughton (instructed by Frisby & Small LLP) for the Claimants

Mr John Vickery (instructed by Irwin Mitchell LLP) for the Second Defendants

The Third Defendant did not appear and was not represented

Approved Judgment

EXPRESSIONS AND ABBREVIATIONS USED IN THIS JUDGMENT

1 In this judgment, the following words and expressions shall have the following meanings assigned to them:

"the Claimants' Advance" shall mean the sums totalling £210,515 (or any part or parts thereof) paid by the First Claimant and/or the Second Claimant directly or indirectly to Barlows for the purchase of the First and Second Properties;

"the Bankrupt" or "Mr Chorera" shall mean Mr Drupad Chorera who was made bankrupt by an order of District Judge Whitehurst in the Leicester County Court (now the County Court at Leicester) on 20 March 2012;

"Barlows" shall mean Messrs Barlows, solicitors, who acted on behalf of the Bankrupt in the proposed purchase of the First and Second Properties and were the First Defendants to the Claim but against whom the Claim has since either been discontinued or dismissed;

"Mr Gooch" shall mean Colin Gooch, a partner or former partner in Barlows;

"the Claim" shall mean the claim made by the Claimants against the Defendants made in this action;

"the First Claimant" shall mean Mr Pravin Patel;

"the Second Claimant" shall mean the First Claimant's wife, Mrs Nalini Patel;

"the Claimants" shall mean the First and Second Claimants;

"the Previous Trustee" shall mean Mr Steven Williams who was appointed as the trustee in bankruptcy of the estate of the Bankrupt on 28 June 2012 but who was replaced as such trustee on the appointment of the Second Defendants as joint trustees of the estate of the Bankrupt on 4 July 2016;

"the Second Defendants" shall mean Mr Paul Stanley ("Mr Stanley") and Mr Paul Barber ("Mr Barber"), the joint trustees of the estate of the Bankrupt, both partners at Begbies Traynor (Central) LLP, who were appointed trustees in bankruptcy of the estate of the Bankrupt on 4 July 2016 under a block transfer order to replace the Previous Trustee;

"the Third Defendant" shall mean Mr Nirmal Tanna;

"the Negligence Claim" shall mean a claim brought by the Second Defendants for negligence, in their capacity as joint trustees of the estate of the Bankrupt, against Barlows in the High Court of Justice, Chancery Division, Manchester District Registry under claim number C30MA407 pursuant to which they received the Settlement Amount;

"the Settlement Amount" shall mean the sum of £275,000 or any part thereof standing to the credit of a deposit account in the name of the Second Defendants' solicitors, recovered by the Second Defendants against Barlows under a "Tomlin" order made in the

Negligence Claim and shall, where appropriate, include any interest accrued on that sum since it was paid into that deposit account;

"the Expenses Application" shall mean the application dated 24 August 2020 made by the Second Defendants under which the Second Defendants seek to recover their costs, expenses, disbursements, and remuneration for collecting and realising the Negligence Claim and preserving and distributing the Settlement Amount;

"the Trust Costs", shall mean the costs, expenses, disbursements and remuneration of the Second Defendants incurred and (where appropriate) proposed to be incurred for collecting and realising the Negligence Claim and preserving and distributing the Settlement Amount;

"the First Property" shall mean the property at 106 High Street, Colliers Wood, London;

"the Second Property" shall mean the property at 108 High Street, Colliers Wood, London;

"the Third Property" shall mean the property at 43 High Street, Colliers Wood, London;

"the First and Second Properties" shall mean the First Property and the Second Property;

"the Properties" shall mean the First Property, the Second Property and the Third Property;

"the Joint Venture" shall mean the enterprise which the First Claimant claims he, the Bankrupt and the Third Defendant entered into in partnership for the purchase of the Properties;

"Wingfield" shall mean Wingfield Financial Heritage Ltd, a company registered in the BVI, which had purported to sell the Properties to the Bankrupt;

"MPV" shall mean Montello Private Finance Ltd, which had agreed to provide the balance of the purchase price by way of bridging finance to the Bankrupt for the purchase of the First and Second Properties;

"the Joint Venturers" shall mean the First Claimant, the Bankrupt and the Third Defendant;

"Mr Thakrar" shall mean Mr Hasukumar Thakrar;

"the Written Agreement" shall mean the written agreement dated 29 March 2010, drawn in the names of the Joint Venturers and Mr Thakrar but signed by the Joint Venturers only; and

"PA 1890" shall mean the Partnership Act 1890.

2 In addition, in this judgment, unless otherwise stated or the context otherwise requires, any reference, where appropriate to:

(a) "the First Claimant" shall also include the Second Claimant;

(b) "The Claimants" shall include either the First Claimant or the Second Claimants;

(c) "the Trust Costs" shall include the whole or any part the costs, expenses, disbursements and remuneration of the Second Defendants incurred and (where appropriate) proposed to be incurred for collecting and realising the Negligence Claim and preserving and distributing the Settlement Amount;

(d) a paragraph number on its own is to a paragraph number in this judgment.

THE CLAIM

3 In the Claim, as it is now formulated in the Re-Amended Particulars of Claim dated 28 March 2019, the First Claimant seeks the payment to him of the whole or a substantial part of the Settlement Amount held by the Second Defendants' solicitors, Irwin Mitchell LLP, on behalf of the Second Defendants. The Settlement Amount represents the fruits of the Negligence Claim brought by the Second Defendants in negligence against Barlows who were the first defendants to the Claim, but against whom the Claim has since either been discontinued or dismissed. I have not seen the order or agreement under which the Claim against them was dismissed but understand that it was on the basis that each side (i.e. the Claimants and Barlows) would pay their own costs.

4 Although the Second Claimant continues to be a claimant in the Claim, she no longer seeks any substantive relief in it. That is because she assigned the benefit of any interest which he had in the Claim to her husband, the First Claimant. I have not seen a copy of the assignment and, so far as I am aware, neither have the Second Defendants. However, they do not challenge either the fact, or validity, of the assignment. The Second Claimant has provided a witness statement in support of her husband's entitlement to the Settlement Amount and been cross-examined on the contents of that statement.

5 The Claim is made by the First Claimant against the Second Defendants in their capacity as the joint trustees in bankruptcy of the Bankrupt. The Bankrupt was made bankrupt by an order of District Judge Whitehurst in the Leicester County Court on 20 March 2012. The Second Defendants, both partners at Begbies Traynor (Central) LLP, were appointed trustees in bankruptcy of the estate of the Bankrupt on 4 July 2016 under a block transfer order to replace the Previous Trustee, who had retired from that firm.

6 The Third Defendant was joined as a party to the claim on the application of the First Claimant. That was because the principal basis upon which the First Claimant claims to be entitled to an

interest in the Settlement Amount is that the Joint Venture was a partnership business (in which the partners were the Joint Venturers) and the Claimants' Advance (which he claims is represented by, or included in, the Settlement Amount) was paid by him as capital for the purposes of that business. The sums totalling the amount of the Claimants' Advance were paid towards the purchase of the First and Second Properties, both investment properties. Although the Joint Venturers had agreed that those properties were to be transferred to, and held in the sole name of, the Bankrupt, the First Claimant claims that the Bankrupt acquired the properties on behalf of the Joint Venture and, therefore, held them on behalf of all three Joint Venturers as partners in the Joint Venture. If the First Claimant is successful in establishing the existence of such a partnership, he seeks a declaration that the partnership is now dissolved. He also invites the court to direct the taking of any necessary accounts and inquiries consequent upon such dissolution. He can only do so if all the alleged partners are before the court by being parties to the Claim.

7 The Third Defendant accepts the substance of the Claim. He has neither filed an Acknowledgment of Service nor filed or served a defence to the Claim.

THE BACKGROUND CIRCUMSTANCES

8 This case has had a chequered history. The lengthy chronology (not agreed by the Second Defendants) prepared on behalf of the First Claimant sets out some of the relevant events which occurred.

9 The bundles prepared for the purpose of the trial are voluminous. However, a considerable amount of further documentation, which may be relevant to the Claim, appear not to have been disclosed in the Claim. I deal with some of that documentation below. I fear, therefore, that I may not have seen all the documents which were relevant to the Claim.

10 Although the facts, matters and evidence which give rise to the Claim are in substantial dispute between the parties, the background circumstances leading to the payment of the Settlement Amount are largely uncontroversial. They need, therefore, only brief mention.

11 In February 2010, Barlows were instructed by the Bankrupt to act for him in the purchase of the Properties. The vendor of all three properties was Wingfield.

12 The proposed purchase of the First and Second Properties came first in time. Part of the purchase price of the Properties (sums totalling £210,515, i.e. the amount of the Claimants' Advance) was paid by the Claimants directly, or through the Third Defendant, to Barlows.

13 Barlows transferred the purchase monies for the acquisition of the First and Second Properties to Wingfield's solicitors. The purchase

monies comprised the Claimants' Advance and the amount of a bridging loan which MPV had made to the Bankrupt. Barlows paid the purchase monies over to Wingfield's solicitors without ensuring that the Bankrupt would acquire a good and marketable title to those properties. Wingfield's solicitors, in turn, released the monies to Wingfield, who dissipated them. Wingfield became insolvent very shortly afterwards. The monies could not, therefore, be traced or recovered from Wingfield.

14 The Claimants thereupon brought the Claim, i.e. the present claim, against Barlows in negligence and also against the Bankrupt, for the amount of the Claimants' Advance together with interest. I understand that MPV has been reimbursed in full for the monies which it lost as a result of the negligent acts or omissions of Barlows.

15 On 20 March 2012, the Bankrupt was made bankrupt by an order of District Judge Whitehurst made in the Leicester County Court. On 28 June 2012, the Previous Trustee was appointed trustee in bankruptcy of his estate; and on 4 July 2016, the Second Defendants were appointed the joint trustees of that estate to replace the Previous Trustee. The Previous Trustee was substituted as second defendant to the Claim in place of the Bankrupt and the Second Defendants are now Mr Stanley and Mr Barber as the present joint trustees of the estate of the Bankrupt.

16 On their appointment as trustees in bankruptcy, the Second Defendants brought a separate claim against Barlows in negligence (i.e. the Negligence Claim) claiming, as was the case, that Barlows had been negligent in, *inter alia*, failing to properly investigate title and failing to obtain an adequate undertaking from Wingfield's solicitors, as a result of which the Bankrupt could not complete the purchase of those properties. In that claim, the Second Defendants reached a settlement with Barlows under which Barlows paid the Settlement Amount to the Second Defendants in full and final settlement of all the claims of the Second Defendants against Barlows.

17 As a result of that settlement, the Claimants allege that they had to discontinue their own claim against Barlows in the present action. They state that this was because the effect of the discontinuance was to compromise the cause of action which they had against Barlows – see paragraph 10 of the Re-Amended Particulars of Claim.

18 The claim of the Claimants – essentially now only the First Claimant – in the Claim is for the return of the capital invested by him, a declaration that the Joint Venture, which was run as a partnership business, is dissolved and a direction for the taking of all necessary accounts and inquiries. In the alternative, the First Claimant claims that the Claimants' Advance was held on trust by Barlows for the

Claimants, and the Settlement Amount, which represents or includes that amount, should be paid to him.

19 As originally put forward by the Bankrupt to Barlows' solicitors, the amount of the loss alleged to have been suffered as a result of Barlows' negligent acts or omissions was stated to be substantially greater. According to a file note prepared by Alastair Comforth (Barlows' solicitor instructed through their insurers) of a meeting which he had with the Bankrupt's representative, the amount which the Bankrupt had alleged represented his loss was in excess of £750,000 – see pages 241 to 244 of the Documents Bundle.

20 For the sake of completeness, I should add that the Bankrupt was convicted of money laundering offences and was made subject to a restraint order under the Proceeds of Crime Act 2002. I have not seen any documentation relating to that. I do not, therefore, know either when he was convicted or when he was made subject to the restraint order. Nor do I know whether he was made subject to a confiscation or other order under the Act. However, the Negligence Claim was released by the Crown from the restraint order and the Settlement Amount which represents the fruits of that claim is held by the Second Defendants' solicitors, free of any claim from the Crown.

THE BASIS OF THE FIRST CLAIMANT'S CLAIM

21 The First Claimant's case is that:

(a) in or around January/February 2010, the Bankrupt, the First Claimant, the Third Defendant and Mr Thakrar orally agreed that they would enter into business involving the purchase and sale of properties. They identified the properties at 43, 106 and 108 High Street, Colliers Wood, London (i.e. the Properties) as suitable for this purpose and put in hand arrangements to acquire them, and subsequently resell them at a profit.

(b) On 29 March 2010, that oral agreement was, in part, reduced to writing in the terms set out in the Written Agreement. The relevant provisions of the Written Agreement were as follows:

"WHEREAS

The Parties have agreed to buy [the Properties]

IT IS AGREED as follows:

1. The profits received from the proceeds in respect of the sale of the [Properties] will be split equally between the parties;

2. The receipt of the rental income of £11,500 per month will be credited into a bank account in the name of Drupad Chorera."

(c) The Written Agreement was signed by the Bankrupt, the First Claimant and the Third Defendant. Mr Thakrar did not sign it. There is no suggestion on the part of the Second Defendants that if the terms of the Written Agreement recorded the existence of an alleged partnership between those four alleged partners (which the Second Defendants dispute), the withdrawal of Mr Thakrar from it brought the partnership to an end and that the subsequent relationship between the Bankrupt, the First Claimant and the Third Defendant was, and was intended to be, materially different from the terms which had been agreed between the four of them.

(d) Despite the fact that the original (and now the remaining) parties had agreed that the Properties (or at any rate the First and Second Properties) were to be transferred in the name of the Bankrupt only, they were partnership assets and were, therefore, to be held on trust by the Bankrupt on behalf of all the partners. In his witness statement, at paragraph 22 onwards, the First Claimant provides a full explanation about why he says the Properties were to be transferred in the name of the Bankrupt only and how, on the basis that the Properties were partnership assets, they were to be held by the Bankrupt on behalf of all of the partners.

(e) The Bankrupt retained Barlows to act as his solicitors for the purchase of the Properties.

(f) The First Claimant advanced the sum of £210,515 (i.e. the Claimants' Advance) towards the purchase price of the First and Second Properties. The rest of the amount of the purchase price was advanced by way of a bridging loan from MPV.

(g) The full amount of the purchase monies which Barlows received from the First Claimant and MPV was paid over by them to Wingfield's solicitors. However, the purchase of the First and Second Properties could not be completed because there was a substantial amount of money due and owing under a prior charge to which those properties were subject and the purchase monies were insufficient to pay off that charge. The undertaking which Barlows obtained from Wingfield's solicitors to pay off the charge was inadequate. As a result, the charge could not be released, and it was not possible for the purchase to be completed. The First Claimant lost the entirety of the investment which he had made in the Joint Venture, i.e. the First Claimant's Advance.

(h) The Settlement Amount was paid by Barlows to the Second Defendants to compensate for that loss. In addition, MPV was able to recover from Barlows the full amount of the loan which it had advanced and the interest which was payable on it.

(i) The First Claimant claims that the Settlement Amount is a partnership asset and should be applied first towards the repayment of the capital which the First Claimant advanced and the rest should be paid to the three of them (i.e. the First Claimant, the Bankrupt and the Third Defendant) equally. In the alternative (i.e. if there was no partnership), he contends that the Settlement Amount was received by the Second Defendants to the order of the Bankrupt for the purposes of the joint acquisition of the First and Second Properties and was, therefore, impressed with a resulting or constructive trust in favour of the First Claimant, though the latter type of trust is no longer relied upon by the First Claimant in support of his claim. Accordingly, the cause of action against Barlows was held on trust for the First Claimant and the Settlement Amount is now held by the Second Defendants on trust for the First Claimant, to be applied first towards the repayment of the amounts advanced by him (together with any interest properly payable thereon) and the remainder on behalf of the three of them equally.

THE BASIS OF THE SECOND DEFENDANTS' OPPOSITION TO THE CLAIM

22 The basis upon which the Second Defendants contest the Claim may briefly be summarised as follows:

(a) No partnership existed between the Alleged Partners;

(b) The Advance was not held by the Bankrupt on trust, whether express, implied, resulting or constructive, for the Claimants or either of them;

(c) The Advance was not a capital contribution made by the First Claimant towards the business of the Joint Venture but was in the nature of an unsecured loan or investment. It follows that the Settlement Amount, which represents the proceeds of the Negligence Claim, belongs to the Second Defendants on behalf of the creditors of the Bankrupt, having vested in the Second Defendants pursuant section 283 of the Insolvency Act 1986. Any claim which the First Claimant has for the amount of the Claimants' Advance is, and should be proved as, an unsecured claim in the bankruptcy;

(d) In the event that the court holds that the Settlement Amount is held on trust for the First Claimant and/or the Joint Venturers, the Second Defendants seeks to have the Trust Costs paid out of the Settlement Amount. They do so on the basis that the Trust Costs were necessarily, properly and reasonably incurred in obtaining the payment of the Settlement Amount. That claim is made under what they refer as the principles in *Re Berkeley Applegate (Investment Consultants) Ltd (No 1)* [1989] Ch. 92. The grounds upon which they do so are set out in the second witness statement

dated 24 August 2020 of Paul Stanley made on behalf of himself and the other joint trustee in bankruptcy.

THE ISSUES IN THE CLAIM

23 It is common ground between the parties that the central issues in the claim are as follows:

(a) whether there was a partnership between the Joint Venturers for the purchase of the First and Second Properties ("the Partnership Issue");

(b) alternatively, whether the Settlement Amount, or any part of it, is held on trust by the Second Defendants for the First Claimant ("the Trust Issue"); and

(c) if the Partnership Issue and the Trust Issue is decided against the Second Defendants, whether they are entitled to the payment of the Trust Costs from the Settlement Amount.

24 The legal issues which arise in the Claim are extremely complex. They involve not just considering proprietary issues arising from the interrelationship between trust and insolvency law but also considering how the provisions of the PA 1890 impact upon that interrelationship. In this judgment, therefore, I have referred to various authorities (including statutory provisions) which were not cited to me. I have done so in order to satisfy myself that I have not overlooked any relevant legal point which arises in the Claim.

25 This case also involves a complex factual matrix. The case of the First Claimant is based on events which took place over 10 years ago. The agreement which the First Claimant alleges he reached with the other Joint Venturers for the purchase of the First and Second Properties was partly oral and partly in writing. The First Claimant also relies, to a significant extent, on his own conduct and the conduct of others at the time in seeking to make good the Claim against the Second Defendants.

26 In addition, the Second Defendants have raised every conceivable point to support the defence which they have advanced in the Claim. As far as my approach to the determination of the various factual issues is concerned, it is appropriate for me to make this short point: it is not necessary for me to decide every point which has been advanced by the Second Defendants in these proceedings in order to determine the issues in the claim. It is only necessary for me to decide whether the matters relied upon by the First Claimant are supported by the evidence which I have heard and, if they are, whether they warrant the relief sought by him against the Second Defendants being granted: see, by way of examples, *Weymont v Place* [2015] EWCA Civ 289, at [4]-[6], per Patten LJ;

and *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605*,* [2002] 3 All ER 385, CA.

27 There are numerous documents which have been referred to in this case. Those documents go back many years and are included in a number of voluminous bundles which have been prepared for the purpose of the trial of the Claim. However, as I have indicated at paragraph 9, above, I cannot help feeling that there are other documents, not included in the bundles (such as the documentation relating to the restraint order), which might have been relevant to my determination of the various issues that arise in the Claim.

BURDEN AND STANDARD OF PROOF IN THE CLAIM

28 The burden of proving the facts and matters upon which the First Claimant relies in the Claim is upon him. The standard of proof is the usual civil standard of proof – the balance of probabilities. There is no heightened standard of proof simply because the issues in the Claim are legally and factually complex: see the decision of the House of Lords in *Re B* [2008] UKHL 35 and of the Supreme Court in *Re S* [2009] UKSC 17.

29 The overall assessment of the evidence in connection with an issue arising in a claim is within the sole province of a trial judge. However, I am mindful of the observations made by Leggatt J (though doubted in some quarters) in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited and another* [2013] EWHC 3560 (Comm), [2013] All ER (D) 191 (Nov), that the presence of contemporaneous documents (and their contents) will be of substantial importance in that assessment.

OVERVIEW OF THE EVIDENCE IN THE CLAIM

30 I heard evidence from the Claimants, Mr Thakrar, the Bankrupt, Mr Stanley on behalf of the Second Defendants, and the Third Defendant.

Mr Stanley's evidence

31 I start first, perhaps unusually, with the evidence of Mr Stanley. He is the joint trustee of the estate of the Bankrupt. He and Mr Barber were appointed joint trustees on 4 July 2016, having taken over as trustees from the Previous Trustee on that date. The Previous Trustee had been in office from 28 June 2012, so for over four years before the Second Defendants took over. The Second Defendants have themselves been in office for upwards of that period.

32 Mr Stanley furnished two statements in these proceedings – a statement dated 12 March 2020, dealing with the substantive issues arising in the Claim and a further statement dated 24 August 2020, in support of the Expenses Application.

33 He was not cross-examined at any length on the contents of his first witness statement. There was good reason for that. He will seldom have first-hand knowledge of the facts and matters upon which he relies. His function is to conduct a detailed enquiry into the affairs of the bankrupt of whom he is trustee and put the material which he has obtained, and upon which he relies in his opposition to the Claim, to the court and provide copies of that material to the other parties. In this context, he has a wide array of powers available to him to enable him to undertake those enquiries, most notably the powers specified in sections 333 and 366 of the Insolvency Act 1986. While the Previous Trustee appears to have used those powers to interview the Bankrupt (see paragraphs 92 and 96 of the First Claimant's written statement), neither he nor the Second Defendants used those powers to obtain information from any other person who might have been able to give them information concerning what the Joint Venturers had agreed. One aspect of the First Claimant's claim was that Mr Gooch of Barlows, who undertook the purchase of the First and Second Properties for the Bankrupt (but was unable due to his negligent acts or omissions to complete the purchase) was fully aware that despite those properties being purchased in sole name of the Bankrupt, they were to be held on behalf of the Joint Venturers who had allegedly agreed that the Joint Venture would be run as a partnership business. The previous Trustee or the Second Defendants could have interviewed, or privately examined, Mr Gooch at the time of their respective appointments or immediately before, or during the course of, these proceedings. They did not. Much the same can be said about obtaining information from the Third Defendant and Mr Thakrar. Although both provided witness statements supporting the position of the First Claimant in the Claim, their witness statements were furnished in March or April of this year. They stated that they could not recall what had happened more than 10 years ago in any, or any great, detail. Even the interview conducted of the Bankrupt did not properly get to the bottom of the relationship between the Joint Venturers. Mr Vickery had to resort to the use by the Bankrupt of specific expressions in the transcripts of the interview (such as the reference by the Bankrupt that he was going to "bridge" money from the First Claimant) to support the Second Defendants' hypothesis that the Claimants' Advance was an unsecured loan or investment. If their legal advisers had asked the right questions at the interview, they may have elicited more helpful information for the Previous Trustee and Second Defendants in support of their position in the Claim. Instead of deploying those powers, they conducted what appears to me to be a high-risk strategy of defending the Claim, based on not having the complete information about what was agreed between the Joint Venturers. Then, in order

to bolster up their defence, they took every conceivable point in resisting the claim, even points which were previously admitted by them (such as putting the First Claimant to proof about the payment of the sums of money referred to in paragraphs 5.1 and 5.4 of the Re-Amended Particulars of Claim, subsequently abandoned because the payments had been admitted by them in paragraph 5 of their defence) and legal points which they knew or ought to have known were extremely unlikely to be accepted by the court, such as the assertion (subsequently abandoned) that the alleged oral agreement reached by the Joint Venturers was an agreement for the creation and disposition of an interest in land and was, therefore, void for want of compliance with the requirements of s 2 of the Law of Property (Miscellaneous Provisions) Act 1989: see the decision of Lewison J in *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* and another [2004] EWHC 2547 (Ch), [2005] 2 P & CR 105, and compare this with the more recent decision in *Bennett v Bennett* [2018] EWHC 1931 (Ch).

34 The evidence of a trustee in bankruptcy will usually comprise the findings and conclusions which he has come to from enquiries which he has made of the bankrupt and others. Ultimately, it is for this court to decide, having seen the written evidence of the parties and heard the oral evidence of the witnesses, to decide whether what the trustee says is correct, remembering, of course, that it is the claimant's burden to prove the matters relied upon by him in support of his claim.

35 In the present case, the Previous Trustee and Second Defendants have made few enquiries over and above the information they obtained relating to the purchase of the Properties from some of Barlows' papers and interviewing the Bankrupt. They seem to have done little to seek to ascertain the true position concerning the status of the Joint Venture. When I asked Mr Stanley about this, he gave an evasive and entirely unconvincing response. The substance of his response was to say that the Previous Trustee and the Second Defendants believed that the Bankrupt was entitled to a claim against Barlows and they saw it as part of their duty to realise that claim and to recover the proceeds of it as part of the assets of the bankruptcy. He was taken to a letter dated 5 November 2014 from the First Claimant's solicitors to his predecessor's solicitors, Freeths LLP, in which they had set out, in full, the details of the First Claimant's claim to be entitled to the repayment of the First Claimants' Advance and the response from Freeths LLP to that letter dated 22 December 2014. He sought to distance himself from that exchange of correspondence initially on the basis that that communication had taken place before his and Mr Barber's appointment as joint trustees. However, when his attention was drawn to paragraph 9 of his first witness statement, he appeared to accept that he knew of the possibility of the Claimants' claim against Barlows but not about a prospective claim against the Trustees. His response to the intimation of a claim against his

predecessor was to say that he received threats of proceedings on a regular basis in the course of the insolvency work which he and his practice undertook. He questioned why the Claimants had not brought a claim against his predecessor until March 2016. He maintained that it was more appropriate for him to recover the monies which formed the subject of the Negligence Claim, rather than have discussions about "hypotheticals" and that he did not believe that any detriment would be caused to anyone by settling the Negligence Claim without reference to the Claimants.

36 I wholly reject what he had to say. I well appreciate that a trustee who takes over from another trustee may not be able to get to grips with every aspect of a bankrupt's affairs within a matter of a minutes after he is appointed but it is a fallacy to think that he, and his co-trustee, would, or should, not have been able to do so, given that: (a) the Claim had already been issued by the Claimants against Barlows and his predecessor (i.e. the Previous Trustee) and the Second Defendants should have known what they were taking on before they accepted appointment under the block transfer order; (b) his predecessor was a member of the same practice, albeit from a different office of that practice; and (c) the solicitors who had been retained to act in the Claim (Irwin Mitchell LLP) were the same as the solicitors who had been retained to act on behalf of the Second Defendants' predecessor in the Negligence Claim and ought to have been in possession, or at least, been aware of the communication passing between Freeths LLP and the Claimants' solicitors. In their letter dated 5 November 2014, the Claimants' solicitors suggested a way in which it might have been possible for the proceeds of the Negligence Claim to be realised pending the dispute between the Claimants and the Previous Trustee being resolved or litigated. The response from Freeths LLP dated 22 December 2014, particularly the first and second paragraphs of page 2 of that letter, provided a helpful response to that suggestion, as was the reply dated 3 July 2015 from the Claimants' solicitors. I have not seen copies of any further communication between the parties on that point but what happened next was that two separate sets of proceedings were issued against Barlows, one by the Claimants and the other by the Second Defendants. The latter set of proceedings was compromised (without any prior reference to the Claimants – something which Mr Stanley was unable to comment about) with the result that the present claim brought by the Claimants against Barlows had to be discontinued or dismissed. I was informed that the Claimants' claim against Barlows was discontinued or dismissed with no order as to costs, so at least the Claimants did not have to pay Barlows costs consequent upon such discontinuance (under CPR 38.6) or dismissal. Nonetheless, the Claimants' own costs are substantial, the court fee itself coming to £10,000. It was wholly inappropriate for the Previous Trustee not to agree a course of action which might have resulted in only one set of proceedings being issued against Barlows and leaving the dispute about whether the Claimants were entitled to the

Settlement Sum, or any part of it, to be determined between them subsequently, as appeared to have been suggested by the Claimants' solicitors in the correspondence to which I have made mention. It does need me to draw to the attention of an experienced insolvency practitioner, such as the Previous Trustee or Mr Stanley, his duty, as an officer of the court, to act fairly towards a bankrupt and others when dealing with the affairs of the bankrupt – see *Ex Parte James*, i.e. *Re Condon, ex parte James* (1874) 9 Ch App 609**.** Although this does not mean a trustee is required to make any unnecessary concessions to the bankrupt or other persons involved in the bankruptcy, such as a creditor, he should not act in a way which is, or may be seen to be, oppressive towards those persons. The Previous Trustee and the Second Defendants should have acted towards the Claimants in a fair and even-handed way. The outcome which they say they obtained for the benefit of the creditors of the Bankrupt could just as well have been achieved by acting in concert with the Claimants against Barlows to recover the Settlement Amount, and at significantly less expense for the Claimants and, possibly, for them as well. As it is, because the Second Defendants did not obtain the consent of the Claimants to settle the Negligence Claim for the Settlement Amount, the possibility exists that the First Claimant may make a claim against them for breach of duty – see paragraph 12 of the Amended Particulars of Claim – though, as I think was accepted by Mr Laughton on behalf of the First Claimant, this may be for determination on another day. If the First Claimant does make a claim against the Second Defendants for breach of duty, the claim is likely to be sizeable, given that, as originally formulated in September 2010, more than 10 years ago, the claim against Barlows was thought to be in excess of £750,000 – see pages 241 to 244 of the Documents Bundle.

37 I question how the course of action which the Second Defendants took in settling the claim with the consent of, or reference to, the First Claimant, can be said to have been in the best interests of the creditors of the Bankrupt, given that it may result in a yet further claim being made against them for breach of duty.

38 The overall quality of the evidence of Mr Stanley was both poor and unsatisfactory. There were many examples of this. It suffices I refer to a few of them.

39 In support of the Expenses Application, Mr Stanley furnished a short witness statement, dated 24 August 2020, the relevant parts of which were in the following terms:

> "2 Where the facts stated in this witness statement are within my own knowledge, *they are true*…
>
> 3 The Trustees [i.e. the Second Defendants] make this application if, at the trial of this action, the Court finds that the [Settlement Amount] is held on trust by the Trustees for the Claimants…

> 7 If the Trustees had not … commenced the [Negligence Claim], and successfully recovered the Settlement [Amount], the Claimants would not have been able to recover any sums whatsoever.
>
> 8. The Trustees' work has therefore been of substantial benefit to the trust property and to the persons interested in it, the Claimants. In those circumstances, the Trustees seek an order that their remuneration, costs and expenses of the Negligence Claim Proceedings, and the costs of this application be paid out of the Settlement."
>
> (My emphasis).

40 No other written evidence was provided in support of the Expenses Application. Specifically: (a) no information was provided about the work which the Second Defendants or the Previous Trustee had done to justify the remuneration which they claimed; (b) in paragraph 4 of his first witness statement, Mr Stanley had claimed that the Previous Trustee had put in a considerable amount of effort to release the Negligence Claim which had been frozen as a result of a restraint order made in the criminal proceedings brought against the Bankrupt. However, no information was provided about that work; and (c) no current information was provided about the likely return to the creditors, Mr Stanley (though I make it clear, not Mr Vickery) questioning why this was relevant to the application.

41 I am unable to accept that the work involved in obtaining a release of the Negligence Claim from the restraint order would have been substantial – certainly not without seeing the evidence to support that. I do not know when the restraint, or any other, order under the Proceeds of Crime Act 2002 was made against the Bankrupt and whether it was made before or after his bankruptcy. However, if the Crown had a better right to the fruits of the Negligence Claim than the Previous Trustee, I would consider it highly unlikely that the Crown Prosecution Service would be prepared to release it to the Previous Trustee without a fight. They might themselves have appointed a receiver to realise the Negligence Claim or required the Previous Trustee to agree to a distribution of the fruits of the claim to take into account any prior right which the Crown had to it. It appears to me, based on the provisions of sections 306A-306C of the Insolvency Act 1986 and section 412 of the Proceeds of Crime Act 2002, that the Crown did not have a right over the Negligence Claim which took priority over the Previous Trustee's right in it. If that is correct, then I am not sure why the work done by the Previous Trustee to have the Negligence Claim released from the restraint order would have needed to be substantial. In any event, on the assumption that Claimants had a better right to the Negligence Claim (at least up to the amount of Claimants' Advance), it is difficult to see how the Crown could assert that it had a better right to it than the Claimants.

42 Mr Stanley was ill-prepared for the hearing. He was unable to answer a number of the questions which I asked him, all of which have a bearing on whether the discretion in favour of granting the Expenses Application should be exercised, such as why the report of the Official Receiver at page 309 of the Bundle referred to the assets of the Bankrupt including "cash at bank" in the sum of £192,412, whether that sum had been collected by the Second Defendants and whether the Bankrupt's interest, valued respectively at £35,988 and £2,622, in the properties referred to in that document had been realised and, if not, why not.

43 Mr Stanley appeared to think that the reference to the amount of £192,412 was to the recovery which the Bankrupt considered was likely to be made in relation to the Negligence Claim. He sought to distance himself from the information included at page 309 on the basis it was not his document but that of a civil servant at the Insolvency Service.

44 It is almost certainly unlikely that the amount of £192,412 referred to the recovery which the Bankrupt considered might be made in the Negligence Claim. If one considers the information provided by the Bankrupt at Question 2.1(c) of the Official Receiver's questionnaire (pages 252-300 of Documents Bundle 2 and continuing at pages 301 to 308 to Documents Bundle 3), that amount is said to comprise the aggregate of two sums which were standing to the credit of two separate bank accounts that the Bankrupt had with Lloyds Bank plc. That suggests that the information included in the report, albeit based on what the Bankrupt had informed the Insolvency Service, was correctly prepared by the civil servant and that it was the evidence of Mr Stanley, based on pure guesswork, which was incorrect. I am none the wiser about whether the amount of £192,412 has been realised.

45 Mr Stanley was unable to assist with how the Settlement Amount was made up. One can only assume, based on previous communication which took place between Mr Jag Singh on behalf of the Bankrupt and Mr Comforth that, in addition to including the Claimants' Advance, it is likely to have included interest and some or all of the Second Defendants' solicitors' costs of the Negligence Claim.

46 Mr Stanley's second witness statement contained the usual statement of truth, which he had signed. The sum claimed by the Second Defendants pursuant to the Expenses Application (i.e. the Trust Costs) was in excess of £180,000 (to include VAT and disbursements). It was supported by various schedules, with the narratives of those schedules redacted in case they contained privileged information. Prior to Mr Stanley being cross-examined on his written evidence, I had a detailed exchange with Mr Vickery about why the Expenses Application was made so late, given that if I acceded to it, a substantial part of the Settlement Amount might

need to be paid to the Second Defendants even if the First Claimant was successful in the Claim. If the First Claimant knew that he was unlikely to recover whole or a substantial part of the Settlement Amount (because all or most of it might constitute Trust Costs), he might have decided not to proceed with the Claim.

47 When Mr Stanley was taken through the schedules which he had appended to his witness statement, it became apparent that the claim made by the Second Defendants, pursuant to the Expenses Application, was not just for the Trust Costs (i.e. for collecting and realising the Negligence Claim and preserving and distributing the Settlement Amount) but the whole of the bankruptcy. I accept that this was a genuine error on his part. As he said, he should have checked the schedules more thoroughly. However, it is extraordinary that neither he nor his solicitors appreciated, at the time of his signature of the witness statement, that the information he had provided was grossly inaccurate and wholly misleading or why he had not considered the contents of his witness statement before he confirmed on oath that he believed those contents to be true. He only confirmed that he had made the error when he was being cross-examined.

48 The law rightly exacts high standards from insolvency practitioners. The Second Defendants (and particularly Mr Stanley) have fallen seriously short of those standards in the present case.

The First Claimant's evidence

49 I found the First Claimant to be a straightforward, honest and reliable witness. He gave spontaneous answers to the questions which were put to him. He has the best recollection of the events which relate to the Claim because he lost most from the Joint Venture and has spent the last 10 years trying to recover what he has lost, having spent a not-insignificant sum of money in legal expenses in order to do so. Other than the suggestion (which I reject) made by Mr Stanley that the Joint Venturers had raised the Partnership Issue as an afterthought, there was no suggestion on the part of the Second Defendants that he had sought to embellish his account in order to recover his loss. Indeed, the honesty of the First Claimant is evident from the fact that he might (with the other assistance of the other Joint Venturers) have taken steps to record what had been agreed by them in much clearer terms than the document dated 29 March 2010 (or taken other steps to protect his investment in the Joint Venture) as soon as the purchase of the First and Second Properties could not be completed. While those steps might have been subject to challenge by the Previous Trustee or the Second Defendants, it is likely to have been difficult for them to do so.

50 The First Claimant's evidence was also fair. He did not rely on any false points and was prepared to be corrected whenever that was appropriate. That is not to say that I found every aspect of his

evidence satisfactory. There were parts of his evidence which were not convincing. I give examples of a few of these: I am still at a loss to understand why the three Joint Venturers (or four before Mr Thakrar withdrew from it) could not have agreed to take a transfer of the Properties in all their names. Nor am I able to understand why if each of the four of them had agreed to be partners, did the First Claimant have to learn from the Bankrupt (see paragraph 70 of the First Claimant's witness statement) that Mr Thakrar had decided to withdraw from the Joint Venture. If the four of them had expressly agreed to be partners in the Joint Venture at a meeting, it seems somewhat strange that Mr Thakrar would not have called him to say that he was withdrawing from the venture. Nor is it clear why they had not thought about registering the partnership as a business with HMRC, as Mr Stanley indicated they should have done. None of the Joint Venturers were asked about this last point. It is possible that it was because the Joint Venture had come to an end almost before it had started and that if it had made a profit as a result of the purchase and subsequent resale of the First and Second Properties, they would have done exactly that. But if the explanation for this is what is contained in paragraph 26 of the First Claimant's witness statement ("We did not form a company and so there was no need to consider becoming VAT registered"), it is neither legally correct nor convincing.

51 There is no question that over the 10 years in which the First Claimant has been seeking to recover his loss, his memory is likely to have faded. Nonetheless, he was able to recall with reasonable clarity the details of the relevant events which took place and was able to answer almost all the important questions which were put to him. He was not fazed by the skilful way in which he was cross-examined by Mr Vickery. He was calm throughout and provided his account in an impressive and firm way.

52 I do not consider that, on the substantive points which arise in the Claim, what he had to say could seriously be challenged either by the contemporaneous documents which were included in the voluminous bundles prepared for this trial or by the evidence of any of the other witnesses.

53 I, therefore, accept the substance of the First Claimant's evidence on both the Partnership Issue and the Trust Issue.

The Second Claimant's evidence

54 The Second Claimant was a straightforward and honest witness. She was not involved in the Joint Venture. She had advanced funds on behalf of her husband, the First Claimant, for the purchase of the First and Second Properties.

55 She indicated that the First Claimant had told her that he wished to be involved in an enterprise with the Bankrupt and the Third Defendant but did not tell her what the roles of each of them would

be. She knew that he was being asked to invest around £200,000 in the enterprise. She had full trust in him and paid various sums of money from her account on his behalf, as requested by him, for the purpose of the enterprise. Neither of them had given any thought to what might happen if things went wrong.

56 There is no substance in the point that until her rights in the Claim were assigned to the First Claimant, she was also maintaining a claim against Barlows for the monies which she had advanced and this was somehow inconsistent with the First Claimant's claim that he and the other Joint Venturers were involved in a partnership. It is plain to me from the original Particulars of Claim that the only reason the Second Claimant was made a party to the Claim was to avoid any point being taken by Barlows, or the Second Defendants, against the First Claimant that, as most of the sums advanced had not been made by him, he did not have standing to recover those sums from them. Once the Second Claimant assigned the benefit of her rights in the Claim to the First Claimant, that point was no longer available to the Second Defendants to take. I suspect that if, following the assignment, an application had been made to remove the Second Claimant as a party to the Claim, the court is likely, to have acceded to it, subject to dealing satisfactorily with any costs issues arising.

The Bankrupt's evidence

57 The Bankrupt furnished a short witness statement dated 12 May 2012, though not in connection with the Claim, because the Claim was commenced some 4 years later. The relevant parts of that witness statement are to the following effect:

> "2 I have had a business acquaintance with the [Third Defendant] over several years. In early 2010, he told me about an investment opportunity involving the purchase and re-sale of [the Properties]. We needed some capital to use as a deposit… We spoke to a Sikh man who ran an employment agency. He was interested in the proposal.
>
> 3 … We agreed between us that [the Third Defendant] would deal with the end buyers, the employment agency guy would provide the deposits and paying legal and other costs … and that I would find the bridging finance. Because I was arranging the finance, and would be doing so in my name, we agreed that I would buy the [the Properties] in my name as well.
>
> 4 … the employment agency guy decided that he did not want to go ahead [so] I approached [the First Claimant] and Mr Thakrar.
>
> 5 We agreed that the arrangement was going to be as before, except that [the First Claimant] would be providing the deposits and Mr Thakrar would *be buying one of [the Properties] outright*.
>
> 6 On or around 29 March 2010, I signed an agreement that set this out.

> 7 At around the same time Mr Thakrar dropped out of the deal. That is why his name was on the agreement, but he did not sign.
>
> 8 Over the next few days, I had a lot of contact with Mr Gooch. I don't think I ever showed him the *partnership agreement, but I am sure that I told him that I was acting with others to get this deal done. I can remember at least one meeting I had with Mr Gooch that [the First Claimant] also attended. I think there might have been two*."
>
> (My emphasis).

58 This statement, which was provided some 8 weeks after the bankruptcy of the Bankrupt commenced, refers to the Written Agreement as a "partnership agreement". It also states that the intention was that Mr Thakrar would purchase one of the Properties (i.e. the Third Property) "outright" and that Mr Gooch knew that the Bankrupt was "acting with others to get this deal done."

59 The interview of the Bankrupt by the Previous Trustee's solicitor forms a significant part of the case of the Second Defendants in seeking to undermine the evidence of the Bankrupt. However, it is appropriate to note that: (a) this interview (the relevant parts of which have been transcribed) took place after the Bankrupt's witness statement dated 12 May 2012. The transcript of it, therefore, needs to be read together with that statement, rather than in isolation from it (which is what the Second Defendants have sought to do); (b) the Second Defendants have sought to emphasise specific words (such as "bridging") used by the Bankrupt in the interview in supporting their premise that the Claimants' Advance amounted to the making of a loan. I reject that premise entirely. In the first place, the Bankrupt cannot expect to use the exactitude of words necessary for a pleading when he gives an account of his relationship with the other Joint Venturers; but second, if what Mr Vickery says is correct, then it would equally be correct to say that by referring in paragraph 8 of his witness statement to the expression "partnership agreement" when describing the Written Agreement, the Bankrupt was confirming that the Joint Venturers were partners. It is plain to me that the word "bridge" or "bridging" is not being used by the Bankrupt in the context of a loan but simply to describe the balance of what would be required by the Joint Venturers to complete the purchase of the Properties just as the reference to "partnership agreement" in paragraph 8 of his witness statement is used in a loose sense. In any event, as I have indicated below, if the transcript is read as a whole, it supports the First Claimant's case against the Second Defendants, rather than support the contentions advanced by the Second Defendants.

60 Much the same can be said about some of the other expressions used by the parties – for example: the reference in the email dated 11 March 2010 (page 50 of the Documents Bundle) sent by the Third Defendant to Barlows to having done so "on behalf of [the

Bankrupt]" or to the First Claimant saying at paragraph 37 of his witness statement that the Third Defendant would be involved as a "go between". As regards the email dated 11 March, there is nothing significant about the Third Defendant sending it on behalf Bankrupt as, notionally at least, Barlows' client was the Bankrupt, not the Third Defendant so the Third Defendant had to "sign off" the email on behalf of the Bankrupt. As regards the reference to the Third Defendant as a "go between", it is clear, if one considers the whole of paragraph 37 carefully, that what the First Claimant is saying is the precise opposite of what is being alleged by the Second Defendants:

> "On 22 February 2010, Mr Gooch sent some client care letters out to Drupad alone in respect of 106 and 108 High Street. There was nothing particularly unusual about this because everyone had agreed that this would be Drupad's responsibility, as he was obtaining the finance. However, days later on 26 February 2010, Mr Gooch also sent a copy of the client care letters to Nirmal [i.e. the Defendant] via email… Nirmal was therefore very much involved as a go between to make sure the transaction completed and Mr Gooch and Ian would often liaise with him."

61 It may have assisted the Second Defendant's case if they had obtained the entirety of the documentation relating to the restraint order made against the Bankrupt. Usually, the respondent to such an order is required to provide full details of all his assets once it is served on him. If the Bankrupt had provided those details, it may have made it possible to ascertain what he was saying about his entitlement to the Negligence Claim and whether it was consistent with the information he gave in his witness statement and interview. The Second Defendants are likely to have had this documentation in their possession, particularly given that Mr Stanley says that the Previous Trustee had put in a considerable amount of effort to release the Negligence Claim from the restraint order. The documentation is not in the bundles. If they did have the documentation in their possession, they should have disclosed it in these proceedings, subject to any claim made by them to withhold inspection of it on the ground of privilege or otherwise. As it is, the First Claimant contends that the information given in the Official Receiver's questionnaire, and the other documents included at pages 252 to 319 of the Documents Bundle, supports his account that the advances made by him were not loans because he is not referred to in those documents as a creditor. In fact, the more important point in favour of the First Claimant may be that the claim against Barlows is not referred to at all in the documents. That may be a stronger reason for inferring that the Bankrupt never had any, or any, real beneficial interest in it.

62 The Bankrupt gave oral evidence at the trial. He stated that he had recently been diagnosed with a blood clot in the brain and was unable to recall much of what had happened more than 10 years ago. He firmly stood by the contents of his witness statement. He stated that there was very little that he could add to it.

63 I am not sure that, by itself, his evidence takes any of the issues which arise in the Claim very far. What I can say is that I cannot see that it undermines the substance of the First Claimant's account in any way.

Application for relief from sanctions concerning the Third Defendant's witness statement

64 The Third Defendant furnished a witness statement in these proceedings dated 4 August 2020. The First Claimant, who relies upon that witness statement in support of his claim, was required by an order of this court dated 5 November 2019 to serve any written evidence upon which he intended to rely by 18 February 2020 (subsequently extended by agreement between the parties to 17 March 2020). That was not done. Instead, the First Claimant made an application for permission to serve a witness summary in respect of that evidence, which was heard by District Judge Rich over the telephone on 27 July 2020. At that hearing, the First Claimant made an application for relief from sanctions under CPR 3.9 in the face of the court.

65 The learned District Judge refused both applications with costs. However, in respect of the latter application, he went on to say, at paragraph 2 of his order:

> "2. Any further application by the Claimants for relief from sanction shall be made to the Trial Judge on notice to the Second Defendant supported by evidence setting out:
>
> 2.1 What steps were taken to try to obtain such a witness statement from Mr Tanna;
>
> 2.2. What steps have been taken since 17 March 2020 to obtain such a witness statement; and
>
> 3.3 Any other reasons why the Claimants did not or were unable to obtain a witness statement from Mr Tanna prior to 17 March 2020."

66 The application was renewed before me in accordance with paragraph 2 of the judge's order. I heard the application over the telephone on 10 September 2020. By that time, there was a formal application for relief from sanctions before me, supported by a witness statement from Ms Anjali Narshi, the First Claimant's solicitor, dated 6 August 2020.

67 I considered that paragraph 2 of the order enabled the First Claimant to have the application to admit the Third Defendant's written evidence heard *de novo*, but could see the force of the contrary argument, which was advanced by Mr Vickery, that the District Judge had made a final determination in the matter and the application before me could not be reheard unless the First

Claimant could demonstrate that: (a) there had been a material change of circumstances since the order was made; (b) the facts on which the original decision was made had been misstated; or (c) there had been a manifest mistake on the part of the judge in formulating the order: see *Thevarajah v Riordan* [2015] UKSC 78, [2016] 1 W.L.R. 76, at [15] and [17]-[19]; and *Griffith and another v Gourgey and others* [2017] EWCA Civ 926, at [11]. There was no evidence before me that any of those matters were applicable.

68 I felt that I needed clarification of what the judge meant in paragraph 2 of the order. I, therefore adjourned the application to the first day of the trial.

69 The parties' legal representatives made enquiries of the District Judge about what he intended by the terms of paragraph 2 of the order. However, he appeared unable to assist with the matter. Nor, I was informed, would a transcript of the hearing or of his judgment help as he had not considered the specific issue in question.

70 I took the view, construing his order as a whole, that the judge appeared to be giving the First Claimant the right to renew the application before me afresh, despite his refusal of the application at the hearing on 27 July 2020. I did so because there would be no reason for the District Judge to include paragraph 2 in his order if had decided to refuse the application outright. Also, the application for relief from sanctions in respect of the Third Defendant was made in the face of the court so the District Judge may not have had the benefit of considering the application properly, hence the terms of paragraph 2.2 requiring the First Claimant to put all the relevant the material since 17 March 2020, rather than (if he had intended to make a final decision on the application) all the material since the date of the hearing, i.e. 27 July 2020, before the trial judge.

71 I granted the First Claimant relief from sanctions and said I would give reasons for my decision subsequently in order to make up for a bit of the time which we had lost in commencing the trial. I now give my reasons at paragraphs 72 to 85, below.

72 The principles governing the grant or relief from sanctions are set out in the decisions of the Court of Appeal in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795 and *Denton v T H White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296. The guidance given in those case may be summarised as follows: a judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages CPR 3.9(1). If

the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application, including those set out CPR 3.9(1)(a) and (b).

73 The First Claimant accepts that the breach in question was not trivial. However, he maintains that it was not significant and, by reference to Ms Narshi's above statement, sets out why this is so. What he says can be summarised in the following few points: first, the substance of what the Third Defendant had to say had already been supplied to the Second Defendants' solicitors by email, albeit not in a form which was CPR compliant; second, Ms Narshi had wrongly believed that it was not appropriate for her to be serving a witness statement from another party to the claim where she was not acting for him; and third that she had incorrectly sought to remedy the errors in the approach she took by applying for permission to serve a witness summary in respect of the Third Defendant's evidence, as opposed to seeking relief from sanctions. I agree with the substance of the explanation which she has provided to this extent. Much, if not most or all, of the material which ultimately made its way in the witness statement of the Third Defendant had been supplied by Ms Narshi to the Second Defendants before or soon after the deadline for exchange. However, I am unable to agree that the breach was not significant.

74 Ms Narshi appears to have wholly misconceived the nature of her functions and duties in relation to the service of the written evidence upon which the First Claimant intended to rely. In his skeleton argument on the First Claimant's application for relief from sanctions, Mr Vickery set out why he says the reasons for the default were inadequate. I accept what he says: the First Claimant's compliance with the requirements to serve the Third Defendant and Mr Thakrar's witness statements was far from adequate; also, solicitors are meant to know and comply with the rules governing those requirements. In addition, it unacceptable that once a deadline is not complied with, the party in default should delay in making an application for relief from sanctions. However, in my view, the delay was minor and arose primarily because the First Claimant's solicitors took an approach which was incorrect, rather than deliberately failed to take any steps at all to remedy the defects in the service of the witness statements.

75 In *Denton* itself, the court gave examples of what would constitute good reason for a breach. They included the following: (a) the fact that the defaulting party or his solicitor suffered from a debilitating illness or was involved in an accident; (b) later developments in the course of the litigation process if they show that the period for

compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal; and (c) circumstances outside the control of the party in default.

76 I do not consider the circumstances identified by Ms Narshi to constitute good reasons for the breach. As is now well-established, if some good reason is shown for the failure to comply with a rule, practice direction or order, the court will usually grant relief from any sanction imposed because of it: see, for example, *Summit Navigation Ltd v Generali Romania Assigurare Reasigurare SA* [2014] EWHC 398 (Comm) [2014] 1 W.L.R. 3472; *Cranford Community College v Cranford College Ltd* [2014] EWHC 349 (IPEC); and *Service Insurance Co Ltd v Beacon* [2014] EWHC 2435 (QB).

77 In *Denton*, the Court of Appeal accepted that, in many cases, a court might conclude that a breach is not serious or significant if it does not imperil future hearing dates and does not otherwise disrupt this case or litigation generally. Nevertheless, it declined to adopt this as a test of seriousness and significance, holding that some breaches are serious even though they are incapable of affecting the efficient progress of litigation. In the present case, I am unable to accept that the breaches were not significant. Although the breaches did not have any material bearing on the conduct of the case, once they took place, the way in which Ms Narshi went about rectifying them was wholly incorrect.

78 I turn to the third stage.

79 In considering the third stage of the *Mitchell* and *Denton* test ("all the circumstances of the case"), the two matters which are specifically mentioned in CPR 3.9 are (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, practice directions and court orders and are referred to in *Denton* as factors (a) and (b). In *Denton*, the court stated that factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders.

80 The 2020 Edition of *Civil Procedure,* i.e. the White Book, states at paragraph 3.9.13:

> "Where the breach in question is serious or significant, the fact that it has not imperilled the trial date will not by itself lead to the grant of relief from sanctions. Factors (a) and (b) of r.3.9(1) are still of particular importance (albeit not conclusive) in all cases where serious breaches affect the efficient progress of the litigation. In *Clearway Drainage Systems Ltd v*

Miles Smith Ltd [2016] EWCA Civ 258, a high-value commercial claim, the claimants delayed serving any witness statements for over two months, and served them less than one month before the trial date. This delay, and a similar delay in making a formal application for relief, had caused the pre-trial review to be adjourned twice. The Court of Appeal upheld the learned judge's decision to refuse relief from sanctions: the prolonged failure over a period of months had been viewed by the court as serious or significant even though it had not imperilled the trial date. No good reason for it had been shown. Whilst the loss of the opportunity to rely upon witness evidence (which effectively terminated the claimant's case) clearly weighed in favour of granting relief, it did not in all the circumstances, outweigh other factors including factors (a) and (b) and the lack of promptness in the application. *Clearway Drainage* was distinguished in *Castle Trustee Ltd v Bombay Palace Restaurant Ltd,* 21 June 2017, unrep., QBD (TCC) (Jefford J). It was held that the defendant's inability to fund its solicitors was not a good reason for its failure to comply with court directions. However, relief from sanctions was granted on the basis that the trial could proceed without any prejudice to the claimant coupled with the fact the defendant's failure to comply with directions did not amount to a disreputable course of conduct or a deliberate flouting of the court's orders for tactical reasons…In *Gladwin v Bogescu* [2017] EWHC 1287 (QB), a low value road accident claim, liability had been admitted and the claim was proceeding to a trial as to the assessment of damages, listed for 8 February 2017. Although a direction for service of witness statements by 3 November 2016 had been made, the claimant did not serve a witness statement until 5 January 2017 and did not apply for relief from sanctions until less than one week before trial. The application was made on the basis that, if relief was granted, the trial would be adjourned. In the lower court, relief from sanctions and an adjournment of the trial was granted on the basis that the sanction (no oral evidence allowed) would not prevent the claimant relying upon the witness statement as hearsay evidence, thereby depriving the defendant of the advantage of cross-examination. The defendant's appeal against the grant of relief and the adjournment was granted and the claim was struck out. Although liability had been admitted, the additional expenses generated by an adjournment were likely to be significant bearing in mind the modest value of the claim. The non-compliance with rules and orders was serious and no good reason for it had been given. Had the court not exercised its power to strike out under r.3.4(2)(c) it would have had ample power under r.32.1(2) to prevent the reliance on hearsay evidence in a claim in which oral evidence was prohibited."

81 However, it then goes on to state in the same paragraph:

> "Where the breach in question is serious or significant, the fact that it has not imperilled the trial date will not by itself lead to the grant of relief from sanctions. Factors (a) and (b) of r.3.9(1) are still of particular importance (albeit not conclusive) in all cases where serious breaches affect the efficient progress of the litigation. *However, in considering all the circumstances of the case, the fact that the conduct of the litigation has not been imperilled is a relevant factor to be taken into account.*"

(My emphasis).

82 What all of this means is encapsulated by the following passage in the White Book, at paragraph 3.9.21:

> "On an application for relief from sanctions, all the circumstances have to be considered but the rule makes express reference to (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the

> need to enforce compliance with rules, practice directions and court orders. In *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, the Court of Appeal decided by a majority (Lord Dyson MR and Vos LJ) that these two factors 'are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered… Decisions as to whether or not to grant relief from sanctions are always discretionary and are highly case-sensitive. Appeal courts will not interfere with a lower court's decision on such matters unless satisfied that the lower court erred in law, erred in fact or reached a conclusion which falls outside the generous ambit within which reasonable disagreement is possible… The fact that "other circumstances" may influence the court's decision even where the two specified factors militate in favour of refusing relief may be taken as an indication that the court's new policy in respect of non-compliance with rules, practice directions and orders is one of low tolerance rather than no tolerance.'"

83 There is no question in mind that it was appropriate to grant relief from sanctions for several reasons. They include the following: (a) the matters referred to by me in paragraphs 73 and 74, above; (b) the fact that the defaults have caused no, or no significant, prejudice to the Second Defendants. Although the Second Defendants complain that the signed witness statement of the Third Defendant was received late, they do not set out any specific prejudice caused to them as a result; (c) the fact that the defaults have not resulted in the trial having to be adjourned or caused any, or any significant delay, in completing it. Although I have ruled that this does not mean that the breach is not significant, it is, as I have said above, relevant to bear this factor in mind when considering the third stage; (d) the fact that it was open to the Previous Trustee and/or the Second Defendants, at any stage, prior to or during the course of these proceedings to obtain information concerning the Third Defendant's involvement in the Joint Venture under section 366 of the Insolvency Act 1986, which they failed to do; (e) the case of the Second Defendants is not based upon any direct evidence which they can give about the circumstances of the events giving rise to the Negligence Claim but upon the material which they have obtained from conducting their own enquiries into the affairs of the Bankrupt and, on the facts, were unlikely to be able to produce material which controverted what the Third Defendant said, apart from testing his account on cross-examination; (f) the Third Defendant was one of the Joint Venturers and his evidence was an important aspect of the Claim, though, as I say at paragraphs 86 to 88, below, I found what he had to say to be of little assistance to me in my assessment and evaluation of the overall evidence I heard in the Claim; (g) the Third Defendant could have served the written evidence himself, rather than seek to do so through the First Claimant's solicitors, though he may not have appreciated this because he was acting in person; and (h) if I found that the Joint Venture was a partnership and directed an account to be taken, the Third Defendant might benefit from the taking of the account if there is found to be due any money to him from the Settlement Amount or be liable to the Second Defendant (on behalf of the Bankrupt) and the First Claimant if there is found to be an amount due from him. In either case (i.e. whether he benefited or

was disadvantaged from the taking of the account), it would have been be wrong for me not to hear what he had to say about his involvement in the Joint Venture.

84 I considered that excluding the Third Defendant's written and oral evidence would have been a draconian consequence in the circumstances. The First Claimant was appropriately penalised by the order for costs made against him by District Judge Rich for the breaches.

85 I should add that even if I am wrong about the construction of the order of District Judge Rich, and had to dismiss the application of the First Claimant for relief from sanctions, I would nonetheless have been prepared, for the reasons summarised above, to allow the Third Defendant to give oral evidence at the trial, pursuant to the discretion vested in me under CPR 32.10. So far as the last recital of the District Judge's order ("AND UPON IT BEING RECORDED that as matters stand, Mr Nirmal Tanna, the Third Defendant, may not give or be called to give oral evidence at the trial of this claim") purports to say otherwise (i.e. that the sanction of not being able to rely upon the oral evidence applies without qualification), the order is incorrect as being inconsistent with the discretion given to the trial judge to allow such oral evidence to be adduced at the trial with his permission under CPR 32.10.

The Third Defendant's evidence

86 I did not find the evidence of the Third Defendant to be helpful. Although he provided a detailed statement about the relevant events and seemed to be precise about the dates when the various events took place in his witness statement, he was considerably less so when giving evidence and some of what he had to say was based on conjecture and speculation. He was prepared to use guesswork when he could not reconcile what he said in his oral with what he had said in his oral evidence.

87 There were also various inconsistencies between what he said in his oral evidence and what he had said in his witness statement. For example, he said that when the opportunity had arisen to purchase the Properties by the Joint Venturers and Mr Thakrar (when he was involved), each person's role was discussed at various meeting which had been held between them. He said that the four of them met regularly either at the Bankrupt's office or at a gym which they all used. When pressed on the matter, he said that "we *would definitely have* met – we regularly went out for meals" which appeared to suggest that he was not sure that they had met on as many occasions as he stated, both at paragraph 10 of his witness statement and initially in his oral evidence. What he said also appeared to be inconsistent with what the First Claimant said in paragraph 22 of his witness statement, even though in paragraph 2

of his witness statement, the Third Defendant said that he had read the First Claimant's witness statement and agreed with its contents "in so far as they refer to myself." It also appeared to be at odds with what Mr Thakrar had to say in his oral evidence about whether they had all met before they had agreed to enter into the Joint Venture.

88 The clear impression I got from his evidence and, to a large extent, also the Bankrupt's evidence was because they had not lost any money in relation to the purchase of the First and Second Properties, they were not too concerned about what had happened subsequently. They believed that once the sale of those Properties fell through, both the Joint Venture and their involvement in it had come to an end, though initially the Bankrupt did try to recover (through Jag Singh) the amount that the Joint Venture had lost (which also included the Claimants' Advance) from Barlows, albeit without (at any rate, on the basis of the documentation which I have seen) disclosing that the First Claimant and the Third Defendant might have an interest in it. They might have taken the view that if the First Claimant wished to recover his loss, it was up to him to do so. They may even have thought that it would not be too difficult for him to do so. However, when it did prove to be difficult, they were content to provide support to him, though the Third Defendant's recollection of the events which had occurred was poor and he seemed willing to say anything that he thought would support the First Claimant's case. I largely disregard what he had to say. Though inconsistent in various areas, I do not consider that his evidence undermined the substance of the evidence of the First Claimant.

Application for relief from sanctions concerning Mr Thakrar's witness statement

89 Mr Thakrar's witness statement is dated 7 April 2020. It does little more than exhibit an email dated 16 March 2020 to Ms Narshi (which contained the substance of what he had to say about the Joint Venture) and reiterates the contents of that email.

90 The Claimant's solicitors served that email upon the Second Defendants' solicitors in order not to miss the deadline for service of witness statements. The circumstances in which that happened are set out in paragraphs 6 to 12 of Ms Narshi's witness statement.

91 The Claimant's solicitors should have made an "in-time" application to extend time for the service of that witness statement. They did not. In the circumstances, in order to be able to rely on that witness statement, they had to apply for relief from sanctions under CPR 3.9. They made that application in the same notice of application as the application for relief from sanctions in respect of the Third Defendant's witness statement. I heard that application at

the same time as the application for relief from sanctions concerning the witness statement of the Third Defendant over the telephone on 10 September 2020. The Second Defendants took a "neutral" stance (i.e. a stance of "no opposition") to the application for relief from sanctions concerning Mr Thakrar's witness statement. I allowed the application, though did not have time to give reasons for my decision because, through no fault of the parties, the telephone hearing which was arranged was delayed substantially and I was already running late for a trial which I had to start later that morning.

92 I said that I would give my reasons subsequently. I now do so. Given the Second Defendants' neutral stance, they are only brief.

93 I do not consider that the breach was trivial or that it was not significant. In addition, the First Claimant's solicitors appear again to have misconceived what they needed to do in order to be able to rely on Mr Thakrar's witness statement. Rather than make an in-time application to extend time to serve his written statement, they thought that they could serve his email in place of a CPR-compliant witness statement. The requirement to comply with the CPR appear to have been regarded by them as unimportant. Miss Narshi is right to accept in her witness statement that it is not. It cannot be emphasised enough that the requirement to furnish a CPR-compliant statement is no empty formality, not least because there are important consequences for a witness if he says anything in it which he knows is deliberately false.

94 There was then some delay in the First Claimant making the application. Some of the actual delay is attributed to Ms Narshi overlooking matters (plainly, not acceptable but often the case) and the Covid-19 crisis. In respect of the latter, it is right to point out that paragraph 4 of PD 51ZA – Extension of Time Limits and Clarification of Practice Direction 51Y – Coronavirus, issued on 2 April 2020, provides that in so far as compatible with the proper administration of justice, the court will, in respect of the period from 2 April 2020 to 30 October 2020 (when the Practice Direction ceases to have effect), take into account the impact of the COVID-19 pandemic when considering applications for an extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions.

95 Nonetheless, largely for the reasons I have indicated relating to the application for relief from sanctions in relation to the witness statement of the Third Defendant, which apply *a fortiori* to the witness statement of Mr Thakrar, it was appropriate for me to grant him relief from sanctions.

Mr Thakrar's evidence

96 Mr Thakrar's witness statement is short and does no more that reiterate his email to Ms Narshi dated 6 March 2020. Disregarding the formal parts, it says this:

> "2 This statement has been prepared to re-iterate the contents of my email dated 16 March 2020, which I produced myself, in the correct form. A copy is attached at Exhibit HTI. It states the following:
>
> 3 I Hasmukh Thakrar can confirm the below statement of facts in 2010. I entered into a joint venture agreement to purchase properties in SW19 Colliers Wood High street 43 plus 106 & 108.
>
> 4 I myself and Drupad Pravin and Nirmal were going to buy the Property with a view to sell on at a profit.
>
> 5 Pravin was going to put in the deposit Drupad was arranging the bridging loan and Nirmal was organising the sales.
>
> 6 Upon advice from my own solicitor regarding no 43 having issues with title and priority charges I decided not to get involved with the venture.
>
> 7 This is the truth and to the best of my recollection."

97 Mr Thakrar was not cross-examined at length on his witness statement. The substance of his evidence was to the effect that there were initially three (him, the Bankrupt and the Third Defendant) and (when the First Claimant became involved) four joint venturers. However, he "withdrew" from the Joint Venture when it became apparent to him that there might be issues with the Bankrupt being able to complete the purchase of the First and Second Properties. He thought himself to be a partner up until the point that he asked for the return of the money that he had paid (through his solicitors) to Barlows for the purchase of the Third Property. Then, as he had made no investment in the Joint Venture, he did not regard himself as a partner.

98 Some support that Mr Thakrar was making a loan to the Bankrupt, to be secured by a charge in his favour, comes from page 78 of the Documents Bundle (proposed insurance details for the Third Property). However, that is to take that document in isolation and to disregard all the other circumstances of the relationship between the four (and then three) proposed joint venturers. Nor is that document necessarily inconsistent with the assertion made by the Joint Venturers that the agreement or intention of the four of them was to be partners. I have seen no document to show that Mr Thakrar's investment was to be by way of a secured loan, though the only letter I have seen from his solicitors Messrs Rich & Carr dated 30 March 2010 (at page 300A of the Documents Bundle) and

his own letter to them dated 9 April 2010 (page 118 of the Documents Bundle) appears to suggest that it may well have been. Most other pieces of documentary evidence point to the contrary and the Bankrupt's own written evidence (see paragraph 5 of his witness statement) was to different effect. In any event, the fact that he might have agreed to make his investment by way of loan does not mean that the Joint Venturers had agreed to do as well, particularly as Mr Thakrar had withdrawn from the proposed enterprise by the time it became apparent that the Bankrupt would not be able to complete the purchase of the First and Second Properties and, therefore, of the Third Property.

WAS THE JOINT VENTURE A PARTNERSHIP? THE APPROACH OF THE COURT

99 The question whether the Joint Venture was operated by the Joint Venturers in the manner contended by the First Claimant is a mixed question of law and fact. The court has to apply the legal principles relating to when a partnership comes into existence (law) to the facts of the case (facts).

SUBSISTENCE OF PARTNERSHIP – THE LAW

100 Section 1(1) of the PA 1890 defines a partnership as "the relation which subsists between persons carrying on a business in common with a view of profit."

101 It follows from this definition it appears that, before a partnership can be said to exist, three conditions must be satisfied: there must be: (a) a business (b) which is carried on by two or more persons in common; and (c) with "a view of profit".

102 Section 2(1) of the PA 1890 states that:

> "in determining whether a partnership does or does not exist, regard shall be had to the following rules:
>
> (1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.
>
> (2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

> (3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular: (a) [t]he receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such… (d) [the] advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto…"

103 It is an axiomatic proposition of law that no formalities are required to create a partnership or for a partnership to come into existence. The terms of a partnership may be in writing or agreed orally between the parties. They may be partly in writing or partly oral or may even be implied by the conduct of the parties who are alleged to be partners in it. Nor is it necessary for the business relationship of the parties to have commenced as a partnership. A partnership may come into existence long after the commencement of the parties' business relationship. They may have started business in some other capacity but ultimately agreed to be, or become, partners.

104 It is wholly irrelevant that a partnership may have existed only for a "single adventure or undertaking". As section 32(b) of the PA 1890 states: "subject to any agreement between the partners, a partnership is dissolved ... if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking ..."

105 In each case, it is necessary to scrutinise the relationship of the parties by reference to the words of s 1, as supplemented by the rules in s 2, of the PA 1890 to determine whether a partnership existed. As Cozens-Hardy MR said in *Weiner v Harris* [1910] 1 K.B. 285 at 290:

> "The Court looks at the transaction and says: 'Is this, in point of law, really a partnership?' It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is."

106 Likewise, *Lindley & Banks on Partnership* (20th Edn, 2017) say, at paragraphs 5-05 and 5-06:

> "If the agreement is not in writing the intention of the parties must naturally be ascertained from their words and conduct…"

> "Needless to say, the fact that the parties have used the words 'partners' and/or 'partnership' will not be determinative…"
>
> "… it is not possible to avoid partnership merely by describing the participants as joint venturers; the label will be ignored and the court will look to the substance of the transaction rather than its outward form."

107 As noted in the preceding paragraph, the description given by the parties to an enterprise (such as the description "joint venture", "joint investment" or "joint enterprise") does not mean that the enterprise is not being carried on by the parties as a partnership. It is often the case that they will use words and expressions to describe their enterprise in different ways, although in reality it is clear from the facts and circumstances of the enterprise that it is being conducted as a partnership. In short, parties who have not sought legal advice about the nature of their business relationship (and, more specifically, reduced the terms of their relationship in a properly prepared and well-drafted written agreement) will often use loose and vague terminology about what they agreed or intended and will ascribe labels and descriptions to the nature of that business (and their positions and status and those of others in it) which will not always reflect the nature of that relationship. Likewise, the description given by the parties to a business enterprise that they are "partners" may provide some evidence that their business is a partnership business. However, it will not be conclusive of the existence of a partnership if, on a proper analysis of the facts and circumstances of their relationship, it is clear that their business is not in fact, or in law, a partnership business. This may be an obvious proposition for lawyers and other professionals to understand but is not always clear to the layman who will, for example, often (as the First Claimant did both at paragraphs 6 and 9 of his witness statement and in the course of being cross-examined by Mr Vickery) describe the directors in a limited company as "partners".

108 *Lindley & Banks on Partnership* (20th Edn, 2017) set out, at paragraph 5-06, the following statement of principle about joint ventures:

> "Joint Ventures
>
> The courts tend to adopt a strangely inconsistent attitude towards joint ventures. Although partnerships and joint ventures obviously have a number of common characteristics, in some instances the two expressions appear to be used interchangeably, whilst in others the joint venture is recognised as a relationship quite separate and distinct from partnership. In *Ross River Ltd. v Waveley Commercial Ltd* [[2014] 1 BCLC 545 at [34]], Lloyd LJ specifically referred to a joint venture as being analogous to a partnership but commented that 'the phrase "joint venture" is not a term of art either in a business or in a legal context'. In the current editor's view, whilst it can properly be said that all partnerships involve a joint venture, the converse proposition manifestly does not hold good. This is demonstrated by the unreported decision in *Spree Engineering and Testing Ltd. v O'Rourke Civil and Structural Engineering Ltd* [18 May 1999,

> unreported] in which a distinction was drawn between a so-called non-integrated joint venture, which would not involve a partnership, and an integrated joint venture, which *would*, in general, constitute the joint venturers as partners. However, the use of such terminology should not be allowed to obscure the need in every case to scrutinise the parties' arrangements in order to identify whether the requirements of section 1(1) of the Partnership Act 1890 are satisfied and whether their relationship displays any of the normal indicia of partnership, as well as, in a borderline case, any "no partnership" declaration in the agreement…. It naturally follows that it is not possible to avoid partnership merely by describing the participants as joint venturers; the label will be ignored and the court will look to the substance of the transaction rather than its outward form. Equally, it cannot be assumed that the participants in a transaction described as a joint venture do not each intend to carry on their own separate businesses: such situations are by no means unknown, e.g. share farming and oil exploration ventures."

109 Section 45 of the PA 1890 sets out what is meant by the expression "business". It states that "business" includes "every trade, occupation, or profession."

110 *Lindley & Banks on Partnership* (20th Edn, 2017), at para 2-02, summarises what the words in section 45 mean:

> "By section 45 of the [PA 1890], business includes 'every trade, occupation, or profession'. It follows that virtually any activity or venture of a commercial nature, including a 'one off' trading venture, will be regarded as a business for this purpose. It obviously does not matter whether the business is a new or existing business, nor for how long it has been carried on nor, indeed, that it may contain two or more disparate elements. On the other hand, the mere fact that a particular activity is profitable will not of itself turn it into a business: an example of such an activity is to be found in the management of a particular property, which may or may not qualify as a business, depending on the circumstances. This is to an extent emphasised by section 2(1) of the Act which, embodying the effect of a number of earlier decisions, provides: 'Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.' Equally, an activity which might not ordinarily be classed as a business, e.g. buying, selling and holding investments, may qualify if it is carried on as a commercial venture; *a fortiori* if a partnership is formed to carry on such an activity."

111 Did the Joint Venture involve a "business"?

112 The purchase of a property with a view to its subsequent sale may constitute a "business" within the meaning of the PA 1890. So far as Mr Vickery suggests otherwise, I respectfully disagree.

113 The statement made in his skeleton argument that "purchasing a property on the basis that [as the First Claimant states in para 17 of his witness statement] '… we can buy it and flip it…' is not 'carrying on business' for the purpose of s 1 of the [PA 1890]" simply cannot be correct as a bare proposition of law. It is not just

inconsistent with the plain words of s 1(1) of the PA 1890 but would take outside the scope of the expression "business" many entities which are set up to buy properties for re-sale. There may be some basis for saying that HMRC may not regard an isolated purchase, and subsequent resale of a property, as a "business" for tax purposes, and may treat any gain made on the resale as being liable to capital gains tax, as opposed to Sch D tax as business income, but that is an altogether different point. In the present case, the proposed enterprise encompassed at least three properties, which the parties intended to purchase and re-sell. I cannot see that they would have been doing so in any way other than as, or in the course of, carrying on a business.

114 I also have reservations about the bold statement made by Mr Stanley that the purchase and resale of those three properties would not be considered by HMRC to amount to the operation of a business but to give rise to liability for capital gains tax. Even if that proposition is correct, I am not sure that this must necessarily mean that the parties were not conducting a business. It is possible that the letter dated 24 May 2001 sent by the First Claimant to David Landau of MPV after the abortive purchase of the First and Second Properties (at page 234 of the Documents Bundle), which states that the First Claimant agreed to make a contribution of £170,015 "in return for an equity stake" in the First and Second Properties, taken by itself, may not be evidence of carrying on a "business" or of the First Claimant being a partner in any business. However, in deciding whether an enterprise is carried on as a business, and whether that business is carried on as a partnership, it is necessary to look at all the circumstances of the relationship of the parties, rather than a particular document in isolation.

115 I find the cases cited by Mr Vickery (such as the decision of the Upper Tax Tribunal in *Ramsey v Revenue and Customs Commissioners* [2013] UKUT 226 (TCC), [2013] STC 1764) in support of the Second Defendants' contention that the enterprise which the Joint Venturers agreed to enter into was not a business, to provide little guidance, still less any form of instruction, to me about whether it was a business. *Ramsey* involved a decision by the Upper Tax Tribunal, on appeal from the First Tier Tribunal, about whether a property which the taxpayer had inherited, and which he had transferred to a company, was eligible for roll-over relief, under section 162 of the Taxation of Chargeable Gains Act 1992 on the basis that the taxpayer had transferred "a business as a going concern, together with the whole assets of the business, or together with the whole of those assets other than cash…". The Upper Tax Tribunal allowed an appeal from the First Tier Tribunal which had held, on the facts, that the taxpayer had not transferred a "business" within the meaning of section 162. The Upper Tax Tribunal found that the legal principles which the First Tier Tribunal had applied were flawed and ruled that the taxpayer had transferred a business to the limited company. Mr Vickery cites the

findings made by Judge Berner in that case, at [12], and the principles expounded by him at [66] and [67], in support of the premise that the degree of the activities which are carried out in relation to an enterprise have an important bearing on whether the enterprise in question is a business. However, even leaving aside both the fact that this was a tax case and that the activities involved were carried out by a sole individual, rather through the medium of a partnership, joint venture or some other form of joint enterprise, I cannot see that any assistance can be derived by the Second Defendants from that case. Judge Berner's observations at [64]-[67] about the facts of that case are appropriate to cite in this context as they demonstrate that the case was decided on its own individual facts:

> "As I have described it earlier, in my judgment the word 'business' in the context of s 162, TCGA should be afforded a broad meaning. Regard should be had to the factors referred to in *Lord Fisher* [i.e. *Customs and Excise Comrs v Lord Fisher* [1981] STC 238, [1981] 2 All ER 147] which in my view (with the exception of the specific references to taxable supplies, which are relevant to VAT) are of general application to the question whether the circumstances describe a business. Thus, it falls to be considered whether Mrs Ramsay's activities were a 'serious undertaking earnestly pursued' or a 'serious occupation', whether the activity was an occupation or function actively pursued with reasonable or recognisable continuity, whether the activity had a certain amount of substance in terms of turnover, whether the activity was conducted in a regular manner and on sound and recognised business principles, and whether the activities were of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them… In my judgment, taking the activities of Mrs Ramsay as a whole, I am satisfied that these tests are satisfied. Certain of the individual activities by themselves have little impact on the issue, but overall, taking account both the day-to-day activities, and the work undertaken by Mrs Ramsay in respect of the early refurbishment and redevelopment proposals, I conclude that the activities fall within the tests described in *Lord Fisher*…There remains, however, the question of degree. That is relevant to the equation because of the fact that in the context of property investment and letting the same activities are equally capable of describing a passive investment and a property investment or rental business. Although resolution of that issue will be assisted by consideration of the *Lord Fisher* factors, to those there must be added the degree of activity undertaken. There is nothing in the TCGA which can colour the extent of the activity which for the purpose of s 162 may be regarded as sufficient to constitute a business, and so this must be approached in the context of a broad meaning of that term…Applying these principles, in this case I am satisfied that the activity undertaken in respect of the Property, again taken overall, was sufficient in nature and extent to amount to a business for the purpose of s 162, TCGA. Although each of the activities could equally well have been undertaken by someone who was a mere property investor, where the degree of activity outweighs what might normally be expected to be carried out by a mere passive investor, even a diligent and conscientious one, that will in my judgment amount to a business. I find that was the case here."

Indeed, when one considers what the learned Judge had to say in paragraphs [25] and [26] of his judgment, it is difficult to see how the submission made by Mr Vickery on behalf of the Second Defendants can be correct:

> "... the word 'business' has been described, by Lord Diplock in *Town Investments v Department of the Environment* [1978] AC 359 at [383], as "an etymological chameleon; it suits its meaning to the context in which it is found. ... The word must be construed according to its ordinary sense, having regard ... in this [context] to the purpose of the legislation.'"

116 In the present case, if the enterprise had been carried on by the Bankrupt on his own, it is difficult to see how it could be said not to involve carrying on a business, given that it related to the acquisition and subsequent sale of more than one property and all the work associated with it in order to turn it into a profit. Even for tax purposes, it is possible that HMRC could have considered it a business, attracting liability to tax under Sch D, as opposed liability for capital gains tax. It seems to me to be clear that the position of the Second Defendants is premised on fundamental misconception that whether an enterprise amount to a business is a question of law. It is not. It is a mixed question of law (legal principles governing the meaning of "business") and fact (facts of the case).

117 On the basis, as I find, that the enterprise was or was capable of being a business, the next question to consider is whether the Joint Enterprise was carried on "by two or more persons" and whether it was carried on by them "in common".

118 The first requirement ("two or more persons") does not give rise to any difficulty. There is no issue that the business of the Joint Venture was carried out by two or more persons.

119 There is no express suggestion by the Second Defendants that it was not carried out "in common", though it appears that many of the matters which are prayed in aid by the Second Defendants go to this question.

120 *Lindley & Banks on Partnership* (20th Edn, 2017), set out, at paragraphs 2-06 and 2-07, what is necessary for this requirement to be satisfied:

> "2-06: If a partnership is to exist, it must be shown that two or more persons are carrying on a single business together. If a group of individuals carry on a business not on their own behalf but on behalf of a third party, they will not be regarded as partners; on the other hand, if a business is run by one or more persons on behalf of themselves and others, a partnership may be held to exist. Thus, a 'sleeping partner' may be 'carrying on a business' for the purposes of the Act. It should, however, be noted that the business must actually be carried on for more than a scintilla of time: if it is disposed of almost as soon as the 'partnership' is formed, this may not satisfy this requirement. The fact that the business is, ultimately, intended to be carried on through a company or other vehicle will not prevent the existence of a partnership in the interim, but much will depend on the facts and the parties' intentions as to whether a partnership will be *inferred*."

> "2-07 It is also a fundamental condition of the definition that the business is carried on by two or more persons 'in common'. In the first place, this necessarily means that there must be a single business, even if that business comprises a number of different and unrelated activities and/or is carried on in a number of separate divisions. In the view of the current editor, this also presupposes that the parties are carrying on that business *together* for their common benefit and, thus, that they have, as regards the business, expressly or impliedly accepted *some* level of mutual rights and obligations as between themselves. However, it must be recognised that, whilst the absence of any such mutual rights and obligations is likely to indicate that there is no partnership between the parties, the mere acceptance of some such rights and obligations will clearly not, in itself, suffice. If, on a true analysis, each supposed partner is carrying on a separate business wholly independently of the other(s), as in the case of a mutual insurance society or a genuine share-farming agreement, or one is actually supplying consultancy or other services to the other, there can in law be no partnership between them. Equally, joint venturers will not necessarily be partners."
>
> (My emphasis).

121 I wholly fail to see how it can conceivably be contended, in this case, that the Joint Venturers were not carrying out the business of the Joint Venture in common. They were not carrying out separate businesses on behalf of the Joint Venture. The Joint Venture was set up for a single purpose, *viz* to purchase and resell the Properties. Each of the Joint Venturers had a specific role to play in carrying out that purpose. They all acted individually in their own right. None of them acted on behalf of a third party. They carried out the purpose for their common benefit. They agreed to share profits equally. On any analysis, it is difficult to see how any of the Joint Venturers could be considered as carrying on a separate business wholly independent of the other.

122 The business must also have been carried on with a "view of profit". I do not believe it is being suggested that this requirement is not satisfied in the present case. Clause 1 of the Written Agreement, by itself, makes it clear that it was.

123 The Second Defendants state that there is an inconsistency between the First Claimant's written evidence and his pleaded case. They allege that in his witness statement, the First Claimant states that Mr Thakrar was a partner in the Joint Venture (see paragraphs 22-24 of the witness statement) and withdrew from the partnership in late April 2010 (*ibid*, paragraph 70). However, at paragraph 1 of the Amended Particulars of Claim, he says that only he, the Bankrupt and the Third Defendant were in partnership together. They contend that where it is alleged that there were four partners, and the court finds there were only three partners, to a partnership, the claim is bound to fail. They rely upon the following passage of

the judgment of Nugee J in *Dutia v Geldof* [2016] EWHC 547 (Ch), [2016] 2 BCLC 252, at [104], in support of this proposition:

> "I agree with the Chief Master that a partnership alleged between 6 partners requires proof that all 6 have become partners. It was submitted in a skeleton argument prepared for Mr Dutia that if a partnership is alleged between 6 people, and the Court finds that only 5 of them were partners, there is no reason why it should not uphold the claim. As a matter of technical law I do not think this is right – an allegation that there was a partnership between A, B and C is clearly different from an allegation that there was a partnership between A and B alone, and it must follow that an allegation of a partnership between 6 parties is a different allegation from one of partnership between 5 parties."

124 I do not agree these remarks are relevant in the present case. I understand the evidence of the First Claimant (supported by the evidence of the Bankrupt and the Third Defendant) to be that there were intended to be four partners in the proposed enterprise but that, at some stage, Mr Thakrar decided to pull out from it. That is quite different from the position where it is being asserted that there were four partners and the court finds there to be only three. In addition, it is also apposite to cite the following passage, at [106], of Nugee J's judgment:

> "The second point was that it was unfair to strike out Mr Dutia's Partnership Claim on the basis that he had not said that he had an alternative case that he was a partner with the first four Defendants alone. It is no doubt true as a general proposition that a Court will be slow to grant summary judgment against a claimant if a viable amendment can be made which would save the case, although in circumstances where Mr Dutia had been given a specific opportunity in the Further Information to address the question whether his case was still that CLSA was a partner and had failed to suggest that he had an alternative case as a fall-back, I can see that it might be different. As it is, the point does not arise as even without this point the claim stands no real prospect of success, and I therefore say no more about it."

125 I am satisfied, therefore, that there is neither any inconsistency between the First Claimant's evidence and his pleaded case nor (as is clear from paragraph 4 of the Amended Particulars of Claim) any suggestion that the First Claimant had ever alleged that, at the relevant time (i.e. when the First and Second Properties were being attempted to be purchased), there were in fact four partners. His case has always been that, at some point, Mr Thakrar had withdrawn from the enterprise and, at the relevant time, there were only three partners in the enterprise. Those partners were the First Claimant, the Bankrupt and the Third Defendant.

126 It is also appropriate to make mention of the following other statements of principle in *Lindley & Banks on Partnerships*, which may be relevant to the law governing the Partnership Issue in the present case:

> "7-13 It has already been explained that persons who are not in fact in partnership together may be held liable as if they were and, conversely, that those who are liable as if they

were partners may not actually be partners. It follows that proof of such liability will amount to no more than prima facie evidence that a real partnership exists; if it is not even possible to prove such liability, there will necessarily be insufficient evidence to establish the existence of a partnership."

"17-02 Once a partner has brought in the asset and been credited with its agreed 'capital' value in the firm's books, the asset as such will cease to be his property and will thereafter belong to the firm. Thus, *in Bieber v Teathers Ltd* it was sought to be argued that capital, once contributed, continued to be held in trust for the contributing partner pending its investment in a manner authorised by the partnership agreement. Predictably, this argument failed, Norris J citing the preceding sentence with approval. Earlier he had observed that the money in question 'cannot be both partnership capital and trust money.'"

127 Finally, it is appropriate to refer to some of the other provisions of the PA 1890, which may be relevant in this context. They include the following:

Section 24 of the PA 1890

"The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm;

…..

(3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

(4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5) Every partner may take part in the management of the partnership business."

Section 26(1) of the PA 1890

"Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners."

Section 33(1) of the PA 1890

"Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner."

Section 44 of the PA 1890

"In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

…

(b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

1 In paying the debts and liabilities of the firm to persons who are not partners therein;

2 In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;

3 In paying to each partner rateably what is due from the firm to him in respect of capital;

4 The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible."

SUBSISTENCE OF PARTNERSHIP – THE FACTS AND EVIDENCE

128 The Second Defendants contend that the Claimant's Advance was a loan or an investment, which ranks as an unsecured claim in the bankruptcy of the Bankrupt. They rely on the fact that while the Bankrupt and the First Claimant were in business, the First Claimant sometimes advanced monies to the Bankrupt's company to help ease its cash-flow problems. The circumstances when this happened are set out at paragraphs 3 to 8 of the First Claimant's witness statement. They were briefly as follows.

129 The Bankrupt ran a company, Window World Ltd, with others, which manufactured and supplied windows for double glazing. The First Claimant had a company which specialised in the installation of those windows.

130 The First Claimant would often purchase windows for his customers from the Bankrupt's company and soon became that company's largest and best-paying customer.

131 From time to time, the Bankrupt's company suffered cash-flow problems. When it did, the Bankrupt might ask the First Claimant – quoting from paragraph 5 of his witness statement – "if I could *lend* his business some money… I recall *lending* Window World around £10,000 to £15,000 by cheque on a handful of occasions. In return, [the Bankrupt] would deduct this sum from my orders and I would

subsequently receive a 2.5% discount for a *pro-forma order*." (My emphasis).

132 The Second Defendants say that this demonstrates that the First Claimant was accustomed to making unsecured loans to or on behalf of the Bankrupt on a regular basis and that the amounts which he had advanced to the Bankrupt for the purchase of the First and Second Properties were also loans or in the nature of loans.

133 I wholly disagree that amounts advanced by the First Claimant to ease the Bankrupt's company's cash flow problems were "loans", as I understand that expression to be.

134 The First Claimant may have used inappropriate terminology ("lend" and "lending") to describe his relationship with the Bankrupt's company. However, it is clear to me that what he was describing was not the making of a loan but the payment to the Bankrupt's company "on account" of the purchases that his business intended to make from the Bankrupt's company for which the First Claimant would receive a 2.5% discount on his next purchase. He explained that that was why he had used the expression "pro-forma order" to describe those transactions. He was at pains to point out that he was not taking any risk in making those payments because he knew that the Bankrupt's company would supply the windows which related to the pro-forma order and he would be able to deduct the amount of the "on account" payment and the 2.5% discount from the payment due to the Bankrupt's company on the invoice which related to the order.

135 I accept what the First Claimant says. The transactions which he was describing with the First Claimant's business were neither loans nor in the nature of loans.

136 But there is no question that the First Claimant had made loans to the Bankrupt from time to time after the Bankrupt had split from his "partners" and started his own business. He explains this at paragraph 8 of his witness statement in the following terms:

> "I recall that [the Bankrupt] applied for an overdraft but did not get it straightaway and so I lent him £20,000 whilst his application was processed. Any monies that I lent him were always repaid in full and in a timely manner."

137 I am unable to accept that the fact that the First Claimant made unsecured loans to the Bankrupt before demonstrates that the payment of the Claimants' Advance was also made by way of loan. It is one thing advancing small amounts by way of a loan to a friend. It is quite another to be advancing over £200,000 to a friend, even a close friend, without taking any form of security for the repayment of the loan from him. In this context, it is important to note that even though the Bankrupt may have been a close

friend or associate of the First Claimant, his wife had misgivings about her husband investing monies in any venture involving the Bankrupt. As he pointedly observed at paragraph 20 of his witness statement (the substance of which was not challenged by Mr Vickery):

> "I spoke to my wife about the proposal. She was extremely cautious because it was a big commitment and she was not too fond of [the Bankrupt]. There had been many rumours about his [*sic*] indefinitely and she told me that she would prefer it if I went into partnership with someone else or did it by myself. I explained that there would be two other people involved as well and that it was a good investment opportunity for us. She reluctantly agreed. If the proposal had been for me to lend such a substantial sum of money to [the Bankrupt] and his friends so that they could make a profit, my wife would never have agreed to let me get involved and neither would she have parted with the money in her account. I would also not have agreed to get involved because this money was our life savings."

138 The First Claimant's own evidence was that his investment was not to be a loan. This is what he said in paragraph 14 of his witness statement:

> "In asking for an investment from myself, [the Bankrupt] was clear that the money I put in would be an investment and not a loan. I had lent him several thousand pounds every now and again in the past so that he could advance his window businesses or pay his bills on the understanding that he would either pay me back as quickly as he could, or he would take the money off my next order(s) until he had cleared the debt. However, this time it was different. He wanted to make some money in the property market, at a time when repossessions were high, but he could not do it alone. He was asking me for a lot more money on the basis that I would be involved rather than on the basis that he would pay me back later."

139 If the Claimants' Advance was paid as a loan, it is difficult to see what the terms of the loan were. There is no documentation which describes the payment of the Claimants' Advance as a loan; and while this, by itself, does not mean that the payment of the Claimants' Advance was not made as a loan, there is no evidence about when the loan would be repaid or the rate of interest which would be payable to the First Claimant for the loan. Although the absence of those provisions is not fatal to the existence of a loan, in a situation where the First Claimant was lending over £200,000 to the Bankrupt, one might have expected to see these matters clearly expressed in a document. It is arguable that the payment of a share of the profits (one-third to each Joint Venturer) in accordance with the terms of the Written Agreement represented the First Claim's return on the loan which the Claimants' Advance represented. However, that seems to me not just to amount to speculation but would be wholly inconsistent with the terms of that document, which does not record any details relating to its amount or repayment.

140 The Second Defendants point to the fact that there is no document between the Joint Venturers which states or records that they were

agreeing to be partners. However, equally, there is no documentation which describes that the First Claimant was making a loan (or the type of investment suggested by the Second Defendants) to the Bankrupt.

141 The First Claimant states that the Written Agreement was preceded by at least one meeting in which the Joint Venturers and Mr Thakrar (prior to his ceasing to be involved in the Joint Venture) agreed to be partners, with each of them having to play a separate role in the partnership. He summarises this at paragraph 24 of his witness statement in the following terms:

> "We agreed that we would enter into the Partnership and that our roles would be as follows:
>
> (a) [The Bankrupt] would be responsible for obtaining the mortgage finance (by way of a bridging loan) for 106 and 108 High Street…
>
> (b) I would provide any outstanding sums needed above and beyond the mortgage finance to purchase the Properties.
>
> (c) Nirmal would be in charge of arranging the sale of the Properties, as part of a back-to-back sale arrangement. He would not invest any money into the Partnership, but his contribution would be by way of sourcing the Properties and arranging onward sales. He was therefore a crucial part of ensuring the transaction completed.
>
> (d) [Mr Thakrar] would also put some money in. He would finance the purchase of 43 High Street … so that there would be no need to apply for a mortgage in respect of it.
>
> (e) Once all the finance had been re-paid (including the money invested by myself and [Mr Thakrar], any net profit would be shared between the four partners equally."

142 If there was agreement (whether oral or implied) among the Joint Venturers about each of their roles, the absence of an expression provision in the Written Agreement is of little significance. Nor can I see how the fact that the role of the Third Defendant changed from being an introducer of a purchaser of the Properties to 426 Leicester Ltd (for which he would be paid a finder's fee of 1%) to a partner in the Joint Venture when that company dropped out of the purchase is significant. The fact is that if the written and oral evidence of the First Claimant are correct, he agreed to be a partner and thus to be entitled to substantially more (for doing a greater amount of work) in that capacity.

143 When the Joint Venture was first discussed between the First Claimant and the Bankrupt, he was told in no uncertain terms that the Joint Venture would be a partnership between the proposed joint venturers. As he says at paragraphs 15 to 17 of his witness statement:

"15. [The Bankrupt] told me that when the Properties were sold, the bridging loan and my investment would be cleared first. Any profit made after that would be split equally between all the partners.

16. To that extent, [the Bankrupt] told me that two old business acquaintances / friends of his, [the Third Defendant] and [Mr Thakrar] … would also join us in this Partnership. The four of us would be Partners.

17. He told me that [Mr Thakrar] would also invest some money into the Partnership and [the Third Defendant] (who like him, also had a lot of contacts) would arrange the sale. His words were *"we can buy it and flip it"* by which I understood him to mean that we could arrange a quick sale of the Properties to make a profit."

144 The substance of the First Claimant's evidence was supported by the evidence of the Bankrupt, the Third Defendant and Mr Thakrar.

145 The Bankrupt does not expressly state in his witness statement that the Joint Venturers had agreed to be partners. However, at paragraph 8 of the witness statement, he describes the Written Agreement as "the partnership agreement". He also gave it that description in the course of giving his oral evidence.

146 The Third Defendant was in no doubt that the parties had entered into a partnership. He says so throughout his witness statement. Specifically, at paragraph 11, reflecting what the First Claimant had said in his witness statement, he says this:

"The initial conversation was informal and we talked about the Properties, what we could do with them and what responsibilities we would each have. We agreed that we would enter into a Partnership in which each of us would have the following roles to play:

(a) [The Bankrupt] would be responsible for obtaining the mortgage finance for 106 and 108 High Street.

b) Pravin would put down a deposit of around £175,000 and pay any disbursements and legal costs.

c) Hasmukh would buy 43 High Street using his own money.

d) I had sourced the Properties and would arrange their onward sale, as part of a back-to-back sale arrangement. I would also find a bridging finance company who could lend [the Bankrupt] the finance required for the purchases. In addition, I would assist with any maintenance / rent collection issues and ensure that we could obtain vacant possession of the Properties."

147 The Third Defendant was also clear when he gave oral evidence that they had entered into a partnership, stating, among other things, that there was "no doubt" that "we all knew we were in a partnership."

148 Likewise, Mr Thakrar was clear that the proposed joint venturers had agreed to enter into a "partnership", though in his witness statement, he described the Written Agreement as a "joint venture agreement" and, in the course of giving his evidence, stated that

when he had decided to "lend" money to the Bankrupt, he believed they would be "partners in the loose sense of the word."

149 The Second Defendants say that the Written Agreement does not support the existence of a partnership and the evidence of the Joint Venturers and Mr Thakrar in support of an alleged partnership does not withstand scrutiny when examined properly and carefully.

150 The Written Agreement is plainly extremely poorly drafted, having been prepared by a non-professional lawyer, albeit one having a Law degree. As I have indicated above, the Second Defendants or the Previous Trustee may have attempted to obtain information from Mr Sachdev, who drafted the Written Agreement, about what the intention behind it was. So far as Mr Sachdev acted for the Bankrupt, the Previous Trustee is likely to have been able to obtain that information, including any documentation which may have been in his possession leading to the signature of the Written Agreement, under sections 311, 333 and 363 of the Insolvency Act 1986. Whether he would have been able to use that information, without the consent of the Bankrupt, is another matter, though there is no reason which I can see why the court would not have allowed him or the Second Defendants to do so if the Bankrupt had refused to provide his consent: see *Re Lemos, Leeds v Lemos* [2017] EWHC 1825 (Ch), [2018] Ch. 81, where the previous authorities on the subject are analysed in detail. Alternatively, if Mr Sachdev acted for all three Joint Venturers or even just the Third Defendant (as appears possible from the evidence), they might (subject to any claim privilege and, in the case of the Third Defendant, an order for disclosure being made against him) have disclosed that information in these proceedings.

151 It is important to observe that none of the contemporaneous documentation, whether leading to the proposed purchase of the Properties, or immediately following the abortive purchase of the First and Second Properties, refers to the Joint Venturers as "partners", or the Joint Venture as a "partnership". Indeed, the word "partner" does not appear in any such documentation. However, as I have already indicated, that does not mean that the Joint Venture was not a partnership, particularly as the only formal documentation recording the relationship of the Joint Venturers was drafted by a non-professional lawyer. Nor, as I have also indicated, would the use of the expression "partner" have meant that the Joint Venturers were partners in the Joint Venture.

152 As I have already observed, the only direct evidence which there is about what the Joint Venturers intended their relationship to be points to the fact that they had agreed to be partners. Even Mr Thakrar stated that before he had withdrawn from the Joint Venture, the four of them had agreed to be "partners in the loose sense of the word." I am unable to ascribe any significance to his reference to the four of them being partners in the "loose sense to

the word" for various reasons: first, those words on their own are meaningless. For whatever reason, Mr Vickery chose not to probe further about what Mr Thakrar meant by them. If he had, he may have elicited more information from Mr Thakrar in support of his clients' case; second, those words, by themselves, would not lead me to the inevitable conclusion that the Joint Venture was not a partnership, particularly as Mr Thakrar had decided to withdraw from the Joint Venture before or immediately after the abortive purchase of the First and Second Properties; and third, for the reasons I have already indicated, the preponderance of direct evidence from the Joint Venturers was to contrary effect.

153 The Second Defendants seek to impugn the credibility of the evidence of the Joint Venturers in various ways.

154 First, they say that clause 2 of the Written Agreement, which states that the "receipt of the rental income of £11,500 per month will be credited into a bank account in the name of [the Bankrupt]", is inconsistent with the existence of a partnership because it appears to suggest that the Bankrupt was entitled to any rent payable in respect of the Properties, until they were resold, in his own right.

155 I wholly disagree with that statement. Even disregarding the evidence of the Joint Venturers, it is plain to me that this simply cannot be correct. Clause 2 does no more than specify the account in which the rental payment had to be made. It does not give the Bankrupt the right to be entitled to keep the rental payment for his sole benefit to the exclusion of the other Joint Venturers. It does not require any great amount of ingenuity to know that if rent was being paid in respect of the Properties (which it was), then it needed to be paid into a bank account and, as the transfer of the Properties was being taken in the name of the Bankrupt, it was obvious that it should be paid into his bank account. There is absolutely no indication in the Written Agreement that the Bankrupt would be entitled to keep the rent for himself. Clause 1 of the Written Agreement clearly sets out what was agreed between the parties and clause 2 was no more than a temporary expedient, designed to set out what should happen to the collection of the rental income, pending the sale of the Properties, which the Joint Venturers had hoped would take place speedily after their purchase or – to use the First Claimant's words – after they were bought and "flipped" over.

156 That this was what the Joint Venturers had in mind was clear from the evidence of the First Claimant. At paragraph 53 of his written statement, he said that the "[Written Agreement] refers to rental income being paid to Drupad alone. This was in order to keep things simple because all the net profit from the sales would have gone into his account." In his oral evidence, the First Claimant honestly admitted that he himself had not given much thought to the payment of the rental income. He thought it was payable in the

Bankrupt's account so the Bankrupt could use it for the payment of disbursements and the like. He was clear that the amount of the rental income was not for the Bankrupt to keep for himself. The Third Defendant's evidence was much clearer on the point. He said that as the Properties were let, rent had to be collected following their purchase and the Bankrupt was charged to collect it. As he observed when questioned: "the [onward] sale [by the Joint Venturers] would not have been completed overnight, so some rent would have been received for the Properties before they were sold."

157 Nor is there any substance in the assertion that because the Joint Venturers did not discuss how the losses between them were to be shared, that is inconsistent with the existence of a partnership.

158 The First Claimant explained why they had not considered how any losses concerning the Joint Venture would be shared: it did not occur to him or the other Joint Venturers that the Joint Venture would make a loss: "… we never thought about anything going wrong; we did not entertain that thought." However, when asked what would have happened in that situation, he said that "we all would have to be responsible for any losses."

159 The evidence of the Third Defendant was to like effect. He said that they "could not see any losses arising because we had a sale set up." He then stated that he accepted that if any losses were made, he and the other Joint Venturers "would be jointly and severally liable for them."

160 That may also be the reason why Mr Sachdev did not think about incorporating a provision regarding losses in the Written Agreement, though, no doubt, a competent solicitor would have done. Partners will often not give thought to the sharing of losses, particularly where, as in this case, they have not taken proper professional advice about their relationship.

161 The failure of the Joint Venturers to make express provision (whether in writing or orally) for the sharing of losses is not fatal to the existence of a partnership. Where the partners fail to do so, section 24(1) of the PA 1890, which I have set out above, expressly provides that they "must contribute equally towards the losses whether of capital or otherwise sustained by the firm." If the Joint Venture is a partnership in the present case, the default position in section 24(1) must apply to it. The substance of this position has been recognised in many cases: see, for example, *Walker West Developments v FJ Emmett* [1979] 2 EGLR 115, CA.

162 The Second Defendants refer to several areas of the written and oral evidence of the Joint Venturers which they say undermines the First Claimant's contention that the Joint Venture was a partnership.

163 First, they refer to the transcript of the Bankrupt's interview with the Previous Trustee's solicitor that took place in September 2012 in which he (or his son Anup Chorera who often spoke for him) appeared to use words such as "bridging" to describe the advances which the Claimants had made towards the purchase of the Properties. I have already indicated that I can see no substance in this assertion if one considers the transcript as a whole and what the Bankrupt had to say in his witness statement dated 12 May 2012.

164 But even if one disregards the cherry-picking by the Second Defendants of various phrases from the transcript in support of their case, and of the explanation provided by the Bankrupt in his written statement and oral evidence about what he meant by them, it is clear that, read as a whole, the relationship which the Bankrupt was describing that he and the other Joint Venturers had in the Joint Venture was one of partnership. The following excerpts from the transcript illustrate this point:

<u>Recording 3 – page 2 of the transcript – 1.30–2.30 mins</u>

"Drupad Chorera:	He didn't know basically, he just…
Anup Chorera:	They were doing it as *a joint venture*.
Drupad Chorera:	It's a *joint venture*. We bought the property and sold it."

…

(My emphasis)

<u>3.30-7 mins</u>

"Drupad Chorera:	The way we done it [pause] we bought this Colliers Wood property.
Interviewer:	Yeah.
Drupad Chorera:	Then we done an agreement with all of us, that when we buy it and sell it, whatever we sell it, we split it three ways.
	…
Interviewer:	Is it three ways or four ways?
Drupad Chorera:	Initially it was four ways but in the end only three people signed.
Anup Chorera:	Because I think the fourth person backed out."

…

(My emphasis).

<u>Page 4 of the transcript – 10.26–11.10 mins</u>

"Drupad Chorera: Now the money needs to get back to wherever it is *because that's what...the bridgers got his money [pause] Pravin needs his money*."

(My emphasis).

165 There is no question in my mind that what the Bankrupt is describing here is a joint venture in which each of the joint venturers would have a third share of the profits after the liabilities to the bridging company (MPV) and the First Claimant are discharged.

166 There then follows the following exchange between the interviewer and the Bankrupt:

<u>Recording number 4 – pages 7 to 8 of the transcript – 2.39 – 3.45 mins</u>

"Anup Chorera: So what they want to do is pay...while the money came in, *pay that Pravin off what he put in*.

Interviewer: Yeah.

Anup Chorera: What money was put in.

Interviewer: Yeah.

Anup Chorera: What solicitors fees he paid to him [inaudible]

Interviewer: So…

Anup Chorera: And then the profits shared between…

Interviewer: Have I understood this correctly then, if the insurers said actually we are going to pay out £700,000, that money will cover £200,000, will repay [sic] Tanna …

Anup Chorera: Patel.

Drupad Chorera: Patel, yeah.

Interviewer: And the half, oh yeah, Mr Patel, sorry.

Drupad Choera: Yeah.

Err, the remaining half a million that would be split three ways.

Drupad Chorera: Yeah

Interviewer: So [inaudible] that…

Drupad Chorera: The split ways was only 300. That was we are owed

for the profit.

Anup Chorera: But we don't know innit, there might even be more, There might even be less.

Drupad Chorera: Yeah, yeah.

Anup Chorera: [inaudible] *what he's saying is right, what happened, whatever they got on top of the 200 was going to be split 3 ways*.

Drupad Chorera: Yeah, that's mine. Yeah. Whatever.

Interviewer: Yeah well, that's what I mean so, if 700,000 comes in.

Drupad Chorera: Yeah.

Interviewer: *Patel will get his 200,000 back and then the half a million gets split three ways. If they, if the insurers give back £203,000, you think Mr Patel should get 200 and then each of you get £1,000 each*?

Drupad Chorera: *Yeah*

Interviewer: *Well, that's what you're saying* [inaudible]?

Drupad Chorera: *Yeah...*"

(My emphasis)

167 It is plain to me that this part of the exchanges demonstrates that the Joint Venturers never thought that the Joint Venture might make a loss. The interviewer might have raised with the Bankrupt what would happen if the Joint Venture had made a loss. However, he did not. It appears to be clear from the Bankrupt's answers that it had never entered into the minds of the Joint Venturers that they might make a loss.

168 The Second Defendants rely heavily on what the Bankrupt says next:

<u>Recording number 4 – page 9 of the transcript – 5.07 – 7.15 mins</u>

"Drupad Chorera: To me, I am not entitled to that money full stop. I've never been. *I bridged it from Pravin [i.e. the First Claimant], I bridged it from the bridger and I was going to bridge it from HKS [i.e. Mr Thakrar]*."

(My emphasis)

169 The Bankrupt said words which were similar in a previous part of his interview – see recording number 3 – page 4 of the transcript – 3.30 – 7.00 mins:

"Drupad Chorera:	So all the money was *bridged* by whoever it was. The third person was *bridging* it. The first person was *bridging* it, second person was *bridging* it. The money went direct to Barlows. Barlows sent it to, wherever it went…"

(My emphasis)

170 It is interesting to note that the interviewer does not probe into what the Bankrupt means by the words "I *bridged* it from Pravin." If he had thought that the Bankrupt was using the words in the sense in which it is conventionally understood, he might have done because it had to be of crucial importance whether the amount payable to the First Claimant ranked as an unsecured claim in the bankruptcy or whether it had to be accorded some sort of priority. However, I am clear that those words were used in a loose sense, i.e. essentially informing the interviewer where the purchase monies had come from. Taken in isolation, I do not read anything else into those words. Taking the transcript as a whole, it is clear that the Bankrupt was describing an "investment" of capital by the First Claimant into the Joint Venture which he would expect the Joint Venture to pay back to him, before any profits were divided, once the Properties were sold. That much is also clear from the Bankrupt's written statement in which he described the amount which the First Claimant was going to pay towards the purchase of the Properties as a "deposit". Despite being asked questions about what he meant by the expression "bridged", he was unable to expand further upon what he had said in his witness statement and in the transcript of the interview which he had provided.

171 The interview continued:

<u>Recording number 4 – pages 9 to 10 of the transcript – 5.07 – 7.15 mins</u>

"Interviewer:	But your, your contract there has you down as getting 25%.
Drupad Chorera:	Yes but that's the profits.
Interviewer:	Yeah.
Drupad Chorera:	That's the profits. The profit was gonna share four ways or three ways that's what I am trying to say. So we just done an agreement and that's it.
Interviewer:	Yeah.

Drupad Chorera: But because we didn't get the property the money needs, from Barlows…. *it's Barlows duty to give the money back to whoever the money was given to. The money went directly from Pravin's account [pause] and all that see. Everybody's money went from, bridger's money went to Barlows. It didn't touch me*.

Interviewer: Right. Yeah I didn't, I wouldn't expect it would.

Drupad Chorera: Yeah, see...

Interviewer: But the...

Drupad Chorera: The profit was the one that we...cos we'd already sold it.

Interviewer: Patel's money…

Drupad Chorera: Yeah...

Interviewer: Did that go straight to Barlows?

Drupad Chorera: That's…from...

Anup Chorera: That's his wife's account.

Drupad Chorera: His wife's account [pause and noise] to Barlows.

[Pause] And the money when we sold it, would have come to Barlows would have put the money back into the different boxes.

Interviewer: Yeah.

Drupad Chorera: And whatever was left, would have been shared.

Interviewer: If it was Mrs Patel's money, why isn't Mrs Patel on there?

Drupad Chorera: No it wasn't Mrs Patel, it was just....

Interviewer: But you said it came from her account.

Drupad Chorera: The money. Pravin's money was in, in Mrs account.

Interviewer: Right.

Drupad Chorera: On the deposit account, we know [inaudible] in the savings to earn more interest, so it was there. She shifted it to his account.

Interviewer: Right.

Drupad Chorera: However it is, it came from Pravin.

Interviewer: Yeah. I've got to be honest, that document, the way it's drafted, I'm not sure it is going to have a a correct legal effect.

Drupad Chorera: Yeah.

Interviewer: It's it's erm..It's not very well done.

Drupad Chorera: *But what I am trying to say to you is, if money was bridged, however it was bridged, the money is owed to whoever it was owed. It was owed by Barlows to him not me or whoever*."

(My emphasis)

172 It is from the above exchanges that: (a) that the Bankrupt was not using the expressions "bridge" or "bridging" to describe the making of a "bridging loan" (as conventionally understood) by the First Claimant to him. He appears to be using those expressions to describe how any shortfall between the purchase price of the Properties and the amount which MPV was prepared to advance to the Bankrupt, would be paid; (b) the First Claimant was not making a loan to the Bankrupt. He was investing capital in the Joint Venture; (c) the Bankrupt's understanding (confirmed by the other Joint Venturers) was that the First Claimant would be entitled to the return of his capital before the profits were divided between them; and (d) each Joint Venturer would be entitled to a third share of the profits.

173 The Second Defendants next refer to how the First Claimant came to make the Claimants' Advance to the Bankrupt and contend that, on a careful analysis of the evidence of the First Claimant and the Third Defendant, their account on this issue is wholly unreliable and that no meeting of the type described by them about the Joint venture is likely to have taken place in or about January 2010, as the First Claimant had claimed in paragraph 22 of his witness statement.

174 At paragraph 11 of his witness statement, the Third Defendant refers to the agreement which the Joint Venturers and Mr Thakrar had reached in January or February 2010 under which they had agreed that the First Claimant would invest £175,000 in the Joint Venture. The Second Defendants point out that this simply cannot be true because on 18 February 2010 (see pages 34 and 35 of the Documents Bundle), MPV had agreed to make a loan of the whole or almost the whole of the purchase price of the First and Second Properties. It was only a few weeks later, on 18 March 2010 (see pages 44 and 45 of the Documents Bundle) that MPV had decided to revise its offer and reduce the amount of the loan which it was prepared to make, such that the First Claimant needed to make a substantially higher investment in the Joint Venture.

175 The Third Defendant made various suggestions about how he might have known that a sum of some £175,000 would need to be invested by the First Claimant. He stated that the Joint Venturers would have undertaken rough calculations about what might be needed (stating that lenders rarely lent the full amount of the purchase price of a property), that the offers might have related to

all the Properties (which they did not) and that things changed as matters moved on.

176 The First Claimant was asked similar questions about the discrepancy in the figures. He was questioned why it was necessary for him to invest the full amount of the Claimants' Advance if MPV were providing the Bankrupt with a loan of the whole or almost the whole of the purchase price of the First and Second Properties. He might have needed to investment monies in the Joint Venture for disbursements (such as stamp duty) but that would be nowhere the full amount of the Claimants' Advance.

177 The First Claimant stated that when they had first met, they had discussed, in rough terms, the amount which he would need to invest in the Joint Venture. I accept what he says. It would have been remarkable if they had not.

178 Whatever different explanations the Third Defendant provided about the discrepancy in the figures (and whether the explanations were plausible), I find that there is little assistance which the Second Defendants can derive from them.

179 Neither in the Amended Particulars of Claim nor in the witness statement does the First Claimant state how much he would have been required to invest. The Written Agreement is also silent on this point. The clear impression I got from his evidence was that his function was to find (or as the Bankrupt would say "bridge") any shortfall between the purchase price of the First and Second Properties and the amount which MPV was prepared to advance to the Bankrupt. That shortfall might have been small (to cover disbursements, legal fees, and the like) if the amount under the first offer had been advanced by MPV to the Bankrupt. However, as events transpired, MPV was not prepared to advance that amount. Accordingly, the amount required from the First Claimant was substantially larger because MPV was only prepared to offer a significantly reduced amount. That was his role in the Joint Venture.

180 I have referred to the lack of contemporaneous documentation referring to the Joint Venturers as partners. Among the various documents upon which the Second Defendants rely is a letter dated 24 May 2011 (at page 234 of the Documents Bundle) in which the First Claimant wrote to David Landau of MPV to inform him of his interest in the First and Second Properties. They say that if there was ever a partnership between the Joint Venturers, the First Claimant, at that stage, would have informed Mr Landau that he was a partner with the other Joint Venturers in the purchase of the First and Second Properties. However, he did not.

181 The First Claimant's response was to say that the "question was never asked" and "I did not think it was important".

182 I am not sure of the context in which the letter was written. However, the letter does little more than confirm in writing an indication given by the First Claimant over the telephone about the facts that he had an "interest" in the First and Second Properties. I would not think – as he said in his evidence – that it would be necessary for him to set out how he became involved in acquiring that interest. It is noticeable that: (a) he refers to "having an equity stake in the property [i.e. the First and Second] Properties", which is consistent with his claim that the First and Second Properties were purchased by the Bankrupt on behalf of himself, the First Claimant and Third Defendant as partners; (b) he makes no mention of the fact that his "interest" was in the form of a loan made by him to the Bankrupt; and (b) he makes no mention of the interest of the Third Defendant, even though, at that stage, the Written Agreement had been signed by the Joint Venturers. If that letter had intended to set out his precise interest in the First and Second Properties, it might have mentioned what interest the Third Defendant had in those properties as well. I, therefore, attach no particular significance to that letter. I have carefully considered whether the First Claimant was, at that stage (at a time when the Bankrupt was not subject to a bankruptcy order, though, I believe, was contesting a statutory demand which had been served upon him), seeking to have the best of both worlds – i.e. maintaining a claim to an interest in the First and Second Properties and, at the same time, attempting to distance himself from the Bankrupt for fear that he would be jointly and severally liable for any losses which could arise from the Joint Venture having come to an end. I am entirely satisfied that he was not.

183 Much the same can be said about the other points, of a similar nature, taken by the Second Defendants.

184 For example, at the meeting which took place between Alastair Comforth (Barlows' solicitor instructed through their insurers) and Jag Singh on behalf of the Bankrupt (pages 241 to 244 of the Documents Bundle), neither Mr Singh nor Mr Gooch, who was present at the meeting, made mention of a partnership or even of the First Claimant or the Third Defendant having an interest in the First and Second Properties. The First Claimant's response to that was to reiterate what he had said throughout his written and oral evidence: the First and Second Properties had been purchased in the sole name of the Bankrupt and it was appropriate, therefore, that any negotiations should be conducted by or on his behalf and in his name. However, it was the First Claimant who had lost monies and, therefore, he was doing a lot of work in the background to recover those monies. A curious feature of the meeting is why the Bankrupt remained outside during the whole meeting. It is at least possible that if he had not, he might have given some indication of what he regarded as being the interests of the other Joint Venturers in the First and Second Properties.

185 That there was – as the First Claimant observed – a substantial amount of work being done by him in the background (which, he said, also explained why he brought the present proceedings against Barlows a day or so before the expiry of the limitation period) is evident from a number of documents contained in the various bundles. They include the documents at pages 214-216 of the Documents Bundle which show that the fees that the Bankrupt incurred in instructing Messrs Broomhall & Co ("Broomhalls") to investigate the possibility of making a claim against Barlows – see paragraph 86 of the First Claimant's witness statement – were being paid by the First Claimant even though Broomhalls purported to act on behalf of the Bankrupt only.

186 There also appears to be no good reason why Barlows would be communicating with the Third Defendant (see pages 151 to 154, 162, 169, 173, 180, 185 to 186 and 198 to 199 of the Documents Bundle) concerning the purchase of the First and Second Properties, and about the aftermath of the issues which arose, if they only acted for the Bankrupt. Nor, for those reasons, is it clear why Broomhalls would have done so (see pages 188 to 189 of the Documents Bundle).

187 There is some uncertainty about why Mr Thakrar did not sign the Written Agreement on or before 29 March 2010, as the Joint Venturers had done, when, as late as 9 April 2010, he appeared to be willing to fulfil his role in the purchase of the Third Property under the purported oral agreement referred to in paragraph 143, above, which the First Claimant alleged had been reached between all of them. In fact, there is no evidence about whether Mr Thakrar had ever seen the Written Agreement and, if he had, why he had not signed it.

188 Mr Vickery says that this supports the premise that when the purchase of the First and Second Properties fell through, even on the First Claimant's case, there must have been four, as opposed to three, partners and, therefore, the First Claimant's case is not supported by his pleaded case. I have already indicated that I do not accept that. But if there were four partners at the time, then the account which I direct should be taken must involve Mr Thakrar.

189 In order to consider the circumstances of Mr Thakrar's "withdrawal" from the purported agreement which he and the other parties reached at the meeting, it is necessary to consider what his functions were under the terms of that agreement. Mr Thakrar was only going to be involved in the purchase of the Third Property. He had no part to play in the purchase of the First and Second Properties.

190 In my judgment, whatever Mr Thakrar may have discussed and agreed with the Joint Venturers, he did not believe that he was committed to any involvement in an enterprise with them until the

Third Property came to be purchased. He was also reluctant to get involved in the enterprise without being assured that his investment would be properly protected. That was why he instructed his own solicitors to investigate title to the Third Property. When his solicitors were unable to assure him that his investment would be properly protected, he decided not to have anything to do with the enterprise. That was why: (a) he described himself and the Joint Venturers as partners "in the loose sense of the word"; (b) he said that there were initially three partners (he, the Bankrupt and the Third Defendant), then four (he and the Joint Venturers) and then three (the Joint Venturers); (c) he described his investment as a loan and why he intended to have a charge over the Third Property to secure it; and (d) in his oral evidence, he said that he "decided not to get involved … I withdrew … I was a partner but because I did not put money in, I cannot be a partner". Without seeking to indulge in speculation, that may also explain why he did not sign the Written Agreement. It appears to me that, at the relevant time, i.e. when the First and Second Properties were being attempted to be purchased, he was not a partner in the enterprise because he had decided not to proceed with it. Alternatively, if he was, then, as Mr Laughton contended, he had retired from it as soon as it appeared to him that Wingfield could not transfer good and marketable title to the Third Property and that, accordingly, his proposed charge over that property would not secure the advance which he had agreed to make for the purchase of the property. This hypothesis would proceed on the basis that the original partnership between the Joint Venturers and Mr Thakrar, which involved the purchase of (all of) the Properties, was dissolved by agreement between them (as opposed to having been dissolved under section 26(1) of the PA 1890, which requires the service of written notice) and replaced by a new partnership between the Joint Venturers which involved the purchase of those properties.

191 The First Claimant stated in his oral evidence that Barlows were aware that the First and Second Properties were being purchased by the Joint Venturers as "partners". The Third Defendant went further and said that he had met Mr Gooch with the First Claimant (possibly when he and the First Claimant first met Mr Gooch in early 2010), gave him a copy of the Written Agreement and told him that the Properties were being purchased in partnership. He seemed to think that he had also sent Mr Gooch an email attaching a copy of the Written Agreement. I am not able to accept what the Third Defendant says about this, though, as I say later, I am satisfied that Barlows were fully aware that the Properties were being purchased by the Bankrupt for himself and others.

192 There is, of course, no documentation to demonstrate that Barlows ever knew that the Joint Venturers were partners. The Second Defendants can derive no assistance from the fact that Barlows appeared only to be treating the Bankrupt as their client. As I have indicated above, they also sent communication to the Third

Defendant about the purchase of the Properties. It is difficult to understand why they would have done so if they thought the Bankrupt was the only person who had an interest in those properties. In addition, they received various sums which constituted the substantial part of the Claimants' Advance from the First Claimant. They must, therefore, have known that he had some interest in the proposed transaction. Moreover, their email dated 3 February 2010 (page 29 of the Documents Bundle) to the Third Defendant enquires about the person or persons in whose names the Properties are to be purchased. Why, it has to be questioned, would they be asking that question if the only person having an interest in them was the Bankrupt? True it is that they regarded the Bankrupt as their client – see pages 38 and 39 of the Documents Bundle. However, they were plainly aware of some (as the Third Defendant put it) "consortium" having been formed for the purchase of the Properties.

193 Although the First Claimant says that Barlows were so aware, there is no evidence to support that statement. In addition, although the First Claimant's witness statement refers to meetings he had with Mr Gooch, he makes no reference in his witness statement to having informed Mr Gooch that the First and Second Properties were being purchased by the Bankrupt on behalf of a partnership. Nonetheless, that does not mean that there was no partnership between the Joint Venturers, simply that there is no evidence that Barlows were aware of one. However, what is clear in my mind – and this is important in the context of the Trust Issue – is that Barlows were fully aware that, despite the fact that the First and Second Properties were being transferred in the sole name of the Bankrupt, it was being purchased by him on behalf of all the Joint Venturers. That fact is not only evident from the account which the First Claimant gave in his written and oral evidence but also by the Bankrupt who, in paragraph 8 of his witness statement, said that he did not think he ever showed Mr Gooch the "partnership agreement" (i.e. the Written Agreement), but was sure that he told him that he "was acting with others to get this deal done" and that "at least one meeting [he] had with Mr Gooch … [the First Claimant] also attended."

194 In the circumstances, I am entirely satisfied that the Joint Venture was a partnership and that the Joint Venturers were partners in it.

SUMMARY OF CONCLUSIONS ON THE PARTNERSHIP ISSUE

195 I am satisfied that the Joint Venture was a "business" within the meaning of the PA 1890.

196 I am also satisfied that the Joint Venturers carried the business of the Joint Venture in partnership. The Joint Venture has all the

classic hallmarks of a partnership business. The Joint Venture plainly involved the carrying on of a business; the Joint Venturers carried on that business in common; and they carried it out with a view of profit.

197 Specifically, I can summarise my conclusions as follows:

(a) At or about the time of the abortive purchase of the First and Second Properties, the partnership subsisted between the three Joint Venturers.

(b) The roles and responsibilities of each Joint Venturer were specifically agreed between them, as summarised in the First Claimant's written evidence.

(c) The Written Agreement confirmed the important matters which governed their relationship.

(d) None of the matters relied upon in support by the Second Defendants (whether taken individually or collectively) is sufficient to convince me that the business of the Joint Venture was not carried out by the Joint Venturers in partnership.

(e) The Joint Venturers were equal partners in the partnership with each of them being entitled to a third share of the profits of the partnership and being responsible for a third share of the losses of the partnership.

(f) I consider the partnership to have been dissolved when it finally became clear that the Bankrupt would not be able to complete the purchase of the First and Second Properties. At that stage, the purpose of the partnership had wholly failed and there was no purpose in continuing with the purchase of the Third Property, especially as it involved taking a transfer of that property from the same vendor, i.e. Wingfield, with the same problems in title arising. At that stage, Mr Thakrar had already decided that he would not be involved in the purchase of the Third Property. Alternatively, it dissolved, pursuant to section 33(1) of the PA 1890, at the very latest, when the Bankrupt was made bankrupt.

198 On the basis that I have determined the Partnership Issue in favour of the First Claimant, it is not necessary for me to determine the Trust Issue. Nonetheless, I do so in the event that I am found to have erred in my determination of the Partnership Issue.

THE TRUST ISSUE – THE APPROACH OF THE COURT

199 The First Claimant claims that the Settlement Amount is held on trust for him and, therefore, falls outside "the bankrupt's estate" as defined in section 283 of the Insolvency Act 1986. If he is correct about that, then the Settlement Amount would need to be paid to him at least to the extent of the Claimants' Advance and any appropriate of interest payable on that amount, subject only to any proper deductions which could be made by the Second Defendants, such as under any order made by the court pursuant to the Expenses Application. If he is not, then the First Claimant would be an unsecured creditor of the Bankrupt and would need to prove in the bankruptcy for the amount of his loss. In that event, it would also be difficult for him to pursue a claim for breach of trust against the Second Defendants unless he could show that there would be a distribution to the unsecured creditors from the proceeds of the recovery of that claim and of the other assets which were included in the Bankrupt's estate.

200 The question whether the Settlement Amount is held on trust for the First Claimant is a mixed question of law and fact. The court has to apply the legal principles relating to when a trust comes into existence (law) to the facts of the case (facts).

THE TRUST ISSUE – THE LAW

201 There is no suggestion by the First Claimant that there is an express declaration of trust by the Bankrupt in his favour. Section 53 of the Law of Property Act 1925 requires such a declaration to be evidenced in writing. There is no such written evidence in existence.

202 The basis of the claim of the First Claimant may briefly be stated as follows:

(a) The First Claimant entered into an agreement with the Bankrupt and the Third Defendant to purchase, and then resell, the First and Second Properties on the basis that they would share equally in the net profits after resale.

(b) The First and Second Properties were to be purchased in the name of the Bankrupt who was, therefore, formally the client of Barlows as the conveyancing solicitors involved in the proposed purchase.

(c) The First Claimant provided the amount of the Claimants' Advance for the sole purpose of purchasing the First and Second Properties.

(d) The Claimants' Advance was paid directly or indirectly to Barlows, who knowingly held it on trust for such purpose.

(e) Alternatively, Barlows held the Claimants' Advance on trust for the Bankrupt, who himself held it on resulting trust for the First Claimant, subject to having the power to apply it for that purpose.

(f) Due to the negligent acts or omissions of Barlows, the Claimants' Advance was not used for the purpose for which it was paid to Barlows. Instead, it was paid to a third party without the First and Second Properties being acquired.

(g) Accordingly, Barlows were under an equitable duty to the First Claimant to restore the amount of the Claimants' Advance to the trust and/or to pay equitable compensation to the First Claimant for his loss.

(j) Alternatively, Barlows were under an equitable duty to the Bankrupt to restore the Claimants' Advance to the trust in his favour and/or to pay equitable compensation to the Bankrupt for his loss, and the Bankrupt was under a similar duty to account for the Claimants' Advance to the First Claimant.

(i) Instead, monies equivalent to such equitable compensation, including interest, (i.e. the Settlement Amount) have been paid to the Second Defendants, who had no beneficial interest in them, and who, therefore, hold them on trust for the First Claimant.

(j) Even if the sums paid by Barlows to the Second Defendants are characterised as damages for negligence, such sums are held on trust for the First Claimant, as the person who had actually suffered the loss claimed against Barlows was plainly the First Claimant, not the Bankrupt.

203 The basis upon which it is pleaded that the Claimants' Advance was held by the Bankrupt, and now the Settlement Amount is held by the Second Defendants, on trust is summarised at paragraph 15 of the Re-Amended Particulars of Claim in the following terms:

> "The monies paid by (or on behalf of) [the First Claimant] as pleaded herein were received by Barlows to the order of [the Bankrupt] for the purpose of the joint acquisition of the [First and Second] Properties and were therefore impressed with a resulting or constructive trust in favour of the [First Claimant]. Accordingly, [the Bankrupt's] cause of action consequent to the negligent disposition of those monies by Barlows was itself held on trust for [the First Claimant], such that the fruits of the cause of action are now held by [the Second Defendants, as joint trustees of the Bankrupt] on trust for [the First Claimant] (to the extent of his financial contribution and/or intended share of the [First and Second Properties])."

204 The trust to which the Second Defendants are said to be subject is a *Quistclose* trust, named after the case in which the House of Lords authoritatively articulated the nature of the trust: *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567.

205 The authors of *Snell's Equity* (34th Edition) describe how such a trust arises:

> "A trust may arise where one person, A, advances money to another, B, on the understanding that B is not to have the free disposal of the money and that it may only be applied for the purpose stated by A. The effect of the trust is to reserve in A the beneficial interest in the money, so providing him with some proprietary security for his advance. This so-called '*Quistclose* trust' shows some of the features of a resulting trust… [The] standard case recognised in the authorities [is] where A lends money to B with the specific purpose that B should apply the money for the payment of his creditors, C. The general feature of this variety of trust is that one person uses a trust to retain a security interest in money which he has advanced to another subject to some binding restriction as to its use. The parties are also free to structure their transaction differently, so that the beneficial interest in the money and the rights to enforce the transaction would vest in someone other than the person in the standard case. The recognition of the standard case does not preclude different forms of arrangement if the proper construction of the transactional documents indicates that this is what the parties intended."

206 *Lewin on Trusts* (20th Edition) summarises a *Quistclose* trust in similar terms, at paragraph 9-046:

> "A *Quistclose* trust is one whereby A pays or transfers money or property to B so that B holds the money or property in trust for A subject to a power for B to apply the money or property for a stated purpose. Hence A's beneficial interest in the money or property will remain unless and until the money or property is applied in accordance with that power. The power will be valid (such that if exercised in accordance with its terms, it will be effective to determine A's beneficial interest) if the court can say that a given application of the money or property does or does not fall within the terms of the power. The question to be asked in terms of validity is whether or not the power is void for uncertainty and it must, accordingly, have certainty of objects. The only trust is the resulting trust for the payer and the power to apply the money for a stated purpose is a mere power and not a purpose trust. If the purpose fails then the money or property is held on resulting trust for A freed from any power, and so can be recovered by A by a proprietary claim whether or not B is solvent. The principle applies not only when the payment is a loan but also when the person making the payment is a debtor making a payment to his creditor with a requirement that it be applied for a particular purpose."

207 The First Claimant claims that the summary of the principles relating to a *Quistclose* trust set out above applies in his case.

208 There are various matters upon which the Second Defendants rely in contending that the Settlement Amount is not held on a *Quistclose* trust.

209 The first is that the premise upon which the claim based on a *Quistclose* trust is advanced is inconsistent with the allegation of

the First Claimant that he and the other Joint Venturers were in partnership. I wholly reject that contention for the various reasons mentioned below.

210 In any event, the claim of the First Claimant, based on the *Quistclose* trust, is advanced by him as an alternative to his claim that the Joint Venture was run as a partnership – see paragraph 15 of the Amended Particulars of Claim. There is nothing in the way in which this alternative basis of the claim is pleaded by the First Claimant which can be said to be inconsistent with the primary basis of his claim.

211 Nor is there any substance in the contention of the Second Defendants that the case of the First Claimant, based on a *Quistclose* trust, is not properly pleaded. The basis upon which it is stated that there is a *Quistclose* trust is sufficiently set out. Paragraph 15 of the Amended Particulars clearly sets out: (a) the purpose for which the amount of the Claimants' Advance came to be paid to Barlows ("… for the purposes of the joint acquisition of the [First and Second] Properties"); (b) why, therefore, the amount of the Claimants' Advance was impressed with a trust in favour of the First Claimant; and (c) why the fruits of the cause of action which the Bankrupt had against Barlows as a result of their dissipation of the Claimants' Advance would be held by the Bankrupt (but following his bankruptcy, by the Second Defendants as his joint trustees) on trust for the First Claimant. The First Claimant has not expressly pleaded either the fact that the Claimants' Advance can be traced into any assets which Barlows held or that the payment of Settlement Amount gave rise to a new or separate trust because, as I say below, it was not necessary for him to do so. It should also be remembered that CPR 16.4(1)(a) only requires a claimant to include in his particulars of claim a concise statement of the facts upon which he relies. The First Claimant has fully complied with that requirement.

212 Several cases have clarified the scope and circumstances in which a *Quistclose* trust will be shown to exist.

213 Starting with *Quistclose* itself, Lord Wilberforce said at [1970] A.C 567 at 580D:

> "In *Toovey v. Milne* (1819) 2 B. & A. 683 part of the money advanced was, on the failure of the purpose for which it was lent (viz, to pay certain debts), repaid by the bankrupt to the person who had advanced it. On action being brought by the assignee of the bankrupt to recover it, the plaintiff was non suited and the non suit was upheld on a motion for a retrial. In his judgment Abbott C.J. said, at p. 684:
>
> > 'I thought at the trial, and still think, *that the fair inference from the facts* proved was that this money was advanced for a special purpose, and that being so clothed with a specific trust, no property in it passed to the assignee of the bankrupt. Then the purpose having failed, there is an implied stipulation that the

> money shall be repaid. That has been done in the present case; and I am of opinion that that repayment was lawful, and that the non suit was right.'
>
> The basis for the decision was thus clearly stated, viz., that the money advanced for the specific purpose did not become part of the bankrupt's estate. This case has been repeatedly followed and applied…"

(My emphasis).

214 The House of Lords later refined the doctrine in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164. In that case, a lender paid money to a solicitor in return for an undertaking by the solicitor that the money lent would be retained by his firm until such time as it was applied in the acquisition of property on behalf of his client, that the money would be used solely for the acquisition of property on behalf of his client and for no other purpose, and that he would repay the money with interest within a certain time. Contrary to the terms of the undertaking, the solicitor paid the money to another solicitor engaged by the client upon receiving an assurance from the client that the money would be applied in the acquisition of property, but the client failed to repay the loan within the prescribed time and became insolvent. The other solicitor paid the money to the client and only part of it was applied by the client in the acquisition of property. The main issue was whether the other solicitor was liable for dishonest assistance in a breach of trust by the solicitor who gave the undertaking. But no question of dishonest assistance could arise unless the solicitor who gave the undertaking to the lender held the money on a trust in which the lender was interested, and not merely on a bare trust for the client. It was held that the money was held by the solicitor who gave the undertaking on a *Quistclose* trust in favour of the lender and so there was a breach of trust by him in paying the money to another solicitor rather than applying it in the acquisition of property on behalf of the client.

215 Lord Millett said:

> "[68] Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases.
>
> [69] Such arrangements are commonly described as creating 'a Quistclose trust', after the well known decision of the House in *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567 in which Lord Wilberforce confirmed the validity of such arrangements and explained their legal consequences. When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to

prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the lender has his normal remedy in debt. *If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower's assets, in which case it passes to his trustee in bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. This depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case. ...*

[71] ... A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. *If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them. ...* .

[74] *The question in every case is whether the parties intended the money to be at the free disposal of the recipient* ...

[76] ... It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract. As North J explained in *Gibert v Gonard* (1884) 54 LJ Ch 439, 440:

> 'It is very well known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose.'

The duty is not contractual but fiduciary. It may exist despite the absence of any contract at all between the parties, as in *Rose v Rose* (1986) 7 NSWLR 679; and it binds third parties as in the *Quistclose* case itself. The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust. ...

[99] There is a further point which is well brought out in the judgment of the Court of Appeal. On a purchase of land it is a commonplace for the purchaser's mortgagee to pay the mortgage money to the purchaser's solicitor against his undertaking to apply it in the payment of the purchase price in return for a properly executed conveyance from the vendor and mortgage to the mortgagee. There is no doubt that the solicitor would commit a breach of trust if he were to apply it for any other purpose, or to apply it for the stated purpose if the mortgagee countermanded his instructions (see *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 715, [1998] Ch 1 at 22). It is universally acknowledged that the beneficiary of the trust, usually described as an express or implied trust, is the mortgagee. Until paid in accordance with the mortgagee's instructions or returned it is the property of the mortgagee in equity, and the mortgagee may trace

the money and obtain proprietary relief against a third party (see *Boscawen v Bajwa, Abbey National plc v Boscawen* [1995] 4 All ER 769, [1996] 1 WLR 328). It is often assumed that the trust arises because the solicitor has become the mortgagee's solicitor for the purpose of completion. But that was not the case in *Barclays Bank plc v Weeks Legg & Dean (a firm), Barclays Bank plc v Layton Lougher & Co (a firm), Mohamed v Fahiya (N E Hopkin John & Co (a firm), third party)* [1998] 3 All ER 213, [1999] QB 309, where the solicitor's undertaking was the only communication passing between the mortgagee and the solicitor. I said:

> 'The function of the undertaking is to prescribe the terms upon which the solicitor receives the money remitted by the bank. Such money is trust money which belongs in equity to the bank but which the solicitor is authorised to disburse in accordance with the terms of the undertaking but not otherwise. Parting with the money otherwise than in accordance with the undertaking constitutes at one and the same time a breach of a contractual undertaking and a breach of the trust on which the money is held.' (See [1998] 3 All ER 213 at 221, [1999] QB 309 at 324).

The case is, of course, even closer to the present than the traditional cases in which a *Quistclose* trust has been held to have been created. I do not think that subtle distinctions should be made between 'true' *Quistclose* trusts and trusts which are merely analogous to them. It depends on how widely or narrowly you choose to define the *Quistclose* trust. *There is clearly a wide range of situations in which the parties enter into a commercial arrangement which permits one party to have a limited use of the other's money for a stated purpose, is not free to apply it for any other purpose, and must return it if for any reason the purpose cannot be carried out.* The arrangement between the purchaser's solicitor and the purchaser's mortgagee is an example of just such an arrangement. All such arrangements should if possible be susceptible to the same analysis.

[100] I find unconvincing for the reasons I have endeavoured to explain, and hold the *Quistclose* trust to be an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset. Contrary to the opinion of the Court of Appeal, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money. Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case."

(My emphasis).

216 In short, a *Quistclose* trust will arise when property is transferred on terms which do not leave it at the free disposal of the transferee, usually an arrangement that the property should be used exclusively for a stated purpose. There must be an intention on the part of the transferor to enter into an arrangement which, when viewed objectively, has the effect, in law, of creating a trust. The party seeking to rely on such a trust must prove the creation of the trust. Absent such proof, the trust will not, or not be presumed, to exist: see, for example, *Goyal v Florence Care Ltd* [2020] EWHC 659 (Ch), [2020] All ER (D) 10 (Apr). The stated purpose must be clear so that a court can determine whether the property was applied for the purpose. The trust which arises as a result of the operation of *Quistclose* is a resulting trust in the manner indicated above. It is not a constructive trust. In fact, it is correct to point that it is no longer part of the First Claimant's case that the monies included in the Claimants' Advance was held by Barlows on some form of constructive trust. It is difficult to see how it can be: see, for example, *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, CA.

217 In *Bieber and others v Teathers Ltd (in liquidation)*, at [15] Patten L.J. stated:

> "I would only add by way of emphasis that in deciding whether particular arrangements involve the creation of a trust and with it the retention by the paying party of beneficial control of the monies, proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved. As Lord Millett stressed in *Twinsectra* (at 73) and the judge repeated in 17 of his own judgment, payments are routinely made in advance for particular goods and services but do not constitute trust monies in the recipient's hands. It is therefore necessary to be satisfied not merely that the money when paid was not at the free disposal of the payee but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the payor's rights and the control of the use of the money through the medium of a trust. Critically this involves the court being satisfied that the intention of the parties was that the monies transferred by the investors should not become the absolute property of Teathers [i.e. the solicitors] (subject only to a contractual restraint on their disposal) but should continue to belong beneficially to the investors unless and until the conditions attached to their release were complied with."

218 There is no reason why a *Quistclose* trust cannot arise in a partnership setting. In *Bieber v Teathers Ltd (in Liquidation)* [2012] Civ 1466, the Court of Appeal emphasised that monies paid by investors into a solicitors' client account were initially held on *Quistclose* trusts. When those monies were paid into the partnership account, such trusts came to an end and the monies belonged to the firm. As Patten LJ said, at [49]:

> "In Teathers' hands the investor's funds were undeniably trust monies at the point of receipt. They were client monies paid to Teathers not beneficially but for the specific purpose of being used as an investment in a ... partnership. Teathers could make no other use of them. ... But assuming the scheme went ahead then Teathers had authority ... to use

> the money subscribed in the client account as that person's contribution to capital ..."

219 Patten LJ went on to say, at [51] and [52]:

> "But I want to concentrate for the moment on the relevance of the subscriptions being trust monies at this stage of the transaction to the question whether they remained trust monies following their authorised payment into the partnership account. [Patten LJ's emphasis]… The answer to that question is that there is no necessary correlation between their status as trust money at stage 1 (their receipt in the HSBC client account) and how they fell to be treated at stages 2 and 3 (payment into the partnership account and investment in a TV production). Mr Tregear [leading counsel for the appellants] accepts (as he must) that any *Quistclose* trust of the kind alleged must have existed at stage 1 when the monies were paid to Teathers for onward investment in Take 3. The existence of such a trust is not necessarily inconsistent with the trust expressly imposed by the client money regulations but it is not identical in terms. Under the regulations the monies ceased to be client and therefore trust money once paid out either to or in accordance with the client's instructions. On the assumption that their payment into the partnership account was authorised, they were not therefore trust monies once they reached the Barclays account. But in relation to the alleged *Quistclose* trust, no allegation of lack of authority can be made in relation to the payment to Barclays… [In this case], the claimants cannot and do not contend in such cases that their payment as partnership capital was unauthorised."

220 The First Claimant contends, in contrast to the position in *Bieber*, that, in the present case, neither Barlows nor the Bankrupt ever had authority to pay the monies included in the Claimants' Advance away to a third party other than in return for legal title in the First and Second Properties being acquired. The trusts, therefore, never came to an end.

221 Among the points which the Second Defendants pray in aid in support of their contention that there was no *Quistclose* trust is the point that the First Claimant is unable to establish either that Barlows had actual knowledge that the amount of the Claimants' Advance was held by them on behalf of the First Claimant solely for the purpose of the acquisition of the First and Second Properties or that, at the time it was paid by the First Claimant on behalf of the Bankrupt, it was to be held by the Bankrupt on behalf and on trust for that purpose.

222 It appears to be well-established that whether monies have been advanced by a loan or for any other purpose is irrelevant to the existence of a *Quistclose* trust, provided the person advancing the monies can prove that it was done for a particular purpose and the monies were not applied for that purpose.

223 In *Quistclose*, Lord Wilberforce said (see [1970] A.C. 567 at 580D):

> "The second, and main, argument for the appellant was of a more sophisticated character. *The transaction, it was said, between the*

respondents and Rolls Razor Ltd., was one of loan, giving rise to a legal action of debt. This necessarily excluded the implication of any trust, enforceable in equity, in the respondents' favour: a transaction may attract one action or the other, it could not admit of both.

My Lords, *I must say that I find this argument unattractive*. Let us see what it involves. It means that the law does not permit an arrangement to be made by which one person agrees to advance money to another, on terms that the money is to be used exclusively to pay debts of the latter, and if, and so far as not so used, rather than becoming a general asset of the latter available to his creditors at large, is to be returned to the lender. The lender is obliged, in such a case, because he is a lender, to accept, whatever the mutual wishes of lender and borrower may be, that the money he was willing to make available for one purpose only shall be freely available for others of the borrower's creditors for whom he has not the slightest desire to provide.

I should be surprised if an argument of this kind – so conceptualist in character – had had ever been accepted. In truth it has plainly been rejected by the eminent judges who from 1819 onwards have permitted arrangements of this type to be enforced, and have approved them as being for the benefit of creditors and all concerned. *There is surely no difficulty in recognising the coexistence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose (see In re Rogers, 8 Morr. 243 where both Lindley L.J. and Kay L.J. recognised this):* when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan. I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not. In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it."

(My emphasis).

224 It is, usually, equally irrelevant that sums in question are paid to a third party. As Briggs L.J. (as he then was) observed in *Bellis v Challinor* [2015] EWCA Civ 59:

"[59] Usually, the question whether the essential restrictions upon the transferee's use of the property have been imposed (so as to create a trust) turns upon the true construction of the words used by the transferor. But where, as in *Twinsectra* and indeed the present case, the transferor says or writes nothing but responds to an invitation to transfer the property on terms, then it is the true construction of the invitation which is likely to be decisive.

[60] In such cases the invitation usually comes from the transferee. In *Twinsectra* it took the form of a solicitor's written undertaking, the terms of which, as Lord Millett put it, were 'crystal clear' in restricting the use of the money

transferred for the specified purpose of the acquisition of property.

[61] But I am content to assume, as the judge did in the present case, that the invitation may come from someone other than the transferee. A may say to B: 'If you transfer money to C, it will be used solely for a specified purpose.' The proper interpretation of B's conduct in transferring money to C pursuant to that invitation is that he thereby created a *Quistclose*-type trust. Whether C will be liable for breach of that trust by using the money for some other purpose will then depend on whether C knew of the terms of A's invitation before disposing of the money."

THE TRUST ISSUE – THE FACTS AND EVIDENCE

225 I do not need to repeat or summarise the observations I have made, or the views which I have reached, concerning the evidence that I have heard in these proceedings. Nor is it necessary for to me to repeat or summarise the factual findings I have already come to by reference to that evidence in connection with the Partnership Issue, save to say that they apply equally to the Trust Issue.

226 It is plain that unless monies are paid to or received by a solicitor by way of costs, disbursement and the like, in which case they will be paid in the solicitor's office account, they are held by the solicitor on trust. As Lord Hoffmann observed in *Twinsectra* [2002] UKHL, at [12]:

> "*Money in a solicitor's client account is held on trust*. The only question is the terms of that trust. The only question is the terms of that trust. I should think that what Carnwath J meant was that Sims held the money on trust for Mr Yardley absolutely. That is the way it was put by Mr Oliver QC, who appeared for Mr Leach. But, like the Court of Appeal, I must respectfully disagree. The terms of the trust upon which Sims held the money must be found in the undertaking which they gave to Twinsectra as a condition of payment. Clauses 1 and 2 of that undertaking made it clear that the money was not to be at the free disposal of Mr Yardley. Sims were not to part with the money to Mr Yardley or anyone else except for the purpose of enabling him to acquire property."
>
> (My emphasis).

227 Monies paid by a client to a solicitor (other than for costs, disbursements or the like) will always be held on trust for the client. Where the monies are paid by a third party on behalf of the client, the third party will usually stipulate that the monies should be held to his order and only be utilised in accordance with the purpose for which they were paid to the solicitor. Often, but not always, the third party will seek a formal undertaking that the monies will only be used for that purpose. This is particularly so where the third party is a lender advancing the monies to the client on the security of a charge over a property in which case the undertaking will expressly state that the monies will not be released to the vendor or his solicitors unless the client's solicitor obtains the client's

signature to the charge document and is able to obtain a good and marketable title to the property to enable the lender's security to enforced in the event that the client defaults under his obligations to the lender.

228 That was what happened to the monies which were advanced by Mr Thakrar to Barlows for the purchase of the Third Property. Such monies as they paid to Barlows on behalf of Mr Thakrar had to be returned by Barlows to them because, among other things, Messrs Rich and Carr were not satisfied that Wingfield's solicitors could procure that title to the Third Property would be good and marketable.

229 However, it is a fallacy to think that the absence of a written document of the type which was found to exist in *Twinsectra* means that the solicitor does not hold the monies paid to him by the third party for the purpose for which it was expressed to be paid to him.

230 Leaving aside for the time being the source of the monies paid to Barlows on behalf of the Bankrupt, suppose after the monies were paid to the Bankrupt for the purchase of the First and Second Properties, Wingfield (i.e. the vendor of those properties) withdrew from the proposed purchase. What would Barlows have done in those circumstances? Would they have paid the monies to the Bankrupt?

231 If they knew the source of the monies, which they obviously did (not just because it is plain from the documentation but also because having to comply with anti-money laundering regulations to which solicitors and those who handle clients' monies are subject must mean that they have to check those sources), it is inconceivable that they would have done.

232 Likewise, suppose, the Bankrupt presented his own petition for bankruptcy (now a bankruptcy application) and was made bankrupt on that petition before the monies were disbursed by Barlows. What would Barlows have done in those circumstances? Would they have paid the monies to the Bankrupt's trustee in bankruptcy? I doubt very much that they would have done, without, at the very least, obtaining a water-tight indemnity from the trustee (as Barlows did in relation to the Settlement Amount) that he would indemnify them from any claims brought against them by a claimant who had a better right to it than the Bankrupt.

233 In both the above scenarios, it is obvious to me that if they paid the monies to anyone other than the person or persons from whom it was received, they would almost certainly be held to be in breach of trust. It would be a misconception on their part to think that because the monies could not be used for the purpose for which it had been paid to them, they had to be paid to the Bankrupt or, as

the case may be, his trustee, rather than returned to the person who advanced them in the first place.

234 So, what is different in the present case? In my view nothing. Barlows had express knowledge of where the sums totalling the amount of the Claimants' Advance had come from. The First Claimant says that he met Mr Gooch on at least two occasions, once with his passport in order that Mr Gooch could be satisfied about the First Claimant's identity and know that any funds which Barlows were to receive from him came from a legitimate source. Both he and the Bankrupt (see paragraph 8 of the Bankrupt's witness statement) say that Mr Gooch was, at the very least, fully aware of the First Claimant's involvement in the purchase as a funder.

235 It is plain to me that Barlows also had express knowledge of how the amount of the Claimants' Advance was to be utilised. That is abundantly clear from their own papers included in the bundles. They even purported to utilise it for that purpose but, through their negligent acts or omissions, were unable to do so. There can be no doubt, therefore, that they were in breach of trust to the First Claimant, from whom they received the Claimants' Advance, for not utilising them in the manner in which they well knew they should have done. Even if they had no express knowledge (and I am fully satisfied that they did), it requires no ingenuity to know that this is an obvious conclusion which arises from the relationship which a solicitor has to a third party. The solicitor simply cannot pay client or third-party monies for a purpose which is not the purpose for which they were sent to him, still less pay them away in the manner in which Barlows did.

236 It is painfully obvious that Barlows well knew that the monies sent by the First Claimant were sent to them solely for the purpose of the purchase of the First and Second Properties. That purpose having failed, the money was returnable to the First Claimant under the resulting trust which arose as a result of application of the principles in *Quistclose*. It follows that the amount of the Claimants' Advance should have been repaid by Barlows to the First Claimant.

237 But even if I am wrong about Barlows having express knowledge of who had provided the monies to them, that is insufficient to exculpate them from liability for breach of trust. As Lord Wilberforce pointed out in *Quistclose* (see [1970] A.C. 567 at 582D):

> "This was sufficient to give them notice that it was trust money and not assets of Rolls Razor Ltd: *the fact, if it be so, that they were unaware of the lender's identity (though the respondent's name as drawer was on the cheque) is of no significance*. I may add to this, as having some bearing on the merits of the case, that it is quite apparent from earlier documents that the bank were aware that Rolls Razor Ltd. could not provide the money for the dividend and that this would have to come from an outside source and that they never contemplated that the money so provided could be used to

> reduce the existing overdraft. They were in fact insisting that other or additional arrangements should be made for that purpose. As was appropriately said by Russell L.J., ([1968] Ch. 540, 563F) it would be giving a complete windfall to the bank if they had established a right to retain the money."
>
> (My emphasis).

Likewise, in the present case. It would be giving a complete windfall to the Second Defendants if they had established a right to retain the Claimants' Advance and, therefore, the Settlement Amount in the present circumstances, even though such retention might notionally have been for the benefit of the creditors in the bankruptcy.

238 On the basis of the above analysis, it seems only necessary for Barlows to have known that the Claimant's Advance was received from a third party and to know the purpose for which it was paid to them. The identity of the person who paid it is not significant. Monies held in a solicitor's client account in such circumstances are, as I have already indicated, held on trust on behalf of the person who paid it, i.e. the First Claimant; and, in the present case, the purpose for which the payment was made to Barlows was well-known to them.

239 The present situation is markedly different from the facts which applied in *Challinor v Juliet Bellis & Co* [2015] EWCA Civ 59, [2015] 2 P & CR D6 upon which the Second Defendants rely. In that case, the central issue for the trial judge was whether the respondents had advanced the monies which they had each paid to the appellants (a firm of solicitors) on trust for themselves pending the satisfaction of certain conditions or whether the respondents had each made an immediate loan to the appellants' clients (AFL) which had entered into insolvent administration, by paying the monies, with no strings attached, to the appellants as AFL's agents. If the judge's answer to the first question had been wrong, the question arose whether the appellants had had AFL's authority to receive and disburse the respondents' monies and, if they had not, whether the consequence was that those monies had been held by the appellants upon a resulting trust for the respondents.

240 On the evidence, the court was not persuaded by the judge's reasons for treating the respondents' payments as having been made to the appellants on terms that they were not to be at the immediate disposal of AFL. On the contrary, on the judge's findings of primary fact, the respondents had made their payments to the appellants as immediate loans to AFL, paying into the appellants' client account at what they understood to be AFL's direction and, therefore, lending to AFL, by payment to the appellants as their agent. The appellants had received those payments into its client account as trustee for AFL and had committed no breach of any obligation owed to the respondents

when they had disbursed them for AFL's benefit. In the present case, there can be no doubt that the amount of the Claimants' Advance was paid solely for the purchase of the First and Second Properties. On that basis, *Challinor v Juliet Bellis* is clearly distinguishable from the facts of the present case. That this issue will usually be entirely fact-specific is demonstrated by a number of cases; see, for example, the different decisions reached on the on their individual facts in *Levack and another v Philip Ross & Co and others* [2019] EWHC 762 (Comm); and *Goyal v Florence Care Ltd* [2020] EWHC 659 (Ch), [2020] All ER (D) 10 (Apr).

241 However, even if I am wrong about my finding that the monies received by Barlows were held on trust for the First Claimant (i.e. even if it is found that the monies were held by Barlows on behalf of the Bankrupt), I cannot see that they could be said to be held by the Bankrupt on any basis other than on trust for the First Claimant, or the Joint Venture.

242 The Second Defendants appear to accept that the Bankrupt held the monies on trust for the Bankrupt. If that is correct, it can make no difference that the Bankrupt conducted the proposed purchase of the First and Second Properties through a firm of solicitors. If he had carried out the proposed purchase himself without using solicitors, the same result would follow: he would hold those monies on resulting trust pending the proper completion of the purchase of those properties with full title.

243 It has to follow from this that so far as the Bankrupt (or the Second Defendants on his behalf) recovered monies which were dissipated by Barlows, such monies (whether characterised as damages, equitable compensation or anything else) were recovered in the Bankrupt's capacity as resulting trustee. There was no other basis upon which he could have claimed against Barlow, since he never had a beneficial interest in the monies advanced. As the First Claimant rightly contends, Barlows were under an obligation to restore the monies to their client account. If they had done so, the monies would have been held in that account on the same trusts as the original monies (i.e. the Claimants' Advance) advanced by the First Claimant. The fact that Barlows paid the monies to the Second Defendants can make no difference: the beneficial owner of such monies continues to be the First Claimant.

244 The only basis upon which it can be contended by the Second Defendants that the Claimants' Advance was held by Barlows beneficially for the Bankrupt and, therefore, the Settlement Amount which includes, or represents it, should be paid to Second Defendants is if the Claimants had made an unsecured loan to the Bankrupt which he turn paid over to Barlows for the purpose of acquiring the First and Second Properties. As I have already stated, that is almost certainly not what happened.

245 The Second Defendants argue that even if the amount of the Claimants' Advance was held on trust, at the point at which it was dissipated by Barlows, any claim which the Bankrupt had against Barlows was a personal, not a proprietary claim. The Bankrupt could not trace the Claimants' Advance into any assets Barlows (or its insurers) held. Similarly, any claim which the First Claimant had against the Bankrupt was a personal claim. The Settlement Amount recovered under a personal claim cannot be held on trust unless a new trust of the Settlement Amount was created at the point of recovery. The First Claimant would need to show that the Second Defendants were trustees of the Settlement Amount under a new trust created at the point when they received the Settlement Amount. That has neither been pleaded nor can be made out on the facts.

246 I am unable to accept this argument.

247 The fact that the original monies were paid to a third party makes no difference. As Lord Browne-Wilkinson said in *Target Holdings v Redferns* [1996] AC 421 at 436:

> "In the case of moneys paid to a solicitor by a client as part of a conveyancing transaction, the purpose of that transaction is to achieve the commercial objective of the client, be it the acquisition of property or the lending of money on security. The depositing of money with the solicitor is but one aspect of the arrangements between the parties, such arrangements being for the most part contractual. Thus, the circumstances under which the solicitor can part with money from client account are regulated by the instructions given by the client: they are not part of the trusts on which the property is held. I do not intend to cast any doubt on the fact that moneys held by solicitors on client account are trust moneys or that the basic equitable principles apply to any breach of such trust by solicitors. But the basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach. I have no doubt that, until the underlying commercial transaction has been completed, the solicitor can be required to restore to client account moneys wrongly paid away."

248 The principle in *Target Holdings Ltd v Redferns* has been applied to a *Quistclose* trust – see, for example, *Wise v Jiminez* [2014] P & CR D27, [2013] All ER (D) 123 (Oct), at [58]-[60], per Miss Penelope Reed QC, siting as a deputy Judge of the High Court.

249 Barlows were plainly under an obligation to restore the amount of the Claimants' Advance to their client account. If they had done so, the amount restored would have been held in that account on the same trusts as the Claimants' Advance. The fact that Barlows instead paid monies (i.e. the Settlement Amount) which included, or largely represented, the amount of the Claimants' Advance to the Second Defendants can make no difference: the beneficial owner of such monies has always remained the First Claimant. This is obvious from the fact that if the Bankrupt had not been made bankrupt, the Settlement Amount would have had to be paid to him. It is a fallacy to think that the basis upon which the Claimants'

Advance, or the amounts representing it, would be different merely because its characteristics had changed or because it was paid to a representative of the person who was the victim of the transaction (by which I mean, in this context, the Bankrupt) or, as was the position in the present case, a trustee in bankruptcy who represented that victim and in whom, pursuant to sections 283, 307 and 311 of the Insolvency Act 1986, all the property of the bankrupt (other than certain exceptions, which have no relevance in the present case) would vest without any conveyance, assignment or transfer. It would be extraordinary if this outcome could be achieved simply by a person's bankruptcy. It would put a trustee in bankruptcy in a better position in relation to a claim to an asset than the original claim of the Bankrupt. In this context, the provisions of section 311(4) of the Insolvency Act 1986 should be noted. It states that where "any part of the estate consists of things in action, they are deemed to have been assigned to the trustee; but notice of the deemed assignment need not be given except in so far as it is necessary, in a case where the deemed assignment is from the bankrupt himself, for protecting the priority of the trustee." The trustee is not stated to have a better right to the chose in action than the bankrupt had. Nor can he be considered to an assignee for value and thus take free from any trust or other liability to which the bankrupt is subject. It must follow from this that although prior to its collection by the Second Defendants, the Negligence Claim was a chose in action, the Second Defendants did not have a better right to its proceeds than the Bankrupt and, therefore, would not have had a better right to the Settlement Amount than the Bankrupt would have had if he had not become bankrupt.

250 The fact that Second Defendants' Negligence Claim was formulated as a claim for damages for professional negligence likewise makes no difference. The Settlement Amount was paid under a Tomlin order which did not specify the legal basis upon which it was paid; rather, paragraph 1 of the Schedule to the states that it was paid "in full and final settlement … of all claims … in contract, tort, or on any other ground whatsoever …". In any event, as the First Claimant rightly points out, even if it had been expressly paid as damages, the damages recovered would have been held on trust for him. The loss claimed was pleaded, and the Settlement Amount paid, by reference to the monies that had been advanced by the First Claimant. The Settlement Amount is, therefore, held on resulting trust for him.

251 I do not understand the relevance of either *Foskett v McKeown* [2001] 1 AC 102 or *Relfo Limited (In Liquidation) v Varsani* [2014] EWCA Civ 360, both of which concerned the remedy of "tracing" or "following" property. In the present case, the First Claimant does not seek such a remedy. The claim by the First Claimant is for the payment of the Claimants' Advance (and any interest properly payable thereon) from the Settlement Amount on the basis that the

Claimant's Advance was: (a) held on trust for him by Barlows; (b) wrongly paid out by Barlows to Wingfield's solicitors in breach of that trust; and (c) is represented or included in the Settlement Amount which was recovered by the Second Defendants. As Barlows restored the Claimants' Advance (which they had paid in breach of trust to Wingfield's solicitors) by paying the Settlement Amount to the Second Defendants, it was not necessary for the First Claimant to trace or follow the loss which he had suffered as a result of Barlows' breach of trust in the hands of a third party. It might have been different if the Claimants' Advance had been paid to the Bankrupt and the Bankrupt had dissipated it before he was made bankrupt. It would then have been necessary for the First Claimant to trace or follow the Claimants' Advance into the hands of a third party. If he was unable to do that, he would only be entitled to prove in the Bankrupt's bankruptcy (unless he could demonstrate that the Bankrupt was guilty of fraud, in which case his claim would have survived the bankruptcy, as to which see section 281(3) of the IA 1986). But that is not the position here.

252 In short, therefore, I wholly agree with the First Claimant's summary of the position which applies in this case: the present position can be no different to that which would have applied had no solicitors been involved in the purchase of the First and Second Properties. Had the First Claimant paid the Claimants' Advance directly to the Bankrupt, to be used purely for the purpose of acquiring the First and Second Properties, he too would have held it on trust for the First Claimant and would have needed to return it to the First Claimant once the purpose for which it was advanced had failed. In so far as the Bankrupt directed the Claimants' Advance to be paid directly to Barlows, it can only have been on the basis that he did so as trustee of it. In either case, the First Claimant retained beneficial ownership under the resulting trust unless and until that purpose was fulfilled. In neither situation was the recipient of the monies free to apply them other than for the purchase of, and obtaining a good and marketable title to, the First and Second Properties. So far as that was not done, the recipient was in breach of trust. It follows that if, contrary to my finding, Barlows held the amount of the Claimants' Advance on behalf of the Bankrupt, it was held by the Bankrupt on trust for the First Claimant. Accordingly, by utilising the Claimants' Advance (or instructing, agreeing or authorising Barlows to pay it to Wingfield's solicitors) without ensuring that it would be used to obtain a good and marketable title to the First and Second Properties, the Bankrupt was in breach of that trust.

253 This case closely resembles the facts in *Glantz v Polikoff & Co* [1993] NPC 145, which was not cited to me. The only report of that case which I have been able to find is in [1994] CLY 4241. In that case, P, a solicitor, acting in a conveyance of a flat and its immediate resale at double the price, paid over deposit money

supplied by a third party, G (a money-lender), to the order of the purchaser after exchange of contracts. The contract fell through when the bank refused to lend the capital on suspicion of fraud as there were no bona fide circumstances which could explain the transaction, and the deposit was forfeited. P was unaware of the fraud. G sued P for money lost. His Honour Judge Moseley held that that P was liable to G in equity. Once he had received G's money, he became a trustee of it, which put him under a duty to act prudently and, had he so acted, he would not have paid over the money without looking into the doubtful circumstances existing at that date. The judge was not satisfied that P was liable at law as G had not established a sufficient duty of care towards G.

254 So far as it asserted by the Second Defendants that the way in which the case against them is pleaded by the First Claimant is inadequate to support the basis upon which he relies to make good that claim, I respectfully disagree. Paragraph 15 of the Amended Particulars of Claim adequately sets out that basis.

255 But the Second Defendants rely upon three further matters in the context of this point.

256 First, they say that; (a) no claim is pleaded against the Bankrupt alleging any breach of trust by him in relation to the Advance; (b) so far as there is such a claim, the Bankrupt cannot be said to be in breach of any trust; (c) as the Claimants' Advance was dissipated by Barlows, any claim which the First Claimant has against the Bankrupt as a result of such dissipation is an unsecured claim in the bankruptcy of the Bankrupt; and (d) so far as there is any claim for breach of trust against the Bankrupt, he is entitled to be relieved from any liability under it as a result of the application of section 61 of the Trustee Act 1925.

257 I am unable to accept any of these points.

258 The claim of the First Claimant for breach of trust is, as I have already found, rightly made against Barlows, not the Bankrupt, though I have considered the alternative scenario – i.e. the possibility that the Claimant's Advance was held by the Bankrupt, not Barlows, on trust. As I have already indicated, it is difficult to see how the claim of the First Claimant for breach of trust could be made against the Bankrupt. It is correct that if the Claimants' Advance had been paid to the Bankrupt, it would be held by him on a *Quistclose* trust on behalf of the First Claimant. However, it was not paid to him. It was paid to Barlows.

259 If I had found that the Claimants' Advance was held by Barlows on trust for the Bankrupt, and in turn, by the Bankrupt on trust for the First Claimant, I would have struggled to find how what Barlows did could amount to a breach of trust on the part of the Bankrupt. That is because the Claimants' Advance was paid by the First Clamant

directly or indirectly to Barlows. It never passed through the Bankrupt. In fact, it was paid to the solicitors that the Joint Venturers had agreed to retain for the purpose of the various transactions which they intended to undertake. At that point, it cannot be said that anyone (whether Barlows or the Bankrupt) was in breach of trust. It is at the point when the Claimants' Advance was dissipated by Barlows (i.e. paid over to Wingfield's solicitors without a suitable undertaking being obtained from them) when the breach occurred.

260 The breach occurred solely because of the acts or omissions of Barlows. It did not happen because the Bankrupt had done anything wrong.

261 That is precisely how the case has been pleaded by the Claimants against the Second Defendants. The breach of trust relied upon is the breach committed by Barlows, not the Bankrupt because the Bankrupt committed no breach.

262 The section 61 point is irrelevant on the facts. That point has not been pleaded. It was raised by me in the course of my exchanges with Mr Laughton. I enquired whether, if the Bankrupt had acted in breach of trust, he might be entitled to seek relief under that provision despite the fact he would have been subject to a resulting, as opposed to an express, trust. That was the narrow context in which I had asked the question.

263 Mr Vickery latched on to this point. He relied upon it in further support of the contention that if the Bankrupt was subject to a *Quistclose* trust, and had acted in breach of it, he was entitled to be relieved from any liability under that provision.

264 Section 61 of the Trustee Act 1925 states:

> "If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."

265 It has always been thought that a failure to plead section 61 is not fatal to an application for relief under section 61: see *Singlehurst v Tapscott Steamship Co.* [1899] W.N. 133, CA; and *Re Pawson's Settlement* [1917] 1 Ch. 541. However, whether this principle holds good under CPR 16.5(2) is not free from doubt: see, for example, *Latchworth Ltd v Dryer* [2017] EWHC 1089 (Ch), at [6].

266 It is clear in my judgment that section 61 has no application in this case for various reasons.

267 Although section 61 extends to a trustee who holds property on a resulting trust – see section 68(17) of the Trustee Act 1925 – it cannot apply in the present case to Barlows because the Settlement Amount (which includes or represents the Claimants' Advance that was paid in breach of trust) has been restored by Barlows and paid to the Second Defendants on behalf of the Bankrupt. In any event, it would only be in a rare case that the relief under s 61 would be granted to a professional person who was a trustee, or was subject to a trust, such as the one under consideration in the Claim.

268 Nor can it apply to the Bankrupt. That is because he has committed no breach of trust.

269 In the present case: (a) it was Barlows who were subject to the *Quistclose* trust; (b) they were in breach of that trust, not the Bankrupt; (c) the Claimants' Advance was represented or included in the Settlement Amount which was paid by them to the Second Defendants for the loss suffered for that breach; and (d) the Settlement Amount is available to be paid out to whoever is entitled to a beneficial interest in it.

270 The second point which the Second Defendants make is that even if there was a *Quistclose* trust in the present case, the Claimants' Advance was applied "in pursuit of the purpose of acquiring the Properties" and there is, therefore, no breach of trust.

271 That proposition is quite extraordinary.

272 To suggest that the Claimants' Advance was applied in pursuit of the purpose of acquiring the First and Second Properties is wrong, both as a matter of law and plain common sense.

273 The Claimants' Advance was made to Barlows on the basis that they would use it to acquire a good and marketable title to the First and Second Properties. It simply does not withstand scrutiny to suggest that Barlows paid it in pursuit of that purpose and cannot, therefore, be held in breach of trust. The suggestion proceeds on the remarkable basis that (despite relying on Barlows' expertise), the First Claimant was content to allow Barlows to take a risk with his monies and to pay it over to a third party, even if they could not complete the purchase of, or secure a good and marketable title to, the First and Second Properties. The First Claimant did no such thing. If there was any merit in that suggestion, Barlows might have raised it in the Negligence Claim (even though I accept that that claim was in negligence, rather than breach of trust).

274 The third point relied upon by the Second Defendants is that there is no claim against them by the First Claimant for breach of trust.

275 That is correct. The reason there is not is because the Settlement Amount currently stands to the credit of a separate account in the

name of the Second Defendants' solicitors and has not been paid out to the Second Defendants. There has, therefore, been no breach of trust, at any rate as far the disposal of the Settlement Amount is concerned. That is why the relief sought in the prayer for relief included in the Amended Particulars of Claim is for a declaration that the Settlement Amount is held on trust for the Claimants. Mr Laughton indicated that if his client thought that the Second Defendants might pay the Settlement Amount to themselves or to anyone other than the First Claimant, then he would have sought an injunction to restrain the Second Defendants from doing so. But, of course, in those circumstances, it would equally be possible for the First Claimant, at that stage, to bring a claim against them for breach of trust and seek the restoration of the Settlement Amount in that claim.

276 I should say, for the sake of completeness, that the First Claimant has intimated a claim for breach of duty against the Second Defendants in paragraph 12 of the Re-Amended Particulars of Claim. However, as I have already indicated, that is a quite separate matter which, I believe Mr Laughton accepts, would need to be the subject of a fresh claim against the Second Defendants.

SUMMARY OF CONCLUSIONS ON THE TRUST ISSUE

277 I can summarise my conclusions on the Trust Issue as follows:

(a) The entire amount of the Claimants' Advance was held by Barlows on a *Quistclose* trust for the First Claimant.

(b) The Claimants' Advance is represented or included in the Settlement Amount.

(b) The First Claimant is entitled to have the Claimants' Advance, and any interest properly payable thereon, paid out to him from the Settlement Amount.

278 In none of the situations referred to in the preceding paragraph can it be said that the Bankrupt was entitled to the Claimants' Advance beneficially.

279 The only basis upon which the Second Defendants would be entitled to the Claimants' Advance and, therefore, to have the Settlement Amount paid out to them would be if the Claimants' Advance belonged to the Bankrupt beneficially. That is not the case here.

280 It follows that if I had not come to the conclusion that the business of the Joint Venture was conducted as a partnership, I would have unhesitatingly come to the conclusion that the whole of the Claimants' Advance was comprised in the Settlement Amount and that it should be paid out (together with any appropriate interest

thereon) to the First Claimant as the sole beneficiary of the Quistclose *trust* to which Barlows were subject in his favour.

THE EXPENSES APPLICATION

281 On the basis that the Second Defendants have no interest in the Settlement Amount, the only ground upon which they can claim to be entitled to the Trust Costs is under the narrow jurisdiction set out in *Re Berkeley Applegate (Investment Consultants) Ltd (No.1*) [1989] Ch 32.

282 In *Berkeley Applegate*, the jurisdiction was defined by Mr Edward Nugee QC, sitting as a deputy Judge of the High Court, at [1989] Ch 32, 50H-51B, in the following terms:

> "The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in *In re Marine Mansions Co.*, L.R. 4 Eq. 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v. Nesbitt*, 14 Ves. Jun. 438); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in *Phipps v. Boardman* [1964] 1 W.L.R. 993).

283 *Berkeley Applegate* has been approved and applied in several cases, including by the Supreme Court in *Re Lehman Brothers International (Europe) (In Administration)* [2012] UKSC 6, [2012] 3 All ER 1. Those cases are analysed in the decision of Morgan J in *Gillan v HEC Enterprises Ltd Deep Purple (Overseas) Ltd (In Administration)* [2016] EWHC 3179 (Ch), [2017] 1 B.C.L.C. 340.

284 In *Re Sports Betting Media Ltd (in administration)* [2007] EWHC 2785 (Ch), [2008] BCC 177, at [10], Briggs J (as he then was) identified the scope of the jurisdiction broadly, accepting the substance of the submission made to him that:

> "… the court has an inherent jurisdiction to require persons beneficially interested in property to subject their beneficial entitlements to a right of payment to persons who have come otherwise than by officious intermeddling into the position of fiduciaries in relation to the relevant fund and have incurred time and cost in realising the fund and identifying the entitlements of the beneficiaries and paying out to those beneficiaries their entitlements."

285 Briggs J went on to say, at [11]:

> "In my judgment, [it] is right to seek to have the *Berkeley Applegate* … principle applied to the position of administrators who, when taking office after the cessation of former administrators, find that they are, whether they realised it previously or not, in the position of having to administer and execute the terms of the statutory charge created by Sch.B1 para.99(4) [of the Insolvency Act 1986]. It seems to me, as a matter of common sense, justice and equity, only right that the beneficiaries of that charge should have to pay collectively a reasonable sum towards the cost of having it executed in their favour against the company's assets."

286 It is unlikely that discretion in *Re Berkeley Applegate* will be exercised in favour of a person where he claims to be entitled to an interest in the fund which is the subject of the dispute between the parties: see, for example, *Re Local London Residential Ltd* [2004] EWHC 114(Ch), [2004] 2 BCLC 72; and *Green v Bramston* [2010] EWHC 1306 (Ch). In *Green v Bramson*, His Honour Judge Cooke, sitting as a Judge of the High Court, said (see [2010] EWHC 1306 (Ch), at [36]):

> "The allowance to be given [under the *Berkeley Applegate* jurisdiction] is a matter of discretion … I do not say that there can be no circumstances in which an allowance can be given out of trust property in respect of work which would be recoverable from other sources such as the free assets of a company in liquidation, or would in principle be so recoverable if any such assets existed, but in my view it would be unlikely to be appropriate to make such an award if the effect of it is to subject the interests of the beneficiaries to the costs of advancing, or considering whether to advance, an interest adverse to their own, as distinct from matters involved in, or for the purposes of, enforcing and giving effect to their own beneficial interest."

287 There may be a separate jurisdiction for the costs expenses and remuneration of an office-holder to be paid out of a trust fund even where the office-holder claims to be entitled to an interest in it: see *Re Wedstock Realisations Ltd* [1988] BCLC 354, (1988) 4 B.C.C. 192. However, this jurisdiction is extremely narrow and has not be relied upon by the Second Defendants in the present case. The circumstances in which it may be invoked by the office-holder are summarised by *Muir Hunter on Personal Insolvency* (loose-leaf), at 3-1072, in the following terms:

> "An inherent jurisdiction has been held to exist in winding-up law and receivership law (which, it is submitted, should logically exist also in bankruptcy law), entitling the insolvency court to order that the costs of determining issues as to the beneficial ownership of funds, which are (as a matter of duty) raised by official receivers, liquidators or receivers, to be paid out of the funds in dispute. Such a jurisdiction may, and often should, be exercisable where the issue is, or should be regarded as, a test case, and where the insolvency office-holders concerned, or representative creditors appointed to argue for conflicting interests, are either not possessed of adequate funds, or have a disproportionately small interest in the subject-matter to justify their incurring of costs: see *Re Exchange Securities Ltd (No.2) [1985]* B.C.L.C. 392, and *Re Westdock Realisations Ltd [1988] B.C.L.C. 354*; cf. also *Re Tetley* 3 Mans. 226 CA. That jurisdiction is an exception to the general rule applying in insolvency, that in the absence of funds in the insolvent estate, creditors must indemnify

> their representatives for the purpose of taking proceedings in their interest: see *Re Westdock Realisations Ltd*, above, applying *Re Trent and Humber Shipbuilding Co Bailey and Leatham's Case* (1869) L.R. 8 Eq. 94, and *Re London Metallurgical Co* [1895] 1 Ch. 758."

288 An office-holder will not usually be entitled to recover the costs, expenses and remuneration from the free assets of an insolvent estate for work done exclusively in relation to trust assets in which the general creditors of the insolvent estate have no interest: see, for example, *Re Eastern Capital Futures Ltd (in liquidation)* [1989] BCC 223 at 227, per Morritt J. In such a case, he should usually seek to recover those costs, expenses and remuneration from the trust assets either under an express or implied provision of the trust or under some other legal basis, such as under the jurisdiction in *Berkeley Applegate*.

289 The court has jurisdiction to make a pre-emptive order for costs in favour of a person under the *Berkeley Applegate* jurisdiction and, in many cases, it would be desirable for it to do so: see *Re Wedstock Realisations Ltd*, above. However, each case will depend upon its own individual circumstances: see, by way of example, *Re Equilift Ltd* [2009] EWHC 3104 (Ch), [2010] B.P.I.R. 116.

290 In my judgment, the discretion in *Berkeley Applegate* should be exercised by a court, having regard to the following non-exhaustive factors:

(a) It is for the person seeking to invoke the *Berkeley Applegate* jurisdiction, i.e. the applicant, to demonstrate that that the discretion under it should be exercised in his favour.

(b) The discretion is unlikely to be exercised in favour of the applicant if he claims to have an interest in the trust fund, whether in his own right or on behalf of others, such as the creditors of an insolvent estate.

(c) The discretion is also unlikely to be exercised in favour of an application who – as Briggs J put it in *Re Sports Betting Media Ltd (in administration)* who "has come across the relevant fund by 'officious intermeddling' into the position of fiduciaries in relation to the … fund."

(d) The applicant should give notice of his intention to invoke the jurisdiction as soon as reasonably practicable (and should make the application timeously) in order that those who claim to be entitled to the trust fund can decide whether it is commercially worth their while to continue maintaining an interest in the fund. Such persons may not wish to continue to do

so if, for example, it is likely that the fund (or a substantial part of it) will be swallowed by the costs, expenses and remuneration of the applicant which might be payable out of it.

(e) The applicant must put before the court all the relevant material upon which he relies in support of the application. That material should be complete and accurate and make a full and frank disclosure of any interest (whether direct or indirect) which he may have in the outcome of any of the claims made by those seeking an interest in the trust fund. This requirement would be independent of any duty which he may have to act fairly towards those who claim to have an interest in the fund, such as under the principles in in *Ex Parte James*, as to which, see paragraph 36, above.

(f) Whether the applicant has lawful recourse to other funds for the payment of his costs, expenses, and remuneration. If he does, the court may only be prepared to exercise the jurisdiction in his favour in relation to a proportion of those costs, expenses, and remuneration.

(g) Whether not exercising the discretion would cause exceptional hardship to the applicant, such as whether he might have to pay the costs, expenses and remuneration associated with the collection, realisation, preservation and distribution of the trust funds out of his own assets, particularly if those costs, expenses and remuneration are likely to substantial.

(h) Whether the applicant has cooperated with those persons claiming to have an interest in the trust fund (or who may be affected by any of the claims being made to the fund) in ensuring an orderly collection, realisation, preservation and distribution of the funds.

(i) Whether the applicant has sought the views of the beneficiaries of the trust fund.

(j) In the case of an office-holder of an insolvent estate, whether he has sought the views of the creditors of the insolvent estate, for example under s 314(7) of the Insolvency Act 1986, even if that was not strictly required. This might be important if he had to fall back on the recovery of his costs, expenses and remuneration from the assets of the insolvent estate in the event that the court refused to exercise the discretion in his favour: see, for example, *Re Local*

London Residential Ltd [2004] EWHC 114(Ch), [2004] 2 BCLC 72.

(k) Whether the trustee incurred costs in having to act urgently in order to preserve the trust fund which he reasonably believed he may have been interested in, even though it is later found that he had no interest in it. In such a case, the court will also wish to know whether and, if so, what enquiries and investigations he made, or could have made, to ascertain whether any other claimant might have a better right or interest to the fund than his.

(l) The amount of the costs, expenses and remuneration incurred and likely to be incurred by the applicant.

(m) The size of the trust fund.

(n) Whether the application is made for an oppressive or collateral purpose, for example to deliberately pressurise the beneficiaries into conceding a genuine interest they may have in the trust fund.

(o) Where there is power to do so, whether the applicant should allow a person who has more expertise in the subject-matter of the trust to replace him as trustee, particularly where that person can perform the work involved in the administration of the trust at significant less cost than the applicant.

291 As stated above, these factors are not exhaustive. There may be several other factors relevant to the exercise of the discretion of the court, depending on the particular facts and circumstances of a case. In every case, it is important to recognise that the jurisdiction is discretionary and that it may only be exercised "sparingly". In addition, even if the court is prepared to exercise its discretion in favour of the applicant, it may only do so for a part of the costs incurred or likely to be incurred by him or to impose a ceiling in respect of those costs.

292 The applicant should also set out, in the written evidence in support of the application: (a) the work already done by him and the costs incurred by him in doing that work; (b) details of the work which remains outstanding; (c) the rate which he proposes charging for that work and the expenses likely to be incurred by him in doing that work; and (d) a proper estimate of the costs and expenses likely to be incurred by him to discharge his duties and functions in full under the trust.

293 Where the court exercises its discretion in favour of the applicant, it should set out clearly: (a) the precise details of the work for which

the applicant should be remunerated; (b) the rate at which he should be entitled to charge for that work; and (c) where appropriate, impose a ceiling on the amount he can charge, with or without liberty to the applicant to apply to remove or increase the ceiling. These matters would be particularly relevant where the application was made on a pre-emptive basis so as to avoid the costs involved in repeated hearings taking place before the court.

294 Leaving aside the quantum of the Second Defendants' claim for Trust Costs, which is based on entirely incorrect and misleading information, the grounds upon which the Second Defendants seek to invoke the jurisdiction are set out in Mr Stanley's second witness statement dated 24 August 2020. I have already referred to the relevant parts of that statement above.

295 Those grounds were expanded upon by Mr Vickery in the course of his submissions.

296 First, he said that it was the duty of the Second Defendants to take into his possession all the assets of the Bankrupt to which the Bankrupt appeared to be entitled and this included any asset which appeared to the Second Defendants belonged to the Bankrupt. Although not cited to me, I have no doubt that Mr Vickery had in mind section 305(2) of the Insolvency Act 1986, which states:

> "The function of the trustee is to get in, realise and distribute the bankrupt's estate in accordance with the following provisions of this Chapter; and in the carrying out of that function and in the management of the bankrupt's estate the trustee is entitled, subject to those provisions, to use his own discretion."

297 In a different but related context, the law recognises that there will be cases where a trustee in bankruptcy may need to seize or take into his possession an asset (almost always a personal chattel) which is not comprised in the bankrupt's estate. Section 304(3) of the Insolvency Act 1986 provides what where he does so and at the time "believes and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property, the trustee is not liable to any person (whether under this section or otherwise) in respect of any loss or damage resulting from the seizure or disposal except in so far as that loss or damage is caused by the negligence of the trustee; and he has a lien on the property, or the proceeds of its sale, for such of the expenses of the bankruptcy as were incurred in connection with the seizure or disposal." This provision mirrors the equivalent provision contained in section 234(3) and (4) of the Insolvency Act 1986 which provides an administrator, administrative receiver, liquidator or provisional liquidator with like relief from liability in similar circumstances.

298 The Second Defendants say that is the precise situation here. They contend that, at the time of bringing the Negligence Claim, the

Claimants were not aware of the Claimants' claim "as pleaded in the current proceedings." The limitation period was about to expire and if the Second Defendants had done nothing, any chance of recovery would have been, as far as they were aware, lost. They claim that the position was one of emergency and rely on the following passage in *Berkeley Applegate* (at [1989] Ch 32, 51G to 52B to make good that point:

> "The particular aspect of the inherent jurisdiction which is sometimes referred to as 'salvage' was said by Evershed M.R. and Romer L.J. in *re Downshire Settled Estates* [1953] Ch. 218, 235, to be exercisable:
>
> > 'where a situation has arisen in regard to the [trust] property (particularly a situation not originally foreseen) creating what may be fairly called an 'emergency' – that is a state of affairs which has to be presently dealt with, by which we do not imply that immediate action then and there is necessarily required – and such that it is for the benefit of everyone interested under the trusts that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose.'"

299 While I can see why, in a urgent case, there might be good reason for a trustee to take in his possession an asset which is not comprised in the bankrupt's estate, that situation does not apply in the present case. The position might have been urgent if the Joint Trustees (or, more accurately, the Previous Trustee) had been appointed a few days before the limitation period for bringing the Negligence Claim had expired. But that was not the case here. The Previous Trustee and the Second Defendants had plenty of time in which to consider whether it was worth their while bringing that claim.

300 For the reasons I have already outlined, I am unable to accept the Second Defendants' contention that they were unaware that the Claimants intended to bring their own action against Barlows because they had received no letter before action from the Claimants or their solicitors. The fact that Mr Stanley had no letter before action is of little significance. It is plain that the Previous Trustee was fully aware of their claim and, as I have observed at paragraph 36, above, the Second Defendants knew or, at the very least, ought to have known, before they took over the trusteeship of the Bankrupt's bankruptcy from the Previous Trustee, that the Claimants claimed to be entitled to the full benefit of the fruits of any successful claim against Barlows.

301 Nor am I able to accept that they could not have been aware or expected to know the basis upon which the Claimants' claim to the Settlement Amount was being claimed until Mr Laughton's skeleton argument was served. Even if this point is correct – and, as I have already pointed, I do not believe it is – the Second Defendants were

sufficiently aware of the basis of the claim to be able to investigate its veracity.

302 Mr Vickery makes the obvious point that if there is, as I have found, shown to be in existence a partnership between the Joint Venturers, and the advances made by the Claimants were capital contributions, then the Second Defendants, as trustees in bankruptcy of one of the partners (i.e. the Bankrupt), were entitled to bring the Negligence Claim and should be remunerated under the *Berkeley Applegate* principles for having done so.

303 I respectfully disagree.

304 First, it was not necessary for the Second Defendants to take urgent steps to recover the fruits of the Negligence Claim. The Previous Trustee was appointed trustee in bankruptcy on 28 June 2012 and the Second Defendants replaced him on 4 July 2016. The Previous Trustee had some four years to make enquiries into who was entitled to an interest in the Negligence Claim. If he had made those enquiries with some amount of alacrity, he would have discovered, at an early stage in the bankruptcy, that the maximum possible benefit he might have in the Negligence Claim was the Bankrupt's interest in it as a partner of the Joint Venture. That would have entitled him, at best, to a third interest in any profits left after the Claimants' Advance (and any interest properly payable on it) was paid to the First Claimant. Given that it was likely that he would have discovered that the whole, or nearly the whole, of the fruits of the Negligence Claim would be exhausted in returning the Claimants' Advance (and any interest properly payable on it) to the First Claimant, it is unlikely that the Second Defendants would have been interested in bringing the Negligence Claim. They might have assigned such interest as the Bankrupt had in it to the Claimants (and might even have been able to recover some money for it) or simply disclaimed that interest under section 315 of the Insolvency Act 1986 and left it to the Claimants to apply for a vesting order in relation to that interest under section 320 of the Insolvency Act 1986.

305 Mr Vickery also points out, rightly, that the documentary evidence did not support, unequivocally, the existence of a partnership. He says that all material aspects of the Joint Venture were conducted solely in the name of the Bankrupt. He contends that the evidence was such that it could not be argued that the Second Defendants ought to have immediately accepted the existence of a partnership and not incurred the cost of bringing the Negligence Claim.

306 This point would not be valid even if the Previous Trustee and the Second Defendants were not from the same practice. But leaving that matter aside, if the Previous Trustee had undertaken proper enquiries in this case, it would have been abundantly clear to him, within a short period of time of his appointment as trustee, that a

substantial, if not the full, amount of any recovery he made against Barlows would have had to be paid out to the Claimants. In the four years since the appointment of the Previous Trustee, there was ample time for him to investigate the matter before deciding to bring the Negligence Claim. If he had done so properly, and used the wide powers of investigation which were available to him, he is likely to have been able to decide very swiftly that the creditors were unlikely to benefit from the Negligence Claim. Although the Negligence Claim was issued before the appointment of the Second Defendants as trustees in bankruptcy, they could have undertaken those enquiries as well in the four years they had before the Claim came to trial. Having had more than eight years to investigate matters properly, it ill-behoves them to say that they did not have sufficient time to investigate the veracity of the Claim.

307 The Second Defendants contend that if the Previous Trustee had not commenced the Negligence Claim, the Claimants would have had no prospect of recovering any sum and, therefore, the Negligence Claim was of substantial benefit to them. They refer to the fact that prior to the Bankrupt's bankruptcy, the Claimants themselves had to rely on the Bankrupt taking action against Barlows, albeit at the Claimant's expense, to recover the monies which they had invested.

308 There is no substance in that point. The transaction relating to the purchase of the First and Second Properties had been conducted in the name of the Bankrupt, albeit on behalf of the Joint Venture. It was, therefore, appropriate that it was the Bankrupt who sought to recover the lost investment from Barlows. However, once the Bankrupt became bankrupt, the position became quite different and, in order to recover that lost investment, the Claimants had to bring a claim against Barlows themselves and set out the full basis of that claim. If the Previous Trustee had investigated the claim properly, as he should have done, and found, as he should also have done, that the claim was unlikely to have any value for the creditors, he could have made it clear to Barlows that he maintained no interest in it. He might then also have taken the courses of action suggested at paragraph 303, above. He should also, at the very least, have cooperated with the Claimants in order to maintain the claim for their mutual benefit. If he had done so, there might have been a stronger case for the exercise of the "sparing" discretion in favour of the Second Defendants.

309 In addition, as I have indicated above, the Second Defendants put information in support of their claim relating to the amount of their costs which was wholly inaccurate. At the date of the submission of the draft of this judgment to the parties, they have still not corrected the misleading information which they gave to the court and the First Claimant, despite there having been at least one further hearing before the court on 1 October to hear oral submissions from the parties. Although I do not doubt that the

information was included by what was an error, I cannot help feeling that, at the time it was provided to the First Claimant, he may have thought to himself whether, if I acceded to application, there was any point in his continuing with the Claim, given that a substantial amount of Settlement Amount would be paid towards the costs of the Second Defendants. I am sure that he would have thought carefully about continuing with the claim if what he was likely to achieve was no more than a pyrrhic victory.

310 In addition, I am still unaware of the work which the Previous Trustee and the Second Defendants carried out in having the proceeds of the Negligence Claim paid to them by Barlows, particularly on the question of how the Negligence Claim was released from the restraint order by the Crown Prosecution Service). Nor, given that the Previous Trustee was fully aware of the nature of the First Claimant's claim against Barlows, do I know whether the Second Defendants sought the views of the Bankrupt's creditors before deciding to bring the Negligence Claim pursuant to section 314(7) of the IA 1986, even if he was not strictly required to so under that or any other statutory provision.

311 Furthermore, I cannot understand why the application was made so late in the day – literally a matter of a few days before the commencement of the trial of the Claim or why accurate and complete information concerning the free assets available in the Bankrupt's estate was not provided to the Claimants or the court.

312 In the circumstances, I cannot help feeling that there has been – to put in Briggs J's language in *Re Sports Betting Media Ltd (in administration)* – some "officious intermeddling" in relation to the Negligence Claim.

313 I am unable, therefore, to find any, or any good, reason to exercise the *Berkeley Applegate* discretion in favour of the Second Defendants. I agree with Mr Laughton that to do so would be to reward a trustee in bankruptcy who – to use his words – 'takes a punt' in attempting to recover for the creditors property that plainly does not fall within the bankrupt's estate, or at least which is unlikely so to fall.

314 In the circumstances, I dismiss the Expenses Application.

315 I should add that I have given thought to whether, at least, the legal costs incurred by the Second Defendants in bringing and prosecuting the Negligence Claim should be paid out to the Second Defendants on the basis that the Settlement Amount appears to include the Second Defendants' solicitors' costs of the Negligence Claim. If the terms of the Tomlin order had been expressed differently – i.e. if it had included a specific provision for the payment of the Second Defendants' solicitors costs, as opposed to including those costs in the Settlement Amount – it is difficult to

see how the First Claimant could challenge the payment of those costs. However, I am unable to do so. The Second Defendants chose to agree to a Schedule which included a global amount for the settlement of the Negligence Claim. I am not in a position to go behind the terms of that Schedule. Should, of course, the First Claimant bring a claim for breach of duty against the Second Defendants, credit will have to be given for the whole of the Settlement Amount which was paid to the Second Defendants so the notional amount of those costs will be taken into account in the quantum of the First Claimant's claim against them.

SUMMARY OF ORDERS I MAKE IN THESE PROCEEDINGS

316 The substantive orders I make in the proceedings as a result of my judgment are these:

(a) A declaration that the Joint Venture was carried out in partnership between the Joint Venturers in the terms specified in paragraph 16 of the prayer for relief set out in the Re-Amended Particulars of Claim.

(b) A declaration that the Partnership between the Joint Venturers has been dissolved. So far as it is necessary for me to do so, I determine that the Partnership was dissolved on the date that the purchase of the First and Second Properties had to be aborted.

(c) An order that the affairs of the Partnership be wound up.

(d) The taking of all necessary accounts and inquiries consequent upon the dissolution of the Partnership in the terms set out in paragraph 16.4 of the said prayer for relief.

317 Despite Mr Laughton's submissions that the taking of an account is not necessary, I consider that it is both necessary and appropriate in this case. I say that because it is possible that there may be a balance from the Settlement Amount which may be considered to be the profits of the Partnership and may have to be split between the Second Defendants (on behalf of the Bankrupt), the Third Defendant and the First Claimant equally. It is possible that the Second Defendants may not wish to participate in the taking of the accounts, either because there is unlikely to be any or any significant amount due and owing to the Bankrupt or because the Partnership may have made losses and any contribution by the Bankrupt towards those losses would rank in the bankruptcy as an unsecured claim. However, even in that latter event, there may be a sum due from the Third Defendant or the First Claimant which the Second Defendants should be entitled to recover from them (in the case of the First Claimant, by the amount due being set off against

any return of capital (and interest) to which he would be entitled from the Settlement Amount).

318 It is not appropriate for me to direct the taking of such an account on the footing of the Second Defendants' wilful neglect or default, i.e. on the basis that, in undertaking the accounting exercise, the Second Defendants should not only be charged with accounting for what they have actually received from Barlows but also with what they should have received from them but for their wilful neglect or default, as alleged against them in paragraph 12 of the Re-Amended Particulars of Claim. That is because on the material before me, there is no evidence that they might, but for their alleged wilful neglect or default, have received more than the Settlement Amount from Barlows.

319 In the same way as in the Business and Property Courts of England and Wales, the taking of the account would be undertaken by a Chancery Master, in the present case, it should be taken by a specialist Chancery District Judge, i.e. a District Judge who is authorised to do Chancery work in the Business and Property Courts in Birmingham.

320 I am also proposing that the Claimants' Advance should be paid out from the Settlement Amount to the First Claimant before the taking of the account. By virtue of section 24(4) of the PA 1890, a partner is not entitled to interest on the amount of any capital subscribed by him but I fear that the payment of interest may not be straightforward because the factual circumstances which arise in the present case considerably complicate matters. If the taking of the account had occurred when the partnership came to an end 10 or so years ago, the First Claimant would have been entitled to, and received, the return of his capital much earlier. The reason he did not was because of the negligent acts or omissions of Barlows and, subsequently, because of the opposition maintained by the Previous Trustee and the Second Defendants to his entitlement to have that capital returned to him. Although some interest appears already to be included in the Settlement Amount, it is not clear how much that amount is. Subject to hearing submissions on the point, I am proposing to direct that Claimants' Advance should be paid out to the First Claimant with 14 days of the handing down of this judgment, though it may be that the most appropriate course of action (given what I say at paragraph 307, above) will be to direct that the amount should be paid "on account" of his capital contribution.

MATTERS ARISING

321 Issues relating to costs and any other matter arising from this judgment (such as directions relating to the taking of the account) may be dealt with when judgment is handed down. I will ask my clerk to list the matter for a hearing, with an estimated length of 1

hour. It may be necessary for the hearing to take place remotely. I am grateful to both counsel for confirming that they and their clients have no objection to this.

322 On the question of costs, in my exchanges with both counsel, I highlighted the possibility of having to consider making an order which is similar to a *Sanderson* (i.e. *Sanderson v Blythe Theatre Co* [1903] 2 KB 533) or *Bullock* (i.e. *Bullock v London General Omnibus Co* [1907] 1 KB 264) in favour of the First Claimant on account of the costs which he incurred as a result of having to submit to an order that his claim against Barlows should be dismissed with no order as to costs. If the First Claimant wishes to pursue such an order for costs, it would be helpful for me to receive a skeleton argument from both parties on that issue.

323 It would also be helpful for the skeleton argument to include the parties' submission on any other issue which arises, including whether, given how I have indicated the Second Defendants have conducted themselves, they should be entitled to the costs of this litigation from any free assets which are available in the Bankrupt's estate. The First Claimant and the Third Defendant may have an interest in this issue. However, whether or not they do, or whether they wish to be heard on it, that issue should also be determined at the above hearing.

324 In due course, it will be necessary for counsel to lodge an approved minute of an order to reflect the orders I have made. However, that can await the further hearing when I hope it will be possible for all outstanding issues to be determined.

ACKNOWLEDGMENTS

325 I again express my deep and sincere gratitude to counsel, both for the manner of the presentation of their clients' case and for their cooperation throughout the trial. Although I have decided most issues in the Claim against the Second Defendants, and expressed strong criticism of their conduct, I do not attribute anything I have said about them to Mr Vickery. He has done everything he possibly can (and a lot more) to present the Second Defendants' case in the best possible way to the court.