Neutral Citation Number: [2023] EWHC 1634 (KB)

Case No: QB-2018-000676

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2023

Before :

MRS JUSTICE ELLENBOGEN

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Between :

Executive Authority for Air Cargo and Special Flights	**Claimant**
- and -	
(1) Prime Education Limited (In Liquidation)	
(2) Tevfik Sekerci	
(3) Sera Jane Sekerci	
(4) Prime Education Havacilik Limited Sitketi	
(5) York Property Suites Limited (Dissolved)	**Defendants**

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George Davies (instructed by **MS Legal Solicitors**) for the **Claimant**
The First Defendant did not appear
The Second and Third Defendants appeared in person
The Fourth Defendant did not appear
The Fifth Defendant was represented by the Third Defendant

Hearing dates: 7, 8, 15, 16, 17 & 20 December 2021

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Approved Judgment

This judgment was handed down remotely at 14:00 on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE ELLENBOGEN

Mrs Justice Ellenbogen DBE:

1. By his judgment handed down on 5 February 2021 [2021] EWHC 206 (QB) and order sealed on 19 February 2021 ('the Saini Order'), Saini J partially allowed the Claimant's appeal against part of an order made by Senior Master Fontaine, by which she had dismissed its application for summary judgment against the First, Second, Third and Fifth Defendants in this matter (the Fourth Defendant, at that stage, having yet to be served with proceedings out of the jurisdiction, in Turkey). At paragraphs 13 to 63 of his judgment, he set out a simplified summary of the factual and procedural history giving rise to the claims, expressly based upon the witness statements and main documents with which he had been provided and focusing on those matters which were common ground. It is convenient to adopt that summary in this judgment, as supplemented or varied by virtue of subsequent developments and so far as material to the issues for determination at trial.

2. The Claimant ('EACS') is an executive agency of the Government of Libya. Its original purpose was to provide flights for senior Government ministers and officials. It enjoys separate legal personality under Libyan law, and is accepted to be an entity having the ability to sue and be sued under the law of England and Wales. The First Defendant ("Prime Education") is a company registered in England, incorporated on 20 June 2008, and now in liquidation. The Second and Third Defendants, who are husband and wife, (respectively, "Mr Sekerci" and "Mrs Sekerci") were, at all material times, the sole directors of Prime Education. Mr Sekerci was also its company secretary. The Fourth Defendant ("PE Turkey") is a Turkish company (incorporated in 2012) of which Mr Sekerci is a director and 50% shareholder, the other 50% shareholder being his business partner, Mr Burhan Conoglu. The Fifth Defendant ("York Property") was a company registered in England and Wales, of which Mr and Mrs Sekerci were the sole directors. By the date of trial, that company had been dissolved and no claims were pursued against it. I made an order staying EACS' claims against that company.

3. In or around 2012, the remit of EACS was extended to take on responsibility for Libyan pilot and aviation engineer training, requiring it to create a pool of pilots

and engineers beyond that which had been required to fulfil its original mandate. Libya's two State-owned airlines, Libyan Airlines and Afriqya, were also intended to benefit from the expanded pool of pilots and engineers. EACS decided to train between 180 and 250 individuals (the precise number being in issue). Those people would be required to attend aviation schools outside Libya, there being no such facilities within Libya. They would also be required to have the necessary facility with the English language in order to undertake the relevant courses.

4. Prime Education's business was to run international education and training programmes from the UK. PE Turkey was established to run education and training projects from Turkey. Each company provided its services for a variety of organisations in Libya and across the Middle East. It appears that Prime Education was first put in touch with EACS via the commercial attaché of the British Embassy in Libya, in around 2014.

5. On 17 December 2015, EACS and Prime Education entered into a written contract ("the 2015 Agreement"), which was signed on behalf of EACS by a Mr Jamil Shubana ("Mr Shubana"), the then General Manager and CEO of EACS, and by Mr Sekerci on behalf of Prime Education. The company stamp of EACS, bearing the words "EACS General Director", appears under Mr Shubana's signature, stated position and date.

6. The 2015 Agreement was made in both Arabic and English language versions. In broad summary, it provided that Prime Education would supply civil aviation educational and training consultancy and management services within the European Union, including the UK, to EACS. Those services would be provided to individuals nominated by EACS, in return for fees to be paid by EACS to Prime Education. In practice, Prime Education was intended to act as an intermediary between EACS and the educational institutions which would provide the training to the students and to handle financial dealings with those educational institutions, as well as paying living allowances and so forth to students. For this purpose, EACS was to provide funds, in advance, to Prime Education, so that it would be able to give assurances to the educational institutions that it was in a position to

pay the course fees, accommodation costs and living expenses of the students. The funds would also be used to pay fees required for obtaining visas for the students. Prime Education (referred to as "PE" in the 2015 Agreement) was required to set up a "designated clients account for EACS".

7. Page 9 of the 2015 Agreement dealt with account management of the "Clients Account" and provided as follows:

"A clients' bank account will be opened with our bankers, HSBC. The account will be controlled by PE's accounts department and they will have instant access to the funds in this account.

A clients account is designed to hold clients' money and is protected if anything happens to the funds. For example, when EACS deposit the project value funds into the clients account, and if PE was to cease trading for whatever reason, the funds in the clients account will be protected and will always legally be the money of EACS. PE will have control of the bank account, and the money in it, however PE will be bound by strict UK laws and regulations on our conduct on this account. Withdrawals from the account will be for payments for education providers, accommodation fees and student wages. All withdrawals will be approved as per a payment schedule to be initially agreed for payments made to education and accommodation providers. This schedule will be agreed upon signing of contracts."

8. The 2015 Agreement also contained terms and conditions for the "Clients Account" which included the following:

"Funds can only be deposited and withdrawn in GBP (£ sterling)

Funds in this account can only be used on behalf of our client (EACS) and cannot be used by PE;

In order to operate this account, PE will be bound by all relevant laws and regulations involved when holding and controlling clients' funds;

If PE was to cease training, sell the company or become bankrupt, the client account funds will be protected and returned to EACS;

For any foreign payments, GBP will need to be transferred to PE's trading account (business current account) and then international payments sent from there...;

A monthly statement of the account will be sent to EACS.

...

By opening a bank account and managing the project funds in this way will mean the following:

...

Any fees due to PE for the management of this project will be pre-agreed in a contract and paid separately directly to PE."

9. EACS' responsibilities under the 2015 Agreement included being able to show that each student had enough money to cover course fees and living costs. In this regard, the agreement provided:

"The evidence PE will use to satisfy this requirement will be for EACS to transfer the full course fees to the clients account held by PE. PE will then transfer the required course fees to the course provider for each student. Receipt of these funds will be detailed in the CAS/visa support letter. The course fees for the remaining course period will be held in the clients account held by PE until payment is requested by the course provider (month 13 of the course, prior to enrolment)."

and:

"EACS must show that they [the students] *have money for living costs per month, per student, for the course duration. All of these funds will be held in the clients account held by PE (in the UK) and a statement of account will be used as evidence for visa application purposes...".*

10. The 2015 Agreement specifically addressed what was to happen were the agreement to be "cancelled" by either party:

"If this contract is cancelled by PE after the contract has been signed and the invoice paid by EACS, PE will refund the full monies received from EACS back to EACS. If EACS cancels the contract after it has been signed and monies have been transferred to PE, PE will refund all course fees, accommodation fees and student salaries but will not refund any fees due to PE. If EACS cancels the contract once the students have started their studies, only the course fees, accommodation fees and student salary balance remaining will be refunded back to EACS. No PE fees will be refunded."

11. The 2015 Agreement set out a "tariff of fees", divided between visa support; health insurance; and student management. Prime Education was to administer "student salaries":

"All students' salaries will be held in the clients account controlled by PE and transferred to the students on monthly/quarterly basis (whatever is required by EACS...)".

12. The 2015 Agreement provided that Prime Education would sign contracts with the individual course/accommodation providers in relation to course fees and accommodation:

"We must adhere to the differing terms and conditions of each provider and these terms will be passed onto EACS. Payments made from the clients account will be in accordance with the signed course/accommodation providers."

13. The 2015 Agreement took effect shortly after signature and it is common ground that very substantial sums subsequently were paid to Prime Education by EACS.

14. On EACS' evidence, Mr Shubana was dismissed as CEO/General Manager of EACS by the Prime Minister of Libya in about October 2016 and Mr Khalil Taher Gammoudi ("Mr Gammoudi") was appointed in his place as its CEO. At that time, Mr Gammoudi asked Captain Emran Al Banghazi, General Manager of EACS, to investigate EACS' dealings with Prime Education, as it appeared that EACS had paid over very large sums of money to Prime Education but had received very little in return. Captain Al Banghazi reviewed EACS' financial and banking records, compiling a schedule of payments made to Prime Education between 25 January and 31 March 2016, and made enquiries with the aviation schools named on the invoices from Prime Education.

15. It is common ground that, pursuant to the 2015 Agreement, EACS transferred to Prime Education's nominated account sums totalling €15,218,008.75 and £1,946,040 (collectively, "the Transferred Money"). It is also not in dispute that those transfers were intended as the course fees payable to the relevant educational establishments, as well as student living allowances etc. Of those sums, EACS accepts that Prime Education has paid the sum of €444,500.00 to educational establishments, pursuant to the 2015 Agreement, but contends that the remainder of the money advanced is unaccounted for and has been mishandled.

16. Captain Al Banghazi reported his initial findings to Mr Gammoudi, who wrote to Mr Sekerci by e-mail, on 6 and 27 November 2016, asking for an account of what had happened to the funds advanced, and what was happening with the placing of students with flying schools. His position in his written evidence was that no reply had been received. On EACS' case, Mr Gammoudi made further attempts to

contact Mr Sekerci by telephone and left voicemail messages but did not receive any response.

17. Prime Education's Euro bank statements for the period spanning March to May 2016 show payments totalling €8,000,000 made to PE Turkey, as follows: on 30 March 2016, €2,000,000; on 28 April 2016, €500,000; and, on 5 May 2016, €5,500,000. It is apparent from those statements that most, if not all, of the money passing through Prime Education's account during this period came from EACS. Captain Al Banghazi then sought assistance from the Libyan Foreign Ministry, which contacted the Libyan Embassy in London, on 29 March 2017. An employee of the cultural attaché's office, Mr Osama Rajhi ("Mr Rajhi"), was able to contact Mr Sekerci and arranged for him to attend a meeting at the Cultural Affairs Bureau, on 25 April 2017. The report from Mr Rajhi to EACS following that meeting was that Mr Sekerci had said that:

"(i) he was continuing to hold the money from EACS, from which [Mr Rajhi] *understood it would still be in* [Prime Education's] *client account;*

(ii) he was still trying to arrange the courses;

(iii) there had been a problem in that HSBC had frozen [Prime Education's] *accounts due to concerns about source of funds;*

(iv) [Prime Education] *was bringing a legal case against HSBC to unfreeze the funds, and expected to have access to the funds shortly; and*

(v) he would provide a full written report on the project within 10 days."

18. In his first witness statement, Captain Al Banghazi stated that he did not recall Mr Rajhi having sent him the report which had been promised. Under cross-examination at trial, he acknowledged that he had received a copy of the report, on or around 15 May 2017. A representative from the Libyan Embassy had told him that, after a number of unsuccessful attempts to contact Mr Sekerci, he was unable

to assist further. Captain Al Banghazi had then made various reports to banking, legal and Government authorities in Libya. Related criminal investigations had been commenced in Libya, including into the conduct of Mr Shubana. In October 2017, the "Litigation Directorate" of the Libyan Government instructed English solicitors to pursue the matter.

19. The filed accounts of Prime Education record that the company had debtors totalling £11,756,821.00, comprising an interest-free loan to PE Turkey, with no fixed date of repayment, of which £11,179,822 was outstanding; and a loan to York Property, amounting to £448,847, of which the full amount was outstanding. That loan, too, was interest-free and had no fixed date of repayment. The accounts also show funds (primarily received from EACS) due to creditors, totalling £13,222,620, and cash at the bank totalling £1,583,386, so that it appears that the funding for the loans to PE Turkey and York Property must have come from the funds transferred by EACS. In broad outline, as matters stood before Saini J, the explanation of events put forward on behalf of Prime Education, Mr and Mrs Sekerci (and, prior to its dissolution, York Property) was that they accepted that, between 15 February and 18 May 2016, EACS had transferred the total sum of €15,218,008.75 to Prime Education's Euro account at HSBC, by way of four separate payments, and the total sum of £1,946,040 to Prime Education's Sterling account, at HSBC, by way of six separate payments. Practical difficulties had been experienced by Prime Education, from March 2016 onwards, falling into two categories:

    a. difficulties in dealing with the Libyan students, comprising the inability of those students to provide the correct documentation so as to comply with the requirements to obtain visas and for the courses for which they were to be enrolled, and the conduct of some students, who had been rude and abusive to Prime Education’s staff; and

    b. HSBC’s blocking of a significant number of payments out of the Euro account, in which the Transferred Money was held.

20. The Defendants' evidence is that, as a result of the above difficulties, Prime Education had sought Mr Shubana's agreement to transfer the funds received from EACS to PE Turkey, in March 2016. Mr Sekerci's evidence is that Mr Shubana's oral agreement was obtained during discussions which had taken place at some point in March 2016, but that he does not know the exact date. He says that Prime Education had received Mr Shubana's express agreement to the transfer of funds to Turkey by the time at which the first tranche of moneys had been transferred to PE Turkey, at the end of March 2016. The communications with EACS had taken place with Mr Shubana and a Mr Lutfi, by telephone only.

21. Mr Sekerci's evidence is that, in the period between March and May 2016, he had been concerned that the project had been running into difficulties, for the reasons summarised above, and that its delivery had been changing from that which had been anticipated at the outset. His position is that, following further oral discussions with Mr Shubana, in May 2016 he had arranged a face-to-face meeting with Mr Shubana, in Istanbul, which had taken place in July 2016. Mr Shubana had arrived in Turkey on 16 July 2016 and stayed for a number of days, meeting Mr Sekerci and Mr Conoglu at PE Turkey's offices. Mr Sekerci's evidence is that, prior to that meeting, he had sent a letter to Mr Shubana, dated 1 June 2016, setting out, in detail, the problems which had been caused by the students, including the abuse directed at staff, and with EACS' conduct in performing the contract. The copy of the letter on which he relies is undated. Mr Sekerci further states that, in the course of the discussions with Mr Shubana in Turkey, a written amended agreement ("the Amended Agreement") was drawn up, and signed by both parties on 22 July 2016. His evidence is that, whilst in Turkey, both he and Mr Shubana signed the signature pages and every page of that document, and that they each retained one copy.

22. The Amended Agreement is at the heart of the defence to all claims and, together with the oral agreement which is said to have preceded it, is relied upon to justify all aspects of that which the Defendants did with the Transferred Money in 2016 and 2017. It is not in dispute that its terms present what Saini J described as 'a striking departure' from the terms of the 2015 Agreement. The financial terms, in

particular, significantly weakened the protections enjoyed by EACS under the latter agreement.

23. The opening paragraph of the Amended Agreement provided:

"Due to a number of changes in circumstances, it is agreed between…PE and … EACS that the following amendments are made to the original contract which was signed on 17th December 2015."

24. The terms of the Amended Agreement included the following:

a. replacing the terms on page 9 of the 2015 Agreement (the Client Account Terms — see above):

"Page 9 of the original contract is no longer valid and it is accepted that the statements made on Page 9 of the original agreement, titled FINANCIAL MANAGEMENT, no longer form any contract between PE and EACS. PE is no longer bound by the conditions set out on page 9 of our original agreement dated 17th December 2015.

EACS's funds will NOT be held in a client's account and EACS has no right to access or request the bank statements of [Prime Education]. All funds will be held in the accounts in the name of Prime Education and or its subsidiaries. PE is bound by UK statutory banking regulations and due to the source of EACS's funds being Libyan, we are regularly investigated by our bank and a client's account has not been granted by our bank, HSBC. The purposes of such investigations could be for reasons such as anti-money laundering, anti-terrorism or fraud, to name a few. If payments of course fees or payments of student salaries are delayed due to bank procedures and standard investigatory measures, through no fault of PE, PE cannot be held accountable for any repercussions of late payments. PE will look for an alternative bank who could provide such an account but no guarantees are given as it will be unlikely any bank will offer this service.";

b. a new Cancellation Policy, which provided:

"If EACS cancels this contract for any reason, PE will NOT refund any monies to EACS and will continue the contract only for any students who are enrolled on a course of study at the time of cancellation. Any monies held by PE for those students who have not yet enrolled in the course of study will not be refunded to EACS and will become cancellation penalty monies paid to PE for the cancellation of the contract. Any balance of funds held at the time of cancellation by PE will then become the cash assets of PE and EACS will no longer have any entitlement to the funds held.

If EACS at any point wishes to cancel the contract, this must be done in writing to Prime Education and the contract can be cancelled immediately.";

c. by numbered point 6 on page 3 of the Amended Agreement:

"If there is any situation where a refund is due to EACS from PE, the monies will be refunded directly into the original source account where the original money from EACS was debited from."

25. As Saini J observed (whilst noting that it would be a matter for trial), the changes allegedly effected to the 2015 Agreement by the Amended Agreement were commercially strange, to say the least, in appearing to give Prime Education the ability to retain for itself potentially large sums (the "balance of funds"), were EACS to cancel the 2015 Agreement, for any reason. On their face, the amendments also substantially eroded the protection of client moneys enjoyed by EACS under the 2015 Agreement. So it was that, when refusing to discharge the freezing order earlier imposed, Yip J had observed [2019] EWHC 522 (QB), at [17]- [19]:

"It is fair to say that this agreement is an extraordinary one. The purported effect of those amendments is to remove the security for the monies to be held as

student disbursements which would have been included in the original agreement and to allow the first defendant to retain all the monies held if the claimant cancelled the contract for any reason. This is particularly extraordinary in circumstances where the value of the student disbursements was so significantly in excess of the fees chargeable by the first defendant. It frankly appears fanciful that the claimant could genuinely have intended that the first defendant should stand to obtain a windfall measured in millions of pounds."

26. EACS' evidence before the Senior Master was that the first that it had heard of the Amended Agreement had been after the claim had been issued (indeed, its Particulars of Claim and evidence in support of its application for the freezing order had made no mention of any agreement other than the 2015 Agreement). At that stage, it had disputed the legitimacy and validity of the Amended Agreement. Captain Al Banghazi's evidence was that, when Mr Sekerci had met the representative of Libyan Cultural Affairs at the Libyan Embassy in London, in April 2017, to explain the position in relation to the 2015 Agreement, he (Sekerci) had not mentioned the Amended Agreement, but had confirmed that Prime Education was continuing to hold the relevant sums on behalf of EACS. It was EACS' then position that, even if Mr Sekerci's account of how the Amended Agreement had come to be made were true, there were certain formalities required under Libyan law for a Government contract (including one operating to end an earlier contract) to be binding and that those had not been effected.

27. Attached to the Defence subsequently served by PE Turkey was an agreement dated 25 March 2016 (and, thus, anteceding the Amended Agreement), signed by Mr Sekerci, on behalf of Prime Education (described in the agreement as 'Prime UK'), and Mr Conoglu, on behalf of PE Turkey (described in the agreement as 'Prime Turkey'): 'the PE Turkey Agreement'. It contained 18 'Articles' and was expressed to be subject to Turkish Law. In its opening paragraph, it was said that the parties had *"reached an agreement on the following terms by negotiating the business partnership based on work sharing and profit-sharing."* Article 2 provided that PE Turkey had assumed certain specified obligations in the field of education. Article 2(f) provided that *"Prime Turkey must comply with all*

instructions that Prime UK will give about education, its course selection, and student payments." Article 4 provided for the obligations of Prime Education 'related to education'.

28. Article 3 provided as follows:

"In addition to its educational commitments, Prime Turkey also commits to Prime UK in terms of investments below:

a. *Prime Turkey shall transfer all that Prime UK has sent to it to its own account;*
b. *Prime Turkey shall convert all the amounts that Prime UK sends to Prime Turkey for educational and investment purposes to the expenses of the students set out in Article 2 and the investments;*
c. *Prime Turkey shall find the projects suitable for investment and put all of its experience in this regard to the joint venture as capital;*
d. *Prime Turkey has the right to use loans in cases where the amounts brought by Prime UK as an investment is not sufficient for the projects;*
e. *Prime Turkey is the manager for the joint projects undertaken and is obliged to inform the Prime UK representative about the works performed and the projects that it shall choose;*
f. *Prime Turkey shall ensure that the resource that Prime UK will send is represented by Tevfik Sekerci and Burhan Conoglu."*

29. Article 5 provided:

"Prime UK's obligations related to investment under this agreement are as follows:

a. *To examine and evaluate the investment projects found by Prime Turkey;*
b. *To take part in the co-ordination of the investments of Prime Turkey when necessary;*
c. *To promote the investments made by Prime Turkey internationally;*

d. To provide financial support to Prime Turkey's projects in the field of education and investment."

30. Article 6 provided:

"The parties shall carry out profit-loss sharing as follows:

a. For each student transferred from Prime UK to Prime Turkey, the profit obtained by Prime UK will be shared in half between the parties. The profit determination shall be made according to Prime UK's agreement. Regardless of the currency of the investment partnership payments sent to Turkey by Prime UK, their Turkish Lira equivalents on the dates when they are received in Turkey are taken as the basis;

b. If the investment fund transferred to Turkey by Prime UK is converted to investment by Prime Turkey;

aa. If the value of this investment exceeds the capital invested by the parties, the investment is considered to be profitable;

bb. However, if the capital invested by the parties is not met, this is considered an investment loss.

cc. If the parties make a profit, the parties will share the profit in half."

31. Article 10 provided (so far as material):

"The parties agree that the agreement is an indefinite term co-operation and investment agreement. However they also agree that the agreement will be terminated in the following cases:

…

b. If one of the educational or investment purposes among the subject matters of the agreement is obtained, or if its obtainment/fulfillment becomes impossible, then the agreement shall continue for the other purpose.

…"

32. There is no reference to EACS within the PE Turkey Agreement. Mr and Mrs Sekerci acknowledge that the PE Turkey Agreement was not disclosed to Mr Shubana, or otherwise to EACS, prior to its attachment to PE Turkey's Defence. It was not mentioned in Mr Sekerci's report to Mr Rajhi. Mr Sekerci's position is that the references in the agreement to investment had related only to any profit which Prime Education and PE Turkey made from the project: PE Turkey would run the project from Turkey and the profit would be shared equally between Prime Education and PE Turkey. In fact, however, it is the Sekercis' position that all moneys were invested in Turkish property and that the Claimant had been neither asked nor told about that investment. The following exchange, taken from Mr Davies' cross-examination of Mr Sekerci, sets out the position:

"Q. …You said that you were simply investing profits which you were hoping to make, or had made, from the educational project.

A. Yes.

Q. My suggestion is that's not what you did. You, through Prime Education and PE Turkey, simply took all of the Claimant's money and gambled with it by investing, or by putting it into Turkish property. You didn't just take the profits; you took the whole of the money. Would you agree?

A. I wouldn't call it gambling but I agree — Prime Education's money has been invested in property. However, this was not started from March 2016. It was more than a year later we decided to put Prime Education's money into property, because of tax reasons."

Mr Sekerci stated that he had never discussed with the Claimant the currency risk arising from the fact that sums paid in Euros and in Sterling had been converted into Turkish Lira almost immediately, upon transfer to PE Turkey. He had never discussed liquidity risk, stating that, in Turkey, real property could be much more easily sold than it could in the UK. He agreed that assets held in Sterling and Euros would be more liquid than would real property in Turkey, stating that the property market did not pose as much of a risk as had the conversion of the funds into Turkish Lira; *"nothing close"*. He acknowledged that there would be some development risk, as it could not be known whether the property developments would complete. He further acknowledged that he had provided no disclosure relating to any property investment in Turkey. He gave as the reason for that that fact that he had been informed by PE Turkey's Turkish lawyers that PE Turkey should not provide documents; a decision which he had taken jointly with Mr Conoglu.

33. Mr Sekerci's position is that, from the sum of €15,218,008.75, received from EACS into Prime Education's Euro account, the following transfers were made:

    a. €12,819,000, to a Euro account in the name of PE Turkey, during the period spanning 30 March 2016 and 21 March 2017;

    b. €444,500, to ESMA (a French aviation college);

    c. €1,333,720, to the students attending the course at ESMA, in France.

    The remaining €620,788.75, not transferred to PE Turkey, had included other fees incurred by Prime Education, including bank charges and fees payable to the latter company.

34. Of the sum of £1,946,040, received from EACS by Prime Education into its Sterling account:

    a. £1,395,480 was transferred to PE Turkey on 8 September 2017; and

b. £495,411.04 was held in Prime Education's account.

35. Mr Sekerci's evidence is that the majority of the transfers from the HSBC Euro account (€10.5 million) had been made by the end of July 2016 and that the money had then sat in PE Turkey's account awaiting the commencement of projects in Spain, Greece and the UK. He says that, whilst the 2015 Agreement had required that the funds received from EACS be held in a client account, this and other obligations regarding those funds had been removed by the Amended Agreement, as had any obligation to refund such sums, were EACS to cancel the contract. His position is that the money transferred from Prime Education to PE Turkey did not remain in PE Turkey's account but that he: *"...considered it prudent to invest the money and assets to be owned by PE Turkey and specifically PE Turkey decided to purchase and develop two prime sites in Istanbul which we considered to be a good investment."* Mr Sekerci details two projects which were included in those investments, being land and buildings on sites at (a) 1215 sok. 34210 Bagcilar, Istanbul; and (b) Mahmutbey Cad 34210 Bagcilar, Istanbul. At the time of the relevant witness statement, he calculated the equivalent Euro value of the Turkish Lira amount invested in those two projects to be €8,562,524, but stated that, as a result of falling Turkish exchange rates, it would have equated with €11,723,561.50 in January 2018. His evidence is that the intention was always to liquidate the assets as and when money was required to progress the project. He says that the entirety of the funds was not invested immediately, but that they were spent across a two-year period, including on construction works. The Sekercis' case is that, in all the circumstances, the property investments were permitted under the Amended Agreement.

36. On 7 December 2018, EACS' solicitors sent a letter to Prime Education demanding the return, within 7 days, of all sums transferred (i.e. of €14,773,508.75, plus £1,946,040.00, less the ESMA payments), together with interest. That sum was not paid and proceedings were issued on 20 December 2018. On that date, Mr Sekerci sent an email to EACS' solicitors stating that he remained willing to deliver the project and referring to an alleged amendment.

There followed the grant of a freezing order by Morris J, on 21 December 2018, continued by Yip J on 8 January 2019. The summary judgment application was issued on 7 October 2019, after statements of case had closed, and dismissed by order dated 30 July 2020. EACS' appeal from that order was allowed, in part, on 5 February 2021.

37. In broad summary, EACS contended that Prime Education had acted in breach of the 2015 Agreement; in breach of fiduciary duty; and/or had held moneys on constructive trust. The case as to alleged wrongdoing was put in a number of ways: Prime Education had not kept the Transferred Money in a separate client account; had misappropriated the Transferred Money by using it other than to meet the cost of courses and accommodation for students as requested by EACS; had used the Transferred Money other than on behalf of EACS; had failed to protect the Transferred Money for the benefit of EACS; had wrongfully used the Transferred Money to make interest-free and unsecured loans to PE Turkey, of €11,179,822, and to York Property, of not less than £448,847. It was and is further contended that Mr and Mrs Sekerci had each induced Prime Education to breach its contract with EACS; procured and/or knowingly and/or dishonestly assisted in a breach of trust by Prime Education; and conspired and combined with Prime Education, each other, PE Turkey and York Property to use unlawful means (including the misappropriation of moneys with intent to defraud) with the intention and effect of harming EACS. I need not recount the further claims made against York Property, which I have stayed, following its dissolution. The Defendants assert that the Amended Agreement and the oral agreement which preceded it constitute a complete answer to all claims.

38. In his judgment on appeal from the order of Senior Master Fontaine, Saini J held (at [83] to [86] and [93] to [98]):

"83. Based on the facts which are not controversial (and even assuming in its favour that the Amended Agreement was valid), in my judgment Prime Education has no answer to a simple contractual claim for damages based on repudiation of either the 2015 Agreement or the Amended Agreement. In

short, the suggestion that it was lawfully permitted in reliance on the Amended Agreement to appropriate substantial funds to invest them in a speculative Turkish property venture ("the Property Purchases") is fanciful.

84. My reasons for this conclusion are as follows:

(1) Even if the Amended Agreement was legally effective (and supported by consideration) and/or there was a representation giving rise to a promissory estoppel, all that either of those would have achieved was to permit Prime Education to remove the Transferred Money from the UK client account and send it to an account of either Prime Education or PE Turkey in Turkey in order to pay the aviation colleges from there.

(2) In this regard, it is significant that on the Defendants' own case, the Amended Agreement provided:

"All funds will be held in accounts in the name of Prime Education and or its subsidiaries."

(3) Despite this, in his witness statement, Mr Seckerci stated that he: "...considered it prudent to invest the money in assets to be owned by [PE Turkey] and specifically [PE Turkey] decided to purchase and develop two prime sites in Istanbul...". He also explains that 53 million Turkish lira (all of it from the Transferred Money) had been so used, amounting in January 2018 to €11,723,561.

85. Accordingly, even if there was a legally effective amendment to the 2015 Agreement, this misuse of the Transferred Money constituted a clear repudiatory breach of the very terms of the Amended Agreement relied upon. Leading Counsel for EACS was right to focus on this as his best point on appeal.

86. Further, even if EACS had impliedly agreed not to seek recompense for Prime Education breaching the 2015 Agreement (by removing the Transferred Money from the client account so as to allow Prime Education to place it in an account in Turkey and run the project from there — the putative representation upon which the Defendants founded their defence of promissory estoppel), in my judgment this could not protect Prime Education from the separate and distinct breach in its taking the money out of the Turkish bank account to fund speculative property development in Turkey."

…

93. …I also do not accept that any relevant factual investigation is material to a construction of the agreement which is the sole basis relied upon for saying the Property Purchases were lawful. In short, an obligation which requires funds to be "held in the accounts in the name of Prime Education and its subsidiaries" is plainly inconsistent with a construction which imports some form of implied power to remove and use the funds (however wise the proposed investment may be).

94. These words are simple and mean what they say: they provide a measure of protection to EACS which would be undermined by giving Prime Education freedom to remove and to speculate with the funds.

95. Accordingly, even if the "trust-like" obligations imposed on Prime Education under the 2015 Agreement as regards monies transferred to it had arguably been superseded by the looser obligations of the Amended Agreement …, Prime Education has no arguable lawful basis for the use of the funds for property speculation. Its defence in relation to the Property Purchases is truly fanciful.

96. In my judgment, those Property Purchases were acts of repudiation of both the 2015 Agreement and the Amended Agreement and such breach was accepted in substance by EACS's letter of 7 December 2018, demanding a

return of the sums transferred to Prime Education. At that time, EACS was not aware of the precise misapplication of the funds by way of Property Purchases but that does not preclude termination for breach under well-established contractual principles: Chitty on Contracts (33rd Edition) Vol.1 at para. 24-014.

97. This is sufficient to make good Ground 1 and to entitle EACS to judgment for damages for breach of contract in the sums €13,439,788.74 and (subject to a qualification) £1,871,560, plus interest thereon. These were sums paid over in reliance on intended performance of Prime Education's obligations. The precise quantification of the latter sum is still the subject of a dispute, which I address at the end of this judgment.

98. I have paused to consider whether judgment should not be entered on this basis given there will be a trial of the other claims. However, I do not consider it is appropriate to deny a claimant judgment in respect of an unanswerable claim. Ultimately, no convincing argument was made to me to suggest that there was any proper legal answer to the contractual claim which might emerge at trial. Prime Education's own case as to the nature of the amendments to the contractual arrangements, and the common ground on the facts, lead to it being in breach."

39. Saini J entered judgment in favour of EACS for damages for breach of contract in the sums of €13,349,788.74 and (subject to a qualification) £1,871,560, plus interest, noting that the remainder of the claims against Prime Education and the other defendants would need to be determined at trial.

40. In June 2021, Prime Education went into liquidation. On 29 July 2021, by operation of the order of Senior Master Fontaine, dated 22 July 2021, PE Turkey's defence was struck out and judgment was entered against it, with damages to be assessed. York Property was dissolved on 21 September 2021. Thus, EACS' focus at trial was on the acts and omissions of Mr and/or Mrs Sekerci and on the quantum of the claims against them and against PE Turkey.

The issues at trial

41. Before me, EACS was represented by Mr George Davies; Mr Sekerci represented himself; Mrs Sekerci represented herself and York Property; and PE Turkey neither appeared nor was represented. Whilst all Defendants other than PE Turkey had previously been represented by Stewarts Law LLP, those solicitors had come off the record on 15 December 2020, when, on the Sekercis' evidence, the Defendants whom they had represented had run out of money. I received live evidence from Captain Al Banghazi, on behalf of EACS, and from Mr and Mrs Sekerci, all of whom attended via video-link.

42. By the time of trial, EACS was, *'for the purposes of this litigation…prepared to accept that the* [2015 A]*greement was varied on 18 July 2016 (''the Amendment Agreement")*', having taken *'a tactical decision not to challenge its authenticity or validity at trial'*. That decision extended to its abandonment of its earlier contention that no consideration had been provided for the Amended Agreement. The extant legal issues to be determined at trial, as identified by EACS, were as follows:

Inducing one or more breaches of the Amended Agreement

a. whether Mr and/or Mrs Sekerci induced a breach of contract by Prime Education, knowing that the terms of the Amended Agreement required that EACS' money be held in an account in the name of Prime Education and/or in an account of a subsidiary of that company;

b. whether Mr and/or Mrs Sekerci knew that (i) moving EACS' money to PE Turkey; and/or (ii) converting it into Turkish Lira, or assets denominated in that currency, thereby exposing EACS to currency risk; and/or (iii) using such money (allegedly) to purchase property in Turkey constituted a breach of the Amended Agreement, alternatively were indifferent or reckless as to any such breach;

c. whether the acts and/or omissions of Mr and/or Mrs Sekerci were effected in order to secure economic advantage for either or both of them;

Dishonest assistance of a breach of fiduciary duty by Prime Education

d. whether Mr and/or Mrs Sekerci (i) knew that; alternatively, (ii) suspected that; alternatively, (iii) were reckless or indifferent as to whether Prime Education owed a fiduciary duty to EACS;

e. whether, through their acts or omissions, Mr and/or Mrs Sekerci consciously assisted Prime Education's breach of its fiduciary duty, or made such a breach of duty easier;

Unlawful means conspiracy

f. whether Mr and Mrs Sekerci:

    i. and/or PE Turkey (acting by its director, Burhan Conoglu) deliberately combined to achieve a common end;

    ii. intending to injure or harm EACS by causing it loss, to their own economic benefit;

    iii. by their acts or omissions, knowingly and deliberately breached Prime Education's fiduciary obligations to EACS (being the alleged unlawful means); and

g. whether the unlawful means fell within the overall scope of their common design;

Quantum

h. the quantum of any liability established against Mr and/or Mrs Sekerci, and payable by PE Turkey. The quantum alleged to flow from each cause of action, if established, is said to be €13,349,788.74, plus £1,871,560, against which, it is said, credit will be given for £400,706.63, drawn from Prime Education's frozen bank account with HSBC.

43. Whilst the case is put in a number of ways, Mr Davies identified the essence of his submissions as being that an honest person looking after £15 million worth of a client's money would have retained it in a bank account (with a first class, international bank), in its own name, or that of a subsidiary or the client, in the original currency so as: (a) to ensure that control over the money was not lost; (b) not to expose the client to currency risk; (c) to ensure that the funds remained liquid; and (d) to ensure that the funds were kept in a form which exposed them to the lowest possible risk, being the credit risk of the bank. Alternatively, it is said, in the event that EACS was unresponsive and moneys were lying dormant and exposed to a tax liability (as the Defendants contend), would have returned those moneys to EACS, that is to the account from which they had had come.

The legal principles

44. Before turning to the detail of the evidence received, it is convenient to summarise the legal principles applicable to each cause of action advanced against Mr and Mrs Sekerci, which were not in dispute.

Inducing breach of contract

45. The test is as set out in *OBG Ltd v Allan* [2007] UKHL 21, per Lord Hoffman [39] to [44]:

'*39. To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so...'*

40. The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions In Emerald Construction Co Ltd v Lowthian [1966] 1 WLR 691 ... Lord Denning MR said, at pp 700–701:

"Even if they did not know the actual terms of the contract, but had the means of knowledge—which they deliberately disregarded—that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless of whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not."

41. This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact: see Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2003] 1 AC 469. It is not the same as negligence or even gross negligence...

42. The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach... Again, people seldom knowingly cause loss by

unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves...

43. On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at"...

44. Finally, what counts as a breach of contract?... I think that one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability...'

Dishonest assistance of a breach of fiduciary duty

46. This is a form of accessory liability having a number of elements. For a person to be held liable for dishonest assistance of a breach of a fiduciary duty: (a) there must have been such a duty in existence at the material time; (b) the fiduciary must have committed a breach of that duty; (c) the defendant must have assisted the trustee to commit that breach of duty; and (d) the defendant's assistance must have been dishonest: *Group Seven Limited v Notable Services LLP & others* [2020] Ch. 129, CA [29]. So far as material to this case, I address the principles relating to each of those elements below.

(1) The fiduciary relationship

47. In *Bristol & West Building Society v Mothew* [1998] Ch. 1, CA, Millett LJ held (page 18):

'...A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of

loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

…

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.'

48. In *Lehtimäki and others v Cooper* [2020] UKSC 33 [42] to [48] and [51], Lady Arden held:

'42. The question whether a person is a fiduciary is important because of the duties which follow...

43. Equity imposed stringent duties on persons who were appointed trustees of trusts: Lord Eldon is said to have held that these duties were imposed with "relentless jealousy" in order to ensure that trustees fulfilled their duties, and that trustees had to be "watched with infinite and the most guarded jealousy" (see Ex p Lacey (1802) 6 Ves Jnr 625, 626; 31 ER 1228 and note 2 to the report). The words "infinite" and "relentless" aptly indicate the capacity of equity to develop to meet new challenges. Over the years these duties were also imposed on directors, agents, solicitors and others. The

term "fiduciary" is used to cover all persons subject to these duties, including trustees, and it is therefore a wider term than that of trustee.

44. *There has been considerable debate as to how to define a fiduciary, but it is generally accepted today that the key principle is that a fiduciary acts for and only for another. He owes essentially the duty of single-minded loyalty to his beneficiary, meaning that he cannot exercise any power so as to benefit himself. In Bristol and West Building Society v Mothew [1998] Ch 18 Millett LJ described the duties of a fiduciary as follows:*

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

45. *So "the distinguishing obligation" of a fiduciary is that he must act only for the benefit of another in matters covered by his fiduciary duty. That means that he cannot at the same time act for himself.*

46. *If a person is a fiduciary then, as part of his core responsibility, he must not put himself into a position where his interest and that of the beneficiary conflict ("the no-conflict principle") and he must not make a profit out of his trust ("the no-profit principle"). The fiduciary is likely to owe other fiduciary duties as well, such as the duty to act in the best interests of the person to whom the duty is owed. Section 178(2) of the 2006 Act expressly makes this a fiduciary duty in the case of company directors. It is not necessary to consider whether these duties are fiduciary duties in all cases.*

It is not enough that a person has agreed to perform certain duties by agreement. As the Privy Council held in In re Goldcorp Exchange Ltd [1995] 1 AC 74, 98 "The essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself".

47. *The Court of Appeal adopted the following test put forward by Finn J, sitting in the Federal Court of Australia, in Grimaldi v Chameleon Mining NL (No 2) (2012) 287 ALR 22, para 177:*

"... a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest ..."

48. *This formulation introduces the additional concept of reasonable expectation of abnegation of self-interest. Reasonable expectation may not be appropriate in every case, but it is, with that qualification, consistent with the duty of single-minded loyalty…*

…

51. *A person can be a fiduciary in relation to another party with whom he has a contractual relationship in respect of some only of his contractual obligations: see, for example, F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2012] Ch 613, especially at paras 212-216 and 223 per Sales J (as he then was). This is only one of the situations in which a fiduciary duty may arise. It is important to examine the very specific context in which it is said that a fiduciary duty arises. This point was made by Sales J:*

"The touchstone is to ask what obligations of a fiduciary character may reasonably be expected to apply <u>in the particular context</u>, where the contract

between the parties will usually provide the major part of the contextual framework in which that question arises." (para 223) (Emphasis added)'.

49. Consistent with the citation at paragraph 51 of *Lehtimäki*, in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, at 206A– 206D, Lord Browne-Wilkinson held*:*

"The phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case. Although, so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised), the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent. Moreover, and more relevantly, the extent and nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties. Thus, in the case of an agent employed under a contract, the scope of his fiduciary duties is determined by the terms of the underlying contract...The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source); but the contract can and does modify the extent and nature of the general duty that would otherwise arise."

50. In *F & C Alternative Investments* itself [249], Sales J considered that, *'...the proper approach here is to analyse what precise fiduciary obligations could reasonably be expected to apply in the particular context created by the agreement, without making any assumption at the outset what they should be.'*

51. In *Wang v Darby* [2021] EWHC 3054 (Comm), Stephen Houseman QC, sitting as a Deputy Judge of the High Court, held [62]:

'As regards the existence or imposition of fiduciary duties on a party to a commercial contract absent the existence of a trust, i.e. non-trustee or independent fiduciary duties, it is possible for these to arise where there is a relationship of trust and confidence that justifies such equitable duties in conjunction with and consistent with the relevant contractual framework. A

contractual obligation to use certain property (i.e. belonging to the obligor, in the absence of any trust) for a particular economic purpose and account to the contractual counterparty (i.e. seller) for the rewards of such promised endeavour is theoretically capable of being conditioned or augmented by fiduciary duties in so far as consistent with such contractual scheme. The precise scope of any fiduciary duties must be moulded to the nature of the particular relationship and facts of the case so as to ensure that any fiduciary duties are consistent with non-fiduciary (i.e. contractual) duties: see Snell's Equity (34th ed. 2019) at 7-009 & 7-012.'

(2) Assistance

52. On behalf of EACS, Mr Davies submitted that actionable assistance of a breach of fiduciary duty could be effected by way of act or omission, citing as authority for that proposition *Madoff Securities International Ltd (in liquidation) v Raven* [2013] EWHC 3147 (Comm), per Popplewell J, at [326] and [351]. In fact, the first of those paragraphs is concerned with a deliberate breach of trust by the trustee and the second (concerned with acts of assistance) does not itself support the proposition which Mr Davies advanced. Indeed, it contains the following dictum, *'So accessory liability on the part of a dishonest assistant requires no more from his point of view than the actus reus of assisting by participation in the transaction, and the mens rea of dishonesty.'* The assistance identified in that case, at [352], was constituted in a series of identified acts. That is consistent with the following *dicta* in *Tan* [387] (with emphasis added), indicating that mere omission to act would not suffice, inasmuch as some form of deliberate intervention, or intentional intrusion, is required:

'...Beneficiaries are entitled to expect that those who become trustees will fulfil their obligations. They are also entitled to expect, and this is only a short step further, that those who become trustees will be permitted to fulfil their obligations <u>without deliberate intervention</u> from third parties. They are entitled to expect that third parties will refrain from <u>intentionally intruding</u> in the trustee-beneficiary relationship <u>and thereby hindering a beneficiary</u> from receiving his entitlement in

accordance with the terms of the trust instrument. There is here a close analogy with breach of contract. A person who knowingly procures a breach of contract, or knowingly interferes with the due performance of a contract, is liable to the innocent party. The underlying rationale is the same.'

53. It must be shown that the conduct in question in fact assisted the breach of fiduciary duty and that the loss directly resulted from that latter breach. The assistance given must have been more than minimal. A claimant must, at least, show that the defendant's actions have made the fiduciary's breach of duty easier than it would otherwise have been. But the causation requirement for dishonest assistance is no stronger than that, and it is no answer to a claim, for example, that the claimant's loss would have occurred anyway, because the wrongdoing fiduciary would have committed the breach even if the defendant had not assisted him: *Group Seven* [110(1)].

(3) Dishonesty

54. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] AC 378, PC [178], Lord Nicholls, giving the judgment of the Court, held:

'...their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly. "Knowingly" is better avoided as a defining ingredient of the principle.'

55. Addressing the meaning of dishonesty for those purposes, Lord Nicholls observed:

'Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts ... in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is

synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless. However, in the situations now under consideration the position is not always so straightforward. This can best be illustrated by considering one particular area: the taking of risks.

Taking risks

All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the

person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own.

This type of risk is to be sharply distinguished from the case where a trustee, with or without the benefit of advice, is aware that a particular investment or application of trust property is outside his powers, but nevertheless he decides to proceed in the belief or hope that this will be beneficial to the beneficiaries or, at least, not prejudicial to them. He takes a risk that a clearly unauthorised transaction will not cause loss. A risk of this nature is for the account of those who take it. If the risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly. This is the type of risk being addressed by Peter Gibson J. in the Baden case [1993] 1 W.L.R. 509 , 574, when he accepted that fraud includes taking "a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take."

This situation, in turn, is to be distinguished from the case where there is genuine doubt about whether a transaction is authorised or not. This may be because the trust instrument is worded obscurely, or because there are competing claims, ... , or for other reasons. The difficulty here is that frequently the situation is neither clearly white nor clearly black. The dividing edge between what is within the trustee's powers and what is not is often not clear-cut. Instead there is a gradually darkening spectrum which can be described with labels such as clearly authorised, probably authorised, possibly authorised, wholly unclear, probably unauthorised and, finally, clearly unauthorised.

The difficulty here is that the differences are of degree rather than of kind. So far as the trustee himself is concerned the legal analysis is straightforward. Honesty or lack of honesty is not the test for his liability. He is obliged to comply with the terms of the trust. His liability is strict. If he departs from the trust terms he is liable unless excused by a provision in the trust instrument or relieved by the court. The analysis of the position of the accessory, such as the solicitor who carries through the transaction for him, does not lead to such a simple, clear-cut answer in every case. He is required to act honestly; but what is required of an

honest person in these circumstances? An honest person knows there is doubt. What does honesty require him to do?

The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific. Knox J. captured the flavour of this, in a case with a commercial setting, when he referred to a person who is "guilty of commercially unacceptable conduct in the particular context involved:" see Cowan de Groot Properties Ltd. v. Eagle Trust Plc. [1992] 4 All E.R. 700, 761. Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did.

Before leaving cases where there is real doubt, one further point should be noted. To inquire, in such cases, whether a person dishonestly assisted in what is later held to be a breach of trust is to ask a meaningful question, which is capable of being given a meaningful answer. This is not always so if the question is posed in

terms of "knowingly" assisted. Framing the question in the latter form all too often leads one into tortuous convolutions about the "sort" of knowledge required, when the truth is that "knowingly" is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not kind.'

56. That test was approved by Lord Hughes JSC, in *Ivey Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67 [74], who, in the same paragraph, went on to hold:

'When dishonesty is in question, the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.'

57. In *Group Seven Limited v Notable Services LLP & others* [2020] Ch. 129 [58] to [61], the Court of Appeal held:

'58. In the light of Ivey [2018] AC 391, it must in our view now be treated as settled law that the touchstone of accessory liability for breach of trust or fiduciary duty is indeed dishonesty, as Lord Nicholls so clearly explained in Tan… That is not to say, of course, that the subjective knowledge and state of mind of the defendant are unimportant. On the contrary, the defendant's actual state of knowledge and belief as to relevant facts forms a crucial part of the first stage of the test of dishonesty set out in Tan. But once the relevant facts have been ascertained, including the defendant's state of knowledge or belief as to the facts, the standard of appraisal which must then be applied to those facts is a purely objective one. The court has to ask itself what is

essentially a jury question, namely whether the defendant's conduct was honest or dishonest according to the standards of ordinary decent people.

Actual knowledge and blind-eye knowledge

59. *The discussions of knowledge by Lord Hoffmann and Lord Millett in Twinsectra [2002] 2 AC 164 indicate that knowledge of a fact may be imputed to a person if he turns a blind eye to it, as Nelson is supposed to have done at Copenhagen, or if in legal parlance he deliberately abstains from inquiry in order to avoid certain knowledge of what he already suspects to be the case. It is convenient to use the expression "blind-eye knowledge" to denote imputed knowledge of this type. In the context of dishonest assistance for breach of trust or fiduciary duty, it was common ground before us, and we consider it correct in principle, to equate blind-eye knowledge with actual knowledge for the purposes of the first stage of the test laid down in Tan [1995] 2 AC 378 and endorsed in Barlow Clowes [2006] 1 WLR 1476 and Ivey. It is important, however, to understand the limits of the doctrine. It is not enough that the defendant merely suspects something to be the case, or that he negligently refrains from making further inquiries. As the House of Lords made clear in Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea) [2003] 1 AC 469 the imputation of blind-eye knowledge requires two conditions to be satisfied. The first is the existence of a suspicion that certain facts may exist, and the second is a conscious decision to refrain from taking any step to confirm their existence: see the speech of Lord Scott of Foscote at para 112, and the observations to similar effect of Lord Hobhouse of Woodborough at para 25. The judgments also make it clear that the existence of the suspicion is to be judged subjectively by reference to the beliefs of the relevant person, and that the decision to avoid obtaining confirmation must be deliberate.*

60. *Furthermore, Lord Scott (with whose speech Lord Steyn and Lord Hoffmann agreed) said, at para 116:*

"In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity. ..."

As this quotation indicates, the issue in the Manifest Shipping case arose in the context of marine insurance; but the principles there stated apply with equal force to the law of accessory liability, as Lord Hoffmann's reference to the Manifest Shipping case in Twinsectra [2002] 2 AC 164 , para 22 makes clear.

61. *Where the conditions for imputation of blind-eye knowledge are satisfied, a person is treated for the purposes of establishing liability for dishonest assistance as if he had actual knowledge of the relevant facts. We do not think it follows from this, however, that suspicions which fall short of constituting blind-eye knowledge are wholly irrelevant to the question whether an alleged accessory has acted dishonestly. The first stage of the test, as it is now understood, requires the court to ascertain all the relevant facts, including the knowledge and beliefs of the defendant. Even though knowledge, in this context, must now be taken to be confined to actual and blind-eye knowledge, we see no reason in principle why a person's beliefs may not include suspicions which he harbours, but which in and of themselves fall short of constituting blind-eye knowledge. The existence of such suspicions, and the weight (if any) to be attributed to them, are then matters to be taken into account at the objective second stage of the test. Or to make the same point in a different way, the existence of a legal technique for imputing constructive knowledge, if certain conditions are satisfied, should not be taken as implicitly restricting the scope of the subjective inquiry into a person's state of mind and beliefs at the first stage. The state of a person's mind is in principle a pure question of fact, and suspicions of all types and degrees of probability may*

form part of it, and thus form part of the overall picture to which the objective standard of dishonesty is to be applied.'

A conspiracy to injure by unlawful means

58. In order to establish this claim, EACS will need to prove that it has suffered loss or damage, as a result of unlawful action taken pursuant to a combination or agreement between the relevant defendant and another or others to injure it by unlawful means, whether or not it was the defendant's predominant purpose to do so: *Kuwait Oil Tanker v Al Bader* No.3 [2000] 2 All E.R. (Comm) 271, CA, at [108]. Required is: (a) a combination or agreement; (b) unlawful action in pursuance of that combination or agreement; (c) consequential loss or damage; and (d) an intention to injure: *Constantin Medien AG v Ecclestone* [2014] EWHC 387 (Ch), at [321], per Newey J (as he then was).

(1) Combination or agreement

59. In *Kuwait Oil Tanker*, at [111] to [112], the Court held:

'111. A further feature of the tort of conspiracy, …is that…it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in R v Siracusa (1990) 90 Cr. App. R. 340 at 349 is of assistance in this context:

Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or

> *passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.*
>
> *Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. In a criminal case juries are often asked to decide whether the alleged conspirators were 'in it together'. That may be a helpful question to ask, but we agree with Mr Brodie that it should not be used as a method of avoiding detailed consideration of the acts which are said to have been done in pursuance of the conspiracy.*
>
> *112. In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself.'*

(2) Unlawful action

60. The unlawful act on which a claimant relies need not be actionable in its own right at the suit of the claimant and, as a matter of principle, a breach of fiduciary duty can qualify as such an act: *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm), at [69].

61. It is not necessary for each defendant to have taken part in every act, so long as it is proven that each act was done pursuant to the combination or agreement: *Kuwait Oil Tanker*, at [133].

(3) Intent to injure

62. For these purposes, the test for intention is as set out in *OBG Ltd v Allan* (see *Constantin Medien*, at [333] to [336] and the caselaw to which those paragraphs refer. As Newey J held, at [336], '*...a relevant intention to injure will exist if a person desires to cause loss to a particular person or desires a result that he knows will cause that person loss. If the loss is, to a defendant's knowledge, inseparably linked to his own gain, a desire to achieve the gain will suffice.'*)

(4) Consequential loss or damage

63. The unlawful acts must themselves have caused loss or damage

The evidence received

64. I formed the view that none of the witnesses of fact gave entirely satisfactory evidence.

Captain Al Banghazi

65. I have summarised above the evidence given by Captain Al Banghazi. He made clear that he had at no point had any direct dealings with any of the Defendants and was inclined to prevaricate in the answers which he gave to questions in cross-examination and from the court. Having stated in his written evidence that he did not recall having seen the report provided by Mr Sekerci to Mr Rajhi, under cross-examination by Mrs Sekerci he said that it had been sent to him by the legal department of the Libyan foreign ministry, on or around 15 May 2017. The following exchange serves as an example of prevarication in relation to the materials with which EACS was to have provided Prime Education under the 2015 Agreement:

> *"Q: According to your investigations, has Prime Education ever said that it was not ready and willing to continue with the contract?*

A: They've said they're willing to continue and train the students, but they never did.

Q: Has Prime Education ever said that it is not ready and willing to continue the contract?

A: They've said they'll continue the contract, but they never did.

Q: Can you please go to page 374. Halfway down the page, it says, 'EACS will be responsible for the following…'.

Judge: Which document is this?

D3: It's the original contract between Prime Education and EACS. Could you please read that…

….

D3: …to the end of the paragraph. Has EACS ever submitted the full required documents for each student to Prime Education?

A: Yes. We sent documents for each student.

Q: No; what I mean is, for Prime Education to apply for a course or a visa on behalf of the students, what that paragraph is talking about are the documents that EACS would gather from each individual student—their high school certificates, IELTS scores, etc. Did EACS do this and send it to Prime Education?

A: I think yes.

Q: What makes you think yes?

A: Because there is a report for each student — their name, passport number and IELTS score is in the file in Tripoli.

Q: Do you have any evidence that the documents were sent to Prime Education?

...

A: I'm not sure if the document was sent to Prime Education or not, but we have a list of students with name, passport number, and IELTS[1] score.

Q: But do you have the documents in those files with actual copies of their IELTS certificate, their medical certificates, their high school certificates?

A: Yes.

Q: And do you have the assessment results for the original assessments they would take, so we would know their level in maths and physics, which was a requirement for getting onto the course?

A: No.

Q: And do you know if those documents for each student were sent to Prime Education?

A: The list of students is still there in the office. When we transfer or choose pilots, their skill tests… Prime Education say they'll send a skill test.

Judge: Were the documents you have got on the file in Tripoli sent to Prime Education; the supporting documents, not the list of students?

[1] International English Language Testing System

A: I don't think so.

...

Q: Do you understand what Prime Education required from EACS, being the individual students' documents , which were required to progress with the contract? What you've just said is that Mr Sekerci had said to Mr Rajhi that he would continue the project, but he never did. In order for Prime Education to apply to the aviation schools and apply for student visas, Prime Education needed documents from the students — medical reports; IELTS certificates; high school certificates; criminal records…"

Judge: Let's break the question down; do you accept that, for Prime Education to continue the project and apply for student visas and to the training schools, it needed documents from the students…?

A: All certificates and documents required for the visa and the schools are available.

Judge: Listen to the question — do you accept that, for Prime Education to continue the project and deal with those matters, it needed the documents from the students; yes or no?

A: Yes — this is normal.

Judge: Is it your evidence that those documents were provided; the underlying student documents?

A: No."

66. It was Captain Al Banghazi's evidence that it had been Mr Shubana who had authorised the sending of funds to Prime Education without a bank guarantee; that

a transfer had been made from EACS' Libyan foreign currency account on his (Shubana's) signature; and that, for those matters, Mr Shubana was under criminal investigation in Libya. It was also Captain Al Banghazi's evidence that Mr Shubana had been charged with misuse of the moneys transferred by EACS. Mr Shubana has not given evidence at any stage of these proceedings.

67. Notwithstanding the unsatisfactory nature of his evidence, it was of limited relevance to the issues which I had to determine, as I shall explain later in this judgment.

68. For reasons to which I shall turn having summarised their evidence in relation to the issues which I have to decide, I formed the view that, in key respects, Mr and Mrs Sekerci's evidence was implausible and, at best, economical with the truth.

Mr Sekerci

69. Mr Sekerci's evidence was that, at all material times, Prime Education had been willing and able to fulfil the contract, though he did not explain how that could have been the case following its liquidation. Furthermore, and in conflict with that contention, his position (and that of Mrs Sekerci) was that EACS had cancelled the contract such that, in accordance with the Amended Agreement, no moneys were due to it. He told me, *"As much as Prime Education has a contract with EACS, it has a contract with PE Turkey, which are the terms stated in the evidence bundle. It is Prime Education's responsibility to claim from PE Turkey, but I have nothing to say on behalf of Prime Education at the moment, as it is in liquidation; I cannot claim on behalf of Prime Education from PE Turkey."*

70. Mr Sekerci acknowledged that he had had approximately 13 to 14 years' experience as a director of an English company and 15 years' experience of running limited companies in this country, including as a company secretary. His evidence was that he understood *'some of'* the duties of a director. He said that he knew that a director was obliged to act in the best interests of the company and should not engage in a business for his own personal benefit, where that ran contrary to the company's interests. He had understood that concept, he told me,

when undertaking the project the subject of these proceedings. He had understood that Prime Education had been looking after EACS' money and that it had been his job to ensure that it did not spend that money on anything other than the project to which it had related. There had been a relationship of trust between EACS and Prime Education. He had appreciated the difference between money which belonged to him and money which belonged to the company and that Prime Education and PE Turkey had been two different entities. It was his evidence that both companies had acted as though PE Turkey had been a subsidiary of Prime Education, though he had subsequently been informed by Stewarts Law LLP that that had not been the position in law. He stated that he had not appreciated that a subsidiary was a company over which a parent company had control and that, as he had been a director of both companies, he had never considered control to be an issue; in his view, he had had sufficient control over PE Turkey. The following questions and answers, in cross-examination, were, in my judgement, informative:

"Q. Have you, as a director, ever held or looked after clients' money before?

A. Yes, on quite a few occasions.

Q. And, presumably, on those occasions you did not spend it on things you weren't allowed to?

A. Our other clients were obliged to and complied with their contractual duties. Neither of them took two years to gather the documents to provide them to us, Mr Davies. Those documents are still not ready. I am sure I can understand what you mean.

Q. Are you suggesting delay by the Claimant allowed you to do what you wanted with the money?

A. Doing it and getting no help from the Claimant put us in this situation."

71. Mr Sekerci told me that Mr Conoglu had not produced a witness statement regarding the activities of PE Turkey because, as far as he (Sekerci) was aware, he (Conoglu) had received legal advice strongly advising him not to get involved.

72. Mr Sekerci was unable to date the conversations with Mr Shubana (in approximately March 2016) during which, on Mr Sekerci's evidence, it had been orally agreed that EACS' money could be moved outside the UK and held by PE Turkey. He acknowledged that there had been nothing in writing recording the existence of that agreement and that the Amended Agreement had continued to require him, as a director of Prime Education, to look after EACS' money and to use it solely for EACS' project. The aim of the Amended Agreement had been to facilitate better provision of the services required of Prime Education.

Mrs Sekerci

73. Prior to her directorships, respectively, of Prime Education and of York Property, Mrs Sekerci had been employed, over five years, as a corporate banking manager, by Bank of Scotland, managing a small portfolio of corporate clients who had turned over between £5M and £25M. She described that role as having been administrative, albeit one carrying some responsibility. She said that she had had no dealings with client accounts, but had appreciated the importance of dealing with other people's money and of taking their instructions in relation to it. She would never have done something with that money which she had not been authorised to do and said that she appreciated that looking after someone else's money involved a degree of trust and loyalty.

74. Mrs Sekerci's evidence was that she had been fully aware of the 2015 Agreement and its terms. The total fee which Prime Education would have been paid for fulfilling the contract had been £536,120. She had also been aware of some of the communications between Prime Education and EACS in connection with that contract. She had known of the ups and downs of that contract, as relayed to her by her husband, but had had no direct communication with EACS. Their roles had been different. Her understanding of a subsidiary was that it was an

'interconnected' company and she had thought that Prime Education and PE Turkey were subsidiaries. She acknowledged that the purpose of the restrictions imposed on the moneys by the 2015 Agreement had been to provide protection for EACS' money and to prevent it from being spent on anything extraneous to the project. The money had not belonged to Prime Education, or to PE Turkey.

75. Mrs Sekerci said that she had been aware of her husband's involvement in PE Turkey and that he had been a 50% shareholder in that company. She had appreciated that, as a director of Prime Education, she had been obliged to act in the best interests of that company and to keep an eye on the activities of her co-director and stated that she would have done something about any action by her husband of which she had disapproved. Had she had any question as to why money was being transferred out of the HSBC accounts, she would have said something to her husband, though either of them had been able to authorise payments out and she had been aware of payments made to PE Turkey from the HSBC Euros account. It had not occurred to her that her husband's interests as a shareholder of PE Turkey might conflict with those of Prime Education. Whilst she understood that PE Turkey undertook some construction and some education projects, she stated that she had no depth of knowledge as to its activities.

76. Mrs Sekerci told me that she had been aware of Mr Conoglu's involvement in the PE Turkey Agreement and that Mr Conoglu's family and the Sekerci family were close friends. She said that Prime Education had faced taxation issues in the UK arising from a currency gain. Her understanding from its accountant had been that HMRC would convert foreign currency held in an account into GBP for the purpose of assessing tax liability. Prime Education had had to pay tax on an exchange rate gain which it had only made on paper. She had not thought that the same issue would arise in Turkey, though, in any event, the tax issue in the UK had not been the main problem, which had been the issues with HSBC and the students.

77. Mrs Sekerci's evidence was that she had first seen the PE Turkey Agreement on her husband's return from Turkey, at the end of March, or the beginning of April,

2016. She said that she had read the agreement and that it had related to investments from the profits which would have been made not simply from the EACS contract but from other contracts between Prime Education and PE Turkey. She said that, between January and March 2017, her husband had told her that there was a tax issue in Turkey and she had believed there to have been a number of risks in relation to tax payments and currency fluctuations, though she had not seen, or asked to see, any tax advice. It had been for that reason that a decision had been taken by PE Turkey to protect the money in real property and she had understood the justification for that and had believed it to be the best way in which to protect the money at that time. Mrs Sekerci stated that she had not raised any objection on the basis that the PE Turkey Agreement had been intended to relate to investment of profits only; *"the problem arose because of the length of time that we weren't receiving documents from EACS to progress the project. We faced real problems during that period without anyone from EACS helping us."* She said that she was not sure whether investing EACS' money in Turkish property had gone beyond the terms of the PE Turkey Agreement; *"When we were faced with the problem, we had to solve that problem. I believed it to be a justified decision…We were faced with a number of problems that required decisions to be made, with a lack of input or communication from EACS. I felt stuck at a number of points with no support from EACS*." Asked why, in that event, Prime Education had simply not returned the money to EACS and walked away from the contract, Mrs Sekerci stated that it had already started the project and that she had had a responsibility to the ESMA students. She had known that Prime Education would be able to deliver the contract once EACS came back to it with the required documentation and her intention had been to complete the project. She also said that she had not had the details of the account from which EACS' money had come.

78. Mrs Sekerci's evidence was that she had been fully aware of the Amended Agreement and its terms, including the requirement that EACS' funds be held in the name of Prime Education and/or of its subsidiaries. She stated that she did not agree that moving the money to PE Turkey had been in breach of the Amended Agreement, *"as the transactions were treated as if PE Turkey was a subsidiary and, in reality, we treated it as a subsidiary. But, legally, now I understand that it's*

a related party, due to the common director and ownership. I only learned this legal specification since the commencement of this claim. I thought, the way we worked together, they were a subsidiary; that was my genuine belief." She said that she had not taken legal advice at the time. It was put to Mrs Sekerci that it must have been perfectly obvious to her that moving the money into Turkish property was a breach of the Amended Agreement. She replied, *"No; what was perfectly obvious was that we were on our own, trying to protect the funds. My priority was, if and when EACS came back to us with the required documents, that we can run the contract."* Mrs Sekerci stated that she trusted her husband and, for that reason, had not asked to see the Land Registry documents or about the prices of the properties. She had not asked to see any of PE Turkey's bank statements. She had never visited any of the properties, or seen any sales particulars, or invoices from contractors or builders. She had known that the properties existed because, after 22 years of marriage, she had believed what her husband had told her, and had had no reason to doubt him, she said. Mrs Sekerci told me that there had been no recent valuation of the property in which EACS' money had been invested and could not remember when the last valuation had been carried out, or what it had been. She said that she could not explain why she had not requested a copy of it, though Mr Sekerci had told her the figures and had been on top of them.

79. Mrs Sekerci said that she had not considered investing in property development to have been risky, given Mr Conoglu's experience in that area, and had been aware that selling property in Turkey was a very quick process. She had not considered there to have been a currency risk, given the stability of the economy, or that converting Euros into a development scheme was imprudent. Mrs Sekerci's stated belief was that, if money were required to continue the contract with EACS, it would be readily available and that Prime Education would be able to deliver the project, via PE Turkey. It would only need to find money to deliver to small groups of students at any one time, which would have been very easy to do, and it would have been the responsibility of PE Turkey to make such funds readily available. If all the money were in real property at that time, that property could be sold in no more than a week, or funds could be used from other parts of PE

Turkey's business. It would be PE Turkey's responsibility to meet any funding gap caused by a drop in the property market and she had been satisfied that it could do so by virtue of its experience, including in large property developments, and through her knowledge of the financial standing of Mr Conoglu's father. She did not believe that Mr Conoglu or his father would not have been good for the money.

80. Mrs Sekerci stated that she believed that the Amended Agreement had entitled Prime Education to have acted as it did because PE Turkey had been a subsidiary. Asked why, in her witness statement, she had stated that EACS' money had been an asset of PE Turkey, she stated, *'Perhaps that wording's not one hundred per cent right; if EACS wanted to cancel the contract and go through the relevant route to cancel the contract, that would be dealt with based on the contract terms between Prime Education and EACS and Prime Education would rely upon the sub-contract with PE Turkey."* In her view, the money belonged to EACS, if the contract had not been cancelled, and to Prime Education, if it had. She also pointed to the so-called 'Recourse Policy' in the 2015 Agreement, whereby, within the specified periods of student enrolment, certain fees would become non-refundable, whilst accepting that the relevant provisions related only to fees payable to Prime Education for work done. There followed the exchange below:

"Q. ...If this property could have been sold so easily, why wasn't it sold so easily and the money given to Prime Education so that it could pay the judgment [of Saini J]*?*

A. Because I don't believe under the judgment of Saini J that a decision was made on the Amended Agreement. From my knowledge and what I understand, the original agreement and the Amended Agreement…What I'm struggling with is we don't know whether it's a valid agreement. I don't think the agreement or invoices have been looked at in detail. I don't know what I'm trying to say.

Judge: The question is why wasn't the property sold and the money given to Prime Education so that Prime Education could pay its judgment debt.

A. Prime Education went into liquidation. For that to happen, Prime Education would need to cancel its contract with PE Turkey…

Judge: And what do you say is the relevance of the sub-contract to the question which Mr Davies asked you?

A. That power, that decision, was taken out of our hands. It had to be dealt with by the liquidators."

81. Mrs Sekerci said that she believed that Prime Education had gone into liquidation in May 2021, some three months after the Saini judgment, and that she had not thought about liquidating the property assets in the interim; *"At that moment, Prime Education didn't have the funds to pay and then it very quickly went into liquidation."* She was not sure whether, as matters now stood, she and her husband, or PE Turkey, could get together the relevant funds and pay them to Prime Education within a week; *"That would have to be a conversation we would have to have."*

82. Mrs Sekerci also stated her belief that certain visa application and administration fees would have become non-refundable under the 2015 Agreement, being £250 per student (yielding, I interpose to note, a maximum total sum of £62,500, for a group of 250 students; and £45,000 for a group of 180 students), together with any non-refundable health insurance and student management fees. It had been on that basis, she believed, that Prime Education had made a loan to York Property, being a vehicle for property investment in York. She believed that, at the time of signing the 2015 Agreement, Prime Education had been entitled to all fees which had been due to it under that contract, being £536,120, and that, in June 2017, it had been entitled to put that sum into Turkish property even though it had only performed the ESMA side of the contract. The preparatory work, she said, had been done for the other schools, but Prime Education had lacked the documentation to take those applications forward.

83. Asked about the statutory accounts which she had signed off, and, in particular, the fact that, in 2018, credit due to EACS, in excess of £13M, had reduced to £98,000, she agreed that, effectively, EACS had disappeared as a creditor, which she stated to have followed accounting advice. She had understood the accountant's rationale to have been that the creditor balance had been released from the balance sheet to the profit and loss account, because the contract had been transferred to a subsidiary; essentially, Prime Education had sub-contracted its role to PE Turkey, which had also taken on the cost of the project. Thus, only the profit margin on the contract had been earned. The fact that £11M owed by PE Turkey had disappeared she thought to have been explained by the subsidiary relationship which they had believed to exist. She could not explain why there had been no note added to the accounts to reflect the fact that, as at 30 June 2017, not all trade had been transferred from Prime Education to PE Turkey. The remaining trade had been transferred during the year ending 30 June 2018 and there had been no intercompany balance. She had trusted the accountant to add such a note. The substantial stated increase in turnover, to £13,169,015, and in the cost of sales, to £12,711,636, was explained by the fact that PE Turkey had taken the income away from Prime Education, which was why it had been *'released'*. That accounting treatment had been applied on advice and she did not believe that EACS had been removed as a creditor, given the sub-contract between Prime Education and PE Turkey, albeit that, she accepted, neither at that time nor subsequently had the vast majority of the contract been performed. Mrs Sekerci's evidence was that they had informed the accountant that PE Turkey was a subsidiary of Prime Education and that, from memory, he had asked no questions about that.

84. Mrs Sekerci was taken to an e-mail, dated 16 November 2021, in which Prime Education's accountant, Mr Atkinson, had sought to clarify the position, following an earlier telephone call with her. Within that e-mail, he had noted that accounting treatment required that income and costs be recognised *'when the work is performed'* and that, in 2016, *'With this in mind, as the contracts were performed, the other debtor balance was released to the P&L (to cost of sale) in line with the income in advance being released to the P&L (to sales)'*. In 2017, *'turnover*

increased to reflect the contracts being performed and the release of the income in advance to sales in the P&L. Cost of sales reflects the cost of fulfilling these contracts, which is the release of the other debtor balance (payment in advance to [PE Turkey]*) in line with the contracts being performed.'* In 2018, *'at the end of the financial year…the directors informed us that Prime Education Ltd had transferred all of the contracts across to the Turkish company. No further new contracts were coming into the UK business and the plan was to close down the UK operations due to the fact that it was no longer performing any trade. As the company was no longer trading and there were no new contracts coming into the company, nor any further funds to transfer across to the Turkish company, the balance sheet amounts (other debtors and other creditors) were released to the P&L… This is reflected in the sales value of £13.1M (compared to £1.2M in the previous year).'* Mrs Sekerci was asked whether she had told the accountant that the work which Prime Education had been obliged to do on behalf of EACS was being done. She replied that she had told him the actual work which had been done, but not that the whole contract had been performed by PE Turkey; *"Maybe he considered the project as being performed by Prime Education transferring it to its subsidiary."* She also said that, whilst Mr Atkinson had been told that Mr Sekerci was a director and shareholder of PE Turkey, and they had had a conversation with him about the status of PE Turkey, neither he nor his assistant had told them that PE Turkey was not a subsidiary of Prime Education. Ms Sekerci stated that she had not thought about calling Mr Atkinson as a witness, acknowledging that it would have been a good idea. As far as she had been aware, the liquidators of Prime Education had been satisfied with the answers which he had provided; a conclusion which she had drawn from the fact that they had not come back to her, or to Mr Atkinson, asking for any further information.

85. Mrs Sekerci concluded her evidence by stating that she had believed that they had been in a position in which they had had to deal with a problem, having waited many months for the project to take off and that she strongly believed that, had EACS followed the contract and complied with its obligations to provide the material required for Prime Education to perform it, her ultimate aim would have been achieved through delivery of the contract. Faced with those problems,

through no fault of their own, she considered that an honest director would have done what (s)he could. EACS had breached the contract and left them in a very difficult situation. She believed that its intention had been to recover its money, through trying to make Prime Education fail, rather than by cancelling the contract. Having heard Captain Al Banghazi's evidence that documents had been available which had never been sent to them, she could not understand why that had been the case; why the documents for which they had been repeatedly asking had not been provided.

The parties' submissions

For EACS

86. Mr Davies submitted that, having regard to the legal principles applicable to each cause of action (which I have set out above), Mr and Mrs Sekerci had admitted that they had: (1) never sought EACS' consent to the removal of its money from Prime Education or a subsidiary; (2) never sought consent from EACS, or made it aware of the nature of PE Turkey's role or involvement; (3) taken at least five material risks with the Transferred Money, without reference to EACS; (4) refused to disclose any documents relating to the property purchases; (5) never explained how it had been proposed to account for any profit or rent which might have been generated by the property development in Turkey; and (6) approved accounts which had contained material discrepancies. All such factors, together with Mr Conoglu's lack of co-operation, pointed to a fraud against EACS of which the Sekercis had been the architects and guiding minds, and in which they had acted for their personal benefit. That submission was advanced recognising that dishonesty was only a necessary ingredient of the alleged dishonest assistance of Prime Education's breach of fiduciary duty.

87. As had been recognised by Saini J [94], the Amended Agreement had continued to provide a measure of protection which would be undermined by giving Prime Education freedom to remove and speculate with EACS' funds. Investment in a speculative property venture had entailed the misuse of the Transferred Money, constituting a clear repudiatory breach of the very terms of the Amended Agreement on which reliance had been placed [85]. As directors, the Sekercis had

been in a position to induce Prime Education's breach of contract and had not acted in good faith. Both of them had known, or turned a blind eye to the fact, that using the Transferred Money for property purchases would cause Prime Education to breach its agreement with EACS. Inaction or silence by Mrs Sekerci would suffice to constitute inducement. It had been the ultimate aim of each of them to effect the property purchases, to their personal benefit, and the breach of the Amended Agreement had been a necessary means to achieving that end. Loss had been caused to EACS because the Transferred Money was now tied up in illiquid property purchases, or had been dissipated somewhere unknown.

88. Mr Davies further submitted that both Mr and Mrs Sekerci had known of the restrictions imposed by the Amended Agreement and, by their acts or omissions, which had led to the property purchases, had assisted Prime Education in breaching its fiduciary duties owed to EACS. Whilst Saini J had considered it to have been arguable at trial that, following the Amended Agreement, the moneys in question had not been impressed with protections in the nature of a trust [103], a quasi-trust relationship, in which a fiduciary had possession and/or control of property which belonged legally and beneficially to another, would suffice and Prime Education had been in such a relationship with EACS. The fact that the protections conferred by the Amended Agreement had been narrower than those for which the 2015 Agreement had provided had not extinguished or negated that relationship, which had clearly been established by the client account conditions imposed by the 2015 Agreement. Mr and Mrs Sekerci's evidence had been that they had appreciated that the Transferred Money had continued to belong to EACS and that it was to be used to run the project from Turkey. That itself provided a very sound basis for recognising the continued fiduciary duties owed by Prime Education to EACS. Prime Education's misuse of the Transferred Money and associated contractual breach had also amounted to a breach of its duties of single-minded loyalty to EACS and had ignored EACS' interests, subordinating them to those of PE Turkey and the Sekercis.

89. On his own evidence, Mr Sekerci had assisted in such a breach by taking the view that it had been prudent to purchase property in Turkey. Mrs Sekerci had been

aware of the Amended Agreement and, through her own inaction, had caused or permitted Prime Education to breach its fiduciary obligations to EACS by relinquishing control of the Transferred Money and by failing to have informed the Claimant of the property investment, at a time when it could have taken whatever steps had been available to it in Turkey. Certainly, she had made Prime Education's breach easier than it would otherwise have been. The notion that any of the Defendants had been entitled to 'help themselves' to €15M of Libyan Government money was preposterous, Mr Davies submitted. No honest person could have believed in such an entitlement. It would suffice if Mr and Mrs Sekerci had known or suspected (without making further enquiries) that the transaction had not been one in which s/he could honestly participate.

90. Irrespective of any earlier oral agreement with Mr Shubana, Saini J had rejected the suggestion that the Amended Agreement had conferred a discretion to invest in Turkish property [84] and the Sekercis' failure to have alerted Mr Shubana or EACS to the existence of that investment prior to January 2019 was indicative of their awareness of that fact. The plain wording of the Amended Agreement had left no room for doubt. Their conduct had been dishonest by the requisite standard, as evidenced by the fact that no provision had been made whereby any account would be made to EACS for both capital appreciation and any streams of income generated by the investment, for example in the payment of rent. The PE Turkey Agreement had provided a commercial imperative to look out for investments, quite separate from the education of Libyan students, and had reflected a gamble from which, had it paid off, the Defendants would have benefited; had it not, EACS would have been the party to lose out.

91. Even if the court were to accept that the Sekercis had been acting with altruistic motives, their taking of risks with EACS' moneys, which they knew that they had no right to take, had itself amounted to dishonest assistance. The court ought to have regard to their personal attributes and knowledge of the commercial world. The absence of disclosure by Mr Sekerci relating to the property purchases, in the face of an order for specific disclosure by Senior Master Fontaine, made on 3 November 2021, was itself indicative of the fact that he had something to hide.

Irrespective of whether he could no longer act on behalf of Prime Education at that time, he had been under an obligation to disclose documents as a Defendant in his own right. His claim that he was not permitted to make disclosure under Turkish Law and/or that he could not obtain Mr Conoglu's consent should be rejected and an adverse inference drawn from Mr Conoglu's absence as a witness. Similarly, his position that PE Turkey had had other sources of funding, in the absence of any disclosure of its accounts, was to be rejected and undermined Mr Sekerci's credibility. Similarly, despite correspondence emanating from Mr Sekerci identifying the need to commit important matters to writing, he had made no mention in writing of his concerns regarding PE Turkey's potential liability to Turkish tax. No document had been produced evidencing any earlier asserted liability of Prime Education to UK tax. Both such matters dealt a further blow to his credibility. An adverse inference ought to be drawn from the absence of any mention of the property investment from the narrative report which he had provided to Mr Rajhi, in which full and frank disclosure ought to have been made. It was curious that Prime Education appeared not to have a record of the investments made pursuant to the PE Turkey Agreement. Whether or not adverse inferences ought to be drawn from the absence of Mr Shubana as a witness, or whether his conduct fell to be criticised, there was ample evidence of dishonesty on the part of the Sekercis, not least their acceptance that the property investments had not been authorised by EACS.

92. As to the claim for conspiracy, the court should draw an adverse inference from the inherent improbability of the Sekercis' case; the fact that a false explanation had been advanced; and the fact that a conspiracy was the most probable alternative explanation. The requisite intention had been demonstrated, given the inseparable link between the intended benefit to themselves and the loss which would be caused to EACS. Assuming that the conspiracy had related to the property purchases alone, it could be inferred that Mr Sekerci had taken active steps to arrange those purchases in which Mrs Sekerci had been implicated by her failure to have prevented them.

93. The Sekercis' acts had themselves caused loss to EACS in having caused or permitted Prime Education's breach of fiduciary duty and having led directly to the property purchases, thereby depriving EACS of the Transferred Money. There had been no cancellation of the agreement, rather, as Saini J had later endorsed by his findings, EACS had accepted Prime Education's repudiatory breach.

94. The quantum of equitable damages, for each cause of action, against the Sekercis and PE Turkey, was that which had been determined by Saini J in relation to Prime Education.

For Mrs Sekerci

95. So far as material to the substantive issues which I have to determine, Mrs Sekerci submitted that, under the 2015 Agreement, the requirement for a client account had only ever been intended to relate to EACS' Sterling funds and Prime Education had never stated that there would be such an account for funds provided in Euros, a fact to which EACS' solicitors had not referred when seeking a freezing order; in their letter before claim; or when providing Mr Shaban's second witness statement. Prime Education had not been permitted to open a client account for the Sterling funds, hence the removal of that requirement from the Amended Agreement. Stating that, she was unaware of whether the Amended Agreement would be held to be valid, Mrs Sekerci provided a spreadsheet of sums which, so she contended, Prime Education would be entitled to retain in the event that it was held to be invalid, compiled by reference to the invoices included within the trial bundle. Furthermore, she stated, Prime Education had been entitled to retain funds relating to six students who had been expelled from the French school. In the event that the Amended Agreement was held to be valid and to have been cancelled by EACS, her contention was that Prime Education would be entitled to retain all of the moneys.

96. Mrs Sekerci submitted that the revised cancellation policy in the Amended Agreement had been included at the request of Mr Shubana, whose authority to enter into it the Defendants had had no reason to doubt, and it had given full

control to EACS over whether (and, if so, when) it wished to cancel the agreement. It had never been the Defendants' intention to use the policy as a means of retaining EACS' funds and all of the decisions which Mrs Sekerci had made had been well thought through and with honest intentions, with a view to surmounting various obstacles and delivering the project. The correspondence between Mr Sekerci and the Libyan Embassy demonstrated that he had been fully co-operative and Captain Al-Banghazi had received the report made to Mr Rajhi, who had failed to arrange a second meeting, as had been suggested by Mr Sekerci, if desired. In general, the evidence provided by EACS of the enquiries which had been made of staff at the Libyan Embassy had been unsatisfactory. EACS' solicitors had confirmed in writing their client's wish to cancel the agreement, in answer to a CPR Part 18 request from the Defendants' former legal representatives, which had been dated 3 April 2019. (I interpose to note that, in fact, the answers provided (at paragraphs 9 and 10) asserted that the agreement had been terminated owing to Prime Education's repudiatory breach, which had been accepted by letter dated 7 December 2018, demanding the return of the balance of the funds, alternatively by issue of the claim form, on 20 December 2018.)

97. Mrs Sekerci made further submissions regarding the asserted requirements of a valid agreement. I do not summarise them here, given that, in the event, the contention that the Amended Agreement had been invalid was not pursued by EACS.

98. Mrs Sekerci identified a number of respects in which she considered Captain Al Banghazi's evidence to have been unsatisfactory, variously relating to: his lack of direct dealings with the Defendants; documents which had not been disclosed to the Defendants, including those said to have been on file in Tripoli; his admission that, contrary to its contractual obligations, EACS had not submitted all of the documentation held on file to Prime Education; his limited explanation of the nature of the criminal investigation, or charges, faced by Mr Shubana; and his inaccurate understanding of the number of students to whom the project had related (which he had considered to have been 250, rather than the 180 indicated

by the invoices). Nevertheless, Mrs Sekerci submitted, it had been clear from Captain Al Bahnghazi's evidence, and that of Mr Sekerci, that the report which had been provided to Mr Rajhi had addressed a list of questions, rather than constituting a free-flowing narrative.

99. Mrs Sekerci stated that the corporation tax levied on UK companies was based upon the profit before tax figure and not on turnover; the premise of Mr Davies' cross-examination regarding Prime Education's accounts had been wrong; the increase in turnover between 2017 and 2018 had not reflected the percentage increase in the tax payable. She was not herself an accountant and had obtained an email from Mr Atkinson, attached to her fourth witness statement, and the liquidators had asked her no questions in relation to it. She could offer no explanation as to why a related party note approved by Mr Sekerci in December 2018 had not been added to the accounts and suggested that it would have been through a genuine mistake, or oversight.

100. Mrs Sekerci submitted that it would not have been possible to return the moneys to the account from which they had come. Whilst, at the time, she said, the Defendants had not thought about doing so, it had since occurred to her that the moneys had not come directly from EACS, but via, for example, The Libyan Foreign Bank or British Commercial Bank, as was apparent form the documents in the bundle. EACS' bank account details had been unknown to, and not held by, Prime Education. In view of the express terms of the Amended Agreement, neither she nor her husband had considered EACS' funds to have been held on trust, nor were they required to have been held in a client account. The transfer of funds to PE Turkey had been known to EACS and referred to in Prime Education's accounts and had not constituted a fraud. Prime Education had been entitled to make that transfer by reason of the oral agreement between Mr Sekerci and Mr Shubana. That had been the agreement on which reliance had been placed prior to conclusion of the Amended Agreement and Mr Shubana had been aware of the fact that the funds would be converted into Turkish Lira on transfer. Captain Al Banghazi had himself stated in evidence that most of his

investigations had taken place orally and had not been backed up in writing. There had been no fraud.

101. Mrs Sekerci stated her belief that PE Turkey had been entitled to invest in property, provided that the funds could and would be made available for the project; it had simply been trying to protect EACS' funds. She did not believe that it had had any obligation to inform EACS. She did not know why that was; her thought process had been that there had been no obligation to do so and that it would only become an issue if Prime Education could not perform the contract. The problems which had been experienced with HSBC had been amply evidenced and outside the Defendants' control. All decisions had been measured and taken with a view to keeping the project moving and avoiding the unnecessary loss of money. EACS' loss was the fact that it did not have 180 fully educated and qualified students in Libya, which was its own fault and that of the majority of the students. Having been married to Mr Sekerci for many years, she had had no reason to doubt his word and had believed the information which he had provided to have been true. She considered that he had been trying to protect EACS from currency fluctuations or Turkish tax rules, and acting with honest intentions. She had always believed PE Turkey to have been a subsidiary of Prime Education and her own intentions had been honest; she had felt stuck in an impossible situation. She had believed that the loan made to York Property had been drawn from Prime Education's funds, earned from the contract with EACS. In any event, it had been repaid in full. She had not used EACS' funds to invest in Turkish property, nor did she believe her actions to have been reckless. She had not committed any act (whether knowingly or at all) in order to secure any economic advantage, or in order to injure or harm EACS. She had not consciously assisted Prime Education in any breach of fiduciary duty, nor had she made any such alleged breach easier.

102. Mrs Sekerci stressed that all evidence and disclosure submitted after Stewarts Law LLP had come off the record had been prepared without the benefit of legal representation and that she had done her best to represent herself in such circumstances. In conclusion, her position was that it had been EACS which had

acted in breach of the agreement, preventing Prime Education from continuing with the project, although it had completed as much work as it could. Accordingly, the claim against her ought to be dismissed with costs. The Defendants had always had the intention of seeing the project through and had not intended to rely upon the revised cancellation provision, albeit that it had been of comfort to them, because they had never anticipated that the project would be cancelled; a matter which had been entirely within EACS' control. At all times, they had been ready, willing and able to deliver the project to completion, but had been denied the opportunity to do so. She was at a loss to understand why EACS had not forwarded the relevant documentation and speculated that it might have been intended to push Prime Education to cancel the contract.

For Mr Sekerci

103. Mr Sekerci relied upon his own submissions and on those of Mrs Sekerci. He submitted that there had been an initial oral agreement with Mr Shubana, entitling the transfer of the project and of EACS' funds to Turkey, following the problems encountered with HSBC and certain students. Later, at the meeting in Turkey, the 2015 Agreement had been amended to cover those changes which had been orally agreed since March 2016. The revised cancellation policy had been suggested by Mr Shubana, in case he were later removed from his position during the currency of the project, which had happened with the previous manager and had put students in an impossible position.

104. The PE Turkey Agreement had been signed before the first transfer of funds had been effected, in order to ensure that Prime Education would retain control of the funds. It had permitted transfer of the funds to PE Turkey, which Mr Sekerci had genuinely believed to have been a subsidiary of Prime Education and which had been established since 2012, having a track record of running education and construction projects and of working with the Turkish and other Governments in that connection, and access to other sources of funding. He (Sekerci) had been working full-time for PE Turkey and managed its education projects in Turkey, the UK and other countries. He did not believe there to have been any conflict

of interest between his directorship of Prime Education and that of PE Turkey and submitted that the contract between those two companies had 'protected the conflict of interest'. He did not consider that the advice received from PE Turkey's Turkish lawyers (that it should not disclose certain documents which might have been of assistance to Prime Education) to be an example of a circumstance in which he would not be able to act in the best interests of Prime Education by virtue of his directorship of, or shareholding in, PE Turkey.

105. Under Article 2 of the PE Turkey Agreement, all of the power and authority to run the project had been in the hands of Prime Education. Prime Turkey had been advised by an expert in Turkish trade law that there had been no contractual relationship between PE Turkey and EACS. Mr Sekerci had not knowingly allowed PE Turkey to expose EACS to a currency risk and had told EACS that the money would be converted into Turkish Lira. PE Turkey would have been responsible for any tax liability. For more than a year after the funds had been transferred, they had been held in an account, which had created a risk when the Turkish Lira had begun to lose value. It was for that reason that the moneys had been invested in property, a fact about which he had been clear since the beginning of this case, in his first witness statement, dated 7 January 2019. There had been no investment for his personal gain; rather the investment had been designed to keep the funds in safe assets and enable the project to run. He had not consciously assisted Prime Education in a breach of fiduciary duty, or made any such breach easier. He had not combined with Mrs Sekerci to achieve a common end.

106. Mr Sekerci told me that the transfer of moneys and of the project from Prime Education to PE Turkey had been authorised by the oral agreement with Mr Shubana, as had the conversion of funds to Turkish Lira. He told me that, *"I did not really think so deeply and legally if we are legally allowed to* [invest in Turkish property]", but that his position was that PE Turkey had been entitled to do so and without EACS' knowledge, by virtue of the Amended Agreement. I asked him where in that agreement such an entitlement was to be found. He replied, *"There isn't such a term, however I believe that if there is any…What I*

was trying to do when this was happening…We were trying to protect the funds. Maybe it's wrong for me to say I was relying on the Amended Agreement. The situation we were in was quite complicated as to why the investment was done. I've done the investment and I saw it as an asset, equal to a cash asset or a property asset which could be liquidised [sic]*...any time needed. We didn't tell the Claimant and* [in] *those days we had no contact with the Claimant. So, specific terms, on either agreement, there is nothing I can say. At the time, it was the best decision, to keep the funds in a safe place."* Mr Sekerci accepted that no tax advice which had informed his view at the relevant time had been disclosed, albeit that the tax liability faced in relation to foreign exchange gains, in the UK and in Turkey, was publicly available information.

107. Mr Sekerci submitted that, since its liquidation, he had not had any authority over Prime Education. It had been EACS which had acted in breach of contract in its failure to have submitted the required documents and to have provided support throughout the project. He had not acted dishonestly, but had taken all possible steps throughout to resolve any issues and to co-operate. He had never intended to injure or harm EACS.

Findings of fact on disputed matters

108. As was apparent from their understanding of and familiarity with the issues in these proceedings and the documents; their respective professional backgrounds and experience; and, in particular in Mrs Sekerci's case, her ability to cross-examine Captain Al-Banghazi and make submissions with considerable skill and sophistication, I am satisfied that Mr and Mrs Sekerci well understood the limits of Prime Education's entitlement under the 2015 Agreement and the Amended Agreement and, as each of them stated, that the money provided by EACS had been provided for an hypothecated purpose. Each understood the limit of the total sum payable in fees to EACS and, I am satisfied, appreciated that neither agreement entitled Prime Education to any greater sum, or to consider the entirety of its fee to be due until the related work had been completed. Accepting that certain fees would be non-refundable in the events

specified by the 2015 Agreement, it must have been clear to them (a) that the sums in question could not be calculated in advance; and, in any event, (b) would come nowhere near the sums which are said to have been invested in Turkish property development.

109. I accept that EACS had failed to provide Prime Education with all of the required documentation and that that failure had been a source of considerable and understandable frustration to Prime Education and its directors. I have concluded that there came a point when Mr and Mrs Sekerci formed the view that the resulting inability on the part of Prime Education to complete its own contractual obligations entitled it, or, at least, afforded an opportunity, to invest the substantial sums transferred by EACS to its own benefit and that of Mr Sekerci and Mr Conoglu, through a corporate vehicle of which each was a 50% shareholder. Whilst that may well have been in the belief that moneys could be liquidated, in stages, were EACS ever to provide the missing documentation, I am satisfied that Mr and Mrs Sekerci each understood that nothing in the Amended Agreement, or in any oral agreement which preceded it, entitled investment of any of EACS' moneys in Turkish real property and it is noteworthy that the contrary position was not put to Captain Al-Banghazi, in cross-examination. His ultimate acceptance that he had seen a copy of the report made to Mr Rajhi cannot assist the Sekercis on this point, as that report had made no reference to the Turkish property investments. Mr Sekerci's lacklustre and unconvincing attempt, in closing submissions, to advance an entitlement under the Amended Agreement to invest in property absent EACS' knowledge, served only to highlight the hopelessness of that contention.

110. Furthermore, and upon the accepted hypothesis that the Amended Agreement was valid and justified the transfer of funds to a subsidiary, I do not accept that Mr or Mrs Sekerci at any material time considered PE Turkey to be a subsidiary of Prime Education, as a matter of law; I am satisfied that each of them understood the material difference between the level of protection conferred by the ability of a parent company to control the activities of its subsidiary and that which would result from the need to rely upon the directors and shareholders of

a different company (one of whom having no separate obligations to Prime Education) independently deciding to act in accordance with the first company's wishes, and obligations to a third party, potentially to the detriment of their own interests. I also consider it to be inherently unlikely that an accountant would not have advised Prime Education, through its directors, as to PE Turkey's true status and consider it significant that Mr Atkinson was not called to give evidence material to that issue and to the matters of which it is said that he had been informed in relation to the so-called sub-contract and its performance to which his advice had related. Applying the well-known principles in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, CA, at P340, I conclude that I am entitled to, and do, draw adverse inferences from his absence, as a witness who might have been expected to have had material evidence to give on such issues, on which the Defendants have a clear case to answer. I do not consider the explanation advanced for his absence (essentially, that no thought had been given to calling him) to be credible. I conclude that, in their dealings with EACS' money, Mr and Mrs Sekerci had, at all material times, been aware that Prime Education's actions would constitute a breach of the Amended Agreement and of the oral agreement which it was said to record and had procured those breaches in that knowledge and with the intention of securing an economic advantage for Prime Education, PE Turkey and, by extension, themselves. Whilst the majority of the dealings between Prime Education and PE Turkey had been conducted through Mr Sekerci, Mrs Sekerci, acknowledged that she, too, would be responsible for effecting the transfer of some moneys. Each of the Sekercis, I am satisfied, appreciated the conflict of interest inherent in the transfer of moneys to a company of which Mr Sekerci was a director and 50% shareholder.

111. The PE Turkey Agreement itself was innately unsatisfactory. Despite being dubbed a sub-contract by Mr and Mrs Sekerci, it made no reference to EACS and extended to activities which had nothing to do with the project for which EACS had provided funding. It was subject to Turkish Law and, by Article 6, provided that, were the capital invested by the parties not to be met, that would be considered an investment loss. Article 10 provided that, if the

obtainment/fulfilment of one of the investment purposes were to become impossible, the agreement would continue for the other purpose. That had been agreed at a time when it had been known that performance in full of the educational aims of the 2015 Agreement was not being achieved, meaning that the moneys which had been provided by EACS (irrespective of any further source of funding for PE Turkey's investments) would continue to be used for unrelated investment purposes, without EACS' knowledge of that fact, or any reference being made to it at the time of the subsequent Amended Agreement. I am satisfied that neither Mr nor Mrs Sekerci could have been, or was, in any doubt that Prime Education had no entitlement to enter into an agreement having that effect, irrespective of whether s/he considered PE Turkey to have been a subsidiary of Prime Education and entitled to run the project on behalf of Prime Education. As Saini J concluded [84], nothing in the oral agreement said to have been reached with Mr Shubana had authorised investment of the funds other than for the purposes of the project. Nothing in the Amended Agreement (intended, on the Defendants' pleaded case and on Mr Sekerci's evidence, to reflect that oral agreement) had done so either. I am satisfied that, at all material times, Mr and Mrs Sekerci had each appreciated that dealing with EACS' money in such a way ran contrary to Prime Education's contractual obligations to EACS and to their own obligations as directors of Prime Education, as did the inevitable risks to EACS' money (however limited or manageable those were considered to be) associated with relative currency instability; exchange rate fluctuations; reduced liquidity; property development; potential fluctuations in the Turkish property market; and the need for any shortfall in funding upon liquidation of the properties to be made good by PE Turkey, Mr Conoglu or his father, none of whom had been under any obligation to EACS, or, in the case of Mr Conoglu and his father, to Prime Education. I conclude that both Mr and Mrs Sekerci were untruthful in their protestations to the contrary and that, in their respective dealings as directors of Prime Education, each had acted dishonestly from, at the latest, in Mr Sekerci's case, the time at which the PE Turkey Agreement was entered into and, in Mrs Sekerci's case, within a short period thereafter, being the time at which she had become aware of that agreement, on her husband's return from Turkey. At that stage, the Amended Agreement had

not been concluded and there could have been no question of the consequences which would flow from any cancellation of the contract under that agreement.

112. It is, to my mind, telling that, on her own evidence, Mrs Sekerci has at no stage visited the properties in which PE Turkey is said to have invested, or seen any documentation evidencing their existence, including subsequent to the commencement of proceedings against her and her husband. I do not accept Mr Sekerci's evidence that he has been precluded from giving disclosure, by virtue of the advice received by PE Turkey, if only limited to documentation which might have been obtained from the Turkish land registry. In any event, he was subject to disclosure obligations as a Defendant in his own right.

113. Against the background of those findings of fact, I turn to consider each cause of action advanced against Mr and Mrs Sekerci.

The causes of action

Inducing a breach or breaches of contract

114. It follows from my findings at paragraph 110, above that, in relation to Mr and Mrs Sekerci, the test set out in *OBG Ltd v Allan* is satisfied.

Dishonest assistance of a breach of fiduciary duty

115. The first question is whether Prime Education was a fiduciary. As Mr and Mrs Sekerci accepted, Prime Education had owed a duty of single-minded loyalty to EACS in relation to EACS' moneys, such that it could not exercise any power so as to benefit itself and in circumstances which had given rise to a relationship of trust and confidence. On their evidence, that position had not changed following the oral agreement said to have been reached with Mr Shubana or the Amended Agreement. Facets of that obligation had required Prime Education to act in good faith towards EACS; not to make an unauthorised profit; not to place itself in a position where its interests and duties might conflict; and not to act for its own benefit or that of any other third person without the informed consent of EACS. In the circumstances in which Prime Education had received EACS' money, EACS had had, at all material times, a reasonable expectation of

abnegation of self-interest, consistent with Prime Education's duty of single-minded loyalty. In the particular context of the 2015 Agreement and the Amended Agreement, the contractual framework had made clear that the moneys were to be applied for a particular, identified purpose and with certain protections for EACS (albeit that the latter had been weakened under the Amended Agreement) and had given rise to and been consistent with the particular fiduciary obligations which could reasonably be expected to apply, as summarised above, notwithstanding the absence of an express trust.

116. I turn to consider the acts of Mr and Mrs Sekerci in this context and, in particular, whether each of them had deliberately intervened or intentionally intruded upon the fiduciary relationship between Prime Education and EACS, thereby hindering EACS from receiving its entitlement in accordance with Prime Education's fiduciary obligations. I am satisfied that, in transferring moneys to PE Turkey (as a non-subsidiary) and, in Mr Sekerci's case, in his direct involvement in investing those moneys in Turkish real property, each of them assisted Prime Education's breach of fiduciary duty and, certainly, made it easier than it otherwise would have been. I am, further, satisfied that neither Mr nor Mrs Sekerci acted as an honest person would have done in the circumstances. Each of them knowingly assisted in the appropriation of EACS' money and cannot escape liability simply because s/he saw nothing wrong in that behaviour in all the circumstances, however inappropriate EACS' own conduct had been. As Mr Davies suggested in cross-examination of Mrs Sekerci, an honest person, faced with an inability to perform the contract through the fault of its counterparty and/or the prospect of a significant associated tax liability (as to which no independent evidence has been provided, nor had a copy of it at any time been sought by Mrs Sekerci), could and would have sought instructions and, in their absence, returned the moneys which had not already been spent in accordance with the agreement. I note the provision made in the Amended Agreement for moneys to be refunded directly into the original source account from which the original money from EACS had been debited, which would have been ascertainable through enquiries made of HSBC, or of EACS itself, even if not independently known to the Sekercis. In that

context, Mrs Sekerci's after-thought that Prime Education had had no details of that account afforded an obviously unsatisfactory answer. Nor could it serve to explain why she had not herself sought (or ensured that her husband had sought) EACS' authority to invest its money in Turkish property, or made it aware of that investment, which, it was clear, had been unauthorised and involved a misapplication of EACS' moneys, to its detriment. The imprudence of the relevant investment, given the risks to which it gave rise, and the benefit which, were it to succeed, would accrue to Mr Sekerci and others (in the face of which it is no answer for Mrs Sekerci to say, simply, that she trusted her husband), of themselves support the dishonesty of Prime Education's directors.

117. Even if I were to accept that Mrs Sekerci's trust in her husband had inclined her to be less vigilant than she might otherwise have been, I am satisfied that, in all the circumstances, she had had, at the least, a firmly grounded suspicion that his and PE Turkey's dealings with the moneys in question were contrary to Prime Education's fiduciary obligations to EACS, but had consciously refrained from taking any step to confirm that fact, in which she had had good reason to believe; indeed, even to confirm whether the asserted investment had been made at all. The accounting treatment of the moneys concerned, which both directors had been content to sign off, knowing, as I have found, that PE Turkey was not a subsidiary of Prime Education and that the vast majority of the contract between that latter company and EACS had not been, and was unlikely to be, performed, serves, in my judgement, as further evidence of their dishonesty. Both of them possessed sufficient intelligence, knowledge and professional experience and expertise to consider such treatment inappropriate, indicating that their professed belief as to its propriety had not been genuinely held. Here again, applying the *Wisniewski* principles, I conclude that I am entitled to, and do, draw adverse inferences from the absence of Mr Conoglu, as a witness who might have been expected to have had material evidence to give on the investment of the moneys in question, on which the Defendants have a clear case to answer. I do not consider the explanation advanced for his absence to be credible, in particular given that he had signed the detailed defence provided by PE Turkey and that, in the absence of his evidence, his fellow director's and

shareholder's defence, together with PE Turkey's own position, could only have been significantly weakened. I infer that the Sekercis appreciated that his evidence would have been unlikely to have supported their case as advanced in these proceedings.

Conspiracy to injure by unlawful means

118. I am satisfied that, from the actions of Mr and Mrs Sekerci, it may and ought to be inferred that they (at least, and irrespective of any involvement of PE Turkey) combined with a common intention, whether or not tacitly, to achieve a common end, in circumstances in which, so both of them told me, they considered that EACS had left them with no choice but to have acted as they and Prime Education had done. Even if I were to have accepted (which I do not) that Mrs Sekerci's role had been limited to passive consent to, and a failure to have prevented, her husband's activities, the requisite combination would have been established. At the very least, she had been sufficiently aware of the surrounding circumstances and had shared a common object, so as to have acted in concert with Mr Sekerci. The fact that she had not taken part in every act done pursuant to their combination is, as a matter of law, irrelevant. As I have found, both she and her husband had desired a result which they knew would cause loss to EACS, inseparably linked to any gain of their own, and/or that of PE Turkey. By their actions, they have caused EACS to lose its moneys to one or more third parties. I reject their joint contention that they had been acting with the intention of protecting the moneys provided by EACS (itself inconsistent with the accounting treatment which had been applied, by which EACS had disappeared as a creditor of Prime Education) and with Mr Sekerci's recognition that none of the economic benefit obtained from the investments made using EACS' money would be transferred to EACS — as the PE Turkey Agreement provided, any profit would be evenly divided between Prime Education and PE Turkey.

119. I further reject the Sekercis' contention that EACS had cancelled the Amended Agreement and, thereby, forfeited its right to the return of any of its money, the short answer to which lies in Saini J's finding, at paragraph 96 of his judgment, that the property purchases had been "*acts of repudiation of both the 2015*

Agreement and the Amended Agreement and such breach was accepted in substance by EACS's letter of 7 December 2018, demanding a return of the sums transferred to Prime Education. At that time, EACS was not aware of the precise misapplication of the funds by way of Property Purchases but that does not preclude termination for breach under well-established contractual principles…" The alleged cancellation on which the Sekercis relied is said to have come in answer to the Defendants' CPR Part 18 request, which, as I have noted, was simply an assertion that the agreement between EACS and Prime Education had terminated upon EACS' acceptance of Prime Education's repudiatory breach. However, their stated belief in its existence is itself indicative of their intention to deprive EACS of the benefit of its moneys.

Quantum

120. I have found that each of the causes of action alleged against Mr and Mrs Sekerci has been made out. Appreciating that neither of them is a lawyer, no submissions of substance were advanced in relation to the quantification of the damages which ought to flow from an adverse finding on liability, in contrast to the detailed submissions which each had made in relation to EACS' case on liability. As I have previously noted, PE Turkey neither appeared nor was represented and made no submissions as to the quantum for which it ought to be held liable, judgment having been entered on EACS' claim that it had received moneys from Prime Education, knowing of that company's fiduciary obligations to EACS and that it had been in breach of those obligations, and that, it was, accordingly liable to account to EACS as a constructive trustee of such moneys, on which interest would be payable.

121. I am satisfied that, whichever cause of action is under consideration, the appropriate measure of the loss caused is the money of which EACS has been deprived by the relevant party's actions, against which appropriate credit for sums paid by Prime Education, in part satisfaction of its judgment debt, is to be given, and to which interest must be added. In my judgement, Mr and Mrs Sekerci and PE Turkey are, accordingly, jointly and severally liable to pay to EACS the sums of:

a. €13,349,788.74 (together with interest at 2% per annum, running from 15 March 2017); and

b. £1,871,560.00 (together with interest at 3% per annum, also running from 15 March 2017),

being the sums for which Saini J entered judgment against Prime Education (having taken account of sums legitimately paid to ESMA/ESMA students and the fee payable to Prime Education in connection with the ESMA element of the project). EACS is to give credit for the sum of £495,706.63 (being the total sum paid by Prime Education, on 11 March 2021, pursuant to paragraph 3 of the Saini Order, which had provided:

'In part payment of the sum ordered in paragraph 2 above[2]*, all sums currently held by* [Prime Education] *in HSBC account number…forthwith be paid…into* [EACS'] *Solicitors' Client Account with details as follows…'*).

Thus, in relation to the sum specified at sub-paragraph (b) above, from 12 March 2021 onwards, interest will be calculated on the reduced sum outstanding after credit. The lesser sum for which EACS had proposed to give credit was net of EACS' costs of the appeal before Saini J (summarily assessed in the sum of £95,197.50), which, having regard to the terms of paragraph 3 of the Saini Order, I am satisfied should not be deducted from the sum for which credit ought to be given. Judgment will be entered accordingly.

Consequential matters

122. Following the circulation of my draft judgment, EACS and Mr and Mrs Sekerci made various written submissions in relation to the form of the orders which should be made, which was not agreed. EACS applied for costs on the indemnity basis against Mr and Mrs Sekerci and PE Turkey, and for the continuation of the pre-judgment freezing order, as varied by Yip J (albeit that, as matters developed, that application was pursued against Mr and Mrs Sekerci

[2] being the sums for which judgment had been entered against Prime Education

and PE Turkey only). PE Turkey made no submissions on any such matter. Pragmatically, Mr and Mrs Sekerci did not submit that EACS' costs should not be borne by them, but left it to the court to determine whether those costs ought to be assessed on the indemnity basis. They did not resist a post-judgment freezing order, in principle, but questioned some of the terms proposed by EACS and sought an increase in the sum which each of them has, hitherto, been permitted to spend each month towards ordinary living expenses (being £2,400), under the pre-judgment freezing order.

Post-judgment freezing order

123. Having regard to the principles set out in *Les Ambassadeurs Club Limited v Yu* [2021] EWCA Civ 1310, I am satisfied that it is appropriate to impose a post-judgment freezing order, for the following reasons:

a. It is for EACS to satisfy the court: (1) of a good arguable case on the merits; (2) that there is a real risk of dissipation; (3) that there are assets held by, or on behalf of, the respondents to its application within the geographical scope of the proposed injunction; and (4) that, in all the circumstances, it is just and convenient to grant the order sought.

b. As EACS has obtained judgment in its favour, the first of the above requirements is met. The third requirement is not in dispute. Thus, the real issue is whether there is a real risk of unjustified dissipation. Notably, none of the respondents to the application submitted to the contrary. As Andrews LJ observed in *Yu* ([14] and [16]), the purpose and design of a freezing injunction is to protect against the frustration of the court process by depriving the applicant of the fruits of any judgment obtained in its favour (whether by concealment or transfer). It is not intended as a safeguard against insolvency; a means of providing security; or a standard means of securing enforcement of a judgment in favour of the applicant. The court must remain vigilant to ensure that such an order will only be granted in cases in which the evidence suffices to establish that there is a real risk of the judgment going unsatisfied by reason of unjustified dissipation and

where it is just and convenient to make the order. Whilst the risk (which is not to be confused with the incentive) must be established whether the freezing order is sought prior to or after judgment, post-judgment injunctions can, in practice, be easier to obtain; the policy of the law is to enforce judgments, for which reason, it may be right that, when a judgment creditor has satisfied the court that there is a real risk of dissipation, it would require particularly strong grounds to refuse an order on the basis of justice and convenience: *Yu* [17]. The fact that a respondent has been guilty of dishonesty will not, without more, suffice; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated: *Lakatamia Shipping Company Limited v Morimoto* [2019] EWCA Civ 2203 [34]. Each case will be fact-sensitive.

c. Having regard to the nature, purpose and effect of the dishonesty and activities for which I have found Mr and Mrs Sekerci to have been responsible, I am satisfied that they demonstrate a real risk that this judgment will go unsatisfied by reason of unjustified dissipation (including by PE Turkey, of which Mr Sekerci is a director and shareholder and which has declined to participate in these proceedings). No other ground has been advanced on the basis of which the grant of a post-judgment freezing order would not be just and convenient and there is no reason independently apparent for declining an order on that basis.

124. As to the terms of that order, so far as the subject of competing submissions:

a. The sums frozen reflect the judgment debt, including interest.

b. I have removed the *'Angel Bell'* exception (permitting the respondents to deal with, or dispose of, their assets in the ordinary and proper course of business), which had been included within the pre-judgment order. It will sometimes, and, perhaps, usually, be inappropriate to include such a provision within a post-judgment freezing order (see *Michael Wilson and 'Partners' Limited v Emmott* [2019] EWCA Civ 219 [56]) and, on the facts

of this case, I am satisfied that its inclusion would have been inappropriate. Unlike the position prior to judgment, EACS is now able to take steps to enforce its judgment against the respondents to the freezing order; the judgment debt is very substantial; there is no evidence regarding the current nature and requirements of any business of any judgment debtor, or the impact of the freezing order on that business. In her submissions, with which her husband concurred, Mrs Sekerci gave as the sole example of the need for the exception to be retained the fact that she and her husband would wish to sell a property in Hull, owned by a partnership of which each owns a 25% share, with the stated intention of putting the net sale proceeds towards discharge of the judgment debt. Given the terms of the order which I shall be making (see sub-paragraph (e), below), there is an alternative route to that end, which will provide suitable protection for all parties in the context of the real risk of unjustified dissipation which I have found to exist.

c. In seeking an increase in the sum which each is permitted to spend per month in ordinary living expenses (to £3,200), Mr and Mrs Sekerci point to the increase in the cost of living, and, in particular, to the imminent increase in the mortgage re-payments due on their home, following the expiry of a fixed rate. Whilst initially contending for its removal, ultimately EACS did not resist the inclusion of the relevant exception but objected to the requested increase in the sum which each of the Sekercis be permitted to spend. Its position was that: no evidence had been provided in support of that request; no such request had been made prior to judgment; and there was no obligation to include an exception to permit any ordinary living expenses in a post-judgment freezing order. Whilst I can take judicial notice of the increase in the cost of living since the living expenses excepted by Yip J were set, and have been shown evidence relating to the increase in the Sekercis' mortgage re-payments and utility bills, I am not satisfied that Mr and Mrs Sekerci will be unable to meet those increased expenses from the combined monthly sum excepted to date of £4,800, consistent with the lack of any pro-active application to vary the provision made by the pre-

judgment freezing order. Post-judgment and in light of the substantial judgment debt, I am not satisfied that it is appropriate to increase the excepted expenses beyond the pre-judgment allowance. In the event that a properly constituted application to vary that allowance is made by Mr and/or Mrs Sekerci in due course, it can be considered on its merits at that time.

d. I accept EACS' submission that no cross-undertaking in damages relating to the respondents (as opposed to third parties) is required in the context of a post-judgment freezing order, where the judgment debt is so substantial; unlike the position pre-judgment, there is no question of the freezing order being discharged on the basis that it ought not to have been granted.

e. Amongst the contentious issues to which the application for a post-judgment freezing order gave rise was the extent to, and basis upon, which the respondents and third parties should be entitled to facilitate execution of the judgment debt without thereby acting in breach of the order. I was not satisfied that the wording proposed by EACS enabled third parties put on notice of the order to understand that which they might lawfully do. Mr and Mrs Sekerci submitted that, in circumstances in which the judgment debt was so substantial; was to be paid within a short period; and could only be settled following the disposal of and/or release of equity in their assets, any process which required EACS' prior consent to such dealings would be unduly restrictive and punitive and, in any event, would be no substitute for clear provisions in the order. It is important that: (1) the freezing order not be used, nor operate, as an instrument of oppression, beyond imposing the pressure to satisfy the judgment debt inherent in an order of that nature; (2) the real risk of unjustified dissipation which has justified the grant of the order be suitably met; and (3) the respondents and affected third parties be clear in what they can and cannot lawfully do. To those ends, I am satisfied that the appropriate balance is struck by the following provisions, coupled with the undertaking which (amongst others) EACS has given, at the court's invitation, set out below:

'9. (1) The Respondent and/or any third parties are permitted to deal with the Respondent's assets in order to facilitate the execution of the Ellenbogen Order, such dealings to be restricted as follows:

(a) At the Respondent's written direction, which must be copied to the Applicant's solicitors at the time at which it is given, any sums held in a bank or building society account in the name of that Respondent may be paid directly into the Applicant's solicitors' client account having the following details ('the Client Account'), in full or partial satisfaction of the Ellenbogen Order:

[account details]

(b) If the First, Second and/or Third Respondents wish to liquidate, or raise equity against, any real property, shares and/or other illiquid asset in order to satisfy the Ellenbogen Order (in whole or in part), the relevant Respondent's/s' written proposal for disposal of that asset/debt financing and payment of the net proceeds directly into the Client Account shall be submitted to the Applicant's solicitors, seeking the Applicant's prior written consent, such consent not to be unreasonably withheld, and to be given/withheld (as the case may be) as soon as reasonably practicable. In the absence of the Applicant's consent, the Respondent may submit the written proposal to a King's Bench Master for (1) determination of whether it ought to be approved; and (2) consideration of whether the Applicant's consent has been unreasonably withheld. In that latter event, the Master shall have power to make such variation (if any) to paragraph 3 of the Ellenbogen Order, concerning the interest accruing on the judgment debt, as s/he considers to be appropriate in all the circumstances.

…

Undertakings given to the Court by the Applicant

1. If the Court later finds that the Applicant has, unreasonably: (1) delayed in giving, or (2) withheld its consent under paragraph 9(1)(b) above and thereby caused loss to the Respondent (including by increasing any interest payable on the judgment debt, or part thereof), and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order which the Court may make.'

f. Post-judgment freezing injunctions should be of limited duration and the judgment creditor should be encouraged to proceed with proper methods of execution: *Republic of Haiti v Duvalier* [1989] 1 All ER 454 (CA), at 465, per Staughton LJ. Subject to an overarching provision for discharge of the order at such time as the judgment debt has been satisfied in full, I have made provision for the court to review the order, in December of this year, and given associated directions.

Costs

125. In seeking assessment of its costs on the indemnity basis, EACS relies upon my findings of dishonesty as taking this case 'outside the norm'. It is said that the Defendants dishonestly appropriated EACS' assets and then caused it to expend further time and costs in pursuing the matter to a trial in which they protested their innocence. That conduct is submitted as being worthy of moral condemnation, outside the ordinary and reasonable conduct of proceedings.

126. The effect of an order that costs be assessed on the indemnity basis is that: (a) the paying party bears the burden of showing that the receiving party's costs were incurred unreasonably, or were unreasonable in amount, rather than the receiving party bearing the burden of proving reasonableness; and (b) there is no requirement that costs be proportionate, as well as reasonable, in order to be recoverable. The discretion to award indemnity costs is to be exercised so as to deal with the case justly in all the circumstances. As is well-known, there must be something in the conduct of the action, or in the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs: *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson* [2002] EWCA (Civ) 879. The paying party's conduct must be unreasonable 'to a high degree': *Kiam v MGN Ltd* [2002] 1 WLR 2810.

127. The fact that allegations of dishonest wrongdoing by a defendant have succeeded does not, without more, warrant an award of indemnity costs having

the effect summarised above. Nevertheless, in the circumstances of this case I am satisfied that such an award is appropriate against Mr and Mrs Sekerci, subject to my conclusions at paragraphs 128 and 129, below. As my findings at paragraphs 108 to 119, above indicate, it is not simply that they pursued a weak defence, but that, at all material times, they had well understood the limits of Prime Education's entitlement under the 2015 Agreement and the Amended Agreement; and had appreciated that: (1) neither agreement had entitled Prime Education to any greater sum, or to have considered the entirety of its fee to be due until the related work had been completed; and (2) there had been no entitlement to invest any of EACS' moneys in Turkish real property. In their dealings with EACS' money, they had acted with the intention of securing an economic advantage for Prime Education, PE Turkey and, by extension, themselves, and had each appreciated that dealing with EACS' money in such a way had run contrary to Prime Education's contractual obligations to EACS and their own obligations as directors of Prime Education. Their position became the more untenable following the findings made by Saini J in relation to Prime Education. In such circumstances, I accept that their pursuit of a hopeless and dishonest defence to trial justifies an order that they pay EACS' costs up to the end of trial on the indemnity basis. For the avoidance of doubt, that order will not override any specific costs orders, made on a different basis, to date.

128. Whilst the application for indemnity costs was advanced against 'the Defendants', the conduct criticised is that of Mr and Mrs Sekerci and PE Turkey has taken no part in these proceedings since November 2021. No basis is advanced or made out for an award of indemnity costs payable by, or in relation to the claim against, that defendant, to which the standard basis of assessment will apply.

129. In their dealings with matters consequential upon my judgment, Mr and Mrs Sekerci have adopted a measured and pragmatic approach. Whilst EACS justifiably pursued an application for a post-judgment freezing order and for indemnity costs, its representatives' approach to the drafting of the order reflective of my judgment and of the freezing order sought (to which the bulk of

their submissions and correspondence related) did not accord with my directions, and resulted in the need for the court significantly to revise the draft freezing order which they had submitted and to draw their attention to relevant caselaw. This was the more regrettable given that the Defendants were not represented. In those circumstances, I consider that EACS' costs relating to all matters consequential upon my judgment ought to be payable by Mr and Mrs Sekerci and PE Turkey on the standard basis and I so order. Such matters will also be of relevance to the assessment to be conducted under CPR 44.4, when the amount of costs payable in relation to matters consequential upon my judgment comes to be determined.