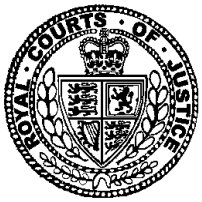

Neutral Citation Number: [2023] EWHC 1658 (Ch)

Claim No: BL-2022-MAN-000051
Application No. BL-2022-MAN-000037

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 4 July 2023

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

MARY SHOVLIN (AS SOLE SURVIVING TRUSTEE OF THE SPH TRUST)	**Claimant**
- and -	
(1) SITE CIVILS AND SURFACING LTD	
(2) GEORGE CROSBY	**Defendants**

- -
- -

Martin Budworth (instructed by **SAS Daniels LLP)** for the Claimant
David Uff (instructed by **Aughton Ainsworth Ltd**) for the Defendants

Hearing dates: 22-24, and 26 May 2023

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 am on Tuesday 4 July 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

HHJ CAWSON KC:

Contents

Introduction

1. In these proceedings the Claimant, Mary Shovlin ("**Mrs Shovlin**"), sues as sole surviving trustee of the SPH Trust, and on behalf of the latter.

2. The SPH Trust is a trust alleged by Mrs Shovlin to have been established by a Declaration of Trust dated 31 October 2016 ("**the Declaration of Trust**") executed by Mrs Shovlin and Austin Fergus and alleged to have had the effect of appointing Mrs Shovlin and Austin Fergus as trustees of the SPH Trust. Austin Fergus was a Certified Accountant who died in February 2019. At all relevant times prior to his death, Austin Fergus was a partner, together with his brother, Henry Fergus, in the accountancy firm of Fergus & Fergus.

3. It is Mrs Shovlin's case that, contrary to her instructions with regard to investment, and without authority, Austin Fergus caused sums totalling £645,000 belonging to the SPH Trust to be advanced by way of loan to the First Defendant, Site Civils & Surfacing Ltd ("**SCS**"). Of this sum of £645,000, £525,000 was used by SCS to fund its purchase, on or about 14 February 2017, of land at Mercury Park, Mercury Way, Urmston, Manchester, ("**Mercury Park**") and £120,000 was subsequently advanced in January 2019 to purchase a strip of land ("**the Regatta Land**") for the benefit of the land originally acquired (together "**the Mercury Way Land**").

4. It is alleged that Austin Fergus acted in breach of trust in paying away the two sum totalling £645,000 to SCS. Although SCS has repaid the £645,000 to the SPH Trust and has more recently paid a sum representing interest thereon at 2% over base rate, Mrs Shovlin maintains that SCS is liable as a *"knowing recipient"* of trust monies to account for the profit that it made on the sale of the Mercury Way Land in March 2020. Further, Mrs Shovlin seeks to amend her Particulars of Claim in order to allege that SCS and the Second Defendant, George Crosby ("**Mr Crosby**"), are liable for dishonestly assisting Austin Fergus to act in breach of trust.

5. Mr Crosby was at all relevant times, and is, the sole director of SCS. Mrs Shovlin maintains that she is entitled to pursue an equitable proprietary tracing claim as against a property belonging to Mr Crosby, known as Greenacres, Fanners Lane, High Legh, Cheshire ("**Greenacres**") and any other assets otherwise belonging to either SCS or Mr Crosby representing the proceeds of sale of the Mercury Park Land.

6. The Defendants position is that they:

   i) Deny that the evidence establishes that Austin Fergus acted in breach of trust in causing the sum of £645,000 to be paid to SCS;

   ii) In any event, deny that SCS knowingly received monies applied by Austin Fergus in breach of trust, or that it or Mr Crosby dishonestly assisted him to act in breach of trust;

   iii) Maintain that even if SCS did knowingly receive monies applied by Austin Fergus in breach of trust, or did dishonestly assist him to act in breach of trust, there is no proper basis for pursuing a claim for loss of profits as against SCS;

   iv) Further, deny that there is any basis for pursuing a proprietary tracing remedy against any assets otherwise belonging to SCS or Mr Crosby.

7. On 26 June 2022, on Mrs Shovlin's application made on a without notice basis, I made a Freezing Order against the Defendants. This followed two earlier hearings on 6 May 2022 and 10 May 2022, when I had declined, on the evidence the before me, to make a Freezing Order. The first application on 6 May 2022 purported to be made by Philip Shovlin Plant Hire Limited ("**PSPH**") rather than Mrs Shovlin on behalf of the SPH Trust.

8. It is a striking feature of the case that, despite her involvement in establishing the SPH Trust, Mrs Shovlin did not, herself, give evidence, and that the case has been largely run by her son, Philip Joseph Shovlin ("**Mr Shovlin**"), who was the main witness for Mrs Shovlin.

9. In addition to Mr Shovlin, Mrs Shovlin's witnesses were:

   i) Thomas Edwards ("**Mr Edwards**") and Jackie Edwards ("**Mrs Edwards**"), a husband and wife who had operated a mobile food van business adjacent to the Mercury Way Land, and who had had dealings with Mr Crosby;

   ii) Nadeem Ahmed ("**Mr Ahmed**"), a company director, who borrowed £330,000 from Austin Fergus, the monies so lent being provided by the SPH Trust;

   iii) Henry Fergus; and

   iv) Helen Sheen ("**Ms Sheen**"), who has acted as secretary and bookkeeper to both Austin Fergus and Henry Fergus.

10. Mr Crosby was the sole witness on behalf of the Defendants.

11. Mr Martin Budworth of Counsel appeared on behalf of Mrs Shovlin, and Mr David Uff of Counsel appeared on behalf of the Defendants. I am grateful to them both for their helpful written and oral submissions.

Background

Austin Fergus

12. Austin Fergus acted as accountant to PSPH and members of the Shovlin family for many years prior to his death in 2019. In evidence, Mr Shovlin described him as being somebody who had been explicitly trusted by PSPH and the family, and his general reputation as being that of an honest and decent man such that, as Mr Shovlin put it, he *"could not believe what he did"*.

13. Austin Fergus also acted for many years as accountant to Mr Crosby and his company, SCS. Mr Crosby described Austin Fergus something of a father figure who had mentored and assisted him in respect of business matters.

14. Mr Shovlin and Mr Crosby both described themselves as having been affected emotionally by Austin Fergus's death, and as missing him, something that is borne out, in particular in the case of Mr Crosby, by a recording and transcript of an important telephone conversation between Mr Shovlin and Mr Crosby on 11 February 2020.

15. Austin Fergus was described in evidence as something of a quiet man who tended to keep things to himself. In the course of his cross examination, Mr Shovlin accepted that Austin Fergus was not a man who had, at least in the past, acted without instructions. In evidence, Mr Shovlin described himself as being *"gobsmacked"* to discover that Austin Fergus had made the payments that it is alleged that he made in breach of trust.

The SPH Trust and Mrs Shovlin

16. In paragraph 5 of his witness statement, Mr Shovlin said this:

> *"My mother paid the sum of £2.5 million into the Trust account in December 2016 from the PSPH account. A Trust Deed had been signed on 9 November 2016 and a bank account had been set up with RBS. The sum of £2.5 million was received*

into the Trust account on 3 January 2017. Account number 12839092 is the account of PSPH from where the money came. A cheque dated 11 January 2017 to K Barry (tax specialist/agent) in the sum of £250,000 represents the tax that the Trust paid to HMRC in respect of the £2.5 million sum."

17. It is Mr Shevlin's evidence that he is the sole beneficiary of the SPH Trust.

18. Prior to 2012, the directors of PSPH were Mr Shovlin's father, Philip Shovlin, Mrs Shovlin, Mr Shovlin's elder brother, Martin Shovlin, and Mr Shovlin. In 2012, and due to disagreements between Mr Shovlin and Martin Shovlin, Mr Shovlin resigned as a director and went to live in Australia where he remained until 2020, returning in early 2020 shortly prior to the Covid pandemic. Evidence before me at the hearing on 10 May 2022 was to the effect that in late 2016 there had been some form of reorganisation within PSPH that had led to Martin Shovlin becoming sole shareholder, but I was concerned at that hearing that there was no cogent explanation with regard to how the SPH Trust had come into existence, and why the sum of £2.5 million had been paid to it, a concern exacerbated by the fact that the initial application for a Freezing Order had, as referred to above, been made on 6 May 2022 in the name of PSPH, and not Mrs Shovlin/the SPH Trust, and at a time when neither Mr Shovlin nor Mrs Shovlin were directors of PSPH and there was no evidence of any authority to make the application on behalf of PSPH.

19. In response to my request for a more detailed explanation as to why the sum of £2.5 million had been paid to the SPH Trust, in his affidavit dated 20 June 2020 Mr Shovlin explained his departure to Australia, and not taking any money for his shares in PSPH. He went on to say that in December 2016, when the money was paid to the SPH Trust, Mrs Shovlin was 79 years old. He then continued: *"She might have been thinking about inheritance tax planning, but I do not know. What I do know is that she sought advice from her accountant, Austin Fergus, who advised her to put the funds in a Trust and pay the tax, which was done within two weeks of the £2.5 million hitting the account."*

20. In paragraph 5 of his witness statement, Mr Shovlin refers to Mrs Shovlin paying the £2.5 million from a PSPH account into the SPH Trust account. However, a letter dated 23 December 2016 has been produced from Mrs Shovlin to RBS confirming an instruction to transfer £2.5 million *"from my Business High Interest Account (No. 12839092) to my SPH Trust Account (No. 11011507, sort code 16 16 25) with immediate effect."* This suggests that if the money did emanate from PSPH, it first passed through an account in Mrs Shovlin's name before being transferred to the account set up for the SPH Trust. The bank statements relating to the latter account show the £2.5 million as being credited thereto on 3 January 2017.

21. The Declaration of Trust (dated 31 October 2016) is believed to have been drafted by Austin Fergus. It is an odd document:

    i) It describes the parties as: (1) *"The SPH Trust (The "Owner")"* and (2) "[PSPH], *existing and former shareholders and their descendants (The Beneficiaries").*

    ii) *"Trust Property"* is defined as meaning *"the amount(s) transferred from RBS account 12839092 in the name of* [PSPH] *and all assets from time to time representing the above."*

iii) By Clause 2, *"the Owner"* irrevocably declared that *"it holds the interest in the Trust Property and the net proceeds of income derived therefrom on trust for the Beneficiaries absolutely."*

iv) Clause 3 is headed *"Trustees powers"* and provides that the Owner, *"as represented by any of it's (*sic*) Trustees may at any time"*, amongst other things, *"(b) sell, assign, transfer, part with possession of or otherwise dispose of in any manner all or any part of, any interest in, the Trust Property."*

v) Finally, clause 4 provides that: *"The power of appointing and retiring Trustees is exerciseable by the Owner, as represented by existing Trustees during their lifetime and by Will thereof."*

vi) The Declaration of Trust was then executed as a deed by both Mrs Shovlin and Austin Fergus.

22. I enquired during the course of submissions as to the basis upon which Mr Shovlin maintained that he was the sole beneficiary of the SPH Trust given the terms of the Declaration of Trust and the fact that the definition of *"Beneficiaries"* provides for a wide class of beneficiaries. No cogent explanation was provided, although in the course of his evidence, Mr Shovlin sought to explain that the rationale for his mother making a gift to him of the £2.5 million through the SPH Trust was, effectively, to compensate him for the fact that he had gone off to Australia leaving his shares in PSPH and had received nothing for the same.

23. It was Mr Shovlin's evidence that he had been told by Mrs Shovlin that she gave instructions to Austin Fergus for the monies transferred to the SPH Trust to be invested in *"things such as stocks, shares and bonds for profit"*. He referred to a discussion to this effect on the way to a meeting with Henry Fergus on 7 February 2020, some time after Austin Fergus's death, at which, so he said, enquiries were to be made as to whether there were any restrictions if Mrs Shovlin wanted to cash in the investments made by the SPH Trust. According to Mr Shovlin, it was at this meeting that he found out from Henry Fergus that Austin Fergus had caused to be made a series of undocumented and unsecured loans out of the monies belonging to the SPH Trust. He said that he could tell from his mother's reaction on hearing about these loans that she would not have approved.

24. Mr Shovlin also referred to other investments made by PSPH with which Austin Fergus had been involved, saying that PSPH had always been conservative in its investments, usually investing in stocks and shares. Mr Shovlin said that he could recall that, on more than one occasion, Austin Fergus approached Mrs Shovlin and Martin Shovlin to see if they would be prepared to invest in housing developments in Manchester and Portugal, but that Austin Fergus was advised that these investments were considered to be too risky, and therefore not suitable for investment.

25. Mrs Shovlin was aged 80 at the time that the SPH Trust was established and is now aged 86. However, in evidence, Mr Shovlin described her as a *"switched on lady"*, and he accepted that she had *"an eye for detail"*. Mr Shovlin further confirmed that Mrs Shovlin had, historically at least, had responsibility for PSPH's finances. In fact, Mrs Shovlin only resigned as a director of PSPH in late 2021, and at the time that application

was first made to me for a freezing order, Mr Shovlin understood her still to be a director with authority to authorise proceedings against the Defendants.

26. It is not in dispute that bank statements relating to the SPH Trust account with RBS were sent to Mrs Shovlin at her home address, and Mr Shovlin accepted under cross examination that Austin Fergus would have known that these bank statements were being sent to her.

27. Although a bank mandate has been produced that would appear to show that the signature of all trustees of the SPH trust was required, at least for significant transactions, the payments the subject matter of the present proceedings were made by cheque drawn on the SPH Trust bank account with RBS signed only by Austin Fergus. I consider it unlikely that RBS would have permitted these significant transactions unless there was some other mandate authorising the transactions or it was otherwise satisfied that Mrs Shovlin had authorised the payments.

28. So far as the relevant payments are concerned:

    i) £2.5 million having been credited to the SPH Trust bank account on 3 January 2016, five large payments were made by cheque out of the account between 12 January 2016 and 13 February 2016, with further large payments being made thereafter.

    ii) The payments made in January 2017 included £525,000 paid to SCS by way of a cheque in favour of SCS dated 5 January 2017, signed by Austin Fergus alone under *"AUSTIN FERGUS / TRUSTEES THE SPH TRUST"*, that cleared the account on . 12 January 2017.

    iii) A further cheque made payable to the Defendants' Solicitors, Aughton Ainsworth, dated 14 January 2019 that cleared the account on 16 January 2019. This was, again, signed by Austin Fergus alone under:

    "AUSTIN FERGUS / TRUSTEES THE SPH TRUST".

    iv) The evidence is to the effect that Austin Fergus made payments to a significant number of other parties, including Mr Ahmed, out of monies standing to the credit of the SPH Trust bank account.

29. As I have said, Mrs Shovlin was not called as a witness, and no witness statement from her has been relied on. Mr Shovlin was asked about this under cross examination, and he said that his mother was unwell and had had a cancer diagnosis. It was put to him that Mrs Shovlin might at least have made a witness statement, to which he responded that he did not want to run the risk of his mother having to give evidence in view of her condition, and that he did not consider it fair to expose her to such a risk. Mrs Shovlin did, however, sign off on her disclosure certificate.

SCS and Mr Crosby

30. Mr Uff candidly referred to Mr Crosby in the course of submissions as a *"rough diamond"*. He left school aged 15 without any qualifications, but after doing various manual jobs dealing with ground works, he set up his own groundworks business in the

late 1990s. He was introduced to Austin Fergus in or about 2006, and Fergus & Fergus acted as accountants from then until 2020 when, following Austin Fergus's death, he instructed Harold Sharp as his accountant in their place.

31. It was Mr Crosby's evidence that he had a very close relationship with Austin Fergus, trusting him, and regarding him as something of a father figure who he would run various business issues past, and depend very significantly upon. He says that Austin Fergus made a number of loans to him personally, and for his business, but that Austin Fergus never required any formal loan agreement or security for the loans that he made. In his witness statement, he referred to doing a number of jobs for Austin Fergus and Henry Fergus without payment.

32. SCS was incorporated on 18 January 2010, and Austin Fergus dealt with its incorporation. On incorporation, Mr Crosby was sole director and shareholder, although later, in 2015, a share was allotted to Mr Crosby's wife, such that he and his wife thereafter held one share each.

33. Referring to the fact that he left school without any qualifications, Mr Crosby says that he relied on professionals such as Austin Fergus with regard to accounts and all company filings for SCS, which carried out civils and servicing works. Mr Crosby says that he worked hard in the business and took little out of it such that by 2016 there was over £400,000 cash in its bank account and a good order book.

34. Prior to 2016, Mr Crosby and his wife owned and lived at 27 Gawsworth Road, Sale Moor, an ex-council house that had been bought at a discount, and that could not be sold until 2017 without having to repay some of the discount. Mr Crosby says in his trial witness statement that he negotiated to purchase another property at Little Lees Lane for £486,000, and that Austin Fergus referred him to a mortgage broker in Southport in order to assist in obtaining a mortgage to help to fund the purchase this property. However, it was then discovered that there was an unpaid County Court Judgment of approximately £60,000 relating to an HMRC liability that prevented a mortgage from being obtained. Mr Crosby says that he therefore decided to purchase the property using the cash in the business, with Austin Fergus agreeing to lend him £15,000 odd to make up a shortfall because Austin Fergus accepted some responsibility for the outstanding HMRC liability.

35. In the event, the purchase did not proceed, and it is Mr Crosby's evidence that he and his wife looked at other properties, and decided to purchase property on Dane Road, Sale ("**the Dane Road Property**"). This was more expensive, with a purchase price of £530,000. Mr Crosby says that Austin Fergus agreed to and did (pending the sale of 27 Gawsworth Road) lend £135,000 to assist in funding the purchase price of the Dane Road Property. It was purchased in May 2016 using, in addition, monies from the business. The sale of 27 Gawsworth Road subsequently completed in January 2018, allowing the loan of £135,000 to be repaid. It is Mr Crosby's evidence that in making this loan of £135,000, Austin Fergus did not require any formal loan agreement or security.

36. In his trial witness statement, Mr Crosby refers to the fact that after he had purchased the Dane Road Property in May 2016, he obtained the opportunity to purchase Mercury Park from its then owner, J Hopkins Contractors Ltd, a company owned by long

standing friends of the family, for which SCS was carrying out clearance work on site. Mercury Park is in close vicinity to the Trafford Centre, and adjacent to a recently constructed Hilton Hotel, and Mr Crosby saw it as a good investment opportunity. He negotiated a price of £400,000 with Mr Hopkins of the above company, which increased to £499,000 after another potential purchaser had expressed interest. Unfortunately given that he had used the available cash to fund the purchase of the Dane Road Property, he did not have the cash available to purchase Mercury Park.

37. It is Mr Crosby's evidence that after the opportunity to purchase Mercury Park had arisen, he mentioned the same to Austin Fergus, saying how *"gutted"* he was that he had just purchased the Dane Road Property and therefore did not have the funds available to purchase Mercury Park. He says that he explained to Austin Fergus that the site was close to the Trafford Centre and had great potential. It is his evidence that, in these circumstances, Austin Fergus offered to lend him the money to purchase Mercury Park, and that he took Austin Fergus up on this offer. When the purchase price increased to £499,000, Austin Fergus agreed to lend this increased amount.

38. It is Mr Crosby's evidence that Austin Fergus said that he would lend at a little over base rate, which was what the money was earning in the bank. At the time the base rate was 0.25%, and he says that Austin Fergus mentioned a figure of 0.4% interest. Mr Crosby says that he told Austin Fergus that he would try to get a mortgage or business loan in order to repay the loan once the site had been purchased.

39. Mr Crosby says that the deposit for the purchase of £25,000 was paid on 24 August 2016 by SCS using funds in the business. He says that the intention was to develop the site, to keep one unit for SCS's use, and to rent out or sell the other units and obtain digital advertising at the front of the site, which fronted onto a new Metrolink line to the Trafford Centre.

40. Mr Crosby says that Austin Fergus gave him a cheque in January 2017 for £525,000, which is the amount that Austin Fergus had agreed to loan. In his witness statement, he says that at the time that he received the cheque, he believed that monies were being loaned by Austin who was the sole signatory on the cheque. He says that whilst he took the cheque to the bank in order to pay it in, he does not recall seeing reference to the SPH Trust on the cheque. He says that if he had seen the reference thereto, he would still have assumed that it was Austin Fergus's money. He says that, at the time, he was not aware of any restriction on Austin Fergus in respect of the use of the monies, if, indeed, there was any such restriction.

41. SCS's purchase of Mercury Park was completed on 14 February 2017 at a purchase price of £499,000.

42. Reliance was placed by Mr Budworth on the fact that in his first affidavit dated 13 July 2022, Mr Crosby had given a rather different explanation concerning the circumstances behind the purchase of Mercury Park, saying, at paragraph 13 thereof, that he made an unsuccessful approach to his bank to obtain a mortgage to fund the purchase of Mercury Park, and that it was in respect of this purchase that he was referred by Austin Fergus to a specialist mortgage broker, only for the latter to discover HMRC's County Court Judgment, leading to Austin Fergus offering to make a loan, with no reference being made to the purchase of the Dane Road Property.

43. In his witness statement Mr Crosby says that he would not have borrowed the money if he had been aware that it was from a third party that he did not know, and that he was only willing to accept the loan from Austin Fergus because of his close personal relationship with the latter. He says that he believed that the money was coming from Austin Fergus personally, and that he had no reason to question, and that at no time did Austin Fergus tell him that the loan was being made by the SPH Trust. Mr Crosby observes that at the time that Austin Fergus offered to loan the money, the SPH Trust had yet to be established, and that the £2.5 million was only transferred to the SPH Trust in January 2017.

44. Mr Crosby refers to the fact that, as with previous loans, the loan was made without any formal loan agreement or security document, which he says reflected the close relationship that he had with Austin Fergus, and the trust that the latter placed in him to repay anything that was lent.

45. Mr Crosby accepts that the loan was not recorded as a loan in the accounts of SCS, but he puts this down to the way in which SCS's accounts were prepared by Austin Fergus, who he relied upon to prepare the same.

46. In his witness, Mr Crosby refers to the fact that, in accordance with his earlier conversations with Austin Fergus about obtaining a mortgage or business loan to repay, he made enquiries of RBS, but these did not bear fruit. He says that he discussed the position with Austin Fergus, but that the latter told him that there was no pressure to repay the loan. Mr Crosby says he then updated Austin Fergus *"almost daily"* with regard to progress in respect of the Mercury Park site, and at the end of a period 12 months offered to pay interest, only for Austin Fergus to say that this was not necessary.

47. SCS made a planning application for the development of the Mercury Park site into 10 industrial units, and planning permission was granted in March 2018.

48. In the meantime, an issue had arisen in relation to the Regatta Land and the owners thereof, and as to whether, in consequence thereof, Mercury Park might be landlocked. SCS was advised by its present Solicitors, Aughton Ainsworth, that this was not the case, but that the issue had the potential to affect future development. Mr Crosby says that it thus became clear that it would be sensible to seek to buy the Regatta Land.

49. SCS did agree to purchase the Regatta Land at a price of £100,000 plus VAT. Mr Crosby says that he discussed the position with Austin Fergus, and that whilst Mr Crosby did not ask for a loan, Austin Fergus offered to provide a further loan of £120,000, which was provided by cheque, again drawn on the SPH Trust account signed by Austin Fergus alone, made out to Aughton Ainsworth.

50. Aughton Ainsworth only accepted this cheque after having been provided with identification information for both Austin Fergus and Mrs Shovlin, a copy of the Declaration of Trust, Mrs Shovlin's letter to RBS dated 23 December 2016, and a copy of the accounts of PSPH.

51. In his witness statement, Mr Crosby says that he did not notice the name of the drawer on the cheque. He says that by the time of the receipt of the cheque for £120,000 the term *"trust"* had been used by Austin Fergus in connection with the loan, but Mr

Crosby says that even then he did not understand what a trust was and continued to believe that the monies being loaned belonged to Austin Fergus.

52. The purchase of the Regatta Land was completed on 18 January 2019.

53. As referred to above, planning permission in respect of the development of Mercury Park had been granted in March 2018. Mr Crosby estimates that the cost of developing the site as 10 units would have been approximately £1.2 million. He says that he had made some enquiries about investors providing finance and had discussed the position with Austin Fergus with regard to him coming in as an investor. Mr Crosby says that Austin Fergus was keen to come in as an investor, Mr Crosby explaining during the course of his evidence that this would have been on a joint venture basis.

54. However, it was Mr Crosby's evidence that, in April or May 2018, he discovered from Austin Fergus that he had been diagnosed with cancer. In his witness statement, Mr Crosby says that, on discovering this, his first concern was to get Austin Fergus's money back to him. When questioned further about this, he explained that he was *"uncomfortable"* about continuing to borrow from Austin Fergus or being concerned in any joint venture with Austin Fergus after this. It was Mr Crosby's evidence that it was in these circumstances that he decided to put Mercury Park on the market for sale, leading to an approach from McDonald's who considered the site was to be in a prime location for one of its restaurants.

55. Mr Crosby says that a sale to McDonald's at a price of £1.6 million was negotiated in August 2018 for a quick sale as Mr Crosby wanted to get money back to Austin Fergus. In the event, the price subsequently increased to £1.8 million, and ultimately to £2 million, to include the Regatta Land, with contracts being exchanged for the sale of the Mercury Way Land to McDonald's at a price of £2 million on 14 June 2019, subject to planning permission and to the Regatta Land being transferred.

56. Austin Fergus sadly died in February 2019 before exchange of contracts in relation to the sale of the Mercury Way Land to McDonald's.

57. I will deal below with the events following Mr Shovlin's entry onto the scene in February 2020, about a year after Austin Fergus's death, but will first deal with SCS's and Mr Crosby's property dealings up to and after the sale of the Mercury Way Land to McDonald's in March 2020.

58. In paragraph 70 of his witness statement, Mr Crosby says that pending the sale of the Mercury Way Land, he identified the property Vinesgrove, Fenners Lane, High Legh ("**Vinesgrove**") as a long-term family home at a purchase price of £900,000. He says that it was his intention to purchase Vinesgrove using the proceeds of sale of the Mercury Way Land to McDonalds, but that as the sale dragged on, he was concerned that he would lose the deal to purchase Vinesgrove. His Solicitors introduced Mr Crosby to Geoff Hadfield at DWFCO9, who granted a personal bridging loan to Mr Crosby of £1 million secured by way of legal mortgage over the Dane Road Property and Vinesgrove to fund the purchase of the latter, which was completed on 10 October 2019.

59. The terms of the relevant bridging facility were set out in an email from DWFCO9 to Aughton Ainsworth dated 20 August 2019. This referred, amongst other things, to the

fact that if either the existing residential property (i.e., the Dane Road Property) or the new property (i.e., Vinesgrove) was sold, then the sale proceeds were to be used to reduce the outstanding debt. In a subsequent email dated 23 August 2019 from Aughton Ainsworth to DWFCO9, Aughton Ainsworth referred to: *"The assumption being that £700-755k will be repaid in 3 months after the sale of his current home* [i.e., the Dane Road Property] *and the balance after six months on completion of his McDonalds deal"*.

60. In the course of giving evidence, Mr Crosby qualified the evidence in his witness statement by suggesting that he had intended to repay the DWFCO9 bridging facility using the proceeds of sale Dane Road Property, but that in the event the sale of the latter delayed until July 2020, resulting in the bridging facility been paid off using the proceeds of sale of the Mercury Way Land.

61. On 6 March 2020, SCS entered into an agreement with DWFCO9 under which the latter agreed to grant a bridging loan to SCS to enable it to pay off the loan made by Austin Fergus. DWFCO9 thus loaned £645,000 to SCS on 6 March 2020. The relevant monies were paid to Aughton Ainsworth, who credited the same to the SPH Trust's bank, and a credit entry in that amount appears on the SPH Trust's bank statements.

62. Having purchased Vinesgrove in October 2019, Mr Crosby sold the same on 1 October 2021 for £1 million, having incurred total costs including the purchase price, the cost of the bridging loan and stamp duty of £1,093,207.40. However, on sale Mr Crosby retained a piece of land at Vinesgrove on which he has built Greenacres. His evidence is that he has incurred construction costs in respect of Greenacres to date of £356,930.81 plus VAT. Further works are required to complete the same totalling approximately £110,000.

63. Mr Crosby separated from his wife in November 2019. His wife continued to live at the Dane Road Property until it was sold in July 2020, when she purchased her own property with her share of the proceeds of sale.

64. After Austin Fergus's death, and as referred to above, Mr Crosby moved accountants to Harold Sharp. He said that this was because his relationship with Fergus & Fergus was dependent upon his personal relationship Austin Fergus. Mr Crosby says that he was advised by Harold Sharp that the loans of £495,000 and £120,000 had not been recorded in SCS's accounts, and that they should therefore be treated as loans made to Mr Crosby, which he had then personally made to SCS. Mr Crosby says that when the bridging loans were repaid, they were dealt with as a personal payment from Mr Crosby and debited to his director's loan account. Harold Sharp advised that there were significant tax consequences if the director's loan was not repaid, so Mr Crosby repaid £1,325,368 to SCS with the balance cleared by declaring a dividend. This sum was paid using the proceeds of sale of Vinesgrove and additional monies.

Events from and after February 2020

65. Mr Shovlin says that he returned from Australia in early 2020, with his return to Australia subsequently being delayed by the onset of the Covid pandemic. In his witness statement, Mr Shovlin refers to attending a meeting with Henry Fergus on 7 February 2020, accompanied by his mother, Mrs Shovlin. Mr Shovlin was not specific as to the context of this meeting, although this is the meeting referred to in paragraph

23 above before which Mrs Shovlin had, according to Mr Shovlin, informed him that the money had been transferred to the SPH Trust to be invested in things such as stocks, shares, and bonds for profit. Mr Shovlin says that this was the first time that he had met Henry Fergus in more than 20 years, and that at this meeting his mother asked Henry Fergus what penalty would apply if early exits were needed from the stocks, shares and bonds. Mr Shovlin says that it was this that prompted Henry Fergus to say that the money had not been invested in stocks and shares, but rather had been given by Austin Fergus to various people as loans, something that Henry Fergus says that he had been unaware of before finding paperwork in Austin Fergus's room after his death.

66. Mr Shovlin says that he and his mother were both shocked, and that Henry Fergus provided details of the names of some of those who had received loans, although he is said to have declined to provide contact details saying that he would contact the individuals himself in order to try and get the money repaid.

67. Mr Shovlin says that he made enquiries at Companies House, and also obtained some details from RBS. This enabled him, he says, to obtain contact details of some of the individuals in question and led to him having a telephone conversation with Mr Crosby on 11 February 2020 relating to the £525,000 paid to SCS, Mr Shovlin not having appreciated at that stage that the £120,000 paid to Aughton Ainsworth related to SCS or Mr Crosby.

68. The present case is short on contemporaneous documentation that might help to determine the factual issues between the parties. An exception is a recording made by Mr Shovlin of his telephone conversation with Mr Crosby on 11 February 2020, in respect of which a transcript has been produced. The parties, respectively, rely upon different parts of this transcript as assisting their case. In particular, Mrs Shovlin places reliance upon passages therein which are said to show that Mr Crosby was aware from prior to when Austin Fergus caused the £525,000 to be paid to SCS that the monies came from a third party, if not the SPH Trust itself, rather than from Austin Fergus's own funds.

69. The day following this telephone conversation, namely on 12 February 2020, Mr Shovlin visited Mr Crosby at his house. It is common ground that this was a long visit, lasting up to nine hours or so. Mr Shovlin is fairly brief in his description as to what was discussed during the course of his lengthy meeting, mentioning that there was discussion with regard to the impending sale of the Mercury Way Land to McDonalds, and that Mr Crosby verbally agreed that upon the sale thereof, the original loan would be repaid. Mr Shovlin says that he was not happy simply to accept the word of Mr Crosby with regard to this and told Mr Crosby that he would try and stop the sale. Mr Crosby says that during the course of this meeting, Mr Shovlin informed him that he expected to receive a return on the loans of 30-50% and that he had connections to the Manchester underworld and to the IRA, and that Mr Shovlin made threats to sell the debt to debt collectors within the Manchester underworld or to the IRA and leave it for them to enforce.

70. A subsequent meeting took place on 28 February 2020 at Costa Coffee at Lymm Services. Mr Shovlin says that Mr Crosby had declined to attend at a meeting at the offices of Fergus & Fergus the previous day. Mr Shovlin alleges that during the course of this meeting Mr Crosby agreed that if his sale to McDonald's did go ahead, then he

would pay a *"fair share"* of any uplift SCS received over and above the alleged loan sum in recognition of the fact that the loan had allowed SCS to make the original purchase. Mr Shovlin says that Mr Crosby declined to state what a *"fair share"* would be but indicated that he would take Mrs Shovlin out for lunch or dinner, and give her a cheque that she would be really happy with. Further, it is Mr Shovlin's evidence that Mr Crosby said that he would be receiving money from his father's estate, and that Mr Shovlin would receive a sum the following Monday.

71. Mr Shovlin suggests that Mr Crosby concealed the existence of the second loan of £120,000, and only disclosed the existence of the same in later conversations.

72. Mr Crosby's account of the meeting on 28 February 2020 is rather different. He says that there was another man present, hovering nearby giving him the impression that he and Mr Shovlin were out to threaten him in order to collect on the loan. However, Mr Crosby says that the two of them backed off when they saw that Mr Crosby had his dog with him. Mr Crosby says that he told Mr Shovlin that he was not going to change the agreement that had been made with Austin Fergus, but that he would take Mrs Shovlin out for a bite to eat and discuss the loan with her, i.e., that he would have thanked her and offered her a gift.

73. Mr Crosby says that it was following this meeting that he arranged the further bridging finance with DWFCO that enabled £645,000 to be paid to the SPH Trust on 6 March 2020 in order to repay the loan.

74. Mr Crosby says that he received a further telephone call from Mr Shovlin from Ireland on or about 8 March 2020, during the course of which Mr Shovlin informed him that he was now going to put Mr Crosby onto the people that he had warned Mr Crosby about. Mr Crosby says that following this call, he changed his telephone number, and spoke to Martin Shovlin on 9 March 2020, telling him that he had repaid the loan but that Mr Shovlin was still threatening him. Mr Crosby says that Martin Shovlin advised Mr Crosby to have nothing further to do with Mr Shovlin.

75. At about this time, Mr Shovlin attended in person at Aughton Ainsworth's offices, and demanded that the £645,000 that had been transferred to the SPH Trust bank account be accepted back by them. Aughton Ainsworth declined to accede to this and, according to Mr Crosby pointed out that that repayment of the loan was what Mr Shovlin had wanted. Mr Shovlin was cross examined on this. His explanation for the SPH Trust seeking to repay the money was that he had agreed to sell this debt (with other debts) for £1 million and wanted to complete this transaction before returning to Australia. The debts in question included another loan of approximately £1.2 million made to a Peter Lynch.

76. Nothing further happen for some time thereafter until Henry Fergus wrote to Mr Crosby on 3 November 2021 seeking an update with regard to the sale of the Mercury Way Land. In the course of this letter, Henry Fergus said that, as things stood: *"I am required to pay in excess of £211,000 interest, on your loans, to the Shovlin Trust and, together with my other commitments, I will be close to being left bankrupt."* He concluded the letter by saying: *"I look forward to hearing from you as soon as possible as I am trying to get this resolved with the Shovlins and others in order to prevent Police involvement and court cases which are being threatened against me."*

77. Under cross examination, Mr Shovlin did not accept that it was him who had required Henry Fergus to pay in excess of £211,000 interest in respect of the loans. Rather, Mr Shovlin referred to Henry Fergus having volunteered to pay, and having paid £300,000 in respect of the loans to SCS, and two of the other larger loans made by Austin Fergus.

78. Under cross examination, Henry Fergus could not initially recall the letter dated 3 November 2021, and suggested that the payment of interest that he had made related to loans other than the three major loans including the initial loan to SCS/Mr Crosby. When asked why he had referred to paying in excess of £211,000 in respect of SCS's/Mr Crosby's loans, he suggested that this must be a *"typing mistake"*.

79. A letter before action was sent by SAS Daniels LLP, Solicitors, to Mr Crosby on 16 February 2022, nearly two years after the sale of the Mercury Way Land and when Mr Crosby is alleged to have offered to pay a *"fair share"* of the profit made thereupon. The letter stated that SAS Daniels LLP was instructed on behalf of PSPH and the SPH Trust, and effectively sought 50% of the profit alleged to have been made on the sale of the Mercury Way Land as representing a *"fair share"* thereof.

80. The initial application for a Freezing Order was made on 6 May 2022. I was not informed on the making of that application that, on Saturday, 9 April 2022, a confrontation had taken place between Mr Crosby and Mr Shovlin over breakfast at the Alderley Edge Hotel. Mr Shovlin alleges that Mr Crosby came up to him and said words to the effect of: *"I'm sorry about the money, I'll get it sorted"*. Mr Shovlin says that he became angry and accused Mr Crosby being a "*lying cheat"*. Mr Shovlin says that a woman with Mr Crosby came up to him and said: *"that's my partner, and I'm doing a development with him, so I need to know what this is all about."* Mr Shovlin says that he believes that the woman was Teresa Dwyer, and that he told her that Mr Crosby had reneged on a promise to give the SPH Trust its fair share on the sale of a property. Teresa Dwyer is the name of the purchaser from Mr Crosby of Vinesgrove. Mr Crosby emphatically denies that she was with him at the Alderley Edge Hotel, and a Teresa Dwyer has written a letter confirming this to be the case. Mr Crosby, whilst accepting that there was some form of confrontation with Mr Shovlin at the Alderley Edge Hotel on the date in question, emphatically denies that he said anything to Mr Shovlin with regard accepting at any liability to the SPH Trust.

The witnesses other than Mr Shovlin and Mr Crosby

Mr and Mrs Edwards

81. Mr and Mrs Edwards ran a mobile food business from a spot on Mercury Way. The essence of their evidence is that they were looking to give up the business given the need to repair or replace their van. They say that in a conversation with Mrs Edwards, Mr Crosby sought to persuade them not to give up the business saying that he did not intend to sell the Mercury Way Land, but that if he did then he would pay them £100,000. They say that, in reliance upon this, they used monies that Mr Edwards had inherited to purchase a new van, only for the Mercury Way Land to subsequently be sold to McDonalds, and for Mr Crosby to deny that he agreed to pay them £100,000.

82. This evidence is relied upon in order to seek to discredit Mr Crosby as a witness. Mr and Mrs Edwards were perfectly believable witnesses whose evidence had a ring of truth about it.

Mr Ahmed

83. As referred to above, Mr Ahmed had also borrowed a significant amount of money from Austin Fergus, with the monies being paid to Mr Ahmed by way of a cheque drawn on the SPH Trust bank account signed solely by Austin Fergus.

84. In his witness statement, Mr Ahmed referred to being telephoned by Mr Crosby, and to there having been a rather strange conversation with Mr Crosby, with the latter jumping from one topic to another, which Mr Ahmed recorded. Mr Ahmed said the main reason that Mr Crosby seemed to have called him was to ask him whether he had been intimidated by Mr Shovlin, with Mr Crosby saying that he had heard from someone else that Mr Shovlin had been threatening Mr Ahmed. Mr Ahmed said that he had not been threatened by Mr Shovlin, and so informed Mr Crosby. There is an agreed transcript of Mr Ahmed's recording of this telephone call, which call took place after the commencement of the present proceedings, and shortly prior to an earlier hearing therein.

85. Under cross examination, Mr Ahmed confirmed that although the money had been paid to him by way of a cheque drawn on the SPH Trust bank account, there was only one signature on the cheque and he understood the money that he was borrowing to be Austin Fergus's money. He said that he trusted Austin Fergus. This was notwithstanding that in response to a request for some form of email confirmation in respect of the loan, Austin Fergus, in a text or WhatsApp message, had said: *"No need for the email for now, in case of prying eyes, we'll sort the detail in due course."*

Henry Fergus

86. I have already referred to Henry Fergus's evidence in respect of his letter dated 3 November 2021 in paragraph 78 above.

87. In his trial witness statement, Henry Fergus refers to sorting out Austin Fergus's papers following his death and coming across a box of papers in which he found bank statements for the SPH Trust and the relevant cheques showing payments out to SCS and others. He says that prior to discovering this box of papers, he knew nothing about the SPH Trust bank account that had been opened, or the payments made out of the same.

88. Henry Fergus says that about 10 days after finding the box of papers, Mr Crosby came into the office, and he and Mr Crosby went through what was in the box, including details of the money that had been paid to SCS. Henry Fergus says that he does not recall that that Mr Crosby ever told him that he knew that the money he received came from the SPH Trust bank account, but in paragraph 10 of his witness statement, Henry Fergus says that Mr Crosby told him not to worry and that *"we would be looked after and get our share"*. Henry Fergus was cross examined about this and said that he was *"sure"* that the word *"share"* was mentioned on several occasions and said that *"words like 50% were used"*.

89. Henry Fergus further refers to the visit by Mr Shovlin, together with his mother, to his offices in early February 2020, and to apologising and telling them that he did not know anything about the relevant payments made out of the SPH Trust bank account, apologising for the fact that he knew nothing about it.

Helen Sheen

90. Helen Sheen is a secretary and bookkeeper who has worked for Fergus & Fergus since 1989. Despite working for both Austin Fergus and Henry Fergus, she says that she knew nothing about the SPH Trust until after seeing papers following Austin Fergus's death. She says that she first had dealings with Mr Crosby after Austin Fergus's death, when she spoke to him on a number of occasions. She says that Mr Crosby told her about the planned sale to McDonalds and that he would *"see us right"*.

91. In paragraph 10 of her witness statement, Helen Sheen refers to Mr Crosby coming into the office to collect his papers on changing accountants, and to saying that he would *"look after us and that we would get our fair share (by that I thought he meant Henry)."* She goes on to say that: *"He said he would see us right when the land was sold. I assumed he meant he would be paying some money to Henry to sort all this out."* Under cross examination, Helen Sheen clarified that what she was saying was that Mr Crosby had said that they would get what they were owed, not a *"fair share"* of any profit made on the planned sale.

Mrs Shovlin's case as trustee of the SPH Trust

Introduction

92. The essence of Mrs Shovlin's case, which serves to identify the key issues in the case, is as follows:

    i) Austin Fergus acted in breach of his duties as a trustee of the SPH Trust in causing the two sums of £525,000 and £120,000 to be paid to SCS and Aughton Ainsworth respectively.

    ii) SCS was a knowing recipient of the monies so applied in breach of trust and, if Mrs Shovlin is permitted to amend to run such an argument, SCS and Mr Crosby dishonestly assisted Austin Fergus to act in breach of trust by paying the monies in question to SCS and Aughton Ainsworth, with the consequence that SCS (and Mr Crosby if amendment is permitted) became liable to account as constructive trustee(s) (at least as constructive trustee(s) of the second class of constructive trustee identified by Millett LJ in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 at 408-409).

    iii) As such constructive trustee, the liability on the part of SCS extends to a liability to account for the profit made from the use of the monies belonging to the SPH Trust that were misapplied by Austin Fergus and applied by SCS in the purchase of the Mercury Way Land, i.e., in respect of the profit made by SCS on the sale of the latter.

    iv) Further or in the alternative, Mrs Shovlin as trustee of the SPH Trust is entitled to pursue an equitable proprietary tracing remedy against the proceeds of sale of the Mercury Way Land as representing the trust monies misapplied, such tracing remedy now extending to Mr Crosby's ownership of Greenacres and any other assets representing such proceeds of sale.

93. I will consider Mrs Shovlin's case in respect of each of these respective aspects of the claim in turn.

Breach of trust by Austin Fergus

94. Whilst recognising that there may be difficulties with the terms of the Declaration of Trust, Mr Budworth submits that it is tolerably clear that by the terms of the Declaration of Trust, Mrs Shovlin and Austin Fergus declared that they held the £2.5 million subsequently to be transferred into the SPH Trust bank account upon trust. To the extent, which he did not concede, that there might be any difficulty in identifying the beneficiaries of the trust, there would, at worst, be a resulting trust in favour of Mrs Shovlin or PSPH.

95. Mr Budworth, on behalf of Mrs Shovlin and the SPH Trust, identified a number of key reasons as to why he says that the Court should conclude that Austin Fergus acted in breach of trust in causing the monies totalling £645,000 to be paid to for the benefit of SCS. In particular, reliance is placed upon the following:

    i) The exchanges that Mr Shovlin says that he had with his mother to the effect that she had instructed Austin Fergus on the setting up of the SPH Trust that the monies were to be invested in investments such as stocks, shares and bonds, and to what Mr Shovlin says was his mother's reaction to what Austin Fergus in fact did;

    ii) The investment history in relation to PSPH and the Shovlin family, and Mr Shovlin's evidence that, in the past, Austin Fergus had come to them with various suggestions as to investment in properties, which had been turned down in favour of more conservative investments in stocks, shares, etc.

    iii) The granting of loans on an unsecured basis, and at an agreed rate of interest significantly below normal commercial lending rates that was not actually recovered, and therefore, so it is submitted, on terms that were contrary to the best interests of the beneficiaries of the SPH Trust. In addition, it is said that this points to Austin Fergus acting for an ulterior purpose and, on that basis, in further breach of his duties as a trustee – see Lewin on Trusts, 30th Ed at 29-033.

    iv) The failure to document the loans in any way, which is said to be consistent with:

        a) The reference in the text or WhatsApp message to Mr Ahmed dated 20 December 2016 to there being no need for an email *"in case of prying eyes*";

        b) A reference in the transcript of the conversation between Mr Shovlin and Mr Crosby on 11 February 2020 to Mr Crosby saying that Austin Fergus had said: *"keep it close to your chest George no one needs to know about what we do."*

    v) The tie in between the loans and Austin Fergus potentially investing in the development of the Mercury Way Land through a joint venture with Mr Crosby.

It is said that this further points to an intention to benefit a non-object of the trust, which would amount to a breach of trust – see Lewin (supra) at 30-070.

vi) The office of co-trustees is a joint one, with decisions required to be made by the trustees acting jointly – see Lewin (supra) at 29-071. It is submitted on behalf of Mrs Shovlin that any departure from this should be strictly construed and that, in the present case, the Declaration of Trust contains no express entitlement on the part of one trustee to engage in investments without the co-trustee's consent.

Knowing receipt

96. A knowing receipt claim depends upon showing:

i) Receipt of the claimant's assets (or their traceable proceeds) by the defendant;

ii) The receipt arising from a breach of trust of fiduciary duty owned to the claimant by a third party; and

iii) Sufficient knowledge on the part of the defendant that the assets he has received are traceable to a breach of trust or fiduciary duty.

97. So far as knowledge is concerned, Mr Budworth submits, as must be the case, that SCS's knowledge is to be assessed by reference to that of its directing mind, Mr Crosby – see *El Ajou v Dollar Holdings* [1994] BCC 143.

98. So far as the sufficiency of knowledge to give rise to a knowing receipt claim is concerned, Mr Budworth relies upon *BCCI v Akindele* [2001] Ch 437, per Nourse LJ at 455D-E, as setting out the relevant knowledge threshold, namely whether:

> "… the recipient's state of knowledge was such as to make it unconscionable for him to retain the benefit of the receipt."

99. Mr Budworth also relies upon *MacMillan Inc v Bishopsgate Investment Trust plc* [1995] 1 WLR 978 at 1000, per Millett J, as authority for the proposition that knowledge of facts which would put a reasonable person on enquiry coupled with a failure to make any enquiry may amount to unconscionability. Further, Mr Budworth relies on the decision of the Privy Council in *Barlow Clowes Ltd v Eurotrust* Ltd [2006] 1 WLR at 1476 at [28], per Lord Hoffmann, as authority for the proposition that someone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means.

100. Mr Budworth referred to the 5-fold classification of knowledge identified by Peter Gibson J in *Baden v Société Général pour Favoriser le Dévéloppement du Commerce et de l'Industrie en France SA* [1993] 1 W.L.R. 509 at 575–583, namely: (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious; (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (4) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (5) knowledge of circumstances which would put an honest and reasonable man on inquiry. Mr Budworth noted that the Court of Appeal in *Akindele* (supra) doubted the utility of this classification. However, he referred to the fact that the editors of Lewin (supra), at 42-063, express the view that this categorisation continues to

provide some assistance as to the quality of knowledge that might be regarded as unconscionable.

101. On behalf of Mrs Shovlin, it is submitted that the Defendants' state of knowledge in the present case was clearly enough to make it unconscionable to retain the benefit of receipt of the monies in question. It is submitted that there was knowledge of the circumstances indicating a breach of trust, alternatively knowledge of the circumstances indicating such breach to an honest and reasonable person, alternatively knowledge of circumstances which would have put an honest and reasonable person on enquiry.

102. In closing, Mr Budworth referred to Lewin (supra) at 42-072 in support of the proposition that the court may infer actual knowledge if the claimant establishes the circumstances set out in *Baden* categories (4) and (5) and the defendant does not give evidence or offer an explanation of his conduct such that proof of knowledge within those categories may shift the evidential burden to the defendant such that if the burden is not discharged, then that may be enough to establish actual knowledge. However, it was primarily his case that the evidence in the present case made any such debate academic as, so Mr Budworth submitted in his Closing Note: *"It is now more obvious that Ds actually knew of a breach of trust (or at least actually knew in the sense of Baden (2)&(3) as the equivalent of (1)"*.

103. As to the facts, it is submitted that there was sufficient to alert Mr Crosby to wrongdoing on the part of Austin Fergus to put him sufficiently on notice thereof to make it unconscionable for SCS to retain the benefit of the receipt.

104. Particular reliance is placed by Mr Budworth, on behalf of Mrs Shovlin, on the following:

i) The fact that despite Mr Crosby/SCS being unable to obtain a loan through RBS or the broker in Southport, Austin Fergus was prepared to provide two substantial loans totalling £645,000 on an undocumented basis, without security, and at an interest rate below normal commercial lending rates.

ii) What is said to be the absence of a cogent reason for the change in strategy so far as the development of the Mercury Way Land was concerned, and deciding to sell the same in order to repay Austin Fergus when Mr Crosby was told by Austin Fergus of his cancer diagnosis. It is submitted that Mr Crosby's evidence that he was *"not comfortable"* continuing to borrow from Austin Fergus is not credible, and that Mr Crosby was evasive when pressed on this point. It is submitted that Mr Crosby's conduct reflected a recognition that, in view of the circumstances in which the monies had been loaned, the matter required to be resolved before it came out into the open if Austin Fergus were to die.

iii) A number of passages in the transcript of the conversation between Mr Shovlin and Mr Crosby on 11 February 2020 are relied upon as contradicting Mr Crosby's case that he believed that Austin Fergus was lending to him his own monies, and as otherwise supporting Mrs Shovlin's case. In particular:

a) The reference on page 1 of the transcript to that fact that Mr Shovlin: *"probably won't be happy about the way me and Austin had our agreement."*

b) The reference on page 3 of the transcript to Austin Fergus saying: *"… no George don't worry I am gonna speak to someone he'll probably help you out and they will and we'll sort it. I said the next day he said that yeah he'd spoke to someone and it's agreed as long as it's in principle …"* . This is said to be an unarguable confirmation that Mr Crosby knew that it was not Austin Fergus's money.

c) The reference on page 15 of the transcript to Mr Crosby thinking *"did it belong to a fund"*.

d) The reference on page 18 of the transcript to Austin Fergus saying: *"keep it close to your chest George no one needs to know about what we do."*

e) The reference on pages 18 and 19 of the transcript to Mr Crosby having concerns that Dermot McKenna might be the source of funds, and might be the sort of person who might try to pull the rug out from under his feet once he had done the hard work, and to Austin Fergus responding: *"… no George they're not people like that he said these are honest people and in the end we did speak about your family and the fact that your father was poorly and I said to him well don't worry mate as never let [inaudible]."*

105. Mr Budworth submits that given the knowledge that Mr Crosby actually had, an honest and reasonable man business would have asked the following questions:

i) How, having already just referred me unsuccessfully to a specialist mortgage broker, has Austin Fergus suddenly got money himself to lend me?

ii) What is the source of this money all of a sudden?

iii) Why is he or the person providing that money to him prepared to loan it to me on an unsecured basis?

iv) He knows that the bank have turned me down. He knows that a mortgage broker had failed to obtain funding. Does the provider of the money know that?

v) Why is there a preparedness to lend to me at all given that the market obviously regards me as an inappropriate risk?

vi) Why, assuming the above question can first be answered, are the terms of the loan so much better than what I could have borrowed at if the market had been prepared to touch me?

vii) Why as an accountant, a professional person, is he prepared to do all this without any written loan agreement?

viii) Why am I not being asked for any security?

ix) Why, even aside from a written loan agreement, is there to be no documentation whatsoever recording the basis on which these payments are being made (apart from the cheques themselves)?

106. Reliance is placed upon the fact that Mr Crosby did not ask these questions as demonstrating such knowledge of the circumstances as to make it unconscionable for SCS to retain the benefit of the monies received that have been applied in breach of trust by Austin Fergus.

107. The pleaded case is one of knowing receipt. However, Mr Budworth goes further and submits that the facts of the present case are such as to demonstrate dishonest assistance on the part of Mr Crosby in the breaches of trust on the part of Austin Fergus, and to the extent necessary he seeks permission to amend in order to run a further case to this effect.

108. Although I was not referred to this authority, I note that the comparatively recent decision of the Court of Appeal in *Group Seven Ltd and another v Nasir and others* [2020] Ch 129 provides authority for the proposition position that:

i) When determining whether a defendant's assistance was dishonest the court should first ascertain all the relevant facts, including the defendant's knowledge and beliefs, and then, having regard to the totality of those facts, determine whether the defendant's conduct had been objectively dishonest according to the standards of ordinary decent people;

ii) There was no requirement that the defendant had subjectively appreciated that what he had done was dishonest;

iii) For the purposes of the first stage of the test, *"knowledge"* included both actual and blind-eye knowledge and *"beliefs"* included suspicions of all types and degrees of probability, including those falling short of blind-eye knowledge.

Liability to account for profits

109. On behalf of Mrs Shovlin, Mr Budworth submits that SCS, as a knowing recipient, has a liability to account for profits made in consequence of the knowing receipt.

110. In answer to the point that a knowing recipient, as a constructive trustee falling within the second class identified by Millett LJ in *Paragon Finance Plc v DB Thakerar & Co* (supra) at 408-409 does not owe the same strict obligation to account for profits as a fiduciary, and as to what was said to similar effect in *Williams v Central Bank of Nigeria* [2014] AC 1189 at [7] et seq, per Lord Sumption, Mr Budworth in relies upon the decision of the Court of Appeal in *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499. Although this was a case concerned with a claim of dishonest assistance in which the Court of Appeal held that a defendant liable as a constructive trustee as a result of dishonest assistance might be liable to account for profits, it is Mrs Shovlin's case that support for the logical extension of the same principle to a knowing recipient is provided by this case, including the citations of authority at paragraph [80] of the judgment of the Court:

> "80 In *Rolfe v Gregory* (1865) 4 De GJ & S 576, 578 and 579 Lord Westbury LC said:
>
> "This wrongful receipt and conversion of trust property place the receiver in the same situation as the trustee from whom he received it, and by the

> principles of this court he becomes subject in a court of equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself.""
>
> "The relief is founded on fraud and not on constructive trust. When it is said that the person who fraudulently receives or possesses himself of trust property is converted by this court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust.""

111. However, it should be noted that in *Novoship* at [114]-[115], the Court of Appeal expressly distinguished the position of a constructive trustee falling within Millett LJ's second class identified in *Paragon Finance* and that of a fiduciary with a strict liability to account, considering that there was a requirement of sufficient causation between the profit and the breach of trust, and that it was not sufficient to show merely that but for the breach of trust the profit would not have been made. Rather it must be shown that the misapplication and the receipt of the monies in question was a real or effective cause of the making of the relevant profit. Further, and again because an account as against a knowing recipient does not involve enforcing a pre-existing duty, the Court of Appeal in *Novoship* at [119] considered that the entitlement to an account of profits was not automatic against a third party and that the Court had a discretion to refuse to allow an account, e.g., where it would be disproportionate in relation to the particular form and extent of the breach of trust.

112. However, Mr Budworth submits that I should be slow to accede to the submission that some rule of causation ought, in the circumstances of the present case, to prevent Mrs Shovlin from being entitled to an account of the profits made from the use of trust monies loaned in breach of trust, namely the profit made in respect of the purchase and sale of the Mercury Way Land. Likewise, it is submitted that I should be slow to accede to a submission that, as a matter of discretion, I should refuse relief in a form that required SCS to disgorge the profits it has made from the purchase and sale of the Mercury Way Land.

113. So far as the present claim is concerned, I understand Mr Budworth to accept that certain costs and expenses incurred by SCS in relation to purchasing and developing the Mercury Way Land could be brought into account in determining the profit made, although Mrs Shovlin would seek to challenge number of the items sought to be brought into account in this way.

Proprietary tracing claim

114. Mr Budworth relies upon the leading authority of *Foskett v McKeown* [2001] 1 AC 102 for the proposition that is open to Mrs Shovlin to trace the trust monies misapplied by Austin Fergus in breach of trust by way of an equitable proprietary tracing claim into the Mercury Way Land, and subsequently into any asset representing the proceeds of sale thereof on the basis that an equitable proprietary tracing claim might be pursued against any recipient of misappropriated or misapplied trust monies or assets representing the same, apart from a bone fide purchaser for value without notice. In the

present case, it is submitted that neither SCS nor Mr Crosby can properly categorised as a purchaser for value without notice, because notice for these purposes is to be equated with knowledge of the breach of trust sufficient to give rise to a claim of knowing receipt – see *Credit Agricole v Papadimitriou* [2015] 1 WLR 4265 at [33], per Lord Sumption.

115. Mr Budworth submits that, in the present case, the whole purchase price of the Mercury Way Land is properly to be regarded as having been funded with the misappropriated £645,000. This is on the basis that, although SCS paid the deposit, the loan itself exceeded the purchase price, including the deposit.

116. On this basis, it is Mrs Shovlin's claim that she was entitled to trace into the entirety of the Mercury Way Land so as to require the latter to be treated as having been a trust asset to which the SPH Trust would have been entitled to the whole of the proceeds of sale, including that represented by any uplift in value occasioned by market conditions and expenditure thereon by SCS or Mr Crosby.

117. So far as tracing into the Mercury Way Land is concerned, the following is relied upon:

i) As Lewin (supra) at 44-024 points out, where the beneficiary asserts a proprietary remedy in relation to land purchased with trust money, he is entitled to do so not because some new trust has been created but because the land represents money or property which was previously validly settled.

ii) For the purposes of a proprietary tracing claim, purchasers or volunteers with notice, such as the Defendants on Mrs Shovlin' case, are treated as akin to wrongdoers, like a trustee, and are therefore subject to the same alternative remedies of a claim to a proprietary interest, or a lien securing the personal remedy against the trustee in breach of trust, with such a purchaser or volunteer being subordinated to the interests of the claimant beneficiaries – see Lewin (supra) at 44-042.

iii) As Lord Parker of Waddington put it in *Sinclair v Broughan* [1914] AC 398 at 442:

> "The principle on which, and the extent to which, trust money can be followed in equity is discussed at length in *In re Hallett's Estate* [13 Ch. D. 696] by Sir George Jessel. He gives two instances. First, he supposes the case of property being purchased by means of the trust money alone. In such a case the beneficiary may either take the property itself or claim a lien on it for the amount of the money expended in the purchase. Secondly, he supposes the case of the purchase having been made partly with the trust money and partly with money of the trustee. In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase. 'The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded."

iv) Even if the SPH Trust is not to be regarded as having provided the purchase price of the Mercury Way Land, *Foskett v McKeown* (supra) at 109, per Lord Browne-Wilkinson, provides authority for the proposition that it would be

entitled to a proportionate share based upon its contribution. Bearing in mind that SCS only itself provided the deposit, the SPH Trust would be entitled to something approaching a 90% share, and therefore a 90% share of the proceeds of sale.

118. So far as a windfall is concerned by virtue of the increase in value of Mercury Way Land occasioned by market conditions and/or Mr Crosby having secured a good deal, and expenditure thereon by SCS Mr Crosby, Mr Budworth submits that there is no proper basis for there being any allowance in respect thereof. This is said to be based on the strict approach taken in tracing claims, and the principle that expenditure on the property of another is not, itself, give rise to any form of interest allowance as exemplified by the explanation of the remedy provided by Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at 1518-1522:

> "1518. A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also; and his interest binds everyone who takes the property or its traceable proceeds except a bona fide purchaser for value without notice: *Foskett v. McKeown* [2001] 1 AC 102, 127 (per Lord Millett), 108 (per Lord Browne-Wilkinson). It follows, therefore, that he can enforce his proprietary rights against a recipient of trust property or its traceable proceeds, even if the recipient had no knowledge of the breach of trust, provided that that recipient did not give value for the property. Accordingly, the proprietary remedy does not depend on knowing receipt.
>
> 1519. However, the proprietary remedy does depend on receipt. If the defendant has not received the claimant's property at all (or any identifiable substitute for it), then it is clear that the proprietary remedy will not lie against him. Equally, it depends on retention. If the defendant no longer has the property (or its substitute), the proprietary remedy is defeated.
>
> 1520. The proprietary remedy does not depend on profit. It is not a claim for unjust enrichment. As Lord Millett explained (at 129): "Conversely, a plaintiff who brings an action like the present must show that the defendant is in receipt of property which belongs beneficially to him or its traceable proceeds, but he need not show that the defendant has been enriched by its receipt. He may, for example, have paid full value for the property, but he is still required to disgorge it if he received it with notice of the plaintiff's interest."
>
> 1521. If the claimant is successful in establishing the proprietary remedy, he will be entitled to the transfer of his property or its identifiable substitute. It will be transferred to him in the state in which it is when the order is enforced; so that if the property (or its substitute) has increased in value, the claimant will receive the benefit of that increase. Equally, if there have been additions or accretions to the property, he will receive those too.

> 1522. The proprietary remedy is not discretionary. As Lord Browne-Wilkinson explained in *Foskett v. McKeown* : "If, as a result of tracing, it can be said that certain of the policy moneys are what now represent part of the assets subject to the trusts of the purchasers' trust deed, then as a matter of English property law the purchasers have an absolute interest in such moneys. There is no discretion vested in the court. There is no room for any consideration whether, in the circumstances of this particular case, it is in a moral sense "equitable" for the purchasers to be so entitled. The rules establishing equitable proprietary interests and their enforceability against certain parties have been developed over the centuries and are an integral part of the property law of England. It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights."

119. Mr Budworth refers to the fact that the potential for the proprietary remedy to operate so as to produce a windfall for the beneficiaries is recognised by Lewin (supra) at 44-061.

120. Thus, it is Mrs Shovlin's case that the proprietary tracing remedy operated so as to extend to the whole of the proceeds of sale of the Mercury Way Land, subject only to credit for the £645,000 that had been repaid to the SPH Trust by the date of the sale of the Mercury Way Land in March 2020.

121. The proceeds of sale of the Mercury Way Land were applied in repaying the bridging loan that had been taken out to fund the purchase of Vinesgrove, secured on the Dane Road Property and Vinesgrove. The general principle is that the proprietary remedy will cease since if the trust assets or its traceable proceeds cease to exist. On this basis, payment into an overdrawn bank account or in discharge of a debt will generally bring a right to trace to an end – see *Re Diplock* [1948] Ch 465 at 521. Thus, the payments off of the bridging loan would, without more, have been likely to have brought the tracing claim to an end.

122. However, Mr Budworth submits that the principle of *"backwards tracing"* applies in the present case. This is a principle that might apply where trust money is used to discharge a debt incurred by the trustee *for the purpose* of acquiring an asset, for example where the trustee raises a secured loan for the specific purpose of acquiring the asset, and the debt or the loan is repaid out of trust money – see Lewin (supra) at 44-114.

123. In *Federal Republic of Brazil v Durant International Corp.* [2015] UKPC 35, [2016] AC 297, the Privy Council held that backward tracing is permissible where there is a close causal and transactional link between the incurring of a debt for the purpose of acquiring property in circumstances where the debt is incurred for the purpose of acquiring the property and the debt is intended to be repaid at the time of acquisition of the property, and is subsequently repaid from the relevant trust monies or the traceable

proceeds thereof – see per Lord Toulson at [34]-[40]. As Lord Toulson put the issue at [40]:

> "40 The Board therefore rejects the argument that there can never be backward tracing, or that the court can never trace the value of an asset whose proceeds are paid into an overdrawn account. But the claimant has to establish a co-ordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund."

124. Mr Budworth relies upon what Mr Crosby himself says in his witness statement with regard to purchasing Vinesgrove with the benefit of the bridging loan that it was intended would be repaid out of the proceeds of sale of the Mercury Way Land. Mr Budworth submits that I should reject Mr Crosby's evidence under cross examination that he was looking to repay the bridging loan upon the sale of the Dane Road Property, which, it is said, conflicts with what Mr Crosby had said in his witness statement. He submits that there is, therefore, sufficient coordination to permit backward tracing into Vinesgrove as now represented by Greenacres. Again, for the same reasons as advanced in relation to the Mercury Way Land, Mr Budworth submits that there is no scope for any credit or adjustment for any expenditure by Mr Crosby on Vinesgrove or Greenacres.

125. Further, Mr Budworth submits that I should direct a more general account or enquiry as to any other assets now representing the proceeds of sale of the Mercury Way Land.

The Defendants' Defence

Introduction

126. The gist of the Defendants' defence is that:

i) Mrs Shovlin has failed to show, on the balance of probabilities, that the payments of £625,000 and £120,000 were paid without her authority or informed consent, and in breach of trust;

ii) In any event, Mr Crosby (and thus SCS) had insufficient knowledge of any breach of trust on the part of Austin Fergus, and was entitled to proceed on the basis that his trusted accountant was honest and entitled to lend the monies that he did such that there is no proper scope for a case of knowing receipt, let alone one of dishonest assistance;

iii) Even if, contrary to the above, SCS is liable for knowing receipt, applying *Novoship* (supra), the advance of the monies was not an effective cause of the making of the profit but was merely the occasion for the making of it. Thus, SCS is not liable to account for the profit it made. Further, in the exercise of its discretion, the Court ought to decline to require SCS to account for the profit made on the sale of the Mercury Way Land because it would be a disproportionate response to the circumstances to do so.

iv) So far as the equitable proprietary tracing claim is concerned, the Defendant's primary position is that SCS and Mr Crosby were purchasers for value without notice and thus acquired any assets derived from the SPH Trust free of any interest of the latter therein. If they were not purchasers for value without notice, then credit does require to be given for the increase in value and expenditure by the Defendants. More fundamentally, it is the Defendants' case that the right to trace was lost upon the proceeds of sale of the Mercury Way Land being applied in discharging the bridging loan. It is submitted that backward tracing is not available as there was, on the facts, insufficient coordination between the purchase of Vinesgrove with the benefit of the bridging loan, and the discharge of the latter proceeds of sale of the Mercury Way Land.

No breach of trust by Austin Fergus

127. The Defendants rely upon the following matters, in particular, in support of their contention that the Court ought to conclude that the payments were made to SCS with the knowledge and informed consent of Mrs Shovlin:

i) The failure to produce any evidence from Mrs Shovlin herself. Whilst Mrs Shovlin is in her 80s and has according to Mr Shovlin, had a cancer diagnosis, and Mr Shovlin does not consider that it would be fair for there to be any risk that she might be called to give evidence, there is no expert or other independent evidence as her current state and condition, and ability to give evidence. If she is unfit to give evidence in Court, then there was always the possibility of her giving evidence remotely. However, we simply do not know, and it is submitted that there is no cogent reason why she could not at least have provided a witness statement. It is submitted that the evidence of Mrs Shovlin is of crucial importance bearing in mind that it was, apparently, Mrs Shovlin who established the SPH Trust whilst Mr Shovlin was in Australia, doing so with Austin Fergus's assistance and allegedly giving him express instructions with regard to an investment strategy. If she had given evidence, then the Defendants would have been able to question her regarding such matters as:

a) How and why the SPH Trust was set up, and the basis upon which it is contended that Mr Shovlin is sole beneficiary notwithstanding the terms of the Declaration of Trust?

b) What instructions, if any, were given to Austin Fergus with regard to investment policy?

c) What, if anything, Mrs Shovlin observed from the bank statements that she received?

d) Why Austin Fergus was, as it would seem, the sole signatory on the SPH Trust bank account?

e) Who, in reality, is driving the litigation?

It is submitted that appropriate inferences ought to be drawn from the fact that Mrs Shovlin did not give evidence, particularly given that a number of circumstances concerning SPH trust are opaque.

ii) It appears common ground that Austin Fergus was generally regarded as a discrete private person, with a reputation for honesty, who people considered that they could trust. On behalf of the Defendants, it is submitted that not only did both Mr Shovlin and Mr Crosby give evidence to this effect, but Mr Ahmed confirmed that he trusted Austin Fergus, and that was the basis upon which he borrowed a very significant sum of money from him without any documentation in relation to the relevant loan.

iii) The presumption must be that professional people such as Austin Fergus do not generally act dishonestly.

iv) Mr Shovlin accepted under cross examination that Austin Fergus was a person who sought instructions in respect of what he did.

v) The bank statements showing the payments to SCS was sent to Mrs Shovlin at her home address. In addition to showing these payments, the bank statements showed various credits inconsistent with investments in stocks and shares. Mr Shovlin described his mother as a switched on lady with an eye for detail, who had had responsibility for financial matters concerning PSPH. Mr Shovlin further accepted that Austin Fergus would have known that the bank statements were being sent to his mother showing the relevant transactions. It is submitted that this is all inconsistent with Austin Fergus concealing the making of the payments, and the circumstances thereof, from Mrs Shovlin, and inconsistent with Austin Fergus doing things off his own bat.

vi) Whilst bank statements were produced, there is no evidence of Mrs Shovlin querying that no investment reports had been produced, or details provided of the investments in stocks and shares that Mrs Shovlin is said to have thought were being made.

vii) The evidence that Mrs Shovlin met with Austin Fergus on a regular basis.

128. I am therefore invited to conclude that the evidence fails to establish that Austin Fergus acted in breach of trust. However, Mr Uff, on behalf of the defendants, concedes that if what Austin Fergus did was done without the informed consent of Mrs Shovlin, then what he did was improper.

Knowing receipt

129. On behalf of the Defendants, Mr Uff submits that in order to succeed on either basis of claim (personal or proprietary) it is necessary for Mrs Shovlin to prove that SCS/Mr Crosby knowingly received trust property which had been applied in breach of trust. Reliance is placed on *Credit Agricole v Papadimitriou* (supra), Per Lord Sumption at [33]:

> "Whether a person claims to be a bona fide purchaser of assets without notice of a prior interest in them or disputes a claim to make him accountable as a constructive trustee on the footing of knowing receipt, the question what constitutes notice or knowledge is the same."

130. Mr Uff submits that this must be correct as the basis that either remedy depends upon there being *"unconscionable conduct"* on the part of the recipient.

131. Relying on Lewin (supra) at 42-072, Mr Uff contends that the burden assumed by Mrs Shovlin is to prove actual knowledge:

> "Knowledge must not be confused with the means of knowledge. To prove that the defendant had documents in his possession does not in itself prove that he knew the contents of the documents at the relevant time, for he might have overlooked or forgotten them."

132. It is submitted that the Amended Particulars of Claim are unsatisfactory and unconvincing, the point being exemplified by paragraph 7 thereof where it is pleaded that: …. "*In the premises there was …. knowledge (actual, constructive or shut eye) by the First Defendant that the monies were traceable to a breach of fiduciary duty, such as to make the First Defendant liable …".* It is submitted that this plea overlooks the fact that there is nothing preceding this bald assertion in the statement of case to support any averment of knowledge of a breach of trust/fiduciary duty.

133. Mr Uff refers to the fact that Lewin (supra) at 42-071 sets out the requirements of pleading knowledge in this context as follows (emphasis added):

> "Allegations of knowledge, especially allegations of knowledge involving want of probity, must be properly particularised in the statement of case. **If it is alleged that the defendant knew or ought to have known of the matters in question, then the allegation must be supported by particulars which differentiate between the case based on what the defendant knew and the case based upon what the defendant ought to have known.** And if the statement of case does not specifically allege want of probity on the part of a defendant, it is not open to the court to find the defendant guilty of want of probity on the basis of a general allegation, unsupported by the particulars, that he knew or ought to have known of the matters in question. **As the law now stands it will not suffice to plead what the defendant ought to have known. The statement of case and particulars should plead what the defendant is alleged to have actually known and set out any facts and matters upon which the claimant relies as showing that in view of the knowledge pleaded retention of the receipt was unconscionable**." [Emphasis added]

134. Mr Uff contends that the *"particulars of knowledge"* set out in paragraph 8 of the Amended Particulars of Claim do not include any particulars of what SCS is alleged to have actually known. At best, so it is said, paragraph 8 contains particulars from which it invites an inference about what SCS either knew or ought to have known, and it does not differentiate between the case based on what SCS knew and the case based upon what SCS ought to have known. Thus, the *"particulars"* do not, it is submitted, support a claim that the Defendants had actual knowledge of facts which would indicate a breach of trust/fiduciary duty on the part of Austin Fergus.

135. Whilst Mr Uff recognises that the appropriate single test post *BCCI v Akindele* (supra) is whether the individual's state of actual knowledge is such that it would be unconscionable for him to retain the benefit of the receipt, he submits that this test too suggests that the actual state of the individual's knowledge or genuinely held belief

must be the starting point for the inquiry because the latter is bound to inform whether or not it would be unconscionable for the recipient to retain the benefit.

136. Mr Uff contends that the five-fold *"Baden"* classification of knowledge remains a useful touchstone. He submits that the weight of authority suggests that only types (1) to (3) of the Baden classification justify a finding of unconscionable conduct and the grant of equitable relief. As to authority, Mr Uff refers to:

i) *In re Montagu's Settlement Trusts* [1987] Ch. 264 [AB/9] per Sir Robert Megarry VC at page 285F:

> "Whether knowledge of the Baden types (iv) and (v) suffices for this purpose is at best doubtful; in my view, it does not, for I cannot see that the carelessness involved will normally amount to a want of probity."

ii) Lewin (supra) at 42-074:

> "Under the general rule it is now clear that notice is not the criterion, and the fact that the defendant has notice will not suffice unless the knowledge on which that notice is based is such as to make the retention of the receipt unconscionable."

iii) *Credit Agricole v Papadimitriou* at [16] per Lord Clarke -

> "After correctly referring to the fact that a bank's account officers are not detectives, he [Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc* (No 3) [1995] 1 WLR 978] said that, unless and until they
>
> > "…. are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the assumption that they are dealing with honest men …."

137. Mr Uff submits that the reference by Sir Robert Megarry VC in *In re Montagu's Settlement Trusts* (supra) to *"a want of probity"* also suggests that the test for dishonesty established in *Ivey v Genting Casinos UK Ltd* [2018] AC 391 at [74] should be applied by analogy. On this basis, Mr Uff submits that the fact-finding tribunal should first ascertain the actual state of the individual's knowledge or genuinely held belief as to the facts. Once that state of mind is established, the objective question is whether his conduct was unconscionable by applying the standards of ordinary decent people.

138. That being so, it is submitted that a likely issue in this case is whether upon accepting the loan from Austin Fergus, Mr Crosby became under a duty to identify and understand who the payer was. Mr Uff submits that in deciding that question, the Court as a fact-finding tribunal should not approach the question upon an analysis of the facts viewed through the lens of an experienced chancery judge. Rather, it is submitted that the Court is bound to take into account the context and the known qualifications, skills, experience and characteristics of the individual.

139. Mr Uff submits that in this context and in plain terms, it is unreasonable to expect a high degree of diligence from an unsophisticated builder/property developer who

accepts a loan from a trusted professional who is also a close friend. Mr Uff identifies, in this context too, that it is a notable feature of the case that a significant degree of trust was reposed in Austin Fergus by all parties.

140. In addition, Mr Uff relies upon the fact that the lack of formality complained of in the dealings between Mr Cosby and Austin Fergus, apart from being a hallmark of earlier dealings between Austin Fergus and Mr Crosby, is also mirrored by the lack of formality in the dealings between PSPH/Mrs Shovlin and Austin Fergus. More particularly, although there is the somewhat perfunctory Declaration of Trust, there are no other documented communications between PSPH/Mrs Shovlin and Austin Fergus about the use of that fund.

141. Mr Uff submits that it is highly material that the £120,000 loan was paid to the Aughton Ainsworth's client account, and Aughton Ainsworth had the documents that would be required in respect of their own due diligence as to the source of the monies. Those documents included personal identification documents for Mrs Shovlin and Austin Fergus as well as the Declaration of Trust.

142. Mr Uff submits that it appears remarkable in this context that even had Mr Crosby made further enquiries about the source of the monies, he would (likely) have been provided with a copy of the Declaration of Trust confirming that the making of loans was within the powers conferred on Austin Fergus.

143. In summary, therefore, it is the Defendants' contention that Mrs Shovlin should be confined to the *"particulars of knowledge"* set out in Paragraph 8 of the Amended Particulars of Claim. It is submitted that those particulars, taken collectively, are unconvincing. The (uncontradicted) evidence is that Austin Fergus did provide loans to SCS and others. The (uncontradicted) evidence is, so it is said, that SCS did provide consideration for the loans. It is submitted that it is striking that Mr Ahmad gave evidence of his accepting monies from Mr Austin Fergus in almost exactly similar circumstances and without thinking it necessary to undertake any due diligence. It is submitted that the absence of any documentary evidence of the loans is consistent with the Defendants' case that the loans were made by a trusted professional and close friend. It is submitted that the absence of reference to the relevant loans in SCS's accounts (and the subsequent correction of the accounts) is convincingly explained by Mr Crosby's evidence.

144. Mr Uff submits that Mrs Shovlin's contention that the Defendants had no basis for a belief that the monies belonged to Austin Fergus is a misconceived attempt to shift the burden of proof.

145. Rather, it is the Defendants' case that the is simply no evidence that the Defendants had actual knowledge of facts which would have put an honest and reasonable person on enquiry that the monies were traceable to a breach of trust/fiduciary duty on the part of Mr Austin Fergus. The reference to *"SPH Trust"* on the face of the cheques is, it is submitted, not sufficient. Any such knowledge in the Defendants is also, it is said, inconsistent with the £120,000 loan being paid to Aughton Ainsworth who would be expected to undertake due diligence and to maintain records of the transaction.

146. Mr Uff submits that I should not allow any amendment of the claim at this late stage so as to introduce a further case of dishonest assistance with the alleged breach of trust on

the part of Austin Fergus. However, is the Defendants' primary submission that if, as they submit is the case, a knowing receipt claim ought to fail, then so ought a dishonest assistance claim which really adds nothing to the case.

Remedy for knowing receipt

147. Of course, the Defendants' primary position is that the knowing receipt claim is not made out, and that SCS and, to the extent relevant, Mr Crosby, are properly to be regarded as purchasers for value without notice who received the monies, and any traceable proceeds thereof, free of any interest of the SPH Trust therein, under a loan agreement for which consideration was provided.

148. If the Court were against the Defendants in this respect, then, as I understand the position, the Defendant accept that *Novoship* (supra) provides persuasive, if not binding authority for the proposition that, in principle, a knowing recipient of trust money may be liable to account for any profit made in consequence thereof. However, the Defendants rely upon *Novoship* at [110] – [114] as authority for the proposition that in considering any such claim to account for profits, it is incumbent upon the claimant to show that the breach of trust was an effective cause of the making of the profit and did not merely provide the opportunity to make the profit. Further, the Defendants rely upon *Novoship* at [119] for the proposition that in the case of a claim for an account of profits against a defendant who is not a fiduciary, and does not owe fiduciary duties, then the Court has a discretion to grant or withhold the remedy.

149. In the present case it is, in short, the Defendants' case that any breach of trust in the making of the two loans of £525,000 and £120,000, and the receipt thereof by SCS, was not an effective cause of the profit that SCS made on the sale of the Mercury Way Land, but merely provided the opportunity for that profit to be made. It is the Defendants' case that the effective cause of the making of the profit was the identification by Mr Crosby of the relevant site as an investment and/or development opportunity, and the time, effort and expenditure spent by the Defendants on improving the site and negotiating a sale to McDonalds.

150. Further, it is the Defendants' submission that this is a case where the Court ought to exercise its discretion against ordering SCS to account for the profit that it made on the sale of the Mercury Way Land even if, contrary to its case, the breach of trust, and the payment of the relevant monies to SCS, was an effective cause of the making of the profit. It is submitted that it would be disproportionate to order an account of profits, particularly given that the Defendants have now paid interest at a rate of 2% over base in respect of the monies loaned. It is said that this is because the profit was generated as a result of Mr Crosby's business nous in identifying the land in question as an opportunity, and the time, effort and expenditure spent thereupon.

151. In the circumstances, even if a claim of knowing receipt, or even dishonest assistance, were made out, it is the Defendants' case that no remedy lies given that the £645,000 has been repaid, together with interest at 2% over base thereupon.

Proprietary tracing remedy

152. The Defendants' primary position is, again, that they were each bone fide purchasers for value, and therefore took free of any proprietary claim by the SPH Trust.

153. The Defendants' primary fallback position is that if there was a proprietary tracing claim as against Mercury Way Land and thus its proceeds of sale, then any ability to trace was lost upon the proceeds of sale being applied in discharging a debt, namely the bridging loan taken out to fund the purchase of Vinesgrove. I consider the Defendants' case as to this in paragraph 163 et seq below.

154. The Defendants did not, in terms, dispute the contention that if SCS were found to be a knowing recipient, then a proprietary tracing claim would have existed as against the Mercury Way Land purchased with the trust monies advanced by Austin Fergus, and thus the proceeds of sale thereof. I understand the Defendants to content that any tracing remedy would have to take into account the fact that SCS had contributed the deposit of £25,000. Further, it is the Defendants' position that an equitable proprietary tracing exercise is properly to be considered to be a compensatory exercise which ought not to produce a result more favourable to the SPH Trust in respect of the Mercury Way Land and the proceeds of sale thereof then provided for by the personal knowing assistance claim, at least to the extent of not providing for a windfall in respect of the profit made on the sale of the Mercury Way Land, and expenditure by the Defendants on that property.

155. In support of this proposition, Mr Uff relies on a number of observations of the Supreme Court in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, namely:

i) Lord Toulson's observation at [1] that: "140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams." It is submitted that this assists in identifying the context of the issue.

ii) In support of the proposition that the basic principle is that both common law remedies and equitable remedies are intended to be compensatory/restitutionary, Mr Uff relies upon what was said by Lord Reed at [111]:

> "Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight in common sense, can be seen to have been caused by the breach."

iii) Mr Uff submits that the overarching principle is expressed most succinctly by Lord Reed at [134]:

> " … The model of equitable compensation, is to require the trustee to restore the trust fund to the position it would have been if the trustee had performed his obligation …"

156. In the course of submissions, I put to Mr Uff that this line of authority appeared to be directed to personal claims for compensation, rather than to a proprietary tracing claim in which it is contended that an asset acquired with misapplied trust monies has become the property of the trust, were the authorities identified by Mr Budworth appear to show that of any windfall arising from market conditions or expenditure on the acquired property subject to the trust will accrue to the later. Mr Uff was unable to point to any authority specifically on the point, but maintained, in effect, that equity is capable of fashioning an answer to prevent an injustice.

157. Mr Uff suggests that it would be extraordinary if a dishonest assistant or a knowing recipient, who are each guilty of wrongdoing, are not liable to account for profits unless there is a sufficient causal connection between the wrongdoing and the profit, but the rules of tracing and following could result in (even) an innocent recipient who does not have the defence of purchaser for value and any further innocent volunteer recipient being bound to disgorge any profit which can be traced to the use of trust property, and to lose the benefit of any expenditure on the property.

158. He submits that such an unconstrained application of the proprietary tracing principles would offend both common sense and any sense of justice or equity. It suggested that this is inconsistent with:

    i) The principle that the effect of the constructive trust is intended to be restitutionary; and

    ii) Equitable principles in that the effect may be to unjustly enrich the claimant - at least to the extent that the enhancement in value of property is attributable to the time, skill and resources of others.

159. Mr Uff submits that a *"windfall defence"* does have application even in the case of a wrongdoer where the windfall is not mere chance but would (in the hands of the beneficiary) be wholly attributable to the skill, industry and resource of another, i.e., the recipient of the trust property.

160. Mr Uff suggests that a *"more traditional approach"* may be found in the allowance for the time, skill and resources deployed by the Defendants in generating the profits on the Mercury Way Land and Vinesgrove/Greenacres. He submits that the Court should ascribe a value to the time, skill and resources deployed by the Defendants in generating the profits and allow that value when apportioning the interests and profits derived on sale.

161. Accordingly, Mr Uff submits that there should be an apportionment of the profit arising on the sale of the Mercury Way Land with the result that if the proceeds of sale are, contrary to his submissions on backward tracing referred to below, capable of being traced further into Vinesgrove/Greenacres, then Mrs Shovlin might then have an equitable interest in Greenacres proportionate to the SPH Trust's share and Mr Crosby would have the equitable interest in the balance.

162. Mr Uff then submits that the SPH Trust's proportionate share in Greenacres (if any) should then be subject to an allowance for the value of the time, skill and resource expended by the Defendants in relation to Vinesgrove/Greenacres.

163. Assuming, contrary to the Defendants' submissions, Mrs Shovlin was entitled on behalf of the SPH Trust to trace into the whole or a substantial proportion of the proceeds of sale of the Mercury Way Land, the question then arises as to whether she is then entitled to backward trace into Vinesgrove as now represented by Greenacres, or whether any right to trace was lost on the proceeds of sale being applied in discharging the bridging loan taken out on the purchase of Vinesgrove.

164. Mr Uff submits that there is no sufficiently close connection to justify the application of a backward tracing process in the present case applying *Federal Republic of Brazil v Durant International Corp.* (supra) at [40]. He relies on a number of factors:

i) The bridging loan used to acquire Vinesgrove was not secured on the Mercury Way Land, but rather on Vinesgrove itself and on the Dane Road Property.

ii) Mr Crosby's wife was a party to the legal charge over Dane Road.

iii) The evidence of Mr Crosby is, he submits, that the original intention was to discharge the bridging loan (first) out of the net proceeds of sale of the Dane Road Property. He suggests that that makes sense as Vinesgrove was intended to be the family home in substitution for the Dane Road Property. Mr Uff submits that what Mr Crosby actually said in giving evidence served to explain what he had said in paragraph 70 of his witness statement and correct it. In closing submissions, Mr Uff took me to the email exchange between Aughton Ainsworth and DWFCO9 in August 2019 referred to above, which he submitted was consistent with at least a primary intention that the bridging loan should be repaid out of the proceeds of sale of the Dane Road Property.

iv) On this basis it is the Defendants' case that it was merely an accident of timing that resulted in the proceeds of sale of Mercury Way being used to discharge the bridging loan.

v) The financial dealings were regularised on Mr Crosby instructing a new accountant when the benefit to Mr Crosby/Mrs Crosby became reflected in his director's loan account with SCS. That director's loan was then discharged by applying the net proceeds of the sale of Vinesgrove (and other monies).

165. The Defendant is therefore submit that the proprietary tracing claim should be dismissed.

Preliminary observations

No evidence from Mrs Shovlin

166. The fact that Mrs Shovlin has not provided any evidence is, as referred to above, a significant factor relied upon by the Defendants, particularly bearing in mind that the instructions that may or may not have been given by Mrs Shovlin with regard to how the £2.5 million ought to be invested lies at the heart of the case that Austin Fergus acted in breach of trust with the case resting on Mr Shovlin's hearsay evidence and what might be contended to be the inherent probabilities of the case. It is submitted Mr Uff that I should draw adverse inferences from the fact that there is no evidence from Mrs Shovlin as to what she might have said with regard to her instructions to Austin Fergus regarding investment policy, and as to her state of knowledge as to what Austin Fergus was doing with the money in question as informed by, for example, her receipt of bank statements.

167. Guidance as to the approach to be taken where adverse inferences of this kind are sought to be drawn is provided by what was said by Lord Leggatt (with the agreement of Lord

Hodge, Lord Briggs, Lady Arden and Lord Hamblen) in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863, at [41]:

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

168. I take on board what Mr Shovlin says with regard to his mother's age and cancer diagnosis. However, I find it difficult to understand why she did not at least make a witness statement dealing with the various issues identified in paragraph 127(i) above. Had she done so, then consideration could have been given as to whether, and if so how, she might have given oral evidence in the light, if necessary, of proper independent evidence explaining her physical health and frailty. Any question of fairness with regard to calling Mrs Shovlin could have been considered in this context. I do not consider that Mr Shovlin's subjective assessment that it would not be fair to expose his mother to the witness box if she were to make a witness statement provides a satisfactory explanation as to why there is no evidence from her.

169. Mrs Shovlin's evidence with regard to the various matters identified in paragraph 127(i) above, if not other matters, would, as I see it, have been bound to be highly material with regard to the central issue in the case, namely whether Austin Fergus acted with propriety as a trustee of the SPH Trust in causing the two payments totalling £645,000 to be made to SCS and Aughton Ainsworth. There is, of course, the hearsay evidence of Mr Shovlin with regard to what his mother told him, but apart from the fact that the Defendants have not been able to cross examine Mrs Shovlin herself on the matters that he has dealt with, this does not go to all of the issues upon which Mrs Shovlin might have been expected to have given evidence, and which would have helped me to understand the purpose behind the SPH trust, and what was intended to be done with the £2.5 million that was paid by Mrs Shovlin into it, which would, in turn, have assisted in my understanding of why Austin Fergus did what he did.

170. In these circumstances, I consider that I am entitled to draw adverse inferences from the fact that there is no evidence from Mrs Shovlin, and to take those inferences into account in considering the overall probabilities with regard to Austin Fergus's conduct.

171. I note that in *Ahuja Investments v Victorygame* [2021] EWHC 2382 (Ch), a case to which I was taken by Mr Budworth, HHJ Hodge QC, sitting as a Judge of the High Court, at [32]-[33], having referred to *Efobi*, observed that omission to call a material witness without reasonable explanation may have a significance that goes beyond the drawing of appropriate adverse inferences, one particular consideration being that a failure to call a witness who might have been able to give evidence on a material issue might mean that the court was left with no direct evidence at all on that issue. Mr Budworth submits that that is not the situation in the present case, where there is other evidence, such as the hearsay evidence of Mr Shovlin and the transcript of the telephone conversation between Mr Shovlin and Mr Crosby on 11 February 2020, which Mr Budworth submits supports his case. However, this is a consideration that I must bear in mind in my overall assessment of the evidence.

Serious allegations of dishonesty

172. The present case concerned serious allegations of dishonesty against a professional person now deceased. The gist of the case is that Austin Fergus acted dishonestly in applying the monies in the way that he did, and that Mr Crosby dishonestly assisted him in doing so.

173. I bear in mind that where serious allegations are made in a civil case, such as allegations of dishonesty of this kind, the burden of proof remains the same, and the standard of proof remains the civil standard, with the onus being on the party maintaining the claim to establish their case on the balance of probabilities, subject to the application of any shifting burdens. However, it is trite that if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, at least to the extent that it is incumbent on the party making the serious allegation to prove it. This is on the basis that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability – see Phipson on Evidence, 20th Ed at 6-57, and *Re H (Minors)* [1996] AC 563 at 586D-F, per Lord Nicholls, cited with approval in *Three Rivers District Council v Bank of England* [2001] UKHL 16 at [181].

174. Allied to this is the inherent improbability of a professional person such as Austin Fergus acting dishonestly – see *Three Rivers* (supra) at [182], and *Attorney General of Zambia v Meer Care & Desai* [2008] EWCA Civ 1007, at [283]-[284] and [292].

175. These are considerations that I must take into account.

The Court's approach to oral evidence

176. The payment of the £525,000 to SCS took place over six years ago, and it is over three years since matters came to something of a head in early 2020. I consider that I must bear firmly in mind the much repeated observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15] – [22] with regard to the unreliability of memory, and his caution to place limited, if any, weight 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.

177. A particular concern identified by Leggatt J was the ability of a witness, in seeking to recall events that took place some time ago, to falsely do so, but with genuine conviction and belief that their recollection is accurate. Thus, as Leggatt J cautioned in Gestmin at [22]: "… it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth." Allied to this is a concern that a witness seeking to recall events over a significant period of time is liable, in reconstructing those events in his or her own mind, to do so in a way that inaccurately recalls the same in his or her favour, and to exaggerate perceived advantages to his or her own case, and to do so without deliberately giving false evidence.

178. The Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 at [88] stressed the importance of making findings by reference to all the evidence, that is both documentary evidence and witness evidence, placing such weight as the circumstances require on each. As I have indicated above, a difficulty in the present case is a paucity of contemporaneous documentation to assist in the resolution of questions of fact. In these circumstances, it will be of importance to test the witness evidence against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions – see *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].

Determination of the Claim

Assessment of the witnesses

Mr Shovlin

179. In his closing note, Mr Budworth referred to Mr Shovlin as honest almost to a fault. However, I regret that I found him a less than an impressive witness. My particular concerns were the following:

    i) I found his explanation for his mother not even providing a witness statement to be unconvincing. He said that he considered that it would be unfair to subject her to the risk of having to be called to give evidence. However, as I have explained, if there are genuine concerns with regard to her physical frailty that might have made giving evidence difficult, there are various ways that the Court might have sought to address those concerns. Mr Shovlin described his mother as a *"switched on lady"* with *"an eye for detail"*. If there is merit in her case, then one might reasonably have expected at least a witness statement from her dealing with the key aspects of the case concerning the setting up of the SPH Trust and the instructions given to Austin Fergus with regard to how the £2.5 million was to be invested, rather than such matters simply being dealt with on a hearsay and frankly somewhat opaque basis by Mr Shovlin.

    ii) I found Mr Shovlin's evidence with regard to seeking to return to SCS the £645,000 paid into the SPH Trust bank account on 6 March 2020 somewhat bizarre, and difficult to understand. Firstly, there is the conduct in turning up in person at Aughton Ainsworth's offices in order to seek to make the repayment, but more fundamentally there is the explanation given in evidence that

agreement had been reached to sell the relevant debts together with other debts, together totalling some £2 million, to an unidentified debt collector for £1 million to allow Mr Shovlin to return to his family in Australia. This, to my mind, does not make a great deal of sense particularly given that there is no evidence of there having been, at that stage, any proper consideration of the realisability of the relevant debts. Further, it is to be noted that this evidence is inconsistent with Mr Shovlin's evidence that he had held back from trying to stop the sale of the Mercury Way Land on a promise on the part of Mr Crosby to pay a *"fair share"* of the profit on sale, although, as referred to below, I reject this latter evidence.

iii) During the course of the telephone conversation between Mr Shovlin and Mr Crosby on 11 February 2020, Mr Shovlin made reference to a number of somewhat bizarre events, including going to Colombia to meet some very dangerous people with a good chance of getting killed, knowing that if he went to Sydney he was going to be shot dead because what he was going to do there was going to be *"horrific"*, and threatening to throw somebody out of a second-floor window in Japan. I gained the impression from the transcript and recording of this meeting that this was Mr Shovlin's way of getting across that he was not somebody to be messed with. There is an issue between Mr Shovlin and Mr Crosby as to whether, during the meeting at Mr Crosby's home on 12 February 2020 that lasted up to nine hours, Mr Shovlin made threats against Mr Crosby in the event that he did not repay the £645,000. I find the idea of Mr Shovlin having spent so long at Mr Crosby's house in itself somewhat bizarre and consider it more likely than not that Mr Shovlin used the opportunity to threaten Mr Crosby in the way that Mr Crosby says that he was threatened, which then led to Mr Crosby to borrowing the £645,000 so that the loans could be repaid fairly shortly thereafter. I should add that I have listened with some care to the transcript of the telephone conversation between Mr Crosby and Mr Ahmed. In the course thereof Mr Crosby refers to the threats made to him by Mr Shovlin in a way and context that leads me to the firm conclusion that he is telling the truth in respect thereof. I thus prefer the evidence of Mr Crosby so far as the events of the meeting on 12 February 2020 are concerned.

iv) I found Mr Shovlin's evidence to the effect that Henry Fergus volunteered to pay the £300,000 that he has apparently paid to be unconvincing. Although this is consistent with what Henry Fergus said in giving evidence, where Henry Fergus referred to the payment as being referable to other debts than the three biggest debts including the loan to SCS, it is inconsistent with what Henry Fergus said more contemporaneously in his letter dated 3 November 2021 to Mr Crosby. In this letter he refers to being *"required"* to pay in excess of £211,000 interest *"on your loans"*, and also refers to trying to get matters resolved with the Shovlins and others *"in order to prevent police involvement and court cases which are being threatened against me."* The contents of this more contemporaneous letter does not rest easily with the suggestion that Henry Fergus volunteered to pay the £300,000 in relation to debts other than the SCS debt. I am concerned that the contents of the letter dated 3 November 2021 firmly points to pressure having been put on Henry Fergus to make the payment, contrary to Mr Shovlin's evidence.

180. In the circumstances, consider that I must treat Mr Shovlin's evidence with some considerable care, and that I should not accept it at face value unless supported by some contemporaneous documentary evidence, other supporting evidence or the inherent probabilities of the situation.

Henry Fergus

181. I am troubled by Henry Fergus's evidence. He is virtually blind and staggered to the witness box with the assistance of Helen Sheen, who he said is his fiancée as well as having a role within Fergus & Fergus. There is the contradiction between his evidence in the witness box, and the contents of his letter dated 3 November 2021 that I have already identified. In giving evidence, he described the way that the reference to the payment of the £211,000 had been put in the letter dated 3 November 2021 as being a "*typing mistake"*. I found this to be an unconvincing explanation. Further, Henry Fergus was rather more certain in giving evidence as to Mr Crosby saying that he would give a *"fair share"* of the profits from the sale of the Mercury Way Land than the impression given by his trial witness statement. In contrast, Helen Sheen, in giving evidence, said that Mr Crosby had said that *"we would get what we were owed"*, but downplayed the suggestion that Mr Crosby had promised a *"fair share"*. I am frankly concerned that Henry Fergus has yielded to pressure or influence to give evidence favourable to Mrs Shovlin, and I do not regard his evidence as reliable.

Helen Sheen

182. Helen Sheen came across to me as a truthful witness doing her best to assist the Court.

Mr Ahmed

183. Again, Mr Ahmed came across to me as a truthful witness doing his best to assist the Court.

Mr and Mrs Edwards

184. I do not doubt that they gave what they considered to be truthful evidence with regard to the promises said to be made by Mr Crosby if they continue to sell from the pitch. However, Mr Crosby was not himself challenged under cross examination in relation thereto. Although there is no strict necessity for a claimant to put his case to a defendant in cross examination, I consider that I must, in the circumstances, give limited weight to Mr and Mrs Edwards' evidence in respect thereof. In any event, even if Mr Crosby did act in an underhand way towards Mr and Mrs Edwards as they maintain, I do not consider that that, in itself, significantly undermines his case.

Mr Crosby

185. Mr Uff was not inaccurate in his own description of his own client, Mr Crosby, as a *"rough diamond"*. However, Mr Crosby came across to me as an essentially honest witness, who has built up a successful business from a humble and difficult background. That is not to say, however, that there were not elements of exaggeration and other imperfections in his evidence.

186. By way of specific criticisms of Mr Crosby's evidence, Mr Budworth focused on what was said to be a number of inconsistencies, and obvious untruths, including the following:

i) An inconsistency between Mr Crosby's evidence that he thought that Austin Fergus was providing the monies loaned himself, from his own funds, and what Mr Budworth contends is the position revealed by the transcript of the telephone conversation on 11 February 2020;

ii) The inconsistency between Mr Crosby's witness statement and an earlier affidavit as to the sequence of events concerning the purchase of the Dane Road Property and Mercury Park, and in respect of which property the mortgage broker in Southport had been unable to obtain a mortgage advance to fund due to an existing HMRC liability;

iii) What was said to be the inconsistency between paragraph 70 of Mr Crosby's witness statement, and his evidence in the witness box with regard to the anticipated use of the proceeds of sale of the Mercury Way Land in order to discharge the bridging loan taken out in respect of the purchase of Vinesgrove;

iv) What was said to be the inconsistency between Mr Crosby's evidence as to carrying out works for Austin Fergus and Henry Fergus gratuitously, and Henry Fergus's evidence on the point;

v) Mr Crosby volunteering for the first time in the witness box that he suffered from Tourette's and that this was the explanation for him repeatedly swearing during the course of the telephone conversation on 11 February 2020.

187. I will deal with the first of these points last, because it is probably the most important.

188. As to the inconsistency regarding the purchase of the Dane Road Property and the Mercury Way Land, there is certainly an inconsistency between Mr Crosby's trial witness statement and his first affidavit, but I consider that an error in the earlier affidavit is the sort of error that might well have been made in seeking to recall events after a number of years, and without full consideration of the position. The explanation ultimately given by Mr Crosby in his witness statement made perfect sense regarding an unsuccessful attempt being made to raise finance to purchase the Dane Road Property, which necessitated the use of funds belonging to SCS which then meant that when the opportunity to purchase Mercury Park arose, SCS did not have the cash available to do so, hence the offer by Austin Fergus to lend the funds in respect of what looked like a very good investment opportunity in respect of the latter.

189. As to paragraph 70 of Mr Crosby's witness statement, I will consider this further when considering the proprietary tracing claim. However, what Mr Crosby said in the witness box was consistent with the exchange of correspondence between Aughton Ainsworth and DWFCO9 on 20 August 2019 and 23 August 2019, and I note from the transcript of the conversation on 11 February 2020, that Mr Crosby referred to a property in Sale being on the market for sale at the time of that conversation. The Dane Road Property was in Sale. It seems clear to me that paragraph 70 of Mr Crosby's witness statement, for whatever reason, does not tell the full story, but that does not mean that I should not accept Mr Crosby's evidence in the witness box.

190. As to the inconsistency concerning the work carried out by SCS and/or Mr Crosby Austin Fergus and Henry Fergus, it seems to me that even if one accepts Henry Fergus's evidence on the point, there is, at the worst, exaggeration on Mr Crosby's part in his witness statement as to his generosity and that the reality of the position is that some at least of the work in question was carried out gratuitously, and/or at cost rather than full value. However, as I have indicated, I have concerns as to the reliability of Henry Fergus's evidence in any event.

191. So far as the Tourette's diagnosis is concerned, and a further self-diagnosis of autism, in the witness box, whilst this evidence did not come across as particularly convincing, I do not consider that this is evidence that I can necessarily dismiss as made up. There is no medical evidence on the point, which cropped up spontaneously in answer to question under cross-examination. Having listened to the recording of the telephone conversation on 11 February 2020 with care a number of times, Mr Crosby's prolific use of swear may be consistent with Tourette's.

192. I finally turn to the alleged inconsistency between Mr Crosby's case that he believed that the money being loaned belong to Austin Fergus, and had not been provided by third party, and what are said to be passages in the transcript of the conversation on 11 February 2020 which show the contrary.

193. The first point that I would make is that I consider it necessary, in considering what Mr Crosby said during the course of the telephone conversation, to seek to distinguish between what Mr Crosby: (a) knew at the time that the monies were advanced by Austin Fergus; (b) ascertained following Austin Fergus's death; and (c) ascertained between when the monies were advanced and when Austin Fergus died, a significant event in this intermediate period being the discovery that Austin Fergus had cancer, and what Mr Crosby says was the change of strategy adopted in respect of the Mercury Way Land in consequence thereof. Unfortunately, in reading the transcript and listening to the recording it is not easy to so distinguish.

194. I have considered not only the transcript that has been produced, but I have listened with some care on a number of occasions to the recording of the conversation. My overall conclusions, having done so, are as follows:

i) It is evident from what Mr Crosby said during the course of the conversation that he was very close indeed to Austin Fergus, this closeness relating to the fact that notwithstanding his background, Austin Fergus had provided Mr Crosby with much advice and guidance with regard to establishing his business, such that Mr Crosby regarded him as something of a father figure. On at least one significant occasion during the course of the telephone conversation, Mr Crosby broke down emotionally in what seemed like an entirely authentic way when recalling Austin Fergus's death.

ii) Further, it is evident from what Mr Crosby said that he trusted Austin Fergus implicitly, and genuinely regarded him as a fundamentally honest person who, for example, was *"so righteous"* and would *"put you on the right path"* – see particularly pages 1, 5 and 11 of the transcript.

iii) On a number of occasions Mr Crosby referred to believing that the money was Austin Fergus's money in terms, and in a way that suggests to me that he did

genuinely believe that the money did belong to Austin Fergus, at least when the initial advance was made. There is an example on page 18 of the transcript where it is recorded: *"I thought it was a [inaudible] I realised [inaudible] I did my own due diligence and I realised what SPH was in the end."* Listening to this carefully on the recording, it is reasonably clear that Mr Crosby said, *"I thought it was his money …"*. There is a further example on page 2 of the transcript where Mr Crosby says: *"… I said to him I'm not arsed about it Austin I just want you to put the money back where it f****** come from because I thought it was his money and he's just bluffing …"*. On this point, I have also listened, as I have said, to the recording of the telephone conversation between Mr Crosby and Mr Ahmed and read the transcript thereof. I appreciate that this conversation took place more recently and not contemporaneously, and after the proceedings had commenced. It is therefore of more limited forensic value. However, it is noticeable that on a number of occasions Mr Crosby referred to believing that the monies were Austin Fergus's money or being lent by him – see pages 8, 11 and 12 of the transcript – in a way that sounded to me to be quite genuine and in circumstances where he had no need to say this if it was not the case.

iv) There are passages within the transcript and recording of the meeting on 11 February 2020 that suggests that Mr Crosby was aware, prior to Austin Fergus's death, that the funds had, or might have come from a third party. Thus, for example:

a) The reference on page 3 of the transcript to Mr Crosby speaking to Austin Fergus about *"this project"* and to Austin Fergus saying *"no George don't worry I'm going to speak to someone he'll probably help you out and they will and we'll sort it"*;

b) The reference on page 15 to Mr Crosby saying: *"I never found it out I thought how's that worked out [inaudible] did it belong to a fund and why wouldn't everyone not want everything right …"* ; and

c) The reference on pages 18 and 19 of the transcript to Mr Crosby's concern about Dermot McKenna's money being brought into *"my project"*, and to Austin Fergus assuring him that *"no no no" … "these are honest people"*, with Mr Crosby adding *"and in the end we did speak about your family and the fact that your father was poorly."* I asked Mr Crosby when these conversations are likely to have taken place, and he did respond that this was in 2016 when he was seeking to buy the Mercury Way Land, and Austin Fergus offered to lend him the necessary funds.

195. The evidence thus discloses some tension within his own evidence as to what Mr Crosby believed with regard to the source of the funds when the initial advance was made. Notwithstanding Mr Crosby's response to my question referred to in paragraph 194(iv)(c) above, on consideration of the evidence as a whole, I consider it more likely than not that Mr Crosby's genuine belief was that Austin Fergus was advancing his own funds, and that he did not give any thought as to there being any third party involvement until the possibility of the use of third-party funds subsequently arose, most likely in the context of a discussion subsequent to the purchase of Mercury Park as to how the

project involving the development of the land into a number of units was to be funded, with a funding requirement of £1.2 million being identified at that stage. Even then, I consider it more likely than not an appreciation by Mr Crosby that the initial monies advanced might have come from third-party funds only arose at a later stage, sometime after Austin Fergus's cancer diagnosis, and possibly even after Austin Fergus's death.

196. I do not consider that Mr Crosby's case is undermined by the change of strategy following Austin Fergus's cancer diagnosis, or by his evidence that, following the diagnosis, he no longer felt *"comfortable"* borrowing money from Austin Fergus. One can, I consider, well see why if Mr Crosby had regarded the loan as something of a favour from Austin Fergus, he might have felt uncomfortable about that favour continuing in the light of Austin Fergus's illness. In addition, Mr Crosby explained that whilst there had been discussion with Mr Crosby with regard to a joint venture involving the development of the Mercury Way Land, he no longer felt comfortable in pursuing that joint venture given the uncertainty created by the cancer diagnosis. This, to my mind, makes sense.

197. Further, I do not consider that Mr Crosby's case is undermined by his reference to Austin Fergus saying: *"keep it close to your chest George no one needs to know about what we do"* (see page 18 of the transcript of the meeting on 11 February 2020). I accept Mr Crosby's evidence, and I consider it more likely that this remark was made in the context of the fact that Austin Fergus had advanced monies to Mr Crosby on favourable terms, and he did not want others who might have been looking to funding from him to know about those advantageous terms rather as recognition that what had taken place involved or might have involved the misuse of third party funds. It is somewhat akin to Austin Fergus's remark to Mr Ahmed about *"prying eyes"*, which did not cause Mr Ahmed to be suspicious of anything.

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

Did Austin Fergus act in breach of trust?

199. I am concerned that in order to fairly and properly determine whether Austin Fergus acted in breach of trust as alleged, I need a full and proper understanding as to the basis and purpose of the SPH Trust, and how it came about that Austin Fergus was entrusted with £2.5 million as sole signatory on the SPH Trust bank account. I consider this particularly so bearing in mind the somewhat Delphic and opaque terms of the Declaration of Trust.

200. The essence of the case is that Mrs Shovlin caused the monies to be paid into the SPH Trust bank account and gave instructions to Austin Fergus that the monies were to be

invested in conservative investments such as stocks, shares and bonds. Although not referred to in his witness statement, in paragraph 7 of his affidavit made on 9 May 2022, Mr Shovlin had specifically referred to Mrs Shovlin giving instructions to Austin Fergus at a meeting in December 2016.

201. However, I consider there to be a number of difficulties with this case regarding Mrs Shovlin giving instructions with regard to the £2.5 million being invested in conservative investments such as stocks, shares and bonds. In particular:

i) The lack of evidence of any kind from Mrs Shovlin herself with regard to the establishment of the SPH Trust, or the giving of instructions with regard to investment policy. We are entirely dependent on Mr Shovlin's hearsay evidence, and, as identified above, I have significant concerns as to the reliability of Mr Shovlin's evidence.

ii) Although, regrettably, not the subject matter of cross-examination at trial, in re-reading the transcript of the meeting on 11 January 2020, and listening to the recording thereof following the trial, I have noted the following exchange between Mr Shovlin and Mr Crosby on page 14 thereof:

> "PS Everything we say is confidential. But we use an independent financial adviser who over the years have been very good they're from Warrington but the return on investment was getting down to between 7 and 10% so when Austin heard this he said I can get you a better return on investment so that is how it came about that Austin got the money
>
> GC Right to borrow it out to these people
>
> PS Yeah yeah"

iii) Even taking account the fact that Mr Shovlin was not cross examined on this, I consider that I must have regard to the fact that this is suggestive of a different motive for placing the monies with Austin Fergus than simply setting up a trust for tax purposes, and suggestive of a different investment policy than the monies in question being conservatively invested in investments such as stocks and shares. The dissatisfaction with the rates of return being achieved by the financial advisers in Warrington is suggestive at least of an appetite for a greater risk so far as investment was concerned. A further consideration is that Mr Shovlin spoke to Mr Crosby on 11 February 2020 shortly after the meeting with Henry Fergus shortly prior to which Mrs Shovlin is supposed to have told him about the circumstances concerning the setting up of the SPH Trust, and the investment policy. It is odd, in this context, that Mr Shovlin should not have mentioned what he now says that he was told by his mother regarding investment policy at this part of the conversation with Mr Crosby, if indeed he was told what he says he was told by Mrs Shovlin, rather than providing the explanation that he did.

iv) No evidence has been adduced as to the terms of the other loans made by Austin Fergus, nor as to the risk profile thereof. There is the issue with regard to lack of documentation it has to be said, but these loans might well have represented

the sort of investment that might have been expected to produce a good return for the SPH Trust consistent with what Mr Shovlin had said on 11 February 2020.

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

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

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

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

vii) It is, I consider, in relation to this particular aspect of the case particularly important to bear in mind that if serious allegations of fraud are being made, then whilst the standard of proof remains the civil standard, stronger evidence is required to overcome the inherent unlikelihood of fraud, in particular on the part of a professional person who, as in the present case, everybody is otherwise regarded as being an honest man. An additional consideration in this context is the acceptance by Mr Shovlin that Austin Fergus had been somebody who sought instructions before acting in the past.

202. I take on board the lack of documentation concerning the loans to SCS, and indeed to the other borrowers, and also the somewhat derisory rate of interest contemplated with regard to the specific loans to SCS and that the loans were made on an unsecured basis, and that it might be said that these advantageous terms were intended to benefit Mr Crosby rather than the SPH Trust. However, given in particular my concerns regarding the absence of evidence from Mrs Shovlin and as to the unreliability of Mr Shovlin's evidence, I consider the evidence as to the circumstances and basis upon which the SPH

Trust was established and funds were entrusted to Austin Fergus to be so unclear and uncertain that I cannot safely conclude on the balance of probabilities that the monies were entrusted to Austin Fergus to invest in investments such as stocks and shares, or otherwise upon a basis that would have prevented Austin Fergus from lending monies to Mr Crosby on the terms that he did in anticipation of, for example, being involved, on behalf of the SPH Trust, in the development of the Mercury Way Land for the benefit of the SPH Trust, and doing so with Mrs Shovlin's informed consent.

203. I therefore conclude that Mrs Shovlin has failed to prove that Austin Fergus acted in breach of trust or fiduciary duty as alleged.

Knowing receipt

204. Of course, if there has been no breach of trust, then the possibility of Mr Crosby having knowingly received monies applied in breach of trust does not arise. However, I consider the position in the event that I should be wrong in respect of my conclusion that the case that Austin Fergus acted in breach of trust has not been established.

205. *BCCI v Akindele* (supra) at 455D-E, per Nourse LJ, is clear authority that the acid test is one of unconscionability, namely whether the recipient's state of knowledge was such as to make it unconscionable for him to retain the benefit of the receipt. However, as the authorities demonstrate, this raises the question as to what quality or state of knowledge is required with regard to the breach of trust or fiduciary duty to make it unconscionable to retain the benefit with particular reference to the 5-fold of knowledge identified by Peter Gibson J in *Baden* at 575-583.

206. I consider the state of the authorities to be such that receiving assets applied in breach of trust will give rise to a good claim of knowing receipt where the receipt is with knowledge falling within *Baden* categories 1-3, i.e., actual knowledge, wilfully shutting one's eyes to the obvious, and wilfully and recklessly failing to make such enquiries as an on honest and reasonable person would make. The issue is as to the significance of categories 4-5, namely knowledge of circumstances which would indicate the facts to an honourable and reasonable man, and knowledge of circumstances which would put an honest and reasonable man on enquiry.

207. As I see it, knowledge falling within category 4 or 5 is capable of founding liability. However, I consider that one must first ascertain what facts were actually known by the particular defendant, and then ask whether on the basis of what was actually known, a reasonable person would have appreciated that the transaction that gave rise to the receipt was probably a breach of trust or would have made enquiries or sought advice which would have revealed the probability of a breach of trust. Otherwise, it is difficult to see how the defendant's position could properly be described as unconscionable.

208. In this context, I accept Mr Budworth's submission that *Barlow Clowes Ltd v Eurotrust Ltd* (supra) at [28] provides authority for the proposition that one does not need to know that the assets in question are held on trust, suspicion may be enough, and that the defendant does not need to know the detail of the breach of trust. However, there is, as I see it, a need for at least *"a clear suspicion"*, cf. *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi VE Pazarlama AS* [2009] EWHC 1276 (Ch), per Briggs J at [990].

209. I have made a number of findings of fact in paragraph 188 et seq above relevant to this issue. The key considerations are, in my judgment, the following:

i) Mr Crosby was close to Austin Fergus, not in any sinister way, but because, in the light of Mr Crosby's humble background and limited formal education, Austin Fergus had acted as something as father figure and business guru, assisting him with the development of his business.

ii) Mr Crosby implicitly trusted Austin Fergus as an honest and righteous professional man. On this basis, I came to the firm conclusion above that Mr Crosby did not contemporaneously consider Austin Fergus to be the sort of person capable of involving himself in illicit or unauthorised deals involving the misapplication of the money of others without their consent in the manner alleged in the present case.

iii) Mr Crosby believed that Austin Fergus had trust and confidence in him as somebody who would repay their debts, and who was asset rich. In this respect, Austin Fergus had somewhat unique insight as to Mr Crosby's financial position as his accountant. In this respect, it is relevant to note Mr Crosby's evidence with regard to Austin Fergus looking at the figures regarding the development of the Mercury Way Land. Consequently, one can see how Mr Crosby might well, in the circumstances, have regarded there to be nothing untoward or suspicious in Austin Fergus advancing the initial £525,000 on an unsecured basis even though Mr Crosby might have been turned down for a loan by the broker in Southport and RBS.

iv) I have considered above Mr Crosby's knowledge with regard to the source of the monies advanced to SCS, and as to when he might have become aware that the monies had come from third party source. However, there is a difference between knowing that monies provided by a trusted professional believed to be honest came from a third party source on the one hand, and believing or suspecting that those monies came from a tainted source on the other hand and were being misapplied. Even if I am wrong as to my finding as to when Mr Crosby became aware that the monies were from a third party source, and even if he did believe that they came from third party source at the time that they were originally loaned that is not, in itself, as I see it, sufficient make their receipt unconscionable.

v) I consider that I am entitled to take into account Mr Crosby's lack of sophistication in respect of formalities and legal matters, and his reliance upon Austin Fergus in respect thereof. It is in this context that I consider one must consider Mr Crosby's perceptions in respect of the lack of formality in respect of the loans in question, the absence of security, and the somewhat loose agreement reached in respect of interest in the light of Austin Fergus's observation that he was simply looking for interest just above that which has been received in the bank account in which the monies were being held. As to this latter bank account, the point was made by Mr Budworth that the monies were loaned shortly after they were transferred to the SPH Trust, and therefore never sat in a bank account for any significant period of time. However, as Mrs Shovlin's letter of instruction to RBS dated 23 December 2016 demonstrates,

the monies had previously been held in a Business High Interest Account, which could have been the account that Austin Fergus was referring to. In these circumstances, I do not accept that basis on which the advances were made was, in the particular circumstances of the present case, such as to made Mr Crosby necessarily suspicious, or in fact suspicious, that the monies had been misapplied in breach of trust, even if he was aware that they were from third party funds.

vi) I consider it significant that the second loan of £120,000 was paid through Aughton Ainsworth's own bank account. Of course, there may be an issue as to how much they knew in contrast to Mr Crosby. However, if the loan in question did so obviously involve the misappropriation or misapplication of the relevant monies, then it is unlikely that Aughton Ainsworth would have been prepared to receive the funds.

vii) Mr Budworth submits that no credible explanation has been provided for the change of strategy once Austin Fergus's cancer diagnosis was known. As I have explained above, I do not accept this. Mr Crosby regarded the loans provided by Austin Fergus as a favour, and by that time at least a joint venture was being contemplated between Mr Crosby and Austin Fergus with regard to the development of the Mercury Way Site. I can well understand how Mr Crosby might have felt, as he put it, *"uncomfortable"* with the arrangements once known, not least given the threat that this posed to the joint venture.

viii) If Mr Crosby had offered to pay a *"fair share"* of the profit to be made on the sale of the Mercury Way Land as contended by Mr Shovlin, then that would support a case that, in conscience given the circumstances in which he had received £645,000, Mr Crosby considered that he should do so. However, I reject the evidence that Mr Crosby made any such offer, and that Mr Shovlin agreed to hold off from seeking to restrain the sale of the Mercury Way Land on the basis of a promise on the part of Mr Crosby to pay this *"fair share"*. I prefer Mr Crosby's version of events as to what transpired at the meeting a Mr Crosby's home on 12 February 2020 for the reasons explained above. I also prefer Mr Crosby's version of events as to what transpired at the subsequent meeting at Costa Coffee on 28 February 2020 when the offer and promise in respect of a *"fair share"* is alleged to have been made. I found what Mr Crosby said about the latter meeting under cross examination regarding having his dog with him to counter the threatening atmosphere of the meeting to be very credible and convincing, and I note that it is consistent with the explanation that Mr Crosby gave to Mr Ahmed in the course of his telephone conversation with him (see page 9 of the transcript). Further, whilst Mrs Shovlin seeks to rely upon the evidence of Henry Fergus on this issue, I do not consider his evidence on the point to be reliable for the reasons that I explained above, and I regard it as significant that Helen Sheen's evidence ultimately did not support Mrs Shovlin's case on the point. Finally, if Mr Crosby had offered to pay a *"fair share"* of the profit on sale, and if Mr Shovlin had held off from restraining the sale on the basis of the alleged promise, there is no cogent explanation as to why it then took nearly two years for it to be alleged that the offer and promise had been made.

210. I concluded in paragraph 198 above that Mr Crosby neither believed nor suspected that the monies that SCS and Aughton Ainsworth received were tainted as a result of the fact that Austin Fergus had misapplied the money of others. I consider that it follows that Mr Crosby's state of knowledge was not such as to make it unconscionable for him to retain the benefit of the receipt of the monies in question, and therefore that he did not become liable as a constructive trustee for knowing receipt, even if the monies were, in fact, applied by Austin Fergus in breach of trust.

211. I would add that it necessarily follows that I do not consider that Mr Crosby can have dishonestly assisted Austin Fergus in acting in breach of trust, even if he did act in breach of trust, and therefore that it is not necessary for me to consider further the question as to whether Mrs Shovlin ought to be given permission to amend so as to include such a claim.

Claim to an account of profits

212. It only becomes necessary to consider whether Mr Crosby might be liable to account for profits should I be wrong as to my finding that a case of breach of trust on the part of Austin Fergus has not been made out, and wrong in my finding that Mr Crosby did not, in any event, knowingly receive any monies applied in breach of trust. However, I deal with the point in case I should be wrong in relation to these issues.

213. I consider that, following the decision of the Court of Appeal in *Novoship* (supra) that I have considered above, it can now be regarded as settled that an account of profits may be sought against a defendant who has either dishonestly assisted in breach of trust, or knowingly received assets applied in breach of trust. However, given that the defendant was never in a fiduciary relationship to the beneficiaries of the trust, the remedy as against the dishonest assister or knowing recipient is more limited as against the latter than against the defaulting fiduciary, in that:

    i) There is a requirement to go further than satisfying a *"but for"* test in respect of causation, and it is necessary to show more of a causal nexus between the misconduct and the profit, and in particular that the misconduct was an effective cause of the profit being made; and

    ii) The Court has a discretion to refuse to order an account, one particular circumstances in which an accountant might be refused being because it would be disproportionate to do so.

214. In the present case, the monies advanced clearly enabled the profit to be made because they enabled the Mercury Way Land to be purchased, which was then sold at a profit. However, I am not persuaded that any misapplication of the monies was an effective cause of the profit being made. As I see it, the cause of the profit being made was Mr Crosby's business nous in identifying the Mercury Way Land as an opportunity, and then exploiting that opportunity by spending money on the Mercury Way Land, and then finding a purchaser (McDonalds) to whom to sell it at a profit.

215. Should I be wrong on this causation issue, then as a matter of discretion I would refuse to order an account, because I consider that it would be disproportionate to do so given that the £645,000 was promptly repaid after Mr Shovlin had come on the scene and taken steps to identify and recover the monies that Austin Fergus had lent to Mr Crosby

and others, given that Mr Crosby has now paid interest on the monies advanced at 2% above base, and given that the profit did arise as a result of Mr Crosby having used his business nous to purchase the Mercury Way Land, expend monies thereupon, and sell it at a profit. In this context, I note that a potential remedy as against a knowing recipient is to order the return of the funds received plus interest at an appropriate rate of interest, which is what, in essence the SPH Trust has now received – see *Watson v Kea Investments Ltd* [2018] EWHC 2483 at [12], per Nugee J.

216. I would therefore have refused relief under this head even if I had otherwise found for Mrs Shovlin.

Proprietary claim

217. If, as I have found, the claim that Austin Fergus acted in breach of trust in misapplied monies belonging to the SPH Trust is not made out, then no question of Mrs Shovlin as sole surviving trustee of the SPH Trust pursuing a proprietary tracing remedy can arise. However, the position is more complicated should I be wrong on this issue, but right to conclude that there was no knowing receipt in any event. Nevertheless, I consider that, in those circumstances, the better view is that Mr Crosby is properly to be regarded as a purchaser for value without notice, or akin to a purchaser for value without notice, in accepting the monies by way of loan in return for an agreement to pay interest. If that is the case, then, again, no proprietary tracing remedy will lie.

218. Thus, I consider that this particular issue is only likely to arise should I be wrong in my finding that the case as to Austin Fergus having acted in breach of trust is not made out, and also wrong to conclude that the case as to knowing receipt is not made out. However, again, I will consider the issue of proprietary remedy in case I should be wrong in respect of these issues, but I will do so more briefly than I otherwise might have done.

219. I consider that the principles and authorities relied upon by Mr Budworth and referred to in paragraph 117 et seq above, and in particular *Foskett v McKeown* (supra) as explained in *Ultraframe v Fielding* (supra) at 1518-1522, lead to the conclusion that subject to any right to trace being lost on the payment of the proceeds of sale of the Mercury Way Land in discharging the bridging loan granted by DWFCO9, Mr Crosby will be treated for the purposes of any actual proprietary tracing claim as a wrongdoer entitling the SPH Trust to trace into the Mercury Way Land so that the same, or at least a proportion thereof less that referable to the deposit, belonged beneficially to the SPH Trust such that, on sale of the Mercury Way Land, the SPH Trust was entitled to trace into Vinesgrove and Greenacres, the latter representing what is now left of Vinesgrove.

220. Further, as explained in Lewin (supra) at 44-061, on the basis of the authorities, any windfall resulting from the sale of the Mercury Way Land at a profit, and any profit from the development of Vinesgrove as now represented by the asset that is Greenacres would accrue to the SPH Trust on the basis that the profit represented the increase in value of its own asset or assets. Further, the authorities would tend to suggest that SCS/Mr Crosby would not be entitled credit for expenditure on improving either the Mercury Way Land or Vinesgrove on the basis that expenditure on the property of another does not, without more, lead to the conferring of a beneficial interest or any form of restitutionary claim. I do have doubts with regard to the correctness of this latter

proposition, but Mr Uff was unable to point to any principle or authority which allows me to reach a different conclusion.

221. Mr Uff's point, made by reference to *AIB v Redler* (supra), is that the remedy for breach of trust should be purely compensatory. However, as referred to above, I consider that this is simply in the context of a claim for damages or equitable compensation, rather than the pursuit of an equitable proprietary tracing remedy. Thus, I do not consider that it assists on this point, in limiting the scope of the tracing remedy.

222. Consequently, on this basis, the ability or otherwise of the SPH Trust to backward trace becomes key. As to this, on the authority of *Federal Republic of Brazil v Durant International Corp.* (Supra), in particular at [40], the question is as to whether there was a sufficiently close connection between the incurring of the debt in question and the use of trust funds to discharge it. The acid test is as to whether there is a sufficient coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, here Vinesgrove.

223. Although I was not taken to this case in submissions, I note that in *Serious Fraud Office v Litigation Capital Ltd* [2021] EWHC 1272, Foxton J helpfully and comprehensively considered the authorities and principles in respect of backward tracing and at [44]-[45] identified circumstances in which backward tracing might be permitted where: "strict insistence on chronological sequence would fail to reflect the substance of the would fail to reflect the substance of the transaction". These included: "cases in which the debit of trust property and the credit to be traced into were effected as part of a single transaction intended to achieve that outcome through a series of co-ordinated elements, whatever the chronological order".

224. Had Vinesgrove been purchased with the unequivocal intention that it be paid for out of the proceeds of sale of the Mercury Way Land, and had the bridging loan been taken out on that basis to bridge the gap until sale, then I consider that Mr Crosby would have some difficulty in saying that the SPH Trust was not entitled to backward trace in that, in those circumstances, there would have been the necessary co-ordination between the depletion of the trust fund and the acquisition of the asset the subject of the tracing claim. Paragraph 70 of Mr Crosby's witness statement, taken on its own, would seem to support that result. However, as I found, the position is rather more complex. I consider that the contemporaneous correspondence, and in particular Aughton Ainsworth's email dated 23 August 2019, and the fact that the bridging loan was secured on the Dane Road Property and Vinesgrove, but not Mercury Way, supports what Mr Crosby said in giving evidence to the effect that that Vinesgrove was acquired to replace the Dane Road Property as *"current home"* and that the proceeds of sale of the Dane Road Property, when sold, were initially at least envisaged as being the primary source of the funds that would be used to pay off the bridging loan, with any balance being met out of the proceeds of sale of the Mercury Way Land.

225. As it happened, there was delay in selling the Dane Road Property, and the sale of the Mercury Way Land took place first. However, in the circumstances that I have described, I have, on balance, come to the conclusion that there was insufficient co-ordination between the purchase of Vinesgrove and the use of the proceeds of sale of the Mercury Way Land to discharge the relevant bridging loan, to allow the Court to depart from the general rule that the right to pursue an equitable proprietary tracing

claim will be lost where the monies belonging to the trust are used to discharge an existing debt.

226. Thus, on balance, I would not have found that an equitable proprietary tracing claim would have existed as against Greenacres.

Conclusion

227. On various grounds set out above, I consider that Mrs Shovlin's claim fails, and that the present claim should be dismissed.