Neutral Citation Number: [2021] EWHC 777 (Ch)

Case No: BL-2018-002614

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 30/03/2021

Before :

MR JUSTICE MORGAN

- -

Between:

JOSEPH BENKEL (as trustee in bankruptcy of Eliezer Fishman)	**Claimant**
- and -	
(1) EAST-WEST GERMAN REAL ESTATE HOLDING	
(2) MIRELLA ELENA HELBET	
(3) WILLIBALD DIKAUTSCHITSCH	**Defendants**

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Mr Simon Colton QC and **Mr Sam O'Leary** (instructed by **Fieldfisher LLP**) for the **Claimant**
Mr Jamie Riley QC and **Mr James McWilliams** (instructed by **Asserson Law Offices**) for the **Defendants**

Hearing dates: 26-29 January, 1-3 and 24-25 February 2021

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Approved Judgment

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

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 30 March 2021.

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MR JUSTICE MORGAN

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Introduction

1. This is a claim by a trustee in bankruptcy. He claims that a certain transaction was entered into for the purpose of hiding the assets of the bankrupt. The claim is an unusual one in that the trustee is not able to show that the transaction concerned assets which he has been able to identify (apart from the rights in the formal legal structure which was created by the transaction). The trustee in bankruptcy and the witnesses he has called cannot give direct evidence as to the purpose of the transaction. Three of the individuals who were involved in the transaction have given evidence that the purpose of the transaction was not as alleged by the trustee and I will have to decide whether to believe their evidence. Further, there are others who almost certainly know a great deal about the purpose of the transaction but they have not been called to give evidence at the trial. The court is therefore asked to determine the purpose of the transaction when it is clear that it has not been given all of the evidence that would be available relating to that issue.

The parties

2. The claimant, Mr Benkel, is an Israeli lawyer and is the trustee in bankruptcy of Mr Eliezer Fishman, an Israeli businessman. Mr Fishman was declared bankrupt by an Israeli court on 21 June 2017 and, on the same day, Mr Benkel was appointed as his trustee. Under Israeli law, all of Mr Fishman's assets vested in his trustee. On 7 December 2018, this court recognised the Israeli bankruptcy proceedings as foreign main proceedings in accordance with the Cross-Border Insolvency Regulations 2016. There was a later attempt by Mr Fishman to challenge the recognition order but that application was discontinued by Mr Fishman. I will refer to Mr Fishman further later in this judgment.

3. The First Defendant, East-West Germany Real Estate Holding ("East-West UK"), is a company limited by guarantee incorporated in England and Wales on 22 September 2016. Since that time, its sole member and its sole director has been the Second Defendant, Ms Helbet. East-West UK owns all of the shares in East-West Real Estate Germany GmbH ("East-West Germany"). I will describe the position of East-West UK in greater detail later in this judgment.

4. The Second Defendant, Ms Helbet, is a Romanian national who, in recent years, has been resident in Ibiza, Spain.

5. The Third Defendant, Mr Dikautschitsch, is a German national and is the domestic partner of Ms Helbet with whom he lives in Ibiza, Spain. Mr Dikautschitsch was joined as a Defendant to these proceedings by an order I made in the course of the trial on 3 February 2021. I gave a separate judgment which contained my reasons for making that order and the neutral citation of that judgment is [2021] EWHC 188 (Ch).

Other relevant persons

6. Mr Fishman is an Israeli businessman. He controlled a number of private companies which together held a controlling interest in a company which invested in real estate, Jerusalem Economic Corporation Ltd ("JEC"). JEC was a public company quoted on

the Tel Aviv stock exchange. It was at the top of a large and elaborate structure comprising some 150 companies or thereabouts. I was told that on 3 November 2015, a creditor, Bank Leumi, took over most of the shares of JEC held by Mr Fishman's private companies and, shortly after that, other creditors took similar steps regarding the remainder of the JEC shares held by Mr Fishman's private companies. On 5 November 2015, Mr Fishman resigned from the board of JEC. Until 30 June 2016, Mr Fishman remained on the board of a subsidiary of JEC, which was referred to as "IBC". The corporate structure which sat under JEC contained a number of companies which had been incorporated in Germany and some, at least, of the German companies owned real property assets based in Germany.

7. Mr Benkel's evidence was that Mr Fishman had given personal guarantees in relation to some of the borrowings of various companies.

8. In August 2016, the Israel Tax Authority petitioned for Mr Fishman's bankruptcy on the basis that he owed substantial sums of personal tax. On 12 December 2016, a court in Israel made a Receivership Order in respect of Mr Fishman's assets and Mr Benkel was appointed as a Special Administrator, which is akin to being an interim trustee in bankruptcy. This gave Mr Benkel the power to control Mr Fishman's assets although they did not vest in Mr Benkel at that stage. At that date, Mr Fishman owed approximately 3.9 billion New Israeli Shekels which I was told was approximately £830 million. Most of this money was owed to banks in Israel and £45 million was owed to the Israel Tax Authority. On 21 June 2017, Mr Fishman was declared bankrupt and Mr Benkel was appointed as his trustee in bankruptcy; as a result, Mr Fishman's assets vested in Mr Benkel.

9. Mr Benkel gave evidence that he had conducted a number of interviews with Mr Fishman, his lawyers, his family and those who worked for him and that Mr Fishman and others had given Mr Benkel "an enormous amount of disclosure of his assets". In particular, Mr Fishman disclosed to Mr Benkel the existence of the following two properties in Germany: first, an apartment in Berlin belonging to Mr Fishman and his wife and, secondly, a property in Wolmirstedt, owed by two German companies which were ultimately controlled by Mr Fishman and his family members through a Dutch company.

10. In connection with a suggestion from the claimant that I ought to draw an adverse inference from the fact that the defendants had not called Mr Fishman to give evidence in this case, I was provided with medical evidence as to Mr Fishman's health.

11. Mr Rese is a lawyer in Chemnitz. His firm is known as P & B Law. He played an important role in the events which are relevant in this case. He did not give evidence at the trial but he provided some answers in a court in Germany under the Taking of Evidence Regulation.

12. Mr Kreider is an investor in property. He was involved in a number of property transactions with Mr Fishman and he was a shareholder in East-West Germany and was involved in the transaction which is of central importance in this case. He did not give evidence at the trial.

13. Mr Katz is the nephew of Mr Fishman. He was involved in some of the events which are relevant in this case. He did not give evidence at the trial.

14. Ms Menipaz is a daughter of Mr Fishman. She is a businesswoman in Israel in her own right and she is a lawyer and member of the Israeli Bar Association. She was a shareholder in East-West Germany until she transferred her shares to East-West UK in around October 2016. She owed approximately €64,000 to East-West Germany at that time. She gave evidence that she was funding the defence of these proceedings by East-West UK and Ms Helbet.

15. At this point, I will provide some further information as to East-West UK, East-West Germany and JURAG Chemnitz GmbH & Co KG ("JURAG").

East-West UK

16. On 22 September 2016, the First Defendant ("East-West UK") was incorporated in England and Wales as a company limited by guarantee. The address of its registered office was in Wakefield, West Yorkshire. The sole member and the sole director was the Second Defendant, Ms Helbet. The address she provided to Companies House was an address in Urziceni, Romania, which was the home of her parents.

17. Pursuant to a deed executed on 7 October 2016, East-West UK acquired all the shares in East-West Germany.

18. East-West UK filed accounts for the first time for the year ending 30 September 2017. The accounts stated that the company was entitled to exemption under section 480 of the Companies Act 2006 relating to dormant companies. The accounts stated that the assets of the company were £0. The accounts were said to be approved by the board on 2 October 2018 and they were signed by Ms Helbet. East-West UK filed accounts in similar terms for the years ending 30 September 2018 and 30 September 2019 save that the assets were stated to be £1. Based on what is shown in its accounts, East-West UK did not carry on any activity during the period covered by these accounts.

19. The accounts for East-West UK stated that its assets were £0 or £1 even though it owned all the shares in East-West Germany the accounts of which stated that it had assets, as I will later explain.

East-West Germany

20. East-West Germany was incorporated in Germany on 2 August 2004. Its managing directors were (as at 29 February 2016 and since at least 2007) Mr Kreider and Mr Steinman. From 2004 to 2006, the registered address of East-West Germany was an address in Hartmannsdorf, Saxony, Germany which was the address of Mr Kreider's real estate investment business, O.K. Haus-u. Immobilien. In 2006, East-West Germany's registered address was changed to an address in Viernheim, Hessen, Germany; Viernheim is the birthplace of Mr Kreider.

21. East-West Germany had a total share capital of €27,000. Prior to October 2016, the shareholders were as follows: Mr Kreider and Mr Steinman each had a 1/3 interest; the remaining 1/3 was divided evenly between Mr Fishman's three children, Ms Anat Menipaz, Mr Eyal Fishman and Mrs Ronit Fishman-Ofir.

22. When East-West UK acquired all of the shares in East-West Germany on 7 October 2016, East-West Germany's registered address was moved to an address at Mühlenstraβe, Berlin. At that stage, Ms Helbet was appointed as the sole managing director with sole authority to sign legal contracts.

23. On 7 December 2018, the Israeli bankruptcy proceedings were recognised by the English Court as a foreign main proceeding by order of Mr Justice Nugee. In the course of the same ex parte hearing, Nugee J granted Mr Benkel's application for a proprietary injunction for the preservation of the shares held by East-West UK in East-West Germany and the membership interest of Ms Helbet in East-West UK. At the same time, Nugee J appointed Mr Jeremy Willmont and Mr Neville Side, then of Moore Stephens LLP (now at BDO) (the "Receivers"), as receivers and managers of all the shares in East-West Germany owned by East-West UK, together with all powers, rights and interests over or arising from such shares. Nugee J held that there was (at least) a good arguable case that those assets were held on trust for Mr Fishman and that the Court had jurisdiction over Ms Helbet under Article 8(1) of the Brussels Regulation (recast). On the adjourned return date on 29 January 2019, Ms Helbet and East-West UK effectively conceded that there was a good arguable case that the relevant assets were held on trust for Mr Fishman, and the proprietary injunction was continued by Ms Julia Dias QC sitting as a Judge of the High Court. The proprietary injunction and the receivership order remain in place.

24. On 14 January 2019, the Receivers resolved to appoint Mr Christian Hahnenberger, a German lawyer, as managing director of East-West Germany. This appointment was registered in the companies register of the Charlottenburg district court on 23 January 2019 and that same day Mr Hahnenberger wrote to Ms Helbet seeking information concerning East-West Germany which she had previously failed to provide in response to requests from the Receivers. He repeated that request on 29 January 2019. On 24 January 2019, Ms Helbet was informed by the Receivers of her dismissal from the role of managing director of East-West Germany. That dismissal was registered in the companies register on 4 February 2019 but was challenged (unsuccessfully) by Ms Helbet.

25. Draft accounts for East-West Germany have been prepared. In April 2019, Baker Tilly prepared draft accounts for the year ending 31 December 2016 and these accounts also showed the figures for the previous year. By April 2019, Ms Helbet had been removed as managing director of the company and the managing director was then Mr Hahnenberger, as explained earlier.

26. For the year ending 31 December 2015, the balance sheet for East-West Germany showed assets in form of loans due to the company of approximately €740,000, sundry assets of approximately €61,000 and cash of approximately €9,500. The balance sheet showed a provision for taxes of approximately €55,000. The comparable figures for the year ending 31 December 2016, were €734,000 (loans), €9,000 (sundry assets), €24,000 (cash) and €nil (provision for taxes).

27. The profit and loss account for the years ending 31 December 2015 and 31 December 2016 showed income in the form of interest and similar income and expenditure in the form of modest operating expenses and some taxes. The new profit for 2015 was approximately €2,800 and the new profit for 2016 was approximately €11,000.

28. The draft accounts for the year ending 31 December 2016 contained a breakdown of the loans referred to above as at 31 December 2015 and 31 December 2016. At the earlier date, the loans were as follows: Mr Kreider owed some €215,000, Mr Steinman owed some €200,000, Mr Eyal Fishman owed some €74,000, Ms Fishman-Ofir owed some €64,000, Ms Menipaz owed some €64,000 and a company referred to as Waterfront owed some €124,000. At the later date, the amount of the loans are only a little different.

29. The draft accounts for East-West Germany for the years ending 31 December 2017 and 31 December 2018 were also prepared by Baker Tilly. The various figures are similar to the figures shown in the earlier years and it is not necessary to set them out. Based on what is shown in its accounts, East-West Germany did not carry on any activity during the period covered by these accounts and its income consisted of interest and "similar income".

A diversion into the loan extensions

30. At the trial, there was a detailed investigation as to the circumstances in which certain loan agreements were executed and given the date of 8 October 2016. The claimant's case was that these agreements were entered into, or purportedly entered into, in 2019 and that they were backdated in order to mislead. The defendants' witnesses denied the allegation that the documents were backdated. This issue then took on an additional importance in relation to the credibility of this denial and the credibility of the defendants' witnesses more generally. The relevant witnesses were Ms Helbet and Mr Dikautschitsch themselves and also Ms Menipaz. At an early point in his closing submissions, Mr Colton QC, on behalf of the claimant, made detailed submissions as to these agreements or purported agreements and relied on those submissions when he invited the court to hold that the defendants' witnesses could not be relied upon as truthful witnesses. In turn, Mr Riley QC for the defendants addressed this issue at an early stage in his closing submissions. In these circumstances, I will adopt a similar approach of dealing with the issue about the loan agreements at this stage in the judgment. I consider that my findings on this issue will have an important bearing on whether I can accept the evidence of the defendants' witnesses.

31. As explained earlier, when the shares in East-West Germany were transferred to East-West UK in October 2016, East-West Germany was owed a total of some €800,000. This was the aggregate of the loans due to the company from the five former shareholders and also from Waterfront. If the transfer of the shares had been a genuine transaction, one would have thought that the former shareholders would have been concerned to know what could happen in the future in relation to these loans. East-West UK was not asked to pay the former shareholders for the shares in East-West Germany and if the result of the transfer of the shares was that the former shareholders would have to pay off the loans from the company, then the transaction would seem to have been disadvantageous to them. Before the transfer of the shares, the five shareholders would have been in a position to procure that East-West Germany would pay a dividend to the shareholders which would equal the amount of the loans; that would mean that the shareholders would have to pay tax on the dividend but would not have to repay the loans. After the transfer of the shares, the new owners of East-West Germany would be in a position to call in the loans. From the evidence in this case, it seems that the five shareholders were in a financial position to pay the loans so that it was not likely that they would be regarded as bad

debts which would have to be written off. Accordingly, the transfer of the shares would indeed have been disadvantageous to the former shareholders unless, of course, some agreement was reached in relation to the loans.

32. There was evidence at the trial that there was an agreement between Mr Dikautschitsch and Mr Kreider, acting for the five shareholders, which dealt with the issue of the loans. The agreement was said to have been an oral agreement between Mr Dikautschitsch and Mr Kreider alone. It was said that Mr Dikautschitsch and Mr Kreider discussed the possibility that East-West Germany might have had tax liabilities. It was said that the amount of those tax liabilities was not known. It was said that it was agreed that if East-West Germany was called on to pay any such taxes (and possibly meet any other liabilities which accrued before the transfer of the shares) then East-West Germany could call in the loans but only to the extent needed to meet its liabilities in relation to taxes and possibly other matters. It was said that otherwise East-West Germany would not call in the loans. As described, the alleged oral agreement sounded reasonably sensible. However, the evidence suggests that it would have been relatively easy to quantify the tax liabilities and then deal with the loans on that basis. In this respect, I take account of what Mr Rese said about the tax liabilities in his email to Mr Kreider and Mr Katz on 10 August 2016; this email was forwarded to some of the other shareholders. In any case, there was no explanation as to why the parties did not record this alleged oral agreement in some way. If the transfer of shares had been a genuine transfer, it would have been desirable to do so and it does not seem that it would have been difficult to do so.

33. There was also evidence at the trial that the parties entered into written agreements about the loans. The problem about the alleged written agreements is that they were in different terms from the alleged oral agreement. The alleged written agreements were dated 8 October 2016 and were made between East-West Germany and four of the five shareholders, namely, Mr Kreider, Mr Eyal Fishman, Ms Fishman-Ofir and Ms Menipaz. The agreements are in German. The agreements are signed by Ms Helbet and these four shareholders. If these were genuine written agreements, entered into on 8 October 2016, then there would have been no reason why there would not also have been an agreement signed by the fifth shareholder, Mr Steinman, but no agreement signed by him was produced.

34. The alleged written agreements recorded that the relevant shareholder had received a loan of a specified amount from East-West Germany; there was no indication of when the loan was made. The agreement then stated that the loan was granted for 10 years and carried interest at 3% (presumably an annual rate) with the interest being due on repayment of the loan. These terms were obviously different from the alleged oral agreement. These terms did not permit East-West Germany to call in the loans to meet any previously accrued liabilities for tax or other matters within the first 10 years so the company did not have the benefit of accessing the loan in accordance with the alleged oral agreement. Further, the former shareholders did not have the benefit of the loans being written off as the loans would be fully recoverable, with interest, after 10 years.

35. The evidence about the differences between the alleged oral agreement and the alleged written agreements was not satisfactory; there was no proper explanation for the differences between the agreement when, on Mr Dikautschitsch's case, the two agreements were made at around the same time.

36. The claimant did not accept that the four signed written loan agreements were entered into on the date they bore, 8 October 2016. The claimant's case was that the signed loan agreements were entered into much later and not for the purpose of recording the arrangements, if any, made in October 2016. The claimant relies on a number of matters, as follows:

    i) Mr Dikautschitsch did not refer to the loan agreements in his first witness statement in January 2019;

    ii) on 14 January 2019, Mr Kreider's secretary emailed Mr Dikautschitsch asking him to arrange for Ms Helbet to sign a document which was attached; it is not possible to know whether the attached document was the written version of the loan agreement; no other document was positively identified as the attached document;

    iii) on 8 February 2019, Mr Dikautschitsch supplied a large number of documents to Mr Hahnenberger who had been appointed by the receivers as the managing director of East-West Germany but the documents did not include the loan agreements;

    iv) it is known that Ms Helbet had signed the loan agreements by April 2019; on 11 April 2019, Baker Tilly wrote to Mr Dikautschitsch referring to the loan agreements which they had obviously seen but pointed out that they had been signed by Ms Helbet alone and not by the former shareholders; Baker Tilly asked to be sent loan agreements signed by the borrowers; they chased up this request on 3 May 2019;

    v) on 29 May 2019, Mr Dikautschitsch emailed Ms Menipaz and attached copies of the draft loan agreements, stating that he had spoken to Ms Menipaz about them; he asked her to send them back signed; it is not in dispute that the attachments included draft loan agreements to be signed by herself, Mr Eyal Fishman and Ms Fishman-Ofir; Ms Menipaz also said that she was sent a draft loan agreement for Mr Steinman and that she asked him to sign it but she thought that he did not sign it;

    vi) Mr Steinman told Mr Benkel in an interview that he was asked to sign the draft loan agreement bearing the date 8 October 2016 but that he declined to sign a back-dated document and no loan agreement signed by Mr Steinman has been produced;

    vii) following Mr Dikautschitsch's email of 29 May 2019, Ms Menipaz sent to Mr Dikautschitsch loan agreements signed by herself and her brother and sister; the loan agreements bore the date 8 October 2016;

    viii) on 7 June 2019, Mr Dikautschitsch sent to Mr Hahenberger the loan agreements signed by Ms Menipaz and her brother and sister.

37. There was evidence about the loan agreements from Ms Helbet, Mr Dikautschitsch and Ms Menipaz. Ms Helbet did not refer to the fact of the loans or to the loan agreements in her witness statement. When cross-examined, she said that she could not recall when she signed the loan agreements.

38. Mr Dikautschitsch's evidence on this subject was not satisfactory. He professed to remember that the loan agreements had been signed on 8 October 2016 in Mr Kreider's office, the day after the transfer of the shares on 7 October 2016. It was pointed out that Ms Helbet had signed the transfer of the shares on 13 October 2016 and Mr Dikautschitsch then said that the loan agreements would have been signed the day after she signed the transfer of the shares. As to the copies of the loan agreements signed by the former shareholders, Mr Dikautschitsch said that he left that to Mr Kreider. Mr Kreider arranged for the former shareholders to sign the loan agreements and when Baker Tilly asked for them in 2019, Mr Dikautschitsch obtained them from Mr Kreider. Mr Dikautschitsch said that he had not had any dealings in relation to this topic with the former shareholders. This was not accurate as he discussed the matter with Ms Menipaz and then sent her the draft loan agreements on 29 May 2019 and she returned the signed loan agreements to him. When cross-examined, it was not clear whether he accepted that the loan agreements were back-dated.

39. Ms Menipaz's evidence about the signing of the loan agreements was also not satisfactory. She professed not to have paid much attention to the alleged original arrangement about the loans. When cross-examined, she accepted that she understood the terms of the draft loan agreements sent to her by Mr Dikautschitsch. She seemed to say that she did not notice that the loan agreements were different from the alleged oral agreement. She said that when she received the draft loan agreements from Mr Dikautschitsch, she went to her sister and her sister found the earlier versions which Ms Menipaz and her brother and sister had already signed and that Ms Menipaz sent these earlier versions to Mr Dikautschitsch.

40. In considering the reliability of the evidence I heard about the signed loan agreements, I can take into account that there was an obvious reason why the former shareholders would have wanted to enter into the loan agreements in early 2019, backdated to October 2016. By early 2019, Ms Helbet and Mr Dikautschitsch had lost control of East-West Germany which was now under the control of the receivers appointed on the application of Mr Benkel. Ms Menipaz in particular, and probably her brother and sister also, were hostile to Mr Benkel and, in any event, would not want to be called on to pay back the loans from East-West Germany. One way to avoid that would be to purport to enter into the loan agreements, backdated to October 2016, in order to attempt to postpone liability to repay for 10 years. That was not a waiver of the loans which might have resulted in a tax liability but would mean that they would not have to pay anything at that point and, after 10 years, the position would be likely to be very different. This possible explanation suggests that the loan agreements were signed for the first time in 2019 and were backdated to 8 October 2016.

41. The subject of the loan agreements is important for a number of reasons. First, it is relevant as to the effect of the backdated loan agreements. Secondly, my findings throw light more generally on the credibility of Mr Dikautschitsch and of Ms Menipaz. Thirdly, they throw light on the nature of the transaction when the shares in East-West Germany were transferred to East-West UK.

42. If the loan agreements were only executed by Ms Helbet in early 2019, they would be of no effect because, at that stage, she did not have authority to act on behalf of East-West Germany.

43. As regards the credibility of Mr Dikautschitsch and Ms Menipaz, I am unable to accept their evidence as to the circumstances in which the loan agreements were signed. The confusion in their evidence between the alleged oral agreement from October 2016 and the terms of the loan agreements was never satisfactorily explained. In those circumstances, the inherent likelihood is that the loans were signed by Ms Menipaz and her brother and sister after the drafts were sent by Mr Dikautschitsch on 29 May 2019. I also have the evidence of Mr Steinman's statement to Mr Benkel that he was asked to sign a backdated loan agreement and he declined to do so. I therefore do not accept the evidence of Ms Menipaz and Mr Dikautschitsch on this subject. That finding means that they (and Ms Helbet also) were prepared to backdate documents to give a misleading impression. Further, Mr Dikautschitsch and Ms Menipaz were prepared to give evidence at the trial which they knew to be untrue; I cannot see how they might have made a genuine mistake about this evidence. That finding means that I cannot really rely on anything which they told me which is of a contentious nature and which is not supported by other material or other considerations, such as its inherent probability. It was submitted that I should not make this finding against Ms Menipaz because it was a very serious finding to make against a lawyer who is a member of the Israeli bar. I agree that the finding is a serious one and I do not make it except for compelling reasons.

44. Further, on the credibility of Ms Menipaz with particular reference to the signed loan agreements, I was referred to her email to Mr Hahnenberger on 31 July 2019. This email was in response to a demand made by Mr Hahnenberger that Ms Menipaz repay the loan which was the subject of the signed loan agreement with her. Mr Hahnenberger's demand was dated 15 July 2019. At the trial, I was told that the letter of demand was not available but the letters of demand to the former shareholders of East-West Germany are in Appendix 5 to Mr Hanhneberger's petition to the court in Charlottenberg to wind up the company. The letter of demand referred to the signed loan agreement, alleged that the making of the various loans had drained all funds from the company and violated the statutory rules on share capital maintenance. The letter then sought to terminate the loan agreement with immediate effect and demanded repayment from Ms Menipaz. Ms Menipaz replied to this demand by her email of 31 July 2019. Most of her email challenged the powers of Mr Benkel to proceed as he had done. She added that the loan agreements did not violate any share capital maintenance rule. It was pointed out that she did not specifically say that the loan was not repayable for the period of 10 years from 8 October 2016. It was submitted that if she had gone to the trouble of backdating documents in June 2019 to obtain the benefit of a 10 year postponement of her liability to repay this loan, it would have been likely that she would have made more of that point. Whilst I accept that this is a matter which deserves to be considered, I am not persuaded that her failure to raise that argument outweighs the other more weighty considerations which point to the signed loan agreements as having been signed in 2019 and backdated to 8 October 2016. For what it is worth, I note that Mr Kreider's reply to the demand made by Mr Hahnenberger on him, did contend that there were no "due claims" against him and that the loan agreement was "still binding"; those references would seem to be to the fact that under the loan agreement, the debt was not due for 10 years.

45. Thirdly, my rejection of the evidence about the loan agreements means that I next need to consider what finding to make as to the alleged oral agreement that East-West Germany could call in the loans but only for the purpose of funding its already

accrued liabilities for tax and other matters. It is of course possible that the parties did enter into an oral agreement in those terms but yet signed and backdated the written loan agreements in 2019 to avoid Mr Hahnenberger being able to call in the loans to meet those liabilities. However, the fact that the loan agreements gave East-West Germany an absolute right to call in the loans after the 10 year period gives no support to the idea that there was an earlier oral agreement which limited the company's right to call in the loans to restricted circumstances only. Further, the suggestion was that this oral agreement was made because it was not possible to quantify the amount of the accrued liabilities in relation to tax. I doubt if that was the case. In Mr Rese's email of 10 August 2016 to Mr Kreider and Mr Katz, Mr Rese was able to describe the tax liabilities of East-West Germany. That email was copied by Mr Katz to Mr Eyal Fishman, Ms Fishman-Ofir and Mr Steinman. In the email, Mr Rese first referred to the tax liability disclosed in the balance sheet of the company and he then referred to an additional liability on the part of the company to pay a capital gains tax of 25%; there is no real suggestion that the amount of that latter tax was difficult to calculate.

46. I am not persuaded that the parties did make an oral agreement in October 2016 about the circumstances in which East-West Germany could, and could not, call in the loans. The evidence on this point from Mr Dikautschitsch and Ms Menipaz is not reliable. The defendants did not call Mr Kreider although Mr Dikautschitsch alleged that the oral agreement was made with him. I consider that the absence of an oral agreement as to the loans is revealing as to the nature of the transaction. It means that the five shareholders of East-West Germany, who owed substantial sums to the company, were prepared to transfer their shares to East-West UK, controlled apparently by Ms Helbet, without receiving any payment for the transfer. On the case put forward at the trial, the former shareholders did not know Ms Helbet and could not assume that she would act in accordance with the directions of the former shareholders. Even if the former shareholders knew that Ms Helbet was likely to act on the direction of Mr Dikautschitsch, the case put forward at the trial was that Mr Dikautschitsch was not the nominee or under the control of the former shareholders or anyone like Mr Katz or Mr Rese or even Mr Fishman. Thus, on the case put forward at the trial (absent an oral agreement as to the loans), the former shareholders were vulnerable to claims by East-West Germany for repayment of the loans. I consider that it is most unlikely that the former shareholders would have placed themselves in that position. That points to the transaction being entered into in circumstances where the persons in control of East-West UK were regarded by the former shareholders as being under the control of someone who would protect the former shareholders from the loans being called in.

JURAG

47. JURAG is a German limited partnership. A German limited partnership has a general partner and a limited partner. The general partner is responsible for managing the limited partnership and is liable for the debts and other liabilities of the limited partnership. However, it is usual for the general partner to be a GmbH, that is, a company with limited liability. The general partner does not own any part of the economic value of the limited partnership. A limited partnership will also have a limited partner. The limited partner will own all of the economic value of the limited partnership but has limited liability for the debts and other liabilities of the limited

partnership. The identity of the general partner and the limited partner are disclosed in a public register of limited partnerships. A limited partnership must file accounts with the public registry.

48. On 9 November 2016, Mr Dikautschitsch entered into an agreement to become the limited partner of JURAG in place of the former limited partners, JURAG AG (a Swiss company) and PRIORA Handelsgelleschaft mbH (an Austrian company), ostensibly having made a €10,000 contribution. On 14 December 2016, East-West Germany agreed to become the general partner of JURAG. This was registered by the Charlottenburg district court companies register on 23 January 2017.

49. Baker Tilly prepared accounts for JURAG for the year ending 31 December 2017 and they show the position for the previous year also. These accounts show that JURAG was owed €10,000 by Mr Dikautschitsch and that it had losses of some €77,000 in the year to 31 December 2016. JURAG had a loss of some €3,000 in the year to 31 December 2017. The accounts refer to a bank account at Volksbank with a small credit balance. Further, the accounts show a debt of some €47,000 owed to JURAG AG and a debt of €22,500 owed to Mr Rese. Based on what is shown in its accounts, JURAG did not carry on any activity after control of it passed to East-West Germany and Mr Dikautschitsch.

The petitions to wind up East-West Germany and JURAG

50. On 23 July 2019, Mr Hahnenberger petitioned on behalf of both East-West Germany and JURAG to wind up the companies, on the basis that they were unable to pay their debts (in particular fines for the late filing of statutory accounts and the debts apparently owed to JURAG AG (some €47,000) and Mr Rese (€22,500)) as they fell due. On 31 July 2019, the Charlottenburg district court appointed an expert, Christian Kohler-Ma, to investigate the matter. In early August 2019, Mr Kohler-Ma made enquiries of both JURAG AG and Mr Rese as to whether they were asserting the claims they apparently had against JURAG. Each promptly replied to say they had no claims against the company. In late August, Mr Rese's law firm (P&B Law), ostensibly acting as Mr Dikautschitsch's and Ms Helbet's attorney, settled the unpaid debts owed by East-West Germany and JURAG. In light of these waivers, and the settlement of debts, Mr Kohler-Ma concluded that both East-West Germany and JURAG were able to pay their debts as they fell due and were thus not insolvent. As subsequent debts fell due, they were settled from a bank account in the name of East-West Germany, controlled by Mr Dikautschitsch.

The procedural history

51. Mr Benkel brought these proceedings on 11 December 2018 against two defendants, East-West UK and Ms Helbet. The Particulars of Claim referred to the acquisition by East-West UK of the shares in East-West Germany and also referred to the acquisition of JURAG. The relief sought by Mr Benkel consisted of various declarations as to East-West UK and Ms Helbet holding their rights and powers as trustee or nominee for Mr Benkel in his capacity as trustee in bankruptcy of Mr Fishman. Mr Benkel also sought an order that the shares in East-West Germany and full ownership and control of East-West UK be transferred to Mr Benkel in that capacity.

52. East-West UK and Ms Helbet served a Defence in the proceedings and denied that Mr Benkel was entitled to the relief which he sought.

53. On 6 May 2020, Mr Benkel applied for orders pursuant to the Taking of Evidence Regulation, Council Regulation (EC) No 1206/2001 so as to secure the taking of evidence by a German court from two German nationals, Mr Rese and Mr Kreider. That application came before Mr Charles Morrison, sitting as a Deputy High Court Judge, at a hearing on 4 June 2020. The defendants told the Deputy Judge that they did not oppose the application but they were sceptical as to the need for it. The Deputy Judge also dealt with a further application which had been made by Mr Benkel to which I will refer below. On 12 June 2020, the Deputy Judge handed down a judgment dealing with both applications, the neutral citation of which is [2020] EWHC 1489 (Ch). The Deputy Judge stated that he was satisfied that he ought to make orders under the Regulation and he did so by an order dated 12 June 2020.

54. On 22 May 2020, Mr Benkel applied to join Mr Dikautschitsch as a defendant to these proceedings. In a draft pleading served in support of that application, it was alleged amongst other things that Mr Dikautschitsch held his rights and powers in JURAG as trustee and nominee for Mr Benkel in his capacity as trustee in bankruptcy of Mr Fishman. That application also came before Mr Charles Morrison sitting as a Deputy High Court Judge at the hearing on 4 June 2020. He dismissed the application. He gave his reasons in his judgment handed down on 12 June 2020. The Deputy Judge concentrated on the allegation that Mr Dikautschitsch had held his rights and powers in JURAG as a nominee for Mr Fishman (and now Mr Benkel as his trustee in bankruptcy). The Deputy Judge was critical of Mr Benkel for not seeking to put this case forward at an earlier stage in the proceedings. The Deputy Judge also said that if Mr Dikautschitsch were joined as a defendant, it was likely he would object to the jurisdiction of the court and, if he did object, that objection would take time to resolve and the trial date for the existing claim would be lost. As a result, the Deputy Judge declined to join Mr Dikautschitsch as a defendant.

55. At a Pre-Trial Review on 14 January 2021, I gave directions for the trial to be held remotely by Microsoft Teams.

56. In the course of the trial, Mr Benkel made a further application to join Mr Dikautschitsch as a defendant and I acceded to that application for the reasons in the judgment which I gave on 3 February 2021. The case as now pleaded against Mr Dikautschitsch is a narrower one than the case pleaded in the draft pleading considered by the Deputy Judge. In particular, the case as now pleaded does not contain the allegation that Mr Dikautschitsch held his rights and powers in JURAG as a nominee for Mr Fishman, or now Mr Benkel. Instead, two other contentions are advanced. The first is that if Ms Helbet held her rights and powers in East-West UK and East-West Germany on trust for Mr Dikautschitsch, then he held his interests under those trusts as nominee for Mr Fishman, or now Mr Benkel. The second contention is that Mr Dikautschitsch was the agent of Mr Fishman, either disclosed or undisclosed, and was able to call on Ms Helbet to exercise her rights and powers for Mr Fishman and that Ms Helbet was obliged to transfer her rights and powers to Mr Fishman or now Mr Benkel.

57. Although the claim as now pleaded does not seek declaratory relief in relation to Mr Dikautschitsch's rights and powers in JURAG, it is clear from the evidence in this

case that the events concerning JURAG are closely connected with the events concerning East-West UK and East-West Germany.

58. On 2 February 2021, Mr Rese attended a court in Chemnitz, Germany pursuant to the order made in these proceedings on 12 June 2020 pursuant to the Taking of Evidence Regulations. That order had set out the questions which were to be put to Mr Rese. There were 59 questions. Questions 1 to 9 related to Mr Rese's relationship with nine individuals who were said to be key individuals. Questions 10 to 19 related to his involvement with East-West Germany. Questions 20 to 22 concerned the operation of the bank account of East-West Germany. Questions 23 to 26 related to the other assets of East-West Germany. Questions 27 to 35 concerned his connection with JURAG. Question 36 related to a newspaper article about Mr Kreider. Questions 37 to 44 concerned the meetings with inquiry agents, the Black Cube investigators to whom I refer later in this judgment. Questions 45 to 55 related to the properties offered for sale to the Black Cube investigators. Questions 56 to 59 came under the heading of other matters.

59. In the Chemnitz court on 2 February 2021, Mr Rese provided a six page written submission containing the answers which he was prepared to give to the above questions. He made it clear that he would not answer some of the questions because, he claimed, they were the subject of legal professional privilege. This was on the basis that his firm, P&B Law had provided legal advice to East-West Germany. He also said that he would not answer other questions because they exclusively concerned his private business.

60. Mr Rese then gave his answers to some of the questions in accordance with his written submission and those answers were noted down by the Chemnitz court in condensed form. Mr Rese answered questions 1 to 9. As to questions 10 and 11, he suggested that the answers should be obtained from the public register for East-West Germany. He did not answer questions 12 to 35 apparently on the basis of the claim to legal professional privilege. He briefly commented on the newspaper article the subject of question 36. He gave brief answers to some of questions 37 to 44. As to questions 45 to 52, concerning a company referred to as MIVNE 11, he said that had nothing to do with Mr Fishman and the questions concerned his own private activities so he would not answer them. He did not answer questions 53 and 54 on the basis that they concerned his private activities. Question 55 was not dealt with. As to question 59, he said that he had not assisted in any way in funding the defence of these proceedings.

61. The taking of evidence from Mr Kreider pursuant to the order of 12 June 2020 was scheduled to take place in Meissen on 7 January 2021. The claimant understands that Mr Kreider told the Meissen court that he would be in South Africa until April 2021 and could not attend in Meissen on 7 January 2021. The result was that the Meissen court rescheduled the hearing for 7 May 2021. The claimant submitted that Mr Kreider's explanation for his alleged inability to attend court on 7 January 2021 was suspicious. However, I was not asked to adjourn the trial until after Mr Kreider gave his answers to the questions asked of him on 7 May 2021 nor was I asked to defer giving judgment until his answers were available.

The issues

62. In order to deal with the case as pleaded, the court is asked to make findings as to:

    i) The relationship between Ms Helbet and Mr Dikautschitsch in relation to East-West UK and East-West Germany;

    ii) The relationship between Ms Helbet and Mr Fishman in relation to East-West UK and East-West Germany;

    iii) The relationship between Mr Dikautschitsch and Mr Fishman in relation to East-West UK and East-West Germany.

The witnesses

63. The witnesses for the claimant were Mr Benkel himself, Dr Yanus and Mr Hayward.

64. In relation to the matters which the court has to decide in this case, Mr Benkel explained why he was very suspicious of the arrangements which were made concerning East-West UK, East-West Germany, Ms Helbet and Mr Dikautschitsch. However, although he explained his suspicions in those respects he was not in a position to give direct evidence of the arrangements which were made between the relevant participants. He gave evidence as to Mr Fishman's bankruptcy and as to background matters. So far as it was material, that evidence was generally not contentious although there was dispute as to whether the evidence established anything relevant in relation to the matters which the court has to decide. The fact that Mr Benkel is suspicious of the arrangements which were made in this case does not establish that those suspicions are well founded; that has to be established, if it can be, in some other way.

65. Dr Yanus is a director of BC Strategy Ltd, which trades as "Black Cube". That company is a business intelligence firm. It was engaged by Mr Benkel to seek to obtain information which might be relevant to the issues in this case. Black Cube carried out such investigations and, in particular, showed an interest in the involvement of Mr Rese. A Black Cube inquiry agent attended four meeting with Mr Rese. I will refer to these meetings later in this judgment. Three of the meetings, which took place in Vienna, were covertly recorded and a transcript made of the recording. A further meeting in Berlin was not recorded. Dr Yanus gave evidence as to the way in which he checked the transcript against the recording. He said that Mr Benkel had asked Black Cube to provide a copy of the covert recordings of the meetings with Mr Rese but Black Cube had declined to do so. He also explained his understanding of the restrictions under Austrian law on Black Cube's ability to make available the covert recordings to Mr Benkel or to the defendants.

66. Mr Hayward is a partner in the firm of Fieldfisher, the solicitors for Mr Benkel. He prepared a witness statement which, so far as now relevant, contained hearsay evidence of a conversation his assistant had with Mr Dikautschitsch on 17 January 2019. In that conversation, Mr Dikautschitsch had said that "the companies" were simply shells with no real estate or assets. The defendants did not seek to cross-examine Mr Hayward and his witness statement was admitted without him being called.

67. The witnesses for the defendants were Ms Helbet, Mr Dikautschitsch and Ms Menipaz.

68. It became clear in the course of the trial that Ms Helbet was merely a nominee for Mr Dikautschitsch. She signed documents and took steps in accordance with his wishes and at his direction. She did not appear to exercise any independent will in relation to the matters which are the subject of these proceedings. In the course of her evidence, she frequently stated that she did not know relevant matters. Much of the evidence as to her ignorance may well be true as it is not obvious that Mr Dikautschitsch would always have explained to her what he was doing and why he was doing it. In other respects, she was prepared to give positive evidence which appeared to provide corroboration for Mr Dikautschitsch. However, when I consider the evidence of Mr Dikautschitsch, I will reach the conclusion that his evidence was generally not reliable and I find that any apparent corroboration from Ms Helbet was simply her sticking to the story which had been agreed between them for the purposes of their giving evidence in this case.

69. The claimant submitted that Mr Dikautschitsch was a dishonest witness and that I should reject his evidence in relation to contentious matters. The claimant made a detailed attack on the honesty and credibility of Mr Dikautschitsch and, in particular, alleged:

    i) he had given false information to the German courts and tax authorities on a number of occasions, including the using of false addresses and lying about his whereabouts;

    ii) he destroyed documents and instructed others to destroy documents;

    iii) he falsified documents;

    iv) he attempted to replace Ms Helbet with himself as a director of East-West UK in breach of the order of Nugee J;

    v) he lied in his evidence to the court.

70. I do not need to set out these allegations in relation to Mr Dikautschitsch in the detail in which they were presented. I am able to summarise matters by reaching the following conclusions:

    i) Mr Dikautschitsch owed money in Germany and he moved to Ibiza partly in order to avoid his creditors; he did not want his creditors knowing his whereabouts but yet it was necessary for him to have some dealings with the German authorities for which purpose he used an address which was not his real, and certainly not his current, address;

    ii) he made excuses, which were not true, to the German tax authorities;

    iii) he asked others to delete emails on the apparent grounds that the contents of the email would be damaging if seen by others;

    iv) he was instrumental in the backdating of the loan agreements;

v) he repeatedly denied that he had provided to Mr Katz (who provided the same to Mr Fishman) a copy of the transcript of a hearing in these proceedings in December 2018 when Ms Menipaz gave evidence that Mr Katz obtained the transcript from Mr Dikautschitsch.

71. In addition to the above points, I was also shown the transcript of the meetings in Vienna between the Black Cube investigator and Mr Rese. Mr Dikautschitsch attended the meeting which took place on 9 April 2018. At an earlier meeting, the Black Cube investigator had discussed with Mr Rese that the investigator's client wished to make investments in German real estate by importing diamonds. My reading of the transcript of the meeting on 9 April 2018 is that Mr Dikautschitsch attended that meeting on the basis that he could assist with importing diamonds into Germany. This was fairly clearly shown when it emerged that the investigator's client would not after all be importing diamonds and Mr Rese said to Mr Dikautschitsch that his services in that respect would not be needed. At that point, Mr Dikautschitsch made some comments which indicated some knowledge of how to import diamonds. Whether or not Mr Dikautschitsch had had experience in illegally importing diamonds, the transcript shows why Mr Dikautschitsch was brought to that meeting. Mr Dikautschitsch had given a different account of why he was there which I found wholly implausible and I do not accept.

72. The overall result is that I find that Mr Dikautschitsch is an unreliable witness and I am not able to accept his evidence save where it is supported by other material or circumstances, such as it being inherently likely.

73. Ms Menipaz is a daughter of Mr Fishman. She was not a party to these proceedings but she said that she has funded the defence of the defendants. She appears to have been involved in the proceedings from an early stage because she said when giving evidence about Mr Dikautschitsch's email to her of 29 May 2019 that she had been in touch with Mr Dikautschitsch "because of these proceedings". Indeed, when these proceedings began in late 2018, Mr Dikautschitsch went to solicitors, Slater & Gordon, for a short time and then instructed the defendants' current solicitors, Asserson Law Offices, whose principal office is in Israel. On the evidence before me, Mr Dikautschitsch is not a man of substantial means and it is likely that the defence of these proceedings was funded by Ms Menipaz from the outset.

74. Ms Menipaz was a relevant witness because she was one of the shareholders who transferred her shares in East-West Germany to East-West UK in October 2016 and she had the benefit of a loan from East-West Germany which was the subject of the signed loan agreement which was backdated to 8 October 2016. It was also relevant for her to explain why she was funding these proceedings when, on the defendants' case, East-West Germany had nothing to do with Mr Fishman.

75. Earlier in this judgment, I considered in detail the evidence which she gave as to the circumstances in which she signed the loan agreement which bore the date 8 October 2016. I found that I was not able to accept her evidence on that subject. I found that she did backdate the signed loan agreement and I also found that she must have understood that the evidence she gave to the court was not true. I further found that I ought to regard her more generally as an unreliable witness. Later in this judgment, I will make specific findings in relation to her evidence as to her reasons for funding the defence of these proceedings.

Persons who were not called as witnesses

76. The documents and the other evidence in this case show the involvement of Mr Rese, Mr Kreider and Mr Katz in the detail of the relevant events. None of those persons was called by the defendants to give evidence at the trial. The court had made orders under the Taking of Evidence Regulation leading to court appointments for the taking of evidence from Mr Rese and Mr Kreider. The claimant did not seek such an order in relation to Mr Katz.

77. Mr Rese did attend a court hearing in Chemnitz but he gave very little evidence on any relevant subject. He claimed legal professional privilege in relation to advice he or his firm had given to East-West Germany. However, the privilege in question is the privilege of the company and East-West Germany is controlled by the receivers appointed by the court. There was no suggestion that Mr Rese had sought instructions from East-West Germany as to whether the company wished to claim privilege in relation to his answers to the questions put to him. I did not receive specific submissions as to whether Mr Rese's claim to privilege was well founded or was available to be claimed by him. I appreciate that where there is a valid claim to legal professional privilege it is not appropriate for a court to draw an adverse inference from the fact that such a claim is made. To err on the side of caution, I will not draw an adverse inference from the fact that Mr Rese sought to claim legal professional privilege. As to Mr Kreider, any evidence which he might give pursuant to the Taking of Evidence Regulation is not available to be considered in this judgment.

78. The principles which I should apply as to when it is permissible to draw an adverse inference from the absence of a relevant witness at the trial are summarised in *Wiszniewski v Central Manchester Health Authority* [1998] PIQR 324 at 340. Before I can draw an adverse inference in relation to a relevant issue, there must be some evidence, however weak, which gives rise to a case to answer on that issue. Further, before drawing an adverse inference, I must have regard to any explanation put forward for the witness's absence even if the explanation is not wholly satisfactory. Finally, I am not obliged to draw an adverse inference even where the preconditions to doing so are met. I will apply those principles in due course in this judgment when I make my findings of fact but at this stage I will comment on the possible relevance of evidence from Mr Rese, Mr Kreider and Mr Katz and the explanations put forward by the defendants for not calling them as witnesses.

79. Mr Rese would have been a very relevant witness as evidenced by the large number of questions which were to be put to him under the Taking of Evidence Regulation. As to a possible explanation for the defendants not calling him as a witness, they submitted that when they filed their witness statements in this case, they had no reason to believe that the sworn evidence of Mr Rese would not be before the court at this trial pursuant to the order of 12 June 2020 under the Taking of Evidence Regulation. However, the fact that the claimant had obtained that order did not in any way inhibit the defendants from calling Mr Rese to give evidence at this trial. If they had wanted to call Mr Rese to give a full account of the many matters of which he was aware and which would be relevant in this case, they could have done so. It was always foreseeable that the claimant's ability to get a full explanation from Mr Rese pursuant to the Taking of Evidence Regulation would have been less effective as compared with a cross-examination conducted at the trial. As it turned out, Mr Rese took the course of providing very little information when he attended the court

hearing in Chemnitz and the claimant was not in a position to cross-examine him at that hearing. Accordingly, although I bear in mind the point that there might have been an expectation that some relevant information would be obtained from Mr Rese pursuant to the Taking of Evidence Regulation, that point is not a full explanation as to why the defendants did not call Mr Rese to give evidence at the trial.

80. The defendants also submitted that the claimant could have taken steps in Germany to exercise powers as a trustee in bankruptcy under a foreign bankruptcy to interview Mr Rese. There was a dispute as to whether the claimant could have taken such steps. But in any case, an interview of Mr Rese by the claimant would have been a less effective way of getting at the real facts as compared with a cross-examination at the trial.

81. In some cases, the fact that a witness is abroad might be considered as a possible justification for him not being called at a trial in London. However, this trial was conducted remotely and I heard evidence from witnesses in Israel and in Ibiza. Mr Rese is based in Germany but it ought to have been possible for steps to have been taken for him to give his evidence remotely in the same way as other witnesses did.

82. As to Mr Kreider, the date of the court hearing at which he would be due to give evidence under the Taking of Evidence Regulation is 7 May 2021 which is after the handing down of this judgment. Accordingly, the court is asked to reach its decision without any evidence from Mr Kreider. The claimant has submitted that the alleged inability of Mr Kreider to attend a court hearing in Germany at an earlier date, so that his evidence could be available at this trial, is highly suspicious. I agree that there are grounds for suspicion and the defendants did not say anything to allay that suspicion. Nonetheless, I doubt if I am in a position to make a finding that Mr Kreider has deliberately made himself unavailable to give evidence pursuant to the Taking of Evidence Regulation so that it could be used at this trial.

83. In any case, Mr Kreider was closely involved in some of the events relevant to this dispute but yet the defendants have not sought to call him as a witness. As to a possible explanation for the defendants not calling Mr Kreider as a witness, they submitted that when they filed their witness statements they had no reason to believe that the sworn evidence of Mr Kreider would not be before the court at this trial pursuant to the order of 12 June 2020 under the Taking of Evidence Regulation. The position in this respect is the same as the position of Mr Rese which I considered earlier in this judgment. As to a further submission that the claimant could have exercised powers to interview Mr Kreider in Germany, I take the same view as I did in relation to the same submission made in relation to Mr Rese. As to the fact that Mr Kreider is based in Germany and might have been in South Africa at the time of the trial, it ought to have been possible for steps to be taken for him to give his evidence remotely.

84. Mr Katz also had some involvement in the events which are relevant to this dispute. The defendants submitted that I should take the view that Mr Katz would not have had any relevant evidence to give and they relied on the fact that the claimant had not applied for an order in relation to Mr Katz under the Taking of Evidence Regulation. I do not take that view. It is clear that Mr Katz would have been able to give evidence as to real estate investments by Mr Fishman's companies in Germany and what had happened to those investments and the continued involvement of Mr Katz in Germany after Mr Fishman's bankruptcy. Further, Mr Katz was involved in the decision to

transfer the shares in East-West Germany to East-West UK. Mr Katz was also aware of the existence of these proceedings before Mr Dikautschitsch or Ms Helbet were and it was Mr Katz who told Mr Dikautschitsch that he needed to deal with these proceedings, whereupon Mr Dikautschitsch did deal with them with the funding of Ms Menipaz.

85. The defendants did not put forward an explanation as to why they did not call Mr Katz. Instead, they submitted that Mr Benkel had interviewed Mr Katz and the court could consider the answers which he gave. However, that process was unlikely to be as effective as a means of establishing the facts relevant in the present case as would have been a cross-examination of Mr Katz at the trial.

86. As to Mr Fishman, in the light of medical evidence, I was not asked to draw an adverse inference from the fact that the defendants did not call him as a witness. The defendants drew my attention to affidavits sworn by Mr Fishman in Israel. In those affidavits, Mr Fishman stated that he did not know Ms Helbet or Mr Dikautschitsch and that he had no interest in East-West UK, East-West Germany or JURAG.

87. In turn, the defendants submitted that I should draw adverse inferences against the claimant because he did not call Mr Hahnenberger or Mr Steinman as witnesses.

88. In relation to Mr Hahnenberger, the defendants said that he had not found that East-West Germany or JURAG had any assets (apart from the loans due to East-West Germany and some cash). It is the claimant's case that Mr Hahnenberger was not able to find the assets of those companies because of the obstruction of the defendants. The defendants submit that I cannot find that there was such obstruction when Mr Hahnenberger was not called as a witness. I doubt if that submission is correct. It would be open to the court to make a finding of obstruction if that finding was supported by the documents. Then it was submitted that I should draw the adverse inference that, if Mr Hahnenberger had been called, he would have said that he had not been obstructed. I am prepared to accept that it would be open to draw that inference but in accordance with the principles referred to above, I would still have to decide whether it would be appropriate for me to draw that inference. However, what is more important in this case is whether the evidence at the trial establishes that East-West Germany and JURAG held any assets (apart from the loans and some cash). The finding which I will make in that respect is the claimant has not been able to show the existence of such assets and this was the conclusion reached by Mr Hahnenberger also.

89. As to Mr Steinman, the defendants say that he could have given relevant evidence as to whether he was asked in 2019 to sign a backdated loan agreement. The defendants say that because the claimant did not call Mr Steinman as a witness, I should draw an adverse inference that his evidence would not have supported that finding. It is submitted that the claimant did not put forward any explanation for not calling Mr Steinman.

90. The defendants' case as to the relevance of Mr Steinman's evidence is fairly limited. It is correct that I do not have the benefit of Mr Steinman's direct evidence as to his being asked to sign a backdated loan agreement but I do have the hearsay evidence from Mr Benkel that that is what Mr Steinman told him. In the ordinary way, I would be inclined to give less weight to hearsay evidence as compared with first-hand

evidence. However, as I have already explained, I do accept this hearsay evidence as credible not least because it fits in with the other evidence as to the loan agreements being backdated. In any case, there is no particular reason to think that there was more of an onus on the claimant to call Mr Steinman to prove the allegation as there would have been on the defendants to call Mr Steinman to refute the allegation.

The position of Ms Helbet

91. The case against Ms Helbet, as originally pleaded, was that she held her powers, rights and interest in East-West UK as trustee or nominee for, originally, Mr Fishman and, now, Mr Benkel as Mr Fishman's trustee in bankruptcy. Alternatively, it was said that East-West UK held its shares in East-West Germany on trust for Ms Helbet and that she held her interest under that trust as trustee or nominee for Mr Fishman and, now, Mr Benkel. The claim against Ms Helbet was amended in the course of the trial to include a further allegation that she held her interests in East-West UK (and in East-West Germany) on trust for Mr Dikautschitsch who in turn held his interest under that trust on trust for Mr Fishman. It was also pleaded that Ms Helbet had contractually agreed with Mr Fishman, alternatively with Mr Dikautschitsch acting as an agent for Mr Fishman, disclosed or undisclosed, to exercise her powers, rights and interest in East-West UK (and in East-West Germany) as directed.

92. Following the amendments to the claim against Ms Helbet, she admitted in a Re-Amended Defence that she held her interest in East-West UK as a nominee for Mr Dikautschitsch but she did not admit that she was a trustee for him. She denied the other allegations made against her as to the basis on which she held her interest in East-West UK or East-West Germany (in the latter case, if any).

93. In the course of her evidence at the trial, Ms Helbet accepted that if Mr Dikautschitsch told her to sign a document transferring her interest in East-West UK, she would have done so. Similarly, if he had asked her to act as a director of East-West UK to transfer shares in East-West Germany, she would also have done so. She also accepted that she had agreed to act in that way in 2016.

94. In his closing submissions, Mr Riley accepted that I should make findings in accordance with this evidence given by Ms Helbet. It follows that I do find that Ms Helbet was not the beneficial owner of whatever rights and interests she had in East-West UK and East-West Germany. She was a mere nominee in relation to those rights and interests. She had agreed to act under the direction of Mr Dikautschitsch in relation to the same.

95. I will consider whether Ms Helbet held her rights and interests merely as a nominee of Mr Dikautschitsch or as nominee or trustee for Mr Fishman or even for an unidentified third party when I have considered whether Mr Dikautschitsch had taken on responsibility to act on behalf of Mr Fishman, as the claimant alleges.

The position of Mr Dikautschitsch

96. The case against Mr Dikautschitsch, which is put forward in the pleading which was amended in the course of the trial, is that Ms Helbet holds her interest as nominee or trustee for him and he hold his interests under those arrangements on trust for Mr Fishman. It is also alleged that Mr Dikautschitsch made an agreement with Ms Helbet

and East-West UK, at a time when Mr Dikautschitsch was the agent, disclosed or undisclosed, for Mr Fishman, under which Ms Helbet and East-West UK agreed to transfer their interests as instructed to do so and to exercise their powers as directed. It can be seen that the combination of the claims against Ms Helbet and those against Mr Dikautschitsch was that Ms Helbet and Mr Dikautschitsch, East-West UK and East-West Germany were under the ultimate control of Mr Fishman and were to act for his ultimate benefit.

97. Mr Dikautschitsch denies all of the different ways that the case is put against him and against Ms Helbet. The defendants, including Mr Dikautschitsch as the third defendant, served a Re-Amended Defence in the course of the trial in which they pleaded that Ms Helbet and Mr Dikautschitsch intended to carry on business involving minor property construction and refurbishment projects in Germany, through the medium of East-West UK and East-West Germany. At the trial, Mr Dikautschitsch's case was that he was the beneficial owner of the shares in East-West UK through his nominee, Ms Helbet, and East-West UK owned all the shares in East-West Germany and that there was no more to it than that. The Re-Amended Defence also referred to JURAG and pleaded that Mr Dikautschitsch, as the limited partner, held 100% of the economic value in JURAG.

98. Thus, the pleadings identify essentially two rival cases whereby the various rights and interests in East-West UK and East-West Germany were either held for the benefit of Mr Dikautschitsch or for the benefit of Mr Fishman. Mr Colton, on behalf of the claimant, presented the case as if there was a straight choice for the court between these two rival cases; if the court rejected Mr Dikautschitsch's case, it would follow that the court ought to accept the claimant's case. Mr Riley pointed out that it would not be enough for the claimant to persuade the court to reject Mr Dikautschitsch's case, the claimant had to go further and prove its own case that the various rights and interests were held for the benefit of Mr Fishman. I consider that Mr Riley is right about that. I will begin by considering whether the evidence persuades me to accept the case advanced by Mr Dikautschitsch.

99. The case advanced by Mr Dikautschitsch relies heavily on his evidence, although it also relies on the evidence of Ms Helbet and Ms Menipaz. Mr Dikautschitsch gave evidence of the work he had done over the years in relation to brokering real estate deals and carrying out minor property construction and refurbishment. He said that he generally did not have enough capital to invest personally in real estate but he worked with partners and associates who could access the necessary finance. He said that he worked with Mr Rese and Mr Kreider and their clients to identify and carry into effect various real estate deals.

100. Mr Dikautschitsch said that the events which led to Ms Helbet (acting as his nominee) incorporating East-West UK and acquiring the shares in East-West Germany began in 2016. In his first witness statement, dated 21 January 2019, Mr Dikautschitsch said that in "September 2016", he was interested in acquiring a company in Germany to deal in property and construction and he described how shortly afterwards, on 7 October 2016, the shares in East-West Germany were transferred to East-West UK. In his second witness statement, dated 22 September 2020, he referred to his interest in starting a property and construction business as dating from "March 2016". It was suggested to him that he had moved the date from September to March because the petition for Mr Fishman's bankruptcy was in August 2016 and evidence that Mr

Dikautschitsch was interested in starting a business as early as March 2016 would help to distance the relevant events in relation to East-West Germany from the affairs of Mr Fishman. Mr Dikautschitsch denied that this was a reason for the change in the dates.

101. Mr Dikautschitsch stated that he was interested in starting a business in March 2016 because contacts of his in Berlin told him about an opportunity to acquire roofs, lofts and attics to convert them into separate apartment for sale or lease. He said that he spent some months exploring the market and seeking potential properties. He realised that to get the business off the ground, he had to set up a formal company structure. He said that he discussed his plans with Mr Rese in the Spring of 2016. Mr Rese advised him to purchase a company with a track record instead of an off the shelf company; the track record would help with opening a company bank account and obtaining finance. Mr Dikautschitsch then spoke to Mr Kreider (who was connected to East-West Germany) and to Mr Manteuffel (who was connected to JURAG).

102. Mr Dikautschitsch said that, in June or July 2016, Mr Kreider told him of East-West Germany which was a dormant company which Mr Kreider was thinking of winding up or selling. The company was said to have had a good track record although the assets it previously owned had been sold. Mr Dikautschitsch said that he expressed concerns about taking on a company with liabilities and Mr Kreider said that it was unlikely that the company had liabilities apart from tax liabilities. If there were any liabilities, Mr Dikautschitsch could turn to the previous shareholders who owed the company about €800,000. Mr Kreider said that in the event that the company incurred or discovered some hidden liability after the purchase, then the company could collect these loans. Mr Dikautschitsch said that he was told by Mr Kreider that he would ask the shareholders to make partial payments of the loans totalling €25,500 and that Mr Kreider would personally cover any of Mr Dikautschitsch's expenses of the transaction although this should not be publicly known. Mr Dikautschitsch also said that the quid pro quo for these arrangements was that the company would not call in the loans until after 10 years. This alleged quid pro quo did not quite fit with the first version of the oral agreement about the loans to the effect that the company could, at any time, call in the loans to meet accrued liabilities but could not, at any time, call in the loans for any other reason. Mr Dikautschitsch also said that he was prepared to write off the loans after 10 years.

103. Mr Dikautschitsch then gave evidence about the steps taken to incorporate East-West UK. He said that he did not want to put any German assets in his own name because he said that he wanted to ascertain whether he had any unknown debts in Germany and he simply did not have sufficient information about that. He explained that this was why he used Ms Helbet to incorporate East-West UK in England and Wales. It emerged at the trial that Mr Dikautschitsch did indeed have debts in Germany and there is no reason to think that he did not know what the debts were and who the creditors were. There was evidence that, subsequently to these events, he was indeed pursued by one of his creditors in Germany. Mr Dikautschitsch described the arrangement he made with Ms Helbet for her to be effectively his nominee. He told her that she had to trust him and that she should sign documents which he put before her and he would write emails in her name.

104. Mr Dikautschitsch then gave evidence about the steps taken to obtain a transfer of the shares in East-West Germany. He said that these steps were taken in the last week of

September and first week of October 2016. Mr Dikautschitsch dealt with Mr Kreider rather than with the other shareholders of East-West Germany. He referred to the transfer being documented on 7 October 2016. He specifically said that the written loan agreements were executed on 8 October 2016.

105. Next, Mr Dikautschitsch described the acquisition of JURAG. He spoke about that possibility to Mr Manteuffel who was a contact of his, having been introduced to him by Mr Rese. Mr Manteuffel suggested that Mr Dikautschitsch and East-West UK take over JURAG. Mr Manteuffel explained to Mr Dikautschitsch that the type of entity which JURAG was would allow him to hold assets in a way which was private and not published to the German authorities. He agreed to pay €10,000 to Mr Manteuffel for JURAG. Although JURAG was an empty shell it was said to have valuable goodwill. The takeover of JURAG occurred in November 2016.

106. Mr Dikautschitsch then gave evidence that by 2017 he was ready to start his new business. He said that he carried out research into real estate opportunities and he produced a number of brochures which were brought into existence in 2017. He said that he went to Berlin a number of times to visit properties.

107. Mr Dikautschitsch gave evidence that Mr Fishman had absolutely nothing to do with his involvement in East-West UK, East-West Germany or JURAG.

108. Ms Helbet gave some evidence in support of Mr Dikautschitsch's account. She said that "at some point in the summer of 2016", he mentioned to her that he was exploring a number of interesting real estate opportunities in Berlin and that he was interested in setting up his own business in Germany to deal with minor construction and refurbishment works. He told her he intended to acquire a company in the UK and a company in Germany. He told her that it would help if she took on the formal position of owner and director until he regulated his personal issues with the tax authorities in Germany. She said that prior to 2019 when the claimant brought the present proceedings, no business was transacted by the companies.

109. Ms Menipaz gave evidence about her position as a shareholder in East-West Germany, its investments, the sale of those investments and the making of loans to the shareholders. She said that she was the beneficial owner of the shares in her name and she did not hold them for Mr Fishman.

110. Ms Menipaz gave evidence about the events which led to the transfer in 2016 of the shares in East-West Germany. In the summer of 2016, her cousin, Mr Katz, told her that there was a buyer for the shares in the company. She was not told the identity of the buyer save that he was a friend of Mr Kreider and Mr Rese, that he wanted a company with a track record and he did not want to assume past liabilities of the company. Mr Katz told her that all the shareholders would have to repay part of the loans to the company so that the total sum repaid would be €25,500 and she repaid her part of that. She referred to what was agreed about the loans due to the company. She said it was agreed that the company could call for repayment of the loans to meet past liabilities of the company, but not otherwise. She said that the bankruptcy petition in relation to her father, presented in August 2016, had nothing to do with the transfer of the shares.

111. Mr Colton, on behalf of the claimant, submitted that I should not accept the evidence in support of Mr Dikautschitsch's case as to his involvement in East-West UK, East-West Germany and JURAG. In particular, he submitted:

i) the evidence as to the relevant events changed over time;

ii) Mr Dikautschitsch's explanation for establishing the corporate structure for his own purposes made no sense;

iii) Mr Dikautschitsch did not have the intention of using the corporate structure for his own business;

iv) East-West Germany never carried on any activity for the benefit of Mr Dikautschitsch;

v) Mr Rese and Mr Katz worked with Mr Dikautschitsch to set up the corporate structure;

vi) the funding to establish the corporate structure was provided by Mr Rese and Mr Kreider and not by Mr Dikautschitsch;

vii) Mr Dikautschitsch, Ms Helbet and Ms Menipaz were not reliable witnesses;

viii) the defendants had not called Mr Rese, Mr Kreider and Mr Katz as witnesses.

112. Mr Colton made detailed submissions as to the different versions given by and on behalf of Mr Dikautschitsch as to the type of business which Mr Dikautschitsch allegedly intended to pursue through the corporate structure which he had created. On 9 November 2018, Mr Dikautschitsch applied to Penta Bank to open a bank account for East-West Germany. He told the bank that the company was proposing to provide services including property management and caretaker services for companies in Germany with whom East-West Germany was in negotiations. In his first witness statement, Mr Dikautschitsch said that the intended business was property and construction. In the Defence, it was said that the intended business involved minor property construction and refurbishment projects in Germany. In his second witness statement, he was more specific about the intended business, referring to acquiring roofs, lofts and attics and converting them into separate apartments. When cross-examined, Mr Dikautschitsch said that Mr Rese had suggested to him providing some housekeeping services and that was why he described the business in that way to Penta Bank.

113. It is correct that the descriptions which Mr Dikautschitsch gave of the intended business were not the same. Some were more specific and some were more general. However, there is a difference between property management and property development. When asked to explain the different descriptions, Mr Dikautschitsch suggested that he was describing essentially the same type of property activity. Because some of the descriptions were rather vague, it was possible for him to say that the descriptions were all connected with real property. However, even if I took the view that the descriptions could be reconciled, the fact remains that the descriptions appear very vague. In addition, Mr Dikautschitsch could not provide any documents to support his oral evidence that he had these various business plans. I am

not persuaded that I can rely on the brochures which he produced which related to various opportunities in 2017. First of all, Mr Dikautschitsch is closely associated in this case with Mr Rese and Mr Katz who would have had access to brochures such as these. Further, some if not all of the opportunities presented in the brochures were not the type of property, namely, roofs, attics and lofts described by Mr Dikautschitsch. All in all, Mr Dikautschitsch's evidence as to his plans gives me no confidence that he was giving me truthful evidence.

114. In addition to the changes in the description of the intended business, Mr Dikautschitsch's evidence changed as to the time when he allegedly had these various plans. His first reference was to September 2016 but he then moved the date of his plans back to March 2016. There is considerable force in the suggestion that he did so because March 2016 was before the petition for Mr Fishman's bankruptcy in Israel and so that evidence, if believed, would suggest that the events which occurred in this case were not linked to the threat of bankruptcy.

115. It is also relevant that Mr Dikautschitsch did not start any business in the period from October/November 2016 up to the commencement of these proceedings. He gave evidence that he did research and he followed up opportunities in Berlin but I found his evidence unconvincing not least because it really relied on him producing a number of brochures which did not necessarily show that he was taking steps to start a business. Mr Dikautschitsch did not produce any emails in this period showing any business activities on the part of the corporate structure which is said to have been created to carry on a new business. Further, Mr Dikautschitsch did not identify any business expenses which the corporate structure had incurred, not even travel expenses in relation to journeys he had allegedly made on business to Berlin.

116. It is next relevant to inquire why Mr Dikautschitsch chose this particular corporate structure for what he said was his intended business. I can well understand why Mr Dikautschitsch wanted to have a limited liability company which would operate the business, rather than have the business in his own name. So the first choice might have been between a newly formed company and an established company. Mr Dikautschitsch gave evidence that the attraction of East-West Germany was that it was an established company with a track record. I am not convinced by the argument that East-West Germany was attractive because it had a track record. First of all, the company does not appear to have had any activity since about 2012. Secondly, the track record of the company appears to have been to hold investment properties which were then sold. There was no apparent connection between that activity and the intended business of converting lofts and similar property or even property managing and servicing. Thirdly, if the benefit of a company with a track record was to enable Mr Dikautschitsch to have a company bank account, he did not appear to try to take over the existing bank account of the company. He agreed to Mr Kreider closing the bank account and he did not open a new bank account until in or after November 2018. Fourthly, a company with a track record might have had disadvantages in that it might have had accrued liabilities. Indeed, part of Mr Dikautschitsch's evidence involved stressing his concern about accrued liabilities; whether that evidence was true or not, it did not support the case for acquiring a company with a track record.

117. The creation of the corporate structure was not confined to acquiring the shares in East-West Germany. Mr Dikautschitsch gave evidence that he did not want his creditors in Germany becoming aware of his interest in the company. But he could

have approached that problem by vesting the shares in Ms Helbet and her becoming the sole director of the company. In any case, he had become a director of Waterfront Appartements GmbH and he did not explain why he could not have similarly himself become a director of East-West Germany. It was not really explained why it was desirable to incorporate East-West UK and to issue shares in that company to Ms Helbet. I accept that, on the evidence, Mr Dikautschitsch did have a motive for concealing his involvement in East-West Germany but he did not conceal his involvement as limited partner in JURAG. Mr Dikautschitsch gave evidence that the assets held by JURAG, as a limited partnership or KG, would not be disclosed in a public register but, although I asked to be given more information in that respect, it was not clear to me that Mr Dikautschitsch was right about that.

118. Standing back, it is reasonably clear that the corporate structure was set up to hide somebody's involvement with the corporate structure. The shares in a German company, East-West Germany, were transferred to a UK company; the shares in the UK company were issued to Ms Helbet who gave her address as her parents' home in Romania. So the question is: was the person who was to remain concealed, Mr Dikautschitsch or someone else? The fact that Mr Dikautschitsch openly became the limited partner of JURAG would tend to suggest that the person being concealed by the corporate structure was not him.

119. The transfer of the shares in East-West Germany to East-West UK was not a normal commercial transaction from the point of view of either the transferor or the transferee, particularly in view of my earlier finding there were no written agreements about the loans at the time of the transfer.

120. From the transferring shareholders' point of view, they were transferring their shares and getting nothing in return and allowing the new owners of East-West Germany to have control over the loans due from the former shareholders. It must have been obvious, if the transfer had been a genuine transaction, that the former shareholders should obtain a clear written commitment as to what was to happen in relation to the loans. Mr Kreider owed a substantial sum and the evidence shows that he was a capable businessman. Mr Steinman was in the same position as regards the size of the loan and his business experience. Even if there was an oral agreement with Mr Dikautschitsch that he would only call in the loans to meet accrued liabilities, one would have expected the former shareholders to have insisted on the oral agreement being recorded in writing and to be with the company, rather than Mr Dikautschitsch. Ms Menipaz said that she was less concerned about the loans because her loan was not very large but even so it would have been straightforward to have recorded in writing in binding form some agreement about calling in the loans before the shares were transferred for no payment. In addition, I have not been persuaded that there was an oral agreement about the loans as the evidence was wholly unsatisfactory on that point.

121. From Mr Dikautschitsch's point of view, if the transfer of the shares had been a genuine transaction, then one would have expected Mr Dikautschitsch to have investigated what the accrued liabilities of the company were. Mr Dikautschitsch gave differing evidence as to whether he was or was not concerned about the extent of unknown accrued liabilities. In fact, the evidence suggests that it would have been straightforward to quantify the liabilities of East-West Germany. In addition, Mr Dikautschitsch became the limited partner of JURAG and on his account paid

€10,000 for being able to do so when it appeared to have debts to JURAG AG and Mr Rese. Mr Dikautschitsch did not give evidence that he had made any inquiries about such debts. I appreciate that these debts were subsequently waived but those waivers are themselves somewhat suspicious.

122. In order to assist in determining why Mr Dikautschitsch entered into the transaction involving East-West UK and East-West Germany, it is helpful to consider the way in which Mr Rese, Mr Kreider and Mr Katz were involved in the transaction. For that purpose, I will refer to what is disclosed in the contemporaneous documents in the relevant period.

123. The defendants referred to emails dated 8 June 2014 and 22 July 2015 passing between Mr Katz and Mr Steinman. Those emails stated that East-West Germany was "empty" (presumably meaning that it had no assets of value to the shareholders), that Mr Kreider had decided not to buy the company and that if Mr Rese did not buy the company then it would be dissolved. The later emails appear to say that the company was in the course of being dissolved. The defendants say that these emails show that the shareholders in the company genuinely did wish to end their involvement with the company, either by a dissolution or a sale of the shares.

124. On 10 August 2016, Mr Rese wrote to Mr Kreider and Mr Katz. Mr Rese said that he was not a shareholder in East-West Germany but he was looking at the company's financial position. Mr Rese referred to the tax liabilities of the company and to the fact that the company had to pay a capital gains tax in relation to an earlier capital gain where sums were paid to the shareholders and recorded as being loans to the shareholders. Mr Rese then stated that "there is an interested party". Mr Katz then forwarded this email to Mr Steinman, Mr Eyal Fishman and Ms Fishman-Ofir. Mr Katz added some wording to say that the suggestion was that Mr Kreider, Mr Steinman and the three children of Mr Fishman would repay the loans to the company by paying altogether the sum of €25,500. Mr Katz added that if the shareholders had any questions, they should contact him or Mr Rese.

125. On 27 August 2016, Mr Katz sent an email to Mr Steinman. He referred to the payments to be made by the shareholders. He said that Mr Kreider and the three children of Mr Fishman had paid their share. He said that the potential buyer of the company was due to purchase it on the following Monday. Mr Katz asked Mr Steinman to pay €8,500 or else the purchaser would not buy Mr Steinman's shares. Mr Katz added that after the sale the purchaser would take all the risks involved with the company. Mr Steinman replied to say that he would pay the sum of €8,500.

126. On 29 September 2016, the notary who was dealing with the transaction in Germany wrote to Ms Helbet with a draft contract in relation to East-West Germany. Ms Helbet (or presumably Mr Dikautschitsch using her name) replied to the notary referring to an email "sent by mistake". He said that after consultation with Mr Rese, the contract should be amended in various respects. One amendment was to remove a reference to the purchase price which was being negotiated "outside the deed".

127. On 5 October 2016, the notary in Germany sent a revised draft contract to Ms Helbet. The revised draft did not have a clause dealing with a purchase price.

128. On 19 October 2016, Mr Dikautschitsch emailed Mr Kreider. Mr Dikautschitsch referred to the fact that Mr Rese had transferred €1,500 into Mr Dikautschitsch's account. At the trial, Mr Dikautschitsch said that the payment was in connection with Mr Rese's boat which was kept in Ibiza. It is clear from the email as a whole that that was not the reason for the payment and Mr Dikautschitsch's evidence was untrue. Mr Dikautschitsch went on to refer to the expenses he had incurred in the matter and that the payment of €1,500 was definitely not enough. Mr Dikautschitsch stated that the things which needed to be done were listed in an attachment to the email. He said to Mr Kreider that he should delete the email irretrievably from his email account and his entire system. This statement would suggest that Mr Dikautschitsch regarded the contents of the email as something which ought to be hidden. It was suggested to him the reason to keep the email hidden was that the transaction in relation to the company involved Mr Fishman. Mr Dikautschitsch did not accept that suggestion but he did not volunteer an alternative reason for keeping the email hidden.

129. The attachment to the email of 19 October 2016 stated that Mr Dikautschitsch urgently needed "the rest of the money" and he needed an additional €6,000. He referred to the new shareholder paying €2,000 and he had chosen a particular method of doing that so that nobody would think about contesting the sale of the company. He said that he had contacted Mr Katz in relation to that matter. Mr Dikautschitsch referred to his hotel and other costs being much higher than earlier thought. In relation to the payments to be made to him, he said that the money had to be provided to Mr Rese in cash and that there was enough time to hand it to Mr Dikautschitsch in person. He then referred to transfers of not more than €2,500 per day. Finally, he said that the email and the attachment should be deleted from Mr Kreider's server, phone, email account and other locations.

130. On 16 November 2016, Mr Katz emailed the former shareholders (apart from Mr Kreider). Mr Katz referred to a conversation between Mr Rese and the buyer of the company which provided "a clarification of the signed agreement". Mr Katz said that the former shareholders were not expected to receive any consideration for the sale and he added that the company had a negative value due to its tax exposure which was taken on by the buyer.

131. Mr Dikautschitsch gave evidence that the only person he had dealt with in connection with the transaction was Mr Kreider. The documents referred to above show that was untrue. He also dealt with Mr Katz and Mr Rese.

132. It is also clear that Mr Dikautschitsch was paid to involve himself in the transaction and that the expenses of the transaction were borne by a mixture of Mr Rese, Mr Kreider and East-West Germany itself. I have referred above to Mr Dikautschitsch writing to Mr Kreider asking for payment to be made to him by Mr Rese. Mr Dikautschitsch gave evidence that Mr Kreider agreed to pay the expenses of the transaction. Mr Dikautschitsch gave evidence that he paid €10,000 to become the limited partner in JURAG. He said that was his own money. He said that he paid it in cash. I do not think that it is likely that Mr Dikautschitsch had €10,000 of his own to make such a payment. It is also the case that at the time that Mr Dikautschitsch says he paid €10,000 to Mr Manteuffel in cash, that sum was withdrawn in cash by Mr Kreider from East-West Germany's bank account. Mr Colton also pointed to other expenses that must have been incurred where it was likely that the expenses were not borne by Mr Dikautschitsch.

133. If Mr Dikautschitsch had been acquiring East-West Germany for the purpose of running his new business, there is no real explanation as to why Mr Katz, Mr Rese and Mr Kreider should have all assisted him in the way in which they did and why they should have borne all the expenses of the transaction and in addition paid Mr Dikautschitsch to involve himself in the transaction. Further, if the transaction was a genuine transaction, as Mr Dikautschitsch would say it was, there is no real explanation as to why he told lies in his evidence as to these matters.

134. I also note that although the transfer of the shares in East-West Germany is said to have taken place on 7 October 2016, Mr Kreider continued to draw money from its bank account after that date. The bank account was not closed until 25 April 2018 although the sum in the account had been reduced to about €24 by 10 November 2016.

135. I referred earlier to the fact that Mr Hahnenberger as the managing director of East-West Germany, appointed by the receivers, petitioned to wind up that company and JURAG on the grounds that they were unable to pay their debts. As regards JURAG, the accounts showed that it owed money to Mr Rese and JURAG AG. In response to the petition to wind up JURAG, Mr Rese and JURAG AG said that the debts had been paid or had been waived. Further, Mr Rese paid the sum of €2,673.31 on behalf of JURAG to the Federal Office of Justice. In relation to East-West Germany, Mr Rese paid a large number of the debts of that company including payments to the Federal Office of Justice, IHK Darmstadt Rhein Main Neckar, Brain Interfaces UG. When these payments were made, the petitions to wind up JURAG and East-West Germany did not proceed. Subsequently, Mr Rese paid sums due from East-West Germany to Baker Tilly and a fine due to the Tax Office. There was no explanation as to why Mr Rese should have done what he did in all these respects if East-West Germany was ultimately owned by Mr Dikautschitsch.

136. Having made the above findings, I now need to stand back and assess whether those findings support or undermine Mr Dikautschitsch's case that he was the beneficial owner of the shares in East-West UK, which owned all the shares in East-West Germany. I consider that the above findings point very clearly to a rejection of his case. I find that Mr Dikautschitsch did not involve himself in this transaction in order to start his own business. I find that he was paid to involve himself in the transaction by Mr Rese and Mr Kreider. I find that the transaction was devised and directed by Mr Katz, Mr Rese and Mr Kreider. I find that Mr Dikautschitsch was an unreliable witness who was obviously lying in the course of his evidence. I also find that in so far as Ms Helbet and Ms Menipaz gave evidence which supported Mr Dikautschitsch's case they also were witnesses on whom I could not rely.

137. It is plain that Mr Katz, Mr Rese and Mr Kreider could, if they had given truthful evidence, have explained what was really going on. In view of my findings as to their involvement, there was plainly a great deal for them to explain. However, none of these three was called by the defendants to support Mr Dikautschitsch's case. At the hearing in the Chemnitz court, Mr Rese did not give any worthwhile evidence about the transaction. I make my findings in this case, rejecting the case put forward by Mr Dikautschitsch, without there being a need to draw any adverse inference due to the absence of these three persons as witnesses. However, I record that this is a proper case to draw an adverse inference from the fact that the defendants have not called these three persons to support Mr Dikautschitsch's case. They had highly relevant

evidence to give and their conduct called for an explanation. The explanations put forward as to why they were not called to give evidence were not adequate. All circumstances of their involvement point towards the court drawing an adverse inference. The inference which I draw is that their evidence would not have supported Mr Dikautschitsch's case if they had been called and had given truthful evidence.

138. As a corollary of my rejection of Mr Dikautschitsch's case in relation to this transaction, I find that the transaction was entered into for some reason other than to give Mr Dikautschitsch beneficial ownership of East-West UK and ownership of East-West Germany. I also find that the obvious reason for the transaction was to conceal the involvement of someone in relation to ownership and control of these companies. It is clear that the reason was not to conceal the involvement of Mr Dikautschitsch himself as he openly became the limited partner of JURAG. The question which now arises is whether the person being concealed behind the transaction was Mr Fishman, or someone else. As Mr Riley submitted, the claimant as the trustee in bankruptcy of Mr Fishman must establish his case that the person concealed behind the transaction was Mr Fishman.

139. The claimant's case is that when Mr Rese, Mr Katz and Mr Kreider set up the transaction in this case, using Mr Dikautschitsch and Ms Helbet to conceal the identity of the person for whose benefit the transaction occurred, they did so for the benefit of Mr Fishman. In order to examine that case, I will refer to the evidence as to the involvement of Mr Rese, Mr Katz and Mr Kreider with Mr Fishman.

140. I will begin this exercise with Mr Rese. The claimant instructed inquiry agents, Black Cube, to approach Mr Rese. The inquiry agents did so on the basis that they were acting for a Russian who had substantial assets but who had just been, or was about to be, declared bankrupt. They told Mr Rese that they wanted to use his services to hide the assets of the Russian bankrupt. The inquiry agents had four meetings with Mr Rese. The second meeting was for the purpose of the inquiry agents viewing a flat in Berlin owned by Mr Fishman and his wife. That meeting was not recorded because, I was told, covert recording of that meeting in Germany would have been illegal. The other three meetings took place in Vienna and were covertly recorded. It was not illegal in Austria to make covert recordings of those meetings.

141. Black Cube provided the claimant with a transcript of the three meetings in Vienna. The claimant asked for the original tapes of the meetings but Black Cube declined to provide the tapes to the claimant. Dr Yanus of Black Cube gave evidence at the trial. He described how he had checked the transcript as against the tapes. He said that he was not entitled to provide the tapes to the claimant or anyone else. He said that the advice he had received as to Austrian law was that if the English court ordered him to produce the tapes because "for example" the defendants persuaded the English court to make such an order, then, although there would still be a risk of that conduct being illegal under Austrian law, he would probably have a defence that he was acting in accordance with the order of the English court. He was asked to clarify this evidence and when he did so he distinguished between an application by the defendants and an application by the claimant for an order that the tapes be provided to such applicant. The defendants did not apply for an order that the tapes be made available to them. As I understand Dr Yanus' evidence, an application by the claimant for an order that the tapes be provided to the claimant would be resisted on the ground that providing the tapes to the claimant would expose Black Cube to the allegation that they had acted

illegally under Austrian law. Further, Dr Yanus referred at the beginning of his evidence to the reason that Black Cube had not provided the tapes to the claimant and he referred not only to Austrian law but also to there being a relevant agreement with the claimant.

142. Mr Riley submitted that the transcripts of the three meetings in Vienna had a number of defects. He said that there were gaps in the transcript where the transcriber could not hear what was being said. That is true but the gaps are fairly limited. Then Mr Riley said that the transcript contained punctuation and, on occasions, slightly different punctuation could change the meaning of the words. That is also true but there are not many such occasions and on any such occasion, if it matters, I will pay attention to the punctuation point. Parts of the transcript remained redacted but I consider that I am able to pay attention to the unredacted parts of the transcript.

143. I consider that there are other difficulties with the transcripts. The meetings in Vienna took place over lunch. The discussion on each occasion was somewhat rambling in that the discussion was not clear and business-like. Quite often, there is some difficulty in knowing exactly what the speaker means. The inquiry agents obviously went to the meetings with an agenda to establish, at least, two things. The first thing was that there was a connection between Mr Rese and Mr Fishman. The second thing was that Mr Rese had expertise and experience in advising wealthy people how to hide their assets. I expect the inquiry agents would also have wanted to establish the combination of these two things, that is, that Mr Rese had acted for Mr Fishman to hide his assets.

144. The transcripts do contain many passages where Mr Fishman is mentioned and where the hiding of assets is discussed. In addition, other things were discussed such as investments made by Fishman, not necessarily involving the hiding of assets, and investments by the fictional Russian client, again without necessarily involving the hiding of assets.

145. It is also clear that on some occasions, Mr Rese did not appear to pick up what the inquiry agents were driving at. They kept steering the conversation around to Mr Fishman and Mr Rese thought that the agents were getting confused about what he was trying to explain.

146. Finally, the lunches appear to have involved Mr Rese consuming a good deal of alcohol. Indeed, before the last of the meetings, Mr Rese had been waiting for some time before the meeting began during which time, on his own account, he became quite drunk.

147. Notwithstanding the shortcomings in the transcripts to which I have referred, it is possible to find some statements made by Mr Rese during the meetings which are certainly relevant and which are potentially reliable.

148. The first meeting in Vienna took place on 26 February 2018. There were two Black Cube inquiry agents at the meeting. After the introductions, Mr Rese referred to Mr Fishman. At that point, Mr Rese referred to Mr Fishman's investments in Germany which he had made with the assistance of Mr Rese. An inquiry agent then explained that his Russian client wanted Mr Rese's help in "moving" money. Mr Rese said that he was not involved in that anymore but that he could approach someone else. Mr

Rese then reverted to discussing possible investments. He referred to having a contact with diplomatic status who could bring gold into Germany in a diplomatic bag. He said that he built a lot of structures so that nobody could see who was behind the structure. He referred to an arrangement involving three of four "circumventions". He suggested a possible investment in a hotel in Berlin, which was the airport hotel at Adlershof. He then referred to Mr Fishman again saying that Mr Fishman had sold the assets in Germany apart from some remaining assets worth €20 million which were poor quality investments. He said that Mr Fishman was selling his apartment in Berlin; he explained that the apartment was owned jointly by Mr Fishman and his wife. He referred to an earlier occasion when he assisted the children of Mr Fishman to bid for an investment property. He referred to Mr Fishman as being honest. He referred to Mr Katz as a friend who was the CEO of the Fishman companies in Germany. The inquiry agents agreed to meet Mr Rese in Berlin in order to view Mr Fishman's apartment there.

149. Between February and April 2018, a Black Cube inquiry agent met Mr Rese and Mr Katz in Berlin and viewed Mr Fishman's apartment.

150. The next meeting with Mr Rese was in Vienna on 9 April 2018, attended by Black Cube inquiry agents. Mr Dikautschitsch was present at that meeting. Mr Rese explained that he had known Mr Dikautschitsch for 30 years and he completely trusted him. He jokingly described Mr Dikautschitsch as "a chimney sweeper". I have already said that it appears that the primary reason that Mr Dikautschitsch was present was for him to assist the fictional Russian client to bring diamonds into Germany, although in the end that proposal was not pursued. Mr Rese referred to Ibiza and to a birthday party he had hosted there and that Mr Fishman was at the birthday party. An inquiry agent explained that his client did not want to buy the Berlin apartment. Mr Rese referred to the question of an investment structure. He suggested a meeting in Germany with an accountant who had already prepared an investment structure. An inquiry agent asked if they could speak openly in front of Mr Dikautschitsch and Mr Rese confirmed that they could.

151. Mr Rese said there could be a structure where the investments were in Germany and the ultimate owner could have a call option which would be hidden. An inquiry agent asked how he could "park" the money and who the front man would be. Mr Rese advised that the structure should be "sober, super sober". He explained that he had a working structure with a number of companies driven by a friend of his, Mr Höhl, who was an accountant with one of the 12 biggest firms of accountants. Mr Rese said that the fictional Russian client could have access to those companies pursuant to a call option which would allow the client to direct what was to be done. Mr Rese said that the companies would be held in the name of Mr Höhl's wife. Mr Rese later explained that he had worked for Mr Fishman for 20 years. There was further discussion about the use of a call option which would be executed outside Germany before a Swiss notary. The call option would give the client "next day control" of the German company.

152. Mr Rese said that he had done this before. He said that the inquiry agent could ask Mr Fishman; that might have suggested that Mr Rese was saying that he had used a structure involving a call option for Mr Fishman but an inquiry agent asked Mr Rese if Mr Fishman had dealt with matters in that way and Mr Rese said he had not. Mr Rese then went on to describe what Mr Fishman had done in a way which concerned

his investments and he referred to listed companies and the investments being tax driven. He referred to some of Mr Fishman's companies such as IBC and Mivne Taasiya and said the company structure was for tax reasons. Mr Rese then referred to Mr Fishman being bankrupt and said that he was not totally, or not really, bankrupt and that he was still Mr Rese's client. Later, Mr Rese said that the structure which the inquiry agent wanted was different from the structure used for Mr Fishman. Mr Rese said that he had worked in the last 10 years only for Mr Fishman and for himself.

153. An inquiry agent asked Mr Rese if he had any properties at a price of €15 to €20 million where they could "switch paper". Mr Rese replied that "we" had some 260 apartments and a possible price was discussed. An inquiry agent asked who the frontman would be and Mr Rese said that he would take responsibility. He said that he thought he was the CEO of the company which owned the apartments and that he was the shareholder "on the paper". An inquiry agent asked if Mr Rese owned the company and Mr Rese replied that he worked "for Fishman" and the property was coming out of the Fishman portfolio. He added that he was at that time buying a hotel for Mr Fishman. Mr Rese agreed that he would be a frontman for the Russian client. Mr Rese then gave some more details about properties in which the Russian client might invest. He referred to properties in Chemnitz, Stolberg and Wilnsdorf (this was a reference to Wünsdorf, Berlin). Mr Rese said that they would not need to change anything as he would continue to be the official shareholder and the CEO of the owning company and they would just "switch papers". He said that the company had two shareholders, himself and Mr Katz. Mr Rese said that he was the only one controlling the company and he reported to Mr Fishman. An inquiry agent said that after the sale, Mr Rese would report to him not Mr Fishman. An inquiry agent asked who would make the decision on the price for the properties, was it Mr Rese or Mr Fishman. The answer as recorded is open to interpretation. It is possible that Mr Rese said that the person making the decision would be Mr Fishman but it is also possible he meant that it would not be Mr Fishman. An inquiry agent said that the answer meant that he would have to meet with Mr Fishman which strongly suggests that Mr Rese was saying that it would be Mr Fishman who would make the decision.

154. The inquiry agents and Mr Rese then discussed the hotel at Adlershof. Mr Rese said the hotel was not related to Mr Fishman but was Mr Rese's deal. Mr Rese referred to a cinema in Stuttgart which belonged to the old structure used by Mr Fishman where Mr Katz was now the CEO. Mr Rese mentioned another property in Chemnitz. Mr Rese referred again to a structure he had used involved Mr Höhl and his wife holding for certain people. An inquiry agent said that he wanted to keep things hidden and Mr Rese said that he would get what he wanted. Mr Rese said that the structure would not be the same as the structure used for Mr Fishman as he had always had an "official" structure.

155. Mr Rese later referred to Mr Fishman being bankrupt. He said that officially Mr Fishman had nothing but, unofficially, Mr Rese had a few things that he still had to take care of. It was agreed that Mr Rese would make written proposals to the inquiry agents after the meeting.

156. The last meeting with Mr Rese was in Vienna on 10 May 2018. Two inquiry agents attended the meeting. There are repeated statements by Mr Rese that he was very drunk. An inquiry agent referred to Mr Fishman and Mr Rese said that Mr Fishman was "not in our business". He said much the same thing a little later. Mr Rese said

that he had bought the hotel at Adlershof. The inquiry agents and Mr Rese then discussed the properties in respect of which Mr Rese had given details to the inquiry agents. Mr Rese referred to MIVNE 11. Mr Rese said that the deal would be with him as he was the 51% partner and Mr Katz was the 49% partner and Mr Rese was the decision maker. He said that he had nothing to do with Mr Fishman at that time apart from the apartment in Berlin. Mr Rese referred to proceedings which had been brought by Mr Benkel in Germany. He said that Mr Fishman's family had a lot of money hidden somewhere and that they were scared and could not move. His personal feeling was that they had €20 – 30 million on the side but it was blocked by the action taken by Mr Benkel.

157. Later in the meeting, an inquiry agent asked Mr Rese about a possible structure for the proposed investments. Mr Rese referred to introducing an English company into the structure; he referred to the English company as sitting "in the middle of nowhere" and "at the end of the world" where nobody would find it. He said that he had done that before on three occasions. Mr Rese referred to another possibility that he would "set in a guy from me, who is buying the shares, he will be the new CEO and he will disappear".

158. Later when Mr Fishman's name was mentioned, Mr Rese was emphatic that he had previously referred to Mr Fishman just to show Mr Rese's track record but the proposed deal did not involve Mr Fishman.

159. In May and June 2018, there were email exchanges between and inquiry agent and Mr Rese with details of the property investments discussed at the meetings. The properties included properties in Chemnitz, Stolberg and Wünsdorf which were owned by the company which was referred to as MIVNE 11. Mr Katz was involved in providing some of the detailed information which Mr Rese passed on to the inquiry agent. The information identified Mr Rese and Mr Katz as the owners or the representatives of the owners.

160. MIVNE 11 had been a company in the corporate structure owned by the public companies with which Mr Fishman had been connected. The ownership of MIVNE 11 apparently changed hands when the assets of various of these companies were sold off. Mr Rese has said that he is the ultimate beneficial owner of the shares in the company or companies which own MIVNE 11. Mr Colton submitted that in view of the answers given by Mr Rese at the meetings with the inquiry agents, I should hold that Mr Rese held his interest in MIVNE 11 for Mr Fishman. That possibility is not an issue which I need to decide. I would decide it if it were reasonably possible for me to do so and it helped me decide the issues which are before me. However, that question is not a straightforward one and I consider that it is better to leave it undecided.

161. Based on what Mr Rese said during the meetings with the inquiry agents, I find:

i) Mr Rese and Mr Dikautschitsch had been closely acquainted for about 30 years and Mr Rese completely trusted Mr Dikautschitsch;

ii) Mr Rese had in the past created structures which were designed to hide assets and the identity of the true owner of such assets;

iii) in 2018, Mr Rese was less active in creating such structures but he was prepared to create such a structure for the fictional Russian client;

iv) Mr Dikautschitsch was trusted to know about Mr Rese's involvement in creating such structures;

v) Mr Dikautschitsch attended one of the meetings in Vienna because it was thought he might be able to assist with bringing diamonds into Germany;

vi) Mr Rese had been involved with Mr Fishman and his companies and his investments for many years;

vii) Mr Fishman had been a very important client for Mr Rese; at one time and for a long period he had been his only client;

viii) Mr Rese still acted for Mr Fishman in 2018;

ix) Mr Rese knew a considerable amount of detail about Mr Fishman, his companies, his investments and his family, including his children and his nephew, Mr Katz;

x) it has not been established that, at any time before Mr Fishman's insolvency, Mr Rese created a structure to hide Mr Fishman's assets.

162. I will now consider the position of Mr Katz. For some time, Mr Katz had an important role in looking after the German investments of the companies in the corporate structure connected with Mr Fishman. Mr Katz was involved in the transfer of the shares in East-West Germany in 2016. Mr Katz was involved with Mr Rese in 2018 in connection with the proposal to sell properties to the fictional Russian client. Mr Katz was aware of the present proceedings almost as soon as they started even before Mr Dikautschitsch was aware of them. When Mr Dikautschitsch obtained a transcript of the hearing before Nugee J on 7 December 2018, Mr Dikautschitsch sent the transcript to Mr Katz who sent it to Mr Fishman. I am not in a position to say precisely whose interests Mr Katz was protecting when he was acting in these various ways at various times.

163. Mr Kreider had been a shareholder in East-West Germany and transferred his shares to East-West UK at a time when he owed a substantial sum to East-West Germany and without obtaining any commitment from the new owner of East-West Germany, certainly not a written commitment, as to calling in of the loans. Mr Kreider had a longstanding business relationship with Mr Fishman.

164. I have already described the circumstances in which the shares in East-West Germany were transferred without the former shareholders obtaining any reassurance about calling in the loans which had been made to the former shareholders. That fact points to the likelihood that the new owner of East-West Germany was someone who was unlikely to call in the loans against the wishes of the former shareholders. That means that the new owner was connected to Mr Kreider, Mr Steinman, and the three children of Mr Fishman and someone whom they all could trust not to act adversely to their interests.

165. Mr Colton submitted that the timing of the transaction involving East-West Germany made it likely that the transaction was connected with Mr Fishman's looming bankruptcy. Mr Riley submitted that the two matters were not connected; he referred to the time in 2014 when the shareholders of East-West Germany were expecting to dissolve East-West Germany and he said that that showed that a dissolution of, or a disposal of, East-West Germany was a real possibility before Mr Fishman's bankrutpcy. Mr Riley also asked why, if the transaction was triggered by Mr Fishman's financial difficulties, it had not happened long before. By way of response, Mr Colton relied on the evidence of Ms Menipaz that her father did not throughout believe that he would be made bankrupt and Mr Colton also referred to the timing of the decision of the Israel Supreme Court in July 2016 when it was held that Mr Fishman had a substantial tax liability in Israel. I consider that the timing of the transaction in October 2016 does not conclusively show that it was prompted by Mr Fishman's looming bankruptcy but overall I accept that the timing does make it likely that there was a connection between those events.

166. I next need to consider the implications of the fact that these proceedings were defended from the outset at the direction of Ms Menipaz and that she has funded the proceedings. On the defendants' case, Ms Menipaz has had nothing whatever to do with East-West Germany since October 2016. In her witness statement, Ms Menipaz stated that she had a financial interest in these proceedings because if the claimant succeeded, he could call in the money which she owed East-West Germany. I can see that that circumstance would give her a financial interest in these proceedings. However, the amount of the loan was some €64,000 and she has spent several hundred thousand pounds funding the defence of these proceedings. More importantly, when she gave evidence she emphasised that, notwithstanding what was stated in her witness statement, the potential liability to repay the loan was not the reason she was funding the defence of these proceedings. I accept her evidence on that point. On that basis, the reasons she has relied upon for funding the defence are, first, that Mr Benkel's allegations in these proceedings were an attack on her father's reputation and, secondly, the allegations were that her father had done something which would be a criminal offence and Mr Benkel was likely to bring criminal proceedings against her father. As to the first of these explanations, Ms Menipaz stressed that Mr Fishman's world had collapsed around him and he had lost everything but what he had left was his honesty. She therefore wanted, and continues to want, to defend these proceedings to defend him against allegations of dishonesty. Ms Menipaz also referred to the effect that these proceedings had on a mediation process which had been taking place in Israel. However, that effect would appear to be in the past and would not seem to be a reason for continuing to fund the defence of these proceedings.

167. The primary reason put forward by Ms Menipaz for funding the defence of these proceedings appears to be to defend her father against an allegation of dishonesty. That could be a good reason for funding the defence. Further, the impression I got from Ms Menipaz's evidence was that although the costs involved are several hundred thousands of pounds (she did not know precisely how much), she was able to afford that level of expense. However, what severely undermines this suggested reason for funding the defence is that when Ms Menipaz gave evidence in this case about the back-dated loan agreements she did not tell the truth. It seems to me to be a very odd way to uphold the honesty of her father by telling lies in her evidence.

168. I am not persuaded that Ms Menipaz has told me the real reason why she is funding the defence of these proceedings. The fact that she is doing so is quite remarkable if it really is the case that her father has no financial interest in the outcome of this case. I consider that the fact that she is defending these proceedings suggests that Mr Fishman does have a financial interest in the outcome of these proceedings but that is not the only possible conclusion.

169. Mr Riley submitted that none of the above findings justify the court in concluding that Mr Dikautschitsch holds his interests in East-West UK and East-West Germany as a nominee for Mr Fishman. Mr Riley submitted:

    i) there is no evidence of any time when Mr Fishman used corporate structures to hide his involvement or his ownership of assets; that was certainly the position before his bankruptcy and the suggestion that Mr Rese holds his interests in MIVNE 11 as a nominee for Mr Fishman has not been established;

    ii) Mr Fishman has given extensive disclosure in relation to his assets; in relation to properties in Germany, he disclosed his half share in the apartment in Berlin and his interest in a company owning property in Germany;

    iii) in general, all of Mr Fishman's interests in property in Germany and elsewhere in the world were held by companies in the corporate structure beneath by the public listed company, JEC; those companies or their assets came under the control of the banks who took steps to realise them;

    iv) even if I held that Mr Dikautschitsch held his interests in East-West UK and East-West Germany as a nominee for someone, it is much more likely that he held his interests for the former shareholders, and in particular Mr Kreider who did not want to dissolve the company as that would trigger a tax liability on his part; Mr Riley described this as a "cold liquidation" which appeared to mean that the company was all but dissolved but was not in fact dissolved.

170. As to the first submission summarised in the last paragraph, I accept that there is no evidence that Mr Fishman used corporate structures to hide his involvement or his ownership of assets before his insolvency. The position in relation to the basis on which Mr Rese holds his interests in MIVNE 11 is far from clear. It may be that Mr Fishman would have a case to answer in that respect but it is not a case which I will determine in these proceedings.

171. I accept the factual basis for the second and third submissions made by Mr Riley as recorded above. I am not persuaded by the fourth submission. I cannot see why it was necessary to change the shareholders in East-West Germany rather than simply allowing the company to become a dormant company which was not liquidated and dissolved.

172. Mr Riley submitted that an asset concealment structure presupposes the existence of assets to be concealed. In this case, the claimant had been unable to establish that there were in fact assets of Mr Fishman that had been concealed, whether in the East-West Structure or at all. It was submitted that the absence of any identified assets of Mr Fishman as assets being concealed undermined the claimant's case either that the

transaction involved asset concealment or, more particularly, the Mr Fishman was the intended beneficiary of that structure.

173. I accept the suggestion that the present case involves an unusual allegation as to the concealment of assets. A more typical case would start with an identified asset and a typical issue would be whether that asset was owned beneficially by the person in whose name it was registered or was owned beneficially by another person whose identity had been concealed. The present case does not start or even finish with identified assets being concealed.

174. I have referred to the assets which East-West Germany and East-West UK owned in 2016 and now own. At the time of the transaction, the assets of East-West Germany were the sums owed to it by its former shareholders and others, less its liabilities. Those were real assets which had a value but I do not consider that the purpose of the transaction was to hide the fact that those assets were owned by Mr Fishman. There was no evidence that those assets were previously owned by him. The assets of East-West UK were the shares in East-West Germany but those assets were not worth more than East-West Germany was worth. The transaction did create a new asset, namely, the shares in East-West UK but that asset was not worth more than East-West Germany was worth. Thus far it would appear that at the time of the transaction, there were no assets the ownership of which was intended to be concealed.

175. It is also the case that the claimant has not shown that East-West Germany or East-West UK has acquired any assets since October 2016. If I were to hold that the transaction was entered into to create a structure into which assets could later be transferred, to disguise the fact that the assets were beneficially owned by Mr Fishman, then the claimant has not been able to identify any occasion on which that occurred. After October 2016, East-West Germany did become the general partner in JURAG but that did not give it an asset of any economic value but instead imposed on it potential liabilities. In addition, in so far as it is alleged that JURAG was acquired by Mr Dikautschitsch to create a structure into which assets could later be transferred, again, the claimant has not been able to identify any occasion on which that occurred. Mr Colton submits that assets might have been transferred into the structure, in particular into JURAG, and the claimant simply does not know about it, so far at any rate. He also submits that the East-West companies may have bank accounts which have not been revealed possibly because they are outside Germany. While I cannot rule out these possibilities, I must act on the material which I have and that material does not show the structure actually being used as a hiding place for assets.

176. The absence of proof of any assets which the owner would wish to hide is a reason for holding that the structure was not created for the purposes of asset concealment. However, as against that, the structure was plainly created for some reason. I have already held that everything points to the structure being created as a form of concealment. I have also held that the structure was not created to conceal the involvement of Mr Dikautschitsch because he did not conceal his involvement in JURAG and, in any case, he did not have and was not expected to have assets which would need to be concealed. Although I have reconsidered these points in the light of the absence of evidence of any assets being actually concealed, I remain of the view that the evidence is convincing that the purpose of the structure was concealment. The intended concealment in this case does appear to be different from a typical case. This is not a case of concealment of a known asset. The evidence instead points to the

creation of a structure with the intention that it could be used to receive assets the true ownership of which was to remain hidden. The fact that it has not been possible to show that assets were subsequently transferred into the structure (if they were not) does not negate a finding that that was the original purpose of the structure although I accept it makes me hesitate before I find that that was the original purpose.

177. At the end of the case there were developments which emphasised the point that the claimant has been unable to show that any assets were transferred into East-West Germany or East-West UK or JURAG. Mr Riley began his closing submissions towards the end of Day 7 of the trial. At the beginning of Day 8, he told me that the defendants' solicitors had made an open offer of settlement in a letter sent at about 8.20 pm on the previous day, 24 February 2021. The letter explained that it was in part prompted by a question I had asked on Day 7 as to why the defendants were defending the proceedings if none of the companies in the structure had any assets (as the defendants claimed). The letter stated that the defendants were not defending the case to protect any assets, hidden or otherwise, held by East-West UK or East-West Germany, because there were no such assets. The letter then contained an open offer to settle the proceedings. The offer was:

    i) to transfer the full powers, rights and interests in East-West UK to Mr Benkel, as trustee in bankruptcy for Mr Fishman;

    ii) there were no admissions of any of the claims or allegations made by Mr Benkel in these proceedings;

    iii) the Claimant's costs of the action were to be paid by Ms Menipaz, in a sum to be assessed, if not agreed.

178. On behalf of the claimant, Mr Colton told me that the claimant did not accept the offer. The trial then continued. Mr Riley completed his closing submissions and Mr Colton replied. I reserved my decision.

179. On 2 March 2021, the defendants' solicitors wrote to the claimant's solicitors. A copy of the letter was provided to the court. The letter contained a further open offer to the claimant. That offer was expressed to lapse one hour before the draft judgment was circulated to the parties. The letter referred to the position in relation to JURAG. It said that JURAG had no assets. It said that Mr Dikautschitsch was content on the basis of no admissions to supplement the earlier offer and to offer to transfer to the claimant the full limited partnership powers, rights and interests held by him in JURAG. I have not been notified of any acceptance of this offer.

180. Although reference was made on Day 8 to the possibility that the defendants might apply to the court for an order that judgment be entered in accordance with the offer of 24 February 2021 on the ground that it gave the claimant all that he could obtain in these proceedings, the defendants did not make an application of that kind. I have not made such an order of my own initiative.

181. Thus far, I have found that the transaction was entered into for the purpose of concealing the ownership of assets. In the absence of evidence that either East-West UK or East-West Germany owned assets at the date of the transaction where there

was an intention to conceal their ownership, it follows that the intended concealment was in relation to assets which would be transferred into the companies.

182. The next question is: who was the intended or expected owner of assets whose identity was to be concealed. I have held that Mr Dikautschitsch was not that person. The claimant says that the relevant person was Mr Fishman. The defendants do not put forward any other candidate; their case was that there was no intention to conceal and Mr Dikautschitsch was to be the beneficial owner of the companies.

183. I consider that the evidence points strongly to Mr Fishman as the relevant person. The structure was set up by Mr Rese and Mr Katz. Mr Fishman was an important client of Mr Rese at the relevant time. Indeed, if one were to take Mr Rese's statement literally that Mr Fishman was his only client in the 10 years up to 2018, then Mr Fishman was Mr Rese's only client in 2016. It can be seen, from his answers to the inquiry agents, that Mr Rese would have been ready, able and willing to set up a concealment structure for Mr Fishman in 2016. Mr Katz was also involved in setting up the structure. I know less about Mr Katz than I do about Mr Rese. Mr Katz was Mr Fishman's nephew. I am not able to tell one way or the other whether Mr Katz would have been keen to help Mr Fishman in this respect so I cannot find either that he would have had a propensity to join in setting up this structure or to do the opposite.

184. The timing of the transaction points to a real likelihood that the relevant person was Mr Fishman. The degree of interest shown by Mr Fishman and his family in these proceedings from the time that they were brought and the fact that the defence of the proceedings is funded by Ms Menipaz again points to a real likelihood that the relevant person was Mr Fishman.

185. I referred earlier to the fact that the defendants do not put forward any alternative candidate. They do not have to in the sense that the burden of proving that the relevant person was Mr Fishman lies on the claimant and the defendants are entitled to submit that the claimant has not discharged the burden. However, in a case where the claimant has produced evidence to suggest that the relevant person is Mr Fishman, the defendants run the risk that the court will indeed make that finding in the absence of evidence from the defendants as to some other candidate.

186. Although the defendants have not identified an alternative candidate I have considered whether the evidence points to another candidate. Could it be said that Mr Dikautschitsch was holding as nominee for Mr Rese as beneficial owner? There is no reason to think so. Mr Rese held interests in his own name and those interests included assets or companies which had been within the group connected with Mr Fishman; Mr Rese did not need to have a nominee for himself as beneficial owner. Could it be said that Mr Dikautschitsch was holding as nominee for Mr Rese who was holding as nominee for another client of his, or even Mr Dikautschitsch was holding as nominee directly for a client of Mr Rese? There is no material on which I could make that finding. Could it be said that Mr Dikautschitsch was holding for Mr Katz as beneficial owner? As with Mr Rese, Mr Katz did not need someone to hold for him as beneficial owner. Could it be said that Mr Dikautschitsch was holding as a nominee for a company in which Mr Fishman had an interest? That was not suggested by the defendants and if the structure was created to hide Mr Fishman's assets, then there would not have been a need for Mr Dikautschitsch to hold as nominee for a Fishman company as distinct from Mr Fishman himself.

187. Thus far, the evidence supports a finding that Mr Dikautschitsch held his interests in East-West UK and East-West Germany for Mr Fishman personally.

188. Mr Riley submits that it is unlikely that Mr Fishman would have used East-West Germany for the purpose of concealing his assets because that company had had an open connection with this three children. Whilst that might have been a reason which might have militated against choosing to use that company, I do not see it as a weighty consideration in the context of my decision.

189. Mr Riley also emphasised that the allegation against Mr Fishman was a serious one and I should not find it proven without substantial evidence. I agree that the allegation is a serious one. I bear in mind that the more serious the allegation, the more the court looks for cogent evidence which establishes it. Nonetheless, the standard of proof is the balance of probabilities.

190. I also take account of the fact that if the structure was not set up to conceal Mr Fishman's assets, then that would be known to Mr Katz, Mr Rese and Mr Kreider. In view of Mr Fishman's long connection with those three persons and in view of the fact that the defence of these proceedings is funded by Ms Menipaz, who has the ability to control to a considerable extent how the claim is defended, if those three persons had been able to give evidence to support Mr Fishman, then I was not given any reason as to why they could not have done so. I consider that it is appropriate for me to draw the adverse inference that if they had given truthful evidence at this trial it would not have assisted Mr Fishman.

191. Accordingly, I find that the claimant has established that Mr Dikautschitsch held his interests in East-West UK and East-West Germany as a nominee for Mr Fishman.

192. Turning to the more specific legal consequences of that finding, they are as follows. I have held that Ms Helbet holds her powers, rights and interests in East-West UK as nominee for Mr Dikautschitsch. I now hold that Mr Dikautschitsch holds his interest under that nominee arrangement for Mr Fishman. As regards East-West Germany, the position is governed by company law and not by the notion of nomineeship or trusteeship. East-West UK owns all shares in East-West Germany. The link between East-West Germany with Mr Dikautschitsch and ultimately with Mr Fishman is through East-West UK.

193. Now that Mr Fishman is bankrupt and his assets have vested in Mr Benkel, Mr Dikautschitsch holds his interests under the nominee arrangement with Ms Helbet on trust for Mr Benkel. I will order Ms Helbet to transfer all her powers, rights and interests in East-West UK to Mr Benkel. He will then control East-West UK and that company will own East-West Germany.

194. The pleaded case against the defendants, including Mr Dikautschitsch, does not claim any declaratory or other relief in relation to Mr Dikautschitsch's position as limited partner in JURAG and so I am not asked to grant any such relief.