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Case No: BL-2021-002047
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 4 November 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

	SANDRA BLOWER	Claimant
	- **and -**	
	GH CANFIELDS LLP	Defendant

- -
- -

Simon Myerson KC and Jonathan McNae (instructed by **McFaddens LLP**) for the **Claiamnt**
Jonathan Seitler KC and Lemuel Lucan-Wilson (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Defendant**

Hearing dates: 25 June – 3 July 2024

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This judgment was handed down remotely at 10:30 am on 4 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

Introduction

This is my judgment on the trial of a claim in professional negligence brought by the claimant (i) in her own right, and (ii) as assignee of the rights of her daughter Kelly Blower (under a deed of assignment dated 31 January 2021), in respect of professional services supplied by the defendant firm of solicitors. The services related

to the mediation in 2015 of proceedings brought or threatened to be brought by Paul Allen, the trustee in bankruptcy of the claimant's husband, John Blower. The trustee's claims against the claimant and her daughter concerned alleged transactions at an undervalue. At the conclusion of the mediation, a settlement agreement was entered into between the trustee on the one hand and the claimant, her husband and their two daughters (Kelly and Natalie) on the other. The claimant now alleges that the defendant was negligent in the conduct of its retainer, in particular with regard to entering into the settlement, and caused her and her daughter Kelly loss. She further alleges that, if they had been properly advised, they would never have agreed to the settlement agreement signed on their behalf.

The defendant's position in summary is that (i) there was no negligence in the advice given (and indeed it was a good compromise of the trustee's claims), (ii) the defendant acted reasonably in taking Mr Blower's instructions as those of the family, (iii) counsel had advised that the trustee's claims were to be settled rather than fought, and, having seen the draft settlement agreement, had no issues with it. In addition, there is a missing causation case, because the claimant has not set out what would have happened if she had not signed a settlement agreement. In any event, (it is said) much of the alleged losses were unforeseeable.

The claim form was issued on 12 November 2021, together with particulars of claim. Amended particulars with schedules of loss were served in January 2023. There was an original defence, but an amended defence was served in February 2023. The Reply (which was not amended) was served in February 2022. Deputy Master Arkush gave directions for trial on 31 January 2023. The trial took place before me between 25 June and 3 July 2024. The evidence overran, and so closing submissions were made in writing: those of the claimant by 12 July, those of the defendant by 10 am on 15 July, and a reply by the claimant by the end of the same day. I have read and taken account of all of these in reaching my judgment.

How judges decide cases

For the benefit of the lay parties in this case I will say something about how English judges decide civil cases like this one. I borrow the following words largely from other judgments of mine in which I have made similar comments. First of all, judges do not possess supernatural powers that enable them to divine when someone is mistaken, or not telling the truth. Instead, they take note of the witnesses giving live evidence before them, look carefully at all the material presented (witness statements and all the other documents), listen to the arguments made to them, and then make up their minds. But there are a number of important procedural rules which govern their decision-making, some of which I shall briefly mention here, because non-lawyer readers of this judgment may not be aware of them.

Burden of proof

The first is the question of the *burden* of proof. Where there is an issue in dispute between the parties in a civil case (like this one), one party or the other will bear the burden of proving it. In general, the person who asserts something bears the burden of proving it. So, in the present case the claimant must prove that the advice given to the claimant and to Kelly was negligent. Further on in this judgment, I deal with an argument that the defendant bears an *evidential* burden in relation to causation of loss.

The importance of the burden of proof is that, if the person who bears that burden satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen. The decision is binary. Either something happened, or it did not, and there is no room for 'maybe'. That may mean that, in some aspects of the case, the result

depends on who has the burden of proof.

Standard of proof

Secondly, the *standard* of proof in a civil case is very different from that in a criminal case. In a civil case like this, it is merely the balance of probabilities. This means that, if the judge considers that a thing is *more likely to have happened than not*, then for the purposes of the decision it *did* happen. If on the other hand the judge considers that the likelihood of a thing's having happened does not exceed 50%, then for the purposes of the decision it did *not* happen. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as (say) medical or scientific experts might be used to. However, the more serious the allegation, the more cogent must be the evidence needed to persuade the court that a thing is more likely than not to have happened.

Role of judges

Thirdly, in our system, judges are not investigators. They do not go looking for evidence. Our system is not inquisitorial, but *accusatorial*. Judges decide cases on the basis of the material and arguments put before them *by the parties*. So, it is the responsibility of each party to find and put before the court the evidence and other material which each wishes to adduce, and formulate their legal arguments, in order to convince the judge to find in that party's favour. There are a few limited exceptions to this, but I need not deal with those here.

The fallibility of memory

Fourthly, more is understood today than previously about the fallibility of memory. In commercial cases, at least, where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22], restated recently in *Kinled Investments Ltd v Zopa Group Ltd* [2022] EWHC 1194 (Comm), [131]-[134]. As the judge said in that case, "a trial judge should test a witness's assertions against the contemporaneous documents and probabilities and, when weighing all the evidence, should give real weight to those documents and probabilities". In the present case, there are many documents available to the court. This is important in particular where, as here, the relevant facts occurred some years ago, one important participant in the events (John Blower) is not available to give evidence, and the memories of the witnesses that are available have necessarily been dimmed by the passage of time.

In deciding the facts of this case, I have therefore had regard to the contents of the documents in the case. In addition to this, and as usual, in the present case I have heard witnesses (who made witness statements in advance) give oral evidence while they were subject to cross-examination and re-examination. This process enables the court to reach a decision on questions such as who is telling the truth, who is trying to tell the truth but is mistaken, and (in an appropriate case) who is deliberately not telling the truth. I will therefore give appropriate weight to both the documentary evidence and the witness evidence, both oral and written, bearing in mind both the fallibility of memory and the (relative) objectivity of the documentary evidence available to me.

Reasons for judgment

Fifthly, a court must give reasons for its decisions. That is what I am doing now. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. They deal with the points which matter most. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that

judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation. Put shortly, judgments do not explain all aspects of a judge's reasoning, although they should express the main points, and enable the parties to see how and why the judge reached the decision given.

Failure to call witnesses

Lastly, there is the question whether the failure to call a witness has any effect on a party's case. In *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3893, SC, this question arose. In his judgment, Lord Leggatt (with whom all the other members of the court agreed) said:

> "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."

I bear all these points in mind in the present case.

Witnesses

The following witnesses gave evidence before me: the claimant (Mrs Sandra Blower), Philip Goodmaker (John Blower's long-term accountant), Marc Ahearne (mortgage broker), Kenneth Van Emden (former conveyancing solicitor), Kelly Blower (claimant's daughter), and Robert Whitehouse (solicitor working for the defendant at the material time). I also read the written evidence of Natalie Turnbull (claimant's daughter), Richard Caplan (conveyancing solicitor), Steven Godfrey (estate agent based in Spain) and Paul Allen (John Blower's trustee in bankruptcy), none of whom attended for cross-examination.

I make the following comments on the witnesses who were cross-examined before me. First, those for the claimant. Mrs Blower herself was hard of hearing, but came across as astute and "on the ball", even though her evidence was that she had always left matters of business to her husband John, and ran their home. Philip Goodmaker was a careful and somewhat reticent witness. His evidence was limited, but I judged it to be honestly given and reliable, so far as it went. Marc Ahearne was a quiet and well-spoken witness, clearly telling the truth so far as he knew. Kenneth Van Emden was a very professional and assured witness, but I had the distinct impression that he was editing, even massaging, his evidence so as to present the claimant's case in its best light. I exercise caution in relation to his evidence. Kelly Blower was a very

positive, indeed talkative, witness. But she floundered in responding to difficult questions, and sometimes went off at a tangent to avoid answering at all. I do not think I can rely on everything that she said.

For the defendant, Robert Whitehouse was a clear and straightforward witness with a highly professional manner, although occasionally with a limited recollection. Where he had answers, he was ready with them whether they favoured his side or not. He accepted correction where due, but otherwise stuck to his guns. I bear in mind that he was aware of privileged material in relation to Natalie and Nathan Turnbull which he could not refer to in his evidence. I bear in mind also that he had moved from the defendant firm in November 2018 and was due to retire shortly after the trial, so his personal interest in the outcome was small, if anything at all. Cross-examination over almost two days (the most of any single witness) made little impression upon him. I accept his evidence where it conflicts with that of the claimant's witnesses.

In relation to the witnesses whose statements I read, but who were not cross-examined, I make these comments. First, their statements are admissible in evidence, and not excluded as hearsay, pursuant to the Civil Evidence Act 1995, section 1. However, the weight to be put upon such evidence is affected by the fact that the witnesses were not tendered for cross-examination. The witnesses were not on oath, no questions could be asked of them to test that evidence, and their demeanours could not be observed. It is for me to decide how much weight to give to that untested evidence, taking into account (amongst other things) its consistency with other oral evidence and the documents in the case.

In relation to Mr Van Emden and Mr Caplan, I should add this. Both are former solicitors. Both were struck off the roll for acts of dishonesty, Mr Van Emden in 2007, and Mr Caplan in 2014, but in each case in respect of acts unconnected with the facts of this case. The fact that each was at some time in the past found to have committed an act or acts of dishonesty is part of the background, but it does not lead to any supposition on my part of a pre-disposition to give false evidence. I have assessed their evidence on the same basis as I have assessed that of the other witnesses.

Lastly, there is the position of John Blower himself who (together with his wife and daughter Kelly) lives permanently in Spain. He was not called to give evidence, and neither did he make a witness statement. Mr Blower was born in 1941, and at the time of the trial he was 83 years old. According to the English translation of a Spanish medical report dated 21 July 2022, he was given what was called a "Diagnosis" of "Multilevel cognitive impairment. Assess encephalopathic vascular process", and under "Evolution" was written "Brain MRI prescribed". However, cognitive impairment is a symptom, not a cause. That is no doubt why the doctor prescribed a magnetic resonance imaging scan of his brain. I do not know if that scan was ever carried out, and, if so, what the result was. Nor do I know the seriousness of the cognitive impairment referred to, or what its effects would have been on his ability to give evidence, or the prognosis of any underlying cause. On this material, I cannot be satisfied that he was unfit to give evidence at the trial.

I note that it was common ground between the parties that Mr Blower "was untrustworthy and was prepared to tell lies or dissemble to further his interests". Of course, lies on one occasion do not prove lies on all (or even most) other occasions, and genuine mistakes can be made. I have not had the advantage of seeing Mr Blower in the witness box, but I have read the transcripts of his interviews with the trustee in bankruptcy, and the comments of the deputy judge in the bankruptcy proceedings. I have also heard from witnesses in this case who have dealt with Mr Blower. I make findings on this further on in my judgment. For present purposes, I simply say that all of this material satisfies me that, in any court hearing, Mr Blower is unlikely to have

been a satisfactory or convincing witness. A competent litigation solicitor would not wish willingly to expose him to cross-examination.

Facts found

On the basis of the evidence before me, I find the following facts. John Blower was a former car salesman and amateur boxer who became a successful businessman. He married the claimant in 1967 and they had two daughters, Natalie (born 1973) and Kelly (born 1979). The claimant ran the household, and John Blower ran his businesses and managed the money. The claimant was not involved in her husband's businesses, and was given little information about them. He was the sole decision-maker in his business affairs. The claimant never had any legal interest in any of the businesses. The claimant and her husband had separate bank accounts, although in later years the claimant was authorised to sign on her husband's account.

John Blower made a lot of money from his businesses, and he and the claimant enjoyed a high standard of living. They were generous towards their children. On Natalie's marriage in 1997 she was given £500,000. After Kelly went to Nottingham University in 1998 (until 2001), her parents bought several flats for her in a new development called Parkgate. Two were acquired in September 2000, and two in August 2001, all directly from the developer. In each case Mr and Mrs Blower paid the purchase price, but the leases were granted to Kelly, and she was registered as the leasehold proprietor at the Land Registry. Kelly managed all the flats herself, retaining agents, approving tenants, collecting rents and arranging for maintenance and repairs. The total paid for the four flats was £619,000.

Flat 201

Two years later, in August 2003, a fifth flat in the development was acquired. This was number 201. Unlike the first four, this was acquired from the first owner/occupier. The price of £165,000 was paid once again by Mr and Mrs Blower, but this time the title was registered in their names rather than Kelly's. In their evidence in these proceedings both Kelly and the claimant attributed this to Kelly's being on holiday in Mexico at the time of the purchase. They attribute the failure to alter the register subsequently to the fact that everyone concerned was content to treat Kelly as the beneficial owner, and Kelly "was completely relaxed about the issue".

However, it is accepted that, although Kelly declared the income from the first four flats to the Inland Revenue, she did not do so in relation to that from flat 201, even though she collected it from the tenants along with the income from the other flats. In cross-examination she said this had been "an honest oversight". In the light of the other evidence in the case, and having observed her closely in the witness box, I am afraid that I do not accept that. Moreover, the service charge demands (4 per annum) continued to be sent to her parents. Despite that, in paragraph 13 of a witness statement made on 10 February 2015 in the proceedings brought by the trustee against her parents relating to flat 201, she said "I was unaware that I was not the registered proprietor of 201 until the present proceedings". She was asked about this statement in cross-examination, and replied that she could not answer, and that she did not remember that far back. That was in 2015, and yet she managed to remember many details *in her own favour* from 2003 and earlier. I do not accept that she was unaware until 2015 that she was not the registered proprietor. Even her mother's evidence was that she frequently told Kelly to deal with the fact that her parents were registered proprietors. I find that she knew very well from the beginning that she was not.

It is also the case that, although Kelly was asked by Mr Whitehouse in January 2015 (when the trustee was making his claims) to explain why her parents were registered as proprietors rather than her, she could give no explanation: "Can't answer this myself, would have to get info from Sandra". She did not say that the reason was that

she had been abroad on holiday at the time of the purchase. She did not mention it in the witness statement she made dated 10 February 2015 in the proceedings brought by the trustee against her father. Nor did Mr Blower in his, dated 24 April 2015. In cross-examination, Kelly explained that she only remembered about the holiday when she was being questioned in 2022 by her present solicitor in preparation for this case, and her mother suggested it. Her evidence was unconvincing. I do not accept this explanation, or indeed the story about the holiday, which I deal with further below.

The second witness statement of Paul Allen (the trustee) referred to an email from Mark Hutchings of Landlord Direct (the agency that Kelly employed) to the trustee dated 22 January 2015 in which Mr Hutchings said that Mr Blower had told him that Kelly managed flat 201 on his behalf. A draft letter from Mr Hutchings to the trustee prepared in February 2015 referred to a meeting between Mr Blower and a colleague of Mr Hutchings, Susan McKenzie, the lettings manager, at which Mr Blower had said that Kelly would manage flat 201 on his behalf.

Kelly was cross-examined about this, and eventually she accepted that there had been a lunch meeting between Ms McKenzie, her father and herself. She maintained in cross-examination that her father would have told Ms McKenzie that she (Kelly) was the owner. Yet, in an email to the trustee's solicitors dated 10 March 2015, confirming the substance of a telephone conversation he had had with them, Mr Hutchings said that he was not aware that Mr Blower or Kelly had ever told him or his firm that Kelly was the beneficial owner of flat 201, and indeed that Mr Blower had instructed that Kelly was to manage the property, and that all rent was to be paid to her instead of to Mr Blower. I prefer the email, and accept what Mr Hutchings said.

Mr Van Emden, who carried out the conveyancing on this flat, said that, because it was a leasehold property, the seller would require a signed indemnity covenant from the buyer, so the buyer would have to be available to sign. But, he said, Kelly was on holiday in Mexico at the time, and technology was not as advanced as it is today. So Mr and Mrs Blower were the purchasers instead. The conveyancing file in the trial bundle opens on 4 August 2003, with correspondence between the solicitors, and runs through to 10 September 2003, when registration of the purchase is completed. An interesting feature is that most of the documents in that file appear to have been sent by fax, between the solicitors and also between Mr Van Emden and Mr and Mrs Blower. So, there was no difficulty about the electronic transmission of documents at that time (indeed, my own experience in legal practice of using fax machines goes back to the 1980s). And I do not accept that a hotel in Mexico welcoming foreign visitors in 2003 would not then have a fax machine for bookings and other correspondence.

A further point of note is that none of the inter partes documents, and none of the conveyancing documents, refers to Kelly. Nor do any of the letters between Mr Van Emden and Mr Blower mention that flat 201 is to belong to Kelly, but that she is not available to sign documents, and therefore her parents will step in. So it is not clear to me how Mr Van Emden can have "remembered" that Kelly was abroad at the time. Indeed, so far as I can see, there are only two mentions of Kelly in the file, and they are both in a letter of 13 August from Mr Van Emden to John Blower. First, he comments on the service charges for flat 201, where he says "you will note from the letter from FPD Savills dated the 11th August that the new service charge is £1617.80 and you can obviously compare this to the amount Kelly pays." Secondly, he asks whether he should ask for a retention for possible excess service charges, and says: "Kelly will be able to advise you as to whether or not she has received any demand for excess service charge since she has owned the other flat." All the documents in the

file, including Mr Van Emden's client care letter, treat Mr (and sometimes Mrs) Blower as the purchaser client.

Simultaneous exchange of contracts and completion are recorded as having taken place (remotely) at 11:25 am on 18 August 2003. On the same day Mr Van Emden wrote to Mr Blower informing him of this, but also enclosing an engrossed deed of covenant for Mr and Mrs Blower to sign and return. Despite what Mr Van Emden implied in his evidence, this was not needed for completion, but only later on, in informing the freeholder of the assignment of the lease. That could have been done at any time. Mr Van Emden sent the deed to Mr and Mrs Blower for signature only on 18 August, the date of completion. In the event, the completed deed of covenant was sent, with the notice of transfer of the lease, to the freeholder only on 1 September 2003.

In addition, the vendor's solicitors gave an undertaking to discharge the vendor's outstanding mortgage on the property out of the completion monies and supply the form DS1 once received from the mortgagee. The application for registration of the transfer was sent to the Land Registry on 21 August. On 26 August the Land Registry raised a requisition because the form DS1 had not been supplied. Mr Van Emden chased the vendor's solicitors on 28 August 2003. This was finally sent to Mr Van Emden on 2 September 2003, and sent on to the Land Registry on 5 September 2003. The registration of the transfer was finally completed on 9 September 2023. Mr Van Emden wrote on 10 September 2023 to tell Mr and Mrs Blower that he had received the Land Certificate, enclosing a copy, but retaining the original until further instructions.

In evidence, Kelly said she was away in Mexico for about three weeks in August 2003, and did not recall being contacted by Mr Van Emden or seeing any documents whilst away. She could not remember when the holiday started or finished, and no longer had her passport which would show entry and exit stamps. Nor did the claimant disclose any documents relating to the holiday, though she is advancing Kelly's claim as her assignee. The story about the "holiday" (advanced for the first time in these proceedings and not in 2015 when the trustee was making his claims) is bald and unconvincing, and I do not accept it. But in any event the facts are that the deed of covenant was not supplied to the freeholder until 1 September 2003, and registration of the transfer was not completed at the Land Registry until 9 September, following the supply of the form DS1 to Mr Van Emden on 2 September.

On any view, even without considering the use of fax technology in Mexico, she was in England and available to sign documents either at the beginning of the conveyancing process or at the end. Even if she had not been in England at the material time, and she was unable to find a fax machine, she could easily have given a power of attorney to her father before she left. So, even if it were true, her story of absence from England on holiday would not satisfy me as to why flat 201 was purchased by Mr and Mrs Blower rather than her. And, even if the story were true, her parents could easily have stated expressly in the transfer form TR1 that they were purchasing as trustees for Kelly's benefit. But they did not. Added to the lack of documentary evidence of her alleged beneficial ownership, and the evidence of Mr Hutchings, it is easy to understand why the trustee considered that, on the evidence, this property was indeed Mr and Mrs Blower's, and Mr Blower's interest fell into the bankrupt estate.

The executive jet

In her evidence, the claimant said she trusted her husband never to make a decision that would cause her harm or loss. She never intervened in his business affairs, except on one occasion. In 2007 Mr Blower told the claimant he wanted to buy an executive

jet aircraft, using finance from Lombard North Central (part of the Royal Bank of Scotland Group, like National Westminster Bank). The claimant suggested leasing rather than buying, but Mr Blower insisted on buying. He changed the name of one of his existing companies to Four Seasons Aviation Ltd, and on 29 October 2007 it borrowed US$10,395,000 from Lombard. This was secured on the aircraft (a Hawker 800) by an aircraft mortgage in the sum of £5,197,500.00 registered on 2 November 2007, and (more importantly) by Mr Blower's personal guarantee. Mr Blower thought that charter income from businessmen and others would easily cover the finance costs. What he had not foreseen was the world financial crisis and "credit crunch" of 2008.

The Chantry and the bank deposits

Mr and Mrs Blower lived in a succession of large houses bought in joint names. In 2000, they bought The Chantry, a residential property in Barnet Lane, Elstree, for £2.25 million. In 2008 they received what the claimant called "a handsome offer" to buy the house which "came out of the blue", and they sold The Chantry for £6.8 million. The sale (by the claimant and her husband jointly) was completed on 17 September 2008. Richard Caplan, a solicitor who had acquired the clients of Mr Van Emden, acted for Mr and Mrs Blower. After allowing for redemption of outstanding charges and other costs, £2,949,148.88 was left. This was distributed as to £2,399,148.88 to Mr Blower, as to £50,000 to the claimant, and as to £500,000 to one David Cowham (to whom Mr Blower owed money in relation to a property investment).

There is no direct evidence of any instructions given to Mr Caplan by Mr and Mrs Blower about distribution of the proceeds of sale, but solicitors are (rightly) cautious about distributing such proceeds, and the claimant does not seem to have complained. I therefore infer that both the claimant and her husband agreed that that should happen. The claimant said that she paid her £50,000 into her own bank account for future housekeeping and holidays. The payment to Mr Blower was made into a bank account in his sole name with National Westminster Bank. What happened to that money thereafter is a matter of some importance. In the meantime, Mr and Mrs Blower moved to live, first at a property in Chorleywood, and then to another property in Northwood. Subsequently, in August 2010, they moved to live at Aisling, a house registered in the names of Natalie and Nathan, which the latter had acquired in 2005.

A bank statement in the trial bundle shows that the sum of £2,366,000 was paid into an account in Mr Blower's name, trading as "JWB Marketing", on 18 September 2003. I do not know what happened to the balance of the £2,399,148.88 distributed to him, *ie* £33,148.88. On the same day, the sums of £1 million and £1,318,000 were withdrawn and placed on term deposits. There is no evidence that these deposits were in the name of anyone but Mr Blower, and there was a bank risk report dated 7 January 2009 which refers to his having "£2m with ourselves". I infer that they were in his name alone. The second deposit (£1,318,000) appears however to have been cashed in the next day, 19 September, but immediately reinvested in a similar deposit. On 22 September the second deposit of that sum appears to have been withdrawn also, and the same day reinvested in a smaller deposit of £1,300,000. Both deposits appear to have been changed subsequently, as appears below.

There is no evidence at this stage to show that the £2.4 million distributed to Mr Blower was to be other than his to do with as he liked. The claimant's evidence was that she had no problem with the distribution to Mr Blower, first because they had complete trust in each other, second because he would get a better rate of interest than she could, and third he was used to handling large sums of money. She also said that she never doubted that he would respect her interests. But the fact remains that, at

least until April the following year, some seven months later, there is no evidence of any conversation between the claimant and her husband, or any other positive outward sign, suggesting a claim by the claimant to an interest in this money. On the other hand, I have found that the money was paid out to Mr Blower at the time with the claimant's consent. As we shall see, it was he and he alone decided what to do with it. The defendant pleads that, in accepting £50,000 of the proceeds of sale, the claimant gave up any claim to the rest.

An internal bank risk report dated 7 January 2009, prepared on the basis of a further request for facilities by Mr Blower, not only for himself, but for his daughter and son in law (Natalie and Nathan Turnbull), referred to the aircraft finance borrowing, and said:

> "Repayments still represent a hefty commitment and I am not sure whether income generated will cover these going forward or whether cash will need to be injected by JB to meet."

It further said, in reference to borrowing by Nathan and Natalie Turnbull (for Aisling):

> "With current debt of £1.25m we would thereafter need gtee from JB in sum of £725k. This would be too big a commitment to provide on an unsupported basis and I would therefore want to benefit from cash cover currently held by way of formal charge."

The reference to "cash cover" is clearly a reference to the cash deposits held by the bank. Mr Blower's application for further funds was reviewed on 28 February 2009. A resubmission of that application recorded that:

> "JWB has accepted the compromise solution of adding £1m of his cash deposits to the Bank's security package for a short term renewal".

However, it appears that, before that was put into effect, Mr Blower executed as a deed a unilateral document called "A Declaration of Trust". It was witnessed by his solicitor Richard Caplan, who drafted the document, but who in his witness statement described himself as "not a trusts specialist". In a recital to this deed, Mr Blower referred to the payment to him of £2,399,148.88 from the sale proceeds of The Chantry, and recited that:

> "£2,000,000 of the sum of £2,399,148.88 belongs to [the claimant] as the true and rightful owner of the same as the Trustee by this Deed acknowledges."

The deed bears the date 3 April 2009 in typescript. Mr Caplan was one of the claimant's witnesses who was not tendered for cross-examination. His witness statement gives evidence as to his drafting the document, and the date it bears, but makes no positive assertion that it was indeed executed by Mr Blower on the date it bears. Nor is there any evidence before the court as to Mr Blower's instructions to Mr Caplan in preparing this deed. I cannot believe that a solicitor would draft such a deed without instructions. If those instructions were not in writing, but instead oral, then I cannot believe that a solicitor would not have recorded them in an attendance note. However, nothing was disclosed. Since Mr Caplan did not come to court, he could not be asked about any of this. Mr Goodmaker's evidence (which I accept) was that he did not know about the deed at the time. Since he was Mr Blower's personal accountant, and there could have been tax consequences, I find this telling. It is unnecessary for me to make any positive finding as to when the document was executed, but what is relevant is the potential for attack by the trustee.

By this deed, Mr Blower stated that he declared himself a trustee for Mrs Blower of two bank deposits with National Westminster Bank plc, namely numbers 12729834/2 and 12720265/4, dated 16 October 2008 and 28 October 2008. There is no documentary evidence of these deposits in the papers before me. However, on 7 April

2009, just four days after the date of the deed of declaration of trust, Mr Blower signed a letter addressed to "Dear Ross". It reads

> "RE: £1,000,000 Treasury funds
> Please accept this letter as my irrevocable undertaking giving Natwest Bank full control of the £1,000,000 currently held on Treasury (Deal ID P21272983400002, settlement account 37532863/605006) due to mature 16 October 2009."

I infer that "Ross" was Ross Davies, then a senior manager in the real estate finance department of National Westminster Bank plc. The reference numbers show that the deposit concerned was that entered into on 16 October 2008, so it was a one-year term deposit. But the most important point is that Mr Blower, having just executed a deed concerning beneficial ownership of the deposit in favour of the claimant, was almost immediately using the deposit as security for his own purposes. It is inconceivable that the bank would have accepted the letter of undertaking as security for Mr Blower if it had known of the deed of declaration of trust for Mrs Blower. There is no evidence that the bank knew of it. I find that it did not. This letter appears to amount to the further security over the "cash cover" referred to in the risk report of 7 January 2009. Certainly nothing else has been disclosed.

A further question which arises if the deed was indeed executed before 7 April is whether the deed was genuinely intended to create a trust, or whether it was a sham. In the former, then the bank would have been misled into taking the deposit as security. In that case, there would have been a question whether the bank took free of the claims of the claimant under the trust. In the latter, it would be the claimant who was misled. I find on the evidence that the interest on the deposits was paid to Mr Blower and not to the claimant, and was included on Mr Blower's tax return. Mr Whitehouse's evidence was that this document was "suspect and a shaky platform" for the defence of the claims. I accept that that is what he thought, and I think many (if not most) lawyers in his position would have thought similarly. As I have said, there was no evidence before me of Mr Blower's instructions in this matter. For present purposes I do not need to find the relevant facts. It is sufficient to know that there are issues which could have been exploited by the trustee in pressing his claims.

The bank continued to be concerned about the servicing of the Lombard loan. In his witness statement dated 28 February 2013, made in the bankruptcy proceedings later brought against Mr Blower, Andrew Barnard (a relationship director from Lombard) said:

> "31. Of course, in the Summer of 2008, the banking crisis hit and the world economic downturn took a heavy toll on the business jet market. Charter income began to dry up as there is an over supply of business jets and by May 2009, the account with [Four Seasons Aviation] showed signs of distress. There was a payment overdue and a couple of payments had been received late."

On 14 May 2009 Mr Barnard wrote an internal memorandum concerning the Four Seasons facility. In it, he wrote

> "Personally he [Mr Blower] was looking to receive charter income which has been slower than expected given the current climate
> The recent slow receipt of monthly payment recently experienced on this aviation mortgage is due to delays in John transferring personal funds in order to meet the monthly commitment in the absence of charter income. We have addressed this issue with John and made the point that his own arrangements regarding chartering of the aircraft are not our concern and cannot be used as a reason for payment delays.

> To this end John is currently making arrangements to ensure sufficient funds are transferred across to facilitate smooth receipt of payments going forwards."

On 27 April 2009 the bank wrote to Mr Blower enclosing a new loan agreement to refinance existing borrowing in relation to Aisling, for Natalie and her husband Nathan to sign.

On 29 May 2009 Philip Goodmaker (Mr Blower's accountant) wrote to Mr and Mrs Blower saying:

> "As promised yesterday I have had a look at the allocation of the value of the sale of the Chantry. It was sold for £6.8m and was held in joint names. So £3.4m is attributable to SB and same to JB.
>
> The mortgage on redemption was £3.8m of which £1m approx was obtained to finance JB's business projects.
>
> So only £2.8m was appropriate to the original purchase and improvements to the property.
>
> Therefore £1.4m of the redeemed mortgage was relevant to Sandra and £2.4m to John.
>
> This means that approx allocation of sales proceeds was £2m to Sandra with £1 [sic] to John. John's share was quite clearly used to pay his business debts since then.
>
> These are only approx figures but I think it simply explains the facts."

At the trial the claimant relied heavily on this email to confirm the existence of the "£2 million trust fund" which she claimed had been created by her husband in her favour. This is curious, given that the trust deed (which if genuine would be transformative rather than, like the email, purely narrative) is dated nearly 2 months earlier. Yet Mr Goodmaker did not know about it.

On 17 June 2009 Rose Elms of the bank's property lending team sanctioned a renewal of a £1,350,000 loan to Natalie and Nathan Turnbull in connection with the financing of their house Aisling. However, she commented that there was "no real appetite to continue funding [Natalie and Nathan] in the long term … " Other internal bank documents show that this was being done only because Mr Blower was regarded as a good customer, and that he was himself putting up security for the loan.

On 18 June 2009 Mr Blower wrote a second letter of undertaking to his bank, dealing with the second deposit, as follows:

> "Please accept this letter as my irrevocable undertaking giving Natwest Bank full control of the £1,000,000 currently held on Treasury Reserve (Deal ID P21272026500004, settlement account 64190153 / 601530) due to mature 28 October 2009."

It will be noted that, whereas on 22 September 2008 the sum deposited was £1,300,000, by 28 October 2008 it had become £1 million. There was no explanation of what happened to the other £300,000. Again, the important thing is that Mr Blower was giving as security to the bank a deposit in his name over which just two months earlier he had purported to declare a trust in favour of the claimant. Once again, the bank cannot have known of the deed of declaration of trust, or it would not have accepted the letter as security, and there would have been further correspondence on the subject. On the material before me, I find that the bank did not know.

On 8 July 2009 Mr Blower signed a guarantee to the bank, limited to £775,000, of the loan to Natalie and Nathan of £1,350,000. The loan agreement was dated 23 July 2009, and the loan was to be repaid on 10 June 2010. In addition to the guarantee from Mr Blower, their property Aisling was charged to the bank as security. It appears that the short-term nature of the loan was the result of the property being put on the

market to find a buyer. It was expected to be sold.
On 28 October 2009, the second bank deposit matured. The entire proceeds (£1,060,000) were paid into Mr Blower's current account, and so were put at his personal disposal, and the deposit account closed. The money so paid was then used for Mr Blower's business purposes, without reference to the claimant.
In June 2010 the Aisling loan was due for repayment. But still no buyer had been found. The bank accepted Mr Blower's suggestion to use some of the remaining deposit monies to reduce the debt, and the bank agreed. Mr Blower instructed the bank by a fax dated 12 July 2010 to pay £500,000 from his remaining £1 million deposit account to the loan account of Natalie and Nathan to pay down the Aisling loan. This appears to have been actioned by the bank on 27 and 28 July 2010, together with a payment to Mr Blower of £100,000, leaving the balance of £400,000 to be reinvested in another deposit. So, the Aisling loan was reduced to £850,000, and the deposit of £1 million reduced to £400,000. In February 2011 the remaining £400,000 came off deposit and the proceeds used to pay down the Aisling loan further. That left a sum of about £62,000 in interest earned, which was paid out to Mr Blower as to about £22,000 in August 2010 and as to about £40,000 to his TorFX account in September 2011. The deposit account was formally closed in October 2011. All of the £2 million said by the claimant to be held on trust for her by her husband had been paid away, on his instructions.
Indeed, Mr Whitehouse's evidence (which I accept) was that Mr Blower had told him on more than one occasion that all of the so-called "trust funds" had already been spent. One was at a consultation with Lexa Hilliard QC in June 2014, at which the claimant and Mr Whitehouse were also present, when Mr Blower admitted that £1 million of the £2 million had been spent on the business of Hangar 8 plc, which managed the executive jet aircraft, and of which he was a director. Moreover, at a lunch after the consultation Mr Blower also admitted that the other £1 million had also been spent, and that the claimant rolled her eyes in response to it, as if to show that she was already well aware of this.
As I have said, two significant payments were made from the bank deposits for the benefit of Natalie and Nathan. One was of £500,000, made in July 2010. As stated above, this was made on Mr Blower's instructions directly to the bank, to reduce the Aisling loan. The other was of the surviving £400,000 from the deposit account. The documents in the bundle show that this was carried out by the bank itself, using its security powers, when the deposit matured. It was paid to Natalie and Nathan's own NatWest account on 24 February 2011, from which it was immediately debited to pay down the Aisling loan further. There is nothing to show that Mr Blower, the claimant, Natalie or Nathan was involved in any of this process. It was all done internally by the bank.
The claimant's evidence was that both payments were *loans* to Natalie and Nathan, out of her trust fund, to be repaid out of the sale proceeds of Aisling once sold. This is supported in very general terms by the witness statement made by Natalie (though, as I have said, she was not tendered for cross-examination, and I can place little weight on this). However, there is no documentary evidence, not even a letter or email passing between them, to support the assertion that the payments were in fact loans to Natalie and Nathan. As I have said, the second of them was not even a voluntary payment by Mr Blower, but one carried out by the bank on its own initiative.
The claimant for her part says that there was no intention to make further gifts to Natalie of £900,000, especially as she and Mr Blower could not have afforded to do the same for Kelly, and the claimant would be giving up almost half her trust fund, intended to provide for her old age. Whether that is so or not, the claimant's intentions

in this case are irrelevant. Mr Blower made the payment of £500,000 to the bank to discharge *pro tanto* the loan to Natalie and Nathan. In the absence of any evidence to the contrary, I hold that the bank was a bona fide purchaser for value without notice and took the money free from any residual claims by the claimant.

As to the payment of £400,000, this too was used by the bank to reduce further the Aisling loan. As with the payment of £500,000, the bank was a bona fide purchaser for value of this money, and, again, if the claimant retained any beneficial interest in it, then the bank took free from it. There was no voluntary act by Mr Blower or the claimant, and thus no direct loan from them. Natalie and Nathan could obviously have assumed a new liability to them if they wished, but that would have to be proved. In the absence of any documentary evidence that they had done so, there was an obvious risk that the trustee would see things differently from the claimant, and seek to litigate the matter, as in fact he did.

The aircraft facility

The interest on the aircraft facility with Lombard had been paid erratically for some time, and in May 2011 it fell into arrears again. There was a meeting between the bank and Mr Blower on 28 June 2011. The meeting did not go well, as Mr Blower revealed that some of the properties be had previously said he owned were no longer his, and the bank came away from the meeting feeling exposed. The bank wrote to Mr Blower afterwards to ask for more information on the position, but did not receive full or satisfactory answers. Further arrears mounted, and there was another meeting in September. At this meeting Mr Blower told the bank for the first time that he could not no longer meet the payments under the facility, and that he would not be doing so. The bank wrote on 21 September 2011 terminating the facility and requiring repayment. Four Seasons Aviation went into default on the facility on 17 October 2011, and on 19 October 2011 the aircraft was repossessed.

The TorFX payment

In December 2011 Natalie and Nathan obtained further finance, through Mr Ahearne, from Dragonfly Property Finance in the sum of £999,500 for 12 months, to be secured by a first legal charge on Aisling. At the same time, the same lender offered Natalie a loan of £280,000 for 12 months secured on a separate property at 111 Uxendon Hill in Wembley, north London. The purpose of these two short term loans was to finance the purchase of a Spanish property by Natalie and Nathan, as they were arranging to move to Spain to live.

Mr Blower had an account with TorFX, a firm of foreign exchange dealers, which he used for multi-currency transactions concerning the aircraft. Natalie and Nathan did not have such an existing facility. On Friday 13 January 2012, the sum of £609,263.86 was paid into Mr Blower's account with TorFX by Klimt & Co, a firm of solicitors (now no longer in practice), to whom Mr Ahearne used to direct mortgage clients. (His evidence in fact does not go so far as to say that he actually did so on this occasion.) This sum appears to have been made up of three separate payments, two of £30,000 each on 19 and 23 December 2011 and one of £540,000 on 13 January 2012. That made a total of £600,000, and the balance may well have been interest, but nothing turns on that. On the next working day, Monday 16 January 2012, that sum was converted to €708,900, and sent to Natalie and Nathan's account with Banco de Sabadell in Spain.

The claimant's evidence was that the sum of £600,000 "plainly" was Natalie's money, derived from the bridging loans. But there is no direct or documentary evidence of this. It is just assertion by the claimant, who after all was not involved in the transaction. It is striking that Natalie in her (hearsay) witness statement does not herself give such evidence. Indeed, she does not mention this payment at all. I do not

need to decide this point, but I have no doubt that the trustee in bankruptcy would have exploited this weakness.

Mr Blower's bankruptcy

On 20 April 2012 a bankruptcy petition was presented against Mr Blower by Lombard under his personal guarantee of Four Seasons Aviation's obligations in the sum of US$3,162,086, then the sterling equivalent of £2,039,545. Mr Blower sought legal advice, and was directed by his mortgage broker, Mark Ahearne, to the defendant firm, where the senior partner, Harvey Shulman, dealt with the matter. The petition was defended on several grounds, including one that Mr Blower's centre of main interests ("COMI") was in Spain (where he and the claimant had a residential property) rather than the UK. In December 2012 that residential property, Apartamento 29, Bloque 6, Camino de Angel, 29660 Marbella, Malaga, was sold for €1,100,000. The entire proceeds were paid to the claimant, who used them to buy a villa at Calle Real 2D, no 27, 29660 Marbella, Malaga, which is (to judge from Google Maps) in the same suburb of Marbella. The COMI and other objections to the petition were heard and dismissed on 22 May 2014 by the High Court (deputy judge Amanda Tipples QC, as she then was), and Mr Blower was adjudged bankrupt at 15:53 that day.

Following that adjudication, Paul Allen was appointed as Mr Blower's trustee in bankruptcy on 6 June 2014. Mr Blower attended a meeting with the Official Receiver on 24 June 2014 (when he completed the bankruptcy questionnaire). At the interview with the Official Receiver he was accompanied by Robert Whitehouse of the defendant firm, who had drafted a statement for him dated 24 June 2012. The questionnaire and the statement, although dated the same day, were inconsistent in some respects. Mr Whitehouse gave evidence (which I accept) that Mr Blower found that his status as an undischarged bankrupt meant that he could not openly engage with various business transactions which interested him, and caused him frustration, although he did nevertheless become actively involved in some transactions nevertheless. This frustration obviously impacted on Mr Blower's appetite ultimately for a settlement of his disputes with the trustee.

Proceedings concerning flat 201

In September 2014 the trustee issued proceedings against Mr and Mrs Blower for the sale of flat 201, still registered in their joint names, on the basis that half of the beneficial interest (*ie* that belonging to Mr Blower) vested in the trustee. Kelly, claiming to be the beneficial owner, instructed the defendant to act for her, though at this stage she was not a party to the proceedings. She received a client care letter from the defendant dated 1 December 2014. (She was joined to these proceedings on l3 February 2015, by order of Chief Registrar Baister.) The claimant however says that she herself did not receive such a letter, although she accepts that her husband's file at the defendant "was expanded" to cover her interests "as they arose, rather than a new file being opened". She further accepts that her interests appear to have been dealt with as early as 1 August 2014, where Robert Whitehouse discussed the equity of exoneration in its application to her.

Mr Whitehouse said in evidence, and I accept, that the claimant had told him before the defendant was instructed on her behalf (both in June and in August 2014), that under no circumstances would she appear as a witness in court on her husband's behalf. Mr Whitehouse also said, and again I accept, that he found it difficult to obtain instructions on particular matters from Mr Blower, because Mr Blower chose not to disclose relevant facts or documents to him or his other legal advisers, let alone to the trustee. Mr Blower was very anxious about disclosing any of his assets to the trustee, or the details of the transactions that had led to their acquisition. Mr Whitehouse was

in effect instructed "to stall the trustee indefinitely on all aspects of the Blower family's affairs". Mr Whitehouse specifically remembers Mr Blower asking him "you don't really think I've disclosed everything do you?" His evidence was that Mr Blower had not been candid with any of his legal advisers concerning his assets, and there was a risk that other matters might be revealed in the course of proceedings. He agreed with Mr Goodmaker that Mr Blower was "extremely resistant to the receipt of advice".

Despite his reluctance to do so, Mr Blower attended another interview, this time with the trustee and his solicitors, on 24 October 2014. Once again, Robert Whitehouse accompanied Mr Blower. At the interview, Mr Blower came across as evasive and erratic. But he explained to Mr Whitehouse that this was all "part of an act to put the trustee off balance and distract him from pursuing his questions". Mr Blower made a number of demonstrably untrue statements to the trustee. For example, he said that the claimant used money derived from the sale of The Chantry in 2008 to buy the villa in Calle Real in late 2012. But the documents show that those proceeds had all been dissipated by 2012. He also said that he and the claimant bought flat 201 for Kelly when she went to university, though by the time of the purchase she had already left, having graduated two years earlier. He admitted lying to the bank about owning a property in Zurich, in order to obtain the loan for the Hawker 800 aircraft. And Mr Blower put down discrepancies with the bankruptcy questionnaire to its having been created by his accountant Mr Goodmaker, though Mr Goodmaker, in a subsequent written statement, expressly denied any involvement in its creation. Having seen Mr Goodmaker in the witness box, I prefer his evidence on this point.

In relation to the two bank deposits over which he had purported to declare a trust for the claimant, but which he then immediately used for his own purposes, Mr Blower said:

> "Ah yes but we were man and wife. I don't need to have permission. We are man and wife for Christ …"

It was pointed out that

> "It is a separate bank account."

Mr Blower replied:

> "Huh? Yes but Finella, she is my wife, I can do what I like … I was looking after the Trust, there was no objection to me doing whatever I did, I have done it for years, you know, blah, blah, blah …"

I am satisfied that Mr Blower regarded the money as his to deal with as he saw fit, and that he did so.

Further claims by the trustee

By 28 November 2014 the defendant was acting not only for the claimant and Kelly but also Natalie, for on that date the defendant sent instructions to Mark Hubbard of counsel on behalf of all three to advise, and also to prepare for a hearing in February 2015. The three primary matters for consideration were (i) the purchase of flat 201, (ii) the purchase of the villa at Calle Real with the proceeds of sale of the apartment in Camino de Angel, and (iii) the payment of £500,000 towards the loan charged on Aisling. Mr Hubbard met the claimant and Mr Blower in conference on 10 December 2014. Subsequently, Mr Hubbard advised that Kelly should be separately represented at the hearing in February. Charlotte Ford of counsel was instructed to represent her. On 13 February 2015 Chief Registrar Baister ordered that Kelly be joined as a party to the trustee's application for an order for sale of flat 201, and gave directions for the filing of evidence by the parties.

In March 2015, the trustee began asking questions about Mr Blower's TorFX account, and in particular about payments made to Natalie and Nathan in Spain from it. On 10

March 2015 Natalie confirmed that she and Nathan would like the defendant to represent them in relation to these payments, and also in relation to the trustee's questions about a payment from Mr Blower's account with the Royal Bank of Scotland to them in the sum of £17,613 made on 29 July 2009.

In the meantime, on 30 January 2015, the trustee applied for an order in Mr Blower's bankruptcy suspending Mr Blower's automatic discharge from bankruptcy until certain conditions had been complied with, including answers being given by Mr Blower to certain questions put by the trustee. On 17 March 2015 the defendant wrote to the trustee that the application would not be opposed. On 27 March 2015 the defendant sent a signed draft consent order to the trustee. On 8 April 2015, Mr Registrar Briggs made the order by consent. (In the trial bundle there is a court certificate dated 22 November 2017 to the effect that Mr Blower had nevertheless been discharged on 22 May 2015. But this cannot be right. Amongst other documents contradicting this, the settlement agreement signed at the mediation on 9 December 2015 recited that Mr Blower's discharge was still suspended.)

On 24 April 2015 the trustee sent a letter before claim to the defendant as the claimant's solicitor. This made claims in respect of: (i) the payment to the claimant of Mr Blower's half of the proceeds of sale of the apartment at Camino de Angel, as an unsanctioned post-petition disposition of the bankrupt's property; (ii) a total of £107,263.86 in three payments made to the claimant from Mr Blower's TorFX account in January and March 2012, as transactions at an undervalue at a relevant time; and (iii) €55,550.26 (then £39,829.50) being half of the balance of €111,100.52 in a joint account of the claimant and her husband with Banco de Sabadell which on 24 March 2012 was changed to an account in the claimant's sole name, as a transaction at an undervalue at a relevant time. The trustee calculated the total value of all three claims as £616,762.36. In addition to this, the trustee was already claiming a half share in flat 201.

In August 2015 Jonathan Crystal of counsel was appointed at Mr Blower's request to represent the interests of the family, on the basis that Mr Blower had arranged with a business contact that that contact would be responsible for Mr Crystal's fees. Mr Whitehouse spoke to him by telephone on 21 August 2015, and met him on 24 August 2015. He instructed Mr Crystal to appear at a directions hearing on 11 September 2015 in the flat 201 application. On 26 August 2015 Mr Whitehouse flew to Malaga at Mr Blower's invitation to attend a boxing event, but where he also met his clients, returning on 1 September 2015.

On 3 September 2015, the trustee issued an application against Natalie and Nathan for declarations that the payments of £500,021 and £400,000 from the two NatWest bank deposits, £600,000 from the TorFX account and £17,613 from the RBS account were all transactions at an undervalue made at a relevant time. The total of all these claims was £1,517,634. A directions hearing was fixed for 16 December 2015. The trustee also placed a unilateral notice on the title to Aisling to preserve an alternative claim to a beneficial interest in that property.

On 11 September 2015 there was a hearing in the flat 201 application before Mr Registrar Briggs to give directions. The disposal hearing for that application was to be listed for one day. A conference with Mr Crystal was arranged for 28 October 2015. Along with Mr Whitehouse, it was attended by Mr Blower and Kelly (although she left after a few minutes for another appointment). The conference lasted about an hour. Mr Whitehouse's evidence, which I accept, was that Mr Crystal had an

> "evident wish to impress upon John [Blower] the advisability of negotiating a settlement with the Trustee … I understood that [Mr Crystal] had formed the view that the litigation was likely to be lengthy and very

> costly and with a very uncertain outcome for the family … [Mr Crystal] was convinced that a settlement must be concluded to avoid potential long-term damage to the Blower family."

It is clear that this was not to be a settlement only of the claim against Kelly, but instead a global settlement in relation to claims against all members of the Blower family.

The mediation

The following day, 29 October 2015, Mr Whitehouse emailed the trustee's solicitors suggesting mediation. They agreed to this, although they also sent the defendant a draft application notice for the intimated further claims, amounting to £616,762.38, against the claimant. The date eventually agreed was 9 December 2015, and Mr Blower would be present in person, accompanied by Mr Whitehouse and (as originally intended) Mr Crystal. It is clear from the email correspondence that the claimant and Kelly were all aware of the date, and Kelly, Natalie and the claimant were invited to attend if they wished. Given that at that time the claimant and her husband, and Natalie and her family, were all living in the same Spanish villa, I infer that Natalie was also aware of the date. In the event, both Kelly and Natalie had childcare commitments that would prevent their attendance in person, but Kelly said she would be available by telephone on the day. In an email to Kelly on 10 November 2015 Mr Whitehouse recommended that Mr Blower attend the mediation, "since ultimately the conclusion of any deal will lie in his hands".

In the following days there was email correspondence concerning a number of matters. This included a discussion between the claimant and Mr Whitehouse of the claims against her and the importance of her "trust fund" (18-19 November 2015), confirmation to the claimant by Mr Whitehouse that the mediation would cover all issues, and not just flat 201 (29-30 November 2015), Mr Whitehouse sending the claimant a copy of the mediation agreement and the claimant asking about the fee and the need for signatures (30 November – 1 December 2015). In the last email (on 1 December) Mr Whitehouse made the point to the claimant that this would be an informal negotiation rather than a formal court hearing.

In an email from Mr Whitehouse dated 30 November 2015 to the claimant, but copied to Kelly, Mr Whitehouse referred to their position paper. He said he was drafting this in consultation with Mr Crystal. He then added this:

> "If you have any particular positions you wish us to stick to come hell or high water, please let us know. At this stage we should decide the absolutely minimum deal we can accept and build from there."

However, none of the family members gave Mr Whitehouse any specific instructions as to how to conduct the negotiations with the trustee, or any "red lines" that were not to be crossed.

There was also correspondence between Mr Whitehouse and Mr Crystal which threw up a possible clash of dates for Mr Crystal's attendance (30 November 2015). By 7 December it was clear that Mr Crystal would not be able to attend, having another hearing the same day. This was a disappointment to Mr Whitehouse, as it put a significantly greater burden on him. But he met Mr Crystal on 8 December to discuss the position. On the same day the parties exchanged position papers.

The mediation took place on 9 December 2015 in London. Mr Blower and Mr Whitehouse attended, together with the trustee and his solicitors. At the outset, in response to enquiries from the mediator, Mr Blower confirmed that he could speak for the members of his family, and Mr Whitehouse confirmed that he was authorised to sign any agreement on their behalf. I find that the family trusted Mr Blower to negotiate the best terms possible to settle the claims against them. The claimant's own

evidence was that she trusted her husband to look after her interests, and Nathan told Mr Blower on the telephone when asked about the potential settlement agreement that he must do whatever was best for the family. If any of them had wished to impose limits or "red lines" on what could be agreed, they could have done so. But they did not. I also find that his clients impliedly authorised Mr Whitehouse as their solicitor to sign on their behalf any deal which Mr Blower was satisfied was in their interests.
The mediation lasted more than 12 hours, finishing at 11:30 pm. During the course of the mediation, offers and counter-offers were made, but were not accepted. Eventually the trustee agreed not to pursue any assets of the family in Spain. He further agreed to allow Mr Blower to obtain his immediate discharge from bankruptcy. Mr Whitehouse considered both concessions important. The first was important because the family were now all resident in Spain, and Mr Whitehouse suspected the existence of further assets of Mr Blower there. At that time (pre-Brexit), orders of the English courts could be enforced in the Spanish courts with relative ease. The second was important to Mr Blower personally, as it would enable him to re-engage openly with his business activities within a short time.
During the course of the afternoon there was considerable discussion of what a settlement figure might be and how it would be provided. Mr Blower began to consider seriously the possibility of borrowing the money to pay the agreed sum. He mentioned a third party to Mr Whitehouse as someone from whom he could borrow the money. It appeared that the trustee was willing to agree to a period of time (up to 9 months) for the settlement monies to be paid, though he would require security in the meantime. Other possible lenders were also considered. By 11 pm the terms of an agreement had been formulated. Mr Blower telephoned Nathan to discuss it. As I have said, Nathan told him that he must do whatever was best for the Blower family. Mr Blower tried to telephone Kelly, but received no answer (it was an hour later in Spain). Mr Blower had earlier made clear to Mr Whitehouse that he had the claimant's authority to settle the litigation on the best terms available.
Mr Whitehouse told Mr Blower that he had to be sure that the settlement sum could be raised and paid within the agreed period. Mr Blower telephoned Mr Crystal about the proposed settlement. Mr Whitehouse spoke to Mr Crystal and read out the proposed terms of settlement. Mr Crystal said that the deal would save Mr Blower and his family "a lot of trouble and expense in the future", and expressed no concerns about its terms. (In an email written to the claimant's solicitor in 2020, Mr Crystal said that he "did not advise in relation to the terms agreed". It may be that he had forgotten about the telephone conversation late on that day, or it may be that he did not regard what he then said as "advice". But the email was over four years later, and he no longer had any papers.) On that evening, Mr Blower also telephoned the business contact who had paid Mr Crystal's fees for his view. That view was that Mr Blower must make up his own mind on whether to enter the agreement proposed. Mr Blower decided that he would go ahead and sign. Mr Whitehouse signed for the other members of the family who were his clients.
The settlement agreement
The parties to the agreement were stated to be the trustee, Mr Blower, the claimant, Kelly, Natalie and Nathan. The trustee agreed to accept £1,500,000 in settlement of all claims (including for costs) against Mr Blower and the other parties, whether known or unknown, the sum to be paid by 1 September 2016. Apart from Kelly, whose liability was limited to £150,000, the liability of the other family members was expressed to be joint and several. Mr Blower agreed to use his best endeavours to procure the granting of charges on various properties belonging to the family to secure the total liability under the agreement. (These were flat 201, and three

properties belonging to Natalie and Nathan, including Aisling.) The trustee agreed not to oppose Mr Blower's application for discharge from bankruptcy subject to certain conditions being met.

The effect of the settlement was to release the Blower family from the existing and any further claims, including any claim for the trustee's costs (said to amount to £750,000 to date), to enable them to keep all their Spanish assets, to unfreeze flat 201 which could now be relet, to enable the discharge of Mr Blower from bankruptcy, and to give Mr Blower nine months in which to raise £1.5 million to settle with the trustee, though it did involve security in the meantime being given to the trustee over flat 201 and three properties belonging to Natalie and Nathan.

However, on 15 December 2015 Mr Blower telephoned Mr Whitehouse and said that he wanted to renege on the settlement agreement, as Natalie and Nathan considered that the charge imposed on the properties belonging to them would affect their income. Mr Whitehouse emailed Mr Crystal the same day for his views, but did not receive a reply. Despite these events, on 16 December 2015 Registrar Derrett made an order by consent in the application against Natalie and Nathan, staying the proceedings on the terms of the settlement agreement. On 17 December 2015, Nathan emailed Mr Whitehouse to complain about the terms of the agreement. Specifically he made the point that only £900,000 had actually been received by them from Mr Blower, given that £600,000 from the TorFX account represented their own borrowing converted into euros. Yet their properties were being used as security for the whole of the £1.5 million debt which Mr Blower had to find within nine months. He said he would be looking to obtain separate representation for himself and Natalie. Later the same day Kelly emailed Mr Whitehouse to ask what the effect of the agreement on her would be, and Mr Whitehouse responded the same day. She said she would be in further touch after Christmas.

On 5 January 2016 Kelly emailed Mr Whitehouse asking if she correctly understood that, if she agreed to a charge being put on flat 201 for £150,000, she would not be liable for any of the sum of £1.5 million. On the same day Mr Whitehouse responded, saying that was correct. He also dealt with some further queries which she raised. Also on that day, he spoke to Nathan by telephone, when the latter confirmed that he intended to adhere to the terms of the settlement agreement rather than be involved in further litigation. He also said that he would speak to Mr Blower about dropping any idea of challenging the agreement. On 15 January 2016 Mr Whitehouse sent an email to the trustee's solicitors to inform them that the defendant was no longer instructed by Kelly, Natalie or Nathan. On 3 February 2016 the trustee applied for charging orders over the properties belonging to Natalie and Nathan and also over flat 201.

In March 2016, Mr Blower attended at Mr Whitehouse's offices and asked to speak to him. When Mr Whitehouse did so, Mr Blower asked Mr Whitehouse to admit that he had acted negligently in concluding the settlement agreement. Mr Whitehouse declined to do so, saying that he did not believe that he had been negligent. That was the last contact between Mr Blower and Mr Whitehouse.

The present claims

On 13 March 2020, an initial letter of claim was sent by solicitors acting for Mr Blower, the claimant, Natalie and Kelly. This included a claim for negligence in allowing Mr Blower to be made bankrupt, and in failing to discharge the bankruptcy. That claim was in the event not pursued. Solicitors acting for the defendant responded in June 2020, and a further lengthy reply was sent by the Blower family's solicitors. In October 2021, after further correspondence, the claimant's solicitors produced draft particulars of claim. As I have already said, the claim form itself was ultimately issued on 12 November 2021. The claim form and particulars of claim make claims in

respect of losses alleged to have been suffered by the claimant and by Kelly (having assigned her claim to the claimant), and alleged to have been caused by the negligence of the defendant. The claim form and particulars of claim make no claim in respect of any losses alleged to have been suffered by Natalie and Nathan, who are in any event not parties to these proceedings.

The amended particulars of claim put the matter in this way:

> "38. In breach of:-
>
> (a) the implied terms of the retainers of the Defendant set out in paragraphs 29 to 37 of these Particulars of Claim; and
>
> (b) its concomitant duty of care in tort;
>
> the Defendant:-
>
> (c) failed to exercise the care and skill to be expected of reasonably competent solicitors in the performance of its duties pursuant to the respective retainers; and
>
> (d) failed to carry out both Kelly Blower's and the Claimant's instructions with reasonable diligence; and
>
> (e) failed to act in the best interests of the Claimant, Kelly Blower and Mr & Mrs Turnbull."

The particulars of the breaches of contract and duty alleged include the following (in my summary):

> (i) there was a potential conflict of interest in acting for Mr Blower and the claimant, "in that, properly advised, the Claimant had a claim against John Blower's bankrupt estate for the sum of £1,424,574, held on trust by John Blower for the Claimant… or alternatively £2 million pursuant to the deed of trust…" (para 38A);
>
> (ii) a reasonably competent solicitor would not have advised the claimant and Kelly to settle the claims against the claimant and Kelly by incurring a liability for more than the claims were worth to the trustee in bankruptcy (para 39);
>
> (iii) a reasonably competent solicitor would not have advised the claimant to settle the claims against her on terms involving any payment at all to the trustee when she had the benefit of a £2 million trust fund (para 40);
>
> (iv) the trustee in bankruptcy had no claim against Natalie and Nathan (para 43);
>
> (v) the claimant had a legitimate set off against the trustee's claim (para 44);
>
> (vi) the defendant failed properly to analyse the material in its possession (para 45);
>
> (vii) the defendant failed properly to advise the claimant as to her position and so she was unable to make an informed decision as to the terms of any settlement (paras 46 and 47).

Law

Professional negligence

There was no real difference between the parties as to the law of professional negligence. This can arise in two contexts, namely, breach of contract and the tort of negligence. In the present case both were pleaded, but the matter was argued at trial as the tort of negligence. Here, this requires that

The defendant owed the claimant and Kelly duties of care not to cause the type of harm suffered;

The defendant breached those duties to each;

The defendant's breaches of those duties caused the claimant and Kelly to suffer loss;

and
The loss caused to the claimant and to Kelly was recoverable, which for present purposes means that the losses fell within the scope of the defendant's duties, were a reasonably foreseeable consequence of the breach of duty, and were not too remote in law.

> I will not cite authorities for these propositions, but they can be found in the textbooks: see *eg Clerk & Lindsell on Torts*, 22nd ed 2020, [7-04]; *Charlesworth & Percy on Negligence*, 15th ed 2022, [1-35].

In my judgment it would make no significant difference if in the present case it were judged as a case of breach of contract. The standard of care and skill applicable to a solicitor is that of a reasonably competent and diligent solicitor: see *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch 384, 403. This test must be applied by reference to the reasonably competent practitioner specialising in whatever areas of law the solicitor professes to be a specialist: *Boyle v Thompsons Solicitors* [2012] PNLR.17, [54](ii); *Jackson & Powell on Professional Liability*, 9th ed, [11-100].

Resulting or constructive trusts

In the present case, it was submitted that the law of resulting or constructive trusts might impact on the claims of the claimant, both in her own right, and in that of Kelly. A trust is a trust, whatever kind of trust it is. But it matters whether a trust is an express trust or a resulting or constructive trust, because, apart from anything else, the formalities for its creation are more onerous where express trusts of land are concerned: see the Law of Property Act 1925, s 53. A resulting or constructive trust for the purposes of section 53(2) is different in *character* from an express trust. An express trust comes about because the settlor has expressed the intention that there should be such a trust, and the trustee has accepted the obligation to act as such. A resulting or constructive trust comes about without either the need for any expression of intention by the settlor or any acceptance by the trustee. Moreover, in the case of a resulting trust, at least, the settlor is always the beneficiary of whatever beneficial interest is held on resulting trust.

In the cases and books, there are usually said to be two kinds of resulting trust. The first is called a *presumed* resulting trust. There are two sub-types: (i) purchase where the price is paid by a third party, and (ii) gratuitous conveyance. They both involve the same idea. This is that, where A conveys property to B without making clear whether B is to take beneficially or to hold as a trustee, the matter must be resolved by the evidence available. In default of such evidence, certain presumptions are applied. But that is not this case. The vendor of the lease of flat 201 assigned it to the claimant and Mr Blower, who paid the price to the vendor. The price was not paid by Kelly, and there was no assignment to her. The second kind of resulting trust is called an *automatic* resulting trust. Where A conveys property to B on an *express* trust, but does not exhaust the beneficial interest, whatever is not the subject of the express trust remains with the settlor: *Commissioner for Stamp Duties v Perpetual Trustee Co Ltd* [1943] AC 425, 441. But this does not apply to Kelly either. There was no express trust of the lease which failed to exhaust the beneficial interests.

The kind of *constructive* trust relied on in support of Kelly's claim is a common intention constructive trust, or a proprietary estoppel (to the extent that they are different). For a common intention constructive trust to arise, the parties must have had a common intention to share the property beneficially, upon the faith of which the claimant then acts in reliance to her detriment: see *eg Gissing v Gissing* [1971] AC 886, 905. The common intention by itself is not enough for the constructive trust to

arise. Otherwise s 53(1)(b) of the 1925 Act would be meaningless. It is the detrimental reliance that makes it unconscionable for the defendant landowner to resile from their otherwise unenforceable agreement: *Hudson v Hathaway* [2023] KB 345, CA.

But the common intention of the parties *either* may be expressed between them, as when they have a discussion and reach a conclusion, *or* it may be inferred from the whole course of conduct between them: see *Lloyds Bank v Rosset* [1991] 1 AC 107, 132. However, even when it is inferred, it still represents the court's conclusion as to what the parties actually intended: see *eg Stack v Dowden* [2007] 2 AC 432, [61]. The court has no power to *impute* an agreement or common intention to the parties based on what it considers would have been fair or reasonable. I add only that, when the court is considering what the parties actually intended, the court looks at the objective phenomena available for consideration, and not into their minds themselves. The assessment is thus an *objective* rather than a subjective one: see *Jones v Kernott* [2012] 1 AC 776, [34].

Once the common intention is established, the question is whether the conduct of the claimant in relying on the common intention to her detriment makes it unconscionable for the defendant to renege on that agreement: see *Cullifford v Thorpe* [2018] EWHC 426 (Ch), [76]. If it is, then the next stage is the quantification of the claimant's share. If that is established by the common intention itself, then there is no need for the court to attempt to quantify it. But in cases where it is clear that the parties intended that the claimant should have a share, but did not quantify it themselves, the court must do so. It does this, once again, by having regard to the whole course of conduct between the parties. But this time, because the parties have not reached an agreement on quantum of share, it is necessary for the court to consider what is *fair*. Here, at this final stage, the court *imputes* to the parties that which they did not agree: see *Jones v Kernott* [2012] 1 AC 776, [51]-[52].

The doctrine of proprietary estoppel springs from a common root with the common intention constructive trust, and operates in a similar way: *Gissing*, 905. First of all the defendant landowner by his words or conduct makes an assurance to or creates an expectation in the claimant. It need not be the promise of a specific right or interest, as long as it is clear enough in all the circumstances: see *Thorner v Major* [2009] 1 WLR 776, [29]. At this stage this is not an enforceable obligation. It does not comply with the relevant formalities rules. But, assuming that it is intended to be relied upon by the claimant, and it is relied upon, to her detriment, such that it becomes unconscionable for the defendant to resile from it, an equity is thereby raised against the defendant. The equity thus created is an interest in the property which does not need to comply with any relevant formalities rules, because it operates by way of imposing a trust on the defendant to satisfy it, and constructive trusts are outside the scope of those rules. The court is then able to fashion an appropriate remedy to satisfy the equity.

Transactions at an undervalue

The claims being advanced by the trustee in bankruptcy against members of the Blower family were based on the Insolvency Act 1986, s 339, dealing with transactions at an undervalue. The most obvious example of such a transaction is a gift. Section 339 relevantly provides:

> "339. (1) Subject as follows in this section and sections 341 and 342, where an individual is [made] bankrupt and he has at a relevant time (defined in section 341) entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section.
>
> (2) The court shall, on such an application, make such order as it thinks fit

for restoring the position to what it would have been if that individual had not entered into that transaction.
(3) For the purposes of this section and sections 341 and 342, an individual enters into a transaction with a person at an undervalue if—
(a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,
(b) he enters into a transaction with that person in consideration of marriage [or the formation of a civil partnership], or
(c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual."

In relation to the interpretation of section 339, section 341(1) relevantly provides that

" … the time at which an individual enters into a transaction at an undervalue … is a relevant time if the transaction is entered into … —
(a) … at a time in the period of 5 years ending with the day of the [making of the bankruptcy application as a result of which, or (as the case may be) the presentation of the bankruptcy petition on which, the individual is made] bankrupt … "

And section 436(1) relevantly provides that

" 'transaction' includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly … "

It is also relevant to bear in mind s 323 of the same Act, dealing with set-off:

"(1) This section applies where before the commencement of the bankruptcy there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any creditor of the bankrupt proving or claiming to prove for a bankruptcy debt.
(2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other.
(3) Sums due from the bankrupt to another party shall not be included in the account taken under subsection (2) if that other party had notice at the time they became due that [proceedings on a bankruptcy application relating to the bankrupt were ongoing or that] a bankruptcy petition relating to the bankrupt was pending.
(4) Only the balance (if any) of the account taken under subsection (2) is provable as a bankruptcy debt or, as the case may be, to be paid to the trustee as part of the bankrupt's estate."

Application of law to facts

Introductory

By the time of the mediation, the Blower family was facing several sets of proceedings, either already launched, or about to be launched, by the trustee. These included claims in respect of (i) the half share in flat 201, (ii) half of the proceeds of sale of the apartment at Camino de Angel (sold for €1,100,000), (iii) the payments by Mr Blower to Natalie and Nathan (totalling over £1.5 million), (iv) various other payments to the claimant (totalling £107,263.86), and (v) half of the balance of a joint account with Banco de Sabadell (€111,100.52, so amounting to €55,550.26). There was limited (and in some cases no) documentary support for the family's defences to these claims. Those defences would therefore depend on oral evidence being accepted at trial. In the case of the claimant's "trust fund", Mr Blower admitted to Mr Whitehouse that he had dissipated the entire funds concerned. Mr Blower himself had

made a poor showing at interviews with the trustee and had not co-operated with the trustee, leading to his discharge from bankruptcy being suspended. He would undoubtedly have made a poor witness at any trial of the trustee's claims, and Mr Whitehouse knew that. In addition, Mr Whitehouse knew that the claimant had told him that she would not appear as a witness on his behalf.

In a case like the present, it is important to bear in mind that it is not a case about the legal result of facts found on matters such as the existence of the trust for the claimant, the beneficial ownership of flat 201, or who owned the monies paid by Mr Blower to Natalie and Nathan. The issue here is rather whether the defendant was negligent in the advice which it gave in relation to settling the claims of the trustee in bankruptcy. But the merits of the arguments are still relevant, even though they are not determinative. The question is whether the conduct of Mr Whitehouse on behalf of the defendant fell below that of the reasonably competent and diligent solicitor specialising in litigation of this kind. It is also important to bear in mind that there is no claim made by Natalie or Nathan, or by anyone else in relation to advice given to Natalie or Nathan.

There is also the question of the impact upon these proceedings of the failure to call Mr Blower to give evidence. I have already held that I am not satisfied that he was unfit to give evidence. The defendant submits that I should draw an adverse inference from the failure to call him. It says that Mr Blower could have given relevant evidence on the issues and could have been extensively cross-examined on them. I accept that. Mr Blower was intimately concerned in all the matters canvassed in this case, including the purchase of flat 201, the distribution of the sale proceeds of The Chantry, the making of the trust deed, the payments out of the bank deposits and through the TorFX account, and the negotiation and settlement of the litigation with the trustee. The defendant says that there is no sufficient explanation for Mr Blower's absence. I accept that also. The claimant made the journey to London to give evidence in person, and there is no evidence that it would have been difficult for Mr Blower to do so. Even if that were the case, he could have given evidence remotely, for example from Gibraltar (which is not far from Malaga), as his daughter Kelly did. There is no suggestion that he has fallen out with the rest of his family and refuses to assist them. In my judgment, I can properly and should draw an adverse inference from Mr Blower's failure to be available for cross-examination at trial. In my judgment this strengthens the defendant's case on these matters.

The issues in the trustee's claims

I turn therefore to consider the various issues. The first issue concerns flat 201. It was not suggested in argument that there was an express trust of the flat for Kelly. So any trust would have to be either a resulting or a constructive trust. It could not be a presumed resulting trust, because Mr and Mrs Blower paid the price to the vendor, and there was no assignment to Kelly by the vendor. It could not be an automatic resulting trust, because there was no express trust of the lease which failed to exhaust the beneficial interests. A common intention constructive trust, or a proprietary estoppel, would not only require a common intention, or at least a reasonable expectation by Kelly based on her parents' actions, that she should acquire the beneficial interest, but also sufficient acts of detrimental reliance by Kelly as to make it unconscionable for the legal owners to deny her that beneficial interest. There is no documentary evidence of any of this. I accept that Kelly paid the service charges and for any repairs. But she also received the rents paid by the tenants, and there is no suggestion that the former exceeded the latter. Even if a common intention or reasonable expectation could be established by the oral evidence of Kelly and her parents (which, on the evidence before me, I would assess as an optimistic view),

there was no evidence before me of any actions which could possibly constitute detrimental reliance. It is not necessary for me to find that Kelly's case would have failed (though in closing the claimant seems to have accepted that it would, and on the material before me I agree). It is sufficient for me to say that it would have been very difficult for her to succeed, and that it was therefore sensible to settle the claim for the best terms available.

The second issue concerns the beneficial ownership of the proceeds of the sale of The Chantry. The form TR1 in the bundle before me showed that Mr and Mrs Blower were selling The Chantry as joint tenants at law, though not whether they were beneficial joint tenants or tenants in common. Either way, each had an interest equal to the other in the proceeds of sale. This appears to be what Mr Goodmaker thought in writing his email of 29th of May 2009. However, I have found that the claimant at least impliedly consented to the distribution of the bulk of the proceeds of sale to Mr Blower to enable him to deal with it as he thought appropriate. The legal effect of that may have been to give the entire beneficial interest to him. The defendant certainly so pleads at paragraph 12.2 of the defence. However, the point was not put to the claimant in cross examination, and I do not decide it. But arguments of this kind would no doubt have been exploited by the trustee. On top of all that, however, even if it were established that the claimant were still entitled beneficially to a half share in the net proceeds of sale of the property after the money was distributed to her husband, there is a further problem with which I will deal below.

The third issue concerns the trust deed of April 2009. Was it genuinely intended to take effect as a trust of the two deposit accounts, and, if so, from what date did it take effect? On the material before me, I cannot and do not attempt to answer these questions. The evidence before me was inconclusive, but I have already noted that Mr Whitehouse himself had his doubts. The deed was not made until (at least) several months after the house had been sold, and the aircraft loan guaranteed by Mr Blower was in difficulty. It is a document to which no publicity would be given, so that it could be produced at a moment's notice if the need arose, or simply suppressed if that were more convenient. The interest paid on the deposit accounts was paid to Mr Blower, and recorded on his tax return.

Moreover, if Mr Blower was settling his own money on the claimant, that would have been a transaction at an undervalue within the five year window. Mr Whitehouse was well aware of that. On any view, even if (as she asserts) the claimant was entitled to half of the net proceeds of the sale of The Chantry, that was £1,474,575 (if the £500,000 paid to Mr Cowham is treated as having been paid by Mr Blower) or £1,224,575 (if not). So at least £500,000 of the £2 million "trust fund" must have been a gift by Mr Blower to the claimant. These weaknesses (amongst others) would undoubtedly have been exploited by the trustee in any litigation.

The fourth issue concerns payments made out of the two bank deposits. Here the problem is that the evidence before me (including the evidence from Mr Whitehouse as to what Mr Blower told him, including in the presence of the claimant) tends to establish that the money had all been spent by Mr Blower as he instructed, rather than as the claimant (as beneficial owner) instructed. Indeed, the claimant so accepted in cross examination, saying "It looks that way". If that is indeed so, then, even if the trust were genuine and created on the date that it bears, it would not avail the claimant, because Mr Blower as trustee for the claimant would have employed the trust funds in breach of trust in dealing with third parties, who on the face of the material before me would have been purchasers of the legal interest in good faith for value without notice, and thus would take free from the trust. The claimant's claim, if

any, would lie against her husband. Once again, the trustee in bankruptcy would have been able to exploit these points in any trial of his claims. The disposal of the "trust fund" also disposes of the allegation of potential conflict of interest between the claimant and her husband.

In closing, the claimant relies (at [132c]) on what she calls "the legally sound assertion that [the claimant's] trust was capable of restoration even if Mr Blower had improperly paid his creditors out of [the claimant's] trust monies". This appears to be a reference to paragraphs 129 and 130 of her closing, which read as follows:

> "129. Mr and Mrs Blower had other assets; and if Mr Blower spent Mrs Blower's money in breach of trust, the trust was capable of being restored from Mr Blower's other assets. In this case, the primary asset known to be available to restore the trust was Mr Blower's share of the equity in the penthouse at Camino de Angel (being £489,669 at time of its sale), the proceeds of which we used to purchase the villa at Calle Real.
>
> 130. Therefore, and leaving aside any other assets that Mr Blower owned and in respect of which the trust could have been restored, when the TIB started asking questions of Mrs Blower, she had at the time the beneficial interest in the whole of the villa and the right to repayment of the £900,000 loan made to Natalie and Nathan out of her trust funds".

No authority is cited in support of these arguments, and I do not accept them. The mere fact that a defaulting trustee, who has caused loss to the trust fund by paying it away irrecoverably to a third party, happens at that time to have other beneficial assets with which that loss could be compensated, does not without more mean that a constructive trust is imposed on those other assets for the benefit of the beneficiaries of that trust fund. If the claimant had sued her husband to judgment for breach of trust, the court could have ordered a reconstitution of the trust fund by the trustee, using his own assets then available, but that is very different. The remedy would be personal and not proprietary.

To the extent that the claimant may be seeking in some way to rely on the doctrine of the equity of exoneration in relation to the property at Camino de Angel, that attempt must fail. There is no evidence that that property was security for any borrowing, and certainly none for the benefit of Mr Blower's business. Nor was it a mixed fund, where the trustee could be assumed to be withdrawing his money first.

The claimant refers to her "right to repayment of the £900,000 loan made to Natalie and Nathan out of her trust funds". I have already explained how the first payment (of £500,000) was made, not to Natalie and Nathan, but to the bank, to reduce their borrowing. That money simply disappeared, consumed in the reduction of the debt. The bank was plainly a purchaser for value without notice. As to the second payment (of £400,000), this was executed by the bank itself using its security powers, and went to pay down the debt further. Again, the money was simply consumed. There is no contemporary evidence that there was a loan by Mr and Mrs Blower, and the trustee was thus able to make his claim. I do not need to decide whether it would have succeeded.

A further issue was the claim by the trustee against the claimant in respect of Mr Blower's half share in the Spanish bank account and his half share in the proceeds of the property at Camino de Angel, and also the three payments made in January and March 2012 out of Mr Blower's TorFX account, amounting to £107,263.86. The claimant certainly accepted that over £500,000 of this claim (relating to the bank account and the proceeds of sale of the property) was due and would have to be paid over.

In the amended particulars of claim there is a claim at paragraph 44 by the claimant to

set off the claims of the trustee in bankruptcy against claims which she could make against her husband in respect of his alleged breaches of trust. This appears to be a claim made in reliance on section 323 of the Insolvency Act 1986, the provisions of which I have set out above. However, the trustee's claims were not made standing in the shoes of Mr Blower, where such a set-off might have been possible. These claims were that the payments made to the claimant were transactions at an undervalue. They do not represent any mutuality of dealing for the purposes of section 323. There is therefore nothing in this claim of set-off.

Negligence

The advice of Jonathan Crystal of counsel to the Blower family had been that the trustee's claims should be settled, rather than be allowed to go to trial. In my judgment, bearing in mind the apparent weaknesses of the family's defences to the claims, the lack of documentary support and the risks inherent in allowing Mr Blower to give evidence, the reasonably competent and diligent solicitor would also have advised settlement rather than trial of these claims.

The question therefore is whether the defendant's advice concerning the settlement and its terms was negligent. Those terms were in fact negotiated by Mr Blower himself, together with Mr Whitehouse. As I have said, the members of the family trusted Mr Blower to negotiate the best terms possible. Mr Blower was a businessman, used to negotiating business deals involving large sums of money. The family faced claims with an apparent money value of more than £2 million, together with a potential costs liability already said to be £750,000. He settled these potential liabilities for an agreed sum of £1.5 million, to be paid within about nine months. He was confident that he could borrow that sum in that time. Mr Whitehouse was careful to advise Mr Blower not to enter this agreement if he had any doubt about his ability to raise the finance. Because the settlement sum need not be paid for some months the trustee required security in the meantime. But once the settlement sum was paid, the need for security would disappear.

Mr Blower telephoned Jonathan Crystal of counsel and informed him of the proposed agreement. Mr Whitehouse read out the proposed terms of the settlement to Mr Crystal. He raised no objection to them, and said it would save trouble and expense for the family. Mr Whitehouse reasonably took that as confirmation of his own view and advice. Mr Blower telephoned his son-in-law Nathan, who at that stage did not object to the terms of the settlement. He also attempted to telephone his daughter Kelly, who had said she would be available by telephone, although without success.

The defendant accepts (as do I) that Mr Whitehouse did not *directly* advise his clients to accept the terms of the settlement, but only *indirectly*, through Mr Blower as their agent. Certainly, he must impliedly have been of that view, or else he would not have signed on behalf of his clients. In taking that view, he was obviously taking into account both the approval of Mr Blower and the non-objection of both counsel and Nathan.

In my judgment his advice in this respect was not negligent. The reasonably competent litigation solicitor would have advised settlement on terms similar to those actually achieved. He was also not negligent in taking Mr Blower's instructions as those of his clients. He had asked his clients to tell him of any "red lines", and they had told him of none. They did not attend the mediation, and had left the negotiations to Mr Blower and Mr Whitehouse. The family were content to trust Mr Blower, as indeed Nathan confirmed in his telephone conversation with Mr Blower.

Causation

Even if I were wrong, and the defendant (through Mr Whitehouse) were negligent or otherwise in breach of duty in advising the members of the family on the terms of

settlement and signing on their behalf, there is still the problem of causation of loss. The claimant's pleaded case on causation in the amended particulars of claim is set out in this way:

> "48. Had the Defendant properly so advised the Claimant, she would not have agreed to the settlement comprised in the Settlement Deed (as indeed she did not) and/or would not have agreed to settle the TiB's claim for the sum to which she was committed by the Defendant or in any sum at all."

This pleads an initial step following proper advice, namely, that the claimant would not have agreed to the terms of the settlement. But the pleading of that first step does not show that the claimant would have ended up in a better position than under the settlement. It leaves open the question as to what would have happened *next*. This is not a case where the claimant has pleaded loss of a chance. Indeed, in her closing (at [113]), she confirmed that that was what the claim was not. So, would the claimant have settled the trustee's claims on more favourable terms (and if so, what)? Or would she have defended the trustee's claims at trial (and if so, with what result)? Since these points have not been pleaded, they cannot have been relied upon at trial, and the defendant has not defended them. As things stand on the pleadings, there is no coherent case on causation of loss.

In her closing, however, the claimant's case on causation is set out in an expanded form as follows:

> "94. C's case is that once proper conflict advice had been given, Mr Blower would either have been separately represented or a position would have been agreed on the basis outlined above. The former would have made any deal impossible because, whatever Mr Blower said, C, Natalie and Mrs Blower [this is probably a mistake for "Kelly"; see line 2 of paragraph 95] would have prevented any such agreement. The latter would have either led to a settlement that acknowledged the factual reality. Or to no settlement being reached. Given the facts of the case, it is surpassingly unlikely that the TiB would have ventured his money on litigation: he was insured against the Blowers' costs, but would have had to account for his own. Commercially, the case was defensible on the merits and would have been costly to run.
>
> 95. It is submitted that, on the balance of probabilities, C, Natalie and Kelly would not have authorised Mr Whitehouse to represent them in the mediation at all, let alone settle, if they had been fully and properly advised: see, e.g. [TRANS 353/157/22 – 159/18]. They would either have waited until the proceedings were issued and there was, therefore, a properly articulated position, or insisted that counsel was fully instructed to ascertain the position and attend the mediation, or told him to cancel the mediation. Mr Whitehouse explained that he anticipated playing second fiddle to Counsel at the Mediation: WS §69 [A179].
>
> […]
>
> 111. … The Court is entitled to and should conclude on the balance of probabilities that the TiB would not have secured the result actually secured had there been no negligence. Once that conclusion is reached, causation is established.
>
> […]
>
> 118. On C's submission the issue of what the TiB would have done is a matter of quantification. But, to address the issue here, looking at matters from the TiB's perspective, it is likely that the TiB would have done a deal for a lesser sum than was agreed in the Settlement. …

> […]
> 134. It is submitted that, C being properly represented at Mediation, the TiB would nonetheless have continued to assert that Mr Blower had a half share in 201 Parkgate, and his claim would defeat Kelly's position, such that the TiB would be entitled to £65,000 together with the costs of those proceedings from Mr and Mrs Blower (initially); and latterly, from Kelly. In the circumstances, there was a deal to be done with the TiB that involved the sale of 201 Parkgate (even if Mr and Mrs Blower needed to account back to Kelly for the loss of this property). This was achievable without putting significant assets at risk, and without putting any of the Blowers' homes at risk. On the balance of probabilities, this was where the deal lay."

Apart from the first half of paragraph 94, which appears to be another way of saying at least some of what is in paragraph 48 of the amended particulars of claim, none of this is pleaded. This is an unsatisfactory position for the court to deal with. The claimant seeks to meet this, at least in part, by citing the statement of Jacob LJ (with which Lloyd LJ agreed) in *Levicom International Holdings BV v Linklaters* [2010] EWCA Civ 494:

> "284. When a solicitor gives advice that his client has a strong case to start litigation rather than settle and the client then does just that, the normal inference is that the advice is causative. Of course the inference is rebuttable – it may be possible to show that the client would have gone ahead willy-nilly. But that was certainly not shown on the evidence here. The Judge should have approached the case on the basis that the evidential burden had shifted to Linklaters to prove that its advice was not causative. Such an approach would surely have led him to a different result."

The claimant relies on this to submit that, once the court finds that advice was given, then the evidential burden shifts to the defendant to show that the advice was not causative of the loss. But, in the *Levicom* case, the claimant pleaded that, had it not been for the negligence of the defendant, the claimant would have settled at an earlier stage and on better terms. In other words, there was a complete case on causation. That is not this case. The amended particulars of claim set out the allegations of what would *not* have happened, but not of what *would*. Shifting the evidential burden does not assist a party who has not set out what needs to be proved (or disproved).

The only thing that is pleaded is that the claimant would not have agreed to the settlement. But even if the reversal of the evidential burden meant that the defendant had to disprove that, on the evidence before me, I am satisfied that neither the claimant nor Kelly would have defied Mr Blower and refused to agree to the terms that he had negotiated. The whole family was under pressure. Kelly herself was heavily pregnant. Here was a solution which Mr Blower was putting forward, confident that he could raise the money that would make it happen. Mr Blower had always made the big financial decisions in the past. On the evidence before me, I am satisfied that they would have let him make this one too.

However, looking at the closing submissions, and in the light of the evidence, I make the following supplementary observations. As to paragraph 94, I do not agree that it was "surpassingly unlikely" that the trustee in bankruptcy would have spent money on litigation. The trustee had already issued two claims, and had paid for another one to be drafted, even before the mediation was proposed. He was insured against adverse costs orders. Some of his claims (including the unissued one) were strong enough that the claimant was prepared to accept them already. That would provide a

cushion for any losses or funds for further claims. His later report to creditors showed that legal costs in the period 2014 to 2018 were £390,000. There is frankly no basis for supposing that the trustee in bankruptcy would have refused to spend money on the litigation.

Secondly, I do not agree with the submission in paragraph 118 of the closing that it was "likely that the trustee in bankruptcy would have done a deal for a lesser sum". Over the 12 hour mediation, the trustee reduced his claim by at least one third (more if you include potential costs liability), and obtained security for the remaining part of the claim that was agreed to be paid. I accept that it is *possible* that the trustee would have reduced his claim further. On the material before me, I do not accept that it was more likely than not.

Thirdly, paragraph 134 is simply not clear. But, if it is suggesting that the trustee in bankruptcy would have taken flat 201 or its value and abandoned everything else, I do not accept it. The trustee's claims were significantly over £2 million in value, whereas flat 201 was worth about £130,000. The claimant by then had admitted over £500,000 worth of claims against her.

In my judgment, even if the defendant had been negligent in the advice given to the claimant and to Kelly about settling the claims made against them by the trustee in bankruptcy, on the pleaded case any such negligence would not have caused any loss.

Conclusion

For all these reasons, I dismiss this claim.