[2021 Gib LR 542]

CHURCH LANE TRUSTEES LIMITED v. LEEDS, WOOD and HELLARD (as joint trustees of the estate of PLATON ELENIN formerly known as BORIS BEREZOVSKY (deceased)), STEADFAST TRUSTEES LIMITED, LMC TRUSTEES LIMITED and MAINSTAY TRUST LIMITED

SUPREME COURT (Restano, J.): October 15th, 2021

2021/GSC/26

Trusts—trust assets—settlement of property into trust—court determined, based on evaluation of evidence, that £4.7m. paid to trust by settlor was settled into trust, not loaned to trust—loan deed created several years afterwards was mistake and did not reflect legal position

The claimant sought directions in relation to a trust.

In 2001, Mr. Berezovsky established a trust, governed by Gibraltar law, with the assistance of English solicitors, Curtis & Co. Steadfast Trustees Ltd. ("Steadfast") was the first trustee of the trust, which was set up to purchase a property in England. Mr. Berezovsky transferred £500,000 to the trust and stated that there would be additional contributions of capital to conclude the purchase at a later date. He subsequently instructed the transfer of £4,745,869.50 (the completion funds). Steadfast lent the sum of £5,190,630 to a BVI company, Sugarbay Ventures Ltd., to fund the purchase of the property.

Steadfast was the trustee of the trust until 2005, after which there were a number of changes of trustee: Mainstay Trust Ltd. was trustee from July 2005 to June 2011; LMC Trustees Ltd. from June 2011 to January 2013; and the claimant, Church Lane Trustees Ltd., from January 2013.

The minutes of a meeting of the board of Mainstay in March 2007 stated that it was noted that the trust received a loan from Mr. Berezovsky of £4,739,115.14. A loan deed confirming the terms of the loan was approved and ratified. The deed was executed by Mr. Berezovsky and Mainstay.

In May 2008, Mainstay countersigned a letter dated May 11th, 2008 from Mr. Berezovsky to the trust which stated that various amounts provided by Mr. Berezovsky to pay trust invoices between August 2001 and September 2005, totalling £11,511, constituted loans on the terms and conditions set out in the letter (the loan facility letter).

Mr. Berezovsky died in 2013 and the first, second and third defendants were appointed trustees of his insolvent estate.

Church Lane issued a claim form seeking declarations that it was not liable for debts of £4,739,115.14 and £11,511 which had been claimed by the trustees pursuant to alleged loans. The trustees relied on the loan deed and loan facility letter in support of their claim for payment of the amounts. Church Lane (and the former trustees) contended that the loan documents were nullities and shams and that the sums they referred to were in fact settled into the trust.

Held, ruling as follows:

(1) When determining whether the money paid into a trust was settled into the trust or loaned to the trust, the following principles applied. (1) If there had been an express declaration of intention so that the transferor or transferee made a written or oral declaration as to whether or not a gift was intended, that would generally be decisive. (2) In default of such declaration, the court looked for evidence from which common intention as to beneficial ownership might be inferred. (3) Finally, recourse could be had to legal presumptions where there was really no evidence from which an inference as to common intention might properly be drawn (para. 56).

(2) In relation to the status of the £4.7m. payment, the proper inference to be drawn from an evaluation of all the evidence was that the payment of £4.7m. made by Mr. Berezovsky in 2002 constituted a settlement into the trust. The parties were therefore mistaken in executing the loan deed as no loan had been made in 2002 and the payment of the £4.7m. could not be designated as a loan to the trust after Mr. Berezovsky had paid those moneys away. The loan deed did not therefore properly reflect the transaction and was not a proper trust expense. As the court had been able to draw an inference as to common intention based on evidence, it did not need to have recourse to presumptions. A proper evaluation of the evidence pointed to the loan deed having been entered into by mistake in 2007 as the £4.7m. had been settled into the trust in 2002. The loan deed did not reflect the true legal position and the trustees did not have a valid claim under it (paras. 79–81).

(3) The settlement of the £4.7m. was effective. The trust deed did not require any further formal acceptance on the part of Steadfast. The memorandum not only resolved to accept the initial contribution of £500,000 but also noted prospectively that the property would be purchased through Sugarbay when the additional contribution of the balance required to complete the purchase was received, and the purchase of the property then took place on this basis. Steadfast therefore took positive action to accept the moneys which were added to the trust fund in accordance with the terms of the trust deed. When the payment was made to Curtis & Co. all the parties proceeded on the basis that the money had been gifted to the trust. It would be artificial to conclude that the addition to the trust was ineffective because matters were not spelt out more clearly when the transfer was made. Rather, the common sense deduction to be made in the light of all

the facts and circumstances was that the payment of £4.7m. to Curtis & Co.'s client account was a practical means of arranging for the money to vest in the trust and for that money to be loaned to Sugarbay so that it could purchase the property (paras. 85–88).

(4) Alternatively, if the court were wrong and the addition of the £4.7m. was not effective because it was never accepted into the trust and therefore constituted an imperfect gift, it did not follow that a resulting trust was imposed in favour of Mr. Berezovsky. Whilst the fundamental rule was that equity would not perfect an imperfect gift, exceptions to that rule had developed over the years. In this case, Mr. Berezovsky's donative intention was clear, namely to settle the £4.7m. into the trust so that the property could be purchased through its subsidiary, Sugarbay, and he did everything in his power to complete that gift. Further, Steadfast (and indeed all parties) proceeded on the basis that the £4.7m. had been settled into the trust. On that basis, the trust property was converted from cash into an illiquid asset, namely shares in a company that owned a property. It would be unconscionable and contrary to the principles of equity to allow Mr. Berezovsky or the trustees to recall the gift of £4.7m. when the plain intention was to settle it into the trust. A constructive trust, not a resulting trust, would therefore be imposed over the £4.7m. in favour of Steadfast and on the terms of the trust (paras. 89–90).

(5) In respect of the payments totalling £11,511 which were the subject of the loan facility letter, the court concluded that the sum of £11,511 relating to invoices settled between 2001 and 2005 were also paid as additions to the trust and they could not be re-categorized as loans years later. It was inherently improbable that a professional trustee would accept a loan for payment of the trust's expenses (para. 94; para. 97).

(6) The court would hear the parties as to the precise form that its directions should take (para. 98).

Cases cited:

(1) *Berezovsky* v. *Abramovich*, [2012] EWHC 2463 (Comm), considered.
(2) *Gany Holdings (PTC) SA* v. *Khan*, [2018] UKPC 21; (2018), 21 ITELR 310, followed.
(3) *JF & MF Hexagon Invs.* v. *Hexagon*, 2014 (2) CILR *N* [9]; (2015–16), 18 ITELR 470, considered.
(4) *Pennington* v. *Waine*, [2002] EWCA Civ 227; [2002] 1 W.L.R. 2075; [2002] 4 All E.R. 215; [2002] 2 BCLC 448, considered.
(5) *Rose*, *In re*, *Midland Bank Executor & Trustee Co. Ltd.* v. *Rose*, [1949] Ch. 78, referred to.
(6) *Rose*, *In re*, *Rose* v. *Inland Rev. Commrs.*, [1952] 1 Ch. 499; [1952] 1 All E.R. 1217; [1952] 1 TLR 1577; [1952] TR 175; (1952), 31 ATC 138, referred to.
(7) *Snook* v. *London & West Riding Invs.*, [1967] 2 Q.B. 786; [1967] 2 W.L.R. 1020; [1967] 1 All E.R. 518, considered.

(8) *Vandervell* v. *Inland Rev. Commrs*., [1967] 2 A.C. 291, [1967] 2 W.L.R. 87; [1967] 1 All E.R. 1; (1966), 43 T.C. 519; 45 A.T.C. 394; [1966] T.R. 315, referred to.
(9) *Wiemar & Trachte GmbH* v. *Tadzher*, Case C-296/17; [2019] BCC 339, referred to.

P. Caruana, *Q.C.* and *C. Allan* (instructed by Peter Caruana & Co.) for the claimant;
A. Clutterbuck, *Q.C.* and *D. Lilly* (instructed by Phillips) for the first, second and third defendants;
G. Stagnetto, *Q.C.* and *K. Power* (instructed by TSN) for the fourth defendant;
D. Feetham, *Q.C.*, *R. Pennington-Benton* and *D. Martinez* (instructed by Hassans) for the fifth defendant;
No appearance on behalf of the sixth defendant.

1 **RESTANO, J.:**

Introduction

The claimant, Church Lane Trustees Ltd. ("Church Lane"), is a professional trustee and currently the sole trustee of the Warren Trust ("the trust"), a discretionary trust established by Boris Berezovsky (also known as Platon Elenin) pursuant to a deed of trust dated August 15th, 2001 ("the trust deed"). The first, second and third defendants are the trustees of estate of Mr. Berezovsky ("the estate trustees") who died in 2013. The fourth, fifth and sixth defendants are all former trustees of the trust. The chain of trusteeship for the trust since it was established is as follows: the fourth defendant, Steadfast Trustees Ltd. ("Steadfast"), was appointed as the first trustee of the trust in 2001. Steadfast was replaced as trustee in 2005 by the fifth defendant, Mainstay Trust Ltd. ("Mainstay"), which itself was replaced as trustee by the fifth defendant, LMC Trustees Ltd. ("LMC") in 2011. Church Lane took over as the trustee of the trust in 2013 and remains the trustee to date.

2 On July 27th, 2018, Church Lane issued a claim form seeking declarations that it was not liable for debts of £4,739,115.14 and £11,511 which had been claimed by the estate trustees pursuant to alleged loans. The key issue in these proceedings is whether or not these alleged loans are valid and whether the estate trustees have a claim under them. The estate trustees rely on a loan deed and loan facility letter in support of their claim for payment of these amounts. Church Lane (and the former trustees of the trust) contend that these loan documents are nullities and shams and that the sums they refer to were in fact settled into the trust to enable the purchase of Warren Mere House ("the property"), a country house in Surrey, for Mr. Berezovsky's daughter, Elizaveta Berezovskaya and her family.

Background

3 Mr. Berezovsky established the trust with the assistance of his English solicitors at the time, Curtis & Co. The senior partner at Curtis & Co. who dealt with Mr. Berezovsky at that time was Stephen Curtis and he was assisted by James Jacobson who worked as a solicitor at the firm. On August 13th, 2001, Mr. Jacobson sent a fax to Nicholas Keeling referring to the establishment of a trust which was to purchase the property. Mr. Keeling was a solicitor practising in Gibraltar and at that time he was the senior partner of Denton Wilde Sapte's Gibraltar office and also the managing director of Steadfast, the fiduciary arm of Denton Wilde Sapte in Gibraltar which was to be appointed as the trustee of this newly formed trust. Mr. Jacobson informed Mr. Keeling that he would email him a draft declaration of trust which then followed as an attachment to an email the following day.

4 Mr. Keeling largely approved the draft declaration of trust sent to him by Mr. Jacobson subject to some comments in his response dated August 15th, 2001. He then set out a list of nine numbered points arising from the draft document including the following at point four:

> "Please let me know who will be contributing funds to this trust and provide brief information as to the source of funds in question. We will need identification details (certified copy passport and confirmation of address) of the person contributing the funds."

5 The trust was then established on August 15th, 2001 and named Steadfast as the trustees. It was set up as a discretionary trust with a trust fund of US$50 plus accumulations and other property transferred by any person and accepted by the trustees as additions to the trust fund. The original beneficiaries included Ms. Berezovskaya, Mr. Anatoly Podkopov, who was her partner at the time, and their children.

6 On August 17th, 2001, Mr. Jacobson sent a fax reply to Mr. Keeling's letter of August 15th, 2001 and in response to point four, he stated as follows: "This is subject to further instructions but I anticipate that the funds will come from the Itchen Trust or Mr Berezovsky's personal account."

7 On August 17th, 2001, Mr. Berezovsky sent a letter to his personal bankers, Clydesdale bank which was also addressed to Curtis & Co. and Steadfast and which was dated August 16th, 2001. This instructed Clydesdale to transfer the sum of £500,000 from his personal account to Curtis & Co.'s client account and further stated as follows: "The said sum of £500,000 is to be treated as a contribution by me into the Warren Trust. There will be additional contributions of capital to conclude the purchase at a later date."

8 On August 20th, 2001, Mr. Keeling replied to Mr. Jacobson's fax of August 17th, 2001 and raised a number of points concerning the setting up of the trust. As for the trustee's fees, Mr. Keeling stated as follows:

> "On the basis, and assumption, that this will be pretty much an 'inactive' trust with a single asset (the shares in Sugarbay Ventures Limited) I suggest that it would be appropriate for the Trustees to charge the lowest level of fees (£800 for establishment and £800 per year) . . ."

9 Mr. Keeling also attached in his reply to Mr. Jacobson a copy of the trustee's memorandum of written resolutions dated August 16th, 2001 ("the memorandum"). The memorandum resolved that the initial contribution of £500,000 was accepted as an addition to the trust fund and that it would acquire the share capital in Sugarbay Ventures Ltd. ("Sugarbay"), a BVI company which would be the purchaser of the property. Further, Ms. Berezovskaya and her family were to be permitted to live in the property with arrangement for payment of expenses to be determined at a future date. Point six of the memorandum further resolved as follows: "NOTED that further contributions into the Trust Fund are expected in order to enable the purchase to be completed."

10 There was some further correspondence between Mr. Jacobson and Mr. Keeling and on August 31st, 2001, Mr. Keeling wrote to Mr. Jacobson asking for some more details about the transaction in order that Sugarbay could prepare a minute resolving to acquire the property. He asked Mr. Jacobson a series of questions contained in five bullet points. The fifth bullet point stated as follows: "the source of the funds for the purchase price (presumably all by way of loan or capital contribution from the Warren Trust)?"

11 Mr. Jacobson replied on September 3rd, 2001, and his answer to the fifth bullet point as set out above was as follows: "Source of funds for the purchase price will come by way of loan from the Warren Trust. The Warren Trust will, in turn, receive a loan from the Itchen Trust."

12 On September 4th, 2001, Mr. Keeling signed a memorandum of resolutions on behalf of Sugarbay's sole director which included a resolution to the effect that Sugarbay would acquire the property and that it would accept a loan from the trust on such terms as may be negotiated with the trustee in order to fund the purchase. Although it was envisaged that the completion date would be December 2001, there was a delay of a few months before the purchase of the property could be completed. Thus, on February 20th, 2002, Mr. Berezovsky sent a letter to Clydesdale bank instructing it to transfer the sum of £4,745,869.50 (which I will refer to as £4.7m. for convenience) from his account to Curtis & Co.'s client account. This transfer enabled the completion to go ahead which was finalized on March 25th, 2002.

13 In March 2004, Mr. Curtis died in a tragic helicopter crash. Later on that year the transaction reared its head again when, on November 22nd,

2004, Mr. Keeling sent an email to Mr. Jacobson. In that email, Mr. Keeling stated that it had come to his attention in the course of a compliance review that the documentation for the provision of the funding for this structure and the verification of the source of that funding was lacking. He then set out a list of the items which were outstanding. Although the response to that email is not available, an internal memorandum dated March 17th, 2005 from Mr. Keeling to Brendan Murphy, who was also at that time a solicitor at Denton Wilde Sapte, refers to arrangements being put in place for the transfer of the trusteeship to Mainstay (which had been set up by Mr. Keeling) of various trusts including the trust. This memorandum further refers to the preparation of audited accounts by English auditors, Leigh Saxton Green ("LSG") and for David Leigh of LSG to travel to Gibraltar on April 11th, 2005 for that purpose.

14 Conference calls then took place between Mr. Keeling and Mr. Jacobson on April 12th, 2005, April 15th, 2005 and (probably) on July 19th, 2005 which are referred to in notes prepared by the auditors and which were updated following each call. These notes refer back to Mr. Keeling's email of November 22nd, 2004 asking for details regarding the purchase of the property and notes that "Details now obtained and included in the Accounts for Warren Trust." Before I turn to those accounts, there is one further working document for this period which I would like to refer to and which bears the footer: "Warren Trust Queries & Notes and Points 9-5-06" and which refers to the trust for the year ended December 31st, 2005. There is a manuscript note at the top of this document which states: "discussed 09/05/06 with Mr. Keeling, Mr. Jacobson and Mr. Wilson." At the end of this note, there is a further manuscript note which states that: "James Jacobson to confirm whether the amounts received by the trust after the initial contribution of £500,000 are to be accounted for as settled funds or a loan." There is no documentary record of Mr. Jacobson's response to this request.

15 Turning back to the draft accounts, these cover the years ended December 31st, 2002, December 31st, 2003, December 31st, 2004 and December 31st, 2005 and written into the top right hand corner of the first page of these drafts is the date of March 26th, 2007. There are, however, two sets of accounts for the trust for the year ended December 31st, 2002. The first of the 2002 draft accounts refers to the assets of the trust as exceeding £5m. but the second set of accounts for the period ended December 31st, 2002 refers to creditors totalling £4,743,500. The notes accompanying the second set of draft accounts refer to a loan which is unsecured, interest free and repayable on demand under the heading of "creditors and accruals." Similarly, there are two copies of the 2005 draft accounts. One of these copies has a handwritten note on it confirming that it was discussed with Mr. Keeling, Mr. Jacobson and Mr. Wilson on May 9th, 2006 and refers to the trust having assets of over £5m. which again clearly indicates that the

funds paid by Mr. Berezovsky represent settled funds. On the other hand, the other set of accounts for 2005 refers to creditors of over £4.7m. and assets of £433,195 in 2005 and contains an accompanying note along the lines of the one in the corresponding draft 2002 accounts. The drafts of the 2002 and 2005 accounts reflecting a settlement of the £4.7m. appear to have come first as the manuscript amendments contained in those drafts are incorporated in the other versions.

16 There are two other documents which are undated but which bear the date of March 26th, 2007 in manuscript on the top right hand corner and which are entitled "Warren Trust, Notes, Points and Queries." The first attached a specimen set of accounts. The other one lists a number of queries for Mr. Keeling and refers to the removal of Steadfast as trustees which in fact took place on July 20th, 2005. This suggests that this document came before July 20th, 2005 and that the handwritten date refers to the date the document was reviewed. Point 8 of this document states as follows: "It has been noted from correspondence between Mr B and the Trustees of the Warren Trust that amounts settled by Mr B into the Trust should be treated as being contributions to capital . . ."

17 On July 20th, 2005, a deed of retirement and appointment ("DORA") was executed, by which Steadfast retired and appointed Mainstay as trustee in its place.

18 On September 2nd, 2005, Mainstay prepared and Sugarbay countersigned a letter evidencing the loan from the trust to Sugarbay. This letter is signed by Mainstay as trustee and states that it sets out the terms and conditions upon which "we" made a loan of £5,189,115.14. Although this particular loan is not in issue, clearly the reference to Mainstay as the trustee which provided the loan is incorrect as the trustee at the time the loan was advanced to Sugarbay was Steadfast.

19 Later that month, on September 16th, 2005, Mr. Berezovsky signed a letter of wishes ("the letter of wishes") that recorded the intention that Ms. Berezovskaya and her family should enjoy the benefit of the property and potential distributions from the trust although he also reserved the right to alter or revoke the wishes he expressed in that letter.

20 Moving forward to 2007, a meeting of the board of Mainstay took place on March 14th, 2007 attended by Mr. Keeling and Wendy Jenkins, both directors of Mainstay. The minutes of that meeting state as following:

> "3. It was noted that on February 27th, 2002, the Trust had received from Boris Berezovskiy [*sic*], by way of loan, the sum of £4,739,115.14. There was laid before the meeting a loan Deed which confirms the terms upon which the said loan has been made to the Trust. After due consideration it was resolved that the terms of the said loan Deed be and are hereby approved, ratified and confirmed and that the same be

> executed as a Deed by the Company in its capacity as a Trustee of the Trust and that Nicholas Keeling (director) and Yvette White (secretary) be and are hereby authorised to sign the said Deed as a deed in the name and on behalf of the Company in its capacity as the Trustee of the Trust."

21 The deed referred to in the minutes above was then executed by Mr. Berezovsky (defined as the lender) and by Mr. Keeling on behalf of Mainstay (defined as the borrower) ("the loan deed") and is dated March 14th, 2007. The second recital to the loan deed refers to the lender having loaned the sum of £4,739,115.14 to the borrower on February 27th, 2002. This is not correct as any loan from Mr. Berezovsky would have been advanced to Steadfast which was the trustee at the time. The terms of the loan deed itself provide that the advance is interest free, unsecured and for repayment sixty days after demand.

22 On May 19th, 2008, Mainstay countersigned a letter dated May 11th, 2008 from Mr. Berezovsky to the trust which states that various amounts provided by Mr. Berezovsky to pay trust invoices between August 2001 and September 2005, totalling £11,511, constitute loans on the terms and conditions set out in that letter ("the loan facility letter"). The invoices referred to were raised by Steadfast, LSG, Mainstay and Streathers who are the solicitors who took over from Curtis & Co. when that firm closed down after Mr. Curtis died.

23 In around late 2004, Mr. Berezovsky's UK tax affairs had come under investigation and he instructed PricewaterhouseCoopers ("PwC") to represent him in relation to this investigation. PwC referred to this instruction as "Project Esther." Mr. Berezovsky asked Mainstay who were the trustees of the trust at the time to provide PwC with information about the trust who in turn provided HMRC with a report. Paragraph 7.41 of this report (the available extract of which is undated) states that: "The Warren Trust owns property and funds were settled on it in order to purchase property. Trust funds were settled from the proceeds of the sale of assets realised prior to PE [*i.e.* Mr. Berezovsky] becoming UK resident."

24 Mr. Keeling died in 2011 and following his death LMC took over as trustee of the trust under a DORA dated June 8th, 2011. Mainstay was then struck off the register of companies on March 28th, 2013 following a request by its directors where they stated that the company "is no longer carrying on business or trading and has no debts, liabilities or charges."

25 On December 11th, 2012, Mr. Berezovsky wrote to LMC ("the 2012 waiver") and stated as follows:

> "I write to advise that after due consideration, I hereby do waive all my right, title and interest to any and all claims to receive repayment of any capital, interest or other amounts arising from any advances

which have been made by me to date, to the trustees of the Warren Trust."

26 On January 31st, 2013, LMC and Church Lane executed a DORA whereby LMC retired as trustee of the trust and was replaced by Church Lane. Mr. Berezovsky died shortly afterwards on March 23rd, 2013.

27 In 2014 and following advice from Thomas Eggar, a firm of English solicitors, Ms. Nina Slavina (Ms. Berezovskaya's mother and Mr. Berezovsky's former wife) was added as a beneficiary of the trust and there was an appointment of the totality of the trust fund to her beneficially. An agreement was then entered into in 2018 between Church Lane, Steadfast, Ms. Berezovskaya and Ms. Slavina which governed the application of the proceeds of sale of the property in the event that Church Lane was unsuccessful in these proceedings.

The witnesses

28 Church Lane's witness was one of its directors, Robert Guest. As Church Lane was only appointed as trustee in 2013, Mr. Guest had no contemporaneous knowledge of the transaction and was therefore not cross-examined on his evidence. After reviewing the pertinent documents, Mr. Guest expressed the view that, despite the existence of the loan deed, the proper inference to be drawn from the documents was that there had been no loan and that the trust was not liable to the estate trustees. Mr. Guest's view was that a sensible trustee would not borrow such a large amount of money repayable on demand and then use the proceeds of the loan to purchase an illiquid asset. Mr. Guest also observed that the directors of Mainstay had stated that the company had no liabilities when they requested that the company be struck off and that this also showed that there was no genuine loan.

29 Church Lane also issued a witness summons against James Jacobson who, as stated above, was a solicitor with Curtis & Co. when this transaction took place. He then moved to Streathers in 2004 which continued to act for Mr. Berezovsky and, since 2006, has practised in Gibraltar. Mr. Jacobson explained that whilst at Curtis & Co. he acted for Mr. Berezovsky under the supervision of Stephen Curtis and that as well as acting for Mr. Berezovsky, the firm acted for the trustees of the trust and the directors of Sugarbay. Mr. Jacobson said that he was not experienced in trust matters at the time the trust was established in 2001 and that it was Mr. Curtis who had direct contact with Mr. Berezovsky, who was a big client of the firm. Mr. Jacobson confirmed that Mr. Curtis never raised the question of a loan between Mr. Berezovsky and the trust with him at that time and that everyone proceeded on the basis that the £4.7m. had been settled, including the trustees, auditors and legal advisors. He also said that the question of a loan was not something that he turned his mind to in 2002 and that the fax

he sent Mr. Keeling on September 3rd, 2001 would have reflected instructions he received from Mr. Curtis.

30 Mr. Jacobson was taken through the draft 2005 accounts prepared by LSG showing that the £4.7m. advanced to the trust had been settled into the trust. He confirmed that this would have been discussed with him at the time and that this treatment of the £4.7m. also accorded with his understanding of the position at that stage, although he accepted in cross-examination that it was possible that he might have been told that the moneys had been settled without having thought about it himself or that he had been told nothing about it and had just been given the documents.

31 Mr. Jacobson was then referred to the manuscript note in the document entitled "Warren Trust Queries & Notes and Points 9-5-06" stating that he was to confirm whether the amounts received by the trust after the initial contribution of £500,000 were to be accounted to as settled funds or a loan. He said that his understanding of this note was that it referred to a review of Curtis & Co.'s paperwork that he was asked to carry out by Mr. Keeling and LSG to establish whether there was an instruction from Mr. Berezovsky, the trustee or Sugarbay as to how those funds were to be treated and whether there was anything committing the parties one way or another. He further explained that this issue arose after Mr. Berezovsky received notice from HMRC that his tax affairs were being investigated and that this first came up in late 2004. As a result of this, PwC were instructed and audits were carried out for the trust as well as for three other trusts. Mr. Jacobson recalled that the issue which came to the fore with the trust was that there was a possible inheritance tax liability because of the delay with the completion of the purchase of the property from late 2001 to early 2002. More specifically, this was because Mr. Berezovsky arrived in the UK in around late October 2001 and he was arguably a UK tax resident by the time the property was purchased. Mr. Jacobson's recollection was that there was no tax consequence if the £4.7m. had been advanced by way of a loan but there was a possible tax consequence if that sum had been settled.

32 Mr. Jacobson explained that the outcome of his investigation was that there was no instruction one way or another and that he was asked to sign a deed confirming this. He also recalled that Mr. Keeling also checked Steadfast's files and that there was no direct instruction on those files either. Mr. Jacobson said that it was this absence of documentation that led the trustees to go down the "loan route." Mr. Jacobson made it clear that his remit was limited to establishing whether or not there were documents on file concerning the payment of £4.7m. and that it would have been Mr. Keeling, after taking advice from Streathers, who concluded that it was proper for the loan deed to be executed. When Mr. Jacobson was taken to

the various invoices referred to in the loan facility letter, he confirmed that he was not aware of these payments having been made by way of a loan.

33 Ms. Berezovskaya also gave evidence and explained that when she was ready to settle down in the UK with Mr. Podkopov who was her partner at the time, she had asked her father to buy the property for her. She said that her father had also bought properties for other family members although the extent of this was unclear from her evidence. In the event, Ms. Berezovskaya said that Mr. Berezovsky had agreed to buy her the property and that, following advice received, this was structured through a trust. Ms. Berezovskaya said that she was completely unaware of any loans until 2012 when this came up in the course of her taking advice after the introduction of new tax legislation in the UK which she was concerned could adversely affect the trust. The response to this had been the 2012 waiver which she had been advised was not a perfect solution to the problem which had emerged but that it was preferable that Mr. Berezovsky sign it. She said that, after taking his own advice, Mr. Berezovsky then went ahead and signed it. She said that both her partner and her had invested heavily in upgrading the property over the years which would have made no sense if they could be kicked out of the property on sixty days' notice. Further, she said that the idea of a loan having been made was inconsistent with the property having been purchased for her and her children which she said was the case.

34 The estate's witness was Nicholas Wood who is an insolvency practitioner and who is one of the estate trustees. Like Mr. Guest, Mr. Wood did not have any first-hand knowledge about or involvement in this transaction before 2017 and, like Mr. Guest, was not therefore cross-examined on his witness statement. Mr. Wood's witness statement provided some background about Mr. Berezovsky, his own appointment, and refers to the documents surrounding this transaction. Further, he referred to the judgment of Gloster, J. (as she then was) in 2012 in the well-publicized claim by Mr. Berezovsky against Roman Abramovich which resulted in a Mr. Berezovsky facing a multi-million pound adverse costs liability and observes that it was following the handing down of this judgment that Mr. Berezovsky signed the 2012 waiver.

35 Steadfast's witness was Brendan Murphy who is a solicitor and a director of Steadfast. Mr. Murphy explained that Steadfast was established in 1993 by Fox & Gibbons which had an office in Gibraltar at that time which was subsequently acquired by Denton Wilde Sapte. Mr. Murphy has been a director of Steadfast since 1998 although he confirmed that he had not had any real involvement with the trust until after Mr. Keeling's retirement as a director of Steadfast in 2005. Mr. Murphy's assessment was that the funds had been advanced to the trust by Mr. Berezovsky by way of settled funds. Mr. Murphy made the point that there was no record of any

loan on Steadfast's Viewpoint software platform or otherwise in Steadfast's records or invoices. Further, his view was that the basic fee of £800 which was charged for the administration of this trust did not suggest that there was a loan involved. Further, he said that there was a requirement on Steadfast to disclose any such loans to the Financial Services Commission which had not taken place and for them to be included in Steadfast's financial statements which they were not.

36 Mr. Murphy also made the point that there was no reference to loan liabilities in the DORA or related deed of indemnity when the trusteeship was transferred by Steadfast to Mainstay nor was that liability novated to the incoming trustee. He also confirmed that Mr. Keeling never mentioned any such loan to him when he left and the trusteeship was transferred and that he would have expected him to have done so had there been a loan. He further pointed out that no security was taken for the loan and that in his view, this is not permitted under para. 5 of the first schedule to the trust deed which confers on the trustees the power to borrow "whether upon the security of the whole of any part of the Trust Fund or upon personal security only . . ." Mr. Murphy also said that he could not see how Steadfast could have accepted a loan on terms that enabled Mr. Berezovsky to call for its repayment at short notice since Steadfast would not have had liquid assets to repay such a loan. In his view, the only way for a trustee to safely accept repayment of such a loan would have been on the basis that it was repayable from the proceeds of sale of the property without further recourse against Steadfast as trustee. He said that Steadfast had never accepted a loan on this basis precisely because of the liability which came with it. He also confirmed that he had not been contacted when the purported loans were documented in 2007 and 2008. Mr. Murphy also made the point that Steadfast would not borrow money to settle its own fees as reflected in the facility letter.

37 LMC's witness was John Simmonds, who gave evidence remotely from the USA. Mr. Simmonds was a director of LMC during 2006 to 2013 and confirmed that whilst LMC was unable to assist the court directly on the issues in the claim, it had always understood during its trusteeship between 2011 and 2013 that the funds had been irrevocably settled on the trust. He also confirmed that he had assisted Mr. Berezovsky with the signing of the 2012 waiver.

Submissions

38 Sir Peter submitted that the correct principles to be applied in determining the status of the payment of the £4.7m. are summarized in *Gany Holdings (PTC) SA* v. *Khan* (2). First, one has to determine whether there has been an express declaration of intention as to whether or not a gift is intended and, if so, that will generally be decisive. If not, evidence from

which common intention as to beneficial ownership may be inferred should be considered. Finally, recourse can be had to legal presumptions.

39 He submitted that there was direct evidence of Mr. Berezovsky's intention to settle the £4.7m., namely Mr. Berezovsky's letter dated August 16th, 2001 which referred to the £500,000 transferred originally as a contribution to the trust and further stated that there "will be additional capital to conclude the purchase at a later date." In Sir Peter's submission, this made it clear that Mr. Berezovsky's intention was that the balance required to complete the purchase of the property would also be gifted by way of an addition to the trust fund. Sir Peter said that the memorandum was also direct evidence of this as it records the fact that apart from the initial contribution referred to above, "further contributions into the Trust Fund are expected in order to enable the purchase to be completed."

40 Alternatively, Sir Peter submitted that there was ample evidence from which it could be inferred that Mr. Berezovsky intended the £4.7m. to be a gift and not a loan. Sir Peter pointed out that the letter of wishes makes no reference to a loan and that its tenor is not consistent with a loan having been granted. In particular, this refers to Ms. Berezovskaya's entitlement to occupy the property or any replacement property during her lifetime, to any cash surplus arising from the sale of the property being paid to Ms. Berezovskaya as distributions and also provides for Mr. Berezovsky's grandchildren in the event of Ms. Berezovskaya's death. Sir Peter said that none of this made any sense if the purchase of the property was subject to a loan of £4.7m. He also submitted that it was wholly improbable that Mr. Berezovsky would have paid out such a large amount by way of a loan and that his solicitors at the time, Curtis & Co., who received the moneys into their client account would have allowed this to happen without properly documenting any such loan. Sir Peter said that it was equally improbable that Steadfast would have accepted the £4.7m. as a loan, applied those moneys towards the purchase of the property without regard to the repayment terms of the loan and running the risk that it would be liable for any shortfall if the proceeds of sale of the property were insufficient to pay off the loan. In his submission, this was reinforced by the evidence of Mr. Murphy who confirmed that this was not the way Steadfast operated and that it had no record of any such loan. Further, Ms. Berezovskaya had said that her father had never mentioned a loan to her when she was given the property and that she had dealt with it as her own, including carrying out an expensive refurbishment. As for the 2012 waiver, Sir Peter said it was a very unlikely document to be signed by someone who genuinely believed that a true loan existed especially as it referred very generally to "any advances which have been made" rather than making reference with precision to the loan in question which is what one would expect in these circumstances.

41 Sir Peter also said that Mr. Keeling's failure to refer to any loan when the compliance review commenced in 2004 or when the trusteeship was transferred from Steadfast to Mainstay in 2005 further indicated that no loan existed. Further, he submitted that LSG's working papers and draft accounts also pointed to no loan having been granted. Sir Peter relied on the fact that the first drafts of the accounts treated the payment of £4.7m. as a settlement into the trust and that the revised accounts for the years dated 2002 to 2005 which emerged when the loan agreement was executed on March 14th, 2007 were amended to reflect that the payment of £4.7m. as a loan. Sir Peter also referred to PwC's draft report on "Project Esther" which referred to trust funds being settled to purchase the property and which he said was probably based on information obtained from Streathers, who were Mr. Berezovsky's solicitors at the time. Sir Peter said that the evidence of Mr. Jacobson also supported his case as this showed that everyone proceeded on the basis of a settlement of £4.7m. and that it was following the HMRC investigation that the gift was re-categorized as a loan.

42 Sir Peter also drew the court's attention to the observations of Rimer, J.A. in a judgment of the Court of Appeal dated June 17th, 2021 (reported, *sub nom. Leeds* v. *Mainstay Trust Ltd*., at 2021 Gib LR 311) concerning the setting aside of a default judgment obtained by the estate against Mainstay in separate proceedings. In particular, Sir Peter referred to Rimer J.A.'s judgment where he stated that (*ibid.*, at para. 11): "There is no contemporary evidence before us suggesting that he was *lending* that money to Steadfast as opposed to settling it into the trust in the like way as he had earlier settled the £500,000." [Emphasis in original.]

43 Sir Peter submitted that the proper conclusion to be drawn in the light of all the evidence was that £4.7m. had been settled and not loaned to the trust. Sir Peter therefore submitted that once moneys had been introduced into the trust as settled funds, they belonged to the trust and could not be re-categorized as a loan by a future trustee. He therefore submitted that Mainstay's execution of the loan deed did not regulate a genuine loan made by Mr. Berezovsky in 2002 or at any time, and it was a sham and bogus document in the sense that it purported to note and record the existence of a loan that did not exist. Alternatively, Sir Peter submitted that the presumption of advancement applied because Mr. Berezovsky had purchased a property for his daughter and he should be presumed to have gifted the funds for this purpose.

44 Sir Peter rejected the estate trustees' alternative case that any gift made failed because it had not been properly accepted by Steadfast in accordance with the terms of the trust deed and pointed out that this part of their case had not been adequately pleaded. In any event, he said that it was wrong for the estate to say that Steadfast had not accepted the funds given the terms of Mr. Berezovsky's letter dated August 16th, 2001 and the

memorandum which clearly anticipated the further payment. Further, the moneys had then been used to purchase the property. Sir Peter said that there was no need for acceptance to be in a written form and that *JF & MF Hexagon Invs.* v. *Hexagon* (3) did not assist the estate trustees with this part of their case. He further submitted that even if Steadfast had failed to properly accept the moneys as additions to the trust fund, Mr. Berezovsky had done all that was required from him to effect the transfer and that it would be unconscionable for the donor to be entitled to retain an incomplete gift because of this. As a result, the presumption of a resulting trust which would otherwise arise was rebutted and instead, a constructive trust of the £4.7m. in favour of Steadfast arose in equity. Mainstay was therefore not at liberty to recognize the existence of a loan in 2007 or advance the moneys at this point. Finally, Sir Peter submitted that the loan facility letter which provides that fees paid to Steadfast totalling £11,511 were paid as loans rather than as contributions to capital of the trust made no sense and was similarly a way to re-categorize contributions to the trust as a loan.

45 Guy Stagnetto, Q.C. who appeared for Steadfast, supported Sir Peter's submissions. He submitted that the evidence before the court pointed to a clear intention on the part of Mr. Berezovsky to settle the entire purchase price of the property into the trust and that the loan agreement was put in place in an attempt to rewrite history rather than to accurately record it and that this sort of conduct was similar to that referred to in the judgment of Gloster, J. in *Berezovsky* v. *Abramovich* (1). Further, he said that Steadfast did not have the power to take an unsecured loan and that it would not in any event have been in a sufficiently secure position to lend money onto Sugarbay if the money it had received had been paid as a loan repayable on demand. He also relied on Mr. Murphy's evidence that Steadfast would not have operated on this basis. Dealing with the estate trustees' alternative argument that any gift to the trust had not been properly accepted, Mr. Stagnetto agreed with Sir Peter's submissions and that the estate trustees' reliance on *Hexagon* was misplaced. As for the loan facility letter, Mr. Stagnetto submitted that it beggared belief that a wealthy settlor would only pay off modest trust expenses by way of a loan. Similarly, he said that it made no sense that these invoices would only be paid subject to repayment in which case they were not truly settled.

46 Daniel Feetham, Q.C. appeared for the LMC and also supported Church Lane. Mr. Feetham submitted that it was clear that Mr. Berezovsky and Steadfast had proceeded on the basis that the £4.7m. had been settled on the trust and that it was inherently improbable that Mr. Berezovsky would have made (and Steadfast accepted) an unsecured, interest-free and undocumented loan of £4.7m. without properly documenting it at the time it was made. Mr. Feetham said that the estate trustees' alternative case on a failed disposition should be disregarded by the court as this relied, for the first time and shortly before trial, on the loan deed and facility letter not

just recording earlier liabilities but also creating new liabilities in 2007 and 2008.

47 Mr. Clutterbuck, Q.C. who appeared for the estate trustees agreed that the correct approach to be taken was set out in *Gany* (2) but said that Mr. Berezovsky's letter dated August 16th, 2001 had been superseded by later instructions which showed that Mr. Berezovsky intended to loan £4.7m. and which were given before the actual payment of the £4.7m. was made. First, he referred to the fax of August 17th, 2001 which refers to funds coming from the Itchen Trust or Mr. Berezovsky's personal account and he said that this showed that at that time, the precise funding of the trust had not yet been finally determined. He also said that it was important to bear in mind that it was at around this point that the trust was described as "inactive" and justifying the "lowest level of fees" which was understandable as the decision to grant a loan came after then although, in his view, a trust funded by a loan was just as inactive as one funded by a settlement which owned a property.

48 In Mr. Clutterbuck's submission, the decisive item of evidence was the fax from Mr. Jacobson to Mr. Keeling dated September 3rd, 2001 which, in response to a question about the source of funds for the purchase of the property, refers to the trust receiving a loan from the Itchen Trust. He submitted that this was a contemporary, unchallenged and documentary item of evidence of Mr. Berezovsky's intention that at that date he intended to fund the balance of the purchase price of the property by way of loan to the trust, rather than by a further settlement. Further, he made the point that this is the last written record of Mr. Berezovsky's intention regarding the £4.7m. prior to the transfer which took place in February 2002. Although the funds did not in fact then come from the Itchen Trust, Mr. Clutterbuck submitted that this did not diminish the importance of this document or detract from the fact that it represented a revised intention to loan rather than to gift the moneys. He also pointed out that there was no trustee minute or other evidence of Steadfast accepting the £4.7m. as an addition to the trust. Further, he relied on the fact that the day after September 3rd, 2001, a memorandum of resolutions was passed by Sugarbay's sole director which was signed by Mr. Keeling, resolving amongst other things, to purchase the property which showed that there was no issue with a loan funding the purchase of the property. Mr. Clutterbuck submitted that Mr. Berezovsky's letter and the memorandum were therefore not binding on Mr. Berezovsky and had been superseded by the fax of September 3rd, 2001, as was confirmed by Mr. Berezovsky's and Mr. Keeling's expression of the intention as recorded in the loan deed itself.

49 Moving forward to the compliance review in 2004, Mr. Clutterbuck said that Mr. Jacobson had acknowledged that he and Mr. Keeling had assumed that the £4.7m. had been settled into the trust and that this was the

reason for the early draft accounts not reflecting the loan. He said that when they realized that this needed to be considered further, an investigation was carried out to determine whether there were instructions one way or another and that this investigation was directed at finding the correct answer and putting the trust's affairs in order. Further, Mr. Keeling said that the investigation carried out between 2004 and 2006 had been a thorough one with access to all the relevant individuals and probably to a more complete set of documents than was now available.

50 Mr. Clutterbuck rejected the claim that the loan deed was a sham and said that there was no evidence of a shamming intention. In his submission, the loan deed was valuable evidence of the parties' intention, especially as both Mr. Berezovsky and Mr. Keeling were now dead. Mr. Clutterbuck submitted that the recital in the loan deed that referred to the sum of £4.7m. being borrowed from the "borrower" defined as Mainstay as trustee of the trust was strictly incorrect as the loan would have been made to Steadfast but that nothing turned on this poor drafting which clearly referred to the trustee of the trust at the relevant time and that a similar mistake contained in the loan to Sugarbay was not being challenged. Mr. Clutterbuck said that there were a number of reasons why a loan made sense. He referred to Mr. Berezovsky's possible concerns about Ms. Berezovskaya's partner being able to make a claim against the property if their relationship ended, which turned out to the case. He also said that there may have been concerns about Ms. Berezovskaya's lifestyle as reported in the Russian press, whether or not those reports were in fact true. In his submission, these concerns were catered for with a loan which enabled Mr. Berezovsky to collapse the trust if required. He said that the letter of wishes was not inconsistent with this because if the loan was not called in by Mr. Berezovsky, and which was there only as a last resort, then the letter of wishes governed his wishes.

51 Mr. Clutterbuck submitted that the loan deed did not prevent the trustee of the trust accepting an unsecured loan as the express power to borrow on an unsecured basis is not required since such loans are personal to the trustee. In his submission, the real question was whether any unsecured borrowing was accepted for a proper purpose of the trust, in which case the trustees would be entitled to an indemnity. As for the 2012 waiver, Mr. Clutterbuck said that this was evidence that a loan had been made and he attacked its validity on three grounds. First, he said that it had been withdrawn by the estate trustees when they made their demand. Secondly, he pointed out that as it was not addressed to Mainstay, Mr. Berezovsky had not waived his rights against Mainstay. Finally, he submitted that it was invalid under English law as a transaction at an undervalue although he conceded that this was a matter for the English courts under the decision of the Court of Justice of the European Union in *Wiemar & Trachte GmbH* v. *Tadzher* (9).

52 Alternatively, Mr. Clutterbuck submitted that if the evidence showed that the £4.7m. had been settled, it had not been properly accepted into the trust in accordance with cl. 1.9 of the trust deed which defines the trust fund as property that has been transferred "and accepted by the Trustee as addition to the Trust Fund." He rejected the pleading objection which was raised in relation to this part of the case and said that the court could hardly shut its ears to the possibility of a resulting trust arising and that it had to be persuaded that a completed gift has taken place if the claimant was to have the relief it was seeking.

53 Mr. Clutterbuck relied on the fact that trustee minutes had been drawn up formally accepting the sum of £500,000 on August 16th, 2001 and $10,000 on May 15th, 2006 but that similar minutes had not been drawn up in relation to the £4.7m. He also relied on *Hexagon* (3),which concerned a trust deed containing a similar requirement for acceptance of additions to the trust fund and where Smellie, C.J. highlighted the importance of a trustee properly accepting additions to the trust. As a result, he said that the transfer in February 2002 was defective and did not result in Mr. Berezovsky parting with the beneficial interest in his money which meant that Steadfast held the £4.7m. (or its proceeds) on resulting trust for Mr. Berezovsky who was therefore able to enter into the loan deed. He further submitted that if Mr. Berezovsky had not turned his mind to the basis upon which the money was transferred to Curtis & Co. in February 2002, the imposition of a resulting trust was also the outcome.

54 In the event that the court had recourse to presumptions, Mr. Clutterbuck submitted that the presumption of advancement did not apply as this was not a case concerning a father and child. Rather, the property had been purchased through a company the shares of which were owned by a discretionary settlement of which Ms. Berezovskaya was one of several beneficiaries. As regards the loan facility letter, Mr. Clutterbuck submitted that it was perfectly acceptable for a professional trustee to discharge its liabilities from a loan as it ultimately had recourse to the trust fund for indemnification.

Analysis

55 The first issue to be determined in these proceedings is whether, when the £4.7m. was paid by Mr. Berezovsky, it was settled into the trust or whether it was loaned to the trust. There was no dispute that the principles to be applied in determining this issue are summarized by the Privy Council in *Gany Holdings (PTC) SA* v. *Khan* (2) as follows ([2018] UKPC 21, at paras. 17–22):

> "17. It is convenient to begin with a re-statement of the basic principles by which equity (which in this respect is shared by England and Wales and the British Virgin Islands) provides for identification of beneficial

interests arising from a gratuitous transfer of property. First, if either the transferor or the transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be decisive, regardless of the subjective intentions of either of them: see for example *Whitlock v Moree* [2017] UKPC 44. Secondly, and in default of any such declaration, the court looks for evidence from which a common intention as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one. Finally, recourse may be had to time-honoured presumptions, such as the presumption of advancement or the presumed resulting trust, where there really is no evidence from which an inference as to common intention may properly be drawn. But these are, in modern times, a last resort, now that historic restrictions on the admissibility of evidence have been removed, and the forensic tools for the ascertainment and weighing of evidence are more readily available to the court.

18. Gratuitous transfers of property between persons who are, respectively, the settlor and the trustees of a trust previously established are only a sub-set of cases of this kind, but the existence of that relationship of settlor and trustee between them may, and frequently will, form a powerful contextual basis for the drawing of common sense inferences as to mutual intention.

19. This is exactly what happened in *In re Curteis' Trusts*. The Reverend C T Curteis directed his bankers to invest £2,000 standing to the credit of his account in consols and to hold them in the name of four persons who were the trustees of his earlier-established marriage settlement. The question arose after his death, whether the investment was to be held by them as trustees, as an augmentation of the trust fund, or upon resulting trust for him beneficially. In a short, trenchant, judgment Sir James Bacon VC said, at pp 220–221:

> 'I do not say that this case is so clear as to be beyond a doubt, but the evidence seems to me sufficient to enable me to pronounce an opinion as to the intention of the testator. When he directed the sum of £2000 to be invested in the names of the four trustees he did not communicate to them what he had done, and it must therefore be presumed that he intended them to take it in the character of trustees only. He placed the fund in their names by a deliberate act. What was his purpose in doing this? Why did

> he select these four persons out of all the rest of the world? It is contended that he intended a resulting trust for himself. What reason is there for supposing this? If he had meant the fund for his own benefit, he would have told the trustees of his intention. As he did not do so, it must be presumed that he intended it to be held upon the same trusts as the trust fund to which it was added. A considerable time elapsed before his death, and he did no act during that period to shew any contrary intention . . .'

20. While it is true that the Vice-Chancellor twice used the word 'presumed' in that short passage, it is clear that he was not speaking of a legal presumption, but rather of an inference to be drawn from the facts about what the transferor said and did, set in the context of the pre-existing relationship between him and his marriage settlement trustees. It is not a case of a competition between competing legal presumptions (including for that purpose the presumed resulting trust) but a pragmatic analysis of the alternatives, and a sensible deduction as to what the transferor intended.

21. The case was so described in *Vandervell v Inland Revenue and Customs* [1967] 2 AC 291, where Lord Upjohn was describing how easily the presumption of a resulting trust could be rebutted by evidence of intention. At p 313D he said:

> 'A very good example of this is to be found in the case of *In re Curteis' Trusts* where Bacon VC, without any direct evidence as to the intention of the settlor, drew a common-sense deduction as to what he must have intended. In reality the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution.'

22. This analysis was adopted in the Grand Court of the Cayman Islands by Smellie CJ in *JF& MF Hexagon Investments* (2015–16) 18 ITELR 470 at paras 172–174. By contrast, the opinion of the editors of Lewin on Trusts (19th ed) (2014) at para 9–034, that *In re Curteis' Trusts* establishes a presumption is, in the Board's view, wrong."

56 This can be summarized as follows:

(1) If there has been an express declaration of intention so that the transferor or the transferee makes a written (or oral) declaration as to whether or not a gift is intended, that will generally be decisive.

(2) In default of such declaration, the court looks for evidence from which common intention as to beneficial ownership may be inferred.

(3) Finally, recourse can be had to legal presumptions where there is really no evidence from which an inference as to common intention may be properly drawn.

The first question: the status of the £4.7m. payment

57 The first question which needs to be answered is whether Mr. Berezovsky's letter dated August 16th, 2001 should be regarded as an express declaration of intention which is decisive in relation to the payment of the £4.7m. This letter states that the payment of £500,000 (which is not disputed was settled into the trust) should be "treated as a contribution by me into the Warren Trust" and goes on to state that there will be "additional contributions of capital to conclude the purchase at a later date." Although this does not specify the amount of the additional contributions or where they would originate from, there is a reference to the additional contributions being used to conclude the purchase of the property at a later date. This is therefore cogent evidence of Mr. Berezovsky's intention, not just in relation to the £500,000 but also in relation to the further contribution to conclude the purchase which turned out to be the £4.7m. If the transfer of the £4.7m. had been made shortly after this letter was sent without any further exchanges taking place between the parties, that would probably have been the end of the matter. There was, however, a delay of around six months between the date this letter was sent and the transfer of the actual £4.7m. in February 2002 and some exchanges did take place during that time which the estate trustees say represent a change of mind on the part of Mr. Berezovsky as to how the trust should be funded. I do not consider that in these circumstances Mr. Berezovsky's letter dated August 16th, 2001 can be taken as decisive as that would be shutting one's eyes to the possibility that a change of mind took place during the hiatus. In my view, the correct approach is therefore to reach a conclusion based on an examination of all the evidence from which common intention as to beneficial ownership can be inferred including evidence before, at the time of, or even after the transfer as well as the parties' conduct in accordance with the second limb of the formulation in *Gany* (2).

58 The key document relied on by the estate trustees in support of their case was the fax from Mr. Jacobson to Mr. Keeling of September 3rd, 2001 which states that the trust would receive a loan from the Itchen Trust to allow it to make an onward loan to enable the purchase of the property. The first point to be made about this fax is that it refers to a loan from the Itchen Trust and not just to a loan. I do not consider that the proper way to construe the words "a loan from the Itchen Trust" is disjunctively, as Mr. Clutterbuck commended, so that it refers first and foremost to a loan regardless of whether it came from the Itchen Trust or not. This is a strained and artificial reading of this fax, the sense of which is clear. Properly construed, this merely refers to the funding for the trust for the purchase of the property

being made available by means of a loan specifically from the Itchen Trust. Mr. Jacobson, who sent this fax, confirmed in his evidence that his source for this information was Mr. Curtis as he did not have direct contact with Mr. Berezovsky. Further, he stated that not only was he unaware of a loan from Mr. Berezovsky having been made but that all the parties proceeded on the basis that the £4.7m. had been settled by Mr. Berezovsky into the trust. If a loan had truly been made by Mr. Berezovsky at that time, one would have expected Mr. Jacobson to have known something about it.

59 It is not clear why the reference to the loan from the Itchen Trust came up. I was referred to paras. 924 and 932 in Gloster, J.'s judgment in *Abramovich* (1) where she states that in 2001 Mr. Berezovsky was the beneficiary of the Itchen Trust and that he used it to effect payments he wished to make. There was, however, no concrete evidence before me as to who the beneficiaries of the Itchen Trust were at the time nor was a copy of the Itchen Trust deed in evidence. What is clear, however, is that Mr. Berezovsky's affairs were complex and that there may have been a number of reasons why this course was contemplated at the point when Mr. Keeling was sent that fax. Whatever the reason, the important point is that it did not come to pass because the payment of £4.7m. was made from Mr. Berezovsky's personal account at Clydesdale bank. The common sense deduction to be made therefore is that when Mr. Berezovsky eventually transferred the money from his personal account in February 2002, the idea of a loan being made from the Itchen Trust to the trust had been abandoned and that the payment was being made in accordance with the intention which he expressed in his letter dated August 16th, 2001. There are a number of points which bolster this conclusion as follows.

60 If Mr. Berezovsky had changed his intention to provide a loan instead of a gift to the trust, one would have expected such an important development to have been recorded in writing at the time and terms governing any such loan also set out clearly. Curtis & Co. would have been anxious to ensure that the rights of Mr. Berezovsky, who was one of their most important clients, were secured as a creditor and it would have been counterintuitive to have just left things up in the air. Mr. Clutterbuck's hypothesis as to why Mr. Berezovsky proceeded with a loan instead of a gift was based on Mr. Berezovsky wanting to retain the power to collapse the trust, possibly because of concerns he had about the relationship between Ms. Berezovskaya and Mr. Podkopov or even a lack of trust in Ms. Berezovskaya herself based on press reports. First, and as Mr. Clutterbuck accepted, one should be slow to speculate about what went on in Mr. Berezovsky's mind especially as he was someone who lived a life far from the norm. In any event, it is what actually happened that matters and inferences should be properly drawn from the evidence and not from suspicion or speculation about the motivation which lay behind the decision. Even then, I do not consider that this theory takes matters any further for the estate trustees. If Mr. Berezovsky

wanted to have the power to recall the £4.7m. and effectively collapse the trust, it only reinforces my view that Mr. Berezovsky and his advisors would have been keen to ensure that any loan was put on a proper footing from the start to avoid any problems with enforcement.

61 Similarly, Steadfast as the counterparty to the supposed loan would have had to address its mind to the terms of any such loan. There was some discussion as to whether Steadfast was even able to accept unsecured borrowing because of the terms in which the power set out in para. 5 of the first schedule of the trust deed is drafted. I do not consider that this provision which allows for trustees to borrow "whether upon the security of the whole of any part of the Trust Fund or upon personal security only . . ." necessarily limits the trustee's power to borrow on a secured basis only. This power is required for secured borrowing by trustees and where trust assets are being encumbered. It does not mean, however, that unsecured borrowing is prohibited. Any such borrowing would be personal to the trustee who would have a right of indemnity out of the trust fund if the loan was entered into as a legitimate trust expense. The more important point to be made in this regard is that if a professional trustee such as Steadfast were to take on a personal liability for repayment of a loan of £4.7m., it would also have been concerned to properly secure its position. This would have involved ensuring that it was not exposed to the risk of being liable for any shortfall which might be due if the loan were to be called in and the value of the property, which represented the entirety of the trust fund, were to drop.

62 It is true that to a certain extent Steadfast took risks. It exchanged contracts for the purchase of the property at a time when all it had was a statement of intention from Mr. Berezovsky which meant that it risked the £450,000 deposit made up of trust funds if it did not receive additional funding and the purchase of the property could not go ahead. Further, the trust ultimately owned an expensive property but had no cash to maintain it even though the responsibility to maintain it ultimately fell on its shoulders. In my view, however, these risks were manageable and Mr. Keeling probably felt able to take them in the knowledge that he could rely on Mr. Berezovsky. Those risks, however, cannot be compared with the risk involved in burdening the trustee of the trust with an undocumented loan liability of £4.7m. on a long-term basis with only illiquid assets to defray it which would have been in another league altogether in terms of risk profile.

63 The estate trustees submitted that the fact that there is no document recording Steadfast's acceptance of the £4.7m. as an addition to the trust when it was sent in February 2002 supports their case and undermines the case that this amount was settled into the trust. The relevant provisions of the trust deed are cl. 1.9, which defines the "Trust Fund" as moneys

accepted by the trustees as additions to the trust, and cl. 3, which refers to the trustees power to accept "additional money investment or other property as may be paid or transferred to them." Paragraph 5 of the memorandum resolved that the £500,000 received would be used to proceed with the exchange of contracts for the purchase of the property and para. 6 noted that further contributions into the trust fund were expected to enable the purchase of the property to be completed. In my view this makes Steadfast's position clear. There was nothing further left to say when the money was received by the trust as these paragraphs signified, in advance, Steadfast's intention to accept the second tranche of moneys (which turned out to be the £4.7m.) for the purchase of the property through Sugarbay. This is what happened when the moneys were loaned to Sugarbay for this purpose and it is difficult to see how one can reconcile the fact that the loan to Sugarbay took place for the purchase of the property (which all the parties accept) and at the same time that Steadfast did not accept this money itself which is what enabled that loan to be made. Formal minutes had been drawn up when the £500,000 was transferred to Steadfast on August 16th, 2001 and also when $10,000 was sent to Mainstay on May 15th, 2006 resolving to accept those additions to the trust and it would certainly have been good practice to have done this again when the £4.7m. was received on February 27th, 2002. This, however, was not required for the funds to be accepted as the memorandum already dealt with this and the parties proceeded on that basis.

64 Another feature of the transaction which is consistent with no loan agreement having been entered into is the minimal level of fees charged by Steadfast. Whilst it is true that when Mr. Keeling wrote to Mr. Jacobson on August 20th, 2001 and referred to the "inactive" trust justifying the "lowest level of fees," the fax of September 3rd, 2001 had not yet been sent, there was no attempt by Steadfast to renegotiate these fees after that point which one would have expected if Steadfast had taken on the liability to repay a loan of £4.7m. Further, even if, as Mr. Clutterbuck submitted, the trust had been equally inactive whether or not a loan had been granted to Steadfast, one would have expected that Steadfast would have wanted to be vigilant about its possible exposure and satisfy itself that the value of the property was sufficient to discharge the loan liability at any given time and for this to be reflected in its own accounts. The idea of a professional trustee charging the lowest level fees is simply not in line with this potential exposure even if it ultimately had recourse to the trust fund for indemnification. Although this point is hardly determinative, it also militates against an inference being drawn that a loan was advanced by Mr. Berezovsky to Steadfast in 2002.

65 Following the guidance in *Gany* (2), the court can have regard to the evidence after the transfer was made and in this case matters resurfaced in 2004 with the compliance review to which I now turn. This started with an email from Mr. Keeling to Mr. Jacobson of November 22nd, 2004 and this makes no reference to any loan to the trust although it does refer to the need

to document the loan from the trust to Sugarbay. Point 5 of this email only refers to the need to obtain a document recording the receipt of the funding "received by the Trust over and above the £500,000 . . ." Had there been a £4.7m. loan to the trust, one would have expected a specific reference to that loan at that point and it would have been very peculiar indeed for Mr. Keeling to have simply forgotten about this altogether or for him not to have turned his mind to this question.

66 Similarly, there is no mention of any loan to the trust in the memorandum sent by Mr. Keeling to Mr. Murphy on March 17th, 2005 in advance of the change of trusteeship. Nor is there a reference to any loan in the DORA itself between Steadfast and Mainstay and the deed of indemnity dated July 20th, 2005. In fact, the benefit of the Sugarbay loan as a trust asset is not included in the definition of trust property in this DORA either which only refers to the shares in Sugarbay. If a loan had existed one would also have expected Steadfast to have specifically addressed it when it retired as trustee and probably to have insisted on that liability being novated to the incoming new trustee.

67 Another document which although undated appears to have been sent in advance of the change of trustee in favour of Mainstay is the memorandum entitled "Notes, Points and Queries." This refers to correspondence and states that "amounts settled by Mr B into the Trust should be treated as contributions to capital . . ." This does not specifically refer to the amount of £4.7m. but if the reference to the amounts settled into the trust referred only to the initial payment of £500,000, one would have expected this document to then make some reference to the £4.7m. The fact that it fails to do so suggests that the reference to the "amounts settled by Mr B into the Trust" includes the £4.7m. as well as the £500,000. Whilst this document appears to be no more than a working document prepared by LSG, it provides an indication of their understanding of the position at that point. There are further conspicuous omissions to make any reference to a loan of £4.7m. in the other working documents created at that time. The note of the conference calls which took place between Mr. Keeling and Mr. Jacobson starting on April 2005 (as updated) does not contain a reference to a loan of £4.7m. and refers back to the draft accounts for the trust. The auditors' manuscript discussion note contained in this document dated July 18th, 2005 and discussed with Mr. Keeling on July 19th, 2005 refers to the need to consider the loan agreement relating to the loan made to Sugarbay but makes no reference to a loan to the trust. One would have thought that auditors concerned to review a loan agreement representing an asset of the trust would have been equally concerned to see a loan agreement which gave rise to a liability of a similar amount.

68 Mr. Jacobson's evidence in relation to the request contained in the document dated May 9th, 2006 that he confirm whether the £4.7m. should

be "accounted for as settled funds or a loan" was helpful. He explained that following HMRC's investigation into Mr. Berezovsky's affairs, he was tasked with checking his records to see whether there were any instructions one way or another confirming whether the £4.7m. had been settled or loaned to the trust. He confirmed that he provided, rather unusually, a deed confirming that there was no such instruction and explained that Mr. Keeling then decided that the trustee could go down the "loan route" because there was no impediment to it doing so. Mr. Jacobson also said that all the advisors concerned regarded this as an "open issue" as there was no specific instruction regarding the £4.7m. The question which the parties' asked themselves was therefore misguided and distorted the outcome of the inquiry. Rather than truly establishing what the parties' common intention was in 2002, the clear picture which emerges is that the parties were proceeding on the basis that in the absence of any written instructions regarding the £4.7m. transfer, it was possible for the transaction to be re-categorized or "accounted for" differently years after the payment was made. The fact that Mr. Jacobson was asked to sign a deed shows the importance which was given to the absence of written instructions relating to the transfer.

69 Mr. Clutterbuck relied on the fact that this investigation took some two years and said that this suggested that it had been a thorough and rigorous process. Further, he said that deference should be paid to it because Mr. Keeling had access to all the relevant individuals at the time and probably to a more complete set of documents. In my view, whilst all of this might suggest in theory that the investigation was conducted properly, in fact the opposite appears to have been the case. As I have said, there appeared to have been a distorted view on the significance of there being no written instruction for the £4.7m. transfer, regardless of Mr. Berezovsky's intention at the time. Another failing was Mr. Keeling's failure to approach Mr. Murphy who was at that point the managing director of Steadfast, having taken over from Mr. Keeling who was no longer able to speak for Steadfast at that point. It was suggested that Mainstay was able to voluntarily take on the liability contained in the loan deed as primary obligor and that there was no need to involve Steadfast at that point. This, however, is not reflected in the loan deed which incorrectly refers in the second recital to Mr. Berezovsky having loaned the £4.7m. on February 27th, 2002 to "the borrower" which is defined as Mainstay (not Steadfast) and makes no reference to Mainstay taking on the liability in this way. Even if this were the case or if the view had been taken that Mr. Murphy would not have have known anything that Mr. Keeling did not know, one would still have expected Steadfast's representative to have been informed about these developments if the process had been conducted diligently.

70 Further, if an incisive inquiry had been conducted, one would have expected that a proper record would have been kept of the steps taken, the

reasons which led to the conclusion being reached that the £4.7m. had been loaned and of any legal advice taken. As it is, the minutes of the meeting dated March 14th, 2007 which led to the loan deed being signed only notes that a loan had been received from Mr. Berezovsky but provides no further explanation in this regard.

71 As explained above, there are various sets of draft accounts some of which record settled funds and others which record a loan. Although it is not clear from the face of the drafts which version came first, the versions of the 2002 and 2005 accounts which record assets of over £5m. by reference to the loan due by Sugarbay to the trust appears to have come first because they include manuscript amendments which are incorporated in the other versions. This again shows that LSG proceeded on the basis that the £4.7m. had been settled into the trust right to the point when they produced their first set of draft accounts and it appears quite likely that they only amended the draft accounts based on some form of comfort provided to them, possibly the deed signed by Mr. Jacobson or the loan deed itself.

72 I have not overlooked the fact that the loan deed was signed by Mr. Berezovsky and Mr. Keeling, albeit some five years after the payment. This document clearly contained an error made in defining Mainstay and not Steadfast as "the borrower" when the loan date was given as February 27th, 2002 which was clearly wrong because Mainstay was incorporated on November 4th, 2004. Whilst this may be no more than a drafting error, it is another example of the carelessness with which the professionals approached this matter. Quite apart from this, and when the evidence is viewed in the round, I do not consider the common sense deduction to be drawn from this document is that it accurately confirmed the parties' common intention in February 2002 but rather that it is the product of a flawed process.

73 I have not overlooked the 2012 waiver either in which Mr. Berezovsky waives all his rights to repayment of any advances made by Mr. Berezovsky to the trustees of the trust. Ms. Berezovskaya explained that this came about when she discovered the loan when taking tax advice in around November 2012 and following professional advice. It was submitted by Mr. Clutterbuck that Mr. Berezovsky would have just torn up the loan deed if there had been no loan and that this waiver acknowledges that a loan was made. This, however, is an over simplistic view and overlooks the fact that the counterparty to the loan deed was Mainstay and that Mr. Keeling who had signed on its behalf had died in 2011. Further, a number of professionals had played a part in the re-categorization of the settlement as a loan which had taken place against the backdrop of an HMRC investigation into Mr. Berezovsky's affairs. The better view therefore is, as Ms. Berezovskaya recalled in her evidence, that it was an imperfect solution to a problem which may well have been brought into sharp focus

following the handing down of Gloster, J.'s judgment, but not a genuine admission that a loan existed in the first place.

74 Sir Peter and counsel for the other trustees also relied on two passages in the judgment of Rimer, J.A. in *Leeds* v. *Mainstay* (2021 Gib LR 311). The first is where Rimer, J.A. states (*ibid.*, at para. 9) that Mr. Berezovsky's letter dated August 16th, 2001 did not "suggest that the 'additional contributions of capital' would be lent" to Steadfast. The second (*ibid.*, at para. 11) is where he states that there is "no contemporary evidence before us suggesting that he was *lending* that money to Steadfast as opposed to settling it into the trust." [Emphasis in original.] These observations, however, have to be seen in the context in which they were made. The question before the Court of Appeal in that appeal was whether the estate trustees had acted abusively when they obtained default judgment against Mainstay in another set of proceedings and although much of the evidence before this court was before the Court of Appeal, the estate trustees said that not all of it was. Whilst my conclusion accords with the view expressed by the Court of Appeal, I should make it clear that I have not relied on it in reaching my decision but have done so based on the evidence before me and following the guidance in *Gany* (2).

75 I have not relied either on various findings contained in Gloster, J.'s judgment in *Berezovsky* v. *Abramovich* (1) which were drawn to my attention. For example, she had this to say about Mr. Berezovsky ([2012] EWHC 2463 (Comm), at para. 100):

> "100. On my analysis of the entirety of the evidence, I found Mr. Berezovsky an unimpressive, and inherently unreliable, witness, who regarded truth as a transitory, flexible concept, which could be moulded to suit his current purposes. At times, the evidence which he gave was deliberately dishonest; sometimes he was clearly making his evidence up as he went along in response to the perceived difficulty in answering the questions in a manner consistent with his case; at other times, I gained the impression that he was not necessarily being deliberately dishonest, but had deluded himself into believing his own version of events. On occasions he tried to avoid answering questions by making long and irrelevant speeches, or by professing to have forgotten facts which he had been happy to record in his pleadings or witness statements. He embroidered and supplemented statements in his witness statements, or directly contradicted them. He departed from his own previous oral evidence, sometimes within minutes of having given it. When the evidence presented problems, Mr. Berezovsky simply changed his case so as to dovetail it in with the new facts, as best he could. He repeatedly sought to distance himself from statements in pleadings and in witness statements which he had signed or approved, blaming the 'interpretation' of his lawyers, as if this

somehow diminished his personal responsibility for accounts of the facts, which must have been derived from him and which he had verified as his own."

76 Further, the judge described Mr. Curtis in the following unflattering terms (*ibid.*, at para. 1145):

"If it were necessary to do so, I would not have difficulty in holding that Mr. Curtis was indeed dishonest in this respect, despite the fact that he was, to use Mr. Rabinowitz's words, 'an English solicitor'. His conduct in relation to the Spectrum and Devonia transactions demonstrated, as Mr. Abramovich's closing submissions somewhat euphemistically put it:

'. . . a track record of recording meetings so as to create a desirable, rather than necessarily truthful, version of events.'

or, in more blunt language, that Mr. Curtis was quite prepared to manufacture sham documents where it suited his clients' purposes and created a significant fee opportunity for himself."

77 Gloster, J. concluded as follows (*ibid.*, at para. 957):

"957. Accordingly I find that the Devonia Agreement was not a genuine agreement. It was a sham agreement, entered into for the purposes of generating documentation that would give a false impression that a genuine commercial transaction had been entered into, so as to satisfy the money-laundering requirements of Clydesdale, and so as to enable Mr. Berezovsky and Mr. Patarkatsishvili to receive the $1.3 billion in a 'legalised' fashion in the UK. Second, Mr. Abramovich was not involved in, or party to, the Devonia Agreement and knew nothing about its terms. Such limited involvement as there was, at a low level, by members of his accounting staff in what might loosely be referred to as the Devonia Agreement transaction was directed at, and limited to, the mechanics for the payment by Abramovich controlled companies of the $1.3 billion to Devonia's account with LTB in Latvia—which had been agreed as between the Abramovich side and the Berezovsky side would be the account to which the funds would be remitted. Third, contrary to the terms of the Devonia Agreement, there was never any genuine intention that Devonia would 'transfer the beneficial interests in the Shares being [purportedly] purchased' under the agreement to Mr. Abramovich or companies or entities controlled by, or associated with, him. Fourth, Devonia never did transfer such interests to Mr. Abramovich or any companies associated with him. Fifth, because it was a sham transaction, neither the recitals, nor the other terms, of the Devonia Agreement, supported Mr. Berezovsky's case in relation to the alleged 1995 and 1996 Agreements or in relation to the Sibneft intimidation issue. Sixth, on

> the contrary, the evidence relating to the issue, and the fact that he chose to assert that the Devonia Agreement was a genuine agreement, did not reflect well on Mr. Berezovsky's credibility."

78 Gloster, J.'s findings were made in separate court proceedings concerning other transactions and I do not consider that I should take account of them for the purposes of the present proceedings. In my view, I should come to my conclusion by drawing proper and natural inferences from the evidence in the present case alone.

79 In my judgment, the proper inference to be drawn from an evaluation of all the evidence is that when Mr. Berezovsky paid the £4.7m. in 2002 to Curtis & Co.'s client account, it was not paid as a loan but as a settlement to the trust. The parties were therefore mistaken in executing the loan deed as no loan had been made in 2002 and the payment of the £4.7m. could not be designated as a loan to the trust after Mr. Berezovsky had paid those moneys away. The loan deed does not therefore properly reflect the transaction and is not a proper trust expense. As I have been able to draw an inference as to common intention based on evidence, I do not therefore need to have recourse to presumptions which are only there as a last resort where there is really no evidence from which an inference as to common intention may properly be drawn.

80 Part of Church Lane's pleaded case is that the loan deed was a "bogus or sham" document. Diplock, L.J.'s (as he then was) definition of a sham in *Snook* v. *London & West Riding Invs.* (7) which remains definitive is as follows ([1967] 2 Q.B. at 802):

> ". . . [A sham] means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create . . . for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create legal rights and obligations which they give the appearance of creating."

81 I do not consider that Church Lane has established that Mr. Keeling and Mr. Berezovsky intended to give the appearance of legal rights and obligations different from the actual legal rights and obligations such as would be required to conclude that they had been parties to a sham arrangement. As I have stated above, a proper evaluation of the evidence points to the loan deed having been entered into by mistake in 2007 as the £4.7m. had been settled into the trust in 2002. This means that the loan deed does not reflect the true legal position and that the estate trustees do not have a valid claim under it.

The second question: was the settlement effective?

82 The next question which falls to be determined is whether the settlement of the £4.7m. was ineffective because it was not accepted by Steadfast in accordance with the terms of the trust deed and, if so, what the effect of this is. Before turning to that question, I must first deal with the complaint that the estate trustees' case in this regard has not been properly pleaded.

83 The estate trustees' case as developed at the hearing was that as the moneys were not accepted by Steadfast when the transfer was made, they were still beneficially owned by Mr. Berezovsky by operation of a resulting trust. Mr. Berezovsky was then able to exchange his entitlement to the funds and their traceable proceeds (which still belonged to him in equity) for loan rights in 2002 as recorded under the loan deed. Alternatively, no final decision was reached as to how the £4.7m. was to be treated which meant that Mr. Berezovsky retained his beneficial interest in the moneys and was entitled to exchange it for his loan rights under the loan deed in 2007. The estate trustees therefore contend that the loan deed does not just record liabilities which arose in 2002 but, in the alternative, that it created new liabilities in 2007.

84 The primary argument set out above is adequately pleaded in the defence and counterclaim. This contains a denial that all the funds received by the trust were additions to the trust and pleads that following an investigation, which concluded that the £4.7m. was loaned to the trust, the loan deed was executed in 2007 to record the terms of that loan. The alternative allegation that new liabilities were created by Mainstay under the loan deed, however, is barely pleaded other than by reference to such debts having been properly incurred as expenses of the trust. In my view, a more detailed pleading should have been provided properly summarizing this aspect of the estate trustees' case. Despite this deficiency, however, this aspect of the case turns largely on inferences to be drawn from the evidence as Mr. Keeling who is the person who would have incurred those debts on behalf of Mainstay as the trustee at that point is now dead as is Mr. Berezovsky. There is no indication that there is any other witness who might be able to assist with this issue had it been properly raised before. Further, I am satisfied that the arguments surrounding this issue were deployed comprehensively by counsel. I do not therefore consider that it would be correct in these circumstances for the court to shut its ears to this part of the case.

85 For the purposes of determining the status of the £4.7m., I have already concluded that the trust deed did not require any further formal acceptance on the part of Steadfast. The memorandum not only resolved to accept the initial contribution of £500,000, but also noted prospectively that the property would be purchased through Sugarbay when the additional

contribution of the balance required to complete the purchase was received and the purchase of the property then took place on this basis.

86 The estate trustees also relied on the reasoning contained in the judgment of Smellie, C.J. in *Hexagon* (3). The trustee in *Hexagon* was Hexagon Investments Ltd. ("HIL") a Cayman Islands company which was the trustee of the Hexagon settlement and the question in that case was whether the portfolios had been transferred to it in its capacity as trustee or beneficially. The donors gave evidence that they had followed their lawyer's advice and had not formed any real understanding of the substance of the transactions but that they had not formed the intention to settle their assets upon a trust. HIL maintained that it had not accepted the assets as trustees of the settlement and there was no documentation supporting that. On the basis of the evidence given in that case, it was held that the portfolios had been transferred to HIL legally and beneficially and not in its capacity as a trustee of the Hexagon settlement. The court then went on to consider an alternative argument which was that there had been a failed disposition because the trust deed in that case, in similar terms to the one in the present case, required that the assets be accepted. The Grand Court rejected the argument that once the transferor had done everything required to effect the transfer of the assets it was complete. Smellie, C.J. held (18 ITELR 470, at para. 133) that the requirement in the trust deed for acceptance of transfers of assets cannot be regarded as anything less than a pre-condition before the addition of assets can be effective. Further, he held that there was no general principle of law which overrode the terms of the trust instrument which required acceptance of trust assets. Smellie, C.J. went on (*ibid.*, at para. 145) to hold that HIL was required as trustee to take the positive step of resolving formally to accept the portfolios and further stated that "nowhere within the bundles of materials placed before me is there any document by which HIL purports, in its capacity as trustee of the Hexagon Settlement, to accept the Portfolios as additions to the Trust Fund." He therefore held that the funds had not been accepted by HIL as trustee.

87 The requirement that a trustee must accept an addition to a trust fund is commonplace and included for good reason, namely it prevents trustees from being saddled with burdensome assets and having to disclaim them. It is, however, not clear to me why the Chief Justice in *Hexagon* concluded (*ibid.*, at para. 145) that this required trustees to take the positive step of resolving formally to accept assets as an addition to the trust fund when that particular formal requirement was not prescribed in the trust deed and why the requirement to accept additions to the trust could not be satisfied by the trustee taking some other positive step to accept an addition to the trust such as acknowledging receipt in writing. In any event, although the material provision in the trust deed in *Hexagon* requiring acceptance of addition to the trust is very similar to the one in the present case, the facts

of the present case are far removed from those in *Hexagon*. Unlike *Hexagon*, where the donor's and donee's evidence was that there had been no settlement, Mr. Berezovsky's intention was to settle the £4.7m. into the trust for the reasons set out above. Further, the memorandum in the present case clearly signified Steadfast's prospective acceptance as an addition to the trust of the second payment (which turned out to be £4.7m.) to enable the purchase of the property which went ahead when the moneys were received. Steadfast therefore took positive action to accept the moneys and this meant that they were added to the trust fund in accordance with the terms of the trust deed.

88 Mr. Clutterbuck submitted that when the payment was made to Curtis & Co.'s client account, it could only have been made for the account of Sugarbay, that Steadfast had not been copied into the transfer instructions (as had been the case with the original £500,000 payment) and that the payment had therefore in effect bypassed Steadfast altogether and had thus not vested in the trust. In my view, this approach ignores Curtis & Co.'s role in the whole transaction and the fact that, as Mr. Jacobson explained, they not only acted for Sugarbay in relation to the acquisition of the property, but that they were Mr. Berezovsky's solicitors, they had set up the trust for him and had acted for Steadfast in the acquisition of Sugarbay's shares. It would therefore be wrong to view the payment to Curtis & Co. as nothing more than a payment to Sugarbay and to disregard Curtis & Co.'s pivotal role in the transaction as a whole. As Mr. Jacobson confirmed in his evidence, when this payment was made to Curtis & Co. all the parties proceeded on the basis that the money had been gifted to the trust. It would be artificial to conclude that the addition to the trust was ineffective because things were not spelt out more clearly when the transfer was made. Rather, the common sense deduction to be made in the light of all the facts and circumstances is that the payment of £4.7m. to Curtis & Co.'s client account was a practical means of arranging for the money to vest in the trust and for that money to be loaned to Sugarbay so that it could purchase the property which had been the plan all along.

89 If, however, I am wrong and the addition of the £4.7m. was ineffective because it was never accepted into the trust and therefore constitutes an imperfect gift, I do not consider that it follows that a resulting trust is imposed in favour of Mr. Berezovsky. Whilst the fundamental rule is that equity will not perfect an imperfect gift, exceptions to that rule have developed over the years and the imposition of a resulting trust provides nothing more than a long stop position where the facts and circumstances do not provide an answer and is designed to further rather than frustrate a donor's intention: see *Vandervell* v. *Inland Rev. Commrs.* (8) ([1967] 2 A.C. 291, *per* Lord Upjohn at 312–313). These exceptions are reflected in cases such as *In re Rose, Midland Bank Executor & Trustee Company Ltd.* v. *Rose* (5), *In re Rose, Rose* v. *Inland Rev. Commrs.* (6) and *Pennington* v. *Waine* (4). These cases all concern the question of whether the legal

owner of shares had made a valid gift of them. In broad terms, the two *Rose* cases decided that once a donor of shares has done all in his power to transfer them, he will be regarded as holding the legal title on trust for the donee, who will then become their beneficial owner. Arden, L.J. (as she then was and with whom Schiemann, L.J. agreed) in *Pennington* v. *Waine* identified three routes by which, in the context of a voluntary transfer of shares, the court might avoid the rigorous application of the principle that equity will not compel the completion of an imperfect gift, in the absence of a valid declaration of trust. She described these as ways in which a court of equity might temper the wind to the shorn lamb. The first was when a donor had done everything in his power to enable the donee to enforce a beneficial claim without further assistance from the donor, as in the *Rose* cases. The second is where some detrimental reliance by the donee on an apparent although ineffective gift may so bind the conscience of the donor to justify the imposition of a constructive trust. The third is where by a benevolent construction an effective gift or implied declaration of trust may be teased out of the words used.

90 In my view, the first two of the methods identified by Arden, L.J. by which the wind to the shorn lamb can be tempered apply in this case. First, Mr. Berezovsky's donative intent was clear, namely to settle the £4.7m. into the trust so that the property could be purchased through its subsidiary, Sugarbay and he did everything in his power to complete that gift. Further, Steadfast (and indeed all parties) proceeded on the basis that the £4.7m. had been settled into the trust and it was on this basis that Steadfast went on to lend the moneys to Sugarbay so that it could purchase the property for the benefit of Ms. Berezovskaya as a beneficiary of the trust. Thus, it was on this basis that the trust property was converted from cash into an illiquid asset, namely shares in a company that owned a property. This would represent a detriment to the trustee of the trust as it would be taking on a liability which would crystallize if it had to repay the £4.7m. at short notice when the value of the property could take some time to realise and which could be insufficient to meet that liability. Against this background, it would be unconscionable and contrary to the principles of equity to allow Mr. Berezovsky or the estate trustees to recall the gift of £4.7m. when the plain intention was to settle this amount into the trust. In my judgment, a constructive trust and not a resulting trust would therefore be imposed over the £4.7m. in favour of Steadfast and on the terms of the trust.

91 In the light of the conclusions which I have reached, the arguments concerning the validity of the 2012 waiver fall away.

The loan facility letter

92 There is little evidence in relation to the payments totalling £11,511 which are the subject of the loan facility letter other than that these relate

to the fees of LSG, Steadfast and Curtis & Co. One of these invoices is Steadfast's own invoice dated August 22nd, 2001 in the sum of £1,615 which probably relates to the fees charged for setting up the trust and the first year's annual fees for its trusteeship. There is no attempt to even suggest that the moneys were loaned when they were paid between 2001 and 2005 as para. 1 of the loan facility letter refers to an agreement reached that these payments "will constitute loans."

93 Given the errors which were made in relation to the £4.7m., the proper inference to be drawn is that this is just another example of the same mistake being made by Mr. Berezovsky and Mr. Keeling. It is a misguided attempt to re-categorize payments made or procured by Mr. Berezovsky to settle invoices between 2001 and 2005 years after they were made where there is no evidence that they were intended as loans at the time of payment. Further, such an arrangement makes no sense even if a trustee ultimately has recourse to the loan fund under its indemnity. Taking the fees of Steadfast in the sum of £1,615 as an example, if this amount had been loaned it would have meant that as well as charging minimum fees for its services as a professional trustee, the first fees Steadfast received were liable to be repaid to Mr. Berezovsky.

94 In my view, it is inherently improbable that a professional trustee would accept a loan for payment of the trust's expenses and the proper conclusion to be drawn is that these amounts were paid as additions to the trust.

Summary and conclusions

95 The proper and natural inference to draw from all the evidence is that the payment of £4.7m. made by Mr. Berezovsky in February 2002 constituted a settlement into the trust.

96 Alternatively, if the settlement of the £4.7m. was not effective because of Steadfast's failure to accept the payment in accordance with the terms of the trust deed, a constructive trust would be imposed over the £4.7m. in favour of Steadfast and on the terms of the trust.

97 The sum of £11,511 relating to invoices settled between 2001 and 2005 referred to the loan facility letter were also paid as additions to the trust and they cannot be re-categorized as loans years afterwards.

98 In the circumstances, I consider that it is appropriate for the court to make declarations consequential on this judgment and I shall hear the parties as to the precise form that these declarations should take. I will also hear the parties as to any further applications which arise from the handing down of this judgment.

Ruling accordingly.