



Neutral Citation Number: [2018] EWHC 2483 (Ch)

**IN THE HIGH COURT OF JUSTICE**

**Claim No: HC-2015-001647**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**BUSINESS LIST (Ch D)**

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

Date: 25 September 2018

**Before :**

**MR JUSTICE NUGEE**

**Between :**

**(1) SIR OWEN GEORGE GLENN KNZM ONZM**

**(2) KEA INVESTMENTS LIMITED**

**Claimants**

**- and -**

**(1) ERIC JOHN WATSON**

(personally and as trustee of the Richmond Trust)

**(2) NOVATRUST LIMITED**

(personally and as trustee of the Park Trust,  
Clearview Trust and Coronet Trust)

**(3) MILES JOHN ANTHONY LEAHY**

**(4) NUCOPIA PARTNERS LIMITED**

**(5) SPARTAN CAPITAL LIMITED**

**(6) MUNIL DEVELOPMENT INC**

**Defendants**

**Elizabeth Jones QC, Justin Higgs, Paul Adams and Oliver Jones (instructed by Farrers) for the  
Claimants**

**Paul McGrath QC and James Brightwell (instructed by Grosvenor Law) for Mr Watson**

Hearing date: 10 September 2018

## **Approved Judgment**

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

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MR JUSTICE NUGEE

**Mr Justice Nugee:**

*Introduction*

1. I handed down my judgment after trial of this action on 31 July 2018, the neutral citation being [2018] EWHC 2016 (Ch) (“**the main judgment**”). A number of consequential issues were argued before me on 10 and 13 September 2018, one of which was the appropriate rate of interest. At the conclusion of the argument on that point on 10 September I ruled that the appropriate rate was 6.5% pa, compounded annually, indicating that I would give my reasons later. This judgment contains my reasons for that ruling.
2. I do not propose in this judgment to set out the background in detail, but will assume that anyone reading it will have read, or will have access to, the main judgment, and I will also adopt the same abbreviations. But it may be helpful to briefly recap the context in which the issue arises:
  - (1) I found that Kea had been induced to enter into the July agreements by deceit and that the July agreements and the subsequent agreements were liable to be set aside for deceit (among other grounds): see the main judgment at [528(1)].
  - (2) The consequence of that was that Kea was entitled to treat Spartan as a constructive trustee of its money and claim back from Spartan the £129m it had paid to it: see the main judgment at [540(5)].
  - (3) That also entitled Kea to claim interest under the equitable jurisdiction (“**equitable interest**”) from Spartan on the £129m: *ibid.*
  - (4) Kea’s claim against Spartan had in fact been settled by the 2017 settlement with Novatrust, but the quantum of its claim against Spartan remained a live issue as it formed the basis of Kea’s claim against Mr Watson for equitable compensation. I found that Mr Watson was liable to pay Kea equitable compensation if the total sum recoverable from Spartan fell short of the amount of Kea’s claim against it: see the main judgment at [541]-[542].
  - (5) In that way the rate of interest that would have been payable by Spartan to Kea on the £129m had its claim not been settled directly affected the amount recoverable by Kea as equitable compensation from Mr Watson.
3. In the main judgment I then had to deal with a contested amendment to plead a claim to interest at 8% pa. This was based on what it was said Kea would itself have done had it not invested in Spartan. I refused the amendment for the reasons given at [543]-[554], which were in effect that it was neither open to Kea on the unamended pleading, nor in accordance with the authorities, which indicated that the Court should not have regard to what the individual claimant would have done but should adopt a broad brush approach based on the general attributes of the claimant.
4. In the course of refusing the amendment I said this (at [549]-[551]):
  - “549. It can be seen that these citations are concerned with cases where the rate of interest was based on the rate at which the claimant can borrow, and decide that one does not look at the individual claimant but at what a class of

claimant (small business, large business and the like) can borrow at. I accept that the borrowing rate, which has been said to be suitable in commercial cases, is not necessarily suitable in all types of case (see Hildyard J's detailed analysis of this point in *Challinor v Bellis*) and that where the claimant that is out of pocket is a trustee that would otherwise have invested in proper trustee investments, the appropriate rate would not be the borrowing rate but a rate to reflect the return on such investments. I also accept that this would apply to Kea which although not itself a trustee is a vehicle for trustee investment. However I do not see that this affects the principle that in assessing such a rate the Court adopts a broad brush approach based on what a person with the general characteristics of the claimant might have received by way of investment on trustee investments, not a rate that reflects what the individual claimant would itself have done.

550. That is I think supported by the usual practice in cases where interest is sought against defaulting trustees. The Court does not as far as I am aware attempt to investigate what other investments the particular trust fund might have made, but adopts, on a broad brush basis, a rate that is intended to be a proxy for the rate of return that trustee investments would normally earn. In the 19<sup>th</sup> century that was 4%, but in more modern times has been fixed by reference to investment returns. I would accept, by analogy with what Forbes J said in *Tate & Lyle v GLC*, that the Court could take into account the general characteristics of the trust in question, so if large private trusts were shown to earn higher investment returns than small ones that could be taken into account, but I do not accept that under this jurisdiction the Court would have regard to what the claimant itself would have done or its particular appetite for investments.

551. In the present case the evidence that Ms Jones relies on in support of the claim to 8% interest is not evidence of what large trust funds are in general able to obtain by investing in proper trustee investments, but evidence of what Kea itself would have wanted to do and sought to do. I do not need to detail the evidence she relied on as in accordance with the principles that I have referred to, I do not think this sort of inquiry is one that the Court would entertain on an application for equitable interest."

5. I reverted to the question at [561]-[564], where among other things I said this:

"563. I have decided above that Kea's claim for equitable interest at 8% cannot be sustained on the basis on which it is sought to be put forward, and that the appropriate rate of interest depends on that available on proper trustee investments. That is not something that the parties have really addressed. Ms Jones quite correctly points out that the question of what rate of interest should be awarded is very often dealt with after judgment, and it appears, judging from the reported cases (and my own experience), that it is not uncommon for parties to put material before the Court after judgment to justify a particular interest rate.

564. That raises the question therefore whether I should assess the appropriate rate now on such material as I have, or give the parties a further opportunity to adduce material on this question. This question was not dealt with in closing submissions and although Question 9 is on the agreed list, I think I ought to hear from the parties as to whether Kea (and indeed Mr Watson) should have any further opportunity to establish what an appropriate interest rate should be."

6. In those circumstances Ms Jones QC, who appears for the Claimants, submits that I have already decided that the appropriate rate of interest for these purposes is to be measured by the return available on proper trust investments, and that it is indeed appropriate to allow her to adduce further material on that question. She relies for that purpose on newly-adduced material from Farrers, the Claimants' solicitors, which addresses the very question as to what rate of return a trust could expect to receive from proper trustee investments. I give the details below.
7. Mr McGrath QC, who now appears for Mr Watson, submits that it is too late for the Claimants to seek to adduce the material that they rely on; that the appropriate rate should in any event, in accordance with the authorities, be determined having regard to the cost of borrowing and not the return on investments; and that there is no good reason to adopt a rate different from that adopted in recent cases of 3% above base rate.

*Preliminary matters*

8. I will deal first with certain preliminary matters which I can dispose of quite shortly.
9. First, although I did express the view in the main judgment that the appropriate rate depended on that available on proper trustee investments, I do not think I should prevent Mr McGrath from arguing that that was to take a wrong view. As appears from the main judgment the argument put forward in closing submissions at trial by Mr McCaughran QC (who then appeared for Mr Watson) was primarily focussed on the submission that Kea should not be permitted for the purposes of equitable compensation to rely on evidence as to what it would actually have done with the money instead if it had not been induced to invest in Spartan. Mr McCaughran did not dispute that Spartan would be liable to pay equitable interest on the £129m if Kea's substantive claims were established, but there was little argument directed specifically at what such a rate of interest should be. That was why I declined in [563]-[564] to deal with the rate without further argument.
10. In those circumstances, I do not think it right to prevent Mr McGrath from arguing that I was wrong to say that the appropriate rate depended on investment returns. The Court has an undoubted jurisdiction to reconsider a judgment at any time until it has been perfected by the sealing of an order giving effect to it; this jurisdiction, confirmed by the Court of Appeal in *re Barrell Enterprises* [1973] 1 WLR 19, has been held by the Supreme Court in *re L* [2013] UKSC 8 not to be restricted to exceptional circumstances but to be exercisable in accordance with the overriding objective. In circumstances where the parties were invited by me to make further submissions on the question of interest, it seems to me more in accordance with the overriding objective of dealing with cases justly (and at proportionate cost) to allow Mr McGrath to deploy his whole argument notwithstanding the views I have already expressed in my main judgment, not least because the sums that turn on this point are very considerable, being in the order of some £20m. It is only fair to add that Ms Jones, who had at one stage intended to invoke the *re L* jurisdiction herself in relation to another point, did not strenuously oppose this course but sought to support the view I had expressed on its merits.
11. Second, as appears from the main judgment at [545], Mr McCaughran did not dispute that in the case of equitable interest, the interest should be compounded. Mr McGrath

did not seek to re-open that point. On the other side Ms Jones did not seek to have the interest compounded any more frequently than annually. It was therefore in effect common ground that whatever rate was awarded should be compounded annually, and I have not heard any argument, nor do I express any views, as to when it is or is not appropriate to direct interest to be compounded, and with what rests. The only question I have heard argument on is the annual rate itself.

12. Third, as appears below, Ms Jones' arguments were premised on the basis that the relevant principles could be found in the cases dealing with claims against defaulting trustees, the paradigm case being where a beneficiary sued a trustee for loss to the trust fund (whether by the trustee misappropriating money or investing it in unauthorised investments or otherwise). I did not understand Mr McGrath to contend that this was wrong in principle. In any event it does seem to me to be the right approach. Spartan received £129m from Kea as a result of deceit. Kea was therefore entitled to treat Spartan as a constructive trustee of the £129m for it. Kea was itself, as everyone knew, a vehicle for investment of trust monies. In those circumstances I do not see why Spartan's liability to account to Kea for interest should be any different from that of a trustee being sued by a beneficiary for misappropriating trust money or otherwise causing it to be lost to the fund. The relevant inquiry therefore is how equity should assess a rate of interest against a defaulting trustee.
13. Fourth, although Mr McGrath did object to the Claimants adducing their material as to investment returns at this stage, I propose to have regard to it. Mr McGrath's overarching submission is that regard should be had to the cost of borrowing not investment returns, in which case the material would be irrelevant but it would do no harm to look at it. If however the level of investment returns is in principle relevant to the assessment of the rate of interest, then the material is both highly relevant and very helpful.
14. I should at this stage describe what this material consists of. It consists of published data from two sources. One is a set of private client indices published by Asset Risk Consultants ("ARC") and available from their website. The other is a set of trustee managed portfolio indices provided by the Society of Trust and Estate Practitioners ("STEP") to its members.
15. The ARC indices are compiled from data from participating investment managers. Over 70 investment houses contribute data. They report the actual performance (net of all fees and charges) of discretionary mandate portfolios larger than £250,000. ARC assign the contributed data series to one of four categories (Cautious, Balanced Asset, Steady Growth and Equity Risk) by reference to a comparison between their returns over cash and pure equity returns, and within each category take the geometric average to compile the indices. The indices start at 100 on 31 December 2003. Farrers have identified the changes in each index for the 6-year period from 30 June 2012 to 30 June 2018. They have also calculated the equivalent annual rate if compounded annually. These are as follows:

| <u>Index</u>      | <u>6-year return</u> | <u>Equivalent annual rate</u> |
|-------------------|----------------------|-------------------------------|
| ARC Cautious      | 25.68%               | 3.88%                         |
| ARC Balanced      | 41.63%               | 5.97%                         |
| ARC Steady Growth | 56.82%               | 7.79%                         |
| ARC Equity Risk   | 69.23%               | 9.16%                         |

16. The STEP indices are similar in nature. They are compiled from data provided by investment managers managing investment portfolios on a discretionary basis on behalf of persons acting in a fiduciary capacity, and are also compiled on the performance of portfolios on a net basis after fees. They are allocated to one of three categories (Low, Medium and High Risk). The indices start at 100 on 31 December 2009. As with ARC, Farrers have compiled a table of changes in each index over the 6 year period from June 2012 to June 2018, and an equivalent rate if compounded annually, as follows;

| <u>Index</u>     | <u>6-year return</u> | <u>Equivalent annual rate</u> |
|------------------|----------------------|-------------------------------|
| STEP Low Risk    | 29.16%               | 4.36%                         |
| STEP Medium Risk | 49.12%               | 6.89%                         |
| STEP High Risk   | 66.53%               | 8.87%                         |

17. These figures and the materials on which they were based were provided by Farrers to Grosvenor Law (Mr Watson's solicitors) on 17 August 2018. Mr McGrath's objection was not that he needed more time to consider or deal with the material, or that it was of doubtful quality, or that he wanted to counter it by putting in evidence of his own. On the contrary he accepted both that the material was objective in the sense that it had not been produced for the purposes of this case, and that the figures looked impressive and that it looked as if a lot of work had gone into producing them. It does seem to me that on the face of it the material is objective and of high quality and a good indication of real-world investment returns in the relevant period. In the absence of any particular criticism of the reliability of the indices, I do not see why the Court should not have regard to the material. Mr McGrath did object that it was too late to adduce it, but I do not think this is right. It is (as I said in the main judgment at [563]) common for the rate of interest to be dealt with subsequent to judgment on the substantive issues being given, and it also seems to be common for parties to put any material they rely on before the Court at that stage. That seems to me a more convenient course than requiring parties to adduce evidence going only to the appropriate rate of interest as part of the trial, and provided that everyone has an opportunity to consider it and if necessary answer it, I see no reason why that should not be done.

*What should the Court have regard to in assessing the rate?*

18. Having cleared away these various points, the main point can now be addressed, which is whether in assessing the relevant rate (that is the rate of equitable interest payable by a defaulting trustee) it is appropriate for the Court to have regard, as Ms

Jones submits, to investment returns, or, as Mr McGrath submits, to the cost of borrowing.

19. I was taken by Ms Jones on an extended historical journey through the authorities. That is not a criticism, as it was a helpful exercise, and I shall try and summarise the results of it.
20. I was referred first to the standard textbooks, *Lewin on Trusts* (19<sup>th</sup> edn, 2015) at §39-060ff, and *Snell's Equity* (33<sup>rd</sup> edn, 2015) at §30-020. These confirm that the traditional approach was to award interest at defined rates, namely 4% in the standard case, and 5% in certain non-standard cases. Among the cases where the higher 5% rate was awarded were cases where the trustee had used the money in his own business (in which case he was presumed to have made more than the standard rate), and where his misconduct was of a serious nature (described by *Lewin* as “*where trustees have been guilty, not merely of negligence, but of actual corruption, or misfeasance amounting to a wilful breach of trust*”, and by *Snell* as “*Where the trustee is guilty of fraud or serious misconduct*”). Ms Jones also drew my attention to the comment in *Lewin* that the Court’s discretion is “*unusually free*”.
21. Ms Jones submitted that there were two theoretical justifications for awarding interest against a defaulting trustee. One was that it was a means of stripping the trustee of profits made with the trust’s money if for some reason it was too difficult, or the claimant did not want to elect, to find the actual profits. For that she referred me to *Docker v Somes* (1834) 2 My & K 656. This was a case where executors and trustees had used sums belonging to the estate in their own business. They had charged themselves 5% on such sums, but the plaintiff sought an account of their actual profits. In upholding the Vice-Chancellor’s decree directing such an account, Lord Brougham LC stated (at 664) the general rule that wherever a trustee dealt with the trust estate for his own benefit he should account to the *cestui que trust* for all the gain which he had made, and (at 665f) that:

“The reason which has induced Judges to be satisfied with allowing interest only I take to have been this: they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock, and the process became still more difficult, where a great proportion of the gains proceeded from skill or labour employed upon the capital. In cases of separate appropriation there was no such difficulty; as where land or stock had been bought and then sold again at a profit; and here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavouring to ascertain what profit had really been made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and assign that to the trust estate.”

I accept that that supports Ms Jones’ submission that one basis for awarding interest against a trustee was as a convenient substitute for an account of actual profits in cases where the trustee had employed trust money in his own business.

22. But interest is not of course limited to cases where the trustee has made, or is assumed



to have made, profits by the use of the trust money. It applies whatever the trustee has done with the money. Ms Jones' submission was that the other justification for awarding interest was to compensate the beneficiaries for the return which should have been made on the money. She referred me to a statement by Lord Cranworth LC in *Attorney-General v Alford* (1855) 4 De G M & G 843 at 851 (cited in *Wallersteiner v Moir (No 2)* [1975] QB 373 ("*Wallersteiner*") at 397 by Buckley LJ) as follows:

"What the court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it."

In that case Lord Cranworth directed the defendant trustee to pay interest at 4% in circumstances where the facts showed that he had not made a profit at all – see at 853:

"I should be very glad to say that he ought to pay five per cent., but I do not think I can; for I not only say that he has not made a profit, but the circumstances seem to me to demonstrate that he has not made a profit."

That I think is therefore an illustration of the Court awarding interest on the basis that the trustee ought to have received it, not that he had in fact done, or could be presumed to have done.

23. Ms Jones also referred me to *re Emmet's Estate* (1881) 17 Ch D 142. Here a trustee of a will should have paid a trust fund over to a child when he attained 21, but failed to do so; some of it remained invested in proper trustee investments, but other parts were invested in unauthorised investments. Hall V-C held that the trustee continued to hold the fund on the same trusts (which included a trust to accumulate) and that the trustee was accountable to the plaintiff. As to such portions of the fund that had been properly invested the trustee was liable for the actual interest he had received; but as to those portions which had been invested improperly the plaintiff was entitled to treat them as not having been invested at all. On those monies (and on monies which were in fact not invested) he awarded interest of 4% compound. That was clearly not done to strip the trustee of profits he had actually made or was presumed to have made, and I accept Ms Jones' submission that the reason why interest was awarded was to compensate the plaintiff for the trustee's failing to invest those sums in the way he should have done (compounded because of the trust to accumulate).
24. I have not been referred to any material which sheds light on why the conventional figure of 4% was adopted for this purpose. But it would seem to follow from the awards in *A-G v Alford* and *re Emmet's Estate* that the figure was regarded as representing what the trustee ought to have received for the benefit of the beneficiary. That has a certain logic to it. In general trustees of a fund are under an obligation to invest trust money for the benefit of those interested in the fund. If a trustee has caused loss to the fund in some way, the beneficiaries have not only lost the capital sum, but have also lost the return which that capital would have made if properly invested. The "*obligation of a defaulting trustee is essentially that of effecting restitution to the trust estate*", that is "*to restore to the trust estate the assets of which he has deprived it*" (*Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 ("*Bartlett*") at 543B, 545C per Brightman LJ). So it does not seem surprising that the trustee is liable to account to the fund not only for the capital sum that has been lost

but the income that has been lost while the fund has been depleted. The natural way to measure that is to award a figure which represents the rate of return that would have been made if the fund had been invested as it should have been, that is in proper trustee investments.

25. That was in effect the view that I expressed in the main judgment at [550] (cited at paragraph 4 above) where I said that the traditional 4% figure was “*intended to be a proxy for the rate of return that trustee investments would normally earn.*” That was admittedly without the benefit of the citation of any authority, but does seem to be supported by the authorities which Ms Jones showed me. At any rate I have not been shown any material which suggests any different rationale for the award of 4% in ordinary cases of breach of trust. I should make it clear that I have not had any evidence as to what rate of return could in fact have been expected on trustee investments in the 19<sup>th</sup> century, but in *A-G v Alford* there is reference to the defendant purchasing 3½% annuities (paying slightly under the nominal value for them), and in *re Emmet’s Estate* significant parts of the fund had been invested on mortgage at either 4% or 5%. That is admittedly very limited material from which to draw any inferences at all, but does perhaps suggest that a rate of 4% was not unrealistic as a proxy for returns on proper trustee investments.
26. I was next referred to two later cases where the Court departed from the traditional fixed rates of 4% or 5%, namely *Wallersteiner* in 1974 and *Bartlett* in 1980. By then, as is well known, the UK was experiencing significant inflation (by contrast to the 19<sup>th</sup> century where the value of money was relatively stable). In *Wallersteiner* the Court of Appeal had previously given judgment in default of defence against Dr Wallersteiner for breaches of his duty as director (see *Wallersteiner v Moir (No 1)* [1974] 1 WLR 991), and one of the matters argued on further application to the Court of Appeal was the question of interest. All 3 members of the Court held that equitable interest should be awarded on the ground that Dr Wallersteiner was to be presumed to have made a profit (per Lord Denning MR at 388C, Buckley LJ at 398E-F and Scarman LJ at 406F); Lord Denning would in addition have awarded it on the ground that “*in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business*” (at 388E), but Buckley LJ disagreed (at 398H) and Scarman LJ did not add anything on this point.
27. So far as the rate of interest is concerned, the Court of Appeal awarded it at 1% above official bank rate or minimum lending rate. Lord Denning MR (at 388H) simply said that he thought that was the appropriate rate, without further explanation; Buckley LJ (at 399A) said:

“In earlier days, when interest rates were more stable than they are at present, the rate of interest used in such a case was 5 per cent. per annum. In the conditions of the present time I think it would be right to award interest at 1 per cent. per annum above the official bank rate or minimum lending rate in operation from time to time.”

Scarman LJ (at 406E-F) said:

“Though the truth is unlikely ever to be fully known, shrouded as it is by the elaborate corporate structure within which Dr. Wallersteiner chose to operate, one may safely presume that the use of the money (or the capital it enabled him to acquire) was worth to him the equivalent of compound interest at commercial rates

with yearly rests, if not more. I, therefore, agree that he should be ordered to pay compound interest at the rates, and with the rests, proposed by Lord Denning M.R. and Buckley L.J.”

The report of counsel’s argument does not disclose any particular argument about the rate. In those circumstances it is not easy to tell from the report why the Court of Appeal adopted the rate it did, the closest one comes to it being Scarman LJ’s reference to the presumption that the use of the money was worth at least the equivalent of a commercial rate – that is, as I understand it, a commercial borrowing rate. I was shown a table of bank rate starting in January 1975 (shortly after *Wallersteiner*, which was decided in November 1974) which showed that bank rate was then 11.25%.

28. *Bartlett* was decided in January 1980. It was a claim for breach of trust where the trustee had allowed a company in which the fund was the majority shareholder to engage in speculative development with disastrous results. On the question of interest Brightman LJ (sitting at first instance) said ([1980] Ch 515 at 546F-547C):

“I turn now to the question of interest. It is common ground that interest can be claimed on the compensation which is found due. Dispute only arises on the rate of interest to be charged. In former days a trustee was as a rule charged only with interest of 4 per cent. unless there were special circumstances. That rate seems to have prevailed as the general rule until recent years. The defendant has helpfully supplied the court with a table of bank and minimum lending rates, and bank deposit rates. Between 1963, the year in which the Old Bailey scheme began, and the present day there have been nearly 80 changes of bank rate of minimum lending rate and nearly 70 changes in Barclays Bank deposit rate. The bank or minimum lending rate during this period has varied between 4 per cent. and 17 per cent. and deposit rate has varied between two per cent. and 15 per cent. In these days of huge and constantly changing interest rates (the movement being usually upwards so far) I think it would be unrealistic for a court of equity to abide by the modest rate of interest which was current in the stable times of our forefathers.

In my judgment, a proper rate of interest to be awarded, in the absence of special circumstances, to compensate beneficiaries and trust funds for non-receipt from a trustee of money that ought to have been received is that allowed from time to time on the courts’ short-term investment account, established under section 6 (1) of the Administration of Justice Act 1965. To some extent the high interest rates payable on money lent reflect and compensate for the continual erosion in the value of money by reason of galloping inflation. It seems to me arguable, therefore, that if a high rate of interest is payable in such circumstances, a proportion of that interest should be added to capital in order to help maintain the value of the corpus of the trust estate. It may be, therefore, that there will have to be some adjustment as between life tenant and remaindermen. I do not decide this point and I express no view upon it. I merely mention it as something which may have to be considered by the trustees and their legal advisers.”

It can be seen that although Brightman LJ followed the Court of Appeal in *Wallersteiner* in departing from the traditional rates, he did not adopt the same rate of 1% above bank rate, but opted for the short-term investment account rate instead. I was shown a table of the rates payable on that account (see the *White Book* for 1999 at §5D-12) which shows that at the time of the hearing in January 1980 the rate was 15% (as compared with the then bank rate of 17%).

29. It can also be seen that Brightman LJ did not explain why he thought the short-term investment account was the appropriate rate to use. It is noticeable however that this was (by definition as it were) an investment rate, that is what trustees could have obtained by investing the money. It was not a borrowing rate.
30. I was next referred to three more recent cases which were cited to me at trial and which I referred to in the main judgment, namely *Fiona Trust v Privalov* [2011] EWHC 664 (Comm) (“*Fiona Trust*”), *Challinor v Juliet Bellis & Co* [2013] EWHC 620 (Ch) (“*Challinor*”) and *Reinhard v ONDRA* [2015] EWHC 2943 (Ch) (“*Reinhard*”).
31. In *Fiona Trust* Andrew Smith J had in his main judgment held the defendants liable to pay equitable compensation on certain claims arising out of schemes to pay commission in breach of fiduciary duty. In this supplementary judgment he dealt with interest at some length at [11]-[34]. At [14] he said:

“the court usually decides what rate of interest will provide just compensation by considering the rate at which the recipient could have borrowed the funds of which he has been deprived: see *Tate and Lyle Food and Distribution Ltd v GLC*, [1982] 1 WLR 149, 154, *Banque Keyser Ullman SA v Skandia UK Insurance Co Ltd and ors* (loc cit) and *Kuwait Airways v Kuwait Insurance* [2000] 1 AER (Comm) 972, 991F.”

Two points can be made on the statement that the Court usually has regard to borrowing rates. First, and most important, there was no dispute in that case that the rate was to be found by selecting an appropriate borrowing rate. The dispute was which such rate to use, the claimant arguing for US Prime Rate, or alternatively US\$ 3 month LIBOR + 2.5%, the defendant for US\$ 3 month LIBOR + 0.85% (see at [12]). Indeed Andrew Smith J pointed out at [14] that it had not been suggested that he should have regard to what return the claimants might have earned from investing the funds to which they were entitled.

32. Second, *Fiona Trust* did not concern a claim against a defaulting trustee for loss to a trust fund that ought to have been invested. It concerned loss to a trading company. So did the three cases to which Andrew Smith J referred. The *Tate and Lyle* case was a claim for damages for negligence and nuisance for failing to dredge. It was in that context that Forbes J said that one looked at the cost to the plaintiff of being deprived of the money which he should have had and (at 154C):

“I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld.”

The *Banque Keyser Ullman* judgment referred to is unreported and I have not seen it, but it was presumably part of the litigation reported at [1990] 1 QB 665, in which Steyn J (later reversed) held the defendant insurance companies liable to the plaintiff banks for damages for negligence and breach of the duty of utmost good faith. The *Kuwait Airways* case was a claim under an insurance policy in which Langley J had ordered an interim payment on the basis that it was very likely that the claimant would establish at trial that its loss exceeded the policy limit for cover for spares and equipment.

33. These cases therefore all share the characteristics of being claims by companies for compensation for losses sustained in their businesses. In such cases the Court has adopted a consistent practice of awarding interest by reference to borrowing rates; and it is apparent from *Fiona Trust* that it does not matter for this purpose whether interest is awarded under statute (now s. 35A of the Senior Courts Act 1981) on damages or money due (as was in fact the case in the earlier three cases), or is awarded in exercise of the equitable jurisdiction. There are no doubt sound practical as well as theoretical reasons for this consistent practice, and nothing I say is intended to cast any doubt on it. But I do not think that it can necessarily be read across to the rather different situation of a claim against a defaulting trustee for loss to a trust fund.
34. *Challinor* concerned a claim by individuals who had paid monies to the defendant firm in circumstances which Hildyard J in his main judgment had held to give rise to a resulting trust; his supplementary judgment considered the question of interest at length. It is too long to cite extensively from, but it is a detailed and valuable analysis which I have read carefully. The claimants were contending for 5% over base rate on the basis (i) that the Court “almost invariably” adopts what it would have cost a person in broadly the same position as the claimant to borrow the money of which he was deprived; (ii) that there is no longer a presumption of 1% over base and examples of higher rates (2%, 2½%, 3% and 5% over base) could be found in cases involving small businesses or individuals; and (iii) that the claimants had adduced evidence that an individual seeking to borrow a six figure sum unsecured would pay significantly in excess of 5% over base (see at [21]-[22]). The defendant’s counsel contended that it would be more appropriate to apply what he called an “investment rate”, that is such rate as would be earned on deposit, although, acknowledging that such rates had been unusually low, he suggested not more than 1% over base instead (see at [25]-[27]). It is to be noted that it was the claimants who were contending for a rate based on borrowing rates and the defendant who was contending for a rate based on what were termed investment rates but which I prefer to call deposit rates (to distinguish them from returns available from other investments).
35. Hildyard J said the authorities distinguished between two types of case (see at [31]-[32]). First there were cases relating to money lost in or in relation to the conduct of a business where the general assumption would be that money lost or detained would have be replaced by borrowing to replace that money; here the Court sought to identify an appropriate interest rate approximating to the cost that a claimant in that line of business would have incurred in borrowing money to replace the money lost or detained. I agree – this is the type of case exemplified by *Fiona Trust* and the authorities there referred to.
36. Second there were cases where any award was an accretion to the funds of the claimant rather than replacement of funds the claimant previously had; in such cases (of which the paradigm might be personal injury cases) the Court seeks to identify an appropriate rate to represent a minimum return based on deposit rates. I have not myself had any cases of this type cited to me, but the principle is a familiar one.
37. He then said:
- “33. This case does not really fit easily into either category. It seems to me an example of a third type of case, which is where the claimant is not running a business that depends upon credit, and where the loss of the money is likely

to deprive the claimant of other opportunities, but where any ordinary presumption of the need for credit is weak or non-existent.

34. In cases of this third type, in my view, neither a minimum investment basis nor a proxy borrowing cost basis, is really a logical proxy. Thus, it is unlikely that any of the Claimants in this case, being sophisticated investors, would have left money on bank deposit at such low rates of return; but it is also unlikely that any of them would have borrowed at (say) 5% over base rate to make further investments: even someone with an unusual appetite for geared investment would be likely to be put off. Further, neither reflects the larger reality that in this case the Claimants' real loss is the opportunity denied for further investment: and that is not measurable."
38. In the result he concluded (at [37]) that the appropriate rate was such rate as it was reasonable to assume that persons in the position of the claimants would have had to pay for monies for geared investment; after considering such evidence as he had (which was not in fact directed at such a rate) he awarded 3% over base rate (at [45]).
39. I agree that *Challinor* was a third type of case which did not readily fit into either of the other categories. As Hildyard J said, neither a rate based on borrowing rates nor one based on deposit rates reflected the reality which was that it was unlikely that the claimants would either have borrowed to replace the money lost, or, if they had had it, have left it on deposit at low rates. The adoption of the rate he did adopt was intended as a substitute for the claimants' real loss, namely the loss of opportunity to deploy their money in further investments, which he regarded as not measurable. That is entirely understandable in circumstances where trying to identify what the claimants might in fact have invested in would be both speculative and wrong in principle (for the reasons given in my main judgment the Court does not for these purposes take into account what the particular claimant might have done), neither party was contending for a rate based on any such exercise, and no evidence was adduced for that purpose.
40. Hildyard J was not asked to consider any of the cases concerned with defaulting trustees. Again I do not find that surprising: although the ground on which Hildyard J found the defendant liable was breach of trust, the trust concerned was not a conventional settlement of a fund on trustees for them to invest for the benefit of beneficiaries, but a resulting trust arising from the receipt by the defendant firm of the claimants' monies, under which the defendant's obligation was to return the money to the claimants. It was not suggested that the claimants were themselves trustees or under any obligation to invest the monies. Thus although his analysis is both interesting and informative, I do not think it ultimately assists in the question I am considering, which is the liability of a defaulting trustee who has caused loss to a fund which should have been invested.
41. *Reinhard* concerned the interest payable on various sums pursuant to a contract, and Warren J awarded interest under s. 35A Senior Courts Act 1981 at 3% over base. His judgment contains an analysis of some of the earlier authorities but unsurprisingly says nothing about interest payable by defaulting trustees. I do not think it assists on that question.
42. I was also referred to the recent Court of Appeal decision in *Carrasco v Johnson* [2018] EWCA Civ 87 ("*Carrasco*"). The judgment of Hamblen LJ shows (at [16])

that the Court of Appeal was referred to many of the cases I have referred to above, including the *Tate and Lyle* case, the *Banque Keyser Ullman* case, *Fiona Trust, Challinor* and *Reinhard*. At [17] Hamblen LJ set out some principles to be derived from those cases as follows:

“The guidance to be derived from these cases includes the following:

- (1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.
- (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants’ general attributes, but will not have regard to claimants’ particular attributes or any special position in which they may have been.
- (3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.
- (4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.
- (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates.”

At [19]-[26] Hamblen LJ considered the exercise of the judge’s discretion, concluding that it neither involved an error of approach nor was outside the wide boundaries of the legitimate exercise of the Court’s discretion. At [27] he said as follows:

“The Appellant’s arguments in this case highlight the importance of the principle that the court does not inquire into the detailed financial position of the claimant, but looks only at general or class attributes. To examine properly, for example, the claimant’s financial position throughout the relevant period; the borrowing carried out by her, when and on what terms; whether and how she needed so to borrow; the uses to which she might otherwise have put the money and the financial consequences of so doing; the extent to which any of these matters were known or in the reasonable contemplation of the Respondent etc. would have required a mini or indeed major trial, consumed significant time and expense and may well not have resulted in definitive answers. The broad approach which the court adopts is fair, practical and proportionate.”

43. I have set this out at some length because this is the only appellate decision to which I was referred since *Wallersteiner* and it is noticeable that in *Reinhard* Warren J commented at [2] that it was surprising that there had been no clear statement of principle by the Court of Appeal, House of Lords or Supreme Court about the correct approach to the exercise of the discretion in a case such as that. But the appeal in *Carrasco* was an appeal against an award by DJ Langley of statutory interest on the balance of unpaid loans at the rate of 3% per annum. Unsurprisingly therefore it too says nothing about the rate of interest payable by defaulting trustees.

*Conclusion*

44. Having completed the survey of the authorities to which I was referred, I can now state my conclusions.
45. First, none of the recent cases have been concerned with the question I am concerned with, namely what is the appropriate rate of interest to be awarded against a defaulting trustee. The most recent case to address this question in the context of a conventional trust under which the trustee's obligation is to invest a fund for the benefit of others is *Bartlett*.
46. Second, I do not see any reason to adopt a rate based on the cost of borrowing in such a case. There appears to be no historical precedent for it, and I do not see any logical justification for it. Unlike the case of a trading business or commercial claimants (where the general presumption, as referred to by Hamblen LJ in *Carrasco*, that they would have borrowed less seems a realistic one) it seems entirely unrealistic to assume that a conventional trust fund would borrow at all. It is not the practice of such settlements to borrow to fund their investment activities, and there is therefore no logic in a presumption that they would have borrowed less.
47. Third for the reasons I have given above it seems to me both logically correct in principle, and consistent with the early cases, that the rate should reflect the fact that by depriving the fund of capital, the defaulting trustee also deprives the fund, until the capital loss has been made good, of the income that such capital would have earned. That points to a rate based on a suitable investment return.
48. In *Bartlett* Brightman LJ used the short term investment account rate for that purpose. But that stood at 15% at the time and so was a very significant increase on the traditional rate of 4% which he described as "*the modest rate of interest which was current in the stable times of our forefathers*". The short term investment account is now called the special account. Ms Jones told me that the current special account rate is 0.1%. I am not sure that is accurate: according to the *White Book 2018* (vol 2, §6A-220) it was last set in 2009 at 0.5%. That may be the product of current monetary policy, but whether it is or not on any view the rate is currently very low and not such as a prudent trustee would be content with for investment of trust funds on anything other than a very temporary basis. To award the special account rate in such circumstances does not seem to me to be either fair to the receiving party or appropriate (nor indeed did Mr McGrath suggest I should do so).
49. I conclude that in the ordinary case of a defaulting trustee who is liable to make good a capital loss to the fund, the equitable interest to be awarded can be regarded as a means of compensating the fund for the income that has been lost to the fund; and that the rate of interest to be awarded can therefore be one that acts as a proxy for the investment return that trust funds with the general characteristics of the fund in question could expect to make. That is indeed the view I expressed in the main judgment, but I have approached the matter afresh in the light of the authorities cited to me and the arguments put forward; having done so, I see no reason to take a different view.
50. As I have already indicated, although Kea's claim against Spartan is not the claim of a beneficiary against a defaulting trustee, it seems to me closely analogous to such a



claim and that it is appropriate to award interest on the same principles. Kea's money was trust money, held as an asset of the Corona Trust and hence for the benefit of its beneficiaries. Kea was induced to part with the money in favour of Spartan by deceit in circumstances where Spartan knew that the money was trust money. If the money had not been paid to Spartan it would have remained in the fund where it was the duty of the trustee to invest it in suitable trustee investments. Spartan was liable as a result of the deceit to account to Kea for the capital sums as constructive trustee. In those circumstances it seems to me appropriate that it should also be regarded as liable to account to Kea for equitable interest on the same basis as if it had itself been a defaulting trustee who had caused loss to the fund, that is at a rate designed to compensate the fund for the loss of income arising from the loss of its capital. For reasons which I gave in the main judgment (and which are in line with the comments of Hamblen LJ in *Carrasco* at [27]) that is not to be determined by reference to evidence as to what Kea itself would have done had it not invested in Spartan, but by reference to the investment returns available generally to trusts with the same general characteristics as the Corona Trust, that is large private trusts with no special features.

51. I have already said that the material adduced by Ms Jones in the form of the ARC and STEP indices seems to me both objective and high quality. I see no reason not to adopt it as a reliable indication of the investment returns that could have been expected by large private trusts investing through professional investment managers.
52. The only remaining question is as to the appropriate rate to be derived from that material. Ms Jones asked me to have regard in particular to the STEP medium risk figure of 6.89%, pointing out that this was not only the middle of the three figures but the most common (29% of the portfolios being low risk, 41% medium risk and 30% high risk). She also pointed to the fact that an average of the two middle ARC figures (5.97% for ARC Balanced and 7.79% for ARC Steady Growth) was 6.88% and the fact that this was almost identical to the STEP figure. Mr McGrath said that if I were to have regard to the indices at all, I should adopt the lower rates in each case of 4.36% (STEP) and 3.88% (ARC) and award a rate based on the average of the two (4.12%).
53. On this I prefer Ms Jones' submissions. It does seem to me that if I am trying to find a proxy for typical trustee investment returns it is preferable to look at the middle of the available data rather than simply the lower end, and at returns which strike a balance between caution and risk. The fact that the two sets of data produce very similar figures for this is something that adds confidence that they do reflect the real world experience of funds invested on a discretionary basis by professional investment managers.
54. The authorities are consistent that one should adopt a broad brush approach. For that reason, and because I prefer to err on the side of caution, I did not adopt the precise rate of 6.886% that Ms Jones asked me to, but instead rounded it down to 6.5%.
55. That may seem quite a high rate, and over 6 years undoubtedly produces a significant sum. It is interesting however to compare it with the traditional rates. It will be recalled that although 4% was the standard rate, the Court would award 5% (which might be compounded) in suitable cases, one of which was where there was fraud or serious misconduct, which is certainly an apt characterisation of the present case. A return of 5% compound in times of stable money is approximately the same in real

terms as a return of 6.5% compound in times when the inflation rate is 1.5% per year (to be more precise, 5% interest at zero inflation is by my calculation the equivalent in real terms of 6.5% interest if inflation is 1.43% (ie  $106.5/105 = 1.0143$ )). I have no evidence of the rate of inflation in the UK over the last 6 years, but although low by comparison with the high inflation prevalent at the time of *Wallersteiner* and *Bartlett*, I think I can take judicial notice that it has not been nil, and I suspect it has been at least in the order of 1.5% pa if not more. In those circumstances an award of 6.5% interest would not seem to be out of line with the traditional rates. Be that as it may, it is the rate which in the exercise of what I understand to be an unusually free discretion I have awarded for the reasons I have sought to explain.

56. I will formally hand down this judgment in the usual way, but there is no need for counsel to attend unless there are any points which they wish to raise.