



Neutral Citation Number: [2024] EWCA Civ 585

Case No: CA-2023-001581

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
His Honour Judge Cawson KC (sitting as a Judge of the High Court)
[2023] EWHC 1658 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 24 May 2024

Before :

LORD JUSTICE MALES
LORD JUSTICE SNOWDEN
and
LADY JUSTICE FALK

Between :

MARY SHOVLIN
(as sole surviving trustee of the SPH Trust)

**Appellant/
Claimant**

- and -

(1) SITE CIVILS AND SURFACING LIMITED
(2) GEORGE CROSBY

**Respondents/
Defendants**

Martin Budworth (instructed by **SAS Daniels LLP**) for the **Appellant**
David Uff (instructed by public access) for the **Respondents**

Hearing dates : 20 and 21 February 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 24 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

Introduction

1. This is an appeal against a decision of HHJ Cawson KC (“the Judge”): [2023] EWHC 1658 (Ch) (the “Judgment”). The Judge dismissed claims by the Claimant (“Mrs. Shovlin”) as sole surviving trustee of the Shovlin Plant Hire Trust (“the Trust”) (i) for an account of profits from the First Defendant (“SCS”), and (ii) for a declaration that a house known as Greenacres, Fanners Lane, High Legh, Cheshire (“Greenacres”) was held by the Second Defendant (“Mr. Crosby”) on trust for her. Mr. Crosby was at all material times the sole owner and director of SCS.
2. The essential basis for both the personal and the proprietary claims was that Mrs. Shovlin’s co-trustee, the late Mr. Austin Fergus (“Austin Fergus”), who prior to his death from cancer in February 2019, was a chartered accountant, had breached his fiduciary duties when he caused a total of £645,000 belonging to the Trust to be lent to SCS in two tranches in January 2017 and January 2019 (the “Loans”). It was alleged that the Loans to SCS were made without authority because they were contrary to the investment policy established when the Trust was created by Mrs. Shovlin; and that, as indicated by the fact that the Loans were unsecured, were made at a low interest rate and were not documented, Austin Fergus had been intending to benefit SCS rather than acting in accordance with his fiduciary duties to the beneficiaries of the Trust.
3. Mrs. Shovlin further contended that SCS, to which Mr. Crosby’s state of mind was to be attributed, was a knowing recipient of the monies lent. SCS had repaid the Loans, together (belatedly) with interest, but Mrs. Shovlin claimed that it was liable to account for the profits that it had made from the development and sale in 2020 of two pieces of land at Mercury Way, Urmston, Manchester (“Mercury Way”) which had been acquired using the Loans.
4. Mrs. Shovlin also claimed that Greenacres represented the traceable proceeds of the Trust’s money, since a bridging loan that had been used by Mr. Crosby to acquire a larger plot of land known as Vinesgrove, on which Greenacres had been built, was paid off using some of the proceeds of sale of Mercury Way. It was claimed that there was a sufficiently close connection between the purchase of the Vinesgrove land using the bridging loan and its repayment using the proceeds of sale of Mercury Way to justify “backwards” tracing.
5. The Judge dismissed both claims, holding (i) that Mrs. Shovlin had not established that Austin Fergus had breached his fiduciary duties in causing the Loans to be made to SCS; (ii) that SCS was not in any event liable on the basis of knowing receipt, because Mr. Crosby’s lack of knowledge of any wrongdoing by Austin Fergus did not make it unconscionable for SCS to retain the benefit of the Loans; and (iii) that Mr. Crosby had acquired Vinesgrove as a replacement family home and had, at least initially, intended to repay the bridging loan using the proceeds of sale of his existing home (upon which the bridging loan was secured). The Judge held that even though the proceeds of sale from Mercury Way had been used to discharge the bridging loan when the sale of the family home had been delayed, on the facts there was insufficient coordination between the taking out of the bridging loan and the use of the proceeds of sale of Mercury Way to justify backwards tracing.

6. Limited permission to appeal was given by Lewison LJ. Lewison LJ indicated that the Judge had been entitled to conclude that Mrs. Shovlin (who did not give evidence at the trial) had not established that the Loans were made contrary to the investment policy she had prescribed for the Trust, but (i) that it was arguable that the Judge did not adequately analyse the terms upon which the Loans were made when determining that there was no breach of fiduciary duty by Austin Fergus (Grounds 1 and 2); (ii) that it was arguable from the fact that the cheques by which the Loans were made were drawn on an account in the name of the Trust that a reasonable person would have appreciated that the Loans were not being made by Austin Fergus from his own monies, so that further inquiries were required (Grounds 6 and 7); and (iii) that the Judge misapplied the law on the available remedies for knowing receipt and backwards tracing (Grounds 9-11).

The background in outline

7. The background facts are unusual and are set out in some detail in the Judgment. For present purposes, they can be summarised as follows.
8. The Trust was established in late October 2016 by Mrs. Shovlin with the assistance of Austin Fergus, who was a partner with his brother, Mr. Henry Fergus, in an eponymous firm of chartered accountants. Austin Fergus had been a trusted adviser to members of the Shovlin family for many years. In the course of his Judgment, the Judge recorded, at [127], that “It appears common ground that Austin Fergus was generally regarded as a discrete [sc. discreet] private person, with a reputation for honesty, who people considered that they could trust.”
9. At the time that the Trust was established, Mrs. Shovlin was 79 years old. However, she was described at trial by her son, Mr. Philip Shovlin (“Mr. Shovlin”), as a “switched on lady” with “an eye for detail”. The trust fund comprised £2.5 million which had been extracted by Mrs. Shovlin from the Shovlin family company, at the end of 2016. The funds were paid into a bank account in the name of the Trust on 3 January 2017 in accordance with a letter of instruction signed by Mrs. Shovlin to her bank on 23 December 2016.
10. After payment of the £2.5 million into the Trust’s bank account, Austin Fergus made a number of payments out of the Trust’s account by cheque to various parties over the following months. The Judge accepted that it was unlikely that the bank would have accepted these payments unless there was some mandate authorising Austin Fergus to act as sole signatory on the account, or if the bank was otherwise satisfied that Mrs. Shovlin had authorised the payments.
11. It was also a particular feature of the case, which the Judge found significant, that Austin Fergus made arrangements for statements for the Trust’s bank account, showing the payments that he had caused to made, to be sent to Mrs. Shovlin at her home address, and that he met Mrs. Shovlin regularly to discuss her affairs.
12. For many years, Austin Fergus had also acted as an accountant and trusted adviser to Mr. Crosby and SCS. Mr. Crosby left school at 15, set up his own groundworks business in the late 1990s, and incorporated it as SCS with the assistance of Austin Fergus in 2010. Mr. Crosby, who the Judge accepted was a “rough diamond”, described

Austin Fergus in evidence as something of a father figure and his mentor in business matters.

13. In 2016, Austin Fergus made a bridging loan of £135,000 to Mr. Crosby from his own funds, without a formal loan agreement or security, to assist Mr. Crosby and his wife to buy a house on Dane Road, Sale. That loan was subsequently repaid in early 2018 when Mr. and Mrs. Crosby sold their former (ex-council) house in Gawsworth Road, Sale Moor.
14. Whilst the sale of the house at Gawsworth Road was pending, Mr. Crosby learned of an opportunity to buy a property in Mercury Way which was near the Trafford Centre and had the potential for development and sale or lease. The price was £499,000. Mr. Crosby's case was that he was already over-extended following the acquisition of Dane Road, and he made an unsuccessful attempt to obtain a mortgage from his bank to borrow the funds needed to buy the property in Mercury Way.
15. However, when Mr. Crosby told Austin Fergus of the situation and explained the potential for development of the site, Austin Fergus offered to lend him £525,000 to fund the purchase. Mr. Crosby said that Austin Fergus agreed to charge interest at a rate of 0.4%, which was more than the rate of 0.25% which the money would have earned in a bank account at the time. Having made that arrangement, Mr. Crosby caused SCS to pay a deposit of £25,000 for the purchase of the property in August 2016.
16. The first of the payments that comprised the Loans was a payment of £525,000 made by cheque drawn in favour of SCS on 5 January 2017. The cheque was signed by Austin Fergus alone under the wording "AUSTIN FERGUS/TRUSTEES THE SPH TRUST". Mr. Crosby's evidence was that he believed that the money was being loaned to him by Austin Fergus in accordance with their earlier agreement. He said that he did not recall seeing the reference on the cheque to the Trust, and that even if he had, he would still have assumed that it was Austin Fergus' own money. The Loan of £525,000 was not secured and was not documented, which Mr. Crosby said was in accordance with the way in which the earlier personal loan from Austin Fergus in relation to Dane Road had been dealt with.
17. SCS obtained planning permission to develop the site at Mercury Way in March 2018. Mr. Crosby estimated that the cost of developing the site would be about £1.2 million, and his evidence was that he had discussed the possibility of Austin Fergus coming in as an investor for this purpose on a joint venture basis. However, in about April or May 2018, Mr. Crosby discovered that Austin Fergus had been diagnosed with cancer. His evidence was that this made him uncomfortable about continuing to borrow money from Austin Fergus or entering into a joint venture with him, so he decided to put the property at Mercury Way up for sale with a view to repaying the first Loan.
18. A sale of the Mercury Way property was provisionally agreed in about August 2018 with McDonalds, who wished to build a restaurant on the land. However, an issue arose as to whether the site might be landlocked. To resolve the issue, Mr. Crosby agreed that SCS should acquire a piece of adjoining land from a third party which gave access, for a price of £120,000. The terms of the deal between SCS and McDonalds were also renegotiated, to include the extra piece of land being purchased, and at an increased price of £2 million.

19. Mr. Crosby's evidence was that Austin Fergus offered to lend the £120,000 to SCS to finance the purchase of the adjoining piece of land. This gave rise to the second of the Loans. A payment of £120,000 was made by cheque dated 14 January 2019 drawn on the Trust's bank account and signed by Austin Fergus under the wording "AUSTIN FERGUS/TRUSTEES THE SPH TRUST". Again, Mr. Crosby's evidence was that he did not notice the name of the Trust on the cheque, and he believed that the money being lent was Austin Fergus' own money.
20. On this occasion, however, the cheque was made payable to SCS's solicitors, Aughton Ainsworth, who were dealing with the sale to McDonalds. They accepted the cheque after having been provided with various copy documents by Austin Fergus, namely the declaration establishing the Trust, identification for both Austin Fergus and Mrs. Shovlin, a copy of the accounts for the Shovlin family company from which the funds had originated, and a copy of the original letter from Mrs. Shovlin to her bank directing the payment of £2.5 million into the Trust's account.
21. Contracts for the sale of Mercury Way to McDonalds were eventually exchanged in June 2019, after Austin Fergus's death in February 2019. However, there were further delays and the sale did not complete until March 2020.
22. In the interim, Mr. Crosby had identified Vinesgrove as a potential site for a new family home for himself and his wife to replace their home at Dane Road. It was available for £900,000 and Mr. Crosby's witness statement indicated that he had originally intended to acquire it using the proceeds of sale of Mercury Way. However, when the completion of the sale of Mercury Way was delayed, so that this was not possible, Mr. Crosby obtained a bridging loan of £1 million from a company known as DWFCO9 (the "Bridging Loan").
23. The terms of the Bridging Loan were set out in an email from DWFCO9 to Aughton Ainsworth dated 20 August 2019. The terms provided that if either Mr. Crosby's existing house at Dane Road, or the new property at Vinesgrove itself were sold, then the sale proceeds were to be used to reduce the outstanding debt. In the course of negotiations for the Bridging Loan, Aughton Ainsworth told DWFCO9 by an email dated 23 August 2019, that the assumption was that £700,000 - £755,000 of the Bridging Loan would be repaid in three months after Mr. Crosby had sold his house at Dane Road, and the balance would be repaid after six months on completion of the sale of Mercury Way by SCS to McDonalds.
24. Mr. Crosby acquired Vinesgrove using the Bridging Loan on 10 October 2019. The Bridging Loan was secured by a legal mortgage over Dane Road and Vinesgrove.
25. Mr. Shovlin had left the UK to live in Australia in 2012 after a family disagreement. He returned in early 2020 after the death of his father. On 7 February 2020 he accompanied his mother to a meeting with Henry Fergus, who (according to Mr. Shovlin) revealed that the Trust's monies had not been invested in stocks and shares, but had instead been lent to various parties including SCS. Mr. Shovlin then made inquiries as to whom the various payments had been made.
26. Mr. Shovlin spoke by telephone to Mr. Crosby on 11 February 2020. That conversation was recorded by Mr. Shovlin, who followed it up with a lengthy visit to Mr. Crosby's house on 12 February 2020. Mr. Shovlin and Mr. Crosby gave very different accounts

at the trial of the meeting on 12 February 2020 and of a subsequent meeting between them at Costa Coffee at Lymm Services on 28 February 2020.

27. In essence, Mr. Shovlin contended that Mr. Crosby offered to repay the loan of £525,000 and to give Mrs. Shovlin a share of profit from the sale of Mercury Way, but did not disclose that there had been a second loan of £120,000. Mr. Crosby's evidence was that at the first meeting, Mr. Shovlin indicated that he expected to receive a return of 30-50% on the Loans and accompanied that with threats, mentioning connections with the Manchester underworld and the IRA; and that at the second Mr. Shovlin was accompanied by a third man who acted in a threatening manner.
28. Following the second meeting on 28 February 2020, Mr. Crosby arranged a further loan from DWFCO9 to SCS in the sum of £645,000. Those monies were then paid by SCS to Aughton Ainsworth, who paid them into the Trust's bank account in repayment of the Loans on 6 March 2020.
29. The sale of Mercury Way by SCS to McDonalds completed on 27 March 2020. The proceeds were used to repay the Bridging Loan of £1 million and the further loan of £645,000, together with interest, to DWFCO9.
30. Dane Road was sold by Mr. and Mrs. Crosby for £675,000 in July 2020. By this time Mr. and Mrs. Crosby had separated, and the proceeds of sale were divided between them.
31. In October 2021 Mr. Crosby sold a part of the land at Vinesgrove for £1 million. He used that money, together with other funds, to repay about £1.325 million to SCS to avoid incurring a tax charge on his director's loan account.
32. A letter before action was sent by solicitors acting for Mrs. Shovlin to Mr. Crosby on 16 February 2022, almost two years after sale of Mercury Way. It sought payment of a 50% share of the profit made by SCS on the sale. After various without notice applications, proceedings were eventually issued in June 2022 and a freezing injunction made against Mr. Crosby.
33. On 22 March 2023 SCS made a payment of interest to Mrs. Shovlin in the sum of £46,084.71.
34. The trial commenced before the Judge on 22 May 2023 and lasted for four court days. Mrs. Shovlin did not give evidence. The main witnesses were Mr. Shovlin and Mr. Crosby. The Judge also heard from another party to whom Austin Fergus had lent the Trust's money on informal terms, from Henry Fergus, and from a lady who had been the secretary and bookkeeper to the Fergus & Fergus partnership.

The parties' cases in outline

35. The essence of the case for Mrs. Shovlin was that Austin Fergus had acted in breach of trust in causing the Loans to be made to SCS. The allegation was that the Loans were contrary to the policy of investing in stocks and shares which had been stated to Austin Fergus by Mrs. Shovlin when the Trust was created, and hence were made without authority. It was further alleged that Austin Fergus had acted for the illegitimate purpose of benefitting SCS and Mr. Crosby rather than in the best interests of the

beneficiaries of the Trust. It was said that this illegitimate purpose was evidenced by the granting of the Loans on an unsecured basis, without documentation, and at a rate of interest substantially below the normal rates of commercial interest. It was said that this had all been done by Austin Fergus without the knowledge or informed consent of Mrs. Shovlin.

36. So far as the liability of SCS was concerned, it was alleged that there were sufficient facts known to Mr. Crosby to alert him to wrongdoing on the part of Austin Fergus so as to put him on inquiry, and that this made it unconscionable for SCS to retain the benefit of the Loans. It was said that this made SCS liable to account as a knowing recipient for all of the profits that it had made from acquiring and developing Mercury Way, subject to some allowance for costs and expenses incurred.
37. The essence of the proprietary tracing claim was that because SCS could not claim to be a bona fide recipient of the Loans without notice, the Trust retained beneficial ownership of the monies lent and the property acquired with them, namely the two pieces of land at Mercury Way. It was said that this gave the Trust a proprietary interest in the entirety of the proceeds of sale of Mercury Way that were received in July 2020, subject only to giving credit for the £645,000 that had been repaid in March 2020.
38. Although the proceeds of sale of Mercury Way had been used to repay the Bridging Loan rather than to acquire Vinesgrove, it was further contended that the principles of “backwards tracing” discussed in Republic of Brazil v Durant International [2016] AC 297 applied so as to permit the Trust to assert a proprietary claim against that property. It was contended that there was a sufficient connection on the facts between the proceeds of sale of Mercury Way and the acquisition of Vinesgrove, because the Bridging Loan had been incurred for the purpose of acquiring Vinesgrove, it had originally been intended to be repaid from the proceeds of sale of Mercury Way, and it was in fact repaid using those proceeds.
39. The essence of the case for Mr. Crosby and SCS was, first, that it had not been shown that Austin Fergus had acted without authority from Mrs. Shovlin or in breach of trust. Reliance was placed upon the general consensus that Austin Fergus had a reputation as an honest person, and the adverse inferences that could be drawn from the fact that Mrs. Shovlin had not given evidence to answer questions about what she knew of the making of the Loans, which would have been apparent from the bank statements that she had received and from her regular meetings with Austin Fergus.
40. On knowing receipt, it was said that the court had first to ascertain the state of Mr. Crosby’s actual knowledge, and then ask whether, in light of that actual knowledge, retention of the benefit of the Loans would be unconscionable. It was said that Mr. Crosby was entitled to proceed on the basis that in arranging the Loans with Austin Fergus he was dealing with an honest man unless alerted to the possibility of wrongdoing. In that regard it was contended that given the background of a close friend and trusted professional, and the informality with which Austin Fergus had made the earlier unsecured loan to Mr. Crosby to acquire Dane Road, there was nothing in the circumstances or terms on which the Loans had been made to put Mr. Crosby on inquiry.
41. Specifically, it was said that the reference to “AUSTIN FERGUS/TRUSTEES THE SPH TRUST” on the cheques was not sufficient to indicate to Mr. Crosby that Austin

Fergus was lending someone else's money rather than his own. Moreover, even though Aughton Ainsworth, as solicitors, did think to inquire into the source of the second Loan payment, they were plainly satisfied that there was nothing untoward in SCS receiving the payment.

42. SCS further denied that even if it was a knowing recipient of the Loans, it should not be liable to account for profit which it had made from the development and sale of Mercury Way. It argued that even if the making of the Loans was a breach of trust by Austin Fergus, this had not been the effective cause of the profit made by SCS on Mercury Way, but merely gave SCS the opportunity to make that profit.
43. Finally, on the proprietary tracing claim, SCS contended that it was a bona fide purchaser for value without notice, so took free of the Trust's interest in the Loan monies. Alternatively, it was said that a proprietary claim to Mercury Way or its proceeds of sale should not give rise to a greater remedy than the liability to account as a knowing recipient. And in relation to the attempt to trace into Vinesgrove and Greenacres, it was argued that there was not a sufficiently close connection on the facts to justify backwards tracing, because whatever might have been the original intention, the primary intention (consistent with the terms of the Bridging Loan and the security given for it) was that the Bridging Loan would be mostly repaid from the proceeds of sale of Dane Road, and the fact that it was eventually repaid using the proceeds of sale of Mercury Way was an accident of timing.

The Judgment

44. In his Judgment, after setting out the essential facts, the Judge outlined the respective legal and factual cases of the parties.
45. The Judge then commented on the fact that Mrs. Shovlin had not given evidence, pointing out that she would have had important evidence on the central issues in the case such as the investment instructions that she had given to Austin Fergus, her state of knowledge of what Austin Fergus had done with the Trust money as shown on the bank statements that she had received, and on the critical question of whether she had given her informed consent to the Loans.
46. The Judge found that it was unsatisfactory that Mrs. Shovlin had not even made a witness statement and that no independent medical evidence had been adduced as to her physical health or frailty to support Mr. Shovlin's contention that it was unfair that his mother should be cross-examined at the trial. The Judge concluded that in all the circumstances he was entitled to draw adverse inferences from the fact that Mrs. Shovlin had not given evidence on the central issues in the case, and to take those inferences into account when assessing the overall probabilities with regard to Austin Fergus's conduct.
47. The Judge then gave his assessment of the witnesses who had given evidence. Of these, clearly the two most important were Mr. Shovlin and Mr. Crosby.
48. Mr. Shovlin had given hearsay evidence as to what he said he had been told by his mother concerning the formation of the Trust and her instructions to Austin Fergus. Mr. Shovlin also gave direct evidence as to his conversations and contacts with Mr. Crosby in early 2020. The Judge found Mr. Shovlin to be a less than impressive

witness, describing his hearsay evidence as to what his mother had told him as “frankly somewhat opaque” . The Judge also found it more likely than not that Mr. Shovlin had threatened Mr. Crosby at the meetings in February 2020, and had subsequently put pressure on Henry Fergus to pay money in respect of other loans to third parties that had not been repaid. The Judge concluded that he should not accept Mr. Shovlin’s evidence unless it was supported by some contemporaneous documents or other reliable evidence.

49. The Judge found Mr. Crosby to be an essentially honest witness, albeit noting that there were elements of exaggeration and imperfections in his evidence. After considering what were alleged to be inconsistencies in his evidence in some detail, the Judge stated, at [195],

“... on consideration of the evidence as a whole, I consider it more likely than not that Mr. Crosby’s genuine belief was that Austin Fergus was advancing his own funds, and that he did not give any thought as to there being any third party involvement until the possibility of the use of third-party funds subsequently arose, most likely in the context of a discussion subsequent to the purchase of [Mercury Way] as to how the project involving the development of the land into a number of units was to be funded, with a funding requirement of £1.2 million being identified at that stage. Even then, I consider it more likely than not an appreciation by Mr. Crosby that the initial monies advanced might have come from third-party funds only arose at a later stage, sometime after Austin Fergus’s cancer diagnosis, and possibly even after Austin Fergus’s death.”

50. The Judge also concluded, at [198],

“Stepping back, and considering what Mr. Crosby said in his evidence, and during the course of the telephone conversation on 11 February 2020, about implicitly trusting Austin Fergus, and regarding him as an honest and righteous man, I have come to the firm conclusion that Mr. Crosby did not contemporaneously consider Austin Fergus to be the sort of person capable of involving himself in illicit or unauthorised deals involving the misapplication of the money of others without their consent in the manner alleged in the present case. I have therefore come to the firm conclusion that Mr. Crosby neither believed nor suspected that the monies that SCS and Aughton Ainsworth received were tainted in this way, or that he was assisting in any way in the misappropriation or misapplication of money by Austin Fergus.”

51. The Judge then turned to consider the central question of whether Austin Fergus had acted without authority or in breach of fiduciary duty in making the Loans.
52. The Judge first reiterated that evidence from Mrs. Shovlin would have been of central importance on the question of the investment policy of the Trust. He also referred to an exchange that had taken place between Mr. Shovlin and Mr. Crosby during their

telephone call on 11 February 2020, in which Mr. Shovlin appeared to report Austin Fergus having told his mother that he could get a better return than the family's financial adviser in Warrington by lending monies out. The Judge then commented at [201(v)],

“If, as seems clearly to have been the case, Austin Fergus was contemplating a joint venture with Mr. Crosby concerning the development of the Mercury Way Land, then, apart from the alleged instruction with regard to investing in stocks and shares, that might well have been the sort of investment, if made with monies belonging to the SPH Trust, that could have provided for a good return on a fairly safe and secure basis consistent with a rate of return better than that achieved by the accountants in Warrington. During the course of the telephone conversation on 11 February 2020, Mr. Crosby referred to Austin Fergus looking at the relevant figures concerning the development of the Mercury Way Land.”

53. The Judge then considered a number of other factors which he thought pointed away from a conclusion that Austin Fergus had been acting improperly in relation to the investment of the Trust's money. He said, at [201(vi) and (vii)],

“(vi) I consider it highly significant that copies of the bank statements relating to the SPH Trust's bank account were sent to Mrs Shovlin:

(a) Firstly, I consider it significant because if Mrs Shovlin's instruction had been for the monies to be invested in investments such as stocks, shares and bonds, then one might have expected a “*switched on lady*” such as Mrs. Shovlin, who paid attention to detail, had been responsible for [the Shovlin family company's] financial affairs, and who met regularly with Austin Fergus to have noticed entries in the bank statements inconsistent with investment simply in stocks, shares and bonds, and to have queried why she was not receiving other information in relation to what ought to have been an investment portfolio in investments such as stocks, shares and bonds.

(b) Secondly, I consider it significant because it is accepted that Austin Fergus would have known that Mrs. Shovlin was receiving the bank statements, and if Austin Fergus had been keeping a dishonest misappropriation of monies belonging to the SPH Trust close to his chest as alleged, then I consider it unlikely that he would have arranged matters so that Mrs. Shovlin received the bank statements.

(vii) It is, I consider, in relation to this particular aspect of the case particularly important to bear in mind that if serious allegations of fraud are being made, then whilst the standard of proof remains the civil standard, stronger evidence is required to

overcome the inherent unlikelihood of fraud, in particular on the part of a professional person who, as in the present case, everybody [has] otherwise regarded as being an honest man. An additional consideration in this context is the acceptance by Mr. Shovlin that Austin Fergus had been somebody who sought instructions before acting in the past.”

54. The Judge then addressed the question of the informality and terms upon which the Loans had been advanced. He said, at [202],

“I take on board the lack of documentation concerning the loans to SCS, and indeed to the other borrowers, and also the somewhat derisory rate of interest contemplated with regard to the specific loans to SCS and that the loans were made on an unsecured basis, and that it might be said that these advantageous terms were intended to benefit Mr. Crosby rather than the SPH Trust. However, given in particular my concerns regarding the absence of evidence from Mrs. Shovlin and as to the unreliability of Mr. Shovlin’s evidence, I consider the evidence as to the circumstances and basis upon which the SPH Trust was established and funds were entrusted to Austin Fergus to be so unclear and uncertain that I cannot safely conclude on the balance of probabilities that the monies were entrusted to Austin Fergus to invest in investments such as stocks and shares, or otherwise upon a basis that would have prevented Austin Fergus from lending monies to Mr. Crosby on the terms that he did in anticipation of, for example, being involved, on behalf of the SPH Trust, in the development of the Mercury Way Land for the benefit of the SPH Trust, and doing so with Mrs. Shovlin’s informed consent.”

55. The Judge thus concluded that Mrs. Shovlin had failed to prove that Austin Fergus acted in breach of trust or fiduciary duty. He then went on to consider and reject both the claim for knowing receipt and the proprietary claim for the further reasons that I have very briefly summarised in paragraph 5 above.

The appeal

56. As I have indicated, Lewison LJ refused permission for Mrs. Shovlin to appeal against the Judge’s finding, based upon his analysis in [201], that she had not demonstrated that the Loans were made contrary to the alleged investment policy of the Trust of investing in stocks and shares.
57. Lewison LJ did, however, grant permission in relation to the Judge’s analysis in [202] that there had been no breach of fiduciary duty, together with the Judge’s decision that Mr. Crosby’s state of knowledge meant that SCS was not liable for knowing receipt and that there was insufficient connection between the acquisition of Vinesgrove using the Bridging Loan and its repayment using the proceeds of sale of Mercury Way to justify backwards tracing.
58. I therefore turn to the first of those topics.

Grounds 1 and 2

59. Ground 1 contended that the Judge was wrong not to find that Austin Fergus had exercised his powers as trustee in order to benefit Mr. Crosby and SCS, and that since they were not objects of the power and the benefit to them was more than an incidental benefit, this amounted to a “fraud on the power”. Ground 2 contended that the Judge was wrong not to find that when Austin Fergus made the Loans on an unsecured basis with a “negligible” rate of interest, this was “so plainly not in the best interests of the beneficiaries as to be a clear breach of trust for that reason alone”.
60. These Grounds are advanced against the background that the knowing receipt claim against SCS and the tracing claim in respect of Greenacres both depended upon there having been a primary breach of fiduciary duty by Austin Fergus. Without such a primary breach of fiduciary duty there could be no secondary liability on SCS for knowing receipt: see El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685 at 700g. Nor could there be any proprietary tracing claim to Mercury Way and then to Vinesgrove or Greenacres, because if Austin Fergus was not acting in breach of fiduciary duty, SCS would have acquired full legal and beneficial title to the money which was the subject of the Loans: see *Lewin on Trusts* (20th ed.) at 44-010 to 44-013.
61. It is also clear that a finding that the terms of the Loans were too favourable to SCS in the sense that Austin Fergus should have extracted a better deal from SCS as to interest, that he should have obtained security for the Loans, or that he should have documented the Loans in a formal agreement, would not by itself suffice to establish a breach of fiduciary duty. Such matters could simply be a breach of Austin Fergus’s duty of care under section 1 of the Trustee Act 2000. As Millett LJ explained in Bristol and West Building Society v Mothew [1998] Ch 1 at page 18, the distinguishing feature of a fiduciary is the obligation of single-minded loyalty to his principal. Millett LJ also explained that a duty of care - even one owed by a trustee - is not a fiduciary duty. As he put it, a servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.
62. In that regard, although Mr. Budworth relied upon cases such as Learoyd v Whiteley (1887) 12 App Cas 727 and Wight v Olswang (2000) 3 ITELR 352 in support of a contention that the Judge should have analysed the terms of the Loans against an objective standard of reasonableness in order to conclude that Austin Fergus had acted in breach of fiduciary duty, I do not consider that this is the relevant test. Both those cases related to claims against trustees for breach of a duty of care rather than breach of their fiduciary duties.
63. As such, I consider that in order to succeed on Grounds 1 or 2, Mrs. Shovlin must show that the Judge wrongly failed to find, as a fact, that when Austin Fergus agreed to make the Loans on behalf of the Trust, his intention was to benefit SCS and Mr. Crosby in such a way that amounted to disloyally disregarding or subordinating the interests of the beneficiaries of the Trust.
64. Mr. Budworth submitted that the Judge had identified the relevant issue in this respect at the start of [202] of his Judgment when the Judge stated that he had “taken on board” the various points that had been made about the terms upon which the Loans had been made and “that it might be said that these advantageous terms were intended to benefit Mr. Crosby rather than the SPH Trust”. Mr. Budworth contended, however, that the

Judge had not addressed these points in the remainder of [202]. He submitted that if the Judge had done so properly, he could only rationally have concluded that Austin Fergus was acting disloyally to the Trust.

65. I accept that the Judge's reasoning in [202] was expressed rather briefly and elliptically. However, it must be read against the background and findings of fact that the Judge had made in the preceding paragraphs.
66. At [201(v)] the Judge had found that the making of the Loans was an investment that "might well have been the sort of investment that could have provided for a good return on a fairly safe and secure basis consistent with a rate of return better than that achieved by the accountants in Warrington". That observation was made on the bases (i) that it had not been shown that making the Loans was contrary to the permitted investment policy of the Trust and (ii) that Austin Fergus was "contemplating a joint venture with Mr. Crosby concerning the development of the Mercury Way land".
67. The first of those bases cannot be challenged on this appeal. Although the second basis could have been more clearly expressed, I read the reference to the investment achieving a better return than that achieved by the Shovlin family accountants in Warrington as a finding that Austin Fergus was contemplating a joint venture with Mr. Crosby in relation to the Mercury Way land as a means of achieving a better return *for the Trust*. That reading is confirmed by the Judge's reference in [202] to Austin Fergus having made the Loans "in anticipation of ... being involved, *on behalf of the SPH Trust*, in the development of the Mercury Way Land *for the benefit of the SPH Trust*" (my emphasis).
68. The finding that when Austin Fergus made the Loans, they were not made in isolation but in anticipation of a joint venture to develop Mercury Way which would deliver an enhanced investment return for the Trust, plainly supports a conclusion that Austin Fergus's intentions were to promote the best interests of the Trust. That would justify a finding that Austin Fergus was not acting in breach of his fiduciary duties of loyalty, even if, viewed as an investment in isolation, it could be said that he should have ensured that the Loans were documented, secured and on better terms as to interest.
69. The potential force of the counter-argument that Austin Fergus's failure to document the Loans or to obtain security or a better rate of interest demonstrated a disloyal intention to subordinate the interests of the Trust to those of Mr. Crosby and SCS is diminished by several particular features of the case to which the Judge referred.
70. The first is that to which the Judge referred in his analysis at the end of [202]. The Judge stated that he was not satisfied that the Loans had been made without Mrs. Shovlin's informed consent. That conclusion stemmed from the Judge's earlier findings, to which he attached significant weight, that Austin Fergus had arranged for the bank statements showing the making of the Loans to be sent to Mrs. Shovlin, whom he met regularly and who was a "*switched on lady*": see [201(vi)]. In the same way that Austin Fergus would have been unlikely to arrange for Mrs. Shovlin to receive statements showing the Loans if he had been deliberately acting contrary to her instructions about investing in stocks and shares, so also it would have been unlikely that he would have done so if he was disloyally intending to disregard or subordinate the interests of the Trust by agreeing terms that were unduly favourable to SCS.

71. The second particular feature of the case is that everyone regarded Austin Fergus as an honest man. In particular, he had been a long-term trusted adviser to the Shovlin family and, as the Judge recorded at the end of [201(vii)], it was accepted that he had sought instructions before acting for them in the past. In [201(vii)], the Judge expressly took these factors into account when considering the likelihood that Austin Fergus had been guilty of what the Judge referred to as “fraud”. In context, this was at least a reference to the allegation that Austin Fergus had been deliberately disobeying Mrs. Shovlin’s instructions as to the investment policy to be followed by the Trust; but the same point can also be made in relation to the suggestion that Austin Fergus was intending to act disloyally in the interests of Mr. Crosby and SCS rather than in the interests of the Trust.
72. The third feature of the case that diminishes the potential force of Mr. Budworth’s argument based on the terms of the Loans is the fact that Austin Fergus had earlier made a loan of his own money to Mr. Crosby, also without security or documentation. I am, of course, not saying that a fiduciary can adopt the same casual approach when dealing with trust monies that he might choose to adopt in his own affairs. But when assessing whether Austin Fergus was acting disloyally to the Trust when making the Loans, the fact that he had previously made a loan of his own money to Mr. Crosby without security or formality means that the argument in relation to the Loans carries less weight than if, for example, Austin Fergus had demanded security and formal loan documentation when lending his own money.
73. On appeal, Mr. Budworth also pressed upon us various specific aspects of the evidence that had been before the Judge. He drew our attention, for example, to various extracts from the transcript of the telephone call that had taken place between Mr. Shovlin and Mr. Crosby on 11 February 2020. He submitted that these exchanges demonstrated that Mr. Crosby knew that Austin Fergus was not lending his own money and that Austin Fergus had not documented the Loans and had urged Mr. Crosby to keep what they were doing secret (“*close to your chest*”). Mr. Budworth also submitted that paragraph 23 of Mr. Crosby’s affidavit of 13 July 2022 should have led the Judge to conclude that any interest of Austin Fergus in providing finance for the development of Mercury Way was a personal interest rather than as a potential further investment on behalf of the Trust.
74. The transcript of the telephone call of 11 February 2020 is long, liberally peppered by expletives, wildly discursive and in many places simply impossible to follow. I do not consider that any of the exchanges to which Mr. Budworth drew our attention clearly show that Austin Fergus was acting improperly in relation to the Trust’s money, or that Mr. Crosby knew that he was. The Judge was not only able to review the transcript and to listen to the recording of the call itself, but he had the very considerable advantage of hearing evidence and cross-examination of both parties to that call. We did not, and we were not taken to any significant passages of the evidence given at trial. Notwithstanding Mr. Budworth’s strenuous efforts to suggest what various statements by Mr. Crosby meant or showed, I do not consider that any of this evidence was sufficiently probative to justify interfering with the Judge’s evaluation of it.
75. I also do not consider that the contents of paragraph 23 of Mr. Crosby’s affidavit undermine the Judge’s conclusion at [201(v)] that when he made the Loans, Austin Fergus viewed the future development of Mercury Way as an advantageous investment opportunity for the Trust. Mr. Crosby’s statement stated that in a discussion shortly after Mercury Way had been purchased, Austin Fergus had “said that he would provide

the finance and we would build the site out". The statement is reported from Mr. Crosby's perspective, and is consistent with Mr. Crosby's belief that Austin Fergus had made the Loans from his own funds.

76. In summary, I do not consider that any of the matters to which Mr. Budworth drew attention are sufficient to justify this Court interfering with the Judge's conclusion that Mrs. Shovlin had failed to prove that Austin Fergus had acted in breach of fiduciary duty when making the Loans. In my view, the Judge's conclusion was one that he was entitled to reach on the (limited) evidence before him.

The other Grounds of Appeal

77. That conclusion is sufficient to dispose of this appeal, and makes it unnecessary to consider the other grounds of appeal. As I have indicated above, if Austin Fergus did not act without authority (i.e. contrary to the investment policy of the Trust) or in breach of fiduciary duty, then Mrs. Shovlin could have no claim against SCS for knowing receipt of monies transferred in breach of trust. Further, SCS would have obtained full title to the monies of the Trust that were lent, so that no proprietary tracing claim to Mercury Way or Vinesgrove could be asserted.

Disposal

78. I would therefore dismiss the appeal.

Lady Justice Falk:

79. I agree with the judgments of both Lord Justice Snowden and Lord Justice Males.

Lord Justice Males:

80. I also agree with the judgment of Lord Justice Snowden. As he has said, this is an unusual case.
81. The late Mr Austin Fergus, a professional man held in high regard by his clients as decent, honest, trustworthy and loyal, was one of two trustees of the SPH Trust. The other trustee, Mrs Mary Shovlin, is a woman in her 80s who unfortunately has cancer. Her son, Mr Philip Shovlin, who appears to be the driving force behind this litigation, claims to be the sole beneficiary of the trust, although that is contrary to the terms of the Trust Deed which, despite being a somewhat home-made document, provides for a class of beneficiaries.
82. It appears that Mr Austin Fergus was in the habit of making loans of trust money to some of his other clients, including Mr George Crosby and his company, SCS. Those loans had some peculiar features. They were undocumented, unsecured, and at a low rate of interest. That might have given rise to questions, although the judge found as a fact that it did not occur to Mr Crosby, a long-standing client of Mr Austin Fergus who regarded him as something of a father figure, that there was anything untoward about them. That did not occur to another client of Mr Austin Fergus to whom a loan was made, a Mr Ahmed, either.
83. It appears to have been Mr Austin Fergus's own idea that the loans should not be documented. According to Mr Crosby, Mr Austin Fergus told him to 'keep it close to

your chest George, no one needs to know about what we do’, while Mr Ahmed’s evidence was that Mr Austin Fergus said that there was no need for his loan to be documented ‘in case of prying eyes’.

84. Despite this, however, Mr Austin Fergus did not attempt to conceal these loans from his fellow trustee, Mrs Shovlin. On the contrary, he sent her bank statements which showed clearly that the trust funds were not being invested in conventional investments such as stocks and shares, and he had regular meetings with her. She was described as a ‘switched on lady’ with ‘an eye for detail’, and as having considerable financial acumen, so this was a significant risk for Mr Austin Fergus to take if he was acting in any way improperly. In addition, the cheques by which Mr Austin Fergus advanced funds showed clearly that the funds in question were trust funds, and in one case a loan of £120,000 was made by sending a cheque to Mr Crosby’s solicitors, Aughton Ainsworth. Again, therefore, Mr Austin Fergus was taking a risk by sending a cheque in this way if what he was doing was (as Mr Martin Budworth for the claimant put it at one point in his submissions) dishonestly raiding the trust fund for his own benefit or the benefit of his other clients. In fact the solicitors did ask for identification information for both Mr Austin Fergus and Mrs Mary Shovlin, which was provided to them together with the Trust Deed and other documents.
85. There are further oddities which have not been explained.
- (1) When Mr Philip Shovlin first made contact with Mr Crosby, he decided to record their telephone call. The transcript of the call, which took place on 11th February 2020, shows that Mr Philip Shovlin made a number of extraordinary claims: that he had been to Colombia to meet some ‘nasty people’, knowing ‘there was a good chance that I was gonna get killed’; that he ‘knew if I went down to Sydney I was gonna be shot dead because what I was gonna do down there was just gonna be horrific’; that his life had been threatened by people who were ‘as extreme as it can get’; and that he had threatened to throw someone in Japan out of a second-floor window because he had ‘ripped me off’.
 - (2) The telephone call was followed by a lengthy meeting at Mr Crosby’s house on 12th February 2020. The judge found that during that meeting Mr Philip Shovlin claimed to have connections to the Manchester underworld and to the IRA, and threatened to sell Mr Crosby’s debt to debt collectors within the Manchester underworld or to the IRA and leave it to them to enforce it if he was not paid a return on the loan of between 30% and 50%.
 - (3) Another meeting took place on 28th February 2020 at a Costa Coffee café. On this occasion Mr Philip Shovlin was accompanied by an unidentified man, giving Mr Crosby the impression that the two of them were there to threaten him. However, they backed off when they saw that Mr Crosby had his dog with him. Apparently Mr Crosby, as well as running his business, is a trainer of German Shepherds, which he describes as ‘protection dogs’.
86. The judge was right to identify a number of significant gaps in the evidence. These included how and why the SPH Trust was set up, the instructions given to Mr Austin Fergus regarding investment policy, and Mrs Mary Shovlin’s knowledge of the loans which had been made. In fact the only evidence about these matters came from Mr Philip Shovlin, who was found by the judge to be an unreliable witness, and who (on

the basis of the matters summarised above) was either a somewhat unsavoury character or something of a fantasist. His evidence, therefore, was unable to plug the gaps in the claimant's case.

87. In these circumstances it was necessary, in my view, to keep firmly in mind that the burden was on the claimant to prove that Mr Austin Fergus had acted in breach of fiduciary duty and the judge was entitled to draw adverse inferences from the fact that Mrs Mary Shovlin did not give evidence. Despite her age and her cancer diagnosis, there was no medical evidence to suggest that there would have been any difficulty in her doing so.
88. Without evidence from Mrs Mary Shovlin, or of course from the late Mr Austin Fergus who appears to have left no papers which would explain his actions, the judge had to do the best with what he had. In my judgment, he was entitled to reject the case that the investment policy of the SPH Trust was confined to low-risk investing in stocks and shares, and to conclude that Mr Austin Fergus had explained that he could get a better return on investment than was currently being achieved by an independent financial adviser in Warrington which the Shovlin family had been using, by lending trust money to contacts of his. There was no reliable evidence that this had not been approved by Mrs Mary Shovlin, and good reason to think that it had been. If that was so, there could be no question of any disloyal intention to subordinate the interests of the Trust to those of Mr. Crosby and SCS.
89. In reaching his decision, the judge took into account the peculiar features of the loans to which I have referred. Nevertheless, he concluded that the claimant had failed to prove an essential element of her case. I see no justification for this court to interfere with that conclusion.