[2023] EWHC 1153 (CH)

Case No: BL-2021-LIV-000027

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN LIVERPOOL

BUSINESS LIST (ChD)

Liverpool Civil and Family Courts

35 Vernon St, Liverpool L2 2BX

Date: 15 May 2023

Before :

HHJ CADWALLADER SITTING AS A JUDGE OF THE HIGH COURT

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Between :

MARK JULIAN O'BRIEN

Claimant

- and -

SIMON PHIPPS

Defendant

- -

- -

Stephen Connolly (instructed by **Escalate Law Ltd**) for the Claimant

Mark Harper KC and Nick Taylor (instructed by **DTM Legal**) for the Defendant

Hearing dates: 6, 7, 8, 9, 10 March 2023

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JUDGMENT

HHJ Cadwallader:

Introduction

1. The claimant, Mr O'Brien, and the defendant, Mr Phipps, are businesspeople, and were also close friends for many years: indeed, Mr Phipps described them as being 'like brothers,' and Mr O'Brien did not disagree. They worked, often together, in the insurance industry, particularly in the motor insurance industry. They used a number of corporate vehicles. It is common ground that when they were in business together, they operated in some sense on the basis of equality (the precise sense, and the significance to be attached to it, is at issue). They were by no means always successful. In 2010 or 2011 a business opportunity arose in the United States of America, and Mr Phipps put a great deal of time and effort into a company incorporated in the state of Kentucky known as Shortfall Cover LLC ("Shortfall") which had been incorporated to realise that opportunity. A Mr Jeremy Coll was also involved. There is an issue as to the extent if any to which Mr O'Brien was involved. Mr Phipps' shareholding in Shortfall was eventually sold in May 2020 for a substantial consideration. By that time, he and Mr O'Brien had fallen out. These proceedings commenced in September 2021. They are primarily concerned with Mr O'Brien's claim that Mr Phipps held his shareholding in Shortfall upon an express oral trust as to half for Mr O'Brien, such trust having been declared by Mr Phipps at a meeting in about August 2013 at a Harvester restaurant in Stoke-on-Trent. Accordingly, he claims half the net proceeds of sale of the shares. Mr Phipps says that nothing of the kind took place, while alleging by contrast that at a much earlier stage, in about late 2010 or early 2011, he had merely made a bare and non-binding promise to Mr O'Brien in respect of the Shortfall project along the following

lines: "Don't worry, if we make any money, I will look after you", or words to substantially the same effect.

2. Moreover, Mr Phipps alleges that there was a binding agreement (referred to in these proceedings as the Profit and Loss Sharing Agreement) between him and Mr O'Brien that the profits and losses they made and suffered together would be shared equally. He counterclaims for various alleged breaches of that agreement; Mr O'Brien denies that there was a binding agreement to that effect, and responds that Mr Phipps was himself in breach of that agreement in various ways if there was found to be one.

Trial

3. The hearing of the trial took place over 5 days. For the claimant, I heard oral evidence from Mr O'Brien, Chris Sharpe (who worked at Insure Online Ltd, one of their companies), and Elaine Sandland (a bookkeeper). Mr O'Brien's evidence was confused, inconsistent and anxious. My impression upon which however I have not placed much reliance, is that he thought he was telling the truth although, for the reasons which appear below, many of his recollections were inconsistent and must have been inaccurate. I found Mr Sharpe's evidence plausible and, to a degree, corroborative of the evidence of Mr O'Brien; but given that the events which he was describing were so long ago, I found it more useful as an indication of his general impression of the relationship between the parties, than as evidence on specific events. I found Miss Sandland's evidence as to general matters to be plausible and useful: in particular, her description of funding as complicated, and of 'money flying all over the place', while the UK businesses were 'scraping round for funds to pay staff'. She produced a number of spreadsheets, and attempted explanations of them, which, however, I did not find helpful: most of them seem to have been prepared ad hoc for particular

purposes which could no longer be reconstructed with confidence, and on the basis of primary information which was no longer available.

4. For the defendant I heard oral evidence from Mr Phipps, Mr Coll, and David Skelton (an information technology manager). Mr Phipps' evidence was given in a more polished way than that of Mr O'Brien, but cross examination revealed certain difficulties in his account too. The claimant had hoped to have the evidence of John Beaumont, but he provided no statement or draft statement, and there was no opposition to his application to be released from his witness summons, so he did not attend. I found I was not assisted by Mr Skelton's evidence generally, nor in particular his evidence about listening to recorded telephone calls. I refer to Mr Coll's evidence below.

5. I had the benefit of full skeleton arguments from counsel, an agreed case summary and list of issues and, after the conclusion of the evidence, an agreed chronology and written closing submissions from both sides, and short written submissions from both sides in clarification or correction of the other's closing submissions. Because of time limitations, and at the suggestion of the parties, there were no oral closing submissions and, in view of the quality of the written material before me, none were necessary. In preparing this judgment, I have reviewed the entire trial bundle, my notes of the oral evidence and the opening remarks of counsel, and the relevant authorities. I have considered all the points made to me, notwithstanding that I have not explicitly referred to all of them in this judgment

The issues

The Claimant's case

6. The issues between the parties are, of course, defined by the statements of case, and it is worth summarising how the claimant's case as to the creation of this trust is put in the particulars of claim. The claimant's case is that he and Mr Phipps had consistently acted on the basis that they were equal business partners through a variety of companies and means (though not partners in the strict legal sense). They had co-owned a company called Insure Online Ltd, which had operated in its own name in the field of motor -related insurance products and, when the financial services authority revoked its authority to conduct such business, they had operated its business through an FCA/FSA company belonging to Mr Coll and his wife Claire called JD Concepts Ltd with their agreement. After Insure Online Ltd was wound up on or around 3 February 2009, Mr O'Brien and Mr Phipps mainly carried out their business through F & I Online Ltd which, however, entered creditors' voluntary liquidation on 4 March 2014.

7. Against that background, in or about 2010 Mr O'Brien, Mr Phipps and Mr Coll discussed the possibility of setting up a business in the USA to provide repatriation insurance for individuals who died when abroad on holiday or business. Mr Phipps and Mr Coll went to the USA to explore the possibility and discovered a gap in the market for Return to Invoice Gap insurance.

8. In a number of conversations over a period the three of them orally agreed to set up a business in the USA to exploit that opportunity on the basis that two US businessmen, a Mr James Hill (referred to throughout the Particulars of Claim as 'Hall') and a Mr Terry Hawkins, and would be given 20% of the shareholding for their business experience and support, Mr Phipps and Mr Coll would undertake the day-to-day running of the company, but Mr O'Brien would

be kept informed and would be involved in all major decisions, while he would remain in the UK and run the UK insurance businesses in order to support the new company with loans from those businesses and from the individual parties, and, importantly, that the balance of the shareholding would be held in equal shares between the three of them. This was described as "the Initial Understanding". It is not an allegation of a declaration of trust.

9. Shortfall was then incorporated on 21 January 2011 to exploit that opportunity, and Mr Phipps told Mr O'Brien that, subject to the 20% shareholding of Mr Hill and Mr Hawkins, Mr Phipps, Mr O'Brien and Mr Coll were equal shareholders; and Mr O'Brien thought that he was being kept fully informed, and he worked in the UK businesses and they provided financial support to Shortfall, Mr Phipps and Mr Coll. But shortly before a meeting in August 2013 at a Harvester restaurant in Stoke-on-Trent at which Shortfall's business was to be discussed, Mr Phipps told Mr O'Brien that the balance of the shares were held by Mr Phipps and Mr Coll equally, and that none were held by Mr O'Brien. During the meeting which followed, Mr Phipps agreed with Mr O'Brien that the balance of the shareholding should be split equally three ways, but Mr Coll claimed he was entitled to half of it. Mr Phipps then expressly stated that, consistently with the business relationship that had always existed between himself and Mr O'Brien, half of his shareholding, at the very least, belonged to Mr O'Brien. In reliance on that, Mr O'Brien agreed with Mr Phipps that they would continue to work together with Mr Coll, reserving their rights as to any additional shares held by Mr Coll.

10. It is the conversation at that meeting in 2013, and in particular, the express statement by Mr Phipps that half of his shareholding belonged to Mr O'Brien, upon which Mr O'Brien relies as a declaration of trust of Mr Phipps' shares in Shortfall in his favour.

The defendant's case

11. The defendant's case, in his defence and counterclaim, is that he and Mr O'Brien were involved in various business ventures on the basis of a relationship whereby it was agreed they would share equally in the profits and losses of those business ventures (in contrast to the claimant's case, it did not have to do with co-ownership). That Profit and Loss Sharing Agreement was the result of an oral agreement made in about 2000 and having contractual force, the existence of which is to be inferred from the circumstances (the defendant did not pursue the alternative allegation that it should be implied from conduct). It did not apply to businesses in which they were not both involved, and in particular it did not apply to Shortfall. Shortfall, and a related US company called Kindred Travel LLC, had nothing to do with Mr O'Brien, who had not been party to the discussions about it (and got Mr Hill's name wrong), had done no work for it, and did not take over Mr Phipps' role in relation to the UK businesses to support it. Mr Phipps did tell Mr O'Brien about the Shortfall project, though, and made a bare promise to distribute some of the anticipated profits to the claimant, saying "Don't worry, if we make any money, I will look after you" or words to that effect; but that did not make a contract, because it was not intended to, was too vague, and was unsupported by consideration. Mr Phipps never told Mr O'Brien the latter was an equal shareholder, did not update him, was not obliged to do so, and continued to spend the vast majority of his time in the UK and to operate the UK businesses.

12. While there had been a meeting at a Harvester restaurant in about August 2013, it was primarily to discuss JD Concepts Ltd and not to discuss Shortfall. In fact, the shareholding in Shortfall was not discussed at all. There had been a discussion to the effect that they were supposed to be three equal shareholders, and Mr Coll refused to reduce his shareholding below 50%, and Mr Phipps and

Mr O'Brien reserved their rights about the issue, but that was about F&I Online Ltd, not Shortfall. So there was no trust of Mr Phipps' shares.

13. There is therefore a direct conflict of evidence about the ways in which the business arrangements generally worked between Mr Phipps and Mr O'Brien, and about their understanding, if any, about Shortfall, and, most acutely, about what happened at the 2013 meeting at the Harvester restaurant. Mr O'Brien says Mr Phipps is lying to avoid liability; and Mr Phipps describes the claim as an opportunistic attempt to claw some financial benefit out of the success of Shortfall. Each describes the other's account as incredible, and as inconsistent with their behaviour at the time, and with the limited documentation which bears upon the question.

Burden of proof and manner of assessing evidence

14. The burden of proof of a trust lies, of course, upon the claimant, and the standard is the balance of probability. The position is the reverse as to the Profit and Loss Sharing Agreement.

15. I am helpfully reminded of the observations of Leggatt J at paragraphs 15 to 22 inclusive in Gestmin SGPS S. v. Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) as to how a Judge should approach a witness' recollections of events which (as here) occurred several year ago, as summarised and expanded in Smith v Secretary of State for Transport [2020] EWHC 1954 (QB)

"a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events.

Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestmin and Kogan).

b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).

c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).

d. Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).

e. The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).

f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."

Similar points are made in Bannister v Freemans [2020] EWHC 1256 QB at [73 - 77] and in Jackman v Harold Firth & Son Ltd [2021] EWHC 1461 at [12 - 14]. I have attempted to adopt that approach in the present case.

The agreed chronology

16. To a degree, the course of events is agreed. Mr O'Brien and Mr Phipps were directors of and equal shareholders in Insure Online Limited from the incorporation of that company on 6 December 1999 (although there were periods in which some shares were held by others). It will be recalled that Mr Phipps' case is that the Profit and Loss Sharing Agreement must have been entered into as a result of a conversation taking place in about 2000. Mr Coll and his wife had set up and run JD Concepts Ltd from 28 May 2002. The three of them first became involved in business ventures together from about 2003. Mr Phipps and Mr O'Brien entered into a joint personal mortgage in June 2006 as securing a loan of £135,000 payable over 15 years to fund the purchase of their property at 70 Eastbourne Rd, Southport PR8 4DU for £170,000. F&I Online Ltd was incorporated on 20 February 2007, and again Mr O'Brien and Mr Phipps were equal shareholders and joint directors. That was a matter of days before the FSA cancelled the registration of Insure Online Ltd; but F&I Online Ltd did not become their main company until after the liquidation of Insure Online Ltd in 2009. In the meantime, Mr Coll had allowed Mr O'Brien and Mr Phipps to provide services formerly provided through Insure Online Ltd through JD Concepts Ltd, which did have FSA registration. Insure Online Ltd went into creditors' voluntary liquidation on 3 February 2009, following which F &I Online Ltd became Mr O'Brien's and Mr Phipps' main company. On 23 June 2009, however, they caused Motor Products Online Ltd to be incorporated. Again, Mr Phipps and Mr O'Brien were co-directors and equal shareholders in that company; but they did not use it for their main business until F& I Online

Ltd in turn went into liquidation in January 2018. Mr Sharp is now a director of and shareholder in Motor Products Online Ltd with Mr O'Brien.

17. Mr O'Brien and Mr Phipps became shareholders in JD Concepts Ltd along with Mr Coll in 2005. A document entitled Amendment to Heads of Agreement dated 16 February 2010 refers to an original Heads of Agreement dated 13 October 2005 which may or may not be extant. It states that Mr O'Brien and Mr Phipps were willing to provide an additional £20,000 for the business of JD Concepts Ltd in return for 5% additional equity to be shared equally between them, so that the shareholdings should be as follows: Mr Coll should have 75%; and Mr Phipps and Mr O'Brien should each have 12.5% of that company, with an option to purchase more, which was itself to be shared equally between Mr O'Brien and Mr Phipps.

18. The parties agree that in October or November 2010 Mr Phipps and Mr Coll travelled to the USA to discuss or investigate repatriation and GAP insurance opportunities there. Following their return, in late 2010 or early 2011, there is an issue about what happened: according to Mr O'Brien, they reached the Initial Understanding that they would each have equal shares in the company formed to exploit the opportunities in the USA; according to Mr Phipps, he had made the bare promise to look after Mr O'Brien if he and Mr Coll made any money in the USA.

19. Shortfall was incorporated on 21 January 2011 in the state of Kentucky. At least according to Mr Phipps, the original shareholdings were 34% each to Mr Coll and Mr Phipps, and 32% shared between Mr Hawkins and Mr Hill. Mr O'Brien's case is that he understood that Mr Hawkins and Mr Hill held 20% of Shortfall, and the balance was split three ways between him, Mr Phipps and Mr Coll. Mr Phipps' case is that Mr O'Brien was never to be involved or to have a shareholding, and he never told Mr O'Brien that he had a shareholding.

20. Mr O'Brien's evidence was that at a golf day in Cheltenham he was told the first time, by Mr Coll, that America (that is, the American businesses, including that of Shortfall) had nothing to do with him. Whether that conversation took place, and how Mr O'Brien responded to it if it did, was in issue between the parties.

21. The following month, the August 2013 meeting at the Harvester restaurant took place, as mentioned above: this was conversation at which Mr O'Brien alleges a declaration of trust was made in his favour over Mr Phipps shares in Shortfall. The meeting is admitted, but what took place at and before it, and to what company it related, is in dispute.

22. Mr O'Brien's evidence is that a few weeks after the Harvester meeting in August 2013, he and Mr Coll met in Southport and discussed the shareholdings in Shortfall again, with Mr Coll saying, "Let's worry about it when the bloody thing starts to make some money". Mr Coll denies that any such meeting or conversation took place.

23. On 30 September 2013 Mr O'Brien and Mr Phipps remortgaged the Property, taking out a new loan of £95,000.

24. In early 2014, the parties agree, Mr Phipps said he would give Mr O'Brien half the profit Mr Phipps received on any sale of his shares in Shortfall. Neither says that this gave rise to any binding obligation.

25. In January 2014 F & I Online became an authorised representative on the FCA register, and on 4 March 2014 JD Concepts Ltd entered creditors voluntary liquidation.

26. Mr O'Brien's case was that in April 2014 Mr Phipps told him that he and Mr Coll had negotiated a buyback of the shares held by Mr Hawkins and Mr Hill for $37,500 with outside funding to follow, and with the assurance that the shareholding would thereafter be 50-50 between Mr Phipps and Mr Coll, with

Mr Phipps' shares being held upon trust at to 50% for Mr O'Brien. Mr Phipps denies there having been any such conversation.

27. It was not until 16 December 2014 that by an assignment and transfer of membership interest in Shortfall, and following a buyback from Mr Hawkins and Hill, Mr Phipps, Mrs Phipps, Mr Coll and his wife, each held 25% of the shares in Shortfall. Mr O'Brien says he was unaware of and did not authorise this transaction.

28. Following that, Mr O'Brien's case is that Mr Phipps told him that funding from South West Business Corporation ('SWBC') had been negotiated, being $500,000 for a 15% shareholding in Shortfall, with assurances that the remaining 85% was split between Mr Phipps and Mr Coll, Mr Phipps' shareholding being held as to half on trust for Mr O'Brien, and that the funding would be used in part to repay monies owed to the UK businesses. Mr Phipps' case, by contrast, is that SWBC invested in Shortfall for a 17.5% initial share, escalating to 35% if Shortfall failed to meet certain performance targets, which it did not.

29. It is agreed that in March 2015 Mr Phipps and Mr O'Brien remortgaged the Property for a second time, taking out a new loan for £108,000.

30. By a Membership Interest Purchase Agreement dated 15 June 2015 and made between SWBC as buyer, Mr Coll, Mr Phipps, and their respective wives as sellers, and Shortfall itself, the parties recited that the sellers were the beneficial owners of all the issued and outstanding membership interests in Shortfall, and it was agreed that SWBC should purchase 17.5% of their shares in Shortfall for $500,000, increasing to 35% if performance targets were not met, with SWBC making a capital contribution of a further $500,000 to Shortfall on completion. Mr O'Brien's case is that he understood that SWBC

was to receive only 15%, and that Mr Phipps was to retain 42.5%, of half of which Mr O'Brien was beneficial owner.

31. It is agreed that on 1 May 2016 the wives' shareholdings in Shortfall were transferred back to their respective husbands' names. Mr O'Brien's case is that he was unaware of this at the time.

32. In June 2016, following a failure to meet the performance targets, SWBC's shareholding increased to 35% under the agreement mentioned above, thus reducing Mr Phipps' shareholding. Mr O'Brien's case is that he was unaware of this until a meeting on 3 March 2017 to discuss their ongoing businesses both in the UK and the USA (Kindred Travel LLC having ceased trading earlier in the year). The parties differ about what was said and agreed at that meeting.

33. As mentioned above, F&I Online Ltd entered creditors voluntary liquidation on 22 January 2018. On 22 June 2018 Mr Phipps resigned as a director of Motor Products Online Ltd. It is common ground that he and Mr Phipps had a meeting on 11 July 2018 to discuss business matters. On Mr O'Brien's case, Mr Phipps signed a stock transfer form transferring his shares in that company to Mr O'Brien for nil consideration.

34. It is common ground that on 6 July 2019 F&I Online Ltd was dissolved. On 1 May 2020 Mr Phipps transferred the remaining balance of the shareholding in Shortfall to a third party on sale, for a variable amount of consideration the total value of which has still not yet crystallised. Again, Mr O'Brien's case is that he was unaware of this agreement before these proceedings.

35. It is common ground that on 1 September 2020 JD Concepts Ltd was dissolved and that on 7 September 2020 a Deed of Dissolution and Settlement was entered into between Mr O'Brien, Mr Phipps, and Motor Products Online Ltd. That Deed dealt with a dissolution of a partnership between Mr Phipps and

Mr O'Brien over the Property, and agreed the Property should be transferred to that company in return for the discharge of the outstanding mortgage.

36. On 11 September 2020, the Property was so transferred. Mr O'Brien's letter of claim in relation to the matters which are the subject of these proceedings followed on 21 September 2020, and proceedings ensued about a year later.

A 'fiduciary relationship'

37. Although by the date of the trial it was of course hard to imagine, I accept Mr Phipps' description of the relationship between himself and Mr O'Brien as being that of "very close friends, like brothers," who "would do anything for each other". I did not understand it to be disputed, and it was well evidenced. Although each had or might have businesses of their own, business concerns in which they were both involved were on an equal basis from about the year 2000. There was equality between them in that way even where others were also involved in the business. They were equal shareholders and co-directors of Insure Online Ltd, of JD Concepts Ltd, F&I Online Ltd and Motor Products Online Ltd. There are no businesses of which I am aware in which both were involved, but unequally. It is likely that they trusted each other to a high degree. I accept that they would be likely to have thought of themselves and referred to themselves as business partners, though not within the meaning of the Partnership Act 1890. In those businesses or companies in which they were the only owners and guiding spirits, it is likely that their business relationship in those businesses and companies gave rise to fiduciary duties between them (for example, such as arise in companies described as quasi-partnerships in the context of petitions in relation to unfairly prejudicial conduct under section 994 Companies Act 2006). It is likely that each of them expected that any businesses in which they might both be involved in the foreseeable future would be

conducted on the same basis and with the same expectation of equality and the same high level of trust based on friendship.

38. I do not accept, however, that their general business relationship could be described as fiduciary or as giving rise of itself to fiduciary obligations in the manner suggested in the particulars of claim. As the learned editors of Snell's Equity 34th ed., state at 7-003, citing Finn, Fiduciary Obligations (1977) at [3]

"A fiduciary "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary". A fiduciary is someone who owes fiduciary duties, and a fiduciary relationship is a relationship between two or more persons in which one, the fiduciary, owes fiduciary duties to the other (or others)."

While there are settled categories of fiduciary relationship, of which the paradigm example is that between trustee and beneficiary, this relationship was not (at least at the outset) within one of those categories. In order to find that the relationship was fiduciary, or involved fiduciary duties, one would be likely to need to find that the parties had undertaken to act for or on behalf of each other in particular matters in circumstances giving rise to a relationship of trust and confidence (that is, a relationship involving a duty of trust and the right to rely upon them): Bristol & West Building Society v Mothew [1998] Ch. 1 at 18. No such undertaking is pleaded or evidenced in this case.

39. Nor would I accept that it follows, from my having found that they were likely to have trusted each other, that there was any general obligation to be trustworthy to each other, still less to subordinate the interests of each to that of the other, whether only in relation to businesses which they conducted together, or more generally: Gray v Smith [2022] EWHC 1153 (Ch)) at [382 – 383, 386, 388] and Al Nehayan v Kent [2018] EWHC 333 (Comm) at [159 and 165]).

Profit and Loss Sharing Agreement

40. The defendant avers that Mr Phipps and Mr O'Brien had entered into a contractual agreement ("the Profit and Loss Sharing Agreement") which governed their relationship in relation to specific business ventures, including Insure Online Ltd, JD Concepts Ltd, F & I Ltd and Motor Products Online Ltd, but not their own separate businesses, or Shortfall. The terms of the agreement are alleged to be that they would share equally in the profits earned by each venture and contribute equally to the losses suffered by each venture; that they would act with integrity and fidelity towards each other, repose trust and confidence in each other and act in good faith towards each other, and to cooperate and collaborate with each other openly. The defendant alleges that the agreement was entered into in about 2000, and is likely to have been oral, although no particulars can be given due to the passage of time, so that it has to be inferred from all the circumstances, and in particular that Mr Phipps and Mr O'Brien conducted themselves in accordance with the those terms at all material times (save as to the breaches of which Mr Phipps complains in his counterclaim); alternatively, such an agreement is to be implied by conduct.

41. This is a rather implausible contract. In the first place, the defendant is unable to give any particulars of the conversation which, it is said, must have taken place in about 2000. In the second place, it is unlikely that businessmen, however close and trusting they were as friends, and with whatever expectation of equality, would bind themselves in advance for an indefinite period only to go into business together on that footing, when in relation to any given business opportunity or set of future circumstances, there might turn out to be good reason for them to go into it unequally. Of course, if they had made such an agreement, they could always agree to change it, or one of them could declined

to go into business with the other so that the agreement would not apply at all; but it is more likely that they would not have bound themselves in advance.

42. In the third place, the supposed agreement is said to apply to all business ventures, including the business ventures of limited companies with which they were concerned. In that context, an agreement to share equally in the profits and losses of each venture would be strange, since the profits and losses would be those of the company, and not of its shareholders or directors, who would only be entitled to the proceeds of sale of their shares, or dividends, and would only be liable under personal guarantees (and not for losses), or in the event of certain breaches of duty. If profits are to be understood more widely as fruits or benefits, and losses more widely as including any circumstances to pay debts of the company, or to provide funding to it, that is not pleaded, and it is difficult to construe a contract sufficiently certain to be enforceable out of it. In his evidence in chief, Mr Phipps attempted to do so: what he said he meant was that any profits would be split equally as dividends, and losses for which there were not already sufficient shareholder funds to keep the business liquid would be met by equal contributions of enough capital to keep the business afloat. But as to dividends, no such agreement would be needed if the shareholdings were equal.

43. From what primary facts is it said that such a contract can be inferred? The defendant relies on the fact that in relation to Insurance Online Ltd, F & I Online Ltd, and Motor Products Online Ltd, Mr Phipps and Mr O'Brien were registered equal shareholders and co-directors, and that there were no other formal agreements such as shareholders agreements. That is, however, equally consistent with an ad hoc decision each time, against the background of the general expectation which I have found to have existed. He also relies on the parties' bearing losses equally in respect of the fraudulent misappropriation of funds from F & I Online Ltd by other individuals. Mr Phipps says this was

repaid 50-50 out of their profits, although he blamed Mr O'Brien for not noticing earlier. This seems to amount, however, to no more than his not pursuing a claim against Mr O'Brien in respect of them, and accepting that the value of his shares, and the availability of dividend, would be reduced by the fraud for him just as much as it was for Mr O'Brien. That does not evidence any overarching contract such as the defendant claims.

44. Mr O'Brien denies there having been any such agreement, and makes the point that as company directors and joint shareholders in the various companies they already had clear sets of rules and duties, so that there was simply no need for a separate agreement. I agree; and Mr Phipps himself appeared to accept this point in cross-examination. In his evidence Mr O'Brien goes on to identify a number of occasions on which he says that, had there been such an agreement, Mr Phipps himself would have been in breach of it: none of those matters seems to bear either way on the question whether there was such an agreement in the first place.

45. When asked in cross-examination how it was that he recalled that he and Mr O'Brien had a clear understanding to the effect of the alleged Profit and Loss Sharing Agreement, Mr Phipps said it was because that what they did going forward. He also said that he recalled having had a conversation with Mr O'Brien about it in 2000, but did not elaborate. However, his pleaded case, and his previous oral evidence, had been that he did not recall such a conversation.

46. Given that the contract alleged is in itself implausible and that the inference that it existed does not follow from the primary facts relied upon, I find that there was no Profit and Loss Sharing Agreement.

The Initial Understanding

47. The burden of proving the Initial Understanding alleged lies upon Mr O'Brien. Mr Phipps denies that there was any such Initial Understanding but alleges (and Mr O'Brien denies) that Mr Phipps had instead made a bare oral promise to Mr O'Brien in early 2011 to 'look after' him if Shortfall made any money. There are obvious similarities between their respective cases: the events are roughly at the same time; they both involve Mr O'Brien getting money in relation to Shortfall; neither is contractual; neither is formalised; and neither is supported by contemporaneous documentary evidence. Equally, there are obvious differences, including the following: on Mr O'Brien's evidence, the arrangements in relation to Shortfall approximated to those which applied to their UK co-owned businesses, while on Mr Phipps' case it was entirely separate; on Mr O'Brien's case it was the result of a specific agreement with both Mr Phipps and Mr Coll, while on Mr Phipps' case Mr Coll was not involved; on Mr O'Brien's case all 3 were to be equal shareholders, while on Mr Phipps' case it did not affect Mr Coll; on Mr O'Brien's case he was and was supposed to be closely involved and informed, and provided substantial support both in money and in time, while holding the fort in the UK for Mr Phipps, while Mr Phipps case, none of that was true.

The claimant's case

48. The events in question are over 10 years ago. There is little in the way of contemporaneous documentation. On Mr O'Brien's account, Mr Coll already had a repatriation product for those living outside the UK, to cover air travel expense to the UK if a close family member was hospitalised, and the return of the expatriate's body to the UK in the event his death abroad) which was

provided through JD Concepts Ltd and offered worldwide. It was Kindred Travel. Mr Coll wanted to investigate the market in the USA and to find a replacement underwriter, and he and Mr Phipps went to the USA in October or November 2010 to investigate. While there, Mr Phipps discovered a gap in the market for return to invoice gap insurance (paying the policyholder the difference between the total loss value paid by their insurer following a write off and the price they had originally paid for the vehicle). On his return, he and Mr Coll discussed the opportunity at great length, considered the technical difficulties, concluded that the product should be written as a membership program, and that they would jointly fund the cost of further investigatory trips to the USA by Mr Phipps, while Mr O'Brien held the fort in the UK. Those trips confirmed that the Kindred Travel product would not get off the ground, and in May 2011 Mr Phipps, Mr O'Brien and Mr Coll had a telephone call to discuss concentrating therefore on the gap insurance opportunity, and thereafter Mr Coll started to tag along on Mr Phipps' trips to the USA. The three of them had already spoken by telephone in January 2011 to discuss the involvement of Mr Hawkins and Mr Hall (as Mr O'Brien called him): Mr O'Brien wanted to know what they were bringing to the table, and for what shareholding. He agreed that they could have the 20% shareholding they wanted, and the other three, including Mr O'Brien, would share the balance equally. Shortfall was incorporated. Mr Phipps and Mr O'Brien agreed that their UK profits would fund the initial investment, and Mr Coll agreed. Most of the work in JD Concepts Ltd was generated by Insure Online Ltd, so JD Concepts Ltd paid £222,000, of which Elaine Sandland kept detailed spreadsheets. Additionally, Mr Coll persuaded a friend named Rob Maclean to lend funds to him and the UK and US businesses between 27 December 2012 and 26 September 2013, some of which was paid into the JD Concepts Ltd account, but most of which was paid directly to Mr Coll. There was a lot of work to be done in the early stages, and Mr O'Brien and Mr Phipps put together a proposal to show to the

underwriters: they did all the development work, such as point-of-sale materials, using the office staff in Southport. There was an express agreement that all the money invested via the UK businesses would be repayable.

49. The accuracy of Mr O'Brien's account was substantially undermined in cross-examination.

50. He got into a self-contradictory muddle over whether Mr Phipps was obliged under their relationship to involve him in Shortfall at all. He did not know that Mr Hill already had an insurance product for the return of mortal remains, and neither Mr Coll nor the defendant had ever discussed Mr Hill's business with him. He did not refer to Mr Coll's earlier visit to the USA in the middle of 2010 with Mr Phipps because he had not been aware of it. He had not known that on that visit Mr Coll had already identified the opportunity for gap insurance in the USA, or that Mr Coll had told Mr Phipps and that that was the reason for their visit. This evidence is unlikely to be right because if Mr O'Brien had been intended to be part of this business, Mr Phipps would surely have told him all about Mr Hill, the visits, and who identified the business opportunity.

51. Mr O'Brien insisted that Mr Phipps and he had formulated the USA gap insurance idea jointly, although that was not mentioned in the letters before action or his particulars of claim. He said that what he had brought to the project was the discovery that it would not be straightforward as a result of his researching the rules, laws and regulations relating to insurance products in the USA and differing states, but had made no notes. He had not referred to this in his witness statement either, and was unable to offer any coherent account of what he had discovered. He appeared evasive during these passages in his evidence, and I formed the view that he was unable to answer the questions because he really had no idea about the regulatory environment. He had not

merely forgotten, in my judgment, because he did not retain even the broad concepts.

52. His witness statement simply did not deal, as it should have, with the process by which the discussions had led to a decision to start the business of Shortfall.

53. He was not sure how many further visits to the USA took place before Shortfall was incorporated. He wrongly thought that Mr Coll was only involved to a lesser degree than Mr Phipps, and was only playing a minor role in the discussions over Shortfall. In fact, it appears that not only was Mr Coll the person who identified the opportunity, but it was he and Mr Phipps who were taking an equal role in driving it forward. That Mr O'Brien was unaware of that suggest that he himself was not involved to a substantial degree, and that his contact with Mr Coll was limited.

54. In the particulars of claim, it was alleged on his behalf that while Mr Hawkins and Mr Hill would have 20% of the shareholding in Shortfall to start with, it was envisaged that he, Mr Phipps and Mr Coll might purchase those shares at some point in the future . In cross-examination, he accepted that this was wrong: it was simply not envisaged at the time.

55. The particulars of claim also allege an express discussion and agreement as part of the Initial Understanding that if those shares were repurchased they will also be held equally between the three of Mr O'Brien, Mr Phipps and Mr Coll. That assertion did not appear in his witness statement, and on the basis of his previous concession it cannot be right.

56. The allegation that it was discussed and agreed that Mr Phipps would keep Mr O'Brien informed, and all major decisions would be taken between the three of them, was not evidenced in Mr O'Brien's witness statement. In cross-examination, he was unable satisfactorily to explain its absence.

57. The evidence of Mr O'Brien is therefore not satisfactory in relation to the Initial Understanding.

58. Mr Coll struck me as a combative witness who was not above a little fencing with Counsel in cross-examination. I therefore approach his evidence with caution. Given the regulatory complexity, I accept as plausible, however, his evidence that until mid-2011 nothing was known about the potential business model for Shortfall (that is, that business be written as a membership program), and that accordingly Mr O'Brien cannot have been involved in the way that he describes with that aspect of the matter. Further, I accept that Kindred Travel LLC did trade until 2017, and the fact that Mr O'Brien seems to have regarded it as a mere exploratory exercise is an indication that he was not as closely involved with the USA businesses as he said he remembered.

The defendant's case

59. Mr Phipps' pleaded case was that it was Mr Coll alone who investigated the business opportunity in the USA, discussed it with Mr Hill, and invited Mr Phipps to join him. They travel to the USA to discuss it with Mr Hill and Mr O'Brien was not involved. They then agreed, together with Mr Hawkins, to set up Shortfall to pursue that opportunity, and a second company called Kindred Travel LLC to pursue the repatriation insurance project. Again, Mr O'Brien was not party to the discussions. He did no work for Shortfall. The UK businesses did lend money to Shortfall to cover initial running costs, but they had been repaid. Mr Phipps told Mr O'Brien about the Shortfall project in late 2010 or early 2011 and made a bare promise to distribute some of the anticipated profits to him if they made any money. That case was supported by his witness statement, which (unlike that of Mr O'Brien) described the process of setting up the companies in some detail. Mr Phipps' witness statement adds that after that,

they did not speak about Shortfall again (apart from passing comments, and some exchanges over its financial position when JD Concepts Ltd was being liquidated because Mr O'Brien thought it owed the UK businesses money) or about Mr Phipps' shareholding in it, until 2015.

60. Mr Phipps largely maintained his evidence in cross-examination. He had stated in his witness statement, however, that he had not even told Mr O'Brien why he was going to the USA with Mr Coll, or anything about the products they were researching. That was implausible, given the relationship. In cross-examination

Mr Phipps then accepted that he had told Mr O'Brien about the purpose of the trip, but maintained his position that he had had no further discussions with Mr O'Brien about Shortfall thereafter (save to the extent described above). That was implausible for the same reason. He then said he had just told Mr O'Brien that he had had a good trip, in the sense that there was a business opportunity there, but that Mr O'Brien had expressed no interest. It is highly unlikely Mr O'Brien would not have been interested to know what opportunity his friend and associate had found, and whether it was an opportunity which might benefit him, and I reject this evidence, and find that Mr O'Brien was interested. Mr Phipps said in oral evidence that it was not until after January 2011 that he had expressly told Mr O'Brien that Shortfall was to be a separate business between Mr Phipps and Mr Coll (after the company had been set up), rather than telling him that on his return from identifying the opportunity.

61. Given the relationship, and the impression I have of him from his oral evidence, I think it likely that Mr O'Brien assumed at this stage that one way or another he would benefit from the venture to the same extent as Mr Phipps, if any benefit was to be had; at least if he was not told otherwise. I consider it likely that Mr Phipps did not tell him otherwise at this point. If he had, I think it unlikely that Mr O'Brien would have been content initially for any of the start-

up costs to be funded by the UK businesses, which he plainly thought was what happened. It is unlikely, in my judgment, that either Mr O'Brien or Mr Phipps will have thought it made any difference to their general way of approaching things on the footing of equality that the company was located in the USA. I think it possible that Mr Phipps offered him some general reassurance at about this time; but not likely that it was in the terms of the alleged "bare promise", since that would have made it clear that Mr Phipps was not proceeding on the basis of equality which Mr O'Brien, at least, will have assumed. I therefore reject the allegation that a bare promise was made by Mr Phipps as alleged.

62. Equally, it is highly unlikely that Mr Phipps, while the relationship with Mr O'Brien was still good, would have positively agreed with Mr O'Brien that they should be equal shareholders in Shortfall, and then gone straight off and shamelessly participated in arrangements such that he was neither a shareholder, nor an express equal beneficiary of a trust of Mr Phipps' shares. I therefore conclude that he did not positively agree that.

63. For all the above reasons, I therefore conclude that there was no agreement with Mr O'Brien, at this stage, that he should be an equal shareholder in Shortfall; and I reject the existence of the alleged Initial Understanding.

64. I accept that from Mr Coll's perspective, there was never any reason to think that he was going into business with Mr O'Brien. I think it most likely, too, that Mr O'Brien did not at this stage appreciate the extent of Mr Coll's role.

Shareholdings in Shortfall

65. Shortfall was incorporated on 21 January 2011. The shareholdings on incorporation intended by the parties to that process (which did not include Mr O'Brien) were set out in an Operating Agreement which, even though unsigned, and even if it was only a draft, is nonetheless the best independent evidence before me of the intention. It shows that what was intended was that Mr Coll

and Mr Phipps should each have 34%, Mr Hill should have 17%, and Mr Hawkins 15%. I find that this is likely to have been the original shareholding proportions in Shortfall.

Financial support

66. Mr O'Brien's case is that he thought he was being kept informed in relation to Shortfall, and in accordance with the Initial Understanding continued to run the UK insurance business and F & I Online Ltd, providing financial support to Shortfall, and Mr Phipps and Mr Coll. Mr Phipps admits that the UK businesses (but not Mr O'Brien) did lend money to Shortfall to cover initial running costs, but asserts that they have since been repaid in full (which Mr O'Brien denies). He denies that Mr O'Brien was kept updated about Shortfall, and that he had any right to be so.

67. These issues are of limited importance. I imagine they were raised partly in order to support the allegation of the supposed Initial Understanding by showing it in action, but I have already found that there was no Initial Understanding as alleged. It is likely that Mr Phipps did from time to time share information with Mr O'Brien about Shortfall, but he did not do so, in my judgment, on the basis that he was under any legal obligation in that regard. It is impossible to form any distinct conclusion, from the incomplete and unsatisfactory evidence on the point, whether (as he alleges) either Mr O'Brien or any of the UK companies provided any substantial funding for Shortfall which has not been repaid. It is clear, however, that Mr O'Brien thought it had (and may still think so), and was concerned so far as possible to ensure that it be repaid so as to assist the UK businesses.

Declaration of trust

The golf day

68. On Mr O'Brien's evidence, in about July 2013 he played golf in Cheltenham with Mr Phipps and Mr Coll at a dealer group golf day, they spoke about the new property he was due to move into, Mr Coll asked him how he was going to afford it, Mr Phipps said that with Shortfall starting to do well, and the investments being paid back to the UK companies, he could afford a new mortgage with a stable income, but Mr Coll told him that 'America was nothing to do with him'. He remembered it clearly because he was completely taken aback. Afterwards he discussed it with Mr Phipps, who told him that the three of them of them were equal partners in Shortfall, although Mr O'Brien was concerned that this was not documented.

69. This account must be very inaccurate. On Mr O'Brien's own account, Shortfall was trading at most in very small amounts in 2013 and it was not profitable at that stage. The supposed start of the conversation therefore makes no sense. Certainly, it does not explain how he could afford a mortgage which he could not otherwise afford. A conversation about how he could afford his house would, I think, have been an odd conversation for him to have had with Mr Coll anyway, and an odder one for Mr Coll to have initiated, since they were not close friends. Neither Mr Phipps nor Mr Coll recalled a conversation of that kind.

70. It is quite likely, however, that there was some conversation about Shortfall and its prospects, since Mr O'Brien was aware of it, and the others were involved in it, and it would have formed part of their conversations. It is likely that Mr O'Brien would have given the impression that he thought he had some rights in relation to it, since I have already found that he would probably have thought that, though not that he thought he was an equal shareholder.

71. It is also likely that Mr Coll would have said that it had nothing to do with Mr O'Brien, because as far as he was aware, Mr O'Brien had neither shares, nor any right to shares, in it. Although Mr O'Brien's account threw up inconsistencies and dubieties (including that it was not pleaded), I accept that in substance he referred to having an interest in Shortfall and Mr Coll had challenged him on it.

72. Mr O'Brien's evidence was that he discussed it with Mr Phipps afterwards, who told him that the three of them of them were equal partners in Shortfall, although Mr O'Brien was concerned that this was not documented. In his oral evidence Mr O'Brien explained that Mr Coll had left before the evening meal, which was therefore an ideal opportunity for this discussion; and again, on the car journey home. While I am prepared to accept that during that evening, and in the car the following day (Mr Phipps agreed they had travelled back together by car), there was a discussion picking up on what Mr Coll had said, I cannot accept that Mr Phipps told Mr O'Brien that they were all three equal partners in Shortfall. They were not; I do not think Mr Phipps would have lied about it given the relationship; and I do not accept that Mr O'Brien ever thought they were equal one third shareholders (after the investors).

Meeting at the office

73. Mr O'Brien's evidence was that later that month he met Mr Phipps at the office to discuss the shareholding in Shortfall again, and Mr Phipps told him that when Shortfall was formed, he and Mr Coll had 80% of the shares between them, and Hawkins and Hill 20% between them. Mr O'Brien suggested that Mr Phipps should have 40% of the shares, and Mr Coll and he 20% each, to reflect the fact that Mr Phipps had been the driving force; but, while acknowledging this, Mr Phipps said he was happy for the three of them to share equally.

74. On Mr O'Brien's case, this is the first time he knew from Mr Phipps that he himself had no shares at all in Shortfall. But, he said, he was not concerned, because, as he said in cross-examination, Mr Phipps told him he had shares, Mr Phipps' shares, although they were not in his name (which he agreed slightly annoyed him). At the same time, he appeared to be saying that he was entitled to one third of all of the shares, apart from those of the external investors.

75. It is hard to know what to make of this evidence. The letter before action written on his behalf appears inconsistent with it. The idea that he was not concerned because he knew he could trust Mr Phipps does not fit well with his evidence that Mr Phipps had told him he was a one third shareholder when in fact he was nothing of the kind. The idea that he was to be entitled to a one third interest does not fit well with the idea that he should be on an equal, or even less than equal, footing with Mr Phipps. Even Mr O'Brien seemed confused by his own evidence on this, but I did not form the impression that he was deliberately lying, nor that he was caught in an evidential tangle as the result of a deliberate lie or lies. He appeared to believe what he was saying. I cannot accept his evidence as accurate, however. Given the findings I have made already, it seems more likely than not that there was a further meeting at the office concerning the shares in Shortfall, since the matter was unresolved; that Mr O'Brien believed or wanted to believe that he was on an equal footing with Mr Phipps in accordance with the way they usually operated, that he thought Mr Phipps deserved more, and Mr Coll less, than they currently had; and that matters were not written in stone, and needed clarifying. That is also broadly consistent with the emails to which I refer below.

The meeting in August 2013 and after

76. The next event was the meeting at the Stoke-on-Trent Harvester restaurant in August 2013 to which I have already referred. Mr O'Brien's evidence was that the purpose was to consider the accounts and a tax liability of JD Concepts Ltd, the standing of F & I Online Ltd with the FCA, and the Shortfall shareholdings. Mr Phipps, Mr Coll and John Beaumont were present. Mr O'Brien explained to Mr Coll that he had been involved from day one and had jointly funded Shortfall. He mentioned the reassurances that Mr Phipps had given him following the golf day. Mr Coll said he did not intend to dilute his shareholding, and Mr O'Brien said in that case he was no longer going to be funding Shortfall. Mr Phipps confirmed that Mr O'Brien had 50% of his shareholding, but Mr O'Brien wanted the agreement to be formalised in writing. It is that statement ("Mr O'Brien had 50% of his shareholding") upon which Mr O'Brien relies as a declaration of trust.

77. The parties agree that if his account is accepted, that statement did amount to a declaration of trust. In that context I remind myself that no technical expressions are necessary for the creation of an express non-charitable trust, which may be created without the settlor necessarily being aware of the legal consequences of his action, so long as he externally manifests an intention to create a state of affairs that can only be accomplished if it creates a trust; and that it is sufficient if the settlor indicates with reasonable certainty an intention to create a trust forthwith, involving the trust property being intended to be kept separate from other property of the trustee and not being at his free disposal, the identity of the trust property, the identity of the intended beneficiaries, and the purpose of the trust so that it is administratively workable and not capricious: see Underhill and Hayton, Law of Trusts and Trustees, 20th ed., 10.1.

78. After the meeting, Mr O'Brien and Mr Phipps discussed matters again and reiterated that the shares should be shared equally between the three of them,

and that Mr O'Brien would make that offer when he met up with Mr Coll later on.

79. He and Mr Coll had a meeting a few weeks later, and Mr O'Brien suggested that Mr Phipps should have 50% of the shares, and Mr Coll and Mr O'Brien should share the remaining 50%. Mr Coll did not disagree, but said "Let's worry about it when the bloody thing starts to make some money". Mr O'Brien said the shareholding split needed to be documented, and Mr Coll agreed to make enquiries about formalising the arrangement, but never did.

80. Mr Phipps' evidence was, in summary, there had indeed been a meeting, but that it had had nothing to do with Shortfall, and there would have been no reason for it to do so: it was all about JD Concepts Ltd. Mr Beaumont would not have been there for a discussion about Shortfall.

The 2015 emails

81. In the face of this direct conflict of evidence, certain emails in 2015 and 2017 are of assistance. Although some years after the events to which they refer, they are considerably closer to them in time than the parties' pleadings, witness statements and oral evidence.

82. On 30 September 2015 Sam Bushell, a solicitor writing on behalf of Mr O'Brien, emailed Mr Phipps in the following terms.

"I understand you are aware that I have recently had a meeting with Mark to discuss the "American project". You would be well aware that the company that you currently own with Mark, namely F&I Online Ltd, has financed the set up of the American company.

It has come therefore as something of a surprise to Mark to find that Jeremy has, in some way and for no apparent consideration, obtained a significant

shareholding in the company. Mark has been advised of a third party investor who has acquired an interest of 15% in the company in exchange for a payment of $600,000 but that the funds are not accessible. It is necessary for details to be disclosed as to the identity and the terms in which the investment into the American company has been made particularly the rules governing the removal of funds.

All of these matters need full and frank explanation and it is understood that you are happy to have a meeting with me and Mark so that the issue can be clarified.

At the first instance, however, it is essential that I have from you details of the American lawyers, their address and confirmation that they will provide details as to the shareholding of the company and the circumstances in which the shares can be transferred to Mark. Matters such as the shareholder agreement and those other issues can be ironed out in our meeting which I understand is to take place in early October.

I therefore await hearing from you with the identity of the lawyers and confirmation from you that you have given them authority to disclose the necessary details to me ahead of our meeting.

It may also be helpful if you would provide me with copies of any correspondence that you have by email or otherwise with both the lawyers and the financial advisors who provided advice regarding the registration of the company in Kentucky.

For the avoidance of doubt, Mark has assured me that you have agreed that he has an equal interest in the American company. What I really need to be able to do is assure him regarding the liability of such a share transfer as it will not be sufficient for a deed of trust to be entered into. I look forward to hearing from you by return."

83. What Ms Bushell is saying here is that Mr O'Brien did not know that Mr Coll had a substantial shareholding in Shortfall, or the identity of the third party investors and the terms of their investment. She is saying that Mr O'Brien had told her that Mr Phipps agreed that Mr O'Brien already had an equal interest in Shortfall, but she does not spell out with whom that is supposed to be equal, apart from Mr Phipps. She is saying that Mr O'Brien wanted a shareholding in his own name, and not just a beneficial interest under a trust deed.

84. The email seems to have been at least a little faux naif: Mr O'Brien must surely have known by this time that Mr Coll had a substantial shareholding in Shortfall. But it is significant that Mr O'Brien was asserting an existing beneficial interest in shares in Shortfall equal with at least Mr Phipps, and clearly knew he did not have a shareholding in his own name.

85. Mr Phipps' reply was not sent until 5 October 2015, and was copied to Mr O'Brien. He said he would sort it out face-to-face with Mr O'Brien, but in the meantime needed to correct some points. He denied that F & I Online Ltd had financed the American companies. He said that Mr O'Brien had known from the outset that Mr Coll was a major shareholder: what he said about this was as follows.

"Complete nonsense. Mark has known from day 1 that Jeremy was a major shareholder in the businesses and to say otherwise is misleading. Without the work of Jeremy and I in the USA, there would be no business. Mark believes that Jeremy`s share is too big because I do most of the work (he also feels that he should not get the same % as me by the way) but this does not change the fact that Jeremy and I have spent 3.5 years building this business and Jeremy is entitled to his share."

I note the statement that Mr O'Brien felt that he should not get the same percentage as Mr Phipps, in the context of the share of work undertaken: that is

plainly a reference to them, and not to Mr Phipps and Mr Coll. I note, too, the indignation with which Mr Phipps asserted that he had informed Mr O'Brien of Mr Coll's shareholding at the time, and that there had been subsequent discussions about it. Mr Phipps appears to be accepting at least a moral obligation to inform Mr O'Brien of these matters.

86. Mr Phipps went on to say that Mr O'Brien had been kept informed as to the third party investment before it happened. He said,

"Mark was kept informed before the investment as to what was happening and even who the 2 potential investors were. I discussed this in detail with him and have done so on many occasions since. "

Again, Mr Phipps appears to be accepting at least a moral obligation to inform Mr O'Brien of these matters; and to be saying that he did so.

87. In a longer passage, he stated,

"Mark is a very close friend (like a brother) and we would do anything for each other. We recently discussed documenting our "arrangement" for America so that if anything ever happened to me, Mark would be protected and get his rewards. However, he cannot become involved as a shareholder in the business as this would cause major issues with the investor, another potential investor that I met with this week and the clients that we have on board as he has never been mentioned in any discussions. I have also never agreed to legally arrange his shareholding in America. It would also dilute my voting rights in the US and make me vulnerable which I am not prepared to do. […]

As my friend, I gave Mark 50% of my first ever business for coming and working with me and over the years we have had many deals where shareholdings / splits etc. were discussed but never documented but where Mark and I were always equal partners. I have never let him down on this. This one is no different. It simply will not work for me to document Mark as a shareholder

and I will, not take the risk by even talking about it. I am however happy to have an agreement in place that says that Mark gets 50% of any sale proceeds from ShortFall, that I get on my shareholding, net of all the relevant taxes, costs etc."

I note the admission that there was an existing, although undocumented, "arrangement" between them in relation to the American business, which they had discussed documenting and which he was willing to document. That is inconsistent with Mr Phipps' case that Shortfall was simply nothing to do with Mr O'Brien, or was some kind of exception to their general way of doing business. I note, too, that the arrangement as it applied to Shortfall included Mr O'Brien's having half of any net proceeds of sale of Mr Phipps' own shares in Shortfall: there is no indication that this was a new proposal; rather, it was the documentation of an existing arrangement.

88. There is no record of any written reply to this email by or on behalf of Mr O'Brien. He does not refer to any in his witness statement, or explain the absence. In his oral evidence he said that he did not instruct the solicitor to dispute what Mr Phipps had said, and it had caused him no concern. In my judgment, that is a powerful indication, not that he was not concerned, but that he agreed with what Mr Phipps then said in relation to Shortfall.

89. These emails do not explicitly state that there had been an oral declaration of trust, whether at the Harvester meeting or otherwise. But they go further than the informal understanding which I have found existed between Mr O'Brien and Mr Phipps in relation to their businesses in common, in particular because the reference to an "arrangement", which suggests something both specific and explicit. That is some support for Mr O'Brien's evidence that there had been a declaration of trust.

The 2017 emails

90. By 2017, the relationship between the two men was breaking down. On 3 March 2017 there was a meeting between Mr Phipps and Mr O'Brien. At 09:30 am on 6 March 2017 Elaine Sandland sent an email to both Mr Phipps and Mr O'Brien setting out some purported minutes of that meeting, which were evidently prepared by Mr O'Brien. Among several other things, those minutes stated as follows.

"8. Shareholding in USA was discussed. SP [Mr Phipps] agreed a meeting took place in Stoke in 2013 with JC [Mr Coll], MOB [Mr O'Brien], SP and John Beaumont. The meeting primarily was to sign off JDC [JD Concepts Ltd] accounts and discuss USA business. During the meeting it was put to JC that the shares in the business should be one third each for SP, JC and MOB. Despite the fact that SP had been the driving force and deserved a higher percentage sign of shares, he acknowledged he was happy with a third each. JC said he had no intention of diluting his shareholding of 50%. SP agreed to split his 50% with MOB.

9. MOB discussed a meeting he had following this in Southport with JC. SP was on business in the USA. MOB discussed with JC that SP should have 50% and JC and MOB 25% each. MOB further told JC that SP was still happy to split a third each. JC did not dispute this but said "lets worry about it when the bloody thing starts to make some money"".

10. SP agreed to sign 25% shares in USA over to MOB and asked him to get solicitors to draw up an agreement for signing next week. MOB agreed to this initially, but with the proviso that the other 8.3% be discussed with SP and JC to ensure shares are split equally. Never intended for any party to have more shares than SP in view of the work he has done…

13. During discussions re USA shares SP stated that US Investors had taken a further 17.5% of the shares due to targets not being reached. SP agreed to forward to MOB paperwork and Contracts relating to this."

There would have been little point in Mr O'Brien's preparing a document in these terms and having Elaine Sandland send it to Mr Phipps if Mr O'Brien had not thought its contents were both true and likely to be accepted. The reference to the meeting in Stoke in 2013 is plainly a reference to the meeting at the Harvester restaurant at which the declaration of trust is alleged to have been made: here, there is a reference to Mr Phipps' having agreed at that meeting to split his shareholding with Mr O'Brien. There is also a reference to the subsequent conversation with Mr Coll to which Mr O'Brien's evidence referred. There is reference to Mr Phipps' having agreed at the meeting on 3 March 2017 to transfer half of his shares in Shortfall, apparently on the basis that he was obliged to do so (there is no suggestion that it was some new act of generosity).

91. Mr Phipps responded to Elaine Sandland (not copying in Mr O'Brien) at 15:44 to say,

"In principle, I agree that this reflects the discussion that Mark and I had although there are some areas where we need information first, before I can talk about specific numbers."

He gave a number of examples where more information was required. Those areas did not include what had been said about Shortfall. He then concluded,

"I will talk to Mark about the other points that I am not 100% in agreement with".

At 16:43 the same day he emailed Mr O'Brien. The attached email trail included his email to Elaine Sandland.

92. It is impossible to read Mr Phipps' reference to "other points that I am not 100% in agreement with" in context as indicating any substantial disagreement on the part of Mr Phipps with the account of the discussions over the Shortfall shareholding. These emails powerfully corroborate the central elements of Mr O'Brien's account of the existence and genesis of the alleged declaration of trust. If, as Mr Phipps suggested, he would never have discussed shareholdings with Elaine Sandland (as a mere employee), he would certainly have corrected Mr O'Brien in the email which he wrote directly to him. But in my judgment, he would have had no alternative but to tell Elaine Sandland that Mr O'Brien had got it wrong, and probably to do it in writing and copy it to Mr O'Brien, since otherwise she would have a wholly mistaken idea as to the ownership of an important business. He did not.

93. Mr Phipps email to Mr Beaumont dated 12 May 2017 relates that the relationship between Mr Phipps and Mr O'Brien had broken down. He expresses a number of concerns, in particular that if Mr O'Brien pushed an issue over a debt, certain adverse consequences would follow,

"…and this will put everything in the USA in jeopardy and Mark has potentially more to benefit from that than he ever would from the UK. However, that promise from me is based on us being friends and an acknowledgement that Mark has supported me over the years, but this could change everything."

This is again a reference to Mr Phipps' agreement that Mr O'Brien should have half his shares in Shortfall. The reference to everything's changing is to everything in the USA being in jeopardy, not to the end of their friendship's releasing Mr Phipps from that agreement. This tends to support Mr O'Brien's case on the declaration of trust.

94. On 6 December 2017 Mr Mason, a solicitor at Brown Turner Ross, wrote to Mr Phipps to says,

"I have been asked to draft a declaration of trust in relation to the shareholding of [Shortfall]. My instructions are that you hold 100% of the shareholding and a trust is to be created whereby 50% of that shareholding is held by you for Mark's benefit."

The email was written on behalf of Mr O'Brien. It would be surprising if such an email had been sent if its contents did not reflect Mr O'Brien's instructions. It is said that it does not support his case, however, because it does not refer to a pre-existing oral declaration of trust which was to be recorded in writing, but to a new trust still to be created. No doubt the solicitor would have understood the difference. It is not at all clear to me that Mr O'Brien would have understood it. If it were to be a new trust, there is no explanation why; whereas in the context of the evidence discussed above, or an oral declaration of trust, which Mr O'Brien was worried was not documented, it makes factual sense, and corroborates his evidence.

95. An email of 7 December 2017 from Mr Phipps to Mr O'Brien and Mr Mason, states

"The verbal deal I have with Mark is that he will get 50% of the net of tax sale proceeds that I get from MY shares, when the company is sold. There are no voting rights or involvement in the running of the business as part of this agreement. This is me purely honouring a promise I made to Mark many years ago. I would also like Mark to consider a cap on this payment…"

96. Again, this supports Mr O'Brien's evidence. The point Mr Phipps is making is that Mr O'Brien has no shares, and Mr Phipps is the shareholder ("MY shares"). He is not disagreeing about the trust. He refers to an existing deal, not a future one. When he refers to the future he is referring to the realisation of the shares. The reference to a promise is not to a supposed 'bare promise' to look after Mr O'Brien if Shortfall made money. Neither the 2015 nor the 2017 emails

support Mr Phipps' evidence about his having made a bare promise. They are inconsistent with such a bare promise. The reference to a promise here is to the declaration of trust at the Harvester meeting.

97. I do not accept the suggestion that because Mr Beaumont was present, and was not concerned with Shortfall, the meeting could not have included a discussion as to the shares in Shortfall. Nor do I accept the submission that if there was to be a discussion about shares in Shortfall, Mr Hill and Mr Hawkins should have been there: for one thing, it did not concern their shares.

98. While a declaration of trust in the terms alleged, without more, would entail a right for Mr O'Brien to call for a transfer of half Mr Phipps shares, the fact that, as he plainly did, Mr Phipps resisted that consequence, does not mean that there was no declaration of trust, only that he did not understand or subjectively wish that consequence of it (at least, when he thought about it).

99. The defendant submits that in 2014 the bare promise of 2011 became a promise that Mr Phipps would give Mr O'Brien half of any sale proceeds of his shares in Shortfall, but that the changed formulation of the promise was of no legal significance, and it remained an unenforceable promise. However, I have found that there was no bare promise in 2011, and I find that that the agreement, arrangement or promise (as the parties variously referred to it at different times) made at the Harvester meeting was objectively intended to create a trust forthwith.

100. For all the reasons set out above, I therefore find that Mr Phipps did declare at the 2013 Harvester meeting that half his shares in Shortfall belonged to Mr O'Brien. I am satisfied that he intended to bind himself legally by doing so.

101. I am equally satisfied that as a matter of fact the declaration was intended to and did cover Mr Phipps' shareholding in Shortfall at all times; so that it

covered shares whenever they might become part of his shareholding, including shares not yet received.

102. I am satisfied that, given the unqualified terms of the declaration, it was a bare trust, so that if called upon and absent any further agreement, Mr Phipps would have had to transfer half of his shareholding to Mr O'Brien, notwithstanding the distinction he later drew between shares and the proceeds of sale of shares, and his unwillingness to effect a transfer. It follows that he owed the usual duties of a trustee (albeit he was a beneficial co-owner of the shareholding from the outset).

The Hill and Hawkins buy-back in December 2014

103. It is common ground that shares in Shortfall held by Mr Hill and Mr Hawkins were bought back in 2014. The written Assignment and Transfer of Interests dated 16 December 2014 records the transfer of shares to Mr Phipps and Mr Coll and their wives, so that each then held 25% of the shares in the company.

104. Mr O'Brien's case as set out in his Particulars of Claim was as follows:

"Following the events set out above, in or around April 2014, the Defendant informed the Claimant that he and Mr Coll had negotiated the ability to buy back the shares of Mr Hill and Mr Hawkins for $37,500 and requested that the Claimant and F&I agree to and assist with the funding of such. The Defendant further informed the Claimant that such a purchase would represent good value for money and that significant outside investment in the Company, addressed below, would later become available allowing for repayment of the initial investments in relation to the Company from the Claimant and F&I. Yet further, the Defendant expressly informed the Claimant that, upon the purchase of such shares from Mr Hill and Mr Hawkins, the formal shareholding in the Company

would be 50% to Mr Coll and 50% to the Defendant with, in accordance with the trust aforementioned, the Defendant holding 25% of the shares in the Company for the Claimant…On the basis of such assurances, the Claimant agreed to the purchase of the shares of Mr Hill and Mr Hawkins and caused F&I to contribute funds towards the same."

Mr O'Brien's case appears to be that what actually happened was therefore a breach of trust because he had been misled in giving his consent; and further that Shortfall did not repay him or F&I Online Ltd.

105. I accept Mr O'Brien's evidence that he was not aware that the wives had become shareholders: if he had been, he would have protested at the inclusion of the wives, and he did not. But in any case, it is more likely than not that it was never intended that the wives would be beneficial owners (as in fact Mr Phipps warranted and Mrs Phipps confirmed on the sale of shares to Shortfall in 2020; and as the Defence and Counterclaim seems to contemplate by referring to the shares as being purchased 'in their names'). Mr O'Brien was therefore beneficial owner of half of the shareholding held by Mr Phipps and his wife at this point.

106. That is quite apart from the question whether either Mr O'Brien or F & I Online Ltd had contributed to the funding of the acquisition. As to that issue, it is impossible, on the fragmentary evidence, to form any satisfactory conclusion as to the extent if any to which Mr O'Brien or F & I Online Ltd contributed to the funding of that acquisition, or upon what basis; and I note that Mr O'Brien's case on this itself lacks any particularity. Accordingly, I do not accept that part of Mr O'Brien's case.

The SWBC purchase

107. By a Membership Interest Purchase Agreement dated 15 June 2015 and made between SWBC Shortfall LLC (as buyer), Mr Coll, Mr Phipps, and their wives (as sellers), and Shortfall, the sellers sold 17.5% of the share capital of Shortfall to SWBC for a base price of $500,000.

108. Mr O'Brien's case is that in January 2015 Mr Phipps had told him that SWBC was willing to invest $500,000 into Shortfall in return for a 15% shareholding, and that Mr Phipps would still hold half of his shares for Mr O'Brien, and that the investment would be used to pay the significant investments in Shortfall made by the UK insurance businesses and Mr O'Brien. On that basis, Mr O'Brien agreed to such a reduction in Mr Phipps' shareholding.

109. Mr Phipps denied that there had been any conversation at all; and alleged that as the result of conditions stipulated by SWBC, the wives had transferred legal title back to their respective husbands, but retained their beneficial interest.

110. It cannot be right that Mr Phipps had not told Mr O'Brien about the SWBC investment: his email of 5 October 2015 asserts that he discussed it in detail with him before the investment was made, and on many occasions since.

111. On that occasion, he described the deal as being 17.5% for $500,000 (not 15% for $600,000, as Sam Bushell's email had said), and said all the money was in the American account. I find that that is what he had told Mr O'Brien. But it was not true or complete. The purchase was 17.5% of the shares, but SWBC would be entitled to another 17.5% within 180 days if certain performance targets were not met (as they were not, so that SWBC became entitled to and took a further 17.5%). The sum of $500,000 was payable to Shortfall. But the base price was a further $500,000 which was payable to the

sellers, not to Shortfall: so that money would hardly have been in the American account, or available for re-paying Mr O'Brien or the UK businesses. Mr Phipps did not tell Mr O'Brien about that.

112. Completing that transaction on that basis, without the informed consent of Mr O'Brien, represented a breach of trust in both a personal and a legal sense. Those breaches may be of academic importance in terms of relief in these proceedings. More to the point, however, failing to account to Mr O'Brien for half of the proceeds of sale of Mr and Mrs Phipps' shares was also a breach of trust, and he remains obliged to account. Moreover, he continued to hold the balance of his shareholding on trust as to half for Mr O'Brien.

Mr McLean

113. In his Particulars of Claim, Mr O'Brien complained that shares of which he was beneficial owner might have been disposed of to a Mr Robert McClean, but that he had no details. In his defence, Mr Phipps states that Mr McLean (this is the correct spelling) had lent money to JD Concepts Ltd and F & I Online Ltd and the debt had been partially settled by Mr Phipps and Mr Coll's agreeing to transfer a 2.5% shareholding each to him, albeit no formal transfer was executed (the balance of the debt being paid off by other means). He pleads that the arrangement was for Mr O'Brien's benefit. Moreover, on the basis of the Profit and Loss Sharing Agreement which I have found not to have existed, Mr Phipps claimed back half the value of the shares he transferred to Mr McLean.

114. The evidence on this is confused and confusing. It does appear that Mr McLean made a loan or series of loans. They appear to have been made to Mr Coll, at least in the first instance. It is unclear in what sums and on what terms the loans were made. It is not clear how much of that money if any made its way to other companies, and if so which companies, and for what purposes. Mr

Phipps' evidence is troublingly unclear, and appears unreliable. Mr McLean was not called to give evidence. Disclosure appears to be, to say the least, incomplete. There seems to be no written settlement agreement. There is an unexecuted written declaration of trust of 5% of the shares in Shortfall in favour of Mr McLean absolutely. Mr Phipps has not proved his case on any of this. If there had been a transfer of beneficial ownership of shares in which Mr O'Brien was beneficially interested without his consent, it would have been in breach of trust.

115. In paragraph 99 of his witness statement, he says that the full value of the 5% shares was paid to Mr McLean in April 2019 by Mr Coll, and Mr Phipps repaid Mr Coll his half of that amount subsequently. Whatever the truth of that, it is clear that Mr Phipps cannot seek to suggest that any shares which he might otherwise hold upon trust for Mr O'Brien are held upon trust for Mr McLean any more.

Disposal of Mr Phipps' remaining shares in Shortfall

116. It is common ground, as stated in the agreed chronology, that on 1 May 2020 Mr Phipps transpired his entire remaining shareholding in Shortfall to an unrelated third party for a variable amount of consideration, the total value of which has yet to crystallise. Mr O'Brien's case is that he was unaware of this until these proceedings. Mr Phipps accept that he did not tell him, and says that he was under no obligation to do so, though it follows from my having found that he held his shares as to half upon trust for Mr O'Brien, that his doing so was a breach of that trust, for which he is accountable.

117. The transaction appears to have been pursuant to a Membership Interest Purchase Agreement dated 30 April 2020 and made between Shortfall Cover

LLC and Mr Phipps. What the purchaser was buying was the Purchased Membership Interests (that is, at least, Mr Phipps' shares) together with all rights to payments or distributions associated therewith.

118. Mr Phipps positive Capital Account attributable to his share of net income from the buyer's operations through April 30, 2020 reduced as described in clause 2.1 of that agreement, was excluded from the sale; but was to be due and payable by the purchaser on 28 May 2020.

119. It was provided that,

"Capital Account" means the capital account of a member of the Buyer established and maintained on the books of the Buyer for each member that shall reflect the value of such member's investment in the Buyer. The Capital Account shall be determined and adjusted in accordance with the Accounting Provisions attached as Exhibit B to the Amended and Restated Limited Liability Company Agreement of the Buyer dated effective April 1, 2019."

The nature and relevance of that Capital Account was not fully explored.

120. The aggregate consideration for that sale and purchase is defined as the purchase price, and was stated to be the earnout payments in respect of sales of depreciation benefits calculated and payable in the manner described, such payments to be made monthly in arrears up to a cap of $4 m. There are other provisions for payment to Mr Phipps, and there may be questions as to the extent if any to which those provisions should also be regarded as part of the purchase price.

121. Mr O'Brien is entitled to all necessary accounts and enquiries to determine to what relief he is entitled in consequence of this disposal in breach of trust.

122. I leave open for further submissions, if necessary, the issue whether Mr O'Brien should be allowed an account on the footing of wilful default, so that

Mr Phipps' account may be surcharged with items of which Mr O'Brien would have had the benefit but for Mr Phipps' wilful default.

Motor Products Online Ltd

123. Mr Phipps resigned as a director of Motor Products Online Ltd in 2018, and there is a stock transfer form transferring his shares in that company to Mr O'Brien, stated to be for nil consideration. Mr Phipps' case is that he had no recollection of executing any stock transfer, but did not believe that he did. He raised a claim that the purported transfer of shares was void, alternatively that Mr O'Brien held the shares upon resulting trust for him. In cross-examination, however, he accepted that it was his signature which occurred on the stock transfer form, and that the purpose was to transfer those shares to Mr O'Brien and be out of the company, and make a clean break with Mr O'Brien in relation to that company. In the light of that evidence, his claim in respect of those shares is sensibly not pursued. I did not find the exploration of what may have been a discrepancy between the date on which the shares were transferred at Companies House as opposed to the date on the stock transfer form illuminating for the secondary purpose for which it was prayed in aid, that of undermining Mr O'Brien's credibility, and in the circumstances I make no findings in relation to it. So far as necessary, I merely find that by that stock transfer form dated 11 July 2018 Mr Phipps transferred the entirety of his legal and beneficial interest in in his shareholding in that company to Mr O'Brien.

Counterclaim

124. The balance of the counterclaim is based on the alleged Profit and Loss Sharing Agreement which I have found not to exist. I do not think it appropriate in the circumstances to go on to attempt to make detailed findings of fact as to matters which would only be relevant had it existed.

125. As already noted, Mr Phipps alleges he transferred 2.5% of the share capital (or rather the beneficial interest in it) of Shortfall to Mr McLean in part settlement of a debt. I have already found that I am not satisfied that he did; but that if he did it was in breach of trust; and on his own evidence he appears to have bought his interest back. Overall, his case and evidence on this was unclear and unpersuasive; and he gave no disclosure in relation to his alleged payments to Mr Coll. If there had been a Profit and Loss Sharing Agreement, I would still not be satisfied that any of this gave rise to a liability on the part of Mr O'Brien.

126. Mr Phipps claims that Mr O'Brien failed to pay his share (approximately £19,333) of Mr Coll's liability under a personal guarantee of the debts of JD Concepts Ltd, leaving Mr Phipps to pay it. Mr Phipps did not prove his case on this: the evidence of the amount of the primary liability, the discharge of it and the sum paid in discharge, and Mr Phipps' contribution, were not satisfactorily evidenced.

127. Mr Phipps claims that F & I Online Ltd owed debts of £70,000 to Premium Credit Ltd which it was unable to pay and which Mr Phipps settled in the sum of only £18,900, but Mr O'Brien refused to pay his half share of that. Mr Phipps failed to prove his case on this: there was no documentary evidence as to any demand or as to Mr Phipps' payment.

128. Mr Phipps claims that Mr O’Brien took an excessive share (that is more than he did) of profits from the business of F & I Online Ltd. Mr Phipps has not proved his factual case on this. The figures are not well evidenced. The Director Questionnaires in the bundle were not prepared for the purposes of an account between the directors, and it is impossible to place any degree of confidence in them in any event, given the confusing way in which the financial affairs of the companies and the parties were conducted, and in any event relate only to a limited period. But in any case, I have found that there as no Profit and Loss Sharing Agreement.

129. Mr Phipps claims that he lent a total of £14,922 to F & I Online Ltd which it was unable to repay, and that under the Profit and Loss Sharing Agreement Mr O’Brien should have contributed half of that. Mr Phipps has not proved his factual case on this. In particular, the unpaid auction invoices upon which he relied were not satisfactory evidence of the funding which he alleged.

130. I therefore dismiss the counterclaim.

Relief

131. The parties should attempt to agree the terms of the relief to follow from this judgment and, if they do so, it may be possible to dispense with a further substantive hearing. The likelihood is, however, that accounts and enquiries will have to be ordered. I will therefore direct that within 7 days of the date of handing down of this judgment, attendance at which is excused, the parties should file and exchange the draft orders which they propose, and short skeleton arguments explaining their respective positions.