Neutral Citation Number: [2022] EWHC 2947 (Ch)

Claim No: BL-2020-000569

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Monday, 21 November 2022

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

(1) MS MELISSA VON WESTENHOLZ (Personal Representative of the Estate of Mr Michael Sanders, Deceased) **(2) MRS THALIA SANDERS** **(3) MR RUPERT SANDERS** **(4) MS MELISSA VON WESTENHOLZ**	**Claimant**
- and -	
(1) MR MARCUS GREGSON **(2) MR DANIEL EVANS**	**Defendant**

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PATRICK GREEN KC AND BEN NORTON (instructed by Croft Solicitors) appeared for the Claimants
PAUL SINCLAIR KC (instructed by Keystone Law) appeared for the Defendants
Hearing dates: 3-7 October 2022

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Approved Judgment

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 21 November 2022 at 10:30am

DEPUTY JUDGE ROBIN VOS:

Introduction

1. Michael Sanders, who was the first claimant in this action until he sadly passed away in July this year, believed that, between 2005 and 2008, he had invested £150,000 by way of subscription for a total of 80,000 shares in All Star Leisure Limited ("ASL") and All Star Leisure (Group) Limited ("ASLG"), both of which formed part of a group of companies ("the ASL Group") run by his son-in-law, Mark Von Westenholz ("Mark").

2. Mr Sanders intended that the shares would benefit the other claimants, being Mr Sanders' wife, Thalia Sanders, his son, Rupert Sanders ("Rupert") and his daughter, Melissa Von Westenholz ("Milly"). However, no shares were ever issued to any of the claimants. It is suggested that, instead, the shares ended up in Mark's name.

3. It subsequently transpired (in 2014) that Mark suffered from a gambling addiction and had withdrawn significant sums from the ASL Group without authorisation. The two defendants, Mr Gregson and Mr Evans were, at this stage, non-executive directors of ASLG and they worked hard to deal with the fallout from Mark's actions.

4. In 2018, ASLG paid a dividend of £5 per share, representing a total of £400,000 in respect of the 80,000 shares which Mr Sanders thought he had acquired for the benefit of his family (for convenience, I shall refer to these shares as the disputed shares). However, the dividend in respect of the disputed shares was retained by ASLG in reduction of the amounts which, at that time, Mark still owed to that company.

5. In September 2019, ASLG was placed into administration.

6. Although it might be thought that the main culprit is Mark for failing to arrange for the shares to be issued to the Sanders family, the claimants are seeking to recover the loss which they believe they have suffered (being the dividend of £400,000 in respect of the disputed shares) from Mr Gregson and Mr Evans personally.

The nature of the claims

7. The claimants rely on a number of different causes of action but they can be broadly grouped under two headings. The first group are claims which are trust related. The

second group are claims which rely on what are commonly known as the economic torts. The summary below gives a flavour of the issues which I will need to determine. Given the number of different causes of action, I will deal in more detail with the issues when I come to consider each one.

Trust related claims

8. The claimants say that Mark held 80,000 shares in ASLG for the benefit of one or more of them based on either an express trust, a resulting trust or a constructive trust. If this is right, they say that the defendants are liable as they have dishonestly assisted Mark to act in breach of that trust.

9. In July 2015, the disputed shares were transferred to the defendants to hold as trustees. Based on this, the claimants put forward three further causes of action:

    9.1 the defendants allowed the dividend to be retained by or paid to ASLG in circumstances where they knew that the Sanders family claimed an interest in the shares (referred to by the parties as the *Guardian Trust* principle following the decision of the Privy Council in *Guardian Trust and Executors Company of New Zealand Limited v Public Trustee of New Zealand* [1942] AC 115);

    9.2 the defendants dealt with the dividend in a way which they knew was inconsistent with the terms of the trust on which Mark had held the shares; and

    9.3 the defendants were in breach of their fiduciary duties, in particular putting themselves in a position of conflict as between their duties as directors of ASLG and their duties as trustees.

Economic torts

10. Pretty much the full suite of economic torts is relied on by the claimants. The claims can be summarised as follows:

    10.1 procuring a breach of contract – the contract in question being either the agreement by ASLG to issue the shares or an agreement by Mark to transfer shares to the Sanders family;

10.2 causing loss by unlawful means – the unlawful means were originally said to be either deceit or breach of the defendants' duties to ASLG resulting in ASLG's failure to issue shares to the claimants. However, following the evidence, the claimants accept that a claim based on deceit cannot succeed as there is no evidence of reliance on any false representations;

10.3 conspiracy to cause loss by unlawful means – leaving aside deceit (which is not pursued) the unlawful means are said to include breach of contract, breach of trust (or procuring such breaches) or breach of director's duties; and

10.4 conspiracy to cause loss by lawful means – it is the claimants' case that the defendants were motivated by malice in that their predominant intention was to cause loss to Mr Sanders.

11. The defendants deny that any of these causes of action are made out. They also defend the claims on the basis that they are time barred. However, in his closing submissions, Mr Sinclair (appearing on behalf of the defendants) accepted that the trust claims are not time barred as the relevant events took place from July 2014 onwards, the original claim form being issued in March 2020.

The evidence and the witnesses

12. The documentary evidence derives from disclosure given by the claimants and the defendants. This does not include disclosure of documents in the possession of the ASL Group. This has resulted in some gaps in the evidence. For example, final signed copied of charges granted by Mark in July/August 2014 over the shares held in his name and the July 2015 declaration of trust in respect of the disputed shares are not available although there is no suggestion that they differ materially from the drafts which have been provided.

13. More significantly, there is limited evidence as to what bank statements the ASL Group had available to it in 2014. This question is important as the bank statements show a cheque received for £30,000 in August 2008 which, following recent correspondence from the bank, it is now accepted is likely to represent Mr Sanders' subscription money in respect of the final 10,000 shares he agreed to subscribe for. The court has therefore had to make findings based on the evidence available.

14. As far as the witnesses are concerned, the claimants, including Mr Sanders, have all provided witness statements. Mrs Sanders, Rupert and Milly all gave oral evidence. The claimants have two other witnesses, Mark and a close friend of Milly, Jemma Freeman. Both of them also provided witness statements and gave oral evidence. No witnesses gave evidence for the defendants other than Mr Gregson and Mr Evans themselves.

15. Looking at the weight which can be given to Mr Sanders' witness statement, the clear and consistent evidence of the witnesses (including the defendants) was that Mr Sanders was a man of integrity who was both decent and honest and who strove to do the right thing. In principle, I consider that his evidence should therefore be accepted even though it was not tested by cross-examination. However, I accept Mr Sinclair's suggestion that his evidence should be treated with some caution given that, as with any witness, Mr Sanders' recollection of events, some of which took place over 15 years earlier, could be faulty and that, given his closeness to the proceedings, there could be some element of reconstruction in his memory.

16. Milly, by her own admission, was not very involved in the investments which her father made in the ASL Group and could not therefore shed much light on the investments themselves. She was somewhat protective of Mark and was understandably economical in some of her responses when it was suggested to her that he had lied or was dishonest. She also had some difficulty recalling events where she did have some involvement which, again, is perhaps not surprising given that the key events took place around eight years ago. Having said that, to the extent that Milly was able and willing to answer questions, I am satisfied that she did so honestly.

17. Mrs Sanders also had little involvement in the investments made by her husband and, given the time which had elapsed, did not generally have a clear recollection of events. However, I have no hesitation in accepting the evidence she was able to give. The same can be said about Rupert's evidence.

18. As far as Mark is concerned, Mr Sinclair submits that his evidence should not be accepted unless it can be corroborated. Although he accepts that Mark appeared superficially to be honest in that he was very open about his previous wrongdoing, he observes that Mark clearly regrets not having transferred the disputed shares to Mr

Sanders or his family and that he therefore has a strong motive to assist the claimants. Whilst I accept that there is some truth in this, I would not go as far as Mr Sinclair in restricting the weight to be put on Mark's evidence.

19. There is no doubt that, in his evidence, Mark was very candid and honest about the problems he had experienced and the mistakes he had made. He readily accepted that he had acted dishonestly but clearly felt genuine remorse for the actions which he had taken and the problems he had caused.

20. It was put to Mark that he had a habit of ducking and diving, saying what he needed other people to hear in order to avoid or defer problems. Whilst he accepted that there was some truth in this at the time of the events in question (a point which needs to be borne in mind when considering the documentary evidence), he suggested that, as a result of his addiction, he was a different character then to what he is now.

21. Broadly speaking, I consider that, although there was a significant element of narrative explanation, Mark was trying to answer the questions put to him as best he could. It was however clear that there was a great deal which he could not remember and, as a result, some of his evidence was speculation which did not make sense in the light of the contemporaneous documents. I have therefore been cautious in relying on Mark's evidence where this is inconsistent with those documents.

22. Ms Freeman only really gave evidence about one point which relates to a comment about the Sanders family which Mr Evans is said to have relayed to her and which was alleged to have been made by Mr Gregson. In my view, she was an impressive witness who was clear and consistent in her answers. Although Mr Sinclair drew attention to some confusion in relation to the precise words used, Ms Freeman was very clear in her evidence as to her recollection and I accept her evidence.

23. Turning to the defendants, Mr Green, appearing for the claimants, suggested that they were not honest witnesses, drawing attention to a number of inconsistencies in their evidence, particularly in the case of Mr Gregson.

24. Whilst, for the most part, Mr Gregson was straightforward in answering the questions put to him, it is clear that some of the important points which he thought he remembered were actually incorrect when tested against the documentary evidence.

Very fairly, he accepted when this was the case. There were however also a number of occasions where, realising where a line of question was leading, he tried to backtrack from his original response or changed his explanation of events and came up with explanations which, in the light of the documentary evidence, did not stand up to scrutiny. It is therefore clear that his evidence must be looked at extremely carefully.

25. Mr Evans, on the other hand, was, in my view, straightforward in his responses to the questions put to him. Although his evidence was, in part, inconsistent with the defendants' pleadings, generally speaking, I accept his evidence.

Background facts

26. Before going on to consider the various causes of action, it is helpful to set out in a little more detail the background facts in respect of which there is no real dispute.

27. ASL was incorporated in 2003 to develop and operate a ten pin bowling venue in Bloomsbury, London known as All Star Lanes. Mark was one of the founders and acted as CEO.

28. In 2005, the company wished to raise further funds and so undertook a "family and friends" funding round at a price of £1 per share. Prior to this funding round, Mark held ten shares in ASL and his father held 14,000 out of a total issued share capital of 58,010 shares.

29. At this time, Mark was engaged to be married to Milly. He discussed with Mr Sanders the possibility of him making an investment in ASL in July 2005 but nothing was agreed at that stage. The funding round was completed in September 2005. No shares were issued to Mark but 41,000 additional shares were issued to his father and 70,000 shares were issued to his father, his mother and a D McBeth. It appears from correspondence (and I find as a fact) that these shares were held as part of the British Wheatfields Pension Fund for the benefit of Mark's father.

30. In early November 2005 (by which time Mark and Milly were married, the wedding having taken place in July 2005), Mark and Mr Sanders resumed their discussion and it was agreed that Mr Sanders would subscribe for 20,000 shares in ASL at £1 per share. He gave a cheque for £20,000 to Mark, payable to ASL. Mr Sanders intended

that these shares should be for the benefit of Milly as a wedding present. From this point on, Mr Sanders started receiving shareholder communications from ASL.

31. In their pleadings, the defendants deny the existence of any agreement by Mr Sanders to subscribe for shares in ASL and that he paid any money to the company. Instead, they suggest that any agreement was a private agreement between Mark and Mr Sanders under which Mr Sanders would acquire shares from Mark. However, having heard the evidence at trial, they concede that it is more likely than not that there was a subscription agreement and that the subscription money was paid into ASL's bank account. This concession also applies to the other three share subscriptions by Mr Sanders which I mention below.

32. As part of the expansion of the business, ASLG was incorporated as a holding company in 2006. In January 2007, a share for share exchange took place under which the shareholders in ASL exchanged their shares for an equivalent number of shares in ASLG.

33. In December 2006 the 70,000 shares in ASL previously registered in the names of Mark's parents and D McBeth were transferred to Mark, apparently as part of the unwinding of the pension scheme following the death of Mark's father. This meant that, following the share exchange, Mark held 70,010 shares in ASLG.

34. ASLG launched a rights issue in March 2007 at £2 per share. In connection with this, Mr Sanders had agreed with Mark in February 2007 to subscribe £50,000 for 25,000 shares in ASLG at £2 per share. As not all of the shares offered were subscribed for, there was a further offer by ASLG in April 2007 made to those shareholders who had agreed to subscribe for shares in relation to the March 2007 rights issue. In anticipation of this further offer Mr Sanders agreed with Mark on 21 March 2007 to subscribe an additional £50,000, again, for 25,000 shares at £2 per share.

35. Completion of both rights issues took place at the same time, in July 2007. No shares were issued to Mr Sanders or his family but 62,838 shares were issued to Mark.

36. The evidence of Mr Sanders is that, of the 50,000 shares, he intended 20,000 shares to be for the benefit of Milly, 20,000 for the benefit of Rupert and 10,000 for the benefit of his wife, Thalia. There was some debate as to when Mr Sanders had formed this

intention and whether his recollection was accurate as neither Milly nor Rupert could recall precisely when they became aware that they were to have an interest in the shares. In addition, although Mr Sanders' evidence is consistent with correspondence between himself and Mark in 2011, there is a minor inconsistency between this and an email he sent to Mr Gregson in 2014 which suggested that the 10,000 shares were to be held for himself and his wife and not just for Mrs Sanders alone.

37. Based on the relatively limited evidence, it is in my view more likely than not that Mr Sanders formed his intention as to who should benefit from the shares at the time he agreed to make the subscription. Mr Sanders' evidence is that he discussed the allocation of the shares with his wife at the time of the subscription. This was confirmed by Mrs Sanders in her oral evidence. In addition, in his evidence, Mark recalled being given a piece of paper by Mr Sanders at the time he agreed to make the subscription which set out the proposed allocation.

38. In relation to the allocation itself, Mr Sanders' evidence is consistent with his exchange of emails with Mark in 2011. Although there is a discrepancy in the subsequent email to Mr Gregson in July 2014, in my judgment, the July 2011 correspondence is more likely to reflect Mr Sanders' true intentions given that this correspondence was closer in time to the actual events in 2007.

39. There was a further rights issue in August 2008. Mr Sanders agreed with Mark to subscribe an additional £30,000 for 10,000 shares in ASLG at £3 per share. The rights issue was completed in November 2008. Once more, no shares were issued to Mr Sanders but 10,000 shares were issued to Mark. Mr Sanders says he intended these shares to benefit Milly and Rupert equally (5,000 shares each). For the reasons I have just explained, I accept that evidence.

40. Further funding rounds took place after this but Mr Sanders did not agree to subscribe for any further shares. By 2011, the largest shareholders of ASLG (either directly or through associates) were Jim Mellon (who held approximately 28% of the shares) and John Duffield (who had about 21%). The other significant shareholders were the Goldsmith family (approximately 15% of the shares), Malek Sukkar (about 11%) and Mark (who, by then, had inherited the shares previously held by his father and now held just under 9%, represented by 279,749 shares).

41. Mr Evans is an architect who designed the All Star Lanes venues. He became a non-executive director of ASLG in 2007. Mr Gregson originally qualified as a solicitor although never practised. He had a long career in stockbroking and banking, eventually becoming chief executive of HSBC Private Bank in the UK until his retirement in 2006. He became a non-executive director and chairman of the board of ASLG in May 2011. Both Mr Evans and Mr Gregson were paid a fee of £20,000 a year as non-executive directors.

42. Mr Evans has never held any shares in ASL or ASLG. Mr Gregson acquired 25,000 shares in ASLG in April 2011 shortly before his appointment to the Board. His wife, Grania Gregson, made a loan to ASLG of £120,000 in September 2011 at an interest rate of 10% a year repayable over three years.

43. Although there had been other members of the Board of ASLG, by 2013, the only directors were Mark and the two defendants, Mr Gregson and Mr Evans.

44. It was in March 2014 that Mark told Mr Gregson about his gambling problems and the fact that he had taken money from the ASL Group to fund his gambling. It eventually transpired that the total amount involved was in the region of £2 million. Mark was put on sick leave and became an in-patient at an addiction clinic until September 2014. Mr Evans and Mr Gregson took over responsibility for the ASL Group.

45. Mr Gregson and Mr Evans were effectively running the ASL Group during the remainder of 2014 with the assistance of Claire Lewis, who dealt with finance and accounting matters. Although Mark nominally remained a director until December 2014, it is clear that he had little involvement during this period and did not in practice act as a director. A new CEO was appointed in early 2015, following which Mr Gregson and Mr Evans reverted to their normal non-executive roles. A finance director was appointed later in 2015 who also became a member of the board.

46. In April 2014, Milly called Mr Evans, partly to enquire about her family's shareholding in ASLG. On 9 July 2014, Mr Gregson emailed Mr Sanders to ask if he had an interest in any shares in ASLG. Mr Sanders replied the following day to say that he had an interest in 80,000 shares, giving the dates and the amounts of each of

the subscriptions mentioned above. He informed Mr Gregson that Mark had told him that the shares were in the Von Westenholz name.

47. Once the problems became known, Mark's family rallied round and agreed to repay part of the money which Mark had taken from the ASL Group. Mark's brother, Nicky Von Westenholz, led the discussions on behalf of the family. Essentially, the understanding between Nicky and Mr Gregson was that the Von Westenholz family would make payments to ASLG in return for the matter not being reported to the police and ASLG not going after Mark's family home.

48. The Von Westenholz family made payments totalling £950,000. However, as it turned out, one of the shareholders of ASLG later reported the matter to the police in any event. In addition, in November 2014, ASLG's lawyers wrote to Milly and Mark making a claim on behalf of the company against the family home in connection with the debt owed by Mark to ASLG as well as lodging a notice against the title at the Land Registry.

49. In order to ensure the survival of the business, it was necessary to obtain additional financing. It did not prove possible to obtain bank financing but in July 2014, two shareholders, Mr Duffield and Kusapi Limited, each agreed to lend £125,000 to ASLG. Mr Duffield's loan was secured over all of the shares held by Mark. The charge document contained a representation that Mark was the sole legal and beneficial owner of the shares held by him. This loan was fully repaid in December 2014 and so the charge fell away.

50. In the meantime, in August 2014, Mark signed a similar charge over his shares in favour of ASLG. This charge contained the same representation that Mark was the legal and beneficial owner of the shares.

51. In October 2014, Farrers, instructed by Mr Sanders and Milly, wrote to ASLG making the first formal claim by the Sanders family in relation to the disputed shares, asking either that the £150,000 subscription price should be refunded or that the shares should be issued to the Sanders family.

52. At that time, a plan was being developed for Mark's shares to be sold in order to help repay his debt to the company. In December 2014, Mr Gregson, on behalf of ASLG,

wrote to the shareholders proposing that all but 80,000 of Mark's shares should be sold at £2.25 per share. The letter explained that Mr Sanders claimed to be the owner of 80,000 of the shares registered in Mark's name and that these shares would be registered in the name of a nominee pending the resolution of the dispute.

53. In fact, the disputed shares were not transferred to nominees until July 2015 when they were transferred by Mark to Mr Gregson and Mr Evans as trustees to hold on the terms of a declaration of trust. That declaration of trust did not refer to the dispute with Mr Sanders but instead provided that Mr Gregson and Mr Evans should hold the shares on trust for Mark subject to a right to sell the shares and use the proceeds to reduce Mark's debt to ASLG in accordance with the terms of the charge which Mark had signed in August 2014.

54. Towards the end of 2014, Mark and Milly separated. They were divorced in 2015.

55. On 3 May 2018, the ASLG board resolved to pay a dividend of £5 per share. This prompted Farrers to write to ASLG's lawyers on 9 May 2018 reminding them of the claim in relation to the disputed shares and requesting an undertaking from Mr Gregson and Mr Evans as trustees that the dividend would be held in trust and an undertaking from ASLG that it would not take any steps which would prejudice the Sanders' interests.

56. Nonetheless, the dividend was approved at a meeting of the directors on 17 May 2018, the dividend to be paid on 25 May 2018 to shareholders on the register on 21 May 2018. The dividend due in respect of the disputed shares was not physically paid but was simply retained by ASLG and treated as reducing Mark's indebtedness to the company.

57. ASLG was placed into administration in September 2019.

58. With that background in mind, I turn now to consider the various causes of action put forward by the claimants.

Were shares held on trust for the Sanders family?

59. As I have already mentioned, the claimants rely on the existence of either an express trust, a resulting trust or a constructive trust. In his skeleton argument and in his submissions, Mr Green relied primarily on the existence of a resulting trust.

Resulting trust

60. In *Westdeutsche Landesbank Girozentrale v Islington* LBC [1996] A.C. 669, Lord Browne-Wilkinson described at [708 A-D] the nature of a resulting trust as follows:

> "Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption*, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton, Law of Trusts and Trustees,* pp.317 et seq.; *Vandervell v Inland Revenue Commissioners* [1967] 2 A.C. 291, 312 et seq.; *In re Vandervell's Trusts (No. 2)* [1974] Ch. 269, 288 et seq. (B) Where A transfers property to B *on express trusts*, but the trusts declared do not exhaust the whole beneficial interest: ibid. and *Quistclose Investments Ltd. v Rolls Razor Ltd (In Liquidation)* [1970] A.C. 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention."

61. It is apparent from this that the key questions in this case are whether Mr Sanders paid for shares which were then issued to Mark and, if so, what the intentions (actual or presumed) of Mark and Mr Sanders were in relation to those shares.

62. It is accepted by the defendants that Mr Sanders paid to subscribe for a total of 80,000 shares and that those payments were received by ASL and ASLG. There is no suggestion that the presumption of advancement applies as between Mr Sanders and Mark (consistent with the view taken by the Supreme Court in New Zealand in *Knight v Biss* [1954] N.Z.L.R. 55). Mr Sinclair however submits that there cannot be a resulting trust for three reasons:

    62.1 there is no correlation between the funds paid by Mr Sanders and the shares issued to Mark;

    62.2 it was not Mr Sanders' intention that he should retain a beneficial interest in the shares as they were to be held for the benefit of his family; and

    62.3 any shares issued to Mark were paid for by him by an adjustment to his loan account balance with the company. There cannot therefore be a resulting trust in respect of these shares as they were not paid for by Mr Sanders.

63. Based on the evidence available, I am satisfied that, as a result of the payments made by Mr Sanders to the companies, the appropriate number of shares were issued in the case of the second-fourth subscriptions to Mark. There is however, in my view, insufficient evidence that any shares were issued in connection with the first payment of £20,000 made by Mr Sanders in November 2005.

64. Starting with the final investment of £30,000 in August 2008, Mark's clear evidence is that the shares were issued to him. This is borne out by the documents which show that 10,000 shares were in fact issued to him when the funding round closed. It is also consistent with an exchange of emails between Mark and Mr Sanders in July 2011 in which Mark specifically confirmed to Mr Sanders that the shares issued in 2008 had been put into his name. There can be little doubt that the shares which Mr Sanders paid for in August 2008 were therefore issued to Mark.

65. The second and third subscriptions were to be for a total of 50,000 shares. Again, Mark's evidence is clear that the shares were issued to him rather than to Mr Sanders. The exchange of emails in July 2011 is less conclusive in relation to this as Mark explains to Mr Sanders that all of the shares had been put into Milly's name saying

that it was simpler to put the shares into a "Von Westenholz" name. This was not of course true as, in fact, no shares were registered in Milly's name.

66. Mark's evidence is however supported by what actually happened when the shares were issued to the various investors in July 2007. Mark received 62,838 shares. Given Mark's acceptance in the 2011 exchange of emails that Mr Sanders had paid for 50,000 shares which were then held in a Von Westenholz name, the overwhelming likelihood is that these 50,000 shares were included in the 62,838 shares issued to Mark in July 2007 given that, contrary to his assertion, no shares had in fact been issued to Milly.

67. There is some suggestion on the part of the defendants that Mark paid for the shares which were issued to him by way of an adjustment to his loan account although this was not a point which was pressed by Mr Sinclair in his closing submissions. Based on the evidence it is in any event, in my view, misconceived.

68. Mark's evidence is that none of the shares issued to him were paid for by adjustments to his loan account. In the case of the shares which Mr Sanders had agreed to subscribe for, Mark confirmed that the payments came from Mr Sanders. In relation to other shares which he subscribed for, he explains that he paid for these out of his personal resources.

69. The suggestion that payments for Mark's shares have been dealt with through the loan account comes from some notes made by Claire Lewis in June 2014. Under the heading "The Investigation Update", she notes that Mark's shares have gone to the loan account as no physical monies were received. It is not clear whether this refers to all of Mark's shares or just the disputed shares.

70. However, what is clear (and was confirmed by both Mr Gregson and Mr Evans in their evidence) is that, as part of the investigation into the use of company funds by Mark, any discrepancies were dealt with by adding the relevant amount to Mark's director's loan account. This practice is confirmed by a report produced by ASL Group's accountants, Leaman Mattei in August 2014.

71. In the light of this evidence, the most likely explanation in my view is that Mark is correct in saying that the payment for shares issued to him was not, at the time, dealt

with by adjustments to his loan account. Instead, where, as part of her investigation, Ms Lewis could not identify receipts from Mark in respect of shares issued to him (and it does not appear that at this stage she was looking for receipts from Mr Sanders), she treated these as funds owing to the company and made a corresponding adjustment to his loan account balance in 2014.

72. My conclusion therefore is that, in respect of the second-fourth subscriptions, a total of 60,000 shares were issued to Mark and that Mr Sanders paid for the 60,000 shares in question.

73. The story in relation to the initial 20,000 shares which Mr Sanders thought he had subscribed for in November 2005 is rather more confused. Mark's evidence is that the friends and family funding round closed in July 2005 before Mr Sanders had agreed to make an investment. However, Mark was fairly sure from his discussions with Mr Sanders that he would agree to make the investment. He therefore says that he decided to subscribe for 20,000 shares in his own name in order to complete the funding round but with a view to using the funds received from Mr Sanders once he had persuaded him to agree to make the investment in order to meet the subscription price.

74. However, the documentary evidence shows that this is not what happened. No shares were issued to Mark as part of this funding round. 41,000 shares were issued to his father and 70,000 were issued to his parents and D McBeth in their capacity as trustees of a pension scheme. However, there is no evidence that these investors did not pay for all of the shares which were issued to them.

75. This does of course raise the question as to why Mark subsequently agreed with Mr Sanders that he should subscribe £20,000 for 20,000 shares following the completion of the funding round. We may perhaps never know the answer to that question although it is of course possible that, as Mark says in his evidence, he intended to transfer 20,000 shares to Mr Sanders in due course and may indeed have anticipated that the 70,000 shares subscribed for by his parents and D McBeth would shortly be transferred to him, as they were in December 2006. In the meantime, it is perfectly possible that he intended to use the funds for some other purpose.

76. As it is, it cannot in my view be inferred solely from the fact that Mr Sanders paid £20,000 to ASL in order to subscribe for shares that were never issued to him, that this represented payment for shares issued to other shareholders connected to Mark. I am not therefore satisfied that any shares were issued in 2005 for which the £20,000 provided by Mr Sanders represented the subscription price and there cannot therefore be a resulting trust in respect of any such shares.

77. In relation to the 60,000 shares (the second-fourth subscriptions) which were paid for by Mr Sanders but issued to Mark, there is still the question as to whether there can be a resulting trust in circumstances where Mr Sanders did not intend to retain the beneficial interest but instead intended to hold the shares beneficially for his family.

78. Mr Sinclair refers to the passage I have already highlighted (at [60] above) from *Westdeutsche Landesbank* where Lord Browne-Wilkinson explains that a resulting trust is regarded as an example of a trust which gives effect to the common intention of the parties. He submits that there cannot therefore be a resulting trust in favour of Mr Sanders as he did not intend to be the beneficial owner of the shares.

79. Mr Green relies on the decision of the Privy Council in *Air Jamaica Limited v Charlton* [1999] 1 WLR 1399 to rebut this point. That case involved a pension scheme which provided that the funds which had been contributed to the pension scheme could in no circumstances be repayable to the employing company. The Privy Council nonetheless decided that the surplus in the pension scheme after it was discontinued was held on a resulting trust for the employer. Lord Millet (giving the judgment of the Privy Council) explained at [1412 B-C] that:

> "Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest – he almost always does not – since it responds to the absence of any intention on his part to pass the beneficial interest to the recipient. It may arise even where the transferor positively wished to part with the beneficial interest, as in *Vandervell v Inland Revenue Commissioners* [1967] 2 A.C. 291."

80. As Mr Sinclair points out, *Air Jamaica* is an example of a resulting trust which falls into category B of the two types of resulting trust which Lord Browne-Wilkinson

described in *Westdeutsche Landesbank*, being one where the transferor has created an express trust but which does not exhaust all of the beneficial interest in the property transferred. It is therefore in some ways very different to the type of constructive trust we are dealing with here where shares have been paid for by Mr Sanders but vested in Mark in circumstances where Mr Sanders did not intend to retain the beneficial interest.

81. I was not referred to any other authority dealing with this point. However, in my view, the key is to be found in the comments made by Lord Browne-Wilkinson in *Westdeutsche Landesbank*. He notes at [705C] that "equity operates on the conscience of the owner of the legal interest.". The key question must therefore be whether Mr Sanders intended to make a gift to Mark and not whether Mr Sanders intended to retain the beneficial interest for himself rather than giving it to other family members.

82. This is reinforced by Lord Browne-Wilkinson's description of the resulting trust presumption which I have already mentioned (at [60] above) where he explains that if the relevant conditions are met there is a presumption that "A did not intend to make a gift to B". There is no mention of whether A might have intended to make a gift to somebody else. In the same passage, he goes on to note that a resulting trust is not imposed by law against the intentions of the trustee but instead gives effect to his (i.e. the trustee's) presumed intention.

83. The comment in *Air Jamaica* that a resulting trust "responds to the absence of any intention on his part to pass the beneficial interest to the recipient" (see [79] above) in my view also supports this conclusion. Although that case dealt with a different sort of resulting trust, this principle is equally applicable to both types of resulting trust. The question is whether there was a common intention that the beneficial interest should pass to the legal owner not whether the person who funded the purchase or created the trust intended to confer a beneficial interest on some other person.

84. In this case I have no doubt that Mr Sanders did not intend to make a gift to Mark. Nor was Mark expecting to become the beneficial owner of the shares paid for by Mr Sanders. The defendants did not seriously contend that he did. These are precisely the circumstances in which it would be expected that equity would operate on the

conscience of the legal owner so that a resulting trust arises in favour of the person who paid for the shares, in this case, Mr Sanders.

85. That is not to say that Mr Sanders would necessarily be the beneficial owner of the shares. It would have been perfectly possible for him to create a trust of his beneficial interest in favour of Mrs Sanders and his children. It is not however part of the claimants' case in relation to the resulting trust analysis that he did so (which may well be understandable given that s 53 Law of Property Act 1925 requires a disposition of an equitable interest or trust to be in writing). Instead, they accept that if there is a resulting trust, that trust is in favour of Mr Sanders. Mrs Sanders, Milly and Rupert will only be beneficial owners if there is an express trust, a question to which I now turn.

Express trust

86. An express trust will come into existence if there is certainty as to the assets which are subject to the trust (the subject matter), the beneficiaries of the trust (the objects) and the existence of words or actions which demonstrate an intention to create a trust. The question for the Court is whether these three requirements are present.

87. In relation to the last requirement, Mr Green draws attention to the fact that a trust may be created informally and that there is no need even for the word "trust" to be used (see *Paul v Constance* [1977] 1 WLR 527 at [530C-D]).

88. It should however be noted that, in that case, Scarman LJ also referred at [531C-F] to the principle that an ineffective attempt to make a gift will not be saved by the inference of the existence of a declaration of trust and that, similarly, if an express trust is intended to take effect by the transfer of the trust assets to a trustee, a court will not treat an intended (but ineffective) transfer as a declaration of trust "for then every imperfect instrument would be made effectual by being converted into a perfect trust" (a reference to the comment made by Turner LJ in *Milroy v Lord* (1862) 4 De G.F. & J. 264).

89. The claimants' pleadings in relation to the existence of an express trust are very brief. There is no explanation as to the circumstances in which such a trust might have come into existence. In his submissions, Mr Green clarified that the claimants' case is that

an express trust came into existence either at the time the shares were issued or, alternatively, that an express trust arose as a result of the exchange of emails in May – July 2011 between Mr Sanders and Mark in which Mark acknowledged that Mr Sanders had paid for a total of 80,000 shares.

90. Having found that there was a resulting trust in favour of Mr Sanders in respect of the 60,000 shares represented by the second-fourth subscriptions, the possible existence of an express trust is most relevant to the first subscription relating to 20,000 shares. It is however also relevant to the remaining 60,000 shares as the existence of an express trust would mean that the beneficial interest in those shares is held by Mrs Sanders, Milly and Rupert and not by Mr Sanders (or his estate).

91. Looking first at the position when the shares were issued, there cannot on any basis have been an express trust in relation to 20,000 shares in connection with the first subscription given my finding that no shares were in fact issued as a result of the £20,000 paid by Mr Sanders to ASL at that time.

92. As far as the remaining subscriptions are concerned, whilst Mark may have known that Mr Sanders intended the shares to be for the benefit of Mrs Sanders, Milly and Rupert, the requirement for an intention on the part of Mr Sanders to create a trust is, in my view, lacking.

93. The evidence is unclear as to whether Mr Sanders expected the shares to be issued to him or to his family. Whilst Mr Sanders' evidence is that he did not discuss how the shares would be registered at the time he made the investments (and therefore it might be said that it was possible that the shares would be registered in Mark's name), in the absence of a specific understanding that the shares would be registered in Mark's name and held by him for the benefit of Mr Sanders' family, there is in my judgment insufficient certainty of intention to create an express trust.

94. Mr Green relies on the exchange of correspondence between Mark and Mr Sanders in May – July 2011 as evidence of the existence of an express trust with effect from the time the shares were issued. However, whilst that correspondence acknowledges that 80,000 shares belonged to Mr Sanders or his family, it does not establish that there was any intention at the time the shares were issued that they should be held by Mark as trustee for the Sanders family.

95. I do not therefore accept that any express trust came into existence at the time of the original subscriptions.

96. The question therefore is whether the exchange of emails between Mr Sanders and Mark in May – July 2011 evidences a sufficient intention that 80,000 shares in ASLG legally owned by Mark should, at that time, be held by him as trustee for Mrs Sanders, Milly and Rupert in the proportions intended by Mr Sanders.

97. Mr Sanders' initial enquiry on 3 May 2011 was to ask Mark for "some details of my contributions to ASL". Mark responded 15 minutes later to say that he would ask the company's accountants who would have all the details but recalled that Mr Sanders had put in £20,000 for 20,000 shares in the first round and £50,000 for 25,000 shares in the second round. He mentioned that Mr Sanders could put the shares in any name he liked as the articles had been amended to make it easier to transfer shares to other people. Mark also recalled that Rupert and Milly were to have some shares.

98. Mark followed up on 11 July 2011 to tell Mr Sanders that "you have 70,000 shares" but (inaccurately) stated that the shares were all in Milly's name, explaining that the shares had been put in a "von Westenholz name for simplicity". He finished by saying that "if you confirm with me how you want to divide these I will arrange the transfers".

99. Mr Sanders responded to Mark the next day to set out the amounts which he had paid to the company and which family members he had intended to benefit in respect of each subscription. Whilst he knew the amounts of cash which he had paid, he did not know how many shares that equated to.

100. Mark responded on the same day to say that the information by Mr Sanders "stacked up". He confirmed that he had forgotten about the £30,000 subscription for 10,000 shares in 2008 which meant that the total number of shares was 80,000 and not 70,000. He noted that the final 10,000 shares had been put in his own name. He also stated that he would transfer the shares "as per the below" (i.e. in accordance with the split between Mrs Sanders, Rupert and Milly indicated by Mr Sanders in his previous email).

101. Read as a whole, this exchange of correspondence in my view is sufficient to create an express trust in favour of Mrs Sanders, Milly and Rupert over 80,000 of the shares in ASLG held at that time by Mark despite the fact that there is no specific declaration of trust or use of the word "trust".

102. One objection put forward by Mr Sinclair is that the 80,000 shares were not segregated but were part of a single holding in Mark's name of almost 280,000 shares. In support of this, he refers to the decision of Lewison J in *Mills v Sportsdirect.com Retail Limited* [2010] 2 B.C.L.C. 143 at [57-58]. However, the observation in that case was that segregation was "a useful (though by no means conclusive) indication of an intention to create a trust" (see Megarry J in *Re Kayford Ltd* [1975] 1 All ER 604 at [607]).

103. In *Mills*, Lewsion J also referred to *R v Clowes* (*No 2)* [1994] 2 All ER 316 at [325] where Watkins LJ said:

> 'As to segregation of funds, the effect of the authorities seems to be that a requirement to keep moneys separate is normally an indicator that they are impressed with a trust, and that the absence of such a requirement, *if there are no other indicators of a trust,* normally negates it. The fact that a transaction contemplates the mingling of funds is, therefore, not necessarily fatal to a trust.'

104. Whilst a lack of segregation must be taken into account in reaching a conclusion as to what was intended, it does not of itself mean that no trust has been created.

105. It is clear from the 2011 exchange of emails between Mark and Mr Sanders that Mark acknowledges that there are 80,000 shares which do not belong to him. This is apparent for example from Mark's statement that "you have 70,000 shares" (subsequently corrected to 80,000 shares). Whilst Mark suggested to Mr Sanders that 70,000 shares were held in Milly's name and 10,000 in his own name, this is in my view a good example of Mark saying what he needed to say to avoid or defer problems. In fact, he was well aware that the shares were registered in his own name.

106. This is evident from the fact that in April/May 2011 (i.e. before July 2011 when Mark suggested that the 70,000 shares were in Milly's name) he had consulted with the company's lawyers about the formalities needed to transfer shares from his own name into Milly's name. He may well have intended to transfer the shares to Milly (but not got around to it) but he clearly knew that the disputed shares were, at that time, in his name.

107. Mark invited Mr Sanders to let him know how he wanted the shares divided and Mr Sanders confirmed the proportions in which the shares should be held as between Mrs Sanders, Milly and Rupert. Mark then confirmed that he would transfer the shares in accordance with Mr Sanders' wishes although, of course, he did not do so. This is however, in my view, an acknowledgment by Mark that, from that point on, the shares were to be held for the benefit of those people.

108. Although the exchange of emails in 2011 refers to a transfer of the shares by Mark, this is not a case where a transfer of the shares was required to constitute the trust (as Mark already held the legal title) and so there is no question of inferring a trust to perfect an imperfect transfer. The proposed transfer by Mark was instead to give effect to the trust by transferring the shares to their rightful owners (thus terminating any trust).

109. It is also not a situation where a trust is being inferred to perfect an imperfect gift. Mark did not intend to make a gift to anybody as he did not believe that he was the beneficial owner of any of the disputed shares. The creation of the express trust simply gave effect to what Mark had agreed with Mr Sanders the position should be in terms of the beneficial ownership of those shares.

110. Although Mr Sanders does not appear to have been aware that all of the shares were in fact registered in Mark's name, I do not consider that this prevents the existence of an express trust. Mark was the legal owner of the shares. It was therefore his intention (and not Mr Sanders) which was relevant. He accepted that 80,000 shares (the subject matter of the trust) did not belong beneficially to him and he agreed with Mr Sanders who should benefit from the shares (the objects of the trust). In substance, this amounts to an acceptance by Mark that, from that time, he held the disputed shares for the family members identified by Mr Sanders (showing a

sufficient intention to create a trust over those shares and for the benefit of those individuals). This of course includes the 20,000 shares which Mr Sanders thought he had originally subscribed for on behalf of Milly, but which had never been issued to any of Mark, Milly or Mr Sanders.

111. Given that I have already concluded that 60,000 shares were held on resulting trust for Mr Sanders, the effect of the creation of the express trust on 12 July 2011 is that the beneficial interest in those shares passed from Mr Sanders to his wife, Milly and Rupert. The beneficial interest in the remaining 20,000 shares will, at the same time, have passed from Mark (as he was not holding those shares on trust for Mr Sanders) to Milly.

112. I should mention a suggestion made by Mr Sinclair that any arrangement between Mark and Mr Sanders should be viewed as purely contractual. However, this cannot be the case where the clear assumption and intention underlying the exchange of correspondence is that the shares belonged beneficially either to Mr Sanders or to his family and Mark clearly believed that he was not the beneficial owner of the shares.

113. Mr Sinclair notes that, in Mr Sanders' witness statement, Mr Sanders recalled that when he asked Mark about the share certificates Mark told him that the shares were all in a "family bundle under his name" so that he would give himself more power in relation to the ASL Group. He suggests that this is inconsistent with Mark holding the shares as trustee.

114. It appears that the evidence given by Mr Sanders relates to the period prior to 2011. However, in any event, what he says is, in my view, more consistent with a trust arrangement than with Mark beneficially owning the shares. Mark apparently assured Mr Sanders that the shares were "perfectly safe". The impression given is that Mr Sanders understood that Mark was not the beneficial owner of the shares but was keeping them safe for the family as well as giving himself more influence. The fact that he was the registered shareholder would of course achieve the objective of having more influence whether or not he was the beneficial owner given that it is the registered holder who has the power to vote the shares.

115. Similarly, Mr Sinclair draws attention to Mark's explanation in his witness statement as to why the shares were registered in his name. The reason given is that, as the

initial shares had not been issued to Mr Sanders, it would be complicated for him to be registered as a shareholder in respect of the subsequent share issues given the pre-emption rights requiring shares to be offered pro-rata to existing shareholders. It was therefore easier for Mark "to continue to subscribe to Michael's shares" in his own name "and then transfer them all to Michael's family at a later date".

116. Mr Sinclair argues that, again, this shows an intention that Mark should be both the legal and beneficial owner of the shares and that he simply agreed to transfer the ownership of the shares at a later date. I do not agree. Mark refers to the shares as "Michael's shares" which clearly evidences a belief that he was not the beneficial owner of the shares. The reference to a subsequent transfer must, in that context, be understood as simply giving effect to what he believed to be the true beneficial ownership.

117. It is true that, in 2014, Mark made a number of statements to the effect that he was the beneficial owner of all of the shares registered in his name. This includes the two charges in favour of Mr Duffield and ASLG as well as a statement made to HMRC as part of a tax investigation and an email to a gambling company in respect of which he had outstanding debts. Mark's explanation in his oral evidence was that, during this period (when he was an in-patient having treatment for his addiction) he was in a very poor state mentally, he relied on his brother to deal with matters and he just signed what was put in front of him.

118. Whilst I have no doubt that there is some truth in this, it is clear from the contemporaneous correspondence in the summer of 2014 that he was not completely disengaged from what was going on to try and sort out the problems resulting from his actions. However, despite the statements made in these documents, there is little doubt in my mind that Mark knew that he held the disputed shares for the benefit of the Sanders family. Indeed, Mark's evidence (which differs from Mr Gregson's evidence but for which there is some support in the documentary evidence) is that he told Mr Gregson and Mr Evans in early July 2014 that he held the disputed shares for the benefit of the Sanders family.

119. This is in my judgment more likely to be another example of Mark saying things or taking actions which he believed would help achieve a particular objective, whether

or not what he was saying was strictly accurate. It certainly does not, in my view, lead to the conclusion that Mark was in fact the beneficial owner of the disputed shares. Indeed, on the contrary, the consistent picture which emerges from the evidence is that Mark clearly did not believe that he was the beneficial owner of those shares.

120. In conclusion, I find that, from 12 July 2011, Mark held the disputed shares on an express trust for the benefit of Mrs Sanders, Milly and Rupert with Milly having the benefit of 45,000 shares, Rupert being a beneficiary of 25,000 shares and Mrs Sanders being the beneficial owner of the remaining 10,000 shares.

Constructive trust

121. Although the claimants have put forward a number of reasons for the existence of a constructive trust in their favour, the only one pursued by them is the existence of a specifically enforceable contract for the purchase of the disputed shares. The principle is well known and is explained by Lewison J in *Mills* at [74-75].

122. The original pleaded case is that the relevant contract was a contract between Mr Sanders and Mark, made when he originally paid for the shares in 2005 – 2008. This was on the basis that the defendants suggested that the agreement between Mr Sanders and Mark was not an agreement to subscribe for shares but was instead an agreement for Mr Sanders to purchase shares from Mark. Given the acceptance by the defendants that the original agreement between Mark and Mr Sanders was that Mr Sanders should subscribe for shares to be issued by the companies, this alleged contract is no longer relevant.

123. Mr Green therefore switched his focus to the exchange of emails between Mark and Mr Sanders in May – July 2011. He argues that, if the disputed shares were not already held in trust by Mark and did not become held in trust as a result of that exchange, the effect of the emails was to create a binding contract for the sale of 80,000 shares in ASLG by Mark to Mr Sanders.

124. It is however difficult to see how this can be the case. No consideration was given by Mr Sanders at this point. He had paid for the shares several years earlier. As I have already said, the assumption which underlies the exchange of emails was that the

shares already belonged beneficially either to Mr Sanders or to his family. In those circumstances, it is difficult to see how either party could have intended to bring into existence a legally binding contract for the sale of the shares by Mark.

125. My conclusion therefore is that there was at no stage a contract between Mr Sanders and Mark for the purchase of the disputed shares. As a result, there is no constructive trust. The question as to whether any such contract would have been specifically enforceable and whether, as a result of delay, Mr Sanders might have lost any right to specific performance does not therefore arise.

Dishonest assistance

126. Given that it has been established that Mark was holding the disputed shares in trust for the Sanders family, I need to consider whether the defendants dishonestly assisted Mark in committing a breach of that trust.

127. The claimants need to establish that there has been a breach of trust, that the defendants assisted in the breach of trust and that they did so dishonestly.

128. In this context, the test for dishonesty is set out by Lord Hughes in *Ivey v Genting* [2017] UKSC 67 at [74], confirming the principles explained by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at [389C-E] and by Lord Hoffmann in *Barlow Clowes International Limited (in liquidation) v Eurotrust International Limited* [2005] UKPC 37 at [10] as follows:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no

> requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

129. The claimants identify three alleged breaches of trust by Mark. The first two are the creation of the two charges over all of the shares registered in Mark's name. The first charge was in favour of the Duffield shareholders as security for loans totalling £125,000 needed to keep the ASL Group afloat. It is not entirely clear when the charge was granted but, based on the correspondence, my conclusion is that, although a charge had been signed by Mark on around 11 July, this had important details missing and the final form of charge was signed on or around 24 July 2014.

130. It is however clear that no loss arose as a result of the first charge. As I have already mentioned, the loan was repaid by December 2014 and the charge fell away. I therefore say no more about it except to the extent it is relevant background to the creation of the charge if favour of ASLG.

131. The second charge given by Mark was in favour of ASLG in order to secure the debts due from him to that company as a result of his unauthorised withdrawals. Again, the precise date of the charge is unknown but it was in the second half of August 2014.

132. The third breach of trust is said to be the transfer by Mark of the remaining 80,000 shares registered in his name (the other shares having been sold to raise money to repay the debts due from him to ASLG) to the defendants in July 2015 to hold on the terms of a declaration of trust which permitted them to use any proceeds to reduce Mark's indebtedness to ASLG in accordance with the terms of the charge which Mark had granted to the company.

133. Whilst the defendants deny that Mark was holding the disputed shares as trustee for members of the Sanders family, they do not suggest that, if there were such a trust, these transactions did not amount to a breach of trust. On the basis that Mark was not the beneficial owner of the shares, I have no doubt that using the shares as security for his own liabilities was indeed a breach of trust, as was transferring the shares to nominees on terms which allowed them to use the shares to satisfy Mark's own liabilities.

134. The defendants also do not deny that they assisted with these transactions. Whilst Mr Gregson clearly took the lead in relation to the charges, Mr Evans accepted that he was part of everything that happened. This is consistent with the contemporaneous correspondence. They were of course both involved in the subsequent transfer of the shares as they were the transferees.

135. The defendants do, however, deny that they were dishonest. In summary, they say that they were doing their honest best as non-executive directors who had been forced into a more active role to keep the company afloat in the extremely difficult circumstances resulting from the problems which had been caused by Mark. There is no doubt a great deal of truth in this but, as I have mentioned, the question of honesty must be judged objectively based on what they knew at the time.

136. The charge in favour of ASLG was being discussed at the same time as the charge which was given to Mr Duffield. The defendants were in a difficult position. The ASL Group urgently needed an additional £250,000 of funding without which it may not have been able to survive. The company was in negotiations relating to the lease of their venue at Whiteleys in Bayswater which was likely to result in substantial compensation being payable to the ASL Group. If ASLG became insolvent or if rent was not paid, the lease could be forfeited and the right to compensation lost.

137. It was important to keep the shareholders on side. Mr Mellon in particular was vociferous in his view that Mark should be reported to the police and that action should be taken against him to make him bankrupt which would of course have implications for the family home. Any such action would therefore affect the arrangements with the Von Westenholz family to provide funds to repay a significant portion of Mark's indebtedness in return for the matter not being reported to the police and no action being taken against the family home.

138. It is clear from the correspondence and from Mr Gregson's evidence that the main purpose of asking Mark to grant a charge over his shares in favour of ASLG was because of concerns about action being taken to make him bankrupt. If this had been done and there were no charge in favour of ASLG, the value of the shares held by Mark would of course have had to have been shared with other creditors such as those to whom Mark owed gambling debts.

139. There was some dispute as to the extent of the defendants' knowledge of any claim by the Sanders family to a beneficial interest in shares held by Mark at the time these events were taking place. In his second witness statement, Mr Gregson claims to have had no recollection of Mr Sanders or Milly suggesting that either of them had any interest in the shares held by Mark other than a suggestion from Mr Sanders in July 2014 that Mark had told him that the shares he had purchased were in a Von Westenholz name. He goes on to say that, apart from this, he had never had any reason to believe that any of the claimants had any beneficial interest in the shares that Mark held in his own name.

140. As emerged in cross examination, it is apparent that this statement is untrue. Milly had raised the question of the Sanders family shares with Mr Evans in April 2014, following which, Mr Evans sent an email to Mark specifically asking him if the Sanders family shares were combined with his. Mr Gregson accepted in his evidence that Mr Evans would have discussed this with him.

141. More significantly, Mr Gregson wrote to ASLG's bank, Santander, on 17 June 2014 mentioned that "there is talk of [Mark] acting as nominee for other family members, that is to say, not all of the shares registered in his name are his beneficially. This is likely to be contentious".

142. It is therefore quite clear that Mr Gregson and Mr Evans were aware of the possibility that some of the shares registered in Mark's name belonged beneficially to members of the Sanders family.

143. Mr Gregson's evidence is that when he asked Mark to sign both of the charges, he drew attention to the representation that Mark was the sole legal and beneficial owner of the shares and asked him if he could give this warranty, which Mark confirmed he could. Mr Gregson accepts however that he did not make any specific reference to any claim or interest of the Sanders family when asking Mark about this.

144. It is perhaps surprising that Mr Gregson accepted Mark's assurance at face value given that he mentions elsewhere in his evidence that, at this time, they were taking most of what Mark said with a large pinch of salt and were keen to corroborate what he said where they could do so. When asked about this in cross examination, Mr Gregson questioned what they could have done to corroborate this. One point which

of course springs to mind would have been to try and find out more about Mr Sanders' claim that his family had an interest in the shares held by Mark either by asking Mark directly about this or confirming whether ASL or ASLG had received payments from Mr Sanders.

145. It is however apparent that no real investigation was carried out at this stage in relation to the Sanders family claim. The defendants gave two reasons for this in their evidence. The first is that their immediate priority and focus was on saving the business and that any dispute in relation to the shareholdings was therefore a secondary matter.

146. The other reason for not prioritising the position in relation to the shares held in Mark's name was a belief that this was something which would be sorted out between the Von Westenholz family and the Sanders family and was not therefore something which the ASL Group needed to be concerned about.

147. This belief was not challenged in cross examination and it is supported by a later email written by Nicky Von Westenholz in November 2014 which confirms his hope that any issue relating to the shares could be dealt with in due course, suggesting that a member of the Von Westenholz family might be willing to purchase shares in another company owned by Mark which had a value approximately equal to the amount invested in the ASL Group by Mr Sanders, thus providing funds to compensate Mr Sanders. I do therefore accept that the defendants genuinely expected that any interest which the Sanders family might have in the shares held by Mark would be sorted out between the Von Westenholz and Sanders families.

148. In discussions with Mark, Mr Gregson suggested that there might be a comfort letter or second charge in favour of Mr Sanders. This was not however pursued. Mr Gregson's explanation for this is that he did not think that there was any realistic possibility of there being any surplus funds after the value of the shares registered in Mark's name had been used to repay the amounts owed by him to the ASL Group.

149. Given that, even after the payments made by his family, Mark still owed ASLG over £1 million and that based on the price at which his shares were sold in December 2104 (£2.25 per share) his total holding (including the disputed shares) would have been worth around £630,000, there seems little doubt that this was indeed the case.

150. One other point which emerges from the correspondence is that Mr Gregson had discussed Mark's shareholding with Rupert Evans (a friend of both the Von Westenholz and Sanders families) at around the time the charges in favour of the Duffield interests and ASLG were being discussed. He also talked to Mark about the situation.

151. It appears that, based on these discussions, Rupert Evans thought that Mark had already given security over his shares to ASLG. Rupert Evans' conclusions were passed on to Milly who in turn passed them on to her father. The Sanders family were therefore aware, as it turns out, before Mark granted the charge in favour of ASLG that it was intended to use Mark's shares as security for his liabilities to the ASL Group.

152. It is fair to infer that, knowing of Rupert Evans' friendship with the Sanders family and the Von Westenholz family, Mr Gregson would have expected that the question of ASLG taking security over Mark's shares would be communicated to them. It is in my view significant that, although the defendants did not discuss the proposed security directly with Mr Sanders, neither did they attempt to keep it a secret from him.

153. It is perhaps worth noting that Rupert Evans' subsequent report direct to Mr Sanders started:

> "I think Marcus did what he could, given he needed to get cash, the shareholders aren't at all happy/co-operative, and time went against him."

154. When Mr Gregson himself informed Mr Sanders (on 30 August 2014) that ASLG had taken a charge over the shares registered in Mark's name (at the same time noting that Mr Sanders had "issues with Mark" about the shares), Mr Sanders' response was to thank Mr Gregson for taking on "this onerous duty".

155. Taking all of this into account, it cannot in my view be said that, looked at objectively, Mr Gregson or Mr Evans acted dishonestly in procuring or assisting Mark to grant a charge over all the shares registered in his name in favour of ASLG.

156. In circumstances where they were not clear what interest (if any) the Sanders family had in the shares held by Mark and where they believed that, if there were an issue, it would be dealt with by the Von Westenholz family, the failure to investigate the Sanders family claim or to question Mark about the beneficial ownership of the shares in more detail is entirely understandable.

157. The need to keep the shareholders onside both in terms of procuring further funding and trying to prevent them from going to the police or insisting that ASLG take action against Mark and Milly's family home was a more pressing issue as the survival of the business depended upon it. Taking a charge in favour of ASLG over the shares held by Mark was important in achieving those objectives.

158. Mr Gregson and Mr Evans took difficult decisions in difficult circumstances. In hindsight, there may well have been things they might have done differently. As Mr Green was at pains to point out, there is no doubt that they were economical with the truth both in what they said to Mr Sanders and in what was disclosed to shareholders. However, in the circumstances in which they found themselves, their conduct was not dishonest by the standards of ordinary, decent people. The comments made by Rupert Evans and by Mr Sanders himself are testament to that.

159. Turning to the transfer of the remaining 80,000 shares registered in Mark's name to Mr Gregson and Mr Evans in July 2015, it is apparent from the documentary evidence and from their own evidence that the purpose of the transfer was to protect the shares in the event that Mark was made bankrupt. Advice had been obtained from ASLG's lawyers that, in those circumstances, other creditors could try and attack the charge which Mark had given to ASLG and it was felt that registering the shares in the name of a nominee would provide further protection.

160. In the autumn of 2014, it was clear that the ASL Group would need further funding in 2015. It was therefore proposed that the shares held by Mark should be sold at £2.25 per share. This money would be used as part repayment of the debts still due from Mark to ASL Group in order to provide the necessary funding.

161. However, on 28 October 2014, Farrers wrote to ASLG on behalf of Mr Sanders and Milly referring to the 80,000 shares which Mr Sanders had subscribed for and asserting a claim either for the return of the £150,000 subscription price or that ASLG

should take steps to ensure that the Sanders family received the 80,000 shares subscribed for. As a result of this, Claire Lewis undertook to review the relevant bank accounts to see if the cheques which Mr Sanders said that he had made out in favour of ASL and ASLG could be identified as a receipt by those companies.

162. I should at this stage address an allegation on the part of the claimants that, in 2014, ASLG had available to it bank statements showing the receipt of £30,000 into its bank account on 19 August 2008 from which, they say, the likelihood that Mr Sanders' claim was genuine should have been appreciated.

163. It is accepted that bank records going back to 2008 in the form of three excel spreadsheets were obtained by ASLG's lawyers in 2016 and were sent by them under cover of an email to all of the directors. Despite this, ASLG's lawyers wrote to Farrers in November 2016 saying that:

> "We, and our clients, are unable to identify in those statements any payment which could correspond to the payment alleged from your client on or after the date of the alleged final cheque".

164. This does of course seem surprising given that the cheque for £30,000 was written on 11 August 2008 and a credit for the same amount appears in ASLG's bank statement on 19 August 2008. The defendants' explanation for this is that it was not thought that this credit could represent Mr Sanders' cheque as the amount was only debited to his own bank account on 21 August 2008 (i.e. after the credit to ASLG's bank statement).

165. The metadata for the spreadsheets provided in 2016 show that they were originally created in September 2014. The claimants speculate that ASLG had asked the bank to put together this information at that time in connection with its investigation into the amounts owed by Mark to the company. The defendants' position is that this information was not available to the company or, if it was, they were not aware of it.

166. The question then is what bank statements were in fact available to ASLG in 2014. An email from Claire Lewis to Mr Gregson on 29 April 2014 makes it clear that she

had bank statements which at least went back to November 2008 but this does not reveal whether the statements she held went back further than this to August 2008.

167. The report prepared by ASLG's accountants, Leaman Mattei in August 2014 refers to "available bank statements" for the companies but does not specify what dates were in fact available. It is however apparent that the nominal ledger accounts were available for earlier periods. The body of the report for example refers to journal entries in 2005, but the earliest mention of a payment traced via the bank statements of any of the All Star companies seems to have been in December 2008.

168. Leaman Mattei's report attaches a detailed analysis of Mark's director's loan account going back to November 2007 but, again, it is not clear whether any of the figures come from bank statements of companies in the ASL Group or whether they come from journal entries.

169. On 15 May 2014, Claire Lewis emailed Dan Evans to say that she had received bank statements for the period 2010 – 2013. There is no mention of missing bank statements from 2008. The claimants suggest that it can be inferred from this that ASLG already had the 2008 bank statements. This is to some extent supported by an email sent by Claire Lewis to Marcus Gregson on 29 October 2014 after receiving the letter from Farrers outlining Mr Sanders' claim in respect of the disputed shares. She told him that she should be able to track back through the bank accounts and see whether these cheques cleared the ASL account.

170. In my view however, this evidence is inconclusive. Why, for example, would ASLG ask their bank to produce the excel spreadsheets in September 2014 if they already had bank statements for 2008 in May 2014? Had ASLG received the spreadsheets in September 2014, it is surprising that this is not recorded or at least referred to in contemporaneous correspondence (as was the receipt of the bank statements for 2010-2013 mentioned above). That correspondence reveals concerns about the Leaman Mattei report and the fact that certain checks needed to be carried out. However, there is no reference to obtaining missing bank statements in order to enable those checks to be undertaken.

171. It can also be inferred from the Leaman Mattei report itself that, whilst Leaman Mattei had certain bank statements for the ASL Group, much of the information

reviewed by them came from journal entries or nominal ledgers rather than bank statements.

172. Based on all of this, it is more likely in my view that Claire Lewis' reference to "bank accounts" in her email of 29 October 2014 was a loose reference by her to whatever financial information the company had available, whether that be bank statements or its own internal accounting records.

173. Mr Green himself made the point that, had the bank statements been available in October/November 2014, it is unlikely that Claire Lewis would have reported to Mr Gregson that there was no trace of any of the payments said to have been made by Mr Sanders given the £30,000 credit on 19 August 2008. Given that I have accepted Mr Gregson's evidence that Claire Lewis reported that she could not find evidence of the payments being received (see paragraphs [188-189] below), this also supports the conclusion that Claire Lewis did not have the bank statements for August 2008 available to her.

174. Mr Green invites the Court to draw an adverse inference from the fact that Claire Lewis was not asked to give evidence. This was specifically in relation to Mr Gregson's evidence that she had reported to him that she could not find evidence of the payments from Mr Sanders. However, I accept Mr Sinclair's response that there is no obligation on a party to call witnesses to give evidence of both sides of a conversation. In this case, it may well have been disproportionate to call Claire Lewis as a witness given the amount at stake and the fact that Mr Gregson was able to give evidence of what she told him.

175. Based on all of this, my conclusion is that, on the balance of probabilities, ASLG did not have the August 2008 bank statements available to it in 2014 and so, at that stage, the defendants were not aware of the £30,000 credit in August 2008. This information only became available in around August 2016.

176. ASLG's lawyers wrote to Mark and Milly on 20 November 2014 requesting an undertaking that any net proceeds from the sale of their house should be paid into a solicitor's client account and not be released without the agreement of ASLG.

177. Mr Gregson accepted in cross examination that this was part of a strategy to try and convince Mr Sanders to drop his claim in relation to the disputed shares although stressed that, in his mind, it was simply a bargaining point and not an attempt to use improper pressure.

178. At around the same time, the Mellon shareholders requisitioned a general meeting trying (amongst other things) to get approval to report Mark to the police and to make him bankrupt. The resolutions proposed by the Mellon shareholders were defeated. However, the minutes of the general meeting called by the Mellon shareholders record that some of Mark's shares may have been funded by family money and that, as a result, the proposal to sell Mark's shares did not include the disputed shares.

179. This was confirmed in a circular to shareholders dated 8 December 2014 offering the shares for sale which stated that:

> "Mr M Sanders, Mark's father-in-law, claims to be the rightful owner of 80,000 of the shares hitherto registered in Mark's name. This is a complicated issue and is in the hands of our lawyers but this is why 80,000 of Mark's shares are excluded from the sale and will be registered in the name of a nominee pending resolution of the dispute".

180. The sale of Mark's shares other than the disputed shares appears to have completed in around April 2015, although share certificates were not issued to the purchasing shareholders until 24 July 2015. It is in my view more likely than not that this is the reason that the disputed shares were not transferred to Mr Gregson and Mr Evans to hold as trustees until then.

181. As I have already mentioned, the declaration of trust signed by Mr Gregson and Mr Evans in July 2015 makes no mention of any interest of the Sanders family in relation to the disputed shares. Instead, the shares are to be held for the benefit of Mark subject to an ability of the trustees to sell the shares and use the proceeds to reduce Mark's debt to the ASL Group in accordance with the terms of the charge which had been entered into in August 2014. Any surplus shares or proceeds are to be transferred to Mark.

182. Despite the terms of the declaration of trust, the evidence given by both Mr Gregson and Mr Evans was, in effect, that the declaration of trust preserved the status quo in that, in their minds, the disputed shares would still be available for the Sanders family should they be able to substantiate their claim. It is worth noting that this is inconsistent with the defendants' pleadings which make it clear that the purpose of the declaration of trust was to hold the shares so that they could be used to reduce Mark's indebtedness to the ASL Group in accordance with the terms of the charge.

183. Taking all the circumstances into account, I am again not satisfied that Mr Gregson and Mr Evans acted dishonestly in arranging for the disputed shares to be transferred to them by Mark to hold on the terms of the declaration of trust.

184. At one level, the transfer and the declaration of trust changed nothing. The shares were still held for the benefit of Mark subject to the terms of the charge. If the charge was invalid as a result of the beneficial interest of the Sanders family, the shares would be held solely for the benefit of Mark who, in turn would hold any interest he had for the Sanders family. The only difference was that the registered owners were now Mr Gregson and Mr Evans as opposed to Mark.

185. As I have noted, the main reason for the change in legal ownership was to give further protection to ASLG in connection with its charge in the event that Mark was made bankrupt. This did not disadvantage the Sanders family as any interest they might have remained exactly the same as it did before the transfer.

186. I also accept that, despite the terms of the declaration of trust, Mr Gregson and Mr Evans intended to respect the outcome of the claim made by the Sanders family as explained in the 8 December 2014 letter to the shareholders. Based on their clear and consistent evidence under cross-examination, I have no doubt that, in their minds, the transfer to themselves as trustees would safeguard the shares either for ASLG in accordance with the terms of the charge or for the Sanders family if they were able to make good their claim. Looked at objectively, what they did cannot be said to be dishonest by the standards of ordinary, decent people.

187. I reject Mr Green's suggestion that the defendants deliberately failed to investigate whether ASL and ASLG had received the subscription monies said to be paid by Mr Sanders. In July/August 2014, this was not a priority, particularly in circumstances

where they believed that the Von Westenholz family would deal with any claim to the disputed shares.

188. Once a formal claim was made at the end of October 2014, Claire Lewis clearly did investigate whether the funds had been received. Mr Gregson's evidence is that she was unable to find any trace of these payments having been received although there is no documentary evidence to back that up. However, there is also nothing in the documentary evidence which would suggest to the contrary. Had Ms Lewis found evidence of funds coming into the company from Mr Sanders it would be surprising if there were no mention of this in the correspondence at the time. However, there is nothing in the documents which gives any hint that this was a possibility.

189. On balance I therefore accept Mr Gregson's evidence on this point. However, in any event, the strength of any possible claim by the Sanders family does not in my view make any material difference to the question as to whether the defendants' actions in assisting with the transfer of the disputed shares out of Mark's name and into their own was dishonest given that the main purpose of the transfer was to protect the shares in the event of Mark's bankruptcy and not to somehow try and make any claim by the Sanders family more difficult.

190. The claim based on dishonest assistance in a breach of trust therefore fails and I turn now to consider the other trust related claims.

Inconsistent dealing

191. As explained by the authors of Lewin on Trust (20th Edition; paragraphs 42-111), a third party who receives trust property may be liable as constructive trustee if, with the requisite degree of knowledge of a trust, they deal with the property inconsistently with the terms of that trust (See *Lee v Sankey* (1872-73) L.R. 15 Eq.204 at [211] per Sir James Bacon VC).

192. The claimants say that the defendants knew that the disputed shares were held by Mark for the benefit of members of the Sanders family and that they dealt with the shares in a manner inconsistent with that trust by allowing the £400,000 dividend in May 2018 to be retained by ASLG in part repayment of Mark's debts to the company rather than being paid to themselves as trustees.

193. There can be little doubt that the defendants dealt with the disputed shares (or at least the dividend) in a manner which was inconsistent with the existence of a trust in favour of the Sanders family. The question is whether the defendants had sufficient knowledge of such a trust.

194. The claimants' pleadings simply say that the defendants "knew" that the disputed shares were held by Mark on trust for the Sanders family, cross referring to other parts of the pleadings where it is alleged that the defendants "knew or at least strongly suspected" that the disputed shares were held on the trust.

195. No submissions were made by Mr Green as to the required level of knowledge. Lewin suggests (at [42-125]) that liability will only arise where there is actual knowledge or where the defendant has shut their eyes to the obvious or wilfully and recklessly failed to make enquiries that an honest person would have made (the first three categories of knowledge described by Peter Gibson J in *Baden v Société Général pour Favoriser le Dévéloppement du Commerce et de l'Industrie en France SA* ([1993] 1 W.L.R. 509 at [575–583]). In principle, I would accept that this level of knowledge is sufficient.

196. However, although (for the reasons I explain below) I am satisfied that the defendants had notice of a claim in respect of the disputed shares, there is no basis on which it could be said that they had actual knowledge of the existence of a trust in favour of the Sanders family as opposed to a possibility that such a trust might exist. Constructive knowledge of the type I have just mentioned has not been pleaded; nor has it been suggested in Mr Green's skeleton argument or submissions. This cause of action cannot therefore in my view succeed.

***Guardian Trust* principle**

197. In *Guardian Trust*, the executors of a will were on notice that the next of kin intended to apply for revocation of the grant of probate on the basis of want of testamentary capacity. Nonetheless, they paid out certain pecuniary legacies under the terms of the will to persons who would not have been entitled to share in the estate on an intestacy.

198. Lord Romer stated (without authority) at [127] that one of the well-established principles of equity is that:

> "…if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded".

199. As the authors of Lewin note (at paragraph [24-030]), given neither the argument in the Privy Council nor the decision of the New Zealand Court of Appeal shed any light on the source of the principle, the basis for the proposition is not wholly obvious, but conclude that "there is no doubt that the principle forms part of English law", referring for example to the fact that the decision was followed by the Court of Appeal in *Lane v Cullens Solicitors* [2011] EWCA Civ 547.

200. It will be noted that liability does not depend on dishonesty or some other lack of probity. All that is required is that the person holding the assets is a fiduciary who has notice of a claim to those assets from a third party but nonetheless deals with them in a way which disregards the claim.

201. In many ways, this is similar to the liability of a third party for inconsistent dealing. The key difference is that the fiduciary only needs to have notice of a claim. There is no requirement that the claim has been vindicated nor indeed that proceedings have even been issued (which they had not both in *Guardian Trust* and in *Lane v Cullens*).

202. Mr Sinclair draws attention to the fact that the authors of Lewin consider (at paragraph [24-031]) that the *Guardian Trust* principle is difficult to reconcile with the principles applicable to knowing receipt, noting the requirement based on comments made in *Carl Zeiss Stiftung v Herbert Smith & Co (No.2)* [1969] 2 Ch 276 that the third party claim must be sufficiently clear to have justified the Court in granting an injunction and that the claimant must give some good reason why such an order was not sought. Based on this, the authors of Lewin suggest that a similar limitation should apply to the *Guardian Trust* principle although acknowledge that the Court may be readier to impose liability on a recipient who is a volunteer (*Carl Zeiss* being a case where money was paid to a solicitor as a payment of fees for work done).

203. Mr Sinclair notes that, in *Guardian Trust*, Lord Romer observes (at [127-128]) that:

> "… the information conveyed to the appellants by the letter of December 18, 1935, from Messrs O'Donnell and Cleary was of such a nature that no reasonable man should have disregarded it. The appellants should on its receipt at least have applied to the Court for directions, and, if the facts and circumstances had been placed before it, the Court would certainly have refused to sanction any payment to the legatees for the time being…"

204. In addition, Mr Sinclair draws attention to the fact that Lord Romer also approved (at [129]) the conclusion of the New Zealand Court of Appeal that, in that particular case, the fiduciaries had notice of circumstances "which should have made it plain to any ordinary, reasonable and prudent man of business that the payment should not have been made".

205. Mr Sinclair submits that this supports the proposition that, in order for the *Guardian Trust* principle to be applicable, the claim must be one which would justify the Court granting an injunction. However, the letter which Lord Romer refers to simply notified the executors that enquiries were being made and that Counsel's opinion was being taken with a view to possible proceedings for the revocation of the grant of probate on the basis of lack of testamentary capacity. No information was given which would allow the executors to assess the strength of otherwise of the claim, nor indeed could they have known whether proceedings would ultimately be launched.

206. This is hardly the sort of material which would justify the granting of an injunction. I therefore reject the suggestion that Lord Romer was somehow implicitly suggesting that any claim of which the fiduciary has notice must be sufficient to justify the granting of an injunction. On the contrary, in my view, he was simply observing that the fiduciary must have clear notice of the potential claim.

207. Some support for this can be found in Lord Romer's comment at [122] that:

> "… however firmly Mr Ward and Mr Harris may have believed that Miss Smith was possessed of full testamentary capacity when she executed the will, these letters show that after her death they had been given ample warning that others who were interested in the matter took a different view."

208. This certainly indicates that a belief on the part of the fiduciary that the claim is ill-founded will not protect them even though no evidence to support the claim has yet been forthcoming.

209. As a matter of principle, there is some logic to this as the fiduciary has a choice as to how they deal with the asset. It is up to them whether they disregard the claim. They may believe that the claim has no foundation and so ignore it but if the claimant makes good their claim there is no reason why the fiduciary should not be liable to make good the loss given that the fiduciary has the option of seeking the assistance of the Court in order to protect themselves before dealing with the assets.

210. As the authors of Lewin conclude (at [24-031]):

> "… trustees will not be able to distribute safely on their own authority once they have notice of a claim, or if circumstances which could give rise to a claim, unless they are able to take the view that the claim is almost indisputably a bad one."

211. In asserting that they have no liability under the *Guardian Trust* principle, the defendants rely principally on the fact that (through his solicitors) Mr Sanders, in 2015, indicated that he no longer wished to be issued with shares in ASLG but, instead, wanted a return of the £150,000 subscription price which he had paid. This was a claim against ASLG and not a claim against Mark or the defendants in relation to the shares themselves.

212. Accordingly, Mr Sinclair submits that the defendants' actions in allowing ASLG to retain the £400,000 of dividends attributable to the shares held by them as trustees did not infringe any claim that was being made by the Sanders family.

213. However, this is not borne out by the contemporaneous correspondence. On 6 March 2018, just under two months before the initial board resolution to pay the dividend (subject to shareholder consent), Farrers wrote to ASLG's lawyers as a result of having been sent by them copies of the company's bank statements going back to 2008 which revealed the receipt of a cheque by ASLG on 19 August 2008 for £30,000 which Farrers claimed confirmed Mr Sanders' case, being evidence of the receipt by the ASLG of payment from Mr Sanders in respect of his final investment for 10,000

shares in August 2008. Under the "What your clients are now going to do", Farrers wrote:

> "Your clients are now going to register the 80,000 shares as instructed by our client and allocated by the CEO and accountant of ASL (Group) in 2011, which are presently being held to abide the resolution of this matter, to our client's nominees…"

214. Farrers also asked for confirmation that ASLG would "not take any step whatsoever which may prejudice our client's rights in respect of those shares".

215. This letter makes it as clear as it could possibly be that, as a result of the additional information provided by ASLG's lawyers, the Sanders family were claiming the shares and warning ASLG not to do anything which would prejudice their interest in those shares. This was followed by ASLG's lawyers confirming on 19 April 2018, at the request of Farrers, that they were instructed to accept service of proceedings.

216. On 3 May 2018, the ASLG board proposed the payment of a dividend of £5 per share subject to shareholder approval. No notice of this was given to Farrers or to the Sanders family although, not surprisingly, they found out about it from other shareholders.

217. This prompted a letter from Farrers dated 9 May 2018 complaining about "the lack of candour in failing to notify us, or our client, of the proposed dividend payment, when your clients were well aware of the dispute as to his entitlement to shares… still being held on trust, we believe, by Mr Marcus Gregson and Mr Dan Evans (to abide the resolution of this issue)".

218. The letter requested an undertaking from ASLG not to take any step, by the proposed payment of the dividend or otherwise, to prejudice the Sanders' interests as well as an undertaking from the trustees to, amongst other things, fully discharge their fiduciary obligations as trustees and to hold on trust any monies payable as dividends in respect of the shares which they held.

219. This was again ignored, although a paper prepared for a board meeting on 17 May 2018 referred to "The Sanders' claim for his shares". At the board meeting itself, it was noted that the shareholders had approved the payment of the dividend and it was resolved that the dividend should be paid on 25 May 2018 to shareholders on the register on 21 May 2018.

220. Mr Gregson's evidence in relation to these events was unsatisfactory. He initially insisted that he still believed the claim was only for repayment of the £150,000 subscription price and that the Sanders family were not making any claim to an interest in the disputed shares. He eventually accepted that he knew there had been a change of attitude by the claimants but described this as an "invalid change" as, in his view, they should have stuck to their claim for the money.

221. Mr Evans fairly accepted that he was aware of the relevant correspondence. His evidence is that he questioned at the board meeting on 17 May 2018 why the dividend relating to the disputed shares should be retained by ASLG and not paid to the defendants as trustees but was persuaded that this was the right thing to do.

222. ASLG's lawyers did not respond to Farrers until 22 May 2018 after Farrers had sent a reminder the previous day. Somewhat surprisingly in the light of the shareholder letter dated 8 December 2014, ASLG's lawyers questioned the existence of a trust in relation to the disputed shares pending resolution of the Sanders claim and indeed denied the existence of any such trust.

223. In the light of this evidence there is no doubt in my mind that Mr Gregson and Mr Evans were well aware from at least 6 March 2018 that the Sanders family was making a claim in relation to the disputed shares and that they were intending to issue proceedings in relation to that claim. They were also on notice that they should hold the proceeds of any dividend on trust pending resolution of the dispute.

224. Despite this, the defendants agreed that ASLG should retain the dividend relating to the disputed shares in part satisfaction of the debt still due from Mark to ASLG. This may well have been in accordance with the terms of the declaration of trust which they had signed in July 2015. However, they took a conscious decision to disregard the claim which was being made by the Sanders family.

225. It is notable that Mr Gregson's evidence in relation to this episode is not that he believed that any claim had no prospect of success (indeed he specifically accepted that the claim was not totally specious) but, as I have said, was that he believed that the Sanders family had given up any claim to the shares and simply wanted the subscription price to be returned. For the reasons I have already explained, this is simply implausible.

226. I should make it clear that I make no finding that Mr Gregson and Mr Evans acted dishonestly in permitting ASLG to retain the dividend. That was, after all, in accordance with the terms of the July 2015 declaration of trust. They did however take a conscious decision to deal with the assets which they were holding in disregard of the claim made by the Sanders family and so took the risk that they would be liable should the claim prove to be a good one.

227. The Sanders family have now proved their claim. Mr Gregson and Mr Evans are therefore liable for the loss suffered by the claimants as a result of dealing with the dividend in disregard of the claim.

228. As I have mentioned, Mr Sinclair suggests that the claimants should have applied for an injunction and also suggests that, had they done so, they would have been unsuccessful. For the reasons I have already explained, it is no part of the *Guardian Trust* principle that a person who indicates a claim against assets held by a fiduciary must seek to protect their position by obtaining an injunction or some other order preventing the fiduciary from dealing with the assets in accordance with the terms on which they are otherwise held. This is clear from both *Guardian Trust* and *Lane v Cullens*. The defendants cannot therefore avoid liability on this basis.

229. My conclusion on this aspect is sufficient to dispose of the claim. However, given the possibility of an appeal, I will deal as briefly as I can with the other causes of action put forward by the claimants.

Breach of fiduciary duty

230. There is no doubt that, following the transfer of the shares to the defendants in July 2015, they have been holding the shares as trustees and therefore owe fiduciary duties. The potential beneficiaries under the 2015 declaration of trust are Mark and

ASLG. There is no mention of the claimants. Mr Sinclair therefore submits that the defendants do not owe any fiduciary duties to the claimants.

231. Mr Green however points out that the 8 December 2014 shareholder letter clearly indicated that the disputed shares would be held by nominees pending resolution of the dispute with the Sanders family. On this basis, he suggests that the claimants were, in effect, beneficiaries of the trust either as the rightful owners of the disputed shares or as those who stood to benefit from the purpose of the trust.

232. No detailed submissions were made as to the circumstances in which fiduciary duties will arise. The principles (such as they are) are not controversial and were helpfully summarised recently by Cockerill J in *Kelly v Baker* [2022] EWHC 1879 (Comm) at [17-20]. Generally speaking 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 (*Bristol and West Building Society v Mothew* [1998] Ch 1 at [18]). Certain relationships (such as trustee and beneficiary) give rise to a presumption that fiduciary duties will be owed. However, a fiduciary relationship can arise outside those relationships where such a presumption arises. There is no need for such an undertaking to be explicit. The test is an objective one.

233. In their evidence, both Mr Gregson and Mr Evans accepted that, despite the terms of the 2015 declaration of trust, they considered themselves to be holding the shares pending the resolution of the dispute with the Sanders family. Indeed, as I have explained, this is one of the reasons I do not consider the defendants to have dishonestly assisted in a breach of trust when the disputed shares were transferred to them. In accepting the shares on this basis, it is my view that Mr Evans and Mr Gregson put themselves in a fiduciary relationship with the claimants.

234. Whilst I accept that the claimants were not beneficiaries of the July 2015 declaration of trust, the fact is that Mr Gregson and Mr Evans were trustees (and were therefore, in principle, acting in a fiduciary capacity), that they considered themselves to be holding the shares pending resolution of the dispute with the Sanders family and that, based on the 8 December 2014 shareholder letter, the Sanders family had a legitimate expectation that the shares would be safeguarded pending resolution of the dispute.

235. Against this background, looked at objectively, this is a situation where Mr Evans and Mr Gregson could not allow their own interests (or those of the ASL Group) to defeat the underlying purpose of the arrangement which was to safeguard the disputed shares pending the resolution of the dispute with the Sanders family. In that sense, there was an implicit undertaking by the defendants of fiduciary duties in favour of the claimants.

236. The claimants put forward a number of different fiduciary duties which they say have been breached. However, the main breach pursued by the claimants is that the defendants put themselves in a position where their duties as trustees were in conflict with their position as directors of ASLG.

237. If I am right that the defendants owe fiduciary duties to the claimants, given the underlying purpose of the trust, there can be little doubt that the defendants were indeed in a position of significant conflict given that, if the shares did not belong to the claimants, they were available to benefit ASLG by reducing the debt owed by Mark to the company and which was secured by the charge which had been granted by Mark in August 2014. This is apparent from the evidence given by both Mr Gregson and Mr Evans that they considered themselves to be holding the disputed shares for ASLG unless the Sanders family were able to substantiate their claim.

238. There is equally no doubt in my mind that Mr Gregson and Mr Evans were influenced by their duty to ASLG. Mr Evans specifically accepted in his evidence that he put his duties as an officer of the company ahead of his duties as trustee. Mr Gregson's actions in effectively ignoring the Sanders' family claim (which had been made clear to him in March 2018 and May 2018) and, as a result, allowing the dividend which would otherwise have been paid to himself and Mr Evans as trustees to be retained by ASLG amply demonstrate that he also put his duties as a director of ASLG ahead of his duties as trustee.

239. I therefore find that the defendants are in breach of their fiduciary duties. This breach has prejudiced the claimants who are amongst those to whom the fiduciary duties were owed. As a result, the defendants are liable to make good the losses suffered by the claimants, being the £400,000 dividend which would have been available to them

had the defendants insisted that this dividend be paid to and retained by them as trustees pending resolution of the dispute.

Economic torts

240. Having dealt with the trust related claims, I turn now to consider the causes of action based on economic torts.

Procuring a breach of contract

241. In order for liability to arise, there must be a breach of a contract by a third party, the defendants must know of the contract and they must intend to procure the breach either as an end in itself or as the means by which they achieve some further end by persuading, encouraging or assisting the third party (see for example Popplewell LJ in *Kawasaki Kisen Kaisha Ltd v James Kemball Limited* [2021] 1 CLC 284 at [21] adopting the formulation of Lord Hodge in *Global Resources Group v Mackay* [2008] SLT 104). The Court of Appeal in *Kawasaki* notes at [32] that simply preventing somebody from performing a contract is not sufficient. As a result of the breach, the claimant must suffer loss.

242. Mr Green submits that it is not necessary for the defendants to know for certain that the contracts in question (in this case, the subscription agreements) existed. Instead, he suggests that it is enough that they suspected that those agreements may exist, that they had the means to confirm whether this was the case or not and deliberately disregarded the possibility (relying on the judgment of Lord Hoffman in *OBG Limited v Allan* [2008] 1 A.C. 1 at [40-41]).

243. Whilst Lord Hoffman was not dealing with the question as to whether or not the defendants knew of the existence of a contract but instead was considering whether they knew that the action which they were procuring would amount to a breach of contract, I accept that in principle, knowledge of the existence of a contract as well as its terms may be constructive (in the sense explained by Lord Hoffman) rather than actual.

244. Looking at the position of directors, Mr Sinclair submits that a director of a company cannot normally procure a breach of contract by the company. In *Said v Butt* [1920] 3 KB 497, McCardie J explained at [506] that:

> "… if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken."

245. Mr Green notes that in *De Jetley Marks v Greenwood* [1936] 1 All E.R. 863, Porter J speculated (at [872-873]) that it might be possible for some of the directors of a company to conspire before a board meeting to induce the board as a whole wrongfully to break a contract. He did however consider the point to be a difficult one and preferred to express no concluded view.

246. In this case, the breach identified by the claimants is the failure by ASL and ASLG to issue shares to Mr Sanders or to other members of the Sanders family in accordance with the four agreements between Mr Sanders and Mark under which Mr Sanders agreed to subscribe for shares in those companies. The suggestion is that the defendants persuaded ASL and ASLG not to allot shares to the claimants in November 2014 in response to the letter from Farrers dated 28 October 2014.

247. I accept that the failure to issue shares to Mr Sanders was a breach of the subscription agreements and that the claimants have suffered loss as a result of those breaches. However, in my view, this claim is somewhat speculative.

248. Whilst the defendants were aware of the possibility of an agreement made between Mr Sanders and Mark to subscribe for shares between 2005 – 2008, they certainly did not know definitively that such agreements had been entered into. They also did not consciously decide not to enquire into the facts. Indeed, it is clear that, following the letter received from Farrers on 28 October 2014, Claire Lewis did indeed investigate whether there was any evidence of money being received by ASL or ASLG from Mr Sanders.

249. In any event, as Mr Sinclair points out, any breach of the subscription agreements took place in 2005 – 2008 when the companies failed to issue the shares for which Mr Sanders had subscribed. Mr Green suggests that there was a continuing breach or a new breach as a result of Mr Sanders affirming the subscription agreements.

250. However, affirmation is an election by an innocent party for a contract to remain in existence despite a breach by the other party rather than to treat the contract as coming to an end. This is without prejudice to the right of the innocent party to recover damages in respect of a loss occasioned by the breach (see Chitty 34th Edition; paragraph 27-054).

251. What affirmation does not do is to give rise to a further breach of contract if the defaulting party continues to fail to perform its obligations. This is apparent from the fact that, even if a contract is affirmed, the innocent party can bring an action for damages in respect of the original breach.

252. Mr Green relies on the decision in *Glencore Energy UK Limited v Transworld Oil Limited* [2010] EWHC 141 (Comm) in submitting that a continuing failure to perform after affirmation constitutes a new breach. However, in my view, that case does not assist the claimants. In *Glencore*, the contract was mutually affirmed by both parties and the breach only occurred as a result of one party subsequently refusing to accept the pricing mechanism incorporated into the contract. There had been no previous breach of this element of the contract.

253. I therefore accept Mr Sinclair's submission that there was no further breach of the subscription agreements in 2014 and so the defendants cannot have procured any breach.

254. I am in any event satisfied that the defendants were acting bona fide within the scope of their authority as directors of ASLG in resisting in any claim by the Sanders family.

255. The breaches are said to consist of failing to act for the benefit of the members of ASLG as a whole (pursuant to s 172 Companies Act 2006) and to exercise reasonable care, skill and diligence (pursuant to s 174 Companies Act 2006).

256. Whilst it is true that the defendants, in their capacity as directors, took no action to arrange for ASLG to issue shares to the Sanders family following receipt of the letter from Farrers in October 2014, it is clear that they did investigate whether funds had been received from Mr Sanders (and were told that they had not). They also took legal advice.

257. Mr Sinclair referred to the decision of Lane J in *Antuzis v DJ Houghton Catching Services Limited* [2019] EWHC 843 (QB) who reviewed the *Said v Butt* principle in detail. His conclusion (at [114-120]) is that a director may well cause a company to breach a contract with a third party without it being in breach of their duties to the company and that, in these circumstances, the director will not be liable to the third party.

258. In this case, even if the failure of ASLG to issue shares to the Sanders family in 2014 constituted a breach or continuing a breach of the original subscription agreement, this would not in my view be a breach of the defendants' duties to ASLG in circumstances where they were not clear whether there was a valid agreement to subscribe for the shares, whether Mr Sanders had in fact paid the subscription price, whether Mark might be holding shares for the benefit of the Sanders family which might represent the shares which Mr Sanders thought he had subscribed for and where they were in any event acting on the basis of legal advice.

259. On the basis that the defendants were acting in good faith within the scope of their authority, any breach was a breach by ASL or ASLG and was not separately procured by the defendants.

260. For completeness, I should add that, given my finding that, even though Mark remained a director of ASLG, he played no meaningful role and the defendants were effectively running the ASL Group alone, the question considered by Porter J in *De Jetley* as to the possibility of some of the directors procuring a breach by the board as a whole does not arise.

261. For all of these reasons, I reject the claim that the defendants procured a breach of contract by ASL and ASLG, thus causing loss to the claimants.

Causing loss by unlawful means

262. Liability will be established if a defendant uses unlawful means against a third party in a way which affects the third party's freedom to deal with the claimant. The defendant must intend to cause loss or damage to the claimant and, of course, such loss or damage must be the result (see Clerk & Lindsell on Torts 23rd Edition; paragraphs 23-78 and *OBG v Allan* at [47-51])

263. As I have already mentioned, the claimants originally relied on deceit as the unlawful means but this is no longer pursued. Instead, the claimants rely on breach by the defendants of their fiduciary duties or alternatively breach of their duties as directors of ASLG.

264. The alleged breach of the defendants' fiduciary duties relates to their duties as trustees following the July 2015 declaration of trust. However, as Mr Sinclair notes, these duties are said to be owed to the claimants and not the ASL Group companies. On this basis, I accept Mr Sinclair's submission that any breach of the defendants' duties as trustees in relation to the 2015 declaration of trust did not interfere with ASLG's freedom to deal with the claimants and cannot therefore form the basis for a claim based on this cause of action.

265. As far as breach of directors' duties is concerned, Mr Green accepts (for the reasons set out above in relation to procuring a breach of contract) that there will be no unlawful means where the defendants have acted in good faith. However, he emphasises that the requirement to act in good faith relates to the specific matter which is said to constitute a breach of duty. It is not, he says, sufficient, for example, that the defendants believed that the end justified the means.

266. The breaches of defendants' duties identified in the particulars of claim are firstly that they accepted appointment as trustees of the disputed shares in July 2015 in circumstances where they had no intention of complying with the representation in the letter to shareholders dated 8 December 2014 that the shares would be held pending resolution of the dispute with the Sanders family. The second alleged breach is that the defendants misled ASLG as to the evidence of payment for the shares being received by ASLG from Mr Sanders. This is based on the fact that, at least by 2016,

the defendants had seen copies of bank statements in the possession of ASLG which showed a receipt of £30,000 by cheque into its bank account on 19 August 2008.

267. As to the first allegation, I have already found that the defendants did intend when they became trustees in July 2015 to hold the disputed shares pending resolution of the dispute with the Sanders family. This may not have been referred to in the declaration of trust but it was certainly their understanding that this was part of the purpose of the arrangement. This allegation is not therefore made out on the facts.

268. As to the second alleged breach, it is common ground that, in 2016, the bank statements in question were sent to all of the directors of ASLG by ASLG's lawyers. In these circumstances it is difficult to see how it can be said that the defendants misled the company. It should be remembered that, by this stage, the business was run primarily by the executive directors, Mr Rose (Managing Director) and Mr Michael Evans (Finance Director). The defendants were once more acting only as non-executive directors.

269. The real complaint made by the claimants is that, as I have mentioned, on 22 November 2016, ASLG's lawyers wrote to Farrers to say that they had reviewed the bank statements and that "we, and our clients are unable to identify in those statements any payment which could correspond to the payment alleged from your client on or after the date of the alleged final cheque."

270. Rightly or wrongly, ASLG and its advisers had concluded that, as the cheque only cleared Mr Sanders' bank account on 21 August 2008, the credit in ASLG's account on 19 August 2008 could not represent a payment from Mr Sanders. Given the evidence that has now been received from NatWest, everybody agrees that the credit is in fact highly likely to be the payment made by Mr Sanders. However, the position taken by ASLG at the time is clearly one which was taken by the company and its advisers and not specifically by the defendants.

271. The evidence from Mr Evans was that he was aware of a great deal of discussion about the cheque and the timing of the receipt in the bank account but that, as far as he was concerned, there was never any proof that this represented the payment by Mr Sanders. Mr Gregson appears to have had some suspicion (perhaps bearing in mind his background as a banker) that the credit might represent the payment from Mr

Sanders as the most he was able to say in cross examination was that "he went along with the assumption".

272. However, taking all of this into account there was, in my view, no breach by the defendants of their duties as directors. It is clear that the issue was fully discussed and that a position was taken by ASLG in conjunction with its advisers based on information in the possession of all of the directors of ASLG and its advisers. In these circumstances, even taking account of Mr Gregson's background as a banker, I do not consider that the defendants were, by going along with the views of the board as a whole and the company's lawyers, in breach of their duties either under s 172 or s 174 Companies Act 2006.

273. Even if a breach of duty had been established, it is not clear that this would have demonstrated an intention on the part of the defendants to prevent ASLG from issuing 80,000 shares to the Sanders family or refunding the £150,000 subscription price (for example if the breach resulted from lack of care or skill as opposed to a deliberate intention to mislead), thus causing harm to the claimants. However, I make no finding on this point given my conclusion that there was no breach of duty.

274. This cause of action is not therefore made out as there has been no wrongful interference by the defendants in relation to the actions of ASL or ASLG.

Unlawful means conspiracy

275. This tort, like lawful means conspiracy which I shall come to next, of course requires a conspiracy. This involves two or more people taking action with a common intention to injure the claimant. The need for two or more people to act together is often referred to as a combination.

276. The action taken must be unlawful. The intention to cause damage to the claimant need not be the only or predominant purpose of the combination but it must form part of the defendants' intentions.

277. Again, the claimants' original case was put on the basis of deceit but this is no longer pursued. The claimants also rely on the defendants procuring the companies to breach

the investment agreements as being the unlawful means. However, I have already dealt with this under the separate claim based on procuring a breach of contract.

278. The remaining unlawful means relied on are procuring a breach of trust by Mark, breach of the defendants' duties as directors and breaches of fiduciary duties as trustees. In each case, the combination is said to be the two defendants.

279. Taking first the breaches of trust by Mark, the suggestion is that the two defendants combined to induce Mark to breach his duties as trustee. As mentioned above, the breaches are entering into the charge in favour of ASLG and transferring the disputed shares to the defendants as trustees.

280. I have already found that the defendants are not liable for dishonest assistance in relation to those breaches of trust. It might perhaps be surprising if, despite this, they are nonetheless liable to the claimants as a result of procuring the breaches of trust. The reasons they are not so liable is that, whilst the breach of trust is itself unlawful, the means employed by the defendants (inducing the breach of trust) is not, in the absence of dishonest assistance, unlawful.

281. In any event, it is clear that the actions the defendants took were taken in their capacity as directors of the ASLG. The defendants' actions were therefore those of the company.

282. Although no submissions were made on the point, it seems to me that it follows from this that there cannot be a combination between the two defendants where, what they were doing represents the action of the company of which they were both directors. To the extent that any breach of trust by Mark was procured, this was done by the company alone and not by the defendants individually in circumstances where there was no breach of their directors' duties.

283. As far as breach of directors' duties is concerned, I have already found that there is nothing to this. This cannot therefore be the basis of any unlawful means conspiracy.

284. The suggestion that there has been an unlawful means conspiracy as a result of breach by the defendants of their fiduciary duties adds nothing to the claim that they are in any event liable to the claimants as a result of the breach of those fiduciary duties. If

they owe fiduciary duties to the claimants (as I have found), they will be liable whether or not there is an unlawful means conspiracy. If, on the other hand, they do not owe fiduciary duties to the claimants, they cannot be in breach of any fiduciary duties and there will be no unlawful means.

285. I should also mention a suggestion by the claimants that there was a combination between the two defendants and Mark to cause loss to the claimants as a result of the transfer of the disputed shares from Mark to the defendants in July 2015. In his evidence, Mark denied any such combination and it was not seriously pursued by Mr Green in his closing submissions. In my view there is no evidence to support any such combination. In any event, I have already found that the transfer of the shares to the defendants was not intended to cause any harm to the claimants but was instead intended to safeguard the shares in the event of Mark's bankruptcy.

286. The claim based on unlawful means conspiracy therefore fails.

Lawful means conspiracy

287. As with unlawful means conspiracy, there must be a combination. There must also be a predominant intention to cause loss to the claimant. If this predominant intention exists, the defendants will be liable for any loss suffered by the claimant, even if the means used to inflict it were lawful. However, if a defendant is pursing their own legitimate interests, they will not be liable if the means are lawful as the predominant purpose will not be to injure the claimant (*Crofter Handwoven Harris Tweed Co. v Veitch* [1942] AC435 at [445]).

288. The combination is said to be the two defendants together or one or both of the defendants together with ASL and/or ASLG. For the reasons set out above, there is in my view no combination. The defendants were acting in good faith in their capacity as directors of the companies.

289. Further directors were appointed in 2015 but this is after most of the actions complained of by the claimants other than the transfer of the disputed shares to the defendants in July 2015 and the payment of the dividend itself in May 2018. However, there is no evidence that these actions were procured or induced by the defendants rather than being decisions of the boards of the relevant companies.

290. Indeed, the evidence of both Mr Gregson and Mr Evans was that, as I have said, after the appointment of Mr Rose as managing director in January 2015, they both reverted to a more normal non-executive role with the business primarily being run by Mr Rose. For example, Mr Rose had primary responsibility together with the company's lawyers for the management of the claim by the Sanders family, albeit that all of the directors were copied in on correspondence.

291. In any event, the allegation that the predominant intention of the defendants was to harm one or more of the claimants is not, in my view, made out. In the particulars of claim, the conduct relied on is a failure on the part of the defendants to take any steps to investigate Mr Sanders' claim to have an interest in the disputed shares. However, as I have already explained, I am satisfied that, initially, this was because the defendants believed that any claim would be dealt with by the Von Westenholz family together with the fact that the most pressing matter was to secure further funding to keep the business afloat. Once a formal claim was intimated, an investigation was carried out but no evidence to support the claim emerged.

292. Mr Green also notes that the evidence shows that Mr Gregson's attitude to Mr Sanders became less sympathetic and more hostile following the letter of claim from Farrers at the end of October 2014. Whilst the correspondence bears this out, it is perhaps not a surprising reaction to a formal claim being made at a time when Mr Gregson believed that arrangements could be put in place to ensure the ASL Group's future. In my view, any reaction to that correspondence was an attempt to defend ASLG's legitimate interests and was not motivated by a predominant intention to injure the Sanders family.

293. Finally, in support of the argument that the defendants acted with the predominant intention of harming the Sanders family, Mr Green draws attention to the evidence of Jemma Freeman that Mr Evans had recounted to her a comment made by Mr Gregson at around the time the ASL Group companies were put into administration in September 2019 to the effect that "*at least that f*****g Sanders family won't get a penny*". Mr Evans does not recall saying this to Ms Freeman and suggests it is unlikely to be something that Mr Gregson would have said. Mr Gregson himself could not recall making the statement but, equally, did not rule it out.

294. As I have said, Ms Freeman was a clear and impressive witness. I cannot see any reason why she would make this up and her recollection in relation to this was certainly more impressive than that of Mr Evans or Mr Gregson. I accept therefore that the statement she recalls was made by Mr Gregson. However, I do not accept that an isolated comment like this in 2019 carries any inference that the defendants had a predominant intention to injure the Sanders family as opposed to protect ASLG's legitimate interests when undertaking the transactions which were primarily entered into in 2014 and 2015 as well as the arrangements relating to the dividend in May 2018 which was of course approved by the whole board of ASLG.

295. The defendants are not therefore liable on the basis of lawful means conspiracy.

Limitation

296. In his skeleton argument, Mr Sinclair suggests that all of the claimants' claims are time barred. However, in oral submission, he accepted that there was no limitation defence to a claim under the *Guardian Trust* principle given that the events in question took place in May 2018. The same must be true in relation to breach of fiduciary duties relating to the payment of the dividend.

297. As I have found in favour of the claimants on both of these points, I do not propose to address the question of limitation in respect of the other claims where I have found in favour of the defendants as Mr Sinclair's submissions were limited to three brief paragraphs in his skeleton argument and Mr Green made no submissions at all in relation to the limitation point.

Conclusion

298. Mark held the disputed shares from July 2011 on an express trust as to 45,000 shares for Milly, 25,000 shares for Rupert and 10,000 shares for Mrs Sanders.

299. The claim by those claimants succeeds both on the basis of the *Guardian Trust* principle and breach of fiduciary duties on the part of the defendants resulting in loss to those claimants. None of the other causes of action put forward by the claimants are made out.

300. The defendants are therefore liable to account to those three claimants for the sum of £400,000 by way of equitable compensation. Milly is entitled to £225,000, Rupert is entitled to £125,000 and Mrs Sanders is entitled to £50,000.

301. In principle, the claimants in question are entitled to interest from 25 May 2018 to the date of judgment (and interest on the judgment debt after that date in the normal way). The parties should make submissions in relation to the rate of interest up to the date of judgment and any other consequential matters including costs should no agreement be reached as to the form of order which the Court should make.

302. Finally, I should mention that Mr Green encouraged the Court to make findings as to whether the defendants made certain statements knowing that they were untrue or being reckless as to whether they were true. These are the statements which were to form the basis of the claim in deceit. However, given that the claim in deceit is not pursued, to do so would serve no useful purpose and so I decline to make any findings in relation to this beyond those findings I have already made.