Neutral citation number: [2019] EWHC 301 (Ch)

Case No: HC-2015-000366

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: Thursday 7 February 2019

Before:

His Honour Judge Hodge QC
sitting as a Judge of the High Court
- -

Between:

ABDULLAH AL-DOWAISAN & Anor

Claimants

- v -

IMAD ABDUL AL-SALAM & 3 Ors

Defendants

- -
- -

Mr Nikki Singla QC and **Mr James Goodwin** (instructed by **HFW**) for the **Claimants**
Mr Mathew Hardwick QC and **Ms Miriam Schmelzer** (instructed by **LockettLoveday McMahon Solicitors**) for the **Defendants**

Hearing dates: 15 -18, 21 -23, 25, 30 January & 7 February 2019 (10 Days)
- -

APPROVED JUDGMENT

Thursday, 7th February 2019

JUDGE HODGE QC

1. This is my judgment on the trial of a claim by Dr Abdullah Al-Dowaisan and another against Mr Imad Abdul Al-Salam and three others, case number HC-2015-000366.
2. This judgment is arranged under nine headings as follows: (1) Introduction and overview; (2) The trial; (3) The witnesses; (4) The liability to account; (5) The claim for an account; (6) The 'on-trust' shareholdings; (7) The mandate account claim and the counterclaim; (8) Paramount; and (9) Conclusions. However, these headings are included for ease of reference and exposition only.
3. Inevitably, my consideration of later issues has informed my decision on earlier ones. Thus, and by way of example, my conclusions on the 'on-trust' shareholdings issue have clearly informed my decision on the claimants' entitlement to an account.
4. If, in the course of this oral judgment, I fail to address a particular point, it is not because I have overlooked it, but because I did not consider it to be sufficiently material to my ultimate decision and because, in the limited time available to me to consider my judgment, it was simply impossible for me to address every single one of the many points urged upon me by counsel.
5. Any wider legal interest in this judgment is likely to focus upon: (a) section 4, covering the liability to account; (b) section 5, concerning limitation and the discretion to order an account; and (c) section 7, concerning the defence of illegality in cases involving tax evasion.
6. I should make it clear that although the parties' written submissions included submissions on costs, this judgment will not address that issue which will have to be the subject of further submissions in the light of this judgment.

1. Introduction and overview

7. The first claimant, Dr Abdullah Al-Dowaisan is a Kuwaiti national and a dentist. He is 68 years old. The second claimant, Al-Dowaisan Pearl General Trading and Contracting Establishment is Dr Al-Dowaisan's Kuwait-registered investment vehicle. The claimants are represented by Mr Nikki Singla QC leading Mr James Goodwin (of counsel).

8. The first defendant, Mr Imad Abdul Al-Salam (who is aged 62), and the second defendant, Mr Husham Abdul Al-Salam (who is aged 58), are British citizens, brothers and businessmen of Iraqi origin based in the United Kingdom and primarily engaged in real estate development and management in the United Kingdom and in Morocco. The first and second defendants are directors of the third defendant, Mayfair Developments and Properties Ltd, a UK company (to which I shall refer as "Mayfair"), and, with Mr Al-Yassin, are directors and shareholders of and in the fourth defendant, Paramount Properties Ltd (to which I shall refer as "Paramount"), a company incorporated in the Isle of Man. The defendants are represented by Mr Matthew Hardwick QC leading Ms Miriam Schmelzer (also of counsel).

9. Mayfair was incorporated on 7 September 1999 as the successor to another company, Park Lane Properties and Estates Limited (also owned and controlled by the first and second defendants), which was incorporated on 11 December 1989 and dissolved on 1 March 2005. Those two companies were responsible for the development and management of a number of property projects in Manchester. Mayfair has been insolvent since about 2007.

10. Mayfair Developments International Ltd (to which I shall refer as "Mayfair International") was incorporated on 10 December 2000 to develop and manage property projects in London. It was the successor to Park Lane Properties International Ltd, which had been incorporated on 10 March 1994 and was dissolved on 22 September 2009. Mayfair International has been insolvent since about 2004. Other Mayfair companies were incorporated to develop and manage properties in Leeds and in Morocco.

11. There is an agreed 27-page chronology which should be treated as appended to the transcript of this judgment to which reference can be made for a detailed history of this litigation and the events that have led up to it.

12. The essence of the claim made by the claimants is that, having invested with the first and second defendants in a number of their property investment projects in the UK and Morocco, the claimants want an account. Over the course of more than 15 years, from about November 1993 to the year 2000, the claimants invested a total of some £12,547,000 into projects which were introduced and managed by the first and second defendant and corporate entities under their control.

13. Although the amended particulars of claim did not identify any returns at all to the claimants from their investments, it is now accepted that they received some £10.6 million. It is common ground that Dr Al-Dowaisan, Imad and Husham (as I shall, without any disrespect, refer to them) had a close, friendly and successful working relationship until about the years 2009 and 2010 when it deteriorated as a result, first, of the failure of two development projects in Morocco (known as Garden City and Tanja) and, second, Dr Al-Dowaisan's decision to side with Imad's former personal assistant, Mrs Ala'a Hamond in her capacity as a defendant to civil proceedings in Manchester which had been brought by Imad to recover the monies represented by a substantial number of cheques which she was said to have forged on certain of Imad's bank accounts. This resulted in a substantial money judgment in Imad's favour in June 2012 following a lengthy trial before His Honour Judge Stephen Davies (sitting as a judge of the High Court).

14. The claimants accept that apart from a few outstanding matters, an account has now been provided to them in relation to the majority of the development projects, but they complain that they never received any contemporaneous account and that these proceedings were necessary in order to obtain the full information to which they had been entitled. The claimants say that in

resisting this claim to an account, the defendants' conduct has been obstructive and unreasonable and that the claimants should be awarded their costs of the claim for an account from the defendants.

15. The defendants maintain that the claimants never made any investment with Imad or Husham, who were not fiduciaries and owed no personal duty to the claimants to account. On the contrary, it is said that after three or four very early projects in the mid-1990s (when direct investments were made) the claimants made each of their UK investments through an offshore holding company, and that the offshore holding company retained a firm of solicitors (Gorvins Solicitors in Manchester) to manage the flow of funds and distribute the proceeds of the development projects.

16. The defendants say that whilst Mayfair did owe a limited duty to account to investors for the funds received and disbursed by it in respect of six of the development projects (for which it was responsible), it fully complied with that duty. In any event, the defendants object that the claim for an account is time-barred or should be refused by reason of the claimants' inordinate delay and/or as a matter of the proper exercise of the court's discretion.

17. Finally, the defendants say that the claim for an account is, and always was, entirely without merit or purpose in circumstances where: (1) the claimants received detailed contemporaneous information in respect of their investments and, in any event, (2) the source of the accounting material in respect of the investment projects was Gorvins Solicitors, whom the claimants could and should have approached for any required material and, further, (3) it has been the disclosure of accounting material from Gorvins in these proceedings which has enabled the parties to reconstitute an account in respect of each of the projects.

18. In addition to the claim for an account, the claimants bring two claims related to that claim. The first is the 'mandate claim' which has provoked a counterclaim by Imad only. Between 2000 and 2004 Dr Al-Dowaisan opened five bank accounts in his name and signed mandates in favour

of Imad and Husham (‘the mandate accounts’). Those accounts comprised one UK account held at NatWest, one Swiss bank account held at UBS, and three Moroccan accounts held at Arab Bank.

19. Dr Al-Dowaisan maintains that he believed, at the time proceedings were commenced, that these were **his** accounts, containing proceeds of **his** investments with the defendants, asserting that this was the reason given to him by Imad and Husham, and so he claimed the £5.4 million which had been transferred out of these accounts without his authorisation.

20. It is said by Dr Al-Dowaisan that this understanding was consistent with his relationship of trust and confidence with Imad and Husham to manage his investments and was also consistent with numerous statements made by the defendants to the court (in these and earlier proceedings) and to the police that the mandate accounts contained Dr Al-Dowaisan's monies. The court is invited by the claimants to disbelieve Imad's vague and incredible evidence that Dr Al-Dowaisan was fully aware that Imad and Husham intended to use the mandate accounts for their personal monies.

21. It is said that the defendants' evidence about the mandate accounts has been inconsistent and dishonest. It is said that the defendants performed a volte-face when they pleaded (for the first time) in their defence to this claim in December 2015 that no monies of Dr Al-Dowaisan had ever passed through the mandate accounts.

22. In the course of these proceedings, Dr Al-Dowaisan learned that the mandate accounts were not in fact used exclusively to receive the claimants' money. In fact, it transpires that Imad and Husham had been using the mandate accounts as if they were their own. At trial, and after the exchange of accountancy evidence and witness statements, Dr Al-Dowaisan narrowed his claim to the beneficial ownership of £750,000 which had been transferred through these accounts and was derived from four shareholdings held in Dr Al-Dowaisan's name. These are referred to as the ‘on-trust’ shareholdings. During oral evidence at trial, however, it also transpired that

additional sums totalling some £11,000 of Dr Al-Dowaisan's monies had been transferred into the mandate accounts, apparently at his signed request.

23. Imad and Husham deny the entirety of Dr Al-Dowaisan's claim and assert that his shareholdings were held on trust for them. Imad and Husham rely on declarations of trust signed by Dr Al-Dowaisan at Imad's request. The claimants deny the effectiveness of these declarations which were neither translated nor explained to him. In any event, there is said to be no declaration of trust at all in respect of the Hatton Gardens project, and the declaration of trust for Spath Road purportedly disposes of only 5% of Dr Al-Dowaisan's 17% interest (to Imad alone and not to Husham). Dr Al-Dowaisan contends that it is therefore incontrovertible that monies to which he was beneficially entitled were paid into the mandate accounts. He therefore seeks payment of the sums beneficially owned by him, and he also seeks his costs.

24. The defendants say that the mandate accounts were established and used in order to receive and transmit funds through to Imad and Husham from projects in which they held shareholdings (through various nominees). It is said that all the parties always intended that the mandate accounts would be used to hold the proceeds of investments and other monies to which Imad and Husham were beneficially entitled. It is said that Dr Al-Dowaisan had no beneficial interest in the funds in the mandate accounts, with the result that the mandate accounts claim, even in the much-reduced sum of £750,000, is totally without merit.

25. Imad, but not Husham, counterclaims for £400,000 received by Dr Al-Dowaisan in respect of the mandate account held with NatWest. Dr Al-Dowaisan raises the defence of illegality to this counterclaim, particularly in respect of Imad's operation of the NatWest mandate account and his failure to declare income from this account to the Inland Revenue and HMRC. The claimants submit that the tax returns and computations disclosed by Imad demonstrate that he did not declare income from mandate accounts, including in years when he was (contrary to the amended defence) domiciled in the UK. In these circumstances, even if the court were to find

that all the monies in the mandate accounts belonged to Imad and Husham, the claimants ask the court to uphold Dr Al-Dowaisan's defence of illegality.

26. The claimants also claim the beneficial entitlement to shares in Paramount, an Isle of Man property holding company of which Imad, Husham and Mr Al-Yassin are directors, and into which Dr Al-Dowaisan invested £750,000 in 2005. Despite asserting time and time again that Dr Al-Dowaisan was only a creditor of Paramount, in their defence to these proceedings (served in December 2015) the defendants finally accepted what it is said they must have known all along: that Dr Al-Dowaisan was entitled to be registered as a shareholder in Paramount, subject to the provision by him of satisfactory 'know-your-client' and source of funds information. No explanation has been given for what is said to be the defendants' attritional conduct prior to this admission. The defendants have continued to refuse to provide any information to the claimants about any rents from the Paramount properties.

27. The defendants say that since he agreed to loan £750,000 to Paramount, in or around May 2005, Dr Al-Dowaisan has been, and he remains, entitled to receive a shareholding in Paramount proportionate to this loan, subject only to the provision of satisfactory 'know-your-client' and source of funds information. However, until Dr Al-Dowaisan's solicitors' letter of 29 November 2018, no attempt had been made by Dr Al-Dowaisan prior to, or in the course of, these proceedings to provide requisite source of funds information.

28. The claimants say that despite numerous requests for assistance with 'know-your-client' information, the defendants never specified what information was required. The claimants say that the defendants' conduct has been unhelpful and confrontational. The claimants say that they attempted to break this deadlock by writing to Paramount's corporate agents in the Isle of Man in November 2018. The corporate agents then wrote to Imad and Husham stating that they needed to act in their capacity as directors to effect the issue and allotment of the shares for the claimants. They sent their own specific forms for completion for 'know-your-client' purposes,

and also indicated that, as Paramount's bankers, Standard Bank would require certain information from the claimants to be filled out on that bank's own specific forms. Neither of the relevant forms had ever been provided to the claimants by the defendants previously.

29. It is said to be clear that before the claimants sent their letter in November 2018, the defendants had not made the corporate agents aware of this matter, and that no preparatory steps to register Dr Al-Dowaisan as a shareholder of Paramount had been taken by the defendants. The obvious inference, say the claimants, is that the defendants have been content to sit on their hands whilst the claimants were put to the cost and effort involved in progressing the situation with the Paramount shares.

30. The claimants say that the precise relief in respect of the Paramount shares is a matter on which the court will need to be updated when it gives its judgment in this matter, and consideration can then be given to the precise wording of the relief to be granted. It is said that if the impasse remains even after trial, Dr Al-Dowaisan may seek personal orders against Imad and Husham, as directors over whom the court has personal jurisdiction, which would require them to take the necessary steps, within a confined time, to ensure that Dr Al-Dowaisan is registered as a shareholder of Paramount, that he is paid the rental income, and that 47.54% of the shares in Paramount are held on trust for him in the meantime. Dr Al-Dowaisan will also seek an order for his costs.

2. The trial

31. The trial began on Tuesday 15 January, after I had spent the previous day pre-reading the parties' skeleton arguments and written opening submissions. The trial was conducted in accordance with a timetable set out at paragraph 8 of an order made at the pre-trial review on 12 December 2018 by Mr Adrian Beltrami QC. Counsel are to be applauded for having complied with that

timetable in a case which, without strict discipline, could have lasted well beyond its allotted nine sitting days in court.

32. The first day of the trial was occupied by counsel's oral openings and by an application by the claimants, which was opposed by the defendants, for permission to rely upon a fifth witness statement of Dr Al-Dowaisan, and for specific disclosure of tax returns submitted by Imad and Husham to Inland Revenue and HMRC and the supporting calculations showing that the mandate accounts had been declared for tax purposes since the year 2000 (as had been asserted in the response to a notice to admit facts which was produced, in unsigned form, as recently as 8 January this year and verified by a statement of truth from the defendants' litigation solicitor on 10 January 2019, only two clear days before this trial commenced). I ruled upon those applications in an extemporary judgment on the afternoon of Tuesday 14 January (of which an approved transcript is available).

33. The court heard oral evidence over seven court days, from Wednesday 15 January to Friday 25 January (with a break on Thursday 24 January when the court did not sit because of a pre-existing official commitment on my part).

34. The claimant called two witnesses. The first was Dr Al-Dowaisan himself, who gave evidence in standard Arabic through an interpreter, although in re-examination (at Day 4, page 94) Dr Al-Dowaisan claimed that his understanding and reading of English was okay, except for law or legal terminology. Dr Al-Dowaisan gave evidence for about 14.5 hours over three court days, starting at 10.30 on the morning of Day 2 and concluding shortly after 3.35 on Day 4. Dr Al-Dowaisan was therefore effectively incommunicado over the first weekend of the trial.

35. The claimants' second witness was Mr Gavin Pearson, a forensic accountant and a partner in Quantuma LLP, who gave evidence for about an hour and 45 minutes in total on the remainder of the afternoon of Day 4 and the first part of the morning of Day 5.

36. For the defendants, I heard from six witnesses. I heard first from Imad who gave evidence for about 7 hours and 40 minutes in total, starting at about 12.15 on Day 5 and concluding at about 3.25 on Day 6. I then heard from Husham, who was cross-examined by Mr Singla for just under 20 minutes on the basis that he had exercised no independent thought about the case, 75 out of the 198 paragraphs of his witness statement having been cut and pasted from his elder brother's witness statement.

37. I then heard from Mr Hussain Hemadi, the defendants' in-house accountant, who gave evidence for about 6 hours, starting at shortly after 4.00 on the afternoon of Day 6 and concluding at 4.30 pm on Day 7.

38. After a day's break, the trial resumed for Day 8 on Friday 25 January 2019 when I heard from the defendants' final three witnesses. The first was Mr Salam Al-Yassin, a director and shareholder of and in Paramount and also of development companies in Morocco. He gave evidence for about an hour and a quarter. The next witness was Mr Nadeem Ahmed, the managing partner of Hentons chartered accountants, based in Leeds, who had undertaken an independent review of statements and accounting records of the defendants, and later of Gorvins, the solicitors. He gave evidence for about an hour and ten minutes either side of the luncheon adjournment.

39. Finally, I heard from Mr Ahmad Al-Osaimi for a little over 15 minutes. He was another investor in various of the defendants' development projects. He had executed declarations of trust in favour of Imad and Husham in respect of investments in three development projects in Leeds and Manchester. He had also executed a bank mandate in favour of Imad, although this was said never actually to have been operated. The oral evidence concluded at about 2.35 on the afternoon of Day 8 of the trial.

40. In addition to the live witnesses, the court also received a witness statement from an accountant, Mr Farroukh Zaheer, whose firm had acted as accountants for Dr Al-Dowaisan in the

preparation and submission of his own self-assessment tax returns until November 2013. Sensibly, he was not required to attend for cross-examination by Mr Singla because his evidence was of no real assistance to the court.

41. I should make it clear that, pursuant to a case management order of Chief Master Marsh dated 24 July 2018, the court received no expert forensic evidence in this case. The evidence of the expert accountants was all presented as evidence of fact, founded upon an analysis of accounting records and documents.

42. In accordance with the pre-trial timetable, a day was set aside for the preparation of written closing submissions by counsel. In fact, that day was preceded by the weekend. At the suggestion of the court, counsel helpfully incorporated in their written closing submissions the material (so far as still relevant) that had been contained in their written openings. The result of this exercise was the production of written closing submissions on behalf of the claimants extending to some 97 pages. The defendants' written closing submissions extended to 116 pages and were accompanied by an updated table giving an overview of accounting issues, a table showing dates of investments and returns, and a table itemising the mandate accounts claim figures.

43. I was given a day to assimilate those written closings. The trial therefore resumed for Day 9 on 30 January 2019 when I received oral submissions from both counsel, starting at 10.30 am and concluding at just before 5.15 that afternoon. I then adjourned to consider my judgment, which I have been preparing to deliver orally over the last few days. Unfortunately, my pre-existing sitting commitments have made it impossible for me to deliver this judgment any later than today, Thursday 7 February.

44. The trial documents extended to over 50 lever-arch files. I was originally presented with eight lever-arch files containing various case law and other authorities. Those were supplemented by the provision of two further bundles of authorities with the closing submissions.

3. The witnesses

45. I deal first with Dr Al-Dowaisan. In their written closing submissions, the claimants' counsel submitted that giving evidence over the course of three long days, assisted by an interpreter, had plainly been a difficult experience for Dr Al-Dowaisan, a man who is said to have placed significant trust and confidence in Imad and Husham only for this relationship to have broken down. It was said that Dr Al-Dowaisan had communicated clearly his concern over his investments, particularly in the Moroccan projects, and at times had been simply unable to stop himself from giving overlong answers to questions. It was said that he did not have the apparent sophistication of Imad and, indeed, he had admitted to having relied upon him for all matters to do with the United Kingdom and investing here.

46. However, it was submitted that he had done his honest best and had given plain and compelling evidence of the trust and confidence he had placed in Imad and Husham and of the lack of clarity he had received over his investments. It was said that the attempt by the defendants to characterise Dr Al-Dowaisan as a meticulous man had failed. It was said that he did not have any accounting expertise, and he was not asked about any detail on his investments or records.

47. I do not agree with the claimants' analysis of Dr Al-Dowaisan as a witness. I found him to be a thoroughly unsatisfactory witness and an unreliable narrator of events, even after making all due allowance for the fact that his evidence was given through an interpreter. The written transcript does not give a full and accurate flavour of the long, rambling speeches, rather than answers to questions, that Dr Al-Dowaisan gave in cross-examination: see, for example, the exchange that took place between the interpreter and Mr Hardwick at Day 2, pages 68 to 69. Dr Al-Dowaisan was voluble and animated in his evidence. He had a tendency to respond to a question with a question of his own, and to volunteer information, or make a speech, rather than answering the

question that had been put to him. That extended even to attempts to question him from the Bench.

48. Dr Al-Dowaisan had enjoyed a long, and entirely satisfactory and profitable, business relationship with Imad until about 2009 to 2010 when matters had turned sour because of the failure of two projects in Morocco which had produced no return for their investors. Until then, as Mr Hardwick's cross-examination (at Day 2, pages 18 through to 80) demonstrated, Dr Al-Dowaisan had a very good grasp of the detail of his investments, as shown by the questions he had posed to Imad from time to time. I find that there were no problems in relation to the flow of information between himself and Imad. Detailed questions were asked by Dr Al-Dowaisan and they were answered promptly and politely. I am satisfied that in his evidence, Dr Al-Dowaisan was deliberately seeking to promote and advance his own case, rather than doing his genuine best to assist the court. I am satisfied that Dr Al-Dowaisan has deliberately exaggerated the degree of trust and confidence he had placed in Imad in order to advance his claim to an account. In closing, Mr Hardwick rightly referred to the contrasting evidence that Mr Al-Dowaisan had given when questioned about the mandate accounts (at Day 4, pages 3 to 7). In the course of that evidence, Dr Al-Dowaisan had emphasised, no less than three times, that the only relationship he had had with Imad had been ‘a business relation’. As Mr Hardwick submitted, that was very revealing evidence which made it very clear that Dr Al-Dowaisan was prepared to say whatever was necessary to succeed on different aspects of his case, even if he thereby contradicted himself.

49. An earlier indication of this propensity on the part of Dr Al-Dowaisan is to be found in a letter which I am satisfied that he caused to be written by the Embassy of the State of Kuwait (of which one of his brothers had been the long serving ambassador to the UK) to Greater Manchester Police on 4 June 2015, only some four months after the issue of the claim form in this litigation on 3 February 2015:

"Re: Dr Abdullah Al-Dowaisan

The Embassy of the State of Kuwait presents its compliments to the Greater Manchester Police and has the honour to require the urgent assistance of the Greater Manchester Police in a most delicate matter concerning Dr Al-Dowaisan who is the brother of his Excellency.

The matter concerns two individuals who are brothers being Imad Al-Salam and Husham Al-Salam. These brothers traded under various company names such as Park Lane Properties, Mayfair, Richmond etc.

The Embassy has been approached by the Doctor for assistance but we can say that prior to this, the Embassy was made aware that there were severe problems concerning many other investors from Kuwait in relation to the same brothers.

In relation to the Dr that he has invested some £12M with these two brothers and to date he has never seen a return on his investment. The solicitors have also advised the doctor that these brothers have been systematically carrying out these fraudulent activities over the past 20 years ... "

[Signed:] Head of Consular Section.

50. Mr Pearson's second report for the claimants accepts that they had received some £10.6 million return on their investments yet Dr Al-Dowaisan was prepared to approach and encourage his embassy to write a letter with the express purpose of getting the police involved in his claim on the basis of a representation that he had received no returns on his investments which he knew was false.

51. In cross-examination about this letter (at Day 2, pages 11 to 13), Dr Al-Dowaisan refused to accept that this was a lie. I find that this was all on a par with the claimants' failure, in their Reply, to engage with the detailed account of the five projects provided, by way of sample, in the defence.

52. I am satisfied that in his oral evidence, Dr Al-Dowaisan deliberately exaggerated the frequency of his requests for information from Imad about the mandate accounts and thereby contradicted his own written evidence: contrast paragraphs 60, 61 and 78 of Dr Al-Dowaisan's witness statement with the cross-examination at Day 4, pages 13 to 18. I am satisfied that Dr Al-Dowaisan's oral evidence under cross-examination went far beyond what he had said at paragraph 81 of his witness statement.

53. On 20 June 2013 Dr Al-Dowaisan had brought a claim against NatWest Bank to recover the losses he had suffered as a result of forged cheques drawn by Mrs Ala'a Hamond on his mandate account at NatWest Bank. On 10 February 2015, Dr Al-Dowaisan had concluded a settlement agreement with NatWest under which it was to pay him £400,000 by way of damages. Only two days after this money came into Dr Al-Dowaisan's bank account, the whole of the settlement sum of £400,000 was paid out in two payments, one of £175,000 to Ala'a Hamond's lawyer, and the other of £225,000 to Ala'a Hamond herself.

54. Dr Al-Dowaisan's explanation in cross-examination was to accept that it had been wrong for him to make these payments, but to say that he had done so because Ala'a Hamond had offered to assist Dr Al-Dowaisan with legal and other advice and so that she could do translation work for him: see transcript Day 4, pages 83 to 90.

55. In circumstances where: (1) Abbey Solicitors, and also counsel, had been representing Dr Al-Dowaisan in his legal proceedings against NatWest Bank for the previous year, (2) Ala'a Hamond had already been found guilty of forging cheques drawn on Imad's bank account, and (3) Dr Al-Dowaisan's whole claim against NatWest Bank had been founded upon Ala'a Hamond's fraudulent activities, I find Dr Al-Dowaisan's actions utterly incredible and incapable of any satisfactory rational explanation; and none was provided. In circumstances where Dr Al-Dowaisan has acted in this way, I find it difficult to attach any credence to his evidence.

56. The constant theme running through Dr Al-Dowaisan's evidence, and his endless concern when giving evidence to the court, was the failure of his investments in Morocco. This was a matter to which he constantly returned, as Mr Hardwick pointed out in his oral closing. I am entirely satisfied that the problems in Morocco with Dr Al-Dowaisan's investments have clouded both his perception of this case and also his evidence and his judgment.

57. Turning to the other principal player in this case, I accept Mr Singla's submission that Imad was an unsatisfactory witness who gave evasive answers to questions he did not want to answer. Like Dr Al-Dowaisan, in his evidence Imad sought to promote his own agenda, coloured by his perception that, as revealed at Day 5, page 74, Dr Al-Dowaisan had "got associated with fraudsters". Imad constantly, and deliberately, sought to distance himself from the relevant Mayfair and offshore companies by emphasising his role as a company director and the separate identity of each company as a "creature by itself", even going so far as falsely to assert that it was not he who had been making Dr Al-Dowaisan money and that it would “mean nothing” if he, Imad, were to leave the companies: see transcript Day 5, pages 61 to 62.

58. I am satisfied that, as Mr Singla put it in his oral closing (at Day 9, page 113), this was all a retrospective lawyers' construct designed to defeat the claim that there were personal relations and personal duties to account.

59. Imad had given inconsistent versions of events about the mandate accounts, including in his statements to the police, to the extent that he had caused the collapse of the criminal prosecution of Oday Hamond, Mrs Hamond's husband. Nevertheless, Imad had sought to suppress that fact by resisting the disclosure of the police statements, yet he was reluctant to admit that he had done so in cross-examination: see transcript Day 6, pages 1 to 2. Although Imad's evidence on this aspect of the case was shifting and sometimes difficult to follow, his evidence was that he had not alerted his long-time solicitor, Mr Humphreys, to what Imad now maintains to have

been the true arrangements that he had reached with Dr Al-Dowaisan about the mandate accounts: see transcript Day 6, pages 13 to 14.

60. I am satisfied that I can attach no more weight to Imad's evidence than I can to the evidence of Dr Al-Dowaisan.

61. So far as Husham is concerned, he played a bit part in the relevant events and Mr Singla was right to limit his cross-examination to less than 20 minutes, which must be approaching a record for heavyweight commercial Chancery litigation.

62. Dr Al-Dowaisan's cross-examination at Day 2, pages 86 to 87 demonstrated his perception of the limited role that Husham had played in relation to Dr Al-Dowaisan's investments; and this point was reiterated during the course of Mr Singla's re-examination on the same day at pages 96 to 97.

63. Despite earlier suggestions in his evidence to the contrary, at Day 3, pages 89 to 90, in answer to questions from the Bench, Dr Al-Dowaisan had clarified that Husham had had no involvement in procuring the declarations of trust: see transcript Day 3, pages 102 to 103.

64. In their written closing submissions, the claimants submitted that Husham's witness statement was self-evidently a ‘cut-and-paste job’ from Imad's witness statement, and a slap-dash one at that. When affirming the truth of the contents of his statement, Husham had corrected two paragraphs where wording had been carried across from Imad's witness statement to the extent that Husham had referred to himself in the third person. Out of 198 paragraphs in Husham's witness statement, it appeared that 75 paragraphs had been cut and pasted directly from Imad's witness statement. This included Imad's mistake, which he had had to correct in a further witness statement, where he had been plainly wrong about a mandate account. Husham had copied the same mistake over to his witness statement.

65. It did not appear from the evidence that Husham had given to the court by way of his witness statement that he had applied his mind to giving the truth independently from his brother. It

appeared that he had no appreciation of the need for witness evidence to be given in the witness's own words rather than that of the lawyers or anyone else. In this respect, the claimants drew the court's attention to observations of Gloster J (as she then was) that in such cases there should be:

> "... scepticism on the court's part as to whether the lengthy witness statements reflected more the industrious work product of the lawyers than the actual evidence of the witnesses":

see *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm) at paragraph 92. It was in those circumstances that the claimants indicated that they had been content not to cross-examine Husham in identical terms. The case had already been put to Imad. I endorse all of those submissions and that analysis.

66. In his oral closing, Mr Singla submitted that, to all intents and purposes, Husham had gone "like a hand in a glove with his brother Imad". Mr Singla submitted:

> "They say the same things. Their position on this case is identical. They make the same mistakes. And that was I didn't feel any obligation to cross-examine him independently on the issues that I took with Imad. He does what his brother says. He says what his brother says. They are, for all intents and purposes, one. And whether you call it agency or joint liability … I am not fussed. But they do not move apart. Their position in this litigation has been totally one.": see Day 9, pages 187 to 188.

67. I accept these criticisms of Husham as a witness; but, in my judgment, they also feed into the quality of Imad's own evidence. Husham's witness statement (at paragraph 98) reads as follows:

> "It should not be forgotten that there was mutual trust and confidence between us and Dr Al-Dowaisan at the time. The same arrangements, holding shares on trust, did apply in Morocco. Until these proceedings Dr Al-Dowaisan never questioned those arrangements despite the passage of over a decade."

68. That paragraph appears in a section of Husham's evidence (headed ‘Declarations of Trust’) at paragraphs 87 to 102 that mirrors paragraphs 242 to 256 of Imad's witness statement save that, and significantly, the first sentence of paragraph 98 is missing from paragraph 253 of Imad's witness statement (as I pointed out at Day 9, pages 121 to 122 of the transcript). That sentence, referring to the mutual trust and confidence between Imad, Husham and Dr Al-Dowaisan at that time, would sit more naturally in Imad's witness statement. I am satisfied that it did appear there originally but that it was then deliberately excised because it was appreciated that it would not suit the defendants' purposes. The corresponding passage in Husham’s witness statement was simply missed.

69. Moving on from Husham, I do not attach great weight to the evidence of Mr Al-Yassin. He seemed to me to be distinctly uncomfortable in the witness box. Parts of his evidence I found difficult to understand: see transcript Day 8, pages 49 to 50, where Mr Al-Yassin was unable to explain why he should have been directed to pay money from a Moroccan project into the UK-based mandate account. The impression I formed was that Mr Al-Yassin was appearing in court to advance the defendants' case, rather than to assist the court.

70. I did not form the same impression in relation to Mr Al-Osaimi. He told the court that Stephenson Harwood had advised that it was for "the integrity of the offshore company to have all non-resident investors in the company"; but when questioned about his understanding of what was meant by "the integrity of the offshore company", he was unable to explain what that meant: see transcript Day 8, pages 100 to 101. Nevertheless, I formed the view that, although he had little real understanding of the issues in this litigation, Mr Al-Osaimi was genuinely seeking to assist the court to the best of his ability and recollection. Mr Al-Osaimi's evidence was consistent with his failure to assert any claim to over £850,000 that had been received into one of the Moroccan mandate accounts in respect of his shareholdings in the Ellesmere and Gotts projects. In cross-examination, at Day 8, pages 102 to 103, Mr Al-Osaimi both looked and

sounded genuinely surprised at Mr Singla's suggestions in cross-examination that he should have had any claim to this money.

71. Turning to the accounting witnesses, I found Mr Pearson to be a highly competent forensic accountant and a reliable and accurate witness. I found Mr Hemadi to be an honest witness who was seeking to do his best to assist the court, but his cross-examination exposed the deficiencies of his record-keeping and the discrepancies in his records. At times, Mr Hemadi was constrained to rely upon his own memory of payments, rather than referring to written records.

72. Mr Ahmed presented himself as a careful witness who was doing his best to assist the court. His evidence revealed that in or about October 2015 he had produced a much more extensive investigation of the then extant records for the various projects than the five sample investment accounts presented - without explaining why only five had been addressed - in the defence served in December 2015. (Having said that, it is fair to observe that in their reply, the claimants never even sought to engage with the limited account that had been provided in the defence.) Mr Ahmed was clearly heavily reliant upon Mr Hemadi's work and the accuracy and completeness of his record-keeping. I accept the claimants' criticism that Mr Ahmed made an error in sharing Mr Hemadi's belief in the infallibility of Mr Hemadi's records without himself undertaking any relevant checks, verification or reconciliation exercises. I also cannot accept Mr Ahmed's evidence that there were two or three documents that could very easily have explained exactly what had been going on. Mr Ahmed did not point to anything more recent than a summary of projects up to 2005, and he was unaware that two projects were missing from that analysis.

4. <u>The liability to account</u>

73. The claimants' case is that Imad and Husham owe a duty to account to the claimants because they owed fiduciary duties to the claimants in respect of all of their investments arising out of

the trust and confidence reposed in them by the claimants, and that Imad and Husham had in fact assumed accounting duties to the claimants. It is said that all fiduciaries are accounting parties. The defendants masterminded and controlled the offshore structure in an attempt to take all the accompanying tax advantages but to lose none of the actual control because they had: (1) personal relationships (with both Gorvins and the investors), and (2) they would produce service agreements which the offshore companies would be bound to execute and which had the effect of outsourcing everything of substance to the defendants.

74. Imad and Husham did have personal custody of Dr Al-Dowaisan's investments into the Moroccan projects. The evidence of the personal relationship of trust and confidence, as vividly evidenced in the oral testimony of Dr Al-Dowaisan and Imad, was said to be strong. The offshore structure has only been relied upon now as a defence in this litigation. There is no evidence that the defendants, at any point over nearly two decades, ever called on this defence when facing investors and meeting with them for the purpose of accounting to them for their investments. At no point, until the parties' relationship broke down, did Imad ever suggest that Dr Al-Dowaisan should instead seek information from the nominee offshore directors, or from Gorvins.

75. The claimants point out that the categories of fiduciary relationships are not closed. Ad hoc fiduciary relationships are common, and fiduciary duties may be owed provided the circumstances justify the imposition of such duties. Founding themselves upon the well-known observations of Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 at pages 18A to B that:

> "… a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary."

and of Sales J in the case of *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch) at paragraphs 222 to 226, and also upon statements in the book of an Australian academic, Dr J A Watson, entitled '*The Duty to Account*' at paragraphs 410, 456 and 465, the claimants derive the following propositions from the authorities:

(1) A fiduciary is someone who has undertaken to act for, or on behalf, or in the interests, of, another in a particular matter in circumstances which give rise to a relationship of trust or confidence;

(2) Fiduciary obligations may arise in a wide range of business relationships where a substantial degree of control over the property or affairs of one person is given to another person;

(3) All fiduciaries are accounting parties; and

(4) The receipt or custody of a fund is not an essential pre-requisite for a duty to account. The management of property is sufficient for a duty of account to arise.

76. The claimants rely on the observations in *JD Wetherspoon Plc v Van de Berg & Co Ltd* of Lewison J at the strike-out hearing ([2007] EWHC 1044 (Ch), [2007] PNLR 28) at paragraphs 23 to 29 and of Peter Smith J at the trial of the same case (at [2009] EWHC 639 (Ch)) at paragraphs 73 to 77 for the proposition that the incorporation of a company does not in and of itself preclude personal fiduciary duties arising. Directors of a company in certain circumstances may owe fiduciary duties to principals to whom the company also owes a duty. In the course of his judgment (at paragraph 76) Peter Smith J placed reliance on observations of Auld LJ speaking for the Court of Appeal in the earlier case of *Conway v Ratiu* [2005] EWCA Civ 1302, [2006] 1 All ER 571 at paragraph 78:

> "There is, it seems to me, a powerful argument of principle, in this intensely personal context of considerations of trust, confidence and loyalty, for lifting the corporate veil where the facts require it to include those in or behind the company who are in reality the persons whose trust in and reliance upon the fiduciary may be confounded."

77. No submissions were addressed to me as to the potential impact upon the authority of that decision of the more recent decision of the Supreme Court in the case of *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, recognising only a limited power to pierce the corporate veil to disregard the personality of a company in carefully defined circumstances so as to deprive the company's controller of the advantages which they would otherwise have obtained by the company's separate legal personality. I note that neither the *Wetherspoon* decisions nor the two authorities cited at paragraph 76 of Peter Smith J's judgment were cited in the *Prest* case.

78. The claimants also rely upon the decision of Atkinson J in *Smith, Stone & Knight Ltd v Birmingham City Council* [1939] 4 All ER 116 as authority for the proposition that companies can also act as agents for their principals. The claimants submit that the true nature of the relationship between Dr Al-Dowaisan and Husham and Imad is one for the court to determine by making an objective assessment of the evidence. The issue is highly fact-specific, fact-sensitive and context-based. The claimants rely upon: (1) the personal relationship between Dr Al-Dowaisan and Imad and Husham, (2) the control that Imad and Husham exercised over the corporate structure they had established, and (3) the reality that, for 15 years, it was Imad who purported to account to Dr Al-Dowaisan for his investments.

79. In support of his submission that the reality of the relationship was one of the utmost trust and confidence, the claimants rely upon the facts and matters they identify at paragraphs 52 to 82 of their written closing submissions. They can also pray in aid the evidence of the defendants' own solicitor, Mr Humphreys, in his 18th witness statement (dated 9 March 2012) made in the civil proceedings brought by Imad against Mr and Mrs Hamond. At paragraph 19 of that witness statement, Mr Humphreys said:

> "It is of course also worth remembering that until quite recently, Dr Al-Dowaisan had trusted [Imad] sufficiently to make him a sole signatory on his NatWest account for many

years. Such a fact must not be disregarded lightly in this situation. Dr Al-Dowaisan trusted [Imad] to handle his investments in the UK and that is what [Imad] did for their mutual benefit. He and Dr Al-Dowaisan were in regular contact throughout this time."

80. The claimants invite the court to find that both Imad and Husham personally owed fiduciary duties to the claimants, including a duty to account founded upon the personal relationship of trust and confidence between Dr Al-Dowaisan and Imad and Husham. The claimants invite the court to note that both Imad and Husham admit that Mayfair owed a duty to account to the claimants; but the claimants point out that they had had a relationship with Imad and Husham before Mayfair was incorporated and before their use of offshore entities. It is said to be artificial to think that if Mayfair owed a duty to account, Imad and Husham did not. Indeed, it is said that their duty to account would be a priori. The claimants submit that there is no objection to directors of Mayfair, namely Imad and Husham, owing fiduciary duties to the claimants in addition to Mayfair itself.

81. The claimants say that the case for a personal duty to account is stronger still in relation to the claimants' investments in Morocco, which were held directly by Imad and Husham. They were directors and shareholders of the Moroccan property companies, holding the Moroccan investments on trust for the investors. There was said to be no corporate bank account for those companies but, instead, the Arab Bank account bore the personal names of Imad and Husham.

82. As to that, in my judgment it became clear during the course of the last day of the trial that the evidence was that although Imad and Husham, together with Dr Al-Yassin, held a foreign currency bank account in their personal names on behalf of the Moroccan development companies, in fact, each of those companies had its own Moroccan currency dirham bank accounts in the company's own name.

83. The claimants submit, in the alternative, that Imad and Husham owed, at the very least, fiduciary duties, and a duty to account in relation to the investments in Morocco.

84. Turning from the claimants' submissions, in reliance upon statements in *Snell's Equity*, 33rd edition (2015), at paragraphs 20-12 and 20-15, the defendants submit that a duty to account only arises out of the receipt of property in an 'accountable capacity'. They criticise the claimants' submissions on the grounds that, rather than taking this as their starting-point, the claimants seek to found a duty to account on the trust and confidence said to have been reposed in Imad and Husham by the claimants. But whilst the defendants accept that these qualities have been identified as a touchstone in respect of an ad hoc fiduciary relationship, the identification of some element of trust is said not to be enough. The concept of trust and confidence in a commercial context is said to be a nuanced one. It is perfectly possible to 'trust' an individual who is part of a corporate structure without reposing the sort of special 'trust' that gives rise to a fiduciary relationship. This is said to have been precisely the point made by Gloster J in the case of *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm) at paragraph 574:

> "But the mere fact that one party to a commercial relationship 'trusts' the other does not predicate a fiduciary relationship. The word 'trust', like the word 'advice' has a variety of meanings. In a broad sense, trust is an important element in many commercial dealings ... Springwell no doubt 'trusted' Chase to conduct itself in a commercially appropriate manner. But I do not consider that Springwell had any legitimate expectation that, in its commercial dealings with Springwell, Chase would subordinate its interests to those of Springwell."

85. Likewise, in *John Youngs Insurance Services Limited v Aviva Insurance Service UK Limited* [2011] EWHC 1515 (TCC), Ramsay J noted (at paragraph 94(7)) that:

> "… Merely because a party puts faith in another party and contends that their trust has not been repaid does not give rise to a fiduciary duty; high expectations do not necessarily lead to equitable remedies ..."

86. The defendants submit that a useful and widely-deployed test for the existence of a fiduciary duty is contained in the decision of the Supreme Court of Canada in *Lac Minerals Limited v International Corona Limited* [1990] FSR 441 at pages 453 to 454 and 485 and its three-limb checklist:

> "Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."

Those observations, which were derived from the dissenting judgment of Madam Justice Wilson in *Frame v Smith* (1987) 42 DLR (4th) 81 at pages 97 to 98, were cited with approval by Vos J in *Global Energy Horizons Corp v Gray* [2012] EWHC 3703 (Ch) at paragraph 392 and were applied by that judge at paragraphs 442 and following.

87. The defendants say that a key factor pointing towards the recognition of a fiduciary relationship is the power of one person to affect the other's legal relations with third parties. This is said to be reflected in the analysis in *Bowstead & Reynolds on Agency*, 21st edition (2017) at paragraphs 1-001 to 1-004, at 1-015 and 6-035. The defendants also rely upon observations of Sir Herbert Cozens-Hardy MR in the case of *Bath v Standard Land Company* [1911] Ch 1 618 at page 627 referring to:

> "… the broad principle that directors stand in a fiduciary position only to the company, not to creditors of the company, not even to individual shareholders of the company, still less to strangers dealing with the company."

88. Relying on Dr Al-Dowaisan's evidence (in the context of the mandate accounts and previously referenced in section 3 above), the defendants submit that the 'business relationship' between Dr Al-Dowaisan and Imad and Husham did not give rise to any fiduciary relationship. Dr Al-Dowaisan was and is a successful dentist with a large multi-disciplinary practice in Kuwait. He was and is a very wealthy man, albeit one of many investors, and the projects in which he invested were substantial commercial investments. Imad explained that he and Husham, through the various Mayfair companies, had been involved in 81 projects which had constructed 1,658 units in the UK and 5,436 units in Morocco. Investors had invested in excess of £100 million. Moreover, the defendants submit that this was not a case about an imbalanced personal relationship between Imad and Dr Al-Dowaisan; it was about a meticulous and careful investor, always closely supported by his accountant, Mohammed Ramadan, and with the input of his brother and other family members who were involved in multiple and substantial property investments in Manchester, Leeds, London and Morocco which had generated large sums of money. It is said to be antithesis of a vulnerable, unsophisticated individual where an ad hoc fiduciary obligation might properly arise.

89. The defendants also rely upon the lack of any power in Imad and Husham to affect Dr Al-Dowaison's legal relations with third parties. They say that the focus of the *Lac Minerals* and *Bowstead* tests for the existence of a fiduciary relationship is on the ability to affect legal relations with third parties. It is said to be that which makes the beneficiary so vulnerable to the actions of the fiduciary. Here there is no suggestion that Imad and Husham were the agents of the claimants, and they were not. There is no suggestion that they had any power to affect the claimants' legal relations with third parties, and again they did not. On the contrary, in every single instance where a money transfer was required from Gorvins, whether by way of re-investment in another project or payment to Dr Al-Dowaisan's private bank account, he was required to, and did provide, signed authorisations to Mayfair.

90. The claimants submit that the alleged personal duty to account on the part of Imad and Husham is inconsistent with the fact that they at all times acted in their capacity as directors of, first, the Park Lane and, then, the Mayfair companies. Dr Al-Dowaisan approached Imad when he was a director of Park Lane. There was no advisory relationship and no personal contact. Instead, it was the various Park Lane and Mayfair companies that had identified potential investments in detailed feasibility studies and then had entered into service agreements with the property companies once there were sufficient investors in any particular project.
91. The existence and use of the offshore companies is said to be another key element of the contractual and business context. An alleged personal duty to account on the part of Imad and Husham is said to make no sense in the context of offshore companies, set up on the advice of Stephenson Harwood, which retained Gorvins solicitors exactly in order to control the collection and distribution of funds.
92. The defendants submit that the reliance placed upon the *Wetherspoon v Van de Berg* case is misplaced. Quite apart from the fact that this was a conventional breach of fiduciary duty case concerning the diversion of profits, in that case there is said to have been no equivalent of the offshore structure: there were no offshore companies and directors and no retained solicitors controlling the flow of money. Dr Al-Dowaisan was well aware of the existence and use of the offshore companies.
93. The upshot is said to be that the claim that the claimants invested with Imad and Husham is wrong. They invested in an offshore holding company in return for which they received shares in the offshore holding company. Imad and Husham were the directors of the particular Park Lane and Mayfair property company that was responsible for the construction of the development work.
94. Clearly Imad introduced Dr Al-Dowaisan to the projects (albeit, it is said, in his capacity as the director of the Park Lane and Mayfair companies) and it was he who was Dr Al-Dowaisan's

principal human contact; but Imad never agreed to provide some sort of free-standing accounting duty to Dr Al-Dowaisan and he was never paid to perform that task. Moreover, there was simply no need for any additional accounting duty when that very task was fulfilled, contemporaneously and professionally, by Gorvins.

95. Dr Al-Dowaisan knew about the Park Lane and Mayfair companies; he knew that he held shareholdings in offshore companies; he knew that Gorvins were retained; and he knew that Gorvins prepared detailed accounting material.

96. As for the six-point test formulated by Atkinson J in the *Smith, Stone & Knight* case, the very first of those points raises the question: 'were the profits treated as the profits of the principal?' In this context, that must mean Imad and Husham. Thus, the question that arises is whether the profits of, by way of example, Emerati Investments Limited (the property company which owned the property investment in the Ellesmere Street project) were treated as the profits of Imad and Husham. The answer is said to be an emphatic no: those profits were the profits of the property company, wholly owned by the holding company, and held by the solicitors, Gorvins, and distributed by them to the shareholders but only upon a signed transfer request. Clearly those sums were not 'treated as the profits of' Imad and Husham.

97. The claimants reiterate that the search for a fiduciary duty is the wrong starting-point. The right starting-point, and the real focus, should be 'the receipt of property in an accountable capacity', as required at paragraph 20-015 of *Snell* and endorsed by observations of His Honour Judge McMullen QC in *Friends of Burbage School Ltd v Woodhams* [2012] EWHC 1511 (QB) at paragraph 10.

98. However, Imad and Husham never held **any** money in an **accountable** capacity. Money came into the Park Lane and Mayfair companies for which they accounted. Once the project was on foot in relation to the UK property investments, Gorvins, solicitors retained by the offshore companies, was in complete control of the money flow. The result is that this critical ingredient

of the accounting duty is missing. Neither Imad nor Husham were in receipt of property in an 'accountable capacity'.

99. The structure in Morocco was admittedly different but not in a way, say the defendants, which alters the analysis. There were no offshore companies, so there was a different approach because banks in Morocco would not lend to offshore entities and the regulatory regime in that country made such a structure impossible.

100. There was a problem with Dr Al-Dowaisan having a direct shareholding in the Moroccan development companies because the Moroccan authorities insisted on certain paperwork and certification before a direct shareholding could be taken. Because Imad, Husham and Mr Al-Yassin had residency permits in Morocco, they were able to acquire direct shareholdings in Moroccan companies. The result was that Dr Al-Dowaisan never acquired direct shareholdings in the Moroccan companies; instead shares were held on trust for him. However, the consequence is said to be that in relation to the Moroccan projects, Imad and Husham never received any money in an accountable capacity, except for the initial monies received into a sterling bank account held in the joint names of Imad, Husham and Mr Al-Yassin. Once they had accounted for those monies to the Moroccan development company, any accounting duty was at an end.

101. Upon the sale and purchase of units, the notary would release purchase monies to the development company, which would then repay the banks and inform Mayfair Morocco of the distributions due to investors. They would then sign transfers authorising either the re-investment of the funds or their payment back to their personal accounts. The accounting obligation was that of Mayfair Morocco and not that of Imad or Husham.

102. Those were the parties' competing submissions. I take as my starting point the observations of Baker J, sitting in the High Court of Ireland, in the case of *Best v Ghose* [2018] IEHC 376 at paragraphs 42 to 44:

"42. ... An obligation to account is implicit in a fiduciary relationship, but it is not always easy to ascertain if a relationship imports fiduciary obligations.

43. I find of particular benefit the statement of principle contained in McGhee: *Snell's Equity* (33rd ed., Sweet & Maxwell, 2015), where the obligation to account is explained as one which arises out of the receipt by a person of property 'in an accountable capacity', at para. 20-015, and although that description might appear to be tautological, it is useful as it identifies the key component. The accountable capacity is one that arises in any circumstance where it can be shown that a person has control of property which belongs to another. As *Snell* says, the central case is that of an express trustee but the principles apply to various categories of relationships, including 'agents who control property belonging to the principals', at para. 20-012.

44. *Snell* also suggests that '[t]he claimant bears the onus of proving that the defendant has received property into their control in circumstances sufficient to import an equitable obligation to handle the property for the benefit of another', at para. 20-015."

103. The present state of the law regarding the circumstances in which fiduciary duties may arise was considered by His Honour Judge Keyser QC in *Bailey v Barclays Bank Plc* [2014] EWHC 2882 (QB) at paragraphs 87 to 88. Citing from an extended passage in the Law Commission's report *Fiduciary Duties of Investment Intermediaries* (Law Commission No 350), Judge Keyser said this:

"3.14. … What is relatively clear is that fiduciary relationships arise in two main circumstances:

(1) Status-based fiduciaries – where a relationship falls within a previously recognised category, such as a solicitor and client; and

(2) Fact-based fiduciaries – where the particular facts and circumstances of a relationship justify the imposition of fiduciary duties.

3.15. Status-based fiduciary relationships are those that are recognised, by their very nature, as inherently fiduciary. They represent the settled categories of fiduciary relationship. They include the relationships between: trustee and beneficiary; principal and agent; mortgagee and mortgagor; solicitor and client; company directors and the company; partners and co-partners; and civil servants and the Crown.

3.16. The categories of fiduciary relationship are not closed. However, the difficulty lies in identifying the circumstances which justify the imposition of fiduciary duties. The courts have traditionally declined to provide a clear definition, preferring to preserve flexibility…"

104. Having cited from the judgments of Millett LJ in *Bristol & West Building Society v Mothew* and of Madam Justice Wilson in the Canadian case of *Frame v Smith* (cited above), the Law Commission conclude in their report (at paragraph 3.24) as follows:

" … The key test is whether there is a legitimate expectation that one party will act in another's interest. However, discretion, power to act and vulnerability are indicators of such an expectation."

105. That way of putting it was said by Judge Keyser to be consistent with the approach of Gloster J in the *Morgan Chase Bank v Springwell* case (previously cited).

106. I am conscious that the second claimant in *Bailey v Barclays Bank* was given permission to appeal at a renewed oral hearing before Kitchin LJ on the issue whether the relationship between the bank and the company had given rise to a fiduciary relationship: see [2015] EWCA Civ 667 at paragraphs 16 and 17. However, Kitchin LJ expressed considerable doubt as to whether that argument had any real prospect of success, and the challenge to Judge Keyser's decision appears to have been as to the application of the law to the particular facts, rather than the exposition of the law itself.

107. I am also conscious that the relationship of bank and customer or insurance company and customer considered in the authorities is very different from the relationship that existed

between Imad and Dr Al-Dowaisan on the facts of the present case. Nevertheless, even in this highly fact-sensitive and context-based area of the law, it seems to me that the applicable legal principles remain the same.

108. In my judgment, the touchstone for the imposition of fiduciary duties, on the particular facts and circumstances of any case, is to be found in Madam Justice Wilson's formulation in *Frame v Smith*. As the Law Commission recognised, the key test is whether there is a legitimate expectation that one party will act in the interests of another, with discretion, power to act and vulnerability being indicators of such an expectation.

109. On the evidence, I find that although Dr Al-Dowaisan reposed trust in Imad, as evidenced by the fact that he continued to invest in projects through Imad for 15 years, the relationship between them was essentially a business one. Dr Al-Dowaisan never subordinated his business judgments to Imad, as distinct from accepting and acting upon his investment recommendations. Dr Al-Dowaisan was never peculiarly vulnerable to, or at the mercy of, Imad. Dr Al-Dowaisan looked to his accountant, Mohammed Ramadan, to assist him in making investment decisions and he paid very careful regard to his investments, as illustrated by the cross-examination at Day 2 pages 38 to 41.

110. I do not find that Imad could unilaterally exercise any power or discretion so as to affect Dr Al-Dowaisan's legal or practical interests. I do not consider that Dr Al-Dowaisan had any legitimate expectation that, in his commercial dealings with him, Imad would subordinate his own interests to those of Dr Al-Dowaisan. I do not consider that Imad ever owed Dr Al-Dowaisan the obligation of single-minded loyalty which is the distinguishing obligation of a fiduciary. After all, to Dr Al-Dowaisan's knowledge, other investors were involved in the various development projects, some of them to a much more substantial extent than Dr Al-Dowaisan himself. There was no perceived bar to Imad or Husham participating in projects with a view to their own profit.

111. Dr Al-Dowaisan did entrust Imad with his investments; but he also knew that Imad was operating through the relevant Mayfair investment company, for which Imad was acting as a director, and that the monies were paid over for shares in the relevant offshore holding company. I can see no proper basis for imposing a personal duty to account on Imad as distinct from the relevant Mayfair company for which he was acting. The relevant offshore company was not acting as Imad's agent, and none of the profits it made were ever treated as profits belonging to Imad so as to constitute him its principal. On the evidence, I can identify no proper basis for lifting the corporate veil so as to identify Imad with the relevant Mayfair company, still less the relevant offshore holding or development company.

112. I cannot regard either the Mayfair companies or the offshore companies as Imad's vehicles for the purpose of discharging any personal relationship of trust he had with Dr Al-Dowaisan. I reject the claimants' submission that the offshore structures were little more than a ‘pocket’, established by Imad and Husham to receive and distribute investment monies. Dealings and transfer requests were routed through Imad; but, in my judgment, that does not make him, rather than the offshore companies and their solicitors, the appropriate accounting party.

113. The claimants point out that when the defence was first pleaded, Imad and Husham described themselves (in paragraph 1) as “at all material times [having] carried on business as property developers”. That was later amended to plead that at all material times they had been “directors of companies which engaged in property development and construction”. In my judgment, and contrary to the claimants' submission, that amendment was not a reconstructed narrative but reflected the reality of the situation.

114. The claimants also rely on the fact that their investments were often ‘re-invested’ from one project to another. Accordingly, one could not explain the flow of monies into and out of one project in isolation; a narrative of all projects was required to identify the source and destination of the claimants' investments. The claimants illustrate the pattern of reinvestments by the chart

at paragraph 97 of their closing submissions. Effectively, they seek to paint Imad - although they did not express it in these terms - as the spider sitting at the centre of a web of many development projects in the UK and Morocco. In my judgment, however, the fact that Imad may have acted as the link between, or even the coordinator of, the different projects does not mean that he assumed a personal liability to account in relation to them.

115. The relevant Mayfair property company owed a limited liability to account in respect of the particular projects in which it was engaged: (1) for sums received from the claimants, and (2) for monies released to it by Gorvins for re-investment or direct payment to the claimants, but not otherwise. That liability arises on the conventional basis of the receipt of money in an accountable capacity.

116. In the case of the Moroccan development companies, as the holders of the foreign currency bank account into which monies were received for investments, each of Imad, Husham and Mr Al-Yassin were liable to account for such monies; but such liability ceased once they were paid over to the relevant Moroccan development company. As the trustees of the shares in the Moroccan development companies, Imad, Husham and Mr Al-Yassin were also liable to account to Dr Al-Dowaisan for any monies or other benefits received in their capacity as shareholders on the basis that they were status-based fiduciaries.

117. Had I found that Imad was liable to account to Dr Al-Dowaisan, I would not have made a similar finding in respect of Husham. It is clear on the evidence (from the passages I have already cited under section 3 above) that Dr Al-Dowaisan placed no trust or confidence in Husham in relation to his investments. Any such reliance was reposed in Imad rather than Husham. I reject the claimants' submission that Husham and Imad were, for all intents and purposes, ‘one’. If, as the claimants would appear to submit, the liability to account is a reaction to particular circumstances of responsibility, assumed by one person in respect of the conduct of the affairs of another (compare paragraph 37 of their written closing), then it is clear on the

evidence that no such responsibility was ever either assumed by Husham or recognised by Dr Al-Dowaisan. Dr Al-Dowaisan's evidence was that he had no significant or material dealings with Husham concerning his investments.

5. The claim for an account

118. In view of my findings as to the liability to account, this claim (insofar as it relates to the UK development projects and investments) now strictly concerns only the third defendant (Mayfair). However, it is right that I should make, albeit briefly, findings about the claim in relation to Imad as well (which would apply equally to Husham if he were to be treated as one with his elder brother).

119. The claimants submit that they did not receive an account contemporaneously. The evidence of Mr Pearson as to the inadequacy of the information provided by the defendants went largely unchallenged. As a stark case in point, when seeking to demonstrate that a certain disputed sum of £11,000 had been accounted for, Mr Pearson was taken to an example of the claimants' funds, which, it transpired, had been transferred from a Gorvins client account into the UK mandate account.

120. As for the defendants' witness evidence, the cross-examination of Imad and Mr Hemadi demonstrated plainly that there was no system in place for the provision of information to investors. It was very unclear what information had been provided contemporaneously to Dr Al-Dowaisan, and such information as was provided had been littered with discrepancies. Prior to being cross-examined, Mr Hemadi had believed that his records were accurate and infallible. In short, it is said by the claimants that it was only through these proceedings that the claimants had received the information to which they were entitled.

121. In support of their submission that whilst some information was provided contemporaneously, the claimants did not receive a proper account of their investments prior to

the commencement of these proceedings, the claimants rely on the matters addressed at paragraphs 100 to 130 of their written closing. The extent to which the claimants say that they have received a complete account now is addressed at paragraphs 131 to 169. The claimants say that they would not have got an account without commencing this claim; and that (for the reasons addressed at paragraphs 170 to 190 of their written closing) even after this claim was commenced, this has proved to be attritional and acrimonious litigation.

122. In their written closing, the defendants provide a chronological overview of the contemporaneous account (at paragraphs 131 to 160) which is said to lead to the conclusion that there was simply no problem at all in relation to the flow of information. Very detailed project-by-project questions were asked and were answered promptly and politely. The relationship is said to have worked well. There was no question of any unsatisfactory responses or missing information.

123. The defendants then proceeded (at paragraphs 161 to 315 of their written closing) to address the contemporaneous account provided in relation to each individual project, leading them to conclude that until the Tanja and Garden City failures in Morocco, Dr Al-Dowaisan was satisfied with the information that he had received in relation to the projects. He had access to the hugely detailed Gorvins accounting material. Assisted by his accountant, Mohammed Ramadan, he asked detailed questions and he received prompt, polite and detailed responses.

124. The contemporaneous documents are said to disclose not a single specific accounting complaint in the period 1994 to 2009. Dr Al-Dowaisan had followed his investments and returns with meticulous care. He had kept his own records. He had been provided with letters, updated tables, statements of account and the Gorvins statements. He knew what had been invested. Yet, in this attritional litigation, it appeared to be part of his strategy to re-write history and to take the position that he knew nothing and needed everything. In the course of his evidence, it became clear that his only substantive complaints in relation to any of the UK

investment projects were with Charles Street, Hulme Street and Paramount; yet his complaint in relation to Charles Street related to a sale in January 2018 to which he claimed not to have consented, almost six years after Mayfair ceased to have any involvement in this project. His complaint in relation to Hulme Street related to a sale in 2017 to which he claimed not to have consented. His complaint in relation to Paramount related to the unresolved 'know-your-client' and source of funds issue and the failure to issue him with his shares.

125. The defendants acknowledge that so many years after the event (bearing in mind that the final project had been constructed in about 2005) it was easy enough to identify certain discrepancies and queries with the projects. It was very much harder to demonstrate that a contemporaneous account had been provided. The claimants' approach had been to take the microscopic and non-contextual approach of identifying specific numerical queries. However, the better approach, according to the defendants, was to stand back, consider the bigger picture and, most importantly of all, to consider Dr Al-Dowaisan's actual documented contemporaneous accounting complaints. The fact is that there were said to be none. That was because the relationship worked well. There was a constant exchange of information in weekly telephone calls, with questions asked and promptly answered. It was only the project failures in Morocco that had caused an absolute breakdown in the relationship, ultimately resulting (albeit not in the original Manchester proceedings) in this hugely onerous and expensive accounting litigation. Yet, for all of Dr Al-Dowaisan's subsequent suspicions of matters hidden away, that exercise had not unearthed any wrongdoing by the defendants; on the contrary, it was said to have shown that monies were received, accounted for and invested in the main with considerable success. The defendants respond to the items remaining in dispute on the account at paragraphs 316 to 348.

126. I prefer the defendants' analysis of the evidence. I am satisfied that until the failure of the Tanja and Garden City projects in Morocco, and the fall-out over Ala'a Hamond and her

unauthorised use of the NatWest mandate account, Dr Al-Dowaisan was entirely satisfied with the information that he had received in relation to the projects.

127. In opening, Mr Singla started by taking me to an email from Imad to Ala'a Hamond (in her capacity as his personal assistant), which was copied to Dr Al-Dowaisan and some other investors, dated 7 September 2009 (at K5/1319), which promised to provide the investors with regular progress reports on a monthly basis. It was a constant complaint in cross-examination from Dr Al-Dowaisan that he was not receiving monthly progress reports, as he said he had been promised; but there had been no previous complaint in that regard. There was recognition on the part of Imad (in an email dated 16 June 2010 at K6/1561) that the defendants were not on top of their work and that more regular reporting was necessary. But prior to September 2009, I accept the defendants' submissions that the relationship worked well. There were detailed queries from Dr Al-Dowaisan from time to time but nothing that did not receive a satisfactory answer.

128. When pressed in cross-examination (at Day 3, pages 20 to 21) Dr Al-Dowaisan accepted that he had seen the Gorvins' statements and that if he had any questions about them, he would ask Imad who would answer his questions. Dr Al-Dowaisan's complaint appeared to be that he was not getting the full picture in the form of detailed information on a monthly or yearly basis. Yet there were no documented complaints in that regard because (as I find) no such complaints were communicated to Imad until about September 2009. I reject the claimants' evidence and case that they were denied any necessary accounting information in the period before the breakdown of the relationship between Dr Al-Dowaisan and Imad. By 2010, there were tensions because of the failure of two projects in Morocco, and by 2011 (as Mr Singla acknowledged in opening at Day 1, page 10) Imad and Dr Al-Dowaisan had stopped speaking altogether.

129. In his oral closing, Mr Singla reminded me of the old case of *Pearse v Green* (1819) 1 Jacob & Walker 136 (also reported at 37 ER 327) where Sir Thomas Plumer MR held that it is the first duty of an accounting party to be constantly ready with his accounts. I accept the claimants'

submission that on the evidence before me, none of the defendants were ready with any proper and complete accounts. It is clear from the evidence of Mr Hemadi and Mr Ahmed that considerable work was required in 2015, after the commencement of these proceedings, before they were able to produce even the semblance of a proper account. Even then the Gorvins' documents were clearly necessary before a fuller account could be produced (although I accept Mr Singla's submission that the Gorvins' documents were not sufficient on their own to provide a full picture of the true position). Indeed, it is the relatively recent production of the Gorvins' documents, following the making of two court orders, that is said by the defendants to have been the reason for the production of Mr Hemadi's witness statement and the detailed analysis of the position on 3 August 2018.

130. I must confess to being troubled by the evidence concerning the production of the Gorvins' statements. As Mr Singla explained in his oral closing, the evidence of Imad was that the defendants had received the Gorvins' statements. At paragraph 81 of his witness statement, Imad said this:

> "I am entirely confident that Dr Al-Dowaisan obtained all statements on a regular basis from Gorvins during both the construction and sales process. Some of the investors did not have any or a good command of English and Park Lane/Mayfair could arrange for the information to be passed to them in Arabic. As a consequence, the statements and sub-statements were also sent to Mayfair, specifically Hussein Hemadi and myself. Mayfair would then send the statements and sub-statements to the investors and, when appropriate, Mayfair would also write, reminding the investors that any distribution could or should be applied to other projects then underway."

131. Imad does not say that Mayfair retained the original statements; but given that the method of regular communication between Imad and Dr Al-Dowaisan (outside their personal meetings) was by telephone and (in the early days) fax and (later) by email, I would have expected Mayfair

to have retained the original statements. If not, I would have expected it to have retained copies as part of good book-keeping practice. Despite that, as Mr Hardwick had been at pains to emphasise in his oral submissions, it was the defendants who took the initiative in this litigation in seeking the production of the Gorvins statements. It seems to me that either: (1) Mayfair had not retained the originals (or copies) of the Gorvins statements, or (2) it had lost them, or (3) (as Mr Singla submitted) it was putting the claimants to the effort of obtaining the statements from Gorvins quite unnecessarily.

132. Given the background to, and the procedural history of, this litigation, I consider that the third is the most likely of these three alternatives. It is, I think, common ground (and, if it is not, I so find) that all the parties to this litigation now know a great deal more about the dealings with, and what has become of, the claimants' investments than was known at the commencement of the litigation. To that extent, this litigation has succeeded in providing a much better picture of the history of the claimants' investments than was known to the parties at the time this litigation commenced. But, in my judgment, that does not mean that this litigation has been justified, at least in the form that it has taken, or that an account would have been ordered but for the provision of the information that is now before the court.

133. The defendants rely on issues of limitation and delay and the exercise of the court's discretion to refuse an account. These issues are addressed at paragraphs 86 to 94 of the claimants' written closing. Essentially the claimants submit: (1) That a distinction is to be drawn between the claim for an account and an order for payment of what is shown to be due on the taking of that account. This distinction is made because it is said by the editors of *Lewin on Trusts*, 19th edition, at paragraph 44-043, that the court can order an account without limit of time in order to ascertain what the facts are (citing *Re Richardson* [1919] 2 Ch 50 and *Attorney-General v Cocke* [1988] 1 Ch 414). However, the accounting party is not to be made to pay an amount which depends on a claim that has become statute-barred. (2) In any event, there is

nothing in this claim that is statute-barred because all potentially applicable dates fall within the period of six years before the issue of the claim form on 3 February 2015 (i.e., after 3 February 2009). (3) Citing the decision of Chief Master Marsh in *Henchley v Thompson* [2017] EWHC 225 (Ch), although the court retains a discretion to refuse an account, the court will ordinarily make an order for an account where none has been provided. I was taken to passages at paragraphs 25, 31, 37, 60 to 62, 66 and 71 of the Chief Master's decision. The defendants' submissions appear more fully at paragraphs 350 to 376 of their written closing.

134. I deal first with the issue of limitation. This is addressed in *Henchley* at paragraph 30. I quote:

> "The right starting point is section 23 of the 1980 Act which directs attention to the basis of the duty to account. The limitation period will be that period which is applicable to the basis in question."

I agree that that is the right starting-point in respect of any limitation period applicable to a duty to account.

135. The defendants refer to a passage in *Snell* at paragraph 7-063:

> "For the purposes of determining appropriate limitation periods, a breach of fiduciary duty is treated as equivalent or analogous to a breach of trust. In general, therefore, a six-year limitation period applies to claims against fiduciaries for breach of fiduciary duty, either by direct application of the Limitation Act 1980 or by analogy with that statute. Where a claim for breach of fiduciary duty is based on the same facts as a claim for breach of contract or a claim in tort and there is 'correspondence' between the remedies available, the six-year limitation period is applied by analogy."

136. However, in *Henchley* at paragraph 31, Chief Master Marsh said this:

> "Section 21(3) of the 1980 Act applies to an action by a beneficiary to recover trust property or in respect of any breach of trust. Plainly the former is not applicable and, to my mind,

neither is the latter. The Claimants' case is not put forward on the basis that, by failing to account, the Defendant has acted in breach of trust but, rather, by virtue of his obligation to account which they seek to enforce. The remedy they seek is one seeking a positive order enforcing the obligation, not a remedy for breach. It seems to me that section 21(3) has no application and the 1980 Act has no limitation period which applies to proceedings brought by a beneficiary for an order for an account in common form, as opposed to an account based on wilful default. Support for this conclusion can be found in obiter remarks by Harman J in *Attorney-General v Cocke* [1988] 1 Ch 414 (at 421E)."

137. The Chief Master continues at paragraph 32:

"This puts a narrow construction on the phrase 'breach of trust' as it is used in section 21(3). It might be said that any failure of a trustee to perform his obligations is a breach of trust. Records should have been maintained and accounts regularly provided. However, an application for an account in common form is not based upon a breach of trust and has never been seen as being contingent on any adverse finding against a trustee. The obligation that is relied upon is matched with the remedy sought. Subject to the court's discretion, the order is essentially administrative in nature, and arises from the court's supervisory jurisdiction over trusts. I do not consider that the draftsman of the Limitation Act contemplated such a claim being treated as a breach of trust."

138. I respectfully agree with those observations.

139. The defendants refer to the decision of Mr Jules Sher QC in the case of *Coulthard v Disco Mix Club Limited* [2000] 1 WLR 707 at 728 E to F. There the deputy judge said that:

"… the simple duty to account, central though it is, is not a fiduciary duty. It is a contractual duty and breach of it gives rise to a claim which would be governed by section 5 of the 1980 Act."

140. That decision was not referred to by Chief Master Marsh in *Henchley v Thompson*. In my judgment there was good reason for that. The *Coulthard* case was concerned with claims by a principal against his agent for wilful under-accounting. As the deputy judge recognised (at page 728, letters F to G):

> "… Despite the express allegation of breach of fiduciary duty, the claims are simply claims for breach of contract and no more. The Act of 1980 cannot be sidestepped by describing them as claims in breach of fiduciary duty..."

141. The proper characterisation of the claim in *Coulthard* was as one for breach of contract. In *Henchley,* and in the instant case, the basis of the claim for an account is one for the enforcement of an equitable obligation. In my judgment that was made clear by Lord Millett, sitting in the Hong Kong Court of Final Appeal, in the case of *Libertarian Investments Limited v TA Hall* [2013] 17 ITELR 1, [2014] 1 HKC 368. At paragraph 167 Lord Millett said this:

> "Once the trust or fiduciary relationship is established or conceded, the beneficiary or principal is entitled to an account as of right. Although, like all equitable remedies, an order for an account is discretionary, in making the order the court is not granting a remedy for wrong but enforcing performance of an obligation."

Those observations were cited by Chief Master Marsh at paragraph 22 of his judgment in *Henchley*.

142. I therefore agree with Chief Master Marsh that no limitation period applies to a claim for an account in common form.

143. I therefore move on to the question of laches. This was addressed by Chief Master Marsh at paragraph 33 of his judgment in *Henchley*:

> "If there had been a limitation period, then it would not have been open to the court to consider the question of laches ... On the basis that the court has a discretion whether to make an order for an account, I am not convinced that consideration of the doctrine of

laches adds a great deal, bearing in mind delay on its own will not be sufficient to make out laches. It is more likely that the sort of considerations relied upon by the Defendant as grounds for the court refusing to make an order will be persuasive than that the Defendant could establish laches."

144. Again, I respectfully agree with those observations.

145. The Chief Master then went on to consider the claims underlying the account at paragraphs 34 to 35.

146. In the present case, it seems to me that the result of the mass of information now produced in the course of these proceedings means that the court may be in a position to consider whether any underlying claims would be time-barred. To the extent that any such claim is, it seems to me that that must be a relevant factor in the exercise of the court's discretion whether to order an account. It is one of the maxims of equity that the court does not act in vain; and if no order for monetary payment is likely to follow from an account, then I see no reason why an account should be ordered, with all of its attendant costs and demands upon court resources.

147. Since I do not consider that any limitation period is applicable to the claim for an account, and since I consider that the issue of delay properly falls to be considered as part of the exercise of the court's discretion, it does not seem to me to be necessary to consider the defendants' submissions about whether the duty to account in the present case and context has the character of a continuing obligation.

148. On the issue of discretion, I agree with the Chief Master's conclusions at paragraphs 60 to 62 of *Henchley*:

"60. The court has a discretion whether or not to make an order for an account in common form to be produced by a trustee. Although it would not be right to say that there is a presumption in favour of making an order for an account, in my judgment, the court will not

decline to make an order lightly where a trustee holds or has held assets for beneficiaries of a trust.

61. The duty to account must also be seen alongside an obligation to keep and to retain records. Although it is perfectly acceptable for trustees, amongst themselves, to divide responsibilities such that one of the trustees is designated to be the record-keeper, that does not absolve the trustees collectively from their duties to the beneficiaries. It is not an answer in this case, therefore, for the Defendant to say that he left record-keeping to Doris Watson and he can, therefore, be absolved from providing an account because no documents have been retained."

149. The Chief Master went on to consider (at paragraph 62) the form of accounts which an accounting party must provide:

"… The style of the accounts, and the level of detail provided will necessarily vary. The accounts produced for 1990 and 1991 may have been suitable for submission to the Inland Revenue, as it then was, for the purposes of assessing tax liability and providing a general summary of the trust's position. However, they were not suitable to provide a beneficiary with an adequate understanding of how the trustees had managed the trust assets in the relevant periods."

150. I turn then to the exercise of the court's discretion. I accept the defendants' submission that each project should be considered separately. Although I have held that no limitation period applies to a claim for an account, I consider that the court should have regard to the question whether any claim for payment that might follow the production of an account would itself be time-barred. Although the court should bear firmly in mind the obligation upon an accounting party to keep and retain proper records, the court should also take account of difficulties that will be involved in requiring the accounting party to provide a full account of his dealings for the relevant project after the time that has elapsed since its completion before an account is sought.

151. The court should have regard to the degree of accounting information that has already been provided, and the likely utility of any further accounting information. The court should also have regard to the reasons why an account is being sought and was being sought at the time the proceedings for an account were issued and it should therefore consider the motivation underlying the claim for an account. I have had regard to all of these factors.

152. In the present case, it is particularly difficult to ignore the fact that, as a result of the mass of further information provided during the course, and as a result, of the instant proceedings, it can be seen that only relatively small sums of money now remain in issue. As the claimants acknowledge (at paragraph 132 of their written closing), with the service of Mr Hemadi's witness statement the account sought by the claimants has now largely been provided; and the further evidence since then has clarified, and narrowed, matters still further.

153. Putting to one side for the moment the on-trust shareholdings (which fall to be addressed later in this judgment in section 6), the first sum remaining in dispute is the 1.074 million dirham (corresponding, I understand, to some £66,000) relating to the Panorama project in Morocco, which had apparently been retained by Mayfair Morocco to deal with a possible tax contingency in respect of a separate Moroccan project (Miramas).

154. In cross-examination (at Day 7, page 133) Mr Hemadi suggested (for the first time and without any documentary evidence) that that money had been used to settle the tax so that there was money still outstanding to be paid back to Mayfair Morocco, although he could not recall when it had been paid.

155. The defendants say that this matter has already been sufficiently investigated and that there is nothing to be gained by any further accounting exercise. I disagree. Even Mr Hemadi was unclear about the position. I would have ordered the relevant accounting party to account for the sum by way of narrative explanation with supporting documentation; but the relevant accounting

party would appear to be Mayfair Morocco, and that entity is not before this court, so no such order can be made.

156. However, the relevant development company may be able to hold Mayfair Morocco to account for the monies as its contractor; and Imad, Husham and Mr Al-Yassin hold the shares in the relevant development company on trust for the claimants. I would invite further submissions in due course as to whether, in those circumstances, the court can and should grant any relief in these proceedings which may assist the claimants in obtaining a clearer picture of what has happened to the tax retention monies.

157. The next disputed sum is the £41,000 that (as I find on the evidence) was remitted from City Road into the City Heights project. The defendants submit that there is no need to follow this through any more. The claimants submit that Imad and Husham should be ordered to account for this apparent re-investment (and also for a further £32,000 invested into City Heights) by way of a narrative explanation with supporting documentation.

158. After all the huge amount of effort that has already been expended in trying to establish the final destination of these sums, I am not satisfied that any further order is likely to achieve anything. In any event, the proper accounting party would be the relevant development company, Mayfair Development Homes Limited. That company is not a party to these proceedings, and no order can be made against it.

159. In his oral closing, Mr Singla suggested that there was a further £41,000 to be accounted for. However, that sum would appear to have belonged to Al-Tarahum and not to either of the claimants. In those circumstances, no account should be ordered in relation to it. Even if the person properly entitled to such an account were before the court, I would have declined to make an order for an account for the reasons I have already given in relation to the first £41,000.

160. There is a further series of three sums totalling some £11,000 that were (as I find) paid into Dr Al-Dowaisan's client account at Gorvins and then transferred into the NatWest mandate

account. In cross-examination (at Day 6, page 101) Imad said (for the first time) that Dr Al-Dowaisan had asked him to donate this sum to a charitable trust, which Imad said he had done. There was, inevitably (due to the late provision of this information), no opportunity for Dr Al-Dowaisan to be asked about this. A sufficient account has now been given of this money. Any claim for its recovery is now probably statue-barred. I would not propose to do anything further in relation to the £11,000. On the evidence before the court, it would appear to have passed out of the NatWest mandate account.

161. Finally, there are three sums (totalling some £12,000) which it is common ground cannot be accounted for. The claimants submit that Imad and Husham should be required to account for these sums by way of a narrative explanation with supporting documentation. The sum of £6,643 from the Sackville Place project would appear to have gone missing in or about April 1999. Any claim for its recovery would appear to be long since time-barred. In any event, it is difficult to see what more information could be provided. Even if the proper accounting party were before the court, I would not make any order in respect of that sum.

162. In relation to the £4,015 from the Charles Street project, this dates back to October 2015. In cross-examination of Mr Pearson (at Day 5, pages 34 to 35) it was suggested that this sum would appear to have been held in an account for Charles Investments Limited in the hands of Gorvins Solicitors. I can see no proper basis for ordering an account in respect of this sum against any of the defendants.

163. The final sum is £1,617 paid from the Wellington Road project in October 2012. This was not a project undertaken by Mayfair. Even if there were an accountable party before the court, any order for any further account would not be cost-effective.

164. It is said that the defendants have failed fully to account for the interest retained by the claimants in four ongoing projects in the UK and two in Morocco. In relation to three of them in the UK (Charles Street, Ellesmere Road and Gotts Road), the relevant investors took the

ongoing management of the sites out of the control of Mayfair (in the case of the first two) and of another company owned or controlled by Imad and Husham (in the case of Gotts Road, which was a Leeds project) as long ago as 2012. It would not be appropriate to order any account in respect of these three ongoing projects against any of the defendants.

165. In the case of Paramount, the fourth ongoing UK project, this claim is more conveniently addressed in section 8 of this judgment. So far as the Garden City and Tanja projects are concerned, the evidence is that no returns were ever received in respect of them and that the relevant banks have effectively foreclosed on them, so that the investments have been irreparably lost. If the claimants wish to challenge that, then that is a matter for other proceedings. I do not see that any further account is required.

166. The claimants submit that they would not have got any account without commencing this claim. I accept that submission. But it seems to me that it poses the wrong question. The relevant questions are: (1) were the claimants justified in bringing this claim for an account in 2015; and (2) what, if any, order would have been made for an account had the defendants not provided the level of information contained in the evidence of Mr Hemadi and Mr Ahmed. These are difficult questions to answer because it involves seeking to separate the evidence that was placed before the court as to the contemporaneous information that was provided to the claimants in relation to their investments from the more detailed project-by-project analysis that has now emerged from the evidence during the course of these proceedings.

167. In my judgment, the claimants completely overplayed their hand in commencing these proceedings in the form that they did. Their real complaint was directed to the failure of their investments in Morocco. But, instead, they launched proceedings which sought an order for an account in relation to all of their investments with the Mayfair companies, extending back to the start of their relationship with Imad in 1993, and to many projects in relation to which they had received a profitable return many years previously and about which they had had no complaint.

The claimants did so without making any acknowledgement of the substantial investment returns (of some £10.6 million) which they had received over the intervening years. In my judgment, that was manifestly unreasonable conduct; and it predictably led to an unhelpful response from the defendants. As a result, both parties were pitched into an unnecessarily wide conflict on too many battlefronts from the outset.

168. The overriding objective of the *Civil Procedure Rules* is to enable the court to deal with cases justly and at proportionate cost. The need for proportionality in litigation is expressly further referenced in CPR 1.1(2)(c). CPR 1.3 requires the parties to help the court to further that overriding objective. As the criticisms justifiably levelled in both sets of written submissions make clear, neither party discharged that duty; and, as a result, this litigation has been conducted in a highly acrimonious and attritional way by both sides. In my judgment, there was never any objective justification for a general account in respect of those projects which had been successfully completed in the UK. The claim for an account should have been confined, from the outset, to the three later projects in Morocco, namely Garden City, White Sands/Panorama, and Tanja.

6. <u>The 'on-trust' shareholdings</u>

169. The defendants originally asserted that Dr Al-Dowaisan had signed declarations of trust in respect of his personal investments in three UK properties, Spath Road, Palatine Road and City Road, in favour of Imad and Husham and, consequently, that when those projects completed, Imad and Husham became entitled to a corresponding proportion of the sale proceeds. In Mr Hemadi's witness statement, a claim was advanced (for the first time, and without producing any written declaration of trust) that Dr Al-Dowaisan also held his 5% interest in the Hatton Gardens project on trust for Imad and Husham. The relevant share of the total sale proceeds of all four projects is said to amount to some £1.269 million. Some £754,000 of this was paid into the

mandate accounts, with the balance of £515,000 being paid into other bank accounts controlled by Imad and Husham.

170. The claimants submit that the documentary evidence is unsatisfactory. First, there is no documentary evidence of the purported declaration of trust in respect of the Hatton Gardens project, in which Dr Al-Dowaisan held a 5% shareholding. Secondly, as to Spath Road, the terms of the declaration of trust provide that Dr Al-Dowaisan purportedly holds only 5% of his shareholding on trust, for Imad. Dr Al-Dowaisan in fact held a total shareholding of 17%. That leaves 12% in respect of which no declaration of trust was made.

171. The claimants' case in respect of the 'on-trust' shareholdings is that, first, the claimants claim ownership of the proceeds from the 'on-trust' shareholdings where there is no documentary evidence of a declaration. In that case, Imad and Husham should account to Dr Al-Dowaisan for £534,000, of which £208,000 was paid into Dr Al-Dowaisan's mandate bank accounts. Second, the claimants deny the effectiveness of the declarations of trust by reason of non est factum, mistake and uncertainty. If the declarations are ineffective, Imad and Husham should account to Dr Al-Dowaisan for £1,269,000 which was paid to Imad and Husham's benefit from these shareholdings, of which £750,000 was paid into the mandate bank accounts. The claimants' case is developed at paragraphs 146 to 161 of the claimants' written closing.

172. The defendants' pleaded case is not that they themselves invested monies into these four projects but, rather, that there was an agreement between Mayfair and the relevant holding company that Mayfair would waive its fee in return for Imad and Husham obtaining an equity interest. It is common ground that these agreements between Mayfair and each holding company are entirely undocumented. Imad described the arrangement as an 'internal arrangement' between Mayfair and its directors. When asked for the rationale of that agreement, Imad stated, "It's like a bonus".

173. The state of the defendants' records does not make it clear either way what the source of the 'on-trust' investments is; but if the defendants were not contributing cash for a percentage shareholding, then the claimants point out that the defendants' alleged claim to a percentage shareholding operates to dilute the consideration paid for the company's share capital. That share capital had been paid for by someone else. That must be the investors, including the claimants. Therefore, it is said to be wrong for the defendants to assert that the claimants had no interest in the shareholding or that they did not contribute to it. From who else did the consideration for it come? It did not come from the defendants.

174. The written declarations of trust do not all follow the same form. That for Spath Road (in favour of Imad only) dates from the year 2000 and contains no declaration as to beneficial entitlement. Given the age of that project, any declaration of trust in relation to Hatton Gardens is likely to follow the same form as the Spath Road declaration (and I so find on the balance of probabilities). However, the declarations of trust for 61 Palatine Road and for City Road, both executed in September 2002, expressly provide that:

> "Dr Al-Dowaisan is the owner or otherwise beneficially entitled to the investments."

This is said by the claimants to be recognition, in formal legal documents on which the defendants have placed reliance, that Dr Al-Dowaisan was, but for the relevant declaration of trust, beneficially entitled to the relevant 'on-trust' shareholdings. The claimants submit that the defendants cannot now resile from that statement. They rely on the doctrine of estoppel by deed as formulated by Bayley J in the case of *Baker v Dewey* (1823) 1 Barnwall & Cresswell, 704 at 707 (also reported at 107 ER) that:

> "A party who executes a deed is estopped in a court of law from saying that the facts stated in the deed are not truly stated."

175. Dr Al-Dowaisan submits that, in any event, he is the beneficial owner of the proceeds from the shareholdings held in his name where there is no declaration of trust, namely 5% in respect

of Hatton Gardens and 12% in respect of Spath Road. Dr Al-Dowaisan submits that on that basis, the defendants are liable to account to him for £534,000, of which £208,000 was paid into his mandate bank accounts.

176. The claimants then go on to address the issues of non est factum, mistake, uncertainty and unlawfulness of the trust arrangements. If the trusts fail, then the claimants claim entitlement to the £1.269 million which was paid to the benefit of Imad and Husham from these shareholdings. As to mistake and non est factum, the relevant legal principles are set out in *Chitty on Contracts*, 33rd edition, at paragraphs 3-004 and 3-049. If a party has been misled into executing a deed, or signing a document, essentially different from that which he intended to execute or sign, he can plead non est factum. The deed is void. The key elements are: (1) the belief of the signer that the person is signing a document of one character or effect whereas its character and effect were quite different, (2) the need for some sort of disability which gives rises to that state of mind, and (3) that the plea cannot be invoked by someone who does not take the trouble to find out at least the general effect of the document."

177. In *Saunders v Anglia Building Society* [1971] AC 1004 Lord Wilberforce confirmed that the principle extended to:

> "... a person who may be tricked into putting their signature on a piece of paper which has legal consequences totally different from anything they intended."

178. Alternatively, it is said to be open to the court to set aside the voluntary disposition of property under the declarations of trust pursuant to the rule in *Pitt v Holt* [2013] UKSC 26, reported at [2013] 2 AC 108. At paragraphs 99 through to 128, Lord Walker outlined that where there has been a causative mistake of sufficient gravity (including one as to the legal character or nature of a transaction) such that it would be unconscionable for the defendant to retain the property given to them, then the court can set aside the transaction. Reference is made, in particular, to paragraphs 122 to 125.

179. In the further alternative, if the court were to hold that this mistake had been induced by Imad, then the court could also rescind the declaration for misrepresentation.

180. The claimants say that Dr Al-Dowaisan's oral evidence as to the execution of the documents is straightforward and plausible, whilst the defendants' explanation of the circumstances in which the documents came to be signed is said to be unsatisfactory. It is common ground that the documents were not translated and that Dr Al-Dowaisan was not advised to obtain independent legal advice. Against the backdrop of the relationship of entire trust and confidence, with Dr Al-Dowaisan signing hundreds of transfer requests at Imad's instigation, and signing Paramount documentation which disguised the nature of the true relationship, a request by Imad for Dr Al-Dowaisan to sign a formal document on the basis of Imad's oral assurance was not an isolated incident.

181. Applying those principles, the claimants submit that the court should set aside the declarations of trust on the basis of non est factum, alternatively mistake or misrepresentation. It is said, first, that Dr Al-Dowaisan was fundamentally mistaken as to the character and effect of the declarations; second, that Dr Al-Dowaisan was, in the context of his relationship of complete reliance on Imad and Husham, tricked into putting his signature on a piece of paper which had legal consequences totally different from his intention; and, third, that in the context of such reliance, Dr Al-Dowaisan could not have been expected to make further enquiries.

182. As to the claim that the declarations of trust are void for uncertainty, the relevant legal principles are said to be set out in *Snell's Equity* at paragraphs 22-012, 22-016 and 22-018. Of the three certainties identified by Lord Langdale MR in *Knight v Knight* (1840) 49 ER 58, 3 Beavan's Reports 148 at 172, certainty of subject matter (which is to be judged at the time of the creation of the trust) requires that the trust instrument should define with sufficient certainty the assets which are to be held on trust. The definition will be sufficiently certainly if it enables the trustee or court to execute the trust according to the settlor's intentions. The declarations of trust

disclosed by the defendants in respect of both 61 Palatine Road and City Road are said to be uncertain on their face because they provide that Dr Al-Dowaisan holds:

"[50%], [one-half part or share], [one-third part or share] of the investments on trust."

There is no counterclaim by the defendants to rectify the relevant clause 1.4. The claimants accordingly submit that the part of the subject held on trust is therefore not identified clearly, and that neither Dr Al-Dowaisan nor the court could execute the trust in accordance with its terms. The trusts therefore fail.

183. I reject the claimants' evidence and case on this issue and prefer the competing submissions of the defendants. There is no evidence that Dr Al-Dowaisan ever made any personal investment in relation to the 'on-trust' shareholdings; and I find as a fact that he did not. It is common ground that Dr Al-Dowaisan personally received no investment return in relation to any of the four 'on-trust' shareholdings since that forms the basis for his present head of claim. That raises the question as to why not. I find that this is because the shareholdings that were nominally in Dr Al-Dowaisan's name were in fact held on trust for Imad and Husham and that Dr Al-Dowaisan was fully aware of this fact. As pleaded in the defence (at paragraph 29) the defendants alleged that Imad and Husham were non-domiciled in the UK for tax purposes and that, in order to preserve that status, they arranged for the shareholdings to be held on their behalf by nominees resident abroad. I am satisfied that this explanation was false. I am satisfied that the true reason why this was done was to preserve the integrity of the offshore status, not of Imad and Husham, but of the holding companies, so as to give the appearance that there were no UK-resident or domiciled shareholders. This is supported by the evidence of Mr Al-Osaimi (in cross-examination at Day 8, page 100) which on this point I accept.

"Question: And what did you understand specifically Husham and Imad to be asking you to do with the declaration of trust?

Answer: They have some investment, they want it to be under my name.

Question: Why do you think they were asking for their investment to be put under your name?

Answer: I think it is because when we reviewed the offshore structure, the solicitors recommended that it is for the integrity of the offshore company to have all non-resident investors in the company."

It was in answer to questions from the Bench (at the end of Mr Al-Osaimi's evidence) that he was able to identify the solicitors involved as Stephenson Harwood.

184. Dr Al-Dowaisan accepted in evidence that he had executed the four declarations of trust, one each for Imad and Husham, in respect of both 61 Palatine Road and 2 City Road East. As to Spath Road, Dr Al-Dowaisan accepted that he had signed a declaration of trust dated 2000 whereby he agreed to hold 5% of the issued shares in the property company formed for the purpose of acquiring that property (or in the holding company which owned the shares in that property company) and/or 5% of the property upon trust for Imad absolutely. Dr Al-Dowaisan did not remember signing an equivalent declaration of trust for Husham for the other 5%. However, in circumstances where: (1) Dr Al-Dowaisan was originally intended to have a 10% shareholding in Spath Road (as he accepted), and (2) Imad and Husham signed equivalent declarations of trust in relation to 61 Palatine Road and City Road East, the claimants submit that the court can be satisfied, on the balance of probabilities, that such an equivalent declaration of trust was signed. I accept that submission, which is entirely consistent with the lack of any personal investment by Dr Al-Dowaisan in this particular project and with the parties' subsequent dealings.

185. Dr Al-Dowaisan did not remember signing two further declarations of trust for Husham and Imad in respect of his increased shareholding of 17%. However, in circumstances where Dr Al-Dowaisan's intended 10% shareholding did increase to 17%, as both Imad and Husham explained, and where Imad told Dr Al-Dowaisan that Imad was going to be increasing his

shareholding, I am satisfied, on the balance of probabilities, that two further declarations of trust in relation to Dr Al-Dowaisan's increased 17% shareholding were signed by Dr Al-Dowaisan, in substantially the same form as the one surviving Spath Road declaration of trust in favour of Imad. As previously stated, I am also satisfied, on the balance of probabilities, that there had been such an earlier declaration of trust in respect of a 5% shareholding in Spath Road in favour of Husham.

186. Turning to Hatton Gardens, the defendants have not been able to locate any surviving declarations of trust in relation to this project, which dates back to 1997. However, Dr Al-Dowaisan accepted the possibility that he had been presented with declarations of trust in relation to his 5% shareholding in Hatton Gardens, and that he could have signed the same. He was unable to remember whether they were in the form of the 2000 Spath Road declarations of trust. On the balance of probabilities, I find that they were, and that Dr Al-Dowaisan executed them. That is consistent with the parties' subsequent dealings in relation to Hatton Gardens.

187. The defendants accept that there are imperfections in the declarations of trust, most obviously in the failure to delete the 50%, one-half part or share, and one-third part or share formulations. There has been no attempt to strike through the text which does not apply. However, I find that the true intention of the parties was readily apparent.

188. Dr Al-Dowaisan was intended to be a nominee shareholder, holding his shareholdings equally for Imad and Husham. In the case of the extra 7% for Spath Road, Imad's evidence had been that the original intention had been that he and Husham would each have 5%, but when no one had taken the extra 7% share, they had taken it on. The explanation provided by Imad was that they had done that to ensure the smooth running of the project, so that it did not require the investors to make any further investments. That may not speak well for Imad and Husham; but I find that that was indeed the case.

189. I find that the declarations of trust lend clear contemporaneous support to the defendants' key claim in respect of each of these four trust investments that, in respect of each of these projects, in which Dr Al-Dowaisan had not made any personal investment, he had agreed to hold his shareholdings on trust for Imad and Husham.

190. In circumstances where Dr Al-Dowaisan has not provided any coherent explanation as to why he should have executed these documents (as I find he did), I consider that they are entirely consistent with the defendants' case that it was the intention of all parties that Dr Al-Dowaisan's shareholdings in these projects were in fact to be held for Imad and Husham.

191. The other investors signed declarations of trust in relation to other projects, as summarised at paragraph 453 of the defendants' written closing. Those declarations of trust, as executed by Mr Al-Osaimi in relation to Wellington Road, Gotts and Ellesmere, and by Mr Al-Yassin and Mr Al-Jarallah in respect of other projects, lend further support to the defendants' position as to the nature of the ‘on-trust’ shareholdings held for Imad and Husham in the four ‘on-trust’ projects.

192. I expressly reject the evidence of Dr Al-Dowaisan as to what he was told when he came to execute the declarations of trust, and also his evidence in re-examination that he was afforded no opportunity to read the documents but was merely told to sign them. It was clear from his evidence that Dr Al-Dowaisan had no clear recollection of the circumstances in which, or even where or when, he had come to sign those declarations of trust which he accepts having executed; and I had to step in to clarify that it was Imad, rather than Husham, who had been responsible for procuring the execution of the various trust documents.

193. I find that the Spath Road declarations of trust, in favour of Husham as well as Imad, were signed in Manchester on or about 11 September in the year 2000, at about the time that Dr Al-Dowaisan was opening the NatWest mandate account. I find that the other declarations of trust were also executed by Dr Al-Dowaisan when he was in Manchester. I reject the claimants'

evidence and case that Dr Al-Dowaisan was labouring under any mistake when he signed any of the declarations of trust. I do not accept his evidence that he was ever told that Imad and Husham were going to be investing in these projects for Dr Al-Dowaisan. Any such statement would have inconsistent with the fact that Dr Al-Dowaisan made no personal investment in these projects and with all that happened in relation to the shareholdings thereafter. If anything to that effect had been said, it must have been a lie; and at this point in the relationship (in 2000 and 2002) I do not consider that Imad or Husham would have been lying to Dr Al-Dowaisan. Had anything to that effect been said, Imad or Husham would have known that Dr Al-Dowaisan would be looking to the return of his investment at some time down the line. On these disputed issues of fact, I accept the evidence of Imad in preference to that of Dr Al-Dowaisan.

194. In the light of these findings of fact, the defences of non est factum and mistake do not even begin to get off the ground and I can deal with them fairly shortly.

195. As the claimants emphasised in their written closing, the doctrine of non est factum is one upon which the courts have placed strict limits. The leading case of *Saunders v Anglia Building Society* (previously cited) emphasises the heavy burden of proof on the person who seeks to invoke this remedy and how it can only be available to a man of full capacity in very exceptional circumstances. As Mann J recently explained in *Irina Yedina v Oleksander Yedin & Skelling Ltd* [2017] EWHC 3319 (Ch) at para 263, the key elements of the non est factum doctrine are: (1) the belief of the signer that the person is signing a document of one character or effect whereas its character and effect were quite different; (2) the need for some sort of disability which gives rise to that state of mind; and (3) that the plea cannot be invoked by someone who does not take the trouble to find out at least the general effect of the document.

196. Moreover, as Lord Reid made clear (at page 1016 letter F of *Saunders v Anglia Building Society*), the belief as to the character or effect of the document cannot be available to a person

whose mistake was really one as to the legal effect of the document, whether that was his own mistake or that of his advisor.

197. Further, the extent of the difference between that which the party challenging the document signed and that which he believed he was signing must be a 'radical' difference in the sense of 'fundamental' or 'serious' or 'very substantial'. That requirement is amply demonstrated by the facts of *Saunders*, where the mistaken belief that she was signing a deed of gift in favour of her nephew rather than a mortgage to the building society was not sufficiently radical because, in the words of Viscount Dilhorne (at page 1020 letters F to G):

> "… she knew that the document she signed was a legal document dealing with her property."

198. I accept the defendants' submission that Dr Al-Dowaisan's non est factum plea fails at the first hurdle. Even if he had established (which he has not) the necessary mistake, that mistake must have involved a relevant belief as to the 'character' of the document. The effect of Dr Al-Dowaisan's evidence appears to have been: (1) that he knew that the document related to investments in the relevant project; (2) that he knew that the document was a trust document; (3) that he knew that by this trust document a shareholding in his name was put under the names of, or held for, Imad and Husham; and (4) that he was told that they were going to be investing for him on this property.

199. I accept the defendants' submission that evidence of that character falls far short of establishing the requisite radical difference between that which Dr Al-Dowaisan signed and that which he believed he was signing. He knew that the declarations of trust were legal documents dealing with investment in the particular property. He knew that the effect of the document was to deal with interests in that investment, even to the extent that it was to put an interest under Imad and Husham's names. The claimed difference lies in his assertion that Imad and Husham explained that they were going to be investing for him on this project. I have already rejected

that evidence; but even if I had not done so, in my judgment the 'investing for' Dr Al-Dowaisan claim would be readily reconcilable with the fact that it was common ground that he had a large 15% shareholding in, for example, 61 Palatine Road through the second claimant (Pearl) and through which he received a substantial return. The relevant difference is altogether less radical than the mistaken belief of the claimant in *Saunders* that she was signing a deed of gift in favour of her nephew rather than a mortgage to the building society.

200. I also accept the defendants' submission that Dr Al-Dowaisan's assertion (which I have rejected) that the legal effect of the declarations was not explained to him is irrelevant. As Lord Reid made clear in *Saunders* (at page 1016 F), the belief as to the character or effect of the document cannot be available to a person whose mistake was really one as to its legal effect.

201. I also accept the defendants' further submission that Dr Al-Dowaisan's claim that it was his understanding that it was to be his interest, and not that of Imad and Husham, is inherently implausible in circumstances where the declarations of trust were signed in 2000 and 2002, at least five years after Dr Al-Dowaisan had first met Imad and Husham and had begun engaging in property investments with them. By that point in time, Dr Al-Dowaisan had already invested in many projects, both personally and through Pearl. He had not needed to sign declarations of trust for any of those projects.

202. The defendants also submitted that it was inherently implausible because Dr Al-Dowaisan was familiar with the concept of trust shareholdings as all his interest in the Moroccan projects was through shareholdings held for him by Imad, Husham and Mr Al-Yassin. I would not accept this further submission because of the chronology of events. At the time of the first two declarations of trust in Spath Road in 2000, and in the case of Hatton Gardens probably earlier, the Moroccan projects were not sufficiently advanced to enable to defendants to rely on this particular additional factor. Nevertheless, for all the other reasons I have given, I reject the defence of non est factum.

203. Most fundamentally, however, the defence of non est factum fails because there was no operative mistake. For the same reason, the defence of mistake also fails. I am also satisfied that there was no material misrepresentation giving rise to any claim for rescission.

204. So far as the challenge on the grounds of uncertainty is concerned, the defendants rely upon the principle that an error in the drafting of a document can be corrected by a legitimate process of construction, without any claim for rectification of that document. The claimants' complaint is that there was no striking through of the alternative formulations in the declarations of trust affecting 61 Palatine Road and City Road East. I accept the defendants' submission that that is an unrealistic approach, which takes no account of the background knowledge which was available to each of the parties.

205. Each of Dr Al-Dowaisan, Imad and Husham were well aware that: (1) Imad and Husham were 50% shareholders in Mayfair; (2) Dr Al-Dowaisan was signing declarations of trust in favour of each of Imad and Husham; and (3) only two declarations of trust were signed in relation to each property.

206. I am satisfied that, taken together, a reasonable person with this background knowledge would have had no difficulty in understanding that, even without striking through the unnecessary textual alternatives, Dr Al-Dowaisan was agreeing to hold his shareholdings as to one-half for Imad and one-half for Husham. The defendants submit that the equitable remedy of rectification is neither sought nor required. As Lord Hoffmann, speaking for the Court of Final Appeal in Hong Kong, recognised in the case of *Jumbo King Limited v Faithful Properties Ltd* [1999] HKCFA 80:

> "The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail."

207. As stated in *Hodge on Rectification*, second edition (2015), at paragraph 1-54:

"If an error in the drafting of a document can be corrected by a legitimate process of construction, in principle the court should do so without ordering rectification of the document."

208. The process of rectification by construction is considered in some detail at chapter 2 of *Hodge on Rectification*. As the author observes (at paragraph 2-11), there are cases in which the court has supplied not merely words but whole phrases, and others in which the court has construed a document by subtracting words where it was satisfied that they were included in error.

209. Speaking extra-judicially, Patten LJ has observed that the principles of linguistic interpretation set out in the *Investors Compensation Scheme* case and repeated in *Chartbrook v Persimmon* were intended primarily to deal with cases where the court can infer that an error has occurred in the drafting process. As the defendants recognise, there was certainly an error in the drafting process in respect of the parties' repeated failure to strike out the non-applicable part of the formulation; but the meaning of that formulation to the parties - to each of Dr Al-Dowaisan, Imad and Husham - at the time, and with their background knowledge, can never have been in any doubt: Dr Al-Dowaisan was to hold his shareholdings on trust for Imad and Husham as to one half each.

210. I am satisfied that what has been described by Patten LJ in *Fons HF v Corporal Limited* [2014] EWCA (Civ) 304 at paragraph 14 as the ‘innovation’ of Lord Hoffmann's approach in the *Investors Compensation Scheme* and subsequent cases is that the court has the ability to correct these errors through a process of interpretation rather than by having to resort to equity’s jurisdiction to order rectification. The applicable conditions are summarised at paragraph 2-27 of *Hodge on Rectification*:

"Before a mistake in a document can be corrected as a matter of construction and without obtaining an order for rectification, two conditions must be satisfied: (1) there must be a

clear mistake; and (2) it must be clear what correction ought to be made in order to cure the mistake.

In deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. But it must be clear from the rest of the agreement, interpreted with the admissible background, what the parties intended to agree; and the mistake must be one of language or syntax. … The correction of clear mistakes by construction is not part of the law of rectification, but is an aspect of the single task of interpreting the document in its context."

211. I am satisfied, for the reasons I have given, that both conditions are satisfied. In this case, the failure to strike through the alternative of one-third part or share in the executed declarations of trust was a clear mistake. For the correction of that obvious mistake, there is a clear solution: that is by the court disregarding the inapplicable, and redundant, alternative formulation in the executed declarations of trust.

212. As for the claimants' reliance on the doctrine of estoppel by deed, this presupposes the validity of the relevant deed. But if one finds that each of the declarations of trust was valid (as I do) then since each declaration operates to effect a change in the ownership of the shares, any estoppel by deed is thereby clearly displaced.

213. For these reasons, I therefore uphold the defendants' case that the shareholdings in these four projects were held in trust for Imad and Husham, to the exclusion of any beneficial interest in favour of Dr Al-Dowaisan. It follows that any claim for an account to recover the proceeds of those investments and any consequential account fails.

7. <u>The mandate account and the counterclaim</u>

214. This issue is closely related to the ‘on-trust’ shareholding issue, particularly once it is appreciated that (as I find) the Spath Road declarations of trust (made in favour of Husham as

well as Imad as I also find) were executed at or about the same time as the NatWest mandate account was opened in Didsbury in September 2000. The starting point must be that, apart from the three sums totalling some £11,000 that were paid into the mandate account by Gorvins (and subsequently, according to Imad, paid over to charity at Dr Al-Dowaisan's direction), it has not been established that any of Dr Al-Dowaisan's monies flowed into the mandate accounts even though sums totalling some £5.4 million passed through those accounts.

215. The defendants assert that although the accounts were opened in Dr Al-Dowaisan's name, the mandate accounts were used to facilitate payments to Imad and Husham in respect of the proceeds of investments to which they were beneficially entitled, albeit they were nominally opened by other investors. Those nominees included Mr Al-Jarallah (in respect of Princess Street), and Mr Al-Osaimi (for the Ellesmere, Gotts, Wellington Road and City Heights projects).

216. Dr Al-Dowaisan's claim to monies passing through the mandate accounts derives support only from the fact that in earlier civil and criminal proceedings touching upon the UK mandate account with NatWest, Imad has provided witness statements, and has caused his solicitors and counsel to make statements, which are entirely consistent with the impression that Dr Al-Dowaisan asserts had been conveyed to him by Imad, namely that the mandate accounts would be used for Dr Al-Dowaisan's own investment returns and that his monies would be paid into those accounts. It was only in December 2015, when the defence to this claim was filed, that the defendants asserted (for the first time, and contrary to what had previously been said) that no monies of Dr Al-Dowaisan's had ever passed through the mandate accounts.

217. I have already indicated (in my review of Imad's performance as a witness) that I have found his evidence about the extent to which he had misled his solicitor, Mr Humphreys, as to the true position in relation to the UK mandate accounts to have been shifting and sometimes difficult to follow. Imad has really brought about the forensic opportunity which has led to this

head of Dr Al-Dowaisan's claim. However, Dr Al-Dowaisan did not have to avail himself of that opportunity.

218. I have already rejected Dr Al-Dowaisan's evidence about what he says he was told by Imad about the 'in-trust' shareholdings. Similarly, I reject Dr Al-Dowaisan's evidence that he was ever told by Imad (or by Husham) that the mandate accounts were to be used for his own investment returns or that his monies would be paid into the mandate accounts.

219. Almost five years into their business relationship, there was no objective need for the first of these accounts to be opened with NatWest. Monies had been flowing freely between Dr Al-Dowaisan in Kuwait and Mayfair, and its associated entities, over all those years.

220. In his witness statement (at paragraph 55), Dr Al-Dowaisan asserts that it was his understanding that all payments out of the mandate accounts would be made on his express instructions. However, he does not recall ever providing any express instructions for any payment to be made out of those accounts. Indeed, the first time that Dr Al-Dowaisan said that he had reason to make enquiries about the NatWest account was in February 2010 (almost ten years after the account was opened), when he received a letter from NatWest about a dishonoured cheque in the sum of £32,000.

221. I find all of this incredible if Dr Al-Dowaisan had really been told that these accounts were **his** accounts which would be used to receive the profits from **his** investments. It is entirely inconsistent with the detailed questioning of Imad by Dr Al-Dowaisan about his investments in the many development projects which was revealed during the course of Mr Hardwick's probing cross-examination of Dr Al-Dowaisan. The fact that Dr Al-Dowaisan knew that he had no beneficial interest to the sums in the mandate accounts may also go some way towards explaining his otherwise inexplicable decision to pay over the proceeds of his agreed recovery from NatWest in respect of the UK mandate account to Ala'a Hamond and her lawyer.

222. In my judgment, this was an opportunistic claim advanced by Dr Al-Dowaisan in the light of Imad's previous false evidence about the ownership and operation of the NatWest mandate account. This head of claim therefore fails.

223. I turn then to the counterclaim. Having upheld the case of the defendants on the 'on-trust' shareholding issue, I am satisfied that the defendants can show that the £400,000 received by Dr Al-Dowaisan by way of settlement of his claim against NatWest represents the traceable proceeds of monies to which Imad and Husham are entitled (although, for reasons which are not presently clear to me, this counterclaim is brought only by Imad, and not also by Husham).

224. Dr Al-Dowaisan invites the court to infer that if Imad and Husham always intended, from the outset, to use the mandate bank accounts for their own monies and they in fact did so, the likelihood was that it was due to escape any tax that might otherwise have been lawfully due. The claimants submit that, on the evidence, no monies from the mandate accounts (including the NatWest account) were ever declared by Imad for tax purposes, and that he gave false evidence in providing the response to the notice to admit facts in order to disguise the fact of his unlawful tax evasion. In those circumstances, Dr Al-Dowaisan submits that a defence of illegality should succeed because, in reliance on the legal principles set out by the Supreme Court in the leading judgment of Lord Toulson in *Patel v Mirza* [2016] UKSC 42, reported at [2017] AC 467, the integrity of the legal and tax systems would be damaged if Imad were to be permitted to benefit from his own wrongdoing.

225. At paragraphs 519 to 525 of the defendants' written closing they submit that Dr Al-Dowaisan has not come close to discharging the burden that falls upon him of establishing a defence of illegality. It is said not to be enough for the claimants to point to some questions raised by the tax returns. I reject this submission. In their written closing, the claimants have subjected the tax returns, and the oral evidence of Imad in cross-examination, to detailed scrutiny. I acknowledge the point made by Mr Hardwick that Imad went into the witness box

only the day after the tax returns and supporting calculations had been disclosed, on the previous Sunday afternoon. However, the response to the notice to admit facts, verified by a statement of truth signed by the defendants' solicitor, was unequivocally to the effect that each of Imad and Husham had declared the taxable income and any gains or losses on their self-assessment tax returns for the relevant period to Inland Revenue or HMRC.

226. As Mr Singla submitted in closing (at Day 9, pages 171 to 173), one would have expected a man who has instructed his solicitor to tell the court that he has declared his income in his tax returns, and who knows that those returns and the supporting tax calculations have been ordered to be disclosed before he goes into the witness box, to have done the work to be able to come along to court to explain where in those returns the income and gains have been declared.

227. I am satisfied that the true reason for the establishment of the NatWest mandate account in the name of Dr Al-Dowaisan, expressly (as I find) as a nominee for Imad and Husham, was for the purpose of concealing the beneficial entitlement of Imad and Husham to the monies passing through this account. I am also satisfied that this was done for the purposes of tax evasion and that the account was in fact used for that purpose. No doubt this explains the false evidence that Imad gave to the police about his entitlement to the monies in the NatWest mandate account, and also his failure to disclose the true position even to his own solicitors and to counsel previously instructed.

228. The applicable legal test for a defence of illegality is now to be found in the majority judgment of Lord Toulson in *Patel v Mirza*. At paragraph 107 Lord Toulson says this:

> "In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled as a matter of public policy, various factors may be relevant ... Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."

229. I note that at paragraph 108 Lord Toulson went on to say this:

"Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility of the criminal courts and in some instances, statutory regulators ... Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing."

230. Lord Toulson summarised the effect of his judgment at paragraph 120:

"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

231. The claimants submit that to uphold Imad's claim to trace into the NatWest settlement proceeds so as to enable him to benefit from his original purpose of concealing his asserts from Inland Revenue and HMRC would impair the integrity of the legal and tax systems. In his oral closing, Mr Singla submitted that there has been a sea-change in the climate affecting people who try to evade taxes and not pay their fair dues to the public tax system. Tax evasion is said to now attract a very different response from public morality than it did in the early 1990s when *Tinsley v Milligan* was decided.

232. The defendants address the trio of necessary considerations identified by Lord Toulson at paragraph 528 of their written closing. It is said: (1) That if this was a case of tax evasion, the relevant prohibition that has been transgressed is the receipt of income or gains without paying HMRC the share of those income and gains to which it is legally entitled. Denying Imad's counterclaim and allowing Dr Al-Dowaisan to treat the £400,000 as his own, would not assist the underlying purpose of ensuring that HMRC receives the monies it is due. (2) Dr Al-Dowaisan's illegality defence proceeds on the assumption that the money in the UK account is beneficially owned by Imad. There is a public policy interest in protecting people's property rights. Denying Imad's counterclaim would only subvert that right. (3) Even if there has been any tax evasion by Imad in respect of the monies flowing through the UK account, the denial of Imad's claim to recover £400,000 would not be a proportionate response to the illegality. It would be disproportionate if, as a consequence, Imad were to be denied recovery of the £400,000 beneficially owned by him from Dr Al-Dowaisan. Relying on what was said at paragraph 108 of Lord Toulson's judgment (previously cited), the defendants say that it is not this court's function to punish.

233. On this aspect of the case, I prefer the submissions of the claimants. In my judgment, to refuse to uphold illegality in this case would be harmful to the integrity of both the legal and the tax systems of this country. For the court to deny Imad's counterclaim, and to allow Dr Al-

Dowaisan to treat the £400,000 as his own, will serve to discourage third parties, as well as Imad, from taking steps to facilitate tax evasion in the future, and will thereby assist the underlying purpose of ensuring that HMRC receives the tax which is its due. It will also serve to discourage people, such as Imad, from lying to the police in circumstances which, as in this case, imperil the integrity of criminal proceedings. The prosecution of Oday Hamond collapsed because of the inconsistent evidence given by Imad about the true beneficial entitlement to the monies in the NatWest mandate account. That evidence was the direct product of Imad's decision to use that account to assist in tax evasion. A highly relevant public policy on which the dismissal of this counterclaim may have an impact is that of bringing dishonest persons to justice in the criminal courts.

234. In the circumstances of the present case, including the collapse of a criminal prosecution and the non-declaration of tax, it would, in my judgment, not be a disproportionate response, or an undue interference with property rights, to deny Imad his right to recover the £400,000 which was received by Dr Al-Dowaisan as compensation from NatWest. Imad had felt unable to pursue the recovery of this sum from NatWest himself because of his use of the mandate account, from which the monies were derived, for the purposes of tax evasion. In these circumstances, it would not be just to allow Imad to benefit from the recovery of this sum by Dr Al-Dowaisan. Notwithstanding the interference with his rights of property under the First Protocol to the European Convention on Human Rights, article 1, it would be a proportionate response to Imad's conduct to refuse the relief to which he would otherwise be entitled as a matter of public policy.

235. I would therefore dismiss the counterclaim.

8. Paramount

236. The present status of the dispute between the parties concerning the fourth defendant, Paramount Properties Limited, is not entirely clear to me. Paramount is an Isle of Man company controlled by Imad, Husham and Dr Al-Yassin, as its directors, which owns six properties in London. Dr Al-Dowaisan invested £750,000 in Paramount, which was funded by his share of the sales proceeds from the Ellesmere Street project. This investment gave him an agreed entitlement to a 47.54% shareholding in Paramount. To date, he has not been registered as a shareholder, nor has he received any return on his investment.

237. The £750,000 investment was documented in the terms of a written loan agreement (later amended) but nowhere in either of the two documents was the true agreement that Dr Al-Dowaisan's investment would entitle him to a shareholding in Paramount ever recorded. Until the service of the defence in these proceedings admitted Dr Al-Dowaisan's entitlement to a 47.54% shareholding in Paramount, the defendants' position had been that Dr Al-Dowaisan had merely advanced monies to Paramount by way of loan to fund its business activities, including the purchase of the six properties in London.

238. The present position is that the defendants now acknowledge Dr Al-Dowaisan's entitlement to be registered as a shareholder in Paramount, subject to the provision of appropriate and acceptable ‘know-your-client’ and source of funds information and supporting documents. In the light of the fact that Dr Al-Dowaisan has still not been registered as a shareholder in Paramount, the claimants ask the court for a declaration that he is entitled to be so registered and that 47.54% of the shares are to be held on trust for him in the meantime. The claimants also seek an account of any rental income or dividends to which he may be entitled.

239. The defendants' position is that now the claimants' solicitors have provided ‘know-your-client’ and source of funding information to Paramount by letter dated 29 November 2018, the claimants are entitled to a 47.54% shareholding in Paramount. The difficulty is said to be that until that letter, no attempt had been made to provide the required information to Paramount's

corporate agents in the Isle of Man. The defendants' position would appear to be that it is not yet apparent whether further documentation, which has subsequently been provided to the corporate agents by the claimants' solicitors, will be adequate to satisfy them that they can properly issue and register the relevant shares in favour of Dr Al-Dowaisan in accordance with applicable Isle of Man regulatory requirements.

240. In these circumstances, it is not clear to me what relief may presently be appropriate. There is no evidence that any rents or dividends have ever been received by Imad or Husham personally, and therefore it does not seem to me that it has been demonstrated that they are an accountable party on the basis of the receipt of monies in an accountable capacity. Any remedies would appear to lie against Paramount once Dr Al-Dowaisan has been registered as a shareholder. I am not sure that any declaration is required from the court as to Dr Al-Dowaisan's entitlement to be registered as a shareholder in Paramount if there is an agreement to that effect which can be recorded in any court order. Nor is it clear to me whether any shares of Paramount have yet been issued to which any trust can attach or, if so, who is presently the registered holder of those shares. The court will require further submissions as to the appropriate form of order in this regard.

9. Conclusions

241. For the reasons I have set out at some length, my conclusions can be summarised as follows:

(1) I find that Imad, still less Husham, did not owe any personal duty to account to the claimants or either of them.

(2) I find that the relevant Mayfair company owed a limited duty to account in respect of the particular projects in which it was itself engaged: (i) for sums received from the claimants; and (ii) for sums released to it by Gorvins for re-investment or direct payment to the claimants, but not otherwise.

(3) In the case of the Moroccan development companies, as the holders of the foreign currency bank account into which money was received for investments, I find that each of Imad, Husham and Mr Al-Yassin were liable to account for such monies, but such liability ceased once those monies were paid over to the relevant Moroccan development company.

(4) As the trustees of the shares in the Moroccan development companies, I find that Imad, Husham and Mr Al-Yassin were also liable to account to Dr Al-Dowaisan for any monies or other benefits received in their capacity as such shareholders on the basis that they were status-based fiduciaries and had received monies in an accountable capacity.

(5) Subject to further submissions in relation to the 1.074 million dirhams tax retained in Morocco, I make no order for an account.

(6) I find that the 'on-trust' shareholdings in Spath Road, Palatine Road, City Road and Hatton Gardens were all held on trust for Imad and Husham to the exclusion of any beneficial interest in favour of Dr Al-Dowaisan. It follows that any claim for an account to recover the proceeds of those investments, and for any consequential account, therefore fails.

(7) I find that the claimants had no beneficial interest in, or entitlement to, any of the moneys in the mandate accounts, and their claims in relation thereto therefore fall to be dismissed.

(8) I find that it would be a proportionate response to Imad's conduct in opening and using the NatWest mandate account for the purposes of tax evasion to refuse the relief to which he would otherwise have been entitled on his counterclaim as a matter of public policy.

I will await further submissions as to the consequences of this judgment and any consequential court orders.

242. So that concludes this judgment.