Neutral Citation Number: [2017] EWHC 1507 (Fam)

Case No: ZC14D02449

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2017

Before :

MRS JUSTICE ROBERTS

- -

Between :

ND	**Applicant**
- and –	
SD	**1st Respondent**
Y TRUSTEES LIMITED	**2nd Respondent**
	3ru Respondent
PH	

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Tim Amos QC, Miss Emily McKechnie and Miss Marina Faggionato (instructed by **The International Family Law Group**) for the **Applicant**
Mr Michael Glaser, Miss Emma Hargreaves and Miss Rachael Cassidy (instructed by **Stewarts Law LLP**) for the **1st Respondent**
Mr Mark Warwick QC (instructed on a direct access basis) for the **2nd and 3rd Respondents**

Hearing dates: 13th to the 21st December 2016

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Judgment Approved

MRS JUSTICE ROBERTS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Roberts :

1. I am concerned with the resolution of a preliminary issue which arises in the context of litigation between former spouses whose marriage came to an end several years ago, although it has yet to be formally dissolved by Decree absolute. They cannot agree

upon the effective date of separation and that is one of the matters which I shall have to determine in due course. Prior to its demise, the marriage had lasted for some 25 years or more. It was, on any view, a long marriage. The parties have two daughters who are now respectively 28 and 25 years old. In the context of ongoing divorce proceedings, the applicant wife has applied for financial remedy orders. Whilst her application was proceeding along a conventional course in its early stages, the disclosure made by the respondent husband in his Form E revealed the existence of an offshore trust which was set up in 2007 for the benefit of the two children. His financial presentation was significant in terms of its impact upon these proceedings. It is his case that, with his wife's agreement, the vast bulk of the fortune which was built up over the course of their marriage was settled into the Trust for the benefit of their children shortly after their separation. In its current form, neither the husband nor the wife are beneficiaries of the Trust. The preliminary issue which I have to determine is whether or not this Trust is genuine or whether, as the wife claims, it is a sham and of no legal significance in terms of the computation of the resources which will, in due course, fall to be divided between them in the context of her financial claims flowing from the ongoing divorce proceedings.

2. In terms of a practical outcome for this couple, the stakes are very high. If the husband's case is made out and the Trust is genuine and left undisturbed by the wife's alternative application to set it aside by engaging the court's powers under section 37 of the Matrimonial Causes Act 1973, some £50 million will be removed from the overall computation of this couple's accumulated family wealth. The wife's claim to an equal share in what they built up together through their marriage will be confined to a share in the value of the wealth which was not diverted into the Trust. This would reduce her potential entitlement to c. £5 million in round figures. If she succeeds in her attack upon the Trust, the scope of her claims will increase exponentially. A separate issue which I shall need to determine is whether the husband has successfully alienated his wealth into the Trust or whether, as the wife contends, she had a 50% beneficial interest in one of the companies which now falls outside the terms of the Trust.

3. The issue may be simple to define but the litigation it has generated has been far from straightforward. Enormous costs (in excess of £2.2 million) have been run up on both sides of the case and we are still only in the foothills of proceedings in terms of a final resolution of the wife's financial claims. The husband has made an open offer to attempt to engage the support of the corporate trustees (based in X country) with a view to reorganising the Trust so as to make financial provision for the wife from the trust funds either by adding her as a beneficiary or by carving out some form of sub-trust. The (adult) children are independently represented in these proceedings. They have taken legal advice and wish to remain entirely neutral in terms of the ongoing litigation between their parents. The husband's offer was unacceptable to the wife as the basis of settlement and/or further negotiations and thus it was that the case was listed before me for determination of the substantive preliminary issue which, by that stage, had been honed and refined into a series of separate issues and questions.

4. Its forensic unravelling has involved extensive discovery of many thousands of pages of documents. The core material which has been distilled into the six court bundles contains detailed pleadings of the parties' respective cases, many narrative statements with extensive exhibits, expert evidence in relation to the law of X country and valuation evidence of complex business interests owned by the husband or by the parties jointly. Several documents in Y language have had to be translated. There is parallel litigation in X country instigated by the rather bizarre intervention of an individual employed by the husband's X country lawyer who has been referred to in the proceedings as a "whistle blower". The parties themselves have given extensive evidence going back over a quarter of a century in relation to events which occurred as they began to expand their family businesses. Each has given conflicting accounts of the arrangements which were put in place in relation to the manner in which shares in the family businesses were allocated. The evidence has been extensive and it has provided the platform for a no less extensive raft of legal submissions from counsel involved in the case. In addition to detailed written skeleton arguments which were available at the start of the case, by its conclusion after nine days I had over a hundred pages of written closing arguments in addition to a substantial bundle containing verbatim transcripts of the entire proceedings.

5. The preliminary issue was originally listed in June 2016 before Mr Justice Flaux. Counsel had estimated that, depending on the extent of the oral evidence, between four and eight days would be sufficient to conclude the case and enable the judge to deliver judgment. The judge had only five days to deal with the case. On any view, that was an impossible time estimate, as the judge himself acknowledged. The matter was adjourned to a further hearing in December 2016 to which was allocated nine days of court time. Despite the fact that two of the witnesses who were due to make themselves available for cross-examination did not participate in the hearing, we did not finish closing submissions until the final day of the hearing which coincided with the end of term. I made the parties aware that I would deliver a reserved judgment as soon as I could but that listings in the new term were likely to mean that the Easter vacation (2017) would be my first opportunity to read back into the case and produce the judgment. Counsel were gracious enough to accept that even their revised time estimate had been hopelessly inadequate but it is right that I acknowledge the fact that their clients have had to wait for longer than I would have wished to know the outcome of their preliminary issue hearing.

Representation

6. The wife is represented in these proceedings by Mr Tim Amos QC, Miss Emily McKechnie and Miss Marina Faggionato. They are instructed by Mr David Hodson and Miss Lucy Loizou of The International Family Law Group. Mr Michael Glaser represents the husband together with Miss Emma Hargreaves and Miss Rachael

Cassidy of counsel. Mr Glaser was formerly led by Mr Martin Pointer QC but has appeared without a leader for the purposes of the preliminary issue hearing. His solicitors are Stewarts Law LLP (Miss Emma Hatley and Miss Lucy Gould). That firm took over the conduct of this case from their predecessors, T & Co[1], in November 2015. Mr Mark Warwick QC appeared on behalf of the second and third respondents, Y Trustees Limited and Miss PH, one of the directors of Y Trustees Limited and an employee of Mr EW, the husband's X country lawyer. He is instructed on a direct access basis by EW in his personal capacity. In circumstances to which I shall come, Mr Warwick's role in these proceedings has not been made any easier by the illness of Mr EW who has terminal cancer. EW is a resident of X country. Whilst he has made a statement in these proceedings and was due to make himself available for cross-examination via a video link with the court, Mr Warwick informed me before the commencement of the December hearing that his client was extremely unwell in an intensive care facility in a hospital in X country. I had a medical certificate from his treating clinicians informing me of his treatment and prognosis.

7. As I indicated at the conclusion of the hearing at the end of last term, I am grateful to counsel and their instructing solicitors for the care and industry which has gone into the presentation of their respective cases. Few (if any) stones have been left unturned in their collective attempts to piece together the evidential backdrop to the issues which I have to decide and the law which I must apply in reaching my conclusions.

A. The Background

8. The narrative history, insofar as it is relevant to the preliminary issue, can be summarised in this way.

9. The husband was born in X country in 1957. He is now 59 years old. The wife is a national of Z country who was born in 1962. She is 55 years old. Each has since acquired British citizenship. They met in 1980 whilst both were students at K University . Two years later, in April 1982, they married in London. Neither had any assets at that stage. The husband was a trainee accountant and the wife was teaching. Both continued to study in London. She went on to obtain a Masters degree in education and a further degree in sociology. The husband was awarded an MBA. Their elder daughter, M, was born in March 1989 some seven years into the marriage. Her younger sister, L, arrived to complete the family in April 1992.

[1] T & Co are the lawyers who represent the corporate interests and the companies through which the family businesses operate.

10. By this stage this young couple had begun to sow the seeds of what was to become a successful property lettings business which would grow into a very substantial property investment portfolio. Both worked very hard in those early days. Notwithstanding the fact that she had a young child to care for (and later, two), the wife played a full part in their first business which was a property lettings agency. She worked daily from the premises they leased to run the business whilst the husband continued his day job with a local firm involved with hotel and property management. He provided some much needed cash flow whilst doing as much as he could to assist the wife in their new business venture. Whilst there was some issue about the date from which he took on a full-time role in the business, I am satisfied on the evidence I have seen that in early 1992 he left his employment and went to work with the wife as the business continued to grow. He has suggested in his evidence, picked up in previous notes prepared by his counsel for earlier hearings, that the wife's involvement in the business came to an end after the birth of their second child. I do not accept that evidence. Whilst it is neither necessary nor appropriate in this context for me to make detailed findings in relation to her contributions to the marriage, I am entirely satisfied that she continued to be fully engaged with the husband in the running and operation of the family businesses during these early years.

11. By now, they had acquired a modest home in Enfield and a small portfolio of buy to let properties in London. Initially, these were managed by a company called A Limited. That company was wound up and succeeded by a second entity called B Limited which was incorporated in March 1994. The issued share capital in that new company (1,000 shares) was held equally by the husband and wife. From the outset, each held 500 shares in his/her own name. They were both directors and I am satisfied from the material which has been included within the exhibit bundles that the wife played a full part in the day to day operations of the company. She told me that she had always regarded the efforts which they both made inside and away from the home to be their joint contributions towards the future welfare and prosperity of the family. She felt herself to be a full partner with the husband in the business and I accept that, for all intents and purposes, throughout these early years in London that is exactly what she was.

12. By 1994, the family business had expanded to the point where a corporate restructure was deemed appropriate. In February that year, a company called C Limited was incorporated in X country. At that time, the family's base was North London. That was where they had a home and it was where most of their property investments were situated. However, the husband's evidence was that he wanted to expand the property investment business and he anticipated that there would significant tax benefits if the corporate vehicle for that expansion was offshore. He had an old friend from his university days, FG, who put him in touch with his cousin who lived in X country. He made an introduction to a firm of lawyers based in Q City in X country, I & Co. It is the husband's case that the lawyers acquired a "shelf company" which, in February 1994, became C Limited. He maintains that this was all done without the need for him to travel to X country.

13. The wife accepts that the decision to expand their property operation into X country was a joint one although she became concerned about the manner in which what she considered to be their joint beneficial ownership was to be reflected in terms of the legal formalities. It is common ground that at that point in time, non-residents of X country were not permitted to be registered as shareholders of any company based in X country. Any such share ownership had to be authorised in advance by the central bank of X country. On 7 February 1994, three days before the incorporation of C Limited, I & Co secured the necessary permission from the central bank of X country in these terms. Two resident corporate entities (J Nominees Limited and J Secretarial Limited) would hold the issued share capital in C Limited as to 500 shares each and, in each case, as nominees of non-resident individuals. There were various conditions imposed on the operation of the company which are not relevant for the present purposes.

14. The effective day to day management of the company was delegated to the husband by virtue of a power of attorney which was executed on 11 February 1994, the day after incorporation.

15. A fundamental issue in the case is the true beneficial ownership of those shares as at the date of incorporation. The husband claims that he was the beneficial owner of 100% of the company. The wife maintains that it was always acknowledged and agreed by the husband that they would own the shares equally in the same way as they were equal shareholders in B Limited. She relies on the fact that a little over a month after the incorporation in X country of C Limited, B Limited (in its new guise) was formally incorporated in England and each held 50% of those shares both legally and beneficially.

16. In any event, the formal legal ownership of the C Limited shares by the two X country corporate nominees was only to last for the next four months. On 15 June 1994, the legal title to the shares was transferred from J Nominees Limited and J Secretarial Limited into the names of the husband's sister and brother-in-law, Mr and Mrs R, who were residents of X country. Each of those two individuals became the registered holder of 500 shares in place of J Nominees Limited and J Secretarial Limited. His sister, YR, became a director of C Limited.

17. She had been to school in X country with EW. They had maintained their friendship and EW was recommended to the husband as someone who could assist in the administration of the company. By this time, he had established a successful law firm in P City in X country. With effect from April 1994, EW was engaged by the husband to act on behalf of C Limited.

18. It is the husband's case that the wife had absolutely no involvement in the incorporation of C Limited and he denies that there was ever any suggestion that she should be an owner or hold some beneficial entitlement in the C Limited shares. The wife's case is quite different. In one of her narrative statements, she describes a meeting which she says occurred shortly after the incorporation of C Limited in February 1994. She describes how she travelled with the husband to X country to meet with the lawyer who dealt with the formalities. That meeting was attended by Mr and Mrs R. She recalls signing paperwork on that occasion which confirmed that both she and the husband each held a 50% beneficial interest in the company. It was agreed that her sister-in-law and Mr R would become the new registered shareholders in place of J Nominees Limited and J Secretarial Limited since they were then resident in X country. She has produced a letter from the central bank of X country dated 20 July 1994 which confirms permission for the transfer of the shares into the names of Mr and Mrs R. As before with the original permission from the central bank, that letter makes specific reference to the transfer of each individual tranche of shares (500 in each case) into the names of Mr and Mrs R "as nominee *(in each case)* of a non-resident individual".

19. The wife's clear recollection is that paperwork was signed to confirm that her sister-in-law was holding 500 shares on her behalf and Mr R was holding his 500 shares on behalf of the husband. She also recalls subsequently signing paperwork for the bank in order that accounts for the company could be set up.

20. I shall need to return to the resolution of this factual dispute in due course because it has a central relevance to an understanding of precisely what was transferred by the husband into the Trust some thirteen years later.

21. The years between 1994 and 1998 were productive years of continuing expansion under the husband's stewardship. The wife asserts that she continued to work on a full time basis at the offices of B Limited in London. Her role, on her case, was marketing and promotion. She has produced a significant amount of evidence to demonstrate the extent to which she was an active participant in what she regarded as the family business. The family's financial fortunes improved considerably. They were able to send the girls to local private schools. They moved to a substantial property in north London which they gutted and refurbished to their own taste. I am told that it now has five bedrooms, three bathrooms and a separate sauna. (It remains home to the husband.)

22. In April 1998 a new company was incorporated in England, D Limited. Upon incorporation, the shares were held in unequal proportions by the husband and a Mr

V, an employee of the husband's at B Limited. However, within a matter of months Mr V had transferred his shares to the husband and wife in unequal proportions but on the basis that, as with B Limited, the shares were thereafter held as to 50% by the husband and 50% by the wife. This company was used over future years to acquire a significant property portfolio in north London which is now comprised of forty-eight separate investments worth some £20 million gross (£10.64 million net) according to the single joint expert, Mr Jon Dodge. Both parties remain equal shareholders in D Limitedalthough there is a live issue which I shall have to determine as to whether or not the husband has declared a trust in respect of his 50% shareholding.

23. The late 1990s and early 2000s saw the expansion of the business continue. Under the corporate umbrella of C Limited, four further property companies were established in England. E Limited, which owns a further sixteen properties in London, is a wholly owned subsidiary of C Limited. A hotel business, F Limited, was established in 2001 with the company returns showing the husband and wife as equal shareholders. A subsidiary entity, G Limited, operates (under lease) five separate hotels. . Another company, H Limited, was incorporated in July 2000 but dissolved in 2001. The initial shareholding in that company was issued in the husband's sole name and it is relied on by Mr Glaser as an example of the acquisition of an asset which was not held by the parties in equal shares.

24. The husband later decided to branch out into different areas. In October 2004 he set up L Limited in which both parties were originally 50% shareholders. The following year, in 2005, he ventured into the territory of providing day care in private nurseries. Neither of these ventures appear to have taken off in commercial terms and the day care nursery business has subsequently collapsed. W was given director status in the catering company in addition to her 50% shareholding. When the marriage broke down, she was removed as a director and her shareholding reduced to 5%.

25. On the wife's case, which is not disputed by the husband, by 2002 this couple had acquired significant family wealth. She describes a standard of living which saw few, if any, constraints on their discretionary spending. They had a luxurious lifestyle which involved expensive foreign holidays and regular dining out at well-known restaurants. The wife points to the husband's acquisition of a Bentley motor car as evidence of the lifestyle which he chose to adopt.

26. 2002 appears to have been an important year for the family. The husband says that the wife became unhappy and disillusioned with life in London. She says that they had lengthy discussions about their daughters' future education. They were then respectively 13 and 10 years old. She wanted them to experience the culture of Z country as part of the dual heritage which was the reality of their lives. She travelled with the girls to Z country during 2002 to make enquiries about schooling. The plan

was that she would establish a home base in Z country and the husband would follow shortly thereafter. Initially they rented a property in T City in Z country. It seems that the husband commuted weekly between T City and London where he continued to take care of the family's various business interests. The home in North London was retained as the family's London base.

27. Given that family life was by now effectively operating on what the wife describes as an "international" basis, the parties took the decision to expand their property owning business into Z country. In June 2003, a new company called M Limited was incorporated in Z country. As the official records show, each was held out to the authorities as a director and 50% shareholder although the company was a subsidiary of C Limited. They acquired office premises in T City and over the next few years both residential and commercial office space was added to the company's portfolio. It is the wife's case that she had (and continues to have) a central role in managing these properties and finding tenants for them.

28. The following year, in 2004, they purchased a substantial property in T City in their joint names. Within the grounds was a swimming pool and a private chapel. Despite this acquisition, it is the wife's case that she continued to make regular trips to and from the United Kingdom to assist the husband in the running of the various businesses. During all significant holiday periods, such as Christmas, Easter and half term holidays, she contends that the family returned to the North London home. There was no challenge on behalf of the husband to this evidence about the typical rhythm of family life at the time.

Date of separation: difficulties emerge in the marriage

29. Whilst his evidence is short on detail, it is the husband's case that the parties separated in 2006 and lived apart since that date. He says that he grew tired of the endless round of commuting between London and T City and had, in any event, become disillusioned about doing business in Z country. He did not consider his Z country business interests to have flourished in the same way as his London enterprises and, in 2006, he took the decision to move back to London on a permanent basis. Thereafter, on his case, he travelled regularly to their T City home to see the girls but on the basis that the wife would voluntarily absent herself from the property so that he could spend time there alone with the children. In the early days she stayed locally in a hotel but came back to the house daily to look after the family. Thereafter she rented a small house on the coast in Town M which she occupied during his visits to the Z country family home.

30. The wife's account of the state of their marriage at this juncture is different. She accepts that there were tensions in their relationship during 2006 and that they argued frequently. In October 2006, it appears to be agreed that the parties engaged in some joint marital therapy or counselling sessions which spanned a period of about four months into the early part of 2007. She says this in her written evidence:

> "I still considered that we were very much a couple and I wanted to work through our differences. We were still sleeping together and holidaying together; we had been a team for 25 years and were going to work through the strains of our relationship."

31. She has produced evidence of a corporate outing to Prague which they both attended at the end of 2006. The beginning of 2007 saw them holidaying together in Vienna with friends.

The private agreement

32. By the summer of 2007, the situation had not improved and the wife approached a local Z country lawyer with a view to putting their living arrangements on a more formal footing. She told me during her oral evidence that the precipitating event behind her decision to formalise their living arrangements had been further altercations within the family during the early summer of 2007. Their elder daughter was studying hard for her final examinations. They were important because her results would determine her entry to university in London. The wife had asked the husband not to visit during that period because she did not want the tension flowing from their marital difficulties to disturb their daughter's studies. He refused to change his schedule and told her that, since it was his house, he would come when he pleased. In order to avoid confrontation, she left the house and moved for a few days to a hotel near Town M. That, for her, was the point at which she felt something had to be done. She approached Mrs CM. Following a meeting which the wife had with that lawyer, a document was produced. The wife has exhibited a copy of that document to one of her written statements. It is dated June 2007. The preamble to the specific numbered clauses in that document has been translated thus:

> "The spouses recognise the existence of problems in their marital cohabitation and aiming both to prevent tensions and frictions from these problems, but also aimed at protecting the mental health and tranquillity of their children and of achieving as far as possible the harmonious coexistence for the good of all members of the family, decided after discussion between them, to make the following arrangements: …."

33. There then follow a series of paragraphs which deal with joint parental care of the children; the allocated use of the family home in T City during term times and holiday periods; the use of the seaside holiday home in Town M; and the occupation of the family home in North London. The husband's trips to T City every fortnight in a given month are predicated in that document on the basis that "because of his work the other two weeks a month he lives in London England". In relation to the London home, each was to have the right to live in the property for a total of six months in every year but on the basis that they would agree dates in advance so as to avoid any "coexistence of the two spouses". The document records that the parties are the joint owners of the London home despite the fact, as the wife was subsequently to discover, that on purchase the legal title had been placed in the husband's sole name.

34. That was where the document ended. It did not make any provision for any financial arrangements nor did it record the ongoing financial provision which the husband continued to make for his family throughout this period.

35. The wife's case is that when she handed this agreement to the husband, there was an angry confrontation. She says that he read it and threw it away. On her case it was never signed by him.

36. When the husband was cross-examined about this agreement, he accepted that the document reflected the terms of what they had agreed at the time. However, he told me that he refused to sign this version when it was presented to him because it fell short of reflecting what he relies on as a composite agreement which was intended to reflect and regulate all aspects of their separation, including financial arrangements. He maintains that Mrs CM drew up a second version of the agreement which dealt with future ownership of the houses in T City and London; the retention by the wife of her 50% shareholding in D Limited; and, crucially, her agreement that the shares in C Limited would "go to the kids". He claims to have signed a copy of the second version of what he believed to be a formal separation agreement. His evidence in relation to what happened thereafter is unclear and, in some aspects, conflicting. He stated that he brought a copy of the signed second version back to London with him. It was placed in his wardrobe in the bedroom at the North London home but was subsequently "stolen" by the wife when she attended the property in 2014 (some seven years later) and removed a quantity of documents without his permission. I say his evidence on this subject is conflicting because he has also claimed that the signed document was returned to Mrs CM's file which was later returned to the wife who subsequently removed/destroyed the document.

37. The truth or otherwise of the husband's assertions is important because of what was to happen a matter of weeks later in the offices of EW. It is a fundamental plank of the husband's case that there was a clear agreement between the parties at the time of their marital difficulties in 2006/2007 that the shares in C Limited (which by this point was a company of very significant value given its underlying property portfolio) would go to the children. The husband has described in his written evidence how these discussions began in 2005. He says that he told the wife that he intended to give his shares in C Limited to the girls although he accepts that there was no mention at that stage of a trust arrangement. He says that he secured her specific agreement to that course. She was to keep her interests in B Limited, D Limited and two other income-producing UK companies (F Limited and L Limited). According to the husband, these companies were intended to provide her with an income and a capital base.

38. The wife denies that there was any such discussion (far less agreement) in relation to the division of their financial affairs at that time. The only document which was produced with input from a lawyer was, on her case, the draft agreement recording the arrangements for custody of the children and the manner in which their occupation of the various family homes was to be regulated. On her case, even that document was not signed because the husband, having read it, became agitated and threw it away. She maintains that his account of the second, signed agreement is a fabrication which is designed to support his claim that she had agreed to the alienation of the C Limited shares for the benefit of the children. She is adamant that there was never any such agreement. As far as she was concerned, she was then a 50% beneficial owner of those shares and has continued to be throughout the course of this litigation.

The creation of The ABC Trust

39. In order to set in context the creation of the Trust which lies at the heart of the wife's allegations of sham I need to travel back in time to pick up the chronology in the summer of 1994 when Mr and Mrs R, as residents of X country, became the registered shareholders of C Limited in place of the two "nominee" shelf companies (J Nominees Limited and J Secretarial Limited). The shares remained in the names of the husband's sister and brother-in-law from June/July 1994 until April 2006, some twelve years later.

40. Notwithstanding the fact that the private separation agreement was not produced until June 2007, it is the husband's case that, having discussed with the wife the transfer of

the C Limited shares to the children in 2005/2006, he initiated discussions with the company's lawyer, EW, as to how this might be achieved.

41. The husband has described in his written evidence how he accumulated value in the C Limited portfolio of companies. The company's banking arrangements were undertaken through Alpha Bank As and when the husband saw opportunities to acquire properties he would raise loans with Alpha Bank using the equity in the existing portfolio as security. The C Limited portfolio was managed by B Limited in London and over the years the underlying value grew exponentially as a result of subsequent purchases and an increase in the capital value of the existing portfolio which rose with the London property market.

42. By this stage his sister and brother-in-law had begun to build their own property portfolio in London. As shareholders in C Limited they had given personal guarantees to Alpha Bank for some of the loans the company. That liability was restricting their ability to expand their own portfolio and they made the husband aware that they wished to cease their involvement with C Limited.

43. The "exit" route which was settled upon to enable Mr and Mrs R to relinquish their legal ownership of the shares was the incorporation of a new holding company in X country called N Limited . EW was responsible for setting it up. It was incorporated on 28 February 2006 and 100% of the shares were immediately issued in the name of YT. She was employed as an administrative assistant in EW's law firm but it is accepted that, from the outset, she held the shares in N Limited on trust for the husband. Both he and EW accept that, for all intents and purposes, the husband was the beneficial owner of N Limited. YT was merely his nominee. According to the written evidence of EW there was a contemporaneous trust deed in place (dated 28 February 2006) which reflected the trust arrangement in relation to the N Limited shares. I accept that evidence since I have now seen a copy of that particular trust deed.

44. Two months after the incorporation of N Limited, on 11 April 2006, Mr and Mrs R dropped out of the picture. The shares they held in their nominee capacities (x 500 each) were transferred into the name of N Limited through YT. Thus, by April 2006, the husband was the de facto owner of the entire issued share capital in that company which, in turn, held the legal title to the C Limited shares.

45. Following the incorporation of N Limited in February 2006, there appear to have been ongoing discussions between the husband and EW as to how he might give effect to

his wish to provide some benefit for the two children through a transfer of C Limited shares. EW's written statement explains what happened (para 21):

> "After N Limited was incorporated [the husband] discussed with me ways how to give part of his beneficial interest in C Limited and [D Limited], another property investment company in England that he had an interest in, to his two children … I met [him] several times when he was in X country, on occasions with Mrs R (who resides in X country), at my office and socially."

46. For reasons which I have already explained, EW did not attend the final hearing in December 2016 by means of the intended video link bridge and his written evidence is the subject of a hearsay notice. There was therefore no opportunity for Mr Amos (or anyone else) to explore in cross-examination the evidence which he has given. I know not, for example, what he would have said about his use of the phrase *"part of his beneficial interest in C Limited and [D Limited]"*. As Mr Amos reminded me in closing submissions, EW is an experienced commercial and trust lawyer whose use of language is likely to have been carefully considered.

47. Be that as it may, EW has confirmed that, following those meetings and discussions, he drew up a draft Deed of Trust ("the 2006 Trust Deed"). It is common ground that the 2006 deed was not signed or otherwise implemented at the time. It appears to have remained on EW's file until 2 August the following year (2007) when the husband requested a copy of the draft deed be faxed to him. EW has confirmed that the copy of the draft deed which he sent to the husband was undated and unsigned. I shall come to the husband's evidence about the 2006 Deed shortly.

48. Before turning to the events surrounding the creation of the ABC Trust in August 2007, I pause at this point in the chronology to consider the terms of the 2006 Trust Deed which EW had prepared following his initial discussions with, and instructions from, the husband.

The 2006 Trust Deed

49. The copy deed which is exhibited to EW's statement is, in many respects, similar to the later (2007) version of the ABC Trust Deed which *was* executed and sealed. I will defer a comprehensive description of the terms of that Trust Deed for the moment but I am satisfied that the 2006 Deed was indeed intended to be the "forerunner" to the

executed settlement. It is referred to as "The ABC Trust" and its terms are comprehensively wide and give the trustee far reaching powers of management and investment typical of those familiar to English trust lawyers.

50. The husband is named as the settlor and Y Trustees Limited is identified as the Trustee. (Y Trustees Limited was an "in house" corporate trustee vehicle which was created by EW in December 2005. Its sole shareholder was Y Secretarial Limited. Its registered office was the P City premises from where EW operated all the legal and professional services which he provided to his clients.) The Trust Property is identified in the second schedule as *"all the shares in N LIMITED"* and *"The shares held by the Settlor in D LIMITED"*. EW was named in the Deed as the Protector.

51. Significantly, "the Beneficiaries" in the 2006 Deed are identified as the husband and the two children. There is a clause permitting the addition of further beneficiaries with the written consent of the Protector. Clause 8 of the draft deed concerns the ultimate default trusts. This section was left incomplete although there is a reference in the definitions section of the Deed to "charity" which includes "any body corporate or incorporate recognized as charitable by the Laws of any country in the world".

The execution of The ABC Trust on 3 August 2007

52. The version of the 2006 Trust Deed which has been exhibited to EW's statement has been signed by the husband. It bears the (handwritten) date "2 August 2007" (being the date when EW says the document was faxed to him). In his oral evidence, the husband said he had signed it on that date at his sister's home in X country. She had witnessed his signature.

53. He met with EW in his offices in P City the following day with a colleague. EW's statement tells me that,

> "During the meeting and the discussions held, the trust deed was amended so that the beneficiaries of the trust will only be the children and not [the husband] and the children. Few other not important amendments were made and a new version of the trust was signed by [the husband] as Settlor, PH as an alternate director of N Limited and myself as director of Y Trustees Limited."

He goes on to explain how, and by whom, the signatures on the Trust Deed were formally witnessed.

54. In his original witness statement dated April 2016, the husband provides this explanation for the changes which were made to the Trust Deed on 3 August 2007. He says this :

> "Whilst I was at [EW's] offices on 3 August 2007, the young solicitor made some further amendments to the trust deed; [EW] advised me these were necessary so that the deed more properly reflected my wishes to transfer C Limited entirely to the girls. I had also decided that I wanted to transfer my share of D Limited to the girls (I obviously could only transfer 50% as [the wife] owned the other 50%.) This would mean that all of the capital owning companies I had previously had an interest in (as opposed to the companies which do not own any significant capital – other than cash in the bank – and are essentially income generators, for example, B Limited) were then beneficially owned by the girls. I felt happy that this would mean the legacy I had built for them was secured."

55. When he was cross-examined by Mr Amos about the difference between the 2006 and 2007 Trust Deeds, and in particular the decision on 3 August 2007 to remove his name from the list of beneficiaries, the husband told me in his oral evidence that the 2006 Trust Deed which he signed was not intended to, and did not, take effect. His evidence on this issue was far from clear but he appeared to be saying that, having signed the 2007 Trust Deed on 2 August 2007, the following day, on 3 August 2007, EW sent him a further (unsigned) copy of the 2006 Deed which had been prepared *[Transcript 16.12.16 page 170-171]*. He told me,

> "I remember signing in [EW's] office that deed and leaving it there like a back-up. I said, "If anything happens to me, use it, all signed" – I said we never executed it but when he faxed it to me, it was unsigned. I signed it again. I put my passport number. I took it to [EW's] office and then it was finalised in 2007."

56. The version of the 2006 Trust Deed which had included the husband as a beneficiary in addition to the children was disclosed by his solicitors on 8 January 2016. In this context it is important to distinguish between *this* 2006 Deed and an earlier 2006 Deed of Trust which related to YT's nominee holding of the N Limited shares on trust for the husband. Having said throughout (and prior to EW's statement confirming its existence) that he did not have a copy of that 2006 Deed in his possession, the husband produced a copy of the same some 72 working hours before the start of the preliminary issue hearing (7 December 2016). He claims that his accountant found

the copy deed in a safe in his London offices. He passed it immediately to his solicitors who sent it to the wife's solicitors. He has sworn a short statement explaining how this document came into his possession. *This* copy Trust Deed identifies the husband as the settlor and YT as the trustee. (She, it will be remembered, was the registered shareholder of the N Limited shares which she was holding as his nominee.) It is dated 28 February 2006 and records by way of recital the husband's beneficial interest in the N limited shares and his entitlement to have those shares transferred into his own name "but for reasons of his own he does not wish to exercise at present such right". YT was directed to hold the shares on trust for, and at the direction of, the husband on the basis that he retained control over them. Those trusts were subject to a default trust "to hold the said shares in trust for [the husband's] legal heirs in the proporit8ions *[sic]* which they would be legally entitled to the same". The trust was deemed to end as and when the shares ceased to be registered in YT's name.

57. It is important to distinguish these two documents. This Deed was nothing to do with the first draft of The ABC Trust but was rather the Trust Deed referred to by EW and relates to the contemporaneous incorporation of N Limited on 28 February 2006 at which point the shares were transferred to YT as the husband's nominee.

58. The document which the husband alleges to have been in the office safe was signed by YT (but not by the husband) and witnessed by another employee, a secretary, at EW's offices. The husband tells me in his short statement that he does not remember how he came to have a copy of this document or when it was received although EW used to send him documents from time to time.

59. During the course of the preliminary issue hearing, and knowing that EW was not going to be available for cross-examination, on 14 December 2016 I made an order for further disclosure directed to the second and third respondents. In partial compliance with that order, PH sent to the court via Mr Warwick QC a further scanned copy of the Trust Deed dated 28 February 2006. Whilst this document appears to be in the same form as that produced by the husband from his office safe, it is different in certain respects. The version sent by PH has been signed by the husband: there are now three signatures on the document instead of two. Some, but not all, of the typographical errors have been corrected. Further, there is now an extra clause in PH's signed version of the document. A new clause has been added which provides that the shares are to be held for the husband absolutely and, only in the event of his death, in trust for his heirs in proportion to their legal entitlement.

60. In the witness statement which accompanies PH's disclosure, she explained that she had only been able to produce a limited number of documents because EW was now keeping all his files "under his personal supervision" and he was currently an

inpatient in hospital in Q City. She explains that he took this step (which I take to mean the files were removed from his offices or otherwise placed securely in a locked cupboard) after learning about the activities of TU (and I shall come to the activities of this so-called "whistle blower" shortly). PH explains in her statement that, apart from the deed dated 28 February 2006 which she had sent via Mr Warwick QC, the only documents to which she had personal access were those on her computer which were the two Deeds of Trust dated 2 and 3 August 2007 and a later Trust Deed dated 28 February 2016.

61. Mr Amos sought to cast doubt on the genuineness of YT's signature on the foot of the February 2006 Trust but I declined to allow him to pursue that point in the absence of expert evidence. He contends that when the husband produced this deed, he knew (or must be taken to have known) that EW would not be submitting himself for cross-examination since he was by then aware of his illness. In any event, it appears that the declaration of trust in this document (executed, as it was, on the same day upon which N Limited was formally incorporated) does no more than to record the trust of *those* shares for the husband's benefit. N Limited did not become the shareholder of C Limited until some two months later on 11 April 2006. At that point in time, Mr and Mrs R were holding the two tranches of 500 shares each on trust either for the husband or (on the wife's case) for each of them as to 50%.

62. It is not in dispute between the parties that, on 3 August 2007 when The ABC Trust was executed in its final form, the wife had no knowledge of its execution or the husband's purported actions in transferring whatever interest in C Limited /D Limited he held into the trust which (in its final form) included only the two children as beneficiaries. Whilst it is the husband's case that she had given prior agreement to this course as part and parcel of the arrangements for their formal separation, he does not seek to say that he took any steps thereafter to send her a copy of the trust documentation or to confirm to her orally or in writing that he had carried into effect this part of their alleged agreement.

63. In relation to the children's knowledge about The ABC Trust, he accepts that they were unaware of its existence until these proceedings started. He said in his April 2016 witness statement, "… the truth is that as long as they receive funds when they need them they do not question the detail of the position".

The activities of TU and the 2002 Trust Deeds (undisclosed until receipt of EW's statement of evidence in June 2016)

64. As I have already indicated, a significant element of the complexity in this case flows from late disclosures from various sources. These disclosures have had to be grafted onto the chronology established over many months by the pleadings and the written evidence. They have, in significant and material respects, altered the evidential landscape whilst still leaving many questions unanswered. The absence from the final hearing of the individuals who had the knowledge and ability to provide answers to these questions has not assisted me, or the legal teams, to find an easy path to the truth. EW, it is said, was unable to attend as a result of critical illness. TU, a long standing employee of his, was prevented from giving evidence as a result of a so-called "gagging" injunction which EW and/or his firm obtained in the courts of X country. The evidence which emanates from TU goes directly to the existence and/or extent of the wife's beneficial interest in the C Limited shares from the outset (i.e. 1994). EW's late decision to submit himself for cross-examination in these proceedings arises in the context of a witness statement which he produced on the eve of the adjourned hearing before Flaux J in June 2016. By way of exhibit to that statement, he produced two drafts of Trust Deeds which had been created in 2002 pursuant to instructions given by the husband which support, to an extent, the wife's case in relation to beneficial ownership of the C Limited shares and the evidence of TU. It is this evidence which Mr Amos has described at various points in the case as "potential dynamite".

65. Thus far, I have set out the chronology of this case up to the point in August 2007 when The ABC Trust came into existence. By this stage, it was the husband's case that the marriage had irretrievably broken down and the parties were living entirely separate lives save for his visits to Z country to see the children. It is also his case that the parties had by then signed the second version of a private separation agreement which governed not only the arrangements for the children but also the division of their financial assets. The wife denies that any such agreement, signed or otherwise, existed and she claims that, whilst fragile, the marriage continued and they were working together to resolve their differences. She was at this stage completely unaware, as I accept, of the practical steps which the husband was taking with EW's assistance to place the C Limited shares into trust. I shall come on to consider separately whether or not there had indeed been prior discussions between them about this possibility.

66. Whilst the 2002 draft Trust Deeds come first in time, I propose to set their context and establish their relevance to the issues by dealing first with the evidence which emanates from the disclosures made to the wife's solicitors by TU. Her evidence (which has never been translated into a formal statement) arises in bizarre circumstances.

67. TU was a long-standing employee in EW's offices in X country. Whether or not she had any formal legal qualifications (and it seems she was more of an administrative or personal assistant), she must be presumed to have been well aware of her professional

obligations in terms of client confidentiality and privilege. She had been working for EW dealing with these sorts of matters for several years by the time she became involved in these proceedings.

68. The wife's solicitor, Ms Loizou, sets out in her witness statement the circumstances surrounding the unsolicited approach which she received from TU through a series of emails sent to her office by that lady in November and December 2015. Initially, these came to her anonymously. In due course Ms Loizou realised that she was dealing with one of EW's employees. The emails which she received appeared to provide support for the wife's case in relation to the beneficial ownership of the C Limited shares and/or to demonstrate that there was a degree of collusion between the husband and EW to present a false case to the court. As Ms Loizou explained in her statement, when she was sent documents which appeared to be privileged, and having deleted them from her computer immediately, she disclosed the existence of the email traffic to Stewarts Law, the husband's solicitors.

69. The first of TU's emails was sent anonymously to Ms Loizou's secretary on 3 November 2015. Its contents were as follows:-

> "[The wife] did sign a deed of trust that she held/holds 50% of the shares of C Limited and this document is still valid and the original is in the safe of [EW's office]. The ABC trust was prepared in 2014 (as can be evidenced by a search on the file) and not in 2007."

70. TU's next email came on 11 November 2015. Having asked for reassurance that her identity would be protected, she said this:

> "I appreciate that you need physical proof about the validity of the trust and the true beneficial ownership of C Limited . I may not have access to such evidence because of its location. I will see what can be obtained."

71. Further details about the nature of the documents she could provide came in TU's next email dated 13 November 2015:

> "The documents I would like to provide you with copies of (the trust deeds signed in 2002 with [the husband and the wife] confirming that 50% of the shares in C Limited were held by [Mr R] for [the husband] and 50% by [Mrs R] for [the wife] are held in the office safe of [EW]. I do not have access to this safe. I have an electronic copy of both documents but these are undated and unsigned. I also have an electronic copy of the ABC Trust which shows it was created in 2014 by [EW].
>
> In essence all the allegations you have raised about the trust being a sham are correct."

72. On 17 November 2015 TU once again expressed concerns about how these documents might be introduced into these proceedings without compromising her anonymity. She confirmed that she did not know the wife and to reveal the documents might expose her "for a lady I do not know". She continued,

> "[The wife] would have the benefit of being given half of the assets of [the husband] which she should have as she never did legitimately cease to be a beneficial owner of 50% of C Limited which owns dozens of properties in London (I think the estimate of £50m is conservative) and I will lose everything and I have three dependants. I am not asking for money. I am asking for secrecy. I need some form of guarantee that my identity will not be revealed. If you were in my position what would you do ?"

73. Ten days later, on 27 November 2015, another email arrived anonymously in Ms Loizou's inbox:

> "You have a very good case and have done a good job but since [the husband] has changed his legal representation from ordinary solicitors to serious players I suggest you go further. His de facto legal advisor [EW] … has said [the husband] has been lucky that you have not challenged him on the trust itself (irrespective of the fact that it is a sham). Assuming that the trust was created in 2007 where has the income of the underlying companies gone since then ? How can the husband demonstrate since 2007 that he had no interest in the trust or the underlying companies ? You should also refer to the X country law firm which originally established C Limited with J Nominees Limited holding 50% of the shares for [the wife]. At the time it was a requirement that non-residents have their shares held by resident nominees by permit from the central bank so an application would have been made to the central bank in the names of [the husband and the wife]. When the company was transferred to the office of [EW] the shares were held by YR (sister of [the husband]) for [the wife] and her husband QR for [the husband] 50/50."

74. A further email on 7 December 2015 was sent. It read:

> "I have reason to believe that [the husband] is now anxious for a settlement given the direction the case is taking and has already discussed this with his elder daughter, [M]. If I am right the offer amounts to something in the region of GBP10m in the unencumbered property and the rental income therefrom. In return for any and all shares [the wife] holds in any [family]-related entity. One of the conditions of the settlement is that [the husband] is to be made third beneficiary of the alleged trust he created for his two daughters. This 2007 trust was an afterthought and a sham and a way of seeking to gain approval for the alienation of considerable assets by alleging these assets were

> held in trust for the two daughters of [the husband and wife]. There was never any trust in 2007, simply the desire of [the husband] to alienate assets from his wife. As I have said, the company C Limited was created by a law firm in X country with two nominee shareholders for two nominee non-residents – J Nominees Limited and J Secretarial Limited and a search on the records of either the incorporating law firm or the central bank … or the Registrar of Companies will bear this out. If the shares were only ever meant to be held by [the husband] why two nominees ? Subsequently the shares (500 and 500) were transferred to the brother in law and sister of [the husband] and there are trust deeds evidencing that these were held for [the husband and wife] in equal proportions. The originals of these trust deeds are now in an unknown location however electronic copies are on the computer system of [EW]. At no point to my knowledge or from a search on the files did [the wife] relinquish or transfer her half share in the company C Limited and I firmly believe no evidence that has not been fabricated can exist of such transfer. I would need access to the records to confirm but to the best of my knowledge C Limited owned dozens of properties, predominantly in London and therefore GBP10m would be perhaps one tenth of the actual worth of the portfolio. In order to be more precise I would need access to certain files. If I were [the wife] I would not accept such offer on the basis that the children who have been dragged into this sorry affair and are being used as pawns by the father, find it "reasonable" according to him."

75. A further email sent by TU (still under a pseudonym) confirmed once again that she did not know the wife and had never met her. She said she had not been in EW's employment in 2007 when the ABC Trust had been created but that this information had come to her on a hearsay basis together with the information that the signed 2002 deeds were in EW's safe. She went on to detail some health difficulties from which she had suffered in the past as a result of which she felt she would be "a most unreliable witness". She asked again for anonymity and concluded her email in this way:

> "I have to say that I do not appreciate your stance given that I unilaterally initiated this correspondence in an effort to see justice done.
>
> If you wish to know the latest position and accept the above please let me know. Otherwise I will assume I am to be sacrificed for someone richer than me, as is usually the case for all whistleblowers."

76. Those latter comments appear to have been a response to Ms Loizou's previous reply informing TU that any documents she could supply from her own computer (and thus the source of those documents) would need to be produced to the court "in the interests of fairness and justice and in the interests of a settlement". Ms Loizou had informed TU in her email that she was aware from "the most basic of web search enquiries" that she knew her true identity and that she was an employee of EW. As such, she was obliged as the wife's representative to produce the chain of email correspondence to the husband's English solicitors and to the court.

77. There were two further emails from TU dated 14 and 15 December 2015. These demonstrated her knowledge about EW's advanced cancer diagnosis as well as her apparent knowledge about the timing of, and strategy behind, a forthcoming offer from the husband's legal team.

78. On 16 December 2015 the wife's solicitors wrote to the husband's solicitors disclosing the unsolicited and anonymous emails from TU and the basic web enquiries which were made to verify her identity as an employee of EW's law firm. Stewarts Law was invited, on the husband's behalf, to concede the issue of the wife's beneficial interest in 50% of the C Limited shares despite the fact that TU had not had access to, and had not produced, the 2002 trust deeds to which she had referred in her emails. The letter included a lengthy request for documentation arising from references in the emails. There was a further complaint about the fact that the husband's solicitors had refused to agree to a joint approach to the firm which had originally put in hand the incorporation of C Limited , I & Co.

79. As soon as EW became aware of TU's disclosure of this material, he applied on a without notice basis the next day in X country for injunctive relief. The District Court of P City made the orders sought preventing TU from making any further disclosures in these proceedings or in any other context. Within the material in the bundles for the preliminary issue hearing was a translation of the affidavit which he swore in support of that application. It records that, bar one year from 2007 to 2008, TU had been in his employment as a personal assistant throughout from 2002. A term of her employment was her obligation of confidentiality to the law firm and its clients. It also refers to the fact that TU had access to all backup information and data for the firm and kept copies of back-up discs at her home "for safety reasons". Those discs contained all of the firm's electronic files including their intellectual property. It informed the P City court that proceedings were ongoing in the High Court in London between the husband and the wife and that Y Trustees Limited had been made a party to those proceedings. TU had had access to "all information concerning the said case as well as the emails which were exchanged between the lawyers and the parties". The emails which she had sent to Ms Loizou were put before the court as evidence of her breach of duty. EW said in his affidavit that "the reason that I do not reveal all these emails is because I believe that such a disclosure is very likely to further adversely affect our client's, [the husband's], case, as well as of the company itself and of [his law firm]". He further refers to TU's reference to the existence in his safe of signed versions of the 2002 Deeds although his affidavit is silent as to the truth or otherwise of this statement.

80. TU was summarily dismissed from her employment on 18 December 2015.

81. I am told that the husband and his legal team fought hard to keep the TU emails out of the English court proceedings for the purpose of the preliminary issue hearing. They argued that the emails were part of the "fruit of the poisoned tree" and, as such, were inadmissible as evidence. On 13 May 2016, Moylan J dealt with a discrete hearing which had been listed to determine issues of privilege. By this point in time, another of EW's employees, Miss OS, had made a statement denying the assertion made by TU in the proceedings in X country that she (OS) had been the source of the information disclosed in one of TU's emails to Ms Loizou, the wife's solicitor. Moylan J concluded that the husband had waived privilege in relation to any documents or files created in or from 2006 held by EW or his firm insofar as these related to the ABC Trust, the Deed dated 2 August 2006 and/or the management and control of the 2007 Trust. His Lordship made orders for specific disclosure by lists with inspection to follow thereafter.

82. Shortly before this hearing, Mr GG (the individual who had dealt with the incorporation of C Limited) had sent an email to confirm that all the documents which had previously been in his possession in relation to the formation of the company in 1994 had been sent to EW in P City. This email was put before Moylan J who directed the husband to use his best endeavours to procure and serve on the wife's solicitors copies of all the documents and to make the originals available for inspection by 31 May 2016. In the event that the documents were no longer available, he was to procure from EW a statement explaining what documents he retained and what had happened to those which he no longer held.

83. Copies of the 2002 Deeds did not become available until 8 June 2016 when, on the eve of the adjourned hearing before Flaux J, EW made a witness statement and offered to submit himself for cross-examination provided that his evidence was given in X country via a video-link facility. Copies of the two relevant Deeds drafted in 2002 came as part of the exhibit bundle to his statement which is dated 8 June 2016[2]. His statement had been preceded by a string of requests from Stewarts Law, the husband's solicitors, seeking disclosure of various documents which the court had ordered the husband to disclose. The absence of a reply to those requests may well have been explained on the basis that EW was, as we now know, in the United States receiving treatment for cancer until 8 May 2016. Be that as it may, the 2002 Deeds are now before the English court together with a narrative account of EW's involvement in the matter.

Written evidence from EW

[2] There are further copies of the (unsigned) 2002 Deeds in the court bundles which emanate from the USB drive which TU produced as part of her obligations under the P City court order.

84. Before turning to the 2002 Deeds and their content, it seems to me that the relevant points and passages arising from the written evidence of EW are these:-

- (para 6) listing the various documents he holds in relation to C Limited whilst noting that he was not involved in the original incorporation of the company in 1994;

- (para 8) confirming that his law firm was and remains the lawyer for C Limited on matters of X country company law with Y Trustees Limited providing services in relation to C Limited 's obligations, for example, to submit company accounts;

- (para 9) noting that C Limited has been very active in terms of acquisitions to its (mainly London) property portfolio with the result that his firm and Y Trustees Limited have several thousands of pages of documents relating to the work undertaken for C Limited spread over eight ring binders. None of that material relates to the ownership of C Limited or The ABC Trust;

- (para 10) such documents as are relevant to ownership and title have been extracted and exhibited to his statement;

- (para 14) Mr and Mrs R throughout their legal ownership of the shares treated the husband as the sole beneficial owner of the shares and the power of attorney which he held meant that EW's firm did not have to go behind any of the instructions which were received from the husband.

85. Paragraph 15 of EW's statement relates to the 2002 Deeds and I repeat it here in full since it is the only narrative evidence which I have from EW on the issue.

> "In 2002 [the husband] made enquiries in order for the shares in C Limited to be held in trust for both [the wife] and himself and therefore [the firm] prepared two draft trust deeds in order for the 500 shares held by Mrs R to be held in trust for [the wife] while the other 500 shares to continue to be held in trust for [the husband]. Later we received new instructions not to proceed as instructed and therefore no steps were taken to finalise those draft trust deeds. I note that it is common practice the trust deeds to be executed *[sic]* in two counterparts one to be held with the trustee (registered shareholder) and the other with the beneficial owner and thus, if the aforementioned trust deeds were executed [the wife] and [the husband] respectively should have had the executed version of the trust deeds."

86. Mr Amos makes much of the fact that, up to this point in time, none of the husband's lists of documents had contained any reference to the existence of the 2002 Deeds despite the fact that it was EW's evidence that he had been the author of the instructions to prepare them for the purposes of the wife's 50% beneficial interest in C Limited . What is not clear from the face of EW's written evidence is whether those 2002 Deeds were intended to confirm and reflect, on the husband's instructions, an *intended* beneficial interest or an *existing* beneficial interest. The fact that he subsequently withdrew his instructions (EW does not say when) to *finalise* the Deeds does not, of course, mean that the absence of the completion of formalities had any impact on her 50% beneficial interest if that was what she had held from the outset.

87. I have already referred to EW's involvement in the creation of The ABC Trust on 3 August 2007 and the "forerunner" to that Deed (i.e. the 2006 draft which was faxed to the husband and signed by him on 2 August 2007, the day before the meeting when the amended version was executed). Despite the finding by Moylan J that the husband had waived privilege in respect of these matters, EW offers the court no further details about or explanation why the last minute change was made so as to exclude the husband from future benefit in the trust.

88. He confirms in his statement that he has not exercised any of his powers as Protector of the Trust and that all aspects of managing C Limited have been undertaken solely by the husband from London although he has never seen anything which would cause him to be concerned about the management of the underlying trust assets. However, EW confirms that his firm received annual updates from the husband summarising the performance of the underlying property portfolio and the application of funds arising. Until she ceased to be a director of C Limited , EW confirms that he had regular contact with Mrs R, the children's aunt.

89. He further confirms that his firm has never had and, to the best of his recollection, he has never seen any document evidencing the beneficial ownership of the shares in C Limited . He contends that if such a document existed, it would have been with I & Co who incorporated the company **and from whom his firm did not receive a complete set of papers after taking over the matter**. I emphasise that point because it appears to be at odds with the email sent by Mr GG confirming he had handed over his entire file to EW. EW does not say why he believed the file which was sent to him was incomplete nor does he refer to any requests which were made by his firm to obtain whatever information or documents were missing. He makes no specific reference to documents in his safe in this context but seeks to justify the intervention of TU by saying that she had a "very acrimonious and messy divorce from her own husband" which may be the reason for her "help" offered to the wife.

90. Of the draft 2002 Deeds themselves which are both exhibited to EW's statement, neither document is signed although provision was made at the foot of each for the execution by the wife and her sister-in-law, Mrs R, on the first document and by the husband and his brother-in-law on the second. The date has been left blank ("200..") although we know from EW's evidence that they were prepared in 2002. In the first draft Deed, the wife is named as "the Grantor" and Mrs R as "the Trustee".

91. The first recital records the following information:

> "The Grantor [i.e. the wife] for consideration given is beneficially interested and entitled to Five Hundred shares (500) fully paid up shares (hereinafter called "the said shares") numbered from 001 to 500 of the nominal value of []1. – each, in the undertaking called C LIMITED a Company incorporated in X country, now held by the Trustee.

92. The document goes on to record the entitlement of the Grantor to have the shares registered in her[3] name forthwith. There follow a number of trusts confirming the rights and entitlements of the wife as the basis for allowing her sister-in-law to continue to hold the legal title to the shares including an obligation to hold them in trust for her benefit absolutely.

93. The second of the two 2002 draft Deeds is in an identical form but mirrors the beneficial entitlement of the husband to the 500 shares in C Limited numbered 501 to 100 and the obligations imposed on his brother-in-law, Mr R, to hold in trust for the husband absolutely.

94. In deciding where the truth lies, I would obviously have been assisted by the evidence of these family members, in particular that of Mrs R. She and her husband were parties to these dealings over the course of a number of years. I heard from neither. The wife told me that she had approached her sister-in-law with a view to providing evidence in these proceedings. It seems that Mrs R is currently in litigation of her own with her brother (the husband) over the ownership of an hotel in London: brother and sister are not currently on speaking terms. She appears nonetheless to have remained on good terms with the wife. Mrs R told the wife, according to her evidence, that she did not wish to get involved in these matrimonial proceedings in case her involvement were to impact on the outcome of her own litigation with her brother whether by way of settlement or otherwise. The husband told me, in contrast, that he did not believe his sister would have been willing to assist the wife because

[3] Although the draft Deed refers to "his" name, it has clearly been drafted generically. The Grantor in this case is specifically identified as the wife.

she knew that she was seeking to mislead the court in relation to her beneficial interest in the C Limited shares.

95. Mr Glaser on behalf of the husband urges care when I come to consider the weight which I can attach to the omission of the 2002 Deeds from any of the husband's lists of documents. He points to the fact that, at the relevant time, his client was asserting a 'collateral use' privilege in relation to them. I take that point on board but nevertheless there is little doubt in my mind that the husband was determined if he could to exclude from these proceedings evidence of the 2002 deeds. I have already referred to the arguments run by his legal team at the "privilege" hearing before Moylan J when an attack was launched on the emails from TU. EW himself appears to have accepted that her evidence in relation to the existence of the 2002 Deeds was potentially damaging for his client in the context of the English proceedings: he recorded as much in his evidence to the P City court. Even after their admission by reference into the proceedings, the husband sought through his solicitors to challenge their *authenticity*[4], a challenge which he was to abandon after reading EW's written evidence. He did not specifically deny having given instructions to EW to prepare the draft Deeds. His oral evidence in cross-examination was inconsistent. Initially he told me that he could not remember if the 2002 Deeds were ever signed. He later changed his stance and told me that he was "100% certain" they were not.

96. When he was asked by Mr Amos about his wife's evidence in relation to the meeting in 1994 when all four family members attended at the lawyer's office to sign the original documentation in relation to the shares in C Limited and whether she had invented her evidence, the husband confirmed that he was not saying it was a lie and that she might have remembered something *[Transcript : 16.xii.16 - page 104]*. However, his clear recollection was that he had never been to such a meeting himself. He was later to back track from that position (and I quote from the transcript of his evidence):

> "A. I can't remember going with [her] to a solicitors, signing, as [she] explaining Q City, any documents. They all been done with I & Co by fax and with envelopes. They send me over whatever was needed to open the bank account, and is the same bank account with (inaudible) until they close in 2015.
>
> Q. Does it follow that you also say that her description of a signing where there was four of you, you and [the wife] signing as the principal parties and your sister and brother-in-law also signing, she has told the learned judge that very clearly, and do you say that must be deliberately not true, in other words … lying ?

[4] Stewarts Law LLP had written on the husband's instructions to say that the deeds "appear to be of recent manufacture … and they emanate from a completely untrustworthy source". That allegation appears to have been repeated in the position documents prepared by Mr Pointer QC and Mr Glaser for the June 2016 hearing before Flaux J.

A. Yes." *[Transcript: 16.xii.16 – page 105]*

97. Mr Amos was subsequently to challenge the husband's assertion in his written statement sworn in April 2016 that his wife "had absolutely no involvement in [C Limited 's] incorporation and there was never any suggestion that she would be an owner". He asked how that statement could stand with the evidence which EW had given about his instructions to prepare the 2002 Deeds. The husband accepted, eventually, that his statement that there was no suggestion that she would be an owner could not stand in the light of EW's evidence which he did not seek to challenge. He said he had no independent recollection of having instructed EW to prepare the 2002 draft Deeds but he was prepared to admit that the contents of those deeds must have reflected the instructions which he gave at the time on the basis of his trust in EW. He asked me to accept that he had forgotten rather than lied in his statement.

98. It was put to the husband by Mr Amos that, whatever difficulties EW might have had in terms of absence from the office for medical treatment, it had been open to him throughout to get on an aeroplane to X country and collect any relevant files from EW's offices. It was suggested to him that the only reason he had not done this was because he knew there was material within those files which was detrimental to his case in relation to the wife's asserted beneficial interest in C Limited . In this context, he was asked why, within the space of less than 24 hours, he had been removed as a beneficiary of The ABC Trust when he had signed a document the previous evening at his sister's home confirming his status as a beneficiary. His response to Mr Amos was that "it was really just chance" *[Transcript: 16.xii.16 – page 198]*. He denied that he had been excluded as a protective measure in the event of any future claims by his wife or to protect his position in relation to potential tax consequences. He said that he had not considered the possibility of a future application to vary the terms of the trust in an English or any other court as a nuptial settlement. In terms, his case is that the change which was made overnight from 2 to 3 August 2007 to the terms of the Trust was not in any sense a reflection of a desire to protect his position in circumstances where he perceived the marriage to have irretrievably broken down *[Transcript: 16.xii.16 – pages 198 to 199]*.

99. At this point it is important to clarify the basis upon which Mr Amos seeks to advance his client's case in relation to her 50% beneficial interest in the C Limited shares. He submits that the evidence in relation to the 2002 Deeds is a clear refection of the *original* intention of the parties in 1994. In this context, the question as to *whether* or not the deeds were executed in 2002 is of secondary importance to what happened in 1994. The wife's case rests on the arrangements or transactions in 1994 as corroborated by both the 2002 Deeds and the evidence of TU. As I have said, the year 2002 coincided with the time when the parties had agreed to trial an arrangement whereby they spent much more of their time as a family living in Z country.

100. What, then, can I legitimately collect from the evidence of the emails from TU ? My preliminary conclusions on this aspect of the evidence are as follows:-

(i) She was entirely conversant with almost all of the detail of the financial remedy proceedings which were ongoing in London and, in particular, the issues flowing from the preliminary issue in relation to the wife's assertion that she had a beneficial interest in the C Limited shares;

(ii) Her reference to the creation of The ABC Trust in 2014 as opposed to 2007 demonstrates an incomplete knowledge of the structure and/or the import of various documents and a willingness to draw (sometimes incorrect) inferences from those documents which she has seen. (I will return to the 2014 Deed of Trust in due course.);

(iii) Whether as a result of seeing emails or hearing conversations, she had clearly been privy to discussions or exchanges between EW and the husband about this case.

101. I did not hear any evidence from Miss OS who was not called for cross-examination on her written statement. Mr Amos submits that it matters not whether she was the source of some of TU's knowledge about the case. The dispute between these two ladies remains and I have not heard from either. However, I know not what TU's motives might have been but I do not consider it appropriate to describe her, without further qualification, as a 'whistle blower'. Her disclosure of confidential and privileged information (which she knew to be so) cannot be justified on any basis however helpful it might have been to the wife or those advising her. I do not know whether she took the action she did because of her own experience of a difficult divorce (as EW surmises) or whether she was, in part, motivated by the expectation of some financial gain at the end of the day. Her emails do not exclude that possibility as potential motivation for her actions.

102. Thus by this point in time (2007) we have a situation where a formal Deed of Trust (The ABC Trust) has been drawn up, executed and sealed. The husband is not a beneficiary and, on the face of the instrument, he has purported to transfer or deliver to the trustee (Y Trustees Limited) or otherwise place under its control (i) all the shares in N Limited , and (ii) his 50% shareholding in D Limited. (Pursuant to the transfer by Mr and Mrs R on 11 April 2006, their 50% nominee shareholdings in C Limited were thereafter owned by N Limited .) Only the two children are named as beneficiaries of the Trust. As at 3 August 2007 they were respectively 18 and 15 years old. EW, as the named Protector, is given power under the terms of the Trust to appoint new trustee(s), a new Protector and to consent to the addition of new beneficiaries. In default of such addition, the parties' daughters are named as both the beneficiaries (as to 50% each) and the default beneficiaries. In terms (clauses 12 and

15), the husband is left free to continue to manage the underlying trust assets without further enquiry from the trustee unless it has actual notice of any act of dishonesty on his part. All decisions pertaining to the management and operation of C Limited /D Limited are left in the husband's hands, including the decision whether or not to pay dividends on the shares. There is a duty to maintain trust accounts and the operation of the trust is covered by a general umbrella of confidentiality. Thus, there is no obligation on the trustee to disclose to the beneficiaries the trust accounts (unless they are specifically requested so to do).

103. On 20 September 2007, EW rendered his invoice for his firm's professional services in setting up the Trust. Again, there is no suggestion on the part of the husband or EW that the wife was told about these steps or notified that the ABC Trust had been created.

104. It is common ground that the ABC Trust was not formally registered or stamped in the period immediately following its creation in August 2007. Indeed, that step was not undertaken until well after this litigation commenced. In July 2015, EW sent the document to the X country Bar Association for formal stamping although even that administrative process was flawed because, on its first submission, the husband was shown as a trustee. EW has said in his statement that it is common practice not to stamp or register such documents unless or until they are required for a specific purpose such as court proceedings. Whilst the law in relation to formal registration did not require such formalities in 2007, there has, it seems, been a recent change in X country law which now requires registration. This appears to be the reason advanced by EW for the submission of the Trust Deed to the X country Bar Association in July 2015. This issue has been addressed by Mr P, the single joint expert, and I shall return to it at a later stage of my judgment.

105. On the husband's case, the marriage was well and truly over by this point in time. On the wife's case, she was still trying to save it although she had taken the step of instructing Mrs CM to prepare the private agreement which, on her case, was intended to cover issues concerning the children and the use of their family homes. That step and the contents of the document which was drawn up show that, at the very least, the wife no longer wished to live in the same house as the husband whether in Z country or in England.

106. So what was she doing at this point in terms of the marriage and/or protecting her interest in C Limited ? It is at this point that I return to the chronology of the events which unfolded in 2008 and 2009.

107. The wife accepts that the marriage continued to be under a great deal of strain. At the very least, cohabitation had ceased. In February 2008 she was admitted to hospital in Z country for some medical tests. She recounts in her written evidence that the husband came with her parents to visit her in hospital. They had what she describes as "a heart to heart" about their relationship. She asked whether he had been having an affair and he allegedly confessed to having been unfaithful. In her written evidence, she maintained that she nevertheless resolved to "make things work for our family". From documents which she has exhibited to her statement, it is clear that she continued to have some involvement in running the Z country operation of the B Limited business although that was finally closed at the end of 2008. M Limited still held a portfolio of properties in T City and these were managed by the wife on a day to day basis. In November 2008 she travelled to London to try to sort out the issues which had arisen in the day care nursery business. Her evidence was not the subject of serious challenge and I accept that she continued her involvement with the family businesses in this way notwithstanding the fact that she and the husband were no longer living together.

108. However, she was by now losing confidence in the husband's willingness to deal with her fairly. I accept that she had been shaken by his admission of infidelity and I accept her evidence about the hospital visit in February 2008. She accepted when cross-examined by Mr Glaser that it was at about this time that she began to realise that their marriage was beyond repair. In June that year, in an attempt to get to the bottom of their financial situation and the manner in which he was running the companies, the wife instructed a firm of Z country lawyers (L & Co) based in T City to make enquiries in relation to C Limited . Because C Limited was registered in X country, she was advised that a law firm in that jurisdiction should be instructed as local agents to carry out various searches. A firm called RS & Co was instructed for that purpose. The firm maintained offices in central P City and carried out a company search in the local Register of Companies which revealed that N Limited was the registered owner of the shares in C Limited . The wife's case is that this came as a complete surprise to her. She had believed that the shares were still held by her sister-in-law and her husband. She knew nothing about N Limited until a new company search revealed that the sole shareholder was Miss YT whose registered address was the same as EW's offices in P City. Up to this point in time, the wife had had no dealings with EW. However, on 17 June 2008, RS & Co wrote to EW on her instructions. I have a copy of their letter within the bundles. The letter is headed "RE: C Limited" and it is expressed in these terms:-

> "We have been instructed by our colleagues in T City to inform you that [the wife], beneficial holder of a 50% stake in the aforementioned company, would like to visit your offices next Friday, 20 June 2008, to discuss issues relating to herself and the aforementioned company.
>
> We would therefore kindly ask you to schedule an appointment for the visit, and to inform us which member of staff she will be having a meeting with."

109. When he was asked about this enquiry, the husband accepted that this was not an enquiry about The ABC Trust since the wife was then unaware of its existence.

110. I have seen a letter written on the same date, 17 June 2008, by her lawyer in T City (Mr L) which makes it clear that the purpose of the wife's intended visit to EW's offices (accompanied by a representative from RS & Co) was to collect the relevant documents relating to her shares. In his written statement EW acknowledges that he received that letter from RS & Co although he recalls that it was an enquiry on her part about the Trust. He has been unable to trace his copy of the letter. I am entirely satisfied that, as the husband has accepted, it was not an enquiry about the Trust but about her asserted 50% ownership of C Limited . Be that as it may, those enquiries seem to have come to nought. EW never met with the wife to discuss these matters and she does not appear to have attended an appointment. As was to become clear, none was ever made.

111. The wife was asked about why she had not pursued these enquiries at the time. She told me that she had never been to EW's offices because he had not wished to see her. She said she had raised the issue with the husband but he had not been forthcoming with any information. She had spoken to Mr RS about what to do next but appears to have been told that the only way she could secure the documentation she sought was to go through the courts and she did not have the funds to take matters further. She accepted that the husband was continuing to provide regular monthly support through her bank account and by meeting the expenses she had charged to her credit card but she told me that she did not have a litigation fund and she could not secure an explanation from the husband.

112. I have seen a copy of a letter which RS & Co sent to the wife's solicitors in December 2015. Having recovered their 2008 file in relation to the wife's instructions, they set out in that letter what they had undertaken on her behalf in 2008. It accords with the history of their involvement as I have set it out above. The letter confirms that they received no response from EW's offices to make an appointment for the wife to collect documents and shortly thereafter they closed the file.

113. In his written evidence the husband sought to run a different case about these events. In his fifth statement sworn in October 2015, he said this:

> "For the avoidance of doubt, I deny that [the wife] was not aware of the Trust prior to these proceedings. I recollect that in or before 2008 I received a telephone call from [EW] advising me that [she] had contacted him through her X country lawyers raising questions about the trust. He had no authority

to assist her attorneys at that time with her enquiries and they were not pursued."

It is not without note that the husband could readily have provided that authority. By his own admission, he never told the wife about the Trust. He told me that he had presumed that RS & Co would have informed her about the trust arrangements which had been set up in 2007. However, it is clear that their enquiries went no further than the formal company searches they were requested to undertake. Despite the letter asking for an appointment to visit EW's offices, there was – as is accepted – no response from EW. As the husband has made clear, he was contacted by EW at the time but did not give him any authority to take the matter further or communicate with the wife or her X country lawyers (acting as agents for the firm in T City). In these circumstances, I have no hesitation in finding that the wife knew nothing about the Trust or the various changes in share ownership other than those revealed by the formal searches in 2008. I accept her evidence that she raised these matters with the husband informally but that he, too, provided her with no information.

114. By 2009 the wife describes the husband's attitude to her as one of open hostility. His visits to Z country had ceased and, after the early part of 2009 she was no longer sleeping at the London family home even in the husband's absence. In February 2009 she came to London to accompany her father who was undergoing a number of medical tests. She remained a director of B Limited and used her visit to London as an opportunity to remove and/or copy a significant quantity of paperwork in the files which were kept at the company's offices. These she delivered to an accountant called Mr B who was asked to look at the documents with a view to assisting her to understand what was going on within the business. The wife told Mr B about what she had learnt the previous year as a result of her lawyers' enquiries in X country about share ownership. She told me that she had not instructed him formally in his capacity as a professional accountant but as someone she had met through a friend. Because he knew the husband socially, she thought they might find some common ground to move matters forward. She had two meetings with Mr B. Her husband attended the second meeting. He told me he had checked his diary and the meeting took place on 22 May 2009. They both accept that this meeting was not successful. It lasted about an hour and, at its conclusion, the wife says she was none the wiser about the state of their business and financial affairs. She told me during the course of her oral evidence that Mr B had told her that what she needed was the original documentation from 1994 evidencing her beneficial ownership of 50% of the C Limited shares. She had implored Mr B to accompany her to a meeting at the North London property to speak to the husband about her predicament in order to *"persuade him how to find a solution and ask him, "What's going on with N Limited ?" and also if it's possible to give me my paper as a document, as a copy" [Transcript: 14.xii.2016 page181]*. She said that during the joint meeting, her husband had told her that she owned nothing. At its conclusion she was told by Mr B that he could not assist her any further and that her redress lay with the courts.

115. Mr B has provided a letter to the wife's solicitors about the nature and extent of his involvement in 2009. He describes her as being extremely distressed during the course of their first meeting. He says that, for the purpose of her first visit, he had secured copies of the accounts for the various companies from Companies House because she did not hold those records. He describes the second meeting which the husband attended as wholly unproductive. There was a good deal of arguing and both the husband and the wife apparently ended up in tears by its conclusion. Whether or not the husband's recollection of the date of the second meeting is correct, it is perhaps not without significance that the wife was removed as a director of B Limited in March 2009 shortly after she had attended the offices for the purpose of retrieving the documents and paperwork which she was to give to Mr B.

116. Having found that the husband did not tell the wife about the creation (or existence) of The ABC Trust in August 2007, it is right to record at this juncture that he told me that he co-operated fully with Mr B in relation to his investigations into the running and operation of the various companies. He had provided him with additional paperwork over and above that removed from the offices by the wife. He accepts that he made no mention during this meeting either to the wife or to Mr B of the second separation agreement they had reached, on his account, in 2007. He told Mr Amos in cross-examination that his copy of that agreement remained in his wardrobe at the North London property. Presumably, on his case, it was there on 22 May 2009 when this meeting took place. Yet for some reason which I confess I do not understand he made no attempt to meet the wife's entreaties for information by producing this document and reminding her that they had settled all these matters two or three years earlier when she agreed that he should pass his interest in C Limited to the children. That would have been the opportunity to explain to her that their joint intention, reflected in the agreement, had been carried into effect through the structure of The ABC Trust. He did not do that. He said nothing at that meeting about the agreement. It seems to me quite extraordinary that, if what was done in August 2007 in setting up The ABC Trust was part and parcel of an agreement between them, he did not use that meeting with Mr B and the wife as the opportunity to remind her about their (allegedly) joint decision to give C Limited to the girls. It appears to be common ground between the husband and wife that nothing was said about an agreement on that occasion and, in my judgment, the omission is highly significant.

117. The husband maintains that he has been unable to produce a copy of the second, signed version of the agreement because she 'stole' it from the wardrobe on a subsequent visit to the property in September 2014 when he was absent.

118. In order to set the context for an analysis of that allegation, I must accelerate forward to 2014 and look at the further dealings which were undertaken in relation to the C Limited shares and the ABC Trust during that year.

Financial restructuring in 2014: the 'sham' Trust dated 21 March 2014

119. In 2013 the X country Bank (Alpha Bank) which had provided all the loan funding for the family business collapsed into insolvency. At that point in time C Limited and its subsidiary companies were carrying just under £19 million worth of loans against approximately £45 million worth of assets. The husband began to explore alternative avenues of financing the business. He had discussions with Beta Bank and with Gamma Bank. An employee of that Bank, KC, had previously worked for Alpha Bank and she was familiar with the C Limited property portfolio and its operation. It appears that the husband's discussions with Beta Bank came to nothing because the Bank was unhappy about lending to C Limited in circumstances where the shares were held by another company, N Limited . He has produced an email dated 4 March 2014 which he sent to Mr A at Beta Bank confirming that the beneficial owners of C Limited were his two daughters.

120. In his parallel discussions with Gamma Bank, he had informed the bank that C Limited was owned by a Trust of which the girls were the beneficiaries. As part of her obligations to complete the bank's 'Know Your Client' anti-money laundering procedures, KC had asked the husband to provide further details about C Limited in terms of its status as the proposed borrower. By email dated 3 March 2014, the husband had emailed to her an organogram showing the corporate structure and N Limited 's holding of the shares through Y Trustees Limited. There was no reference to the Trust on that document. By an email reply sent the same day, KC asked the husband to confirm who EW, PH and another director were and to identify the ultimate beneficial owners of the various companies.

121. The husband's case is that there was a meeting with Gamma Bank on 18 March 2014 which was attended by KC, the Gamma Bank partner responsible for credit and another individual. During the course of that meeting, he alleges that KC told him that the bank would only be prepared to lend if the shares were held by a person rather than by a trust company. As a further condition of any lending, the Bank would need to be satisfied that he (the husband) was the ultimate beneficial owner of the shares because they knew him to be a good businessman with an established commercial track record.

122. Following this meeting, the husband had discussions by telephone with EW. A strategy was devised whereby N Limited would transfer the shares to PH (EW's office employee) and EW would then create a new Trust Deed which recorded that she was holding the shares on trust for the husband. This plan was duly put into effect. On 20 March 2014, the shares in C Limited were transferred from N Limited

into the name of PH. The following day, on 21 March 2014, the husband and PH executed a new Deed of Trust which EW had prepared. This document recorded the husband's beneficial entitlement to all 1,000 issued shares in C Limited . It included a recital that he was entitled as of that date to have the entire shareholding transferred into his name but for reasons of his own, he did not wish to exercise that right at present. Accordingly, they were to be held in PH's name as his trustee. She, in her turn, acknowledged that she was holding the shares for his benefit absolutely. Their signatures were witnessed on the deed and, on 2 May 2014, EW signed a stamped pro forma confirmation that the copy document produced to the Bank was a complete and accurate copy of the original which he had seen. It is quite clear to me from reading that Trust Deed that, bar the particulars of the parties and the recitals, it is in typical format to other similar trust documents which EW produced during his earlier involvement with the husband and C Limited .

123. It is quite clear that the husband did not sign the Trust Deed on 21 March 2014 although there is no doubt that he signed it at a later stage when it was sent to him in London. On behalf of EW, PH sent it to the husband on 21 March 2014, the day after she became the legal owner of the shares. Her email refers to the intended preparation of a "trust agreement" between the husband and his two daughters to reflect their status as the true beneficial owners of the C Limited shares. Only her signature appears on the document which was emailed through to the offices of B Limited in London later that afternoon. The husband told me during the course of his oral evidence that, although they had intended to prepare further documents making it clear that the beneficial interest in C Limited belonged to the girls, those steps were never taken. He told me that EW had advised him that there was no purpose in doing so since the 2007 Trust was irrevocable and the 2014 Deed was irrelevant insofar as it purported to say something different.

124. On 14 April 2014, the husband completed a formal application to Gamma Bank for corporate finance on behalf of C Limited . In that application form he represented to the bank that he owned 100% of the C Limited business. He then sent to the bank a new organogram which showed him as the beneficial owner of all the X country companies with PH holding 100% of the C Limited shares for his benefit. His sister is shown on the document as a director of C Limited . That organogram, too, has been stamped and signed by EW himself as a true and complete copy of the original.

125. It is accepted by the husband that this (2014) Trust Deed is a complete sham. He acknowledges that the information he provided to Gamma Bank was untrue. However, he contends that, in essence, the Bank was a willing participant in what was essentially a fraudulent scheme. He invites me to accept that this scheme was devised at the behest of the Bank in order to comply with their lending requirements. He acknowledges his, and – by implication – EW's, complicity in this wrong doing but contends it was his only means of saving the companies from financial collapse when they lost their banking facilities with Alpha Bank.

126. I have no evidence from Gamma Bank apart from the emails which the husband has produced. I have not seen any attendance note of the meeting with the bank on 18 March 2014 and I do not know what grounds those discussions covered. It is right that the Bank, through KC, sent a brief email to the husband on 10 April 2014 enquiring whether the amended company structure was finalised. She indicated in that email that she needed to pass the same to her compliance department and to the Bank's solicitors. However, I have significant doubts about whether or not I can place any reliance on the husband's evidence that the Bank itself was complicit in the fraud. It seems to me to be an inherently unlikely proposition particularly in the highly regulated environment in which the financial and banking sectors were then operating. In my judgment, it is highly likely that the true scenario at the time was that either the bank expressed concern about the lack of clarity as to who owned C Limited beneficially or they were unhappy about lending in circumstances where the husband was not the de facto owner of the corporate structure. It was, after all, his track record and KC's previous client relationship with him which had apparently influenced the Bank's decision to consider his application for refinancing.

127. Perhaps what this whole débacle does demonstrate is the lack of any resistance on the part of either the husband or EW to present a false and misleading impression to third parties when it suited them or when it appeared to them expedient to do so. The husband has admitted as much to me. Although I have not heard from EW, I have reluctantly reached the conclusion that the same must be true of him in this instance, and notwithstanding his professional status, since it was he who prepared the 2014 Trust Deed knowing full well what he believed to be the irrevocable nature of the 2007 settlement. In certifying the Trust Deed and the corporate organogram as true copies of the original documents, he must be taken to have known that they were going to be submitted to the Bank for lending purposes. Thus, whilst Mr Warwick QC reminds me of the distinction between certifying that a document is a true copy of the original and certifying the truth of the contents of a document, I take the view that it is a distinction which does not, and cannot, exonerate either the husband or EW in this instance. It is, perhaps, of note that EW's witness statement contains no reference whatsoever to the creation of the 2014 Trust Deed.

128. The position is not made any less opaque by the fact that, on 2 September 2014 but a few months after this presentation to Gamma Bank, the husband executed a Will. EW had no hand in the preparation of this document. It was prepared by a London lawyer who had undertaken some conveyancing work for the husband on previous occasions, Mr Y. The husband describes the circumstances in which the Will was drafted. He was about to depart on a holiday to Brazil for a fortnight. He says that a number of his employees became concerned that he was going to a relatively unsafe part of the world and he did not have a Will in place. He spoke to Mr Y the night before his departure and asked him to draw up a Will at short notice. The husband gave instructions on its contents over no more than two hours when Mr Y came to his office that same night. He intended Mr Y to make it clear in the Will

that the C Limited and D Limited shares were already owned by the girls and that everything else which he owned should also go to them in the event of his death. Having signed the Will, he left it in a documents folder in the wardrobe at the North London home.

129. I have a copy of the Will in the court bundles. The two girls are named as executors and trustees. They are also the sole beneficiaries. Clause 3 of the Will identifies in broad generic terms which property falls into the husband's estate on his death. Clause 4 reads as follows:

> "4. By way of guidance only my Estate included (but not limited to) at the time of preparing my Will:
>
> (1) 100% of the beneficial interest in C Limited a company registered in X country ….. whose shares are held in trust on my behalf by PH (and previously N Limited Holdings Ltd) … such beneficial interest having been transferred on 3rd August 2007 to The ABC Trust for the benefit of my children should be disregarded for the purposes of my Estate together with its following interest….. *[there are then listed the five corporate entities wholly owned within the C Limited structure]*

130. The Will goes on to make reference to the former family home in Z country and the Z country seaside holiday home in which he records the wife's 50% interest and his legal and beneficial ownership of the English family home in North London.

131. Clause 7 records the absence of any provision in the Will for the wife on the basis that they have been living separately for over seven years and she has had the benefit of shares in various properties and companies during his life (including her 50% interest in D Limited). The Will is silent as to any formal or informal separation agreements and there is no reference to the existence of any concluded agreement between them in the context of their formal separation.

132. The Will, as a legal document, is not drafted with any particular precision or clarity. In particular, I accept that clause 4(1) might be construed in different ways. It might, as Mr Amos contends, be a true reflection of the husband's position that, as at 2 September 2014, it was he rather than the girls who held 100% of the beneficial interest in C Limited . Alternatively, as Mr Glaser submits, it may be that the specific reference to the transfer of the shares into The ABC Trust for the children's benefit rescues the clause from this construction.

133. Either way, it was a reference which was seized upon by the wife when she came across the Will on a subsequent visit to the North London property.

134. There is an issue between the parties over what happened next.

135. The wife describes in her written evidence a turbulent two years after the meeting with Mr B and the husband in 2009. She describes how she felt powerless in the face of the husband's unwillingness to help her to understand her position in relation to the C Limited shares. She said that she no longer had the energy to fight and instead concentrated on caring for the children. By this stage, their elder daughter had left Z country and was studying at a university in England. Through one of the property companies (D Limited), a property in Kent had been acquired for their eldest child's use whilst she was a student. Their youngest child had a number of health problems which included what have been described as sporadic psychotic episodes. She was receiving counselling and therapy in T City but spent some time in the United States before completing her studies in England. The wife describes how she divided her own time between T City and London over the next few years in order to continue her support for the children. There is no criticism of the husband in terms of the regular ongoing financial support which he continued to provide. The wife received regular sums into her bank account and he discharged her credit card bills as they were presented to him.

136. On one of her trips to London in August 2014, the wife was staying in London when their younger daughter suffered a further relapse in her health. The husband was due to depart for a holiday in South America with his girlfriend despite the wife having asked him to remain to assist with the present crisis in their daughter's health. After he left the country, she moved out of the hotel where she had been staying and moved into the North London property to care for their child. The wife has explained that each had retained keys to the family homes in London and T City. At the North London property there was a cupboard or wardrobe which the wife describes as "communal" in which various documents and personal possessions were stored. She was due to have some dental work done on this trip to London and was looking in the wardrobe for her English NHS card. In so doing, she found two copies of the Will which the husband had executed on 2 September 2014. She says this:

> "I was stunned by this discovery of his 100% asserted ownership [of C Limited] and the clear implication from [him] that I had nothing to do with our family assets. This led me to commence divorce and financial remedy proceedings later that month."

137. She retained one copy of the Will but denies removing anything else from the wardrobe. The husband became aware almost immediately that she had removed it because the wife told their elder daughter what she had done and this was relayed to her father. The copy Will was returned to his solicitors by the wife's own solicitors in November 2014 and he subsequently produced it in these proceedings as a document relevant to the case. Whilst the husband maintains that the wife took the opportunity to remove a quantity of his personal possessions (including photographs, the girls' birth certificates), the wife denies doing any such thing. She tells me that the children's birth certificates and their marriage certificate had been in the family home in T City for many years.

138. The wife was clearly very angry when she read the contents of the Will. She said that it appeared that the husband was trying to present a case that she had no interest whatsoever in a very valuable portfolio of property businesses which they had been building up over thirty years of married life. I have no doubt that her instruction to her solicitors to issue divorce proceedings was an instinctive reaction to that discovery. I am also prepared to accept her evidence that her discovery of a document which appeared to reflect a claim to 100% of the shares in C Limited had provided her with the documentary evidence she needed to litigate her claims through the English courts. She had been told on a number of occasions that she needed to establish a paper trail if she was to advance her proprietary claims to a 50% interest in C Limited and in her own mind I am sure that she felt this might be a starting point. She told me that she had been "so happy to find that piece of paper" because it gave her that first step on the ladder.

139. Her Petition seeking dissolution of the marriage was issued on 12 September 2014.

140. Its service on the husband prompted a somewhat belligerent response from his English company lawyers, T & Co who, for these purposes, had been instructed to accept service of the proceedings. By his acknowledgement of service he indicated an intention to defend the proceedings. The letter continues thus:

> "Our client accepted that the marriage has broken down irretrievably, nevertheless he does not accept that he has behaved in such a way that [the wife] cannot reasonably be expected to live with him. He does so because he has been separated by agreement between the parties since 2006 or thereabouts, with him based in England and your client resident in Z country. Indeed we are instructed that he has only seen your client once since then, in 2010 or thereabouts, when he attended his youngest daughter."

141. Pausing there, it is of note that nowhere in this letter is there a reference to a formal signed separation agreement such as the one relied on by the husband as confirming the wife's agreement to the alienation of the C Limited shares to their daughters. I regard that omission as relevant in ascertaining where the truth lies, particularly in the light of what follows in the letter which continues in this vein:

> "In addition our client states that your client has never worked and describes the assertion that a business partnership exists or ever existed as nonsense. Your client is an individual of considerable assets and each and every asset that she holds has been given to her by our client.
>
> ….. Apart from the fact that your client has never worked, let alone worked in the purported 'family business'. Our client has never offered work to [her] either in England or in Z country. He points out that [she] has neither training nor experience to undertake any such work. In addition it is also difficult to see how she could work in both England and Z country at the same time.
>
> The contents of your letter and pleadings indicate to our client that [your client] is being irrational and not in control of her full mental faculties. We are instructed that [she] has historically suffered from a number of mental issues which border between clinical depression and bipolar disorder. We are informed that your client did originally seek psychiatric assistance, but chose not to take her prescribed medication, believing the same to be damaging to her. It is a matter for you to consider when taking instructions from this lady and in particular securing from her large sums of money by credit card."

142. In the light of the wife's contributions to the business over a number of years which I have described earlier in this judgment, and which she has been able to document, this is a surprising letter, to say the least. It does, perhaps, speak volumes about the husband's attitude to her and his dismissal of the assistance which she had undoubtedly provided within the businesses at least prior to 2006. However, I am satisfied that 2006 (being the point at which the husband considered the marriage to be over) did not mark the demise of those contributions. It is a matter of record that even after Mrs CM had provided the wife with what I will call "the first version" of the Z country private agreement concerning the children and housing/living arrangements (on her case, the *only* agreement), the family business continued to expand. The husband had ambitions, as we know, to grow the property business internationally. For these purposes O Limited was incorporated in England in December 2006 and traded for a number of years, albeit unsuccessfully, before being wound up in 2013. The wife has produced a copy of a formal 'announcement' in respect of the 'B Limited' company which had been incorporated in T City. That company (B Limited) was incorporated on 18 January 2007 and it operated from premises inT City which were owned by M Limited of which both parties were 50% shareholders on incorporation in 2003. Whilst the husband is shown on the official

government 'announcement' as the company's local representative in Z country, the wife and the husband are shown as the "representatives" of the foreign (i.e. UK) branch of the company.

143. The wife has described in her statement of April 2016 how she worked in the local T City office during 2008 together with a team of five full-time staff. She describes her function as the 'office manager' and, as such, she says she ran the office on a day to day basis. In this context she has produced contemporaneous documentation which shows that she was signing off on instructions to the company's bank regarding the payment of staff wages and local taxes. In addition, I accept her evidence that during this period she was continuing to run and manage the portfolio of properties owned in Z country by M Limited. I simply do not accept the picture which the husband seeks to paint in the T & Co letter in relation to this wife's role in, and contributions to, the business.

144. In terms of the effective date of separation, I do not doubt that the husband himself regarded the marriage as all but over in 2006. From his perspective, it might have limped along for a few more weeks or months as they explored the possibility of counselling or therapy but I accept that, by the summer of 2006, he had ceased to make any real investment in salvaging their marriage. He describes the holiday at the beginning of 2007 to Vienna as a "disaster" following which there were no further attempts at reconciliation. The fact that the wife may have had a slightly different subjective impression of this period does not necessarily mean that either party is right or wrong in their respective cases as to the effective date of separation. It is often difficult to define with any degree of precision the actual date upon which parties have effectively "called time" on a marriage precisely because one of the spouses will often have a different perception of the prospects of reconciliation. Many marriages may "limp on" for months, if not years, before one of the parties decides to "call time" on the relationship. In a statement which he swore in October 2014 in support of an application to adjourn the financial aspects of the divorce, the husband said this:

> "Our marriage collapsed over the four year period [i.e. 2002 to 2006] we were together in Z country for various reasons, including (but not limited to) my constant commuting, my disillusionment with Z country, my inability to conduct business there, and what appeared to me to be the Petitioner's increasing irrational behaviour."

145. In this case, I am satisfied that, notwithstanding the trips to Prague and Vienna at the end of 2006 and beginning of 2007, the husband had decided his marriage was over by the summer of 2006. I am also prepared to accept that the wife struggled on despite the obvious difficulties and did what she could in the hope of salvaging the marriage. I accept that by the beginning of 2009 when the husband confessed his

extra-marital affair, she herself relinquished that hope. In this context, I accept that her attempts to shore up the failing property business in T City were part and parcel of her continuing effort to support the husband in his wish to see the company survive in Z country, albeit that those efforts to save the company were eventually unsuccessful.

146. The litigation having commenced, the divorce proceeded eventually on an undefended basis. Decree nisi was pronounced on 27 May 2015. It has yet to be made absolute. I have within the papers a copy of the Answer which the husband filed in response to the wife's Petition. That document refers to an agreement in relation to finances in 2006 that he would retain the London house whilst the wife kept the house in T City. It makes no reference to a formal or written separation agreement. Mr Glaser urges caution about attaching too much significance to this document since his client was addressing the circumstances in which the marriage had broken down and not the financial repercussions of that breakdown.

147. The husband produced a Form E on 19 December 2014. In that document he refers to the agreement to treat the London and T City family homes as separately owned and occupied properties. Under section 2.14 which provides for disclosure in relation to any trust interests, he wrote "none". The total value of the assets disclosed by the husband came to just under £2.15 million, including his business assets. Under section 4.5 in the box which required details of any agreements between the spouses, the husband made no reference to any agreement and certainly none which related to the C Limited and his D Limited shares being placed in a trust or otherwise given to the children. That document was completed under the guidance of his former solicitors, T & Co, and before his present advisers, Stewarts Law LLP, took over his representation. Despite the absence of any narrative explanation about these matters, it is right to record that the husband did exhibit to his Form E a copy of The ABC Trust. It is the wife's case that this was the first she knew about the terms of the Trust apart from the oblique reference to its existence in the letter from T & Co.

148. Having surveyed the evidence in the round, I am entirely satisfied that she is being truthful when she tells me this. The husband himself accepts that he did not tell her about the Trust in 2007 but presumes that she would have learnt about it from the enquiries made on her behalf by RS & Co. That cannot be right because, as I have recorded earlier in my judgment, neither the husband (nor EW on his instructions) was prepared to open the door to those enquiries in 2008. The appointment for her to attend at EW's P City offices was never made, as requested, and that line of enquiry was abandoned. Whilst the husband has stated in his evidence that the telephone call he received from EW in 2008 reporting the approach from RS & Co was specifically in connection with "questions about the trust", the letter from RS & Co refers only to her "50% stake in C Limited ". Just as I have accepted that the wife knew nothing about the Trust at this stage, I accept that there was no mention in the enquiries made of EW by RS & Co about a trust. Whatever EW may or may not have said to the husband at the time, I am satisfied that neither the wife nor her Z country or X country

lawyers knew anything about the 2007 (or any other Trust) at the time they initiated their enquiries on her behalf. Nothing was said about the Trust during the meeting which the parties had with Mr B the following year in 2009. The wife was not informed when the entire share capital in C Limited was transferred from N Limited to PH in March 2014; neither, as I accept, was she informed about the "revised" (albeit sham) trust arrangements which underpinned the corporate restructuring in 2014.

149. The husband's first substantive pleaded account of these matters appears in his Points of Reply to her Particulars of Claim in relation to the preliminary issue. These were served on 23 October 2015 and it is right to observe that, from the outset of his oral evidence, the husband conceded that there were several mistakes in this document. One such mistake was his pleaded case that the second version of the private agreement was prepared by the wife's lawyer but never signed. In his oral evidence, he said that this was wrong. On his case, the second agreement *had* been finalised and signed by the wife and left for his attention on the dressing table of their family home in T City. She had signed it and he had signed it. He had taken it back to London and put it in the wardrobe in the bedroom at the North London property. That second agreement had disappeared during his absence on holiday in September 2014. On his account, at that time their younger daughter was staying with him and recovering from a period of illness. When he left to go on holiday to Brazil, the wife had moved from a local hotel in which she had been staying to the London family home. By the time he returned and discovered she had removed the copy of his recently signed Will, he also discovered that his copy of the second agreement was also missing. As I have said, this evidence came as part and parcel of his examination in chief on the fifth day of the hearing as he corrected earlier mistakes in his pleaded case.

150. In order to reach any conclusions about the existence or otherwise of this alleged second version of the agreement, I look back to see the way the husband's pleaded case has developed. The issue was squarely joined by the husband by the time he came to formulate his statement of issues in February 2016. In paragraph 3 of that document, he set out his case in this way:

> "The extent to which (if any) the parties' shareholdings in various companies, i.e. the Petitioner's shareholding in [D Limited], the parties' equal shareholding in [B Limited] …. should be redistributed. It is the Respondent's case that he built up these businesses without contribution from the Petitioner and whilst he does not wish to deprive [her] of the shareholdings that she holds, sufficient shares should be transferred to him to enable him to operate these companies without intrusion from the Petitioner. In addition having given his shares in [C Limited] and [D Limited] to the children in 2007 the Respondent will seek equality in the shareholdings in [D Limited] and a transfer of 25% of the shares."

151. Once again, there is no mention in this document about any agreement signed on separation, nor – importantly – an averment that the "gift" of his shares in C Limited to the children in 2007 was part and parcel of an agreement which he had reached with the wife at the time they separated. In his third statement sworn on 13 March 2015, the husband says that divorce was never discussed during or after the separation in 2006. He states that the only issues discussed and agreed between them was that the wife would keep the house in T City and that he would transfer his interest in C Limited (described as "a substantial property investment company") to the children which he did by means of the 2007 Trust. Once again, there is silence as to the existence of any signed separation agreement prepared by the wife's Z country lawyer which evidenced this alleged agreement.

152. On 23 July 2015, he swore his fourth witness statement in which he says that he placed C Limited into a trust "pursuant to an agreement between me and my Wife when we separated. My Wife attempted to prepare a separation agreement through lawyers, but that had terms in it which I found objectionable and did not agree it." There is nothing in his evidence at this stage of the proceedings to suggest that a second agreement was drawn, far less that it was signed by the parties.

153. Two months later, on 18 September 2015 (before Stewarts Law LLP had taken over his representation), the husband submitted a response to a schedule of deficiencies which had been raised on behalf of the wife. He was asked to provide full details of the alleged agreement in 2006. This is the point at which he 'goes to print' in terms of his assertion that there was a second agreement prepared by Mrs CM. Having set out his case in relation to the deficiencies in the first draft which was silent in relation to any agreement in respect of the transfer to the children of the C Limited shares, he says this:

> "The Respondent recollects that the Applicant prepared an alternative agreement which to the Respondent's recollection was a truer reflection of what had been agreed between them. Unfortunately the Applicant has only produced the first draft of the agreement and has resisted request *[sic]* to disclose her attorney's file."

154. It is clear from enquiries made of Mrs CM by the wife's solicitors in February 2016 that the entire file maintained by that Z country lawyer was handed back to the wife in an envelope in October 2015. The only relevant document in that file at the time it was handed to Ms Loizou was an incomplete copy of a private agreement document dated June 2007. It was unsigned and, on the wife's case, can be presumed to be a copy of the document which was sent to the wife and subsequently presented by her to the husband. Ms Loizou enquired whether Mrs CM had kept any internal paperwork or correspondence with the wife. She received email confirmation from

Mrs CM that she had handed over her entire file to the wife. There is no reference in any of the Z country lawyer's file to a request from her client to redraft the agreement in different or wider terms.

155. On 29 April 2016, Mr Glaser settled Amended Points of Reply on behalf of the husband pursuant to an order made by Moylan J earlier that month. In this document, the husband pleads that he *saw* a second draft produced by his wife which substantially reflected the terms of their oral agreement including her agreement that he should be permitted to put into effect his longstanding intention to divest himself of his C Limited shareholding in C Limited to their children. The wife flatly denies there was ever any such agreement and it is her case, maintained throughout, that there was never any discussion between them about any transfer of the C Limited shares to the children. As I have said, it is now the husband's case that the copy of the second separation agreement which he signed and brought back to London was one of the documents which the wife removed when she took his Will during her visit to the North London property in August 2014.

156. That allegation surfaced in a letter sent by Stewarts Law LLP to the wife's solicitors on 9 February 2016. In seeking to establish the wife's prior knowledge about the existence of the 2007 Trust, the wife was asked to make a search for any documents relating to her instruction of RS & Co and Mr B in 2008 and 2009. The letter went on to include a request for the following:

> "All documents … produced by the Z country lawyer instructed in or around June 2007 to produce a record of the agreement reached between our clients as to financial arrangements following separation. This should include the second version of the agreement which my client believes your client removed from the property at [the North London address]."

157. Mr Amos relies on the fact that this was the first occasion on which there had been any reference to the allegation that the wife had stolen that document although it was followed shortly thereafter in mid-March 2016 by a reference in the husband's list of documents.

158. I have reached the clear conclusion that the wife is telling me the truth about the absence of a second signed separation agreement. I reject the husband's evidence on this aspect of the case. Mrs CM is quite clear that she was never asked to produce an amended version of the original draft and that she handed the entire contents of her file to her former client once the case was closed. The husband's account is inconsistent and has only emerged in the context of this litigation. EW's evidence is silent as to the existence of this agreement and I find that a surprising omission if, as

the husband contends, it was that agreement which underpinned his instructions to 'perfect' the gift of the C Limited shares to the children through the vehicle of the Trust. Further, the husband made no reference at all to any agreement at the time of the RS & Co enquiries or during the meeting with Mr B in 2009. With some reluctance, I am driven to the conclusion that the husband's case in relation to the second agreement is a complete fiction and I reject it out of hand. It follows that I reject, too, his case that she "stole" a copy of this agreement from the London family home in September 2014.

159. On 27 July 2015, the wife issued her formal notice of application by which she seeks declaratory relief that the ABC Trust is a sham. The same month, EW – no doubt fully aware of the progress of the English litigation – sent the 2007 Deed to the X country Bar Association for formal stamping. As I have said, that first attempt at registration was flawed since the application form showed the husband and N Limited as the trustee of the 2007 Trust. On 28 March 2016 the certificate was amended to show Y Trustees Limited as the registered trustee.

160. The application was transferred to the Family Division of the High Court by order of Deputy District Judge Willbourne on 29 July 2015. On the same occasion, the wife's solicitors were given permission to travel to P City to inspect the original trust deed and the accompanying file maintained by EW. By this stage, the wife had been obliged to seek a penal notice and the husband's committal because of his unwillingness to provide replies to a lengthy questionnaire which she had served.

The evidence of Ms Lucy Loizou

161. That visit took place on 25 September 2015. Ms Loizou attended by prior appointment with a local agent at EW's offices in X country. I have a record of that visit set out in Ms Loizou's statement and she went into the witness box at the start of the preliminary issue hearing and submitted herself for cross-examination on its contents. She describes the meeting with EW as "a very difficult and awkward meeting". On arrival she was handed a black lever arch file labelled "The ABC Trust". She was struck by how few papers it contained. There were no emails, letters, attendance notes or formal letters of engagement. She was not permitted to

take any copies of the documents she inspected. She told me that she felt that EW was reluctant to answer her questions.

162. The file did contain a series of invoices rendered to the husband by the trustee, Y Trustees Limited, which appeared to go back some eight years, although Ms Loizou said she was struck by the pristine quality of the copies on the file. They appeared to her as if they had just been printed and there were no receipts on the file confirming payment of the invoices. There was nothing on the file to evidence the payment of the invoice which had been prepared in respect of EW's services for the creation of the Trust in 2007. The file also contained money laundering documents which had been provided by the husband and the two children in August 2015. EW justified their comparatively recent origin as the result of an audit at about that time.

163. The Trust Deed on the file appeared to be identical to that produced by the husband with his Form E. EW told Ms Loizou that it had only been recently registered at the request of his English solicitors. As to the circumstances surrounding the creation of the Trust, Ms Loizou said this in her evidence:

> "[EW] told me that he had known [the husband] for many years. He told me that he had suggested the creation of a trust to [him]. He told me that he had a meeting with [the husband] and his sister and brother in law at some point in 2007 which then led to the purported trust being created. He told me that there had been some discussions prior to that about the creation of a trust although there was no evidence of this on the file. He also told me about a conversation he had with [the husband] in which [he] had informed him that [the wife] was mentally unwell. [EW] told me that he had advised [the husband] to protect "his" assets and put them into a trust. At that point in our conversation [EW's] assistant, [CE], who was also present at the meeting, intercepted and told him to be careful as to what he said to me as he was a "defendant" in the proceedings.
>
> [EW] went on to tell me that he did not feel that [the wife] had made any contribution to [the husband's] wealth and that she should not have any entitlement. He further added that anything that [the husband] had made had been with his *"own two hands"*."

164. When she was cross-examined by Mr Glaser, Ms Loizou confirmed that she had the clear impression that EW was reluctant to answer some of her questions. When she was pressed in relation to the reasons underlying the setting up of the Trust, she was clear that EW had advised him to do this in order to protect his assets *[Transcript: 13.xii.2016 page 154]*.

165. She was also asked questions about the emails which had been sent to her office by TU. She confirmed that, as the email traffic continued, it became increasingly clear that the author of the emails was connected in some way to EW's law firm in X country albeit that the emails and the information they contained were entirely unsolicited. As soon as the author of the emails had indirectly confirmed her identity, Ms Loizou and her principal, Mr Hodson, had declared the position to the husband's solicitors. When Mr Glaser sought to suggest to this witness that she should have taken these steps at an earlier stage, I intervened to prevent any evidence which might have invaded the firm's legal professional privilege in terms of the steps it had taken or the advice which might have been sought in relation to TU's disclosures. Miss Loizou declined to breach her client's privilege by dealing with Mr Glaser's questions about whether or not consideration had been given to obtaining a search and seizure order in relation to EW's safe or offices.

166. The other aspect of the case with which Ms Loizou dealt in her evidence was in relation to a meeting which she had with her client and the parties' elder daughter, M, in February 2015. The meeting had taken place over afternoon tea at The Sanderson Hotel in London. Its purpose had been to establish what M knew about The ABC Trust which had recently come to light as a result of the husband's Form E. During the course of her oral evidence, Ms Loizou was asked by Mr Glaser about how this meeting had been arranged. She said that she had spoken to the wife and asked whether M might have an objection to meeting with her to talk about this development which she described as "the bombshell that had hit in the Form E". The wife had spoken to her daughter who gave her consent to the meeting in the full knowledge of what was going to be discussed.

167. The upshot of that meeting was that M confirmed that she had only known about the existence of the trust for about a year when her father had made some oblique reference to it "in passing". She had no knowledge about it before and knew nothing now about its administration. She confirmed that she did not want anything from the trust and felt that her mother should certainly have some benefit on the basis that "the trust should be broken". She had further commented that "Dad sees the business as his baby and he is very defensive about it". Ms Loizou accepted that the words which she had quoted in express quotation marks were, to the best of her recollection, the words, or the gist of the words, which had been used by M on that occasion although she did not have the manuscript notes from which she dictated her attendance note. I did not hear directly from M in relation to these matters and both she and her younger sister, L, now have the benefit of experienced representation at Irwin Mitchell. For present purposes it is sufficient to note that the two girls are maintaining an entirely neutral stance as between their parents in this litigation.

The parties as witnesses

168. Before turning to the law and the submissions of the parties in relation to the preliminary issue which I have to decide, I want to address some words in this judgment to my views about the parties themselves. Each has levelled against the other allegations of dishonesty and attempts to mislead this court. I have already made my findings in respect of some of these allegations and, in the main, I have found the wife to be a truthful witness, particularly in respect of her knowledge about the 2007 Trust and the existence – or otherwise – of the second separation agreement. I am also prepared to find, whether as a result of cultural influences or as a result of the personal dynamics within this marriage, that the husband had a tendency to be controlling and overbearing at times. There is no medical evidence before me that the wife suffered from any form of psychological illness, still less that she was bipolar. She herself accepts that there were occasions when her relationship with her husband was difficult and strained and I have no doubt that at times she may have struggled with feelings of low mood and depression. She clearly regarded him as holding most, if not all, of the cards in relation to the manner in which he was operating the family business in 2005 and 2006 when the marriage began to break down. She is clearly angry that he has deceived her about the C Limited shares and sought to alienate (as she perceives it) part of her just entitlement at the end of what has been a very long marriage. She is angry, too, about his attempts to 'air brush out of existence' the significant contributions which I have found she made to the success of this business in its early days and beyond.

169. That said, these are fundamentally good parents who love their children and wish only what is best for them. The wife is rightly proud of the steps she has taken to preserve the children's close relationship with their father despite their estrangement as spouses. The husband, for his part, has consistently maintained the family in terms of its financial wellbeing. I accept his evidence (because it is borne out by the inaction of the wife prior to 2014) that neither contemplated the formal dissolution of their marriage through divorce even after 2007. Leaving aside the wife's case in relation to the absence of sufficient resources to pursue a full scale legal enquiry into what had happened to "her" C Limited shares after 2009, this is not a case where the husband had sought to put any pressure on the wife financially during several years of separate existence. It is much to his credit that he continued to support the family and ensure that the rhythm of life for the wife, commuting as often as she pleased between Z country and England, continued as before. The children were fully supported through their tertiary education and, depending on the outcome of these proceedings, they are potentially the beneficiaries of very substantial wealth as a result of their father's gift. He has said that he trusts them to look after him as and when he ceases to be an integral part of the businesses and that may not happen for many more years if the girls are content to leave matters as they stand. These are all matters which I shall need to consider in relation to the formation of the Trust which is at the centre of these proceedings.

170. It was clear to me as I listened to the parties giving their evidence that each has been exhausted by the course of this protracted litigation. It has been enormously costly and it has taken its emotional toll on this couple. There were times when the wife was unable to contain her emotions and the husband wept openly at the conclusion of his evidence. I acknowledge and accept that the husband places significant trust in, and reliance upon, EW and what he is told by his friend and lawyer. He clearly shares a relationship of confidence with EW and I am in no doubt, despite what the husband told me, that he will on past occasions have discussed with his friend his own perceptions of the wife's psychological frailty. The husband's own evidence at the beginning of these proceedings signals loud and clear his deeply held opinions about her entitlement to share in the financial fruits of their family businesses. It is abundantly obvious to me that, having left in her hands the home in T City and her shareholding in D Limited amongst other assets, he believed that he had met whatever financial entitlement she may have at the end of this marriage. I am entirely persuaded that these are discussions he has had in the past with EW and that those discussions found reflection in what EW had to say to Ms Loizou when she saw him at his office in X country in September 2015. I accept her evidence on this point entirely notwithstanding the absence of EW from this hearing.

171. By the end of last year, no doubt with advice and encouragement from his new solicitors, the husband made his open offer whereby he conceded that the 2007 Trust might be varied with the consent of the children and the trustee so as to include the wife and enable her to benefit in an appropriate way from the underlying trust assets. I have encouraged these parties to find a way through this litigation and the enormously expensive "second round" which is likely to flow from my judgment in relation to the preliminary issue. I still hope that may not be an empty aspiration on my part. However, it is right to record in my judgment that, regardless of my findings in relation to the specific aspects of dishonesty which each of the parties makes against the other, by the time we came to the oral evidence which each gave to me in December 2016, there appeared to be a willingness on the part of both to assist me to understand their respective cases as they unfolded under the scrutiny of some acutely targeted forensic examination by Mr Amos and Mr Glaser. The husband has admitted to several mistakes in the earlier pleadings. He has accepted that aspects of his written evidence have in the past been misleading. He has "put up his hands" to a fundamentally and (on his case) intentionally misleading series of representations to the bank in 2014. I have rejected his evidence in relation to the existence of the second Z country separation agreement but I approach my task in relation to the circumstances surrounding the creation of The ABC Trust with an open mind and a complete overview of *all* the evidence which is available to me.

172. Before undertaking that analysis, I need to address the law. There is little dispute between counsel as to the law in relation to sham trusts and I shall therefore deal with it as shortly as I can.

B. The issues and the law

173. The list of issues to be determined in this preliminary hearing was originally defined thus:-

(i) Whether, prior to August 2007, the shares in C Limited were owned
a. 50% by the husband and 50% by the wife; or
b. 100% for the husband,

whether in law and/or in equity.

(ii) Whether, subject to the issue of sham, the Deed of Settlement dated 3 August 2007 had the effect of settling into The ABC Trust the husband's beneficial interest in (a) D Limited and/or (b) C Limited (and its subsidiary companies).

(iii) Whether The ABC Trust, in particular the Deed of Settlement dated 3 August 2007, is a sham.

(iv) Whether, if The ABC Trust is not a sham and the husband's interest in C Limited was settled into that Trust, he now holds the beneficial interest in the shares of C Limited by virtue of the Deed of Trust dated 21 March 2014.

(v) What was the effect if any (in law and in equity) of the transfer on 20 March 2014 of the entire shareholding in C Limited to Ms PH and the Deed of Trust dated 21 March 2014.

(vi) Whether, prior to 3 August 2007, the respondent had informed the wife that he intended (as he asserts) to divest his interest in C Limited (and its subsidiary companies) to the children.

(vii) Whether, prior to the commencement of these proceedings:

a. The husband had informed the wife that he had (as he asserts) settled his interest in (a) D Limited and/or (b) C Limited (and its subsidiary companies) into trust; or
b. Whether she had otherwise become aware that this had happened.

(viii) Whilst not asserted by any party did the 2006 Deed of Settlement take effect ?

(ix) If the 2006 Deed of Settlement took effect, what is the impact on the Deed of Settlement dated 3 August 2007 ?

174. I have already made findings in relation to issues (vi) and (vii): I am entirely satisfied that the husband did not inform the wife that he intended to divest his interest in C Limited and its subsidiary companies to the children. Whilst I accept that there may have been general conversations over the years about the children one day benefitting from the fruits of their parents' hard work, I accept the wife's evidence that, in the context of their separation, she remained entirely ignorant about his intention to settle the shares into a Trust or otherwise gift them to the children. I am equally confident in my findings that, until receipt of his Form E, she had no prior knowledge of The ABC Trust or the draft Deed which had been prepared by EW in 2006. Her own solicitor described the revelation of The ABC Trust as "a bombshell" and I am satisfied that her description was an accurate reflection of the wife's reaction to that particular disclosure.

175. By the time we reached closing submissions, Mr Amos had distilled the wife's case down to four essential pillars.

(i) Whether the husband and wife agreed that the beneficial interest in the C Limited shares and its underlying entities was held as to 50% for each of them.

(ii) Whether, if C Limited was transferred anywhere away from the husband and wife, it was transferred on the basis it was impressed with that agreement.

(iii) The ABC Trust was (and is) ineffective for three reasons –

(a) there was no transfer of the D Limited shares into the Trust;

(b) the purported trust was a sham transaction which means (i) the husband intended different rights from those which appear on paper, and the truth is that he intended no change and there was no change to the status quo ante; and (ii) the husband intended to give a false impression to third parties;

(c) the *Carman* point: having executed the 2014 Deed of Trust whereby the Gamma Bank refinancing was secured, and having represented himself for these purposes to be the beneficial owner of C Limited , the husband is now bound by that Deed and the representations recorded on its face. (This latter point is based upon a decision of Charles J – *Re Yates (a bankrupt); Carman (trustee of the estate in bankruptcy) v Yates and others* [2004] EWHC 3448 (Ch).); and

(iv) Whether, in the event that the 2007 Trust is *not* held to be a sham, section 37 of the Matrimonial Causes Act 1973 is engaged so as to provide the wife with the relief which she seeks.

176. I shall need to analyse these submissions in greater depth shortly but, for present purposes, I turn to the law in relation to sham trusts.

177. Clause 23(a) of The ABC Trust provides that the governing law of the Trust should be that of X country and all rights under the Deed and its construction and effect shall be subject to the jurisdiction of, and construed according to the laws of, X country. By his order of 28 April 2016, Moylan J recorded by way of preamble that "the preliminary issue hearing shall proceed on the basis that English trust law is the same as X country trust law apart from the discrete issues identified in the letter of instruction to Mr P".

178. Mr P was appointed as a single joint expert in relation to issues flowing from The ABC Trust. He is a commercial / corporate lawyer based in P City, X country and, by letter of instruction dated 28 April 2016, he was asked to address a number of issues and questions. In relation to the law as to "sham trusts", he sets out a number of principles in his report.

> "In respect of a trust governed by X country law, a consideration to be analysed is the settlor's reserved powers. A prerequisite for the creation of a trust is the transfer of legal ownership to the trustee. If it can be shown from either the nature or the amount of powers reserved to the settlor that the transfer cannot be said to have occurred because the intention of the parties [i.e. the settlor and the trustee] was for the settlor to remain effective legal owner and control the assets, the trust may be held void ab initio as a sham. The issue is in identifying the point at which the settlor has retained so much control that it can hardly be said that she or he has relinquished any proprietary interest to the trustees at all. In making such an assessment it is necessary to consider not only the number, but also the nature of the powers cumulatively that may infer a sham trust and the facts surrounding it. So a settlor's power to replace the trustees may alone trigger a sham risk whereas retaining the power to add to the class of beneficiaries and change the governing law may be permissible." (page 21)

179. Mr P then goes on to list a number of fairly extensive powers which may be reserved in a trust deed to a settlor but which, under X country law, will not necessarily render a trust a sham. He quotes from one of the seminal English authorities on sham transactions, *National Westminster Bank plc v Jones and Others* [2001] 1 BCLC. In that case, Neuberger J (as he then was) was dealing with the grant of an agricultural tenancy of a farm and the sale of its farming assets by the partners in a farming business where the issue was the genuineness or otherwise of those transactions in the face of claims by a receiver in bankruptcy appointed by the bank. At paras 36 to 39 of his judgment, his Lordship said this (and I extract the relevant passages):

> "36. The bank contends that the tenancy and the sale agreement are, on proper analysis, shams. As I have mentioned, it is conceded that the formation and acquisition of the company, the grant of the tenancy, and the sale agreement were artificial, in that they occurred solely because the defendants wished to do their best to protect their farming business, and their home, from being taken from them and sold over their heads by the bank….."
>
> "37. It is equally clear, to my mind, that the mere fact that a tenancy, or any other contractual transaction, is entered into for such an artificial purpose, namely to avoid the contractual or statutory rights which a third party would otherwise enjoy, does not by any means of itself render the transaction a sham….."
>
> "39. Accordingly, while the palpable, and freely admitted, artificiality of the agreements in the present case cannot be doubted, it certainly does not follow that, as a result, the agreements must be shams. However, in my judgment, the fact that a particular transaction is palpably artificial is a factor which can properly be taken into account when deciding

> whether it is a sham. Indeed, it would seem to me to require very unusual circumstances before the court held that a transaction which was not artificial was in fact a sham. I add this. If the court were to conclude that a transaction was artificial, in circumstances where the party relying on it was contending that it was not artificial, then that might be a further reason (although certainly not a conclusive reason) for deciding that the transaction was a sham, given that a sham transaction involves a degree of dishonesty on the part of the parties involved."

180. His Lordship then went on to quote from the well-known judgment of Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 1 All ER 518 at 528, [1967] 2 QB 786 at 802:

> '… it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and perjorative word. I apprehend that, if it has any meaning in law, it 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. One thing I think, however, is clear, in legal principle, morality and the authorities … that for acts or documents to be a "sham", with whatever legal consequences follows from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

181. That passage from *Snook* was cited with approval by the Court of Appeal the following year in *Stone v Hitch* [2011] EWCA Civ 63 per Arden LJ. In that case, her Ladyship set out five fundamental principles in relation to the law on sham acts or documents.

> "65. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.
>
> 66. Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

> 67. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where the parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.
>
> 68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied: see for example Garnac Grain Co Inc v H.M.F. Faure and Fairclough Ltd [1966] 1 QB 650, 683-4 per Diplock LJ….
>
> 69. Fifth, the intention must be a common intention: see Snook's case above."

182. In the *Jones* case, Neuberger J concluded, in paras 45 and 46, that:

> "….. the whole point of a sham provision or agreement is that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement, while in fact they have no intention of honouring with their respective obligations, or enjoying their respective rights, under the provision or agreement."
>
> "Thus, in the present case, provided the bank or the court accepts that the agreements are genuine, then (subject to any other point) the defendants have achieved their aim: it is not of the essence that the agreements are genuine, merely that they are accepted as genuine. Of course, having made that point, one should not lose sight of the fact that there is obviously a strong presumption, even in the case of an artificial transaction, that the parties to what appear to be perfectly proper agreements on their face intend them to be effective, and that they intend to honour and enjoy their respective obligations and rights. That that is so is supported by the fact that an allegation of sham carries with it a degree of dishonesty, and the court should be slow (but not naively or unrealistically slow) to find dishonesty."

183. In relation to the transactions at the heart of the *Jones* case, Neuberger J reached these conclusions:

> "68. In these circumstances, I have reached the conclusion that neither of the agreements was a sham. Each of them was an artificial transaction …. Both principle and the authorities indicate that the court is slow to find that an agreement is a sham, and that, before the court can reach such a conclusion, it must be satisfied that the purported agreement is no more than a piece of paper which the parties have signed with no intention of it having any effect, save that of deceiving a third party and/or the court into believing that the purported agreement is genuine. Taking all the evidence together, I think that the bank has plainly fallen short of discharging the onus, which it undoubtedly has, of establishing that either of the agreements was a sham."

184. Thus, two headline points emerge at the outset: (i) there must be a dishonest intent before the court will find an instrument to be a sham, and (ii) where instruments or agreements are properly and formally drawn (i.e. "perfectly proper agreements on their face"), absent a dishonest intent, there is a strong presumption that the parties intend to honour their rights and obligations thereunder.

185. It is agreed that the burden falls on the shoulders of the party alleging sham to make out his or her case and thus, here, it is the wife who must discharge that burden on the balance of probabilities.

186. The next headline point which emerges from both *Jones* and *Stone v Hitch* is this: before transactions or documents will be construed by the court as sham transactions, all the parties to them must share a common intention that the documents themselves will not create the legal rights and obligations which they give the appearance of creating. The principle has a particular resonance here because The ABC Trust is a bilateral trust where there is both a settlor (the husband) and a trustee (Y Trustees Limited). This legal principle, as Mr P has confirmed, has the endorsement of the Supreme Court of X country. This principle is derived from an English case decided by Rimer J (as he then was) in 2005. In *Shalson v Russo* (2005) Ch 281, at 342, his Lordship explained the principle thus:

> "When a settlor creates a settlement he purports to divest himself of assets in favour of the trustee, and the trustee accepts them on the basis of the trusts of the settlement. The settlor may have an unspoken intention that the assets are in fact to be treated as his own and that the trustee will accede to his every request on demand. But unless that intention is from the outset shared by the trustee (or later becomes so shared), I fail to see how a settlement can be regarded as a sham. Once the assets are vested in the trustee, they will be held on the declared trusts, and he is entitled to regard them as so held and to ignore any demands from the settlor as to how to deal with them. I cannot understand on what basis a third party could claim, merely by reference to the

> unilateral intentions of the settlor, that the settlement was a sham and that the assets in fact remained the settlor's property. One might as well say that an apparently outright gift made by a donor can subsequently be held to be a sham on the basis of some unspoken intention by the donor not to part with the property in it. But if the donee accepted the gift on the footing that it was a genuine gift, the donor's undeclared intentions cannot turn an ostensibly valid disposition of his property into no disposition at all. To set that sort of case up the donee must also be shown to be a party to the alleged sham. In my judgment, in the case of a settlement executed by a settlor and a trustee, it is insufficient in considering whether or not it is a sham to look merely at the intentions of the settlor. It is essential also to look at those of the trustee." [my emphasis]

187. These authorities were considered more recently by Munby J (as he then was) in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467. In that case the allegation of sham was levelled by a wife against two discretionary trusts which held shares in a family business which she and the husband had run throughout a twenty year marriage. The settlors were the husband's father (who had originally established the business) and his brother. The trustees had changed through the life of the trusts but were based offshore in Jersey at the time of the litigation which concerned the wife's entitlement to ancillary (financial) relief arising on divorce. The wife alleged that the trusts were shams and that the husband should be treated as holding a significantly enlarged share of the business. In the alternative, she argued that the shares held within the trusts should be treated as available to the husband in accordance with the principle enunciated in *Thomas v Thomas* [1995] 2FLR 668, CA. Munby J held that the wife had not even begun to make out a case against the original trustees as having been parties to a sham transaction. Further, the two cases presented by the wife as alternatives in respect of the shares held within the trusts were wholly inconsistent with each other and involved diametrically different assertions. The first proceeded on the basis that the trusts were shams and the second on the basis that the trusts were genuine. That observation is highly relevant in this case because, although the wife has not yet articulated her case on the basis of any *Thomas* arguments, she does invite me – should I find the 2007 Trust to be genuine – to consider what Mr Amos has described as her "fall back" application pursuant to section 37 of the Matrimonial Causes Act 1973. In other words, she asks me to find in the alternative that this was a reviewable disposition which was undertaken for the purposes of defeating her claims in the context of an application for financial remedy orders. As Munby J acknowledged in *A v A*, when the court is considering claims under section 37 of the 1973 Act, it is concerned with a document or transaction which is entirely genuine. The purpose of the transferor is to do the very thing which the transaction purports to achieve, i.e. to divest himself of assets which are thereby put beyond the reach of his former spouse and/or the court. Section 37 is merely a statutory mechanism whereby, in appropriate circumstances, the court is entitled to set aside a transaction which is otherwise entirely genuine.

188. One of the aspects which Munby J had to consider in *A v A* was whether a trust which is not at its point of creation a sham could subsequently become a sham

because of the changed intentions of settlor, trustee or both. His Lordship reached this conclusion :-

> "**[42]** … Once a trust has been properly constituted, typically by the vesting of the trust property in the trustee(s) and by the execution of the trust deed setting out the trusts upon which the trust property is to be held by the trustee(s), the property cannot lose its character as trust property save in accordance with the terms of the trust itself, for example, by being paid to or applied for the benefit of a beneficiary in accordance with the terms of the trust deed. Any other application of the trust property is simply and necessarily a breach of trust: nothing less and nothing more.
>
> **[43]** A trustee who has bona fide accepted office as such cannot divest himself of his fiduciary obligations by his own improper acts. If therefore, a trustee who has entered into his responsibilities, and without having any intention of being party to a sham, subsequently purports, perhaps in agreement with the settlor, to treat the trust as a sham, the effect is not to create a sham where previously there was a valid trust. The only effect, even if the agreement is actually carried into execution, is to expose the trustee to a claim for breach of trust and, it may well be, to expose the settlor to a claim for knowing assistance in that breach of trust. Nor can it make any difference, where the trust has already been properly constituted, that a trustee may have entered into office – may indeed have been appointed as a trustee in place of an honest trustee – for the very purpose and with the intention of treating the trust for the future as a sham. If, having been appointed trustee, he has the trust property under his control, he cannot be heard to dispute either the fact that it is trust property or the existence of his own fiduciary duty."

189. This passage and the law as explained within it is clearly relevant to the events which unfolded in relation to the execution of the (admittedly) sham Trust Deed in 2014 when Gamma Bank agreed to refinance the companies. There was no change of trustee at that stage since Y Trustees Limited remained as trustee but, subject to Mr Amos's arguments about the effect of the *Carman* case, it is difficult in the light of *A v A* to see how the trust property (i.e. the C Limited shares and/or the husband's D Limited shares), once validly settled on the terms of the 2007 Trust, could be resettled on different terms. Whilst the beneficiaries of the 2007 Trust may well have had their remedies against the trustees for a purported breach of trust, the fundamental nature of the trust property and the trusts upon which it was originally settled – absent a finding of sham in relation to the 2007 Deed – remained as before.

190. What, then, must the wife here establish in relation to the intention shared by both the husband and Y Trustees Limited at the time of the creation of The ABC Trust in 2007 ? Munby J's judgment in *A v A* traces the authorities and provides some helpful guidance.

"**[49]** … Whatever the settlor or anyone else may have intended, and whatever may have happened since it was first created, a trust will not be a sham - in my judgment cannot as a matter of law be a sham - if *either*:

(i) The original trustee(s), *or*
(ii) The current trustee(s),

were not, because they lacked the relevant knowledge and intention, party to the sham at the time of their appointment. In the first case, the trust will never have been a sham. In the second case [*which is not relevant here – my addition*], the trust, even it was previously a sham, will have become a genuine – a valid and enforceable – trust as from the date of appointment of the current trustee(s).

[50] There has been some debate in the authorities as to what is required to establish the requisite common *intention*. In *Midland Bank plc v Wyatt* [1995] 1 FLR 696, [1996] BPIR 288, the deputy judge, Mr David Young QC, said at 699 that:

> 'a sham transaction will still remain a sham transaction even if one of the parties to it merely went along with the "shammer" not either knowing or caring about what he or she was signing. Such a person would still be a party to the sham and could not rely on any principle of estoppel; such as was the case in *Snook*.'

Singer J said much the same thing in *Minwalla v Minwalla and DM Investments SA, Midfield Management SA and CI Law Trustees Ltd* [2004] EWHC 2823 (Fam), [2005] 1 FLR 71 (*Minwalla*), adopting at paras [54]-[55] the following statement of principle by a commentator:

> 'In order for a trust to be found to be a sham, both of the parties to the establishment of the trust (that is to say the settlor and the trustees in the usual case) must intend not to act on the terms of the trust deed. Alternatively in the case where one party intends not to act on the terms of the trust deed, the other party must at least be prepared to go along with the intentions of the shammer neither knowing or caring about what they are signing or the transactions they are carrying out.'

[51] Singer J's judgment in *Minwalla* gave rise to further proceedings in the Royal Court of Jersey, where the relevant trusts were located. In *CI Law Trustees Limited and Another v Minwalla and Others* [2005] JRC 099, the bailiff pointed out at para [15] that Singer J appears not to have been referred to

Shalson v Russo where, as the bailiff correctly observed, the judgment of the deputy bailiff in *Re Esteem* had been cited and been regarded, as a matter of English law, as correct in principle. The bailiff continued:

> 'In *Re Esteem Settlement*, this Court held that, in order for a trust deed to be a sham, both the settlor and the trustee must subjectively have a common intention that the trust deed is not to create the legal rights and obligations which it gives the appearance of creating: it is not sufficient that the settlor alone has such an intention. *Re Esteem Settlement* has been followed in *MacKinnon v Regent Trust Company Limited* 2004 JLR 477, a decision which was upheld by the Jersey Court of Appeal at [2005] JCA 066, [2005] WTLR 1367.'

[52] In *Re Esteem* the Royal Court had in fact been referred to *Midland Bank plc v Wyatt* [1995] 1 FLR 696, [1996] BPIR 288. The deputy bailiff in *Re Esteem* explained matters as follows:

> '[58] … In our judgment the court in *Wyatt* was simply confirming that a party who goes along with a sham neither knowing or caring what he is signing (ie, who is reckless) is to be taken as having the necessary intention.
>
> [59] It follows that in our judgment, in order to succeed, the plaintiffs will need to establish that as well as [the settlor], [the trust company] intended that the assets would be held upon terms otherwise than as set out in the trust deed or, alternatively, went along with [the settlor's] intention to that effect without knowing or caring what it had signed, and that both parties intended to give a false impression of the position to third parties or to the court.'

I agree with that analysis. What is required is a common *intention*, but reckless indifference will be taken to constitute the necessary intention." [my emphasis]

C. The parties' submissions in relation to the issue of the validity or otherwise of the 2007 Trust

191. Thus, here, in order to establish the sham relied upon by the wife, Mr Amos must establish that not only did *the husband* have a dishonest intent in that he regarded the 2007 Trust Deed as being no more than a 'paper' which created no legal rights or obligations as between himself, the trustee and the purported beneficiaries (the children); he must also establish that Y Trustees Limited either shared that dishonest intent or was recklessly indifferent to the fact that it was entering into a document which on its face purported to impose on it, qua trustee, onerous fiduciary obligations towards the beneficiaries and the trust property which it had no intentions of honouring.

192. There is no challenge to the formal legal status of Y Trustees Limited as a properly constituted X country trust corporation. The company was incorporated in X country on 27 December 2005. Its single shareholder and the registered company secretary is another X country company called Y Secretarial Limited. The directors of Y Trustees Limited are EW and PH. The thrust of Mr Amos's attack upon the bona fides of that entity is that it is no more than a 'creature' of EW's. He is its controlling mind and, for the purposes of establishing the requisite intention to establish that the 2007 Trust is a sham, he submits that I can look to EW's intentions as being one and the same as those of Y Trustees Limited. Since Mr Amos says that the evidence points to a dishonest intention on the part of both the husband and EW, that is sufficient to establish the necessary element of sham. In other words, each intended to give a false impression of the position to third parties or to the court. The essence of the wife's case, as advanced by Mr Amos, is that the 2007 Trust Deed was a meaningless piece of paper and was intended to be so: neither the husband nor EW/Y Trustees Limited had any intention of transferring the legal or beneficial interest in the C Limited /D Limited shares held by the husband into the hands of the trustee for the benefit of the children. Throughout, he submits, that interest has remained with the husband who has carried on his dealings with the companies in exactly the same way as he did prior to 2007. The 2007 Trust, on the wife's case, is no more than a pretence created to encourage the court to believe that the underlying value of the shares cannot be treated as a resource of the husband's for the purposes of any sharing claim she may have in the current financial remedy proceedings. Because the husband resists her claim to original beneficial ownership of 50% of the C Limited shares, the husband has used the device of the Trust (says Mr Amos) to attempt to remove entirely from the underlying asset base 100% of the value in those shares which runs, as we know, to tens of millions of pounds.

193. I pause there to remind myself that, at the time when The ABC Trust was created, there were no extant divorce proceedings. The wife's Petition was not issued until seven years later. Whilst she may not have considered the marriage to have irretrievably broken down by that point, it is clear, as I have found, that the husband regarded their relationship as having foundered by 2006. There is no evidence that he sought advice at that stage in relation to the wife's likely entitlement in the event of a divorce under either English, Z country or X country law. I accept his evidence that he had no plans at that stage to formally dissolve the marriage by instituting proceedings in any of those jurisdictions. However, that does not, without more, absolve him of a wish to protect his assets in the event of a future divorce. One of the issues which I have to decide is whether such a desire to achieve that measure of protection in the future was part and parcel of a dishonest intent on his part and on the part of the trustee to deceive the wife and the court as to the true nature of the transaction and the terms reflected in The ABC Trust.

194. The two people in this respect who are capable of forming any 'intentions' are the husband and EW. Each has given evidence that The ABC Trust was never intended

as a sham but was settled with the clear intention that the children of the family were to be the beneficiaries of those assets which were transferred into the legal ownership of the trustees. In this context, the extent of the wife's beneficial ownership of the C Limited shares as at 2007 is a separate point. Both Mr Glaser and Mr Warwick QC accept that the husband could not settle on the trustee property in respect of which he was not the beneficial owner. I shall deal with this aspect of the wife's case shortly. First, it is necessary to consider whether the structure set up in August 2007 was itself a sham. For these purposes, I accept that EW's intentions are relevant because of his status as the director of Y Trustees Limited and Protector of the 2007 Trust.

195. The husband has said in his written evidence that he had always planned on giving everything he had to the two girls and that the wife knew that this had been his intention whilst they were together. To an extent, she accepted this during the course of her oral evidence. She told me that it was part of their national culture to pass on wealth to their children. She acknowledged that, in due course, they both intended their children to inherit substantial wealth but she denied the existence of a separate and specific agreement to accelerate that benefit by means of an inter vivos 'gift' in 2007. I have already found that, in this respect, the husband's intentions were unilateral. That fact, by itself, would not prevent him from making a genuine disposition of his assets through the vehicle of a trust since, absent a live claim by the wife at the time, he was perfectly entitled to deal with his own assets as he saw fit. He sets out in his written evidence his wish to manage the transition of ownership to the girls efficiently. He acknowledges that, given their ages (18 and 15 years old at the time), the business needed to carry on trading and he, in turn, needed to remain at the helm to manage it actively for their benefit. He sought advice from EW as to how this could be achieved and EW suggested the possibility of a trust.

196. As to EW's intentions, these can be collected from his own evidence and from that which Ms Loizou gave the court. He confirms in his statement that he had several meetings with the husband after N Limited was incorporated to discuss how he might give part of his beneficial interest in C Limited and D Limited to the children. Ms Loizou records in her own evidence the separate conversation she had with EW in September 2015 that the idea in relation to the creation of a trust had come from EW in 2007. She also contends that she was told by EW that part of the husband's motivation for putting assets into trust was his desire to protect those assets in the event of future claims, a course which EW himself appears to have supported. However, as is clear from the decision in *National Westminster Bank v Jones*, a desire to protect assets from third party claims is not sufficient, without more, to render a transaction a sham albeit that were such purpose the sole reason for the transaction, thus rendering it artificial, it might be a factor which the court would need to take into account.

197. I accept that Mr Amos has been denied the opportunity to test EW's explanation of the circumstances in which the Trust was set up and I have reminded myself of the

need for caution in attaching significant weight to what he has said in his written evidence about the circumstances surrounding its creation. Nevertheless, I ask myself this question: even if part (or all) of the husband's/EW's/Y TRUSTEES Limited's intentions related to asset protection, who were they/it intending to deceive in 2007 ? In order to qualify as a legal sham, I would need to find a common intention at the time of the creation of the 2007 Trust that the notional trust property was to remain throughout the husband's property, as Mr Amos contends was in fact the case.

198. The evidence of TU in relation to the issue of the intentions of the husband and EW in 2007 is based upon her knowledge of documents she has seen after the event. She appears to have had a break of about a year in her employment in EW's offices, whether as a result of illness or maternity leave, I know not. Her emails leave open the possibility of either cause. As I have already recorded earlier in this judgment, it is clear that she has 'reconstructed' a time-line which, in at least one instance, is entirely inaccurate. I shall return to her evidence later in the context of the separate point relating to the wife's alleged interest in 50% of the C Limited shares but TU's evidence is of little assistance to me in terms of what happened in 2007 because she was not there and was not privy to the discussions between EW and the husband nor does she refer to the existence of any contemporaneous documents such as attendance notes which might assist.

199. As to the children, the only evidence I have is from M, the parties' elder child, and the conversation at The Sanderson Hotel. She was plainly aware of the existence of a trust and the potential benefit which she and her sister had as a result. Her reference to her belief that the trust should be "broken" might suggest a subjective understanding of its essential validity but I do not place any reliance on this evidence since the children, through their lawyers, have made it abundantly clear that, as between their parents, they are adopting a position of complete neutrality.

200. How, then, does Mr Amos seek to justify the wife's case in relation to the allegedly sham nature of the 2007 Trust ? Before turning to his submissions on the evidence, I need to deal with a preliminary observation which he made to me about his client's position in relation to what he has called "round two" of this litigation. It arises in this way. If The ABC Trust is found to be genuine, it nevertheless has a resonance in these proceedings outside the limits of the preliminary issue which I am determining. The husband has already made an open proposal to seek the support of the trustee and the children in varying the terms of the trust so as enable the court to consider its status as a potential 'resource' for the purposes of the wife's claims. Mr Amos contends that I should ignore this partial concession on his part because, by the time we come to 'round two', in the event of a finding that the Trust is genuine, he is likely to be contending that the assets under the control of the trustee are entirely quarantined in terms of the wife's substantive claims for financial remedy orders. He points to the lack of co-operation from EW in securing relevant documents in these proceedings and suggests that his client will be at a significant litigation disadvantage

if I were to find the Trust was, and is, valid. He submits that her position in this event will be "very heavily handicapped" *[Transcript:* 20.xii.2016, page 83]. It seems to me that point can be dealt with shortly.

201. The validity of this Trust, whether sham or otherwise, is a matter of law. The outcome in terms of my application of the law to the particular facts of this case is binary in its nature. Either this was a genuine Trust or it was not. On this issue, and subject to the separate issue of what went into the Trust at its inception, I have no discretion in terms of maintaining a level playing field for this wife. Save in circumstances where her second application under section 37 of the Matrimonial Causes Act 1973 were to succeed, I cannot at this stage concern myself about issues of perceived juridical advantage or disadvantage. Even in the context of section 37 of the 1973 Act, I would have to be satisfied that the husband had set up the Trust with the specific intention of defeating the wife's future claims for financial relief (i.e. by preventing orders from being made for her benefit or reducing the amount of any financial relief or frustrating or impeding the enforcement of any order which might be made by the court).

202. Thus I turn to Mr Amos's substantive submissions in relation to dishonest intent.

203. Dealing first with EW, he invites me to regard him as the "enabler" or "puppet master" of the husband. He describes him as both "the starting point" and "the finishing point" of the case. He points to the fact that the husband had told me during the course of his evidence that he could rely on EW to sign documents as and when they were required. Certainly, I have the evidence of EW's involvement in the representations made to Gamma Bank in the context of the 2014 financial restructuring of the business. Whether or not it is fair to characterise EW's willingness to sign the stamped certifications of "true copies" of documents as active collusion with the husband in a deception practised on the bank, he was nonetheless prepared to advise the husband to sign documents which he knew to be untrue in terms of their underlying representations. Mr Amos points to the fact that EW plainly has documents in files which relate to the husband's professional relationship with his firm which he has removed from third party scrutiny. In this context, I accept as true TU's assertion in one of her emails to Ms Loizou that she had no access to some of the documents because they have either been removed by EW from the office or placed securely under lock and key. Further, Mr Amos points to the significant omission in the list of documents produced on behalf of the second respondent, Y TRUSTEES Limited, in relation to the existence of the 2002 draft Deeds of Trust prepared on the husband's instructions to record the wife's beneficial ownership of 50% of the shares in C Limited . I have reached the conclusion that the omission of any reference at all to the existence of these documents on the part of EW can only have been deliberate. In his 2016 witness statement, he makes specific reference to the fact that his firm and Y Secretarial Limited (company secretary to C Limited) have several thousand pages of documents relating to C Limited and its property

acquisitions. He confirms that there is nothing in those documents apart from those exhibited to his statement which relate to the ownership of C Limited or The ABC Trust. Whilst I accept that this was the first time that EW himself had been willing to provide the English court with direct evidence of his own involvement in this matter, he is – and has been throughout – the lawyer who was acting for the second respondent in these proceedings. As such it seems to me that I am entitled to conclude that he had seen, and approved, the list of documents which had been compiled by PH in November or December 2015 (the document in the bundle is undated) which was submitted to the English court on behalf of Y Trustees Limited. EW does not say in his witness statement that the 2002 draft trust deeds were 'late discoveries'. Yet there is no reference to their existence in the list of documents notwithstanding EW's knowledge that the issue at the heart of this stage of the litigation was the wife's claim that she beneficially owned 50% of the issued share capital in C Limited . I am aware that Mr Glaser has raised the point about a collateral litigation privilege but, if there is any basis for such a submission, it cannot rescue EW from a finding that he must have been aware that the existence of the 2002 Deeds was likely to be highly prejudicial to the husband's case in relation to the beneficial ownership of the C Limited shares.

204. In relation to the husband, Mr Amos submits that both his oral and written evidence in relation to the creation of the 2007 Trust is inconsistent and entirely dishonest. He points to the confusing trail of trust documentation which has been produced in these proceedings. I have already set out earlier in my judgment the chronology of the production of the various earlier drafts of trust deeds and I will not repeat it here. But Mr Amos asks me to look closely at what actually happened in 2006 and 2007.

205. N Limited was set up as a separate corporate entity in X country on 28 February 2006. This step took place in the context of Mr and Mrs R wishing to relinquish their previous role as the two shareholders in C Limited . There were discussions between the husband and EW at the time as to whom those shares should be transferred. Because EW's firm was by then running the legal administration of C Limited , a decision was taken to keep everything 'in house' and transfer legal ownership of the shares to a new holding company which would also be run by EW's firm. That decision resulted in the incorporation of what was essentially a SPV[5] which had been set up with the sole purpose of holding the C Limited shares. It is clear from the Memorandum & Articles of Association that Miss YT (an employee in EW's offices) was the original shareholder. Despite the fact that she is named in that document as the legal shareholder, it is accepted by both the husband and EW that the husband was the beneficial owner of the company from its inception.

[5] Special Purpose Vehicle

206. We know that a Deed of Trust was executed on 28 February 2006 whereby the husband, as beneficial owner of N Limited , set out the terms upon which YT held his shares as trustee. During his lifetime, they were for his absolute benefit and, in the event of his death, they were to go to his legal heirs "in the proportions which they would be legally entitled to the same". As I have already explained, there are two versions of this particular Trust Deed. One was produced by the husband just before the start of the December (2016) hearing having been apparently found by his accountant in a safe at the London offices of B Limited; the other was produced from X country by PH as a result of a further disclosure order which I made on 14 December 2016. The latter has been signed by the husband and YT and witnessed; the former only bears YT's signature. Both documents attest to the intention that he should be the ultimate beneficial owner of the shares in N Limited but it is clear to me that the version found by the husband in London must be an earlier draft of the Deed which was eventually signed and retained in EW's offices in P City. In the first draft of the Deed, there is no provision for what should happen to the shares in the event of the husband's death.

207. Thus, says Mr Amos, we reach a position whereby a holding company has been created as the vehicle of ownership for the C Limited shares and it is that corporate entity which subsequently becomes the trust property of The ABC Trust the following year. Just pausing there for a moment, I see nothing sinister in the *creation* of N Limited . I accept that there came a time when Mr and Mrs R wished to cease their involvement with C Limited in order to concentrate on their own business interests. EW in his written evidence has told me that they always treated the husband as the beneficial owner of the C Limited shares. In my judgment that statement takes me no further since I have to look at the underlying reality of beneficial ownership and I shall come to my findings in relation to that aspect of the case shortly. However, I am prepared to accept that the incorporation of N Limited was part of the strategic plan to provide Mr and Mrs R with an "exit" route and that is what subsequently happened. It is equally clear that discussions were ongoing at the time between the husband and EW about setting up a trust structure for the ultimate benefit of the girls or, as Mr Amos, would have it, for the purposes of asset protection in the event of any future claims by the wife given the state of the marriage at the time.

208. The next step in the sequence was the production on 8 January 2016 of the Deed of Trust dated 2 August 2006. This was sent to the wife's solicitors by Stewarts Law having been produced to them by the husband on 22 December 2015. It was clearly a new document in the litigation. The covering letter from Stewarts Law acknowledges that the document would need to be addressed in the husband's Amended Reply to the wife's Particulars of Claim and in the list of issues to be addressed in the context of the preliminary issue question list. This particular Deed of Trust (V1) was the forerunner of The ABC Trust which was executed on 3 August 2007 (V2) and which is said to be the sham transaction at the heart of this case. V1 is the document which the husband claims he received by fax from EW. It is clearly an incomplete draft. The date has been left blank as has section 8 which deals with the ultimate default trusts. The major difference between V1 and V2, as I have already

noted, is the inclusion in V1 of the husband as a named beneficiary with the two children.

209. The husband's evidence in relation to the 2006 Deed was confused to say the least. He appeared to think that he had signed the 2006 draft (V1) twice; once in EW's offices in 2006 and then again on 2 August 2007 whilst he was staying overnight with his sister in X country just prior to his meeting with EW the following day. Initially he told me that V1 was faxed to him as a draft by EW. He received it in his London office. I can see from the copy document that the draft deed left EW's offices at 13.44 on 2 August 2007 but it must have been prepared some time before that date because the first line of the draft document appears thus:

"THIS DEED OF SETTLEMENT is made the … day of …… 2006."

The husband was travelling to X country to meet with EW as part and parcel of the ongoing discussions about the Trust. He took the draft to read on the plane and spent the night of 2 August 2007 staying at his sister's house in X country prior to his meeting the following day with EW in his P City offices. Whilst at his sister's house, or possibly the following day at EW's offices, he completed the date section by writing "02" and "08" at the top of the document. He did not change the year from '2006' to '2007'. He signed each page at the bottom and completed the section which required his passport number. His signature appears on the final page and it has been witnessed by Mrs R, his sister. However, he told Mr Amos in cross-examination that he had a recollection of signing a similar document in 2006, the year when he says he and the wife separated. That document, he contends, was left in EW's offices in X country as a "back-up". He said that he had told EW that if anything should happen to him, he should use it, "all signed". When he received the document by fax on 2 August 2007, it was a clean, unsigned version.

210. Whilst I make due allowance for the fact that we are deliberating over events which happened more than ten years ago, I have to say that I found the husband's evidence in relation to the 2006 draft Deed (V1) very confusing. It may well be that, with discussions about the formation of the Trust ongoing through 2006 and 2007, the husband did sign some sort of 'holding' document although, if he did, he must have done so after 11 April 2006 since the Trust Fund refers to the Trust Fund as comprising the N Limited and D Limited shares. In the absence of any evidence on this point from EW himself, I am left with very little reliable evidence upon which I can reach any clear conclusions about the 2006 Deed. I have already found that the husband was untruthful in his evidence about the existence of a second, signed separation agreement. It may well be that he is wrong about signing a version of the 2006 Deed prior to signing the faxed copy which was sent to him on 2 August 2007.

211. However, what *is* clear is that there was an ongoing dialogue about the formalities of creating a trust structure and that dialogue must have been ongoing since 2006. EW had advised the husband in relation to setting up a trust and had subsequently produced a document for him to consider. I am prepared to accept that the meeting between them in X country on 3 August 2007 had been pre-arranged and that its purpose, or one of its purposes, was to finalise the trust documentation. It is clear that there were alterations made to the draft Deed which had been faxed to the husband the previous day. His manuscript notation of his passport number was copied into the engrossment of the Deed which was executed on 3 August 2007. Significantly, he himself is omitted as a named beneficiary with only the two children named as such although his position as a potential future beneficiary is preserved by the trust power in clause 3 to add new beneficiaries with the consent of the Protector (i.e. EW). Whilst there is power under clause 4 to exclude named beneficiaries from future benefit under the trust terms, the husband is not named in the Trust Deed (V2) as an "excluded person".

212. Why did that change occur between 2 and 3 August ? The husband told Mr Amos during cross-examination that he had removed himself as a beneficiary. In an earlier skeleton argument prepared for the purposes of the abortive hearing before Flaux J in June 2016, his legal team had represented that he had not intended the 2006 Deed to take effect because it did not reflect his wish that the relevant assets should be held on trust for his daughters alone. Whilst he also appeared to be suggesting that his removal as a beneficiary had occurred 'by chance' (as put by Mr Amos), I suspect the husband may by this point have become confused about the question. I cannot reach findings by treading into the impermissible realm of speculation. Whilst the husband denied that his motivation was to put up a shield to future claims, it may well be that EW advised the husband during their meeting on 3 August 2007 that his name should not appear as a beneficiary in order to maximise any protection which the Trust was designed to afford him in terms of either tax or future claims by the wife. In this context, it might well be said that there was a degree of artificiality about these arrangements but that *per se* is not enough to render this formally executed Trust Deed a legal sham if he did indeed intend to pass the benefit in his shares to the children. The Trust Deed itself was drafted in sufficiently wide terms to enable him to continue running the business without interference from the trustees. Clause 15 absolves the trustees of any liability without actual notice of dishonesty on the part of a director of C Limited or D Limited even in circumstances where one of the trustees was also a director of those companies. That clause, in my judgment, does not indicate an intention on the part of either the husband or EW that the Trust Deed should carry no legal significance whatsoever. Similar provisions appear in many trust deeds prepared by English lawyers: it is familiar territory in terms of the delineation of powers in relation to the administration of the trust itself and parallel powers vested in a third party to run the underlying business assets owned by the trust. That position is reinforced by the existence of the formal Power of Attorney which was drawn up on 11 February 1994 the day after the formal incorporation of C Limited in X country. That document has been signed and sealed. Under its terms C Limited appointed the husband as its attorney and granted to him the widest powers "to transact, manage, carry on and do all and every business matters and things

requisite or necessary or in any manner connected with or having reference to the business and affairs of the company".

213. Thus far, I do not regard the mere creation of the 2006 Trust Deed (V1) to be inconsistent with an expressed intention by the husband to benefit the two children and/or to create a trust structure which was intended to have no legal consequences whatsoever. The absence of EW as an important witness as to fact from these proceedings necessarily means that there are evidential gaps which remain unfilled. I have already found that there was never an agreement as between husband and wife that the shares in C Limited would pass to the children as part and parcel of an informal agreement which *they* reached on separation. Further, I am prepared to accept that the husband may well have had mixed motives for wanting to place the shares into trust but that, without more, does not allow me to find that the entire edifice of The ABC Trust was a complete sham and void ab initio.

214. It is significant, in my judgment that even for the purposes of corporate refinancing, the husband was maintaining to the Bank some seven years after the Trust was created that his daughters were the beneficial owners of the company. That is evidenced by an email which he sent to Gamma Bank some six months <u>before</u> his wife's discovery of his Will at the North London property led her to initiate divorce proceedings in September 2014. If he did not believe the children to be the true beneficiaries of a properly constituted Trust, I have to ask myself why he would have sent that email in circumstances where the parties had been separated for several years on any view and there was nothing to indicate that the wife was planning to take any steps to start proceedings. It would have been far simpler for him simply to have told the Bank that he was the ultimate beneficial owner of the company, a representation which he subsequently made through the 2014 Deed which he accepts to be a dishonest presentation. I accept that, when the 2014 Deed was created, there was a parallel intention (albeit one which was never acted upon) to make clear in fresh documents that the beneficiaries were in fact the children. That much is evident from the letter which PH sent to the husband with the 2014 Deed on 21 March 2014. Again, that predates the institution of the divorce proceedings by some six months and it was written at a time when the husband had no reason to believe that she had any intention to make financial claims against him. As I have already remarked, the Will itself, whilst ambiguous, is certainly drafted in terms which permit a construction that the husband considered the C Limited shares to be outside his residuary estate having been transferred to the trustees of The ABC Trust for the benefit of the children. There is no evidence that he had discussed the drafting of his Will with EW. That had all been undertaken (in some haste) by the solicitor he instructed in England. Whatever construction is placed upon the rather unhappily drafted clause in the Will, there is a clear and explicit reference to The ABC Trust and to the children as its beneficiaries.

215. In reaching my conclusions, I am entitled to look more widely "outside the four corners" of the Trust Deed itself. In this context, Mr Amos has taken me to the evidence in relation to the preparation of Trust accounts which is relied on by the husband. He was asked to produce documents to demonstrate what financial records had been maintained by the Trust. The documentation he provided is within the court bundles. The thrust of Mr Amos' submission on this point is that money which the husband has been able to demonstrate he spent on the children or for their benefit has not emanated from trust funds. Rather, it is his money and no more than financial support from a generous father. Further, Mr Amos submits that there is no evidence of the husband ever having asked the trustee (Y Trustees Limited) to reimburse him for those expenses. The "fiction" of the girls being maintained out of trust funds is simply part of the sham edifice which is The ABC Trust on the wife's case.

216. This led us into an examination of the basis upon which the various interlinked businesses under the C Limited umbrella operated. It is clear from his replies to earlier questionnaires and from the answers which he gave during the course of his cross-examination that the internal system of accounting within the companies might properly be described as fairly loose. The Trust itself has made no distributions to the beneficiaries since its inception. However, the husband has maintained throughout his written pleadings that he has dealt with all the children's financial needs through C Limited and, to a lesser extent, through D Limited. In terms of how this arrangement worked, the husband told me that he was often operating under constraints of cash flow. Essentially he would draw funds from whichever company had the greatest liquidity at any given time. These funds would be used to meet the family's expenses post-separation including the regular sums he paid to the wife's Z country bank account, her credit card expenditure and the expenses which their daughters incurred independently whilst they were studying away from home. At the end of the companies' various financial year ends, all this information would be provided to the team which he employed at C Limited 's London offices. A team of five or six book-keepers would analyse the financial expenditure records for the purposes of preparing the individual annual company accounts. Any expenditure referable to the children would be attributed to C Limited regardless of the actual source of payment. What he has described is essentially an exercise of reconciliation. All this information would then be sent to the company's auditor, an accountant based in X country called Mr HJ.

217. The husband told me that the documentation which he had disclosed to the wife's solicitors in relation to the companies' financial accounting records ran to many lever arch files. What he has produced for the purposes of the court bundles is essentially a distillation of those records into various sheets of 'Trust Summaries'. Copies of those summaries have also been produced in these proceedings independently by the Trustee (Y Trustees Limited). Each has maintained that these documents are produced on an annual basis from the reconciliation exercise which I have just described. The individual summaries (which relate to each of M and L) show that some of their expenditure has been met by B Limited, a company which is outside of the C Limited trust structure. The expenditure includes items such as the purchase of

a car and the refurbishment of the company property in Kent which M was occupying whilst an undergraduate at a local university. Medical expenses and college fees have also been attributed as expenses referable to the children. He agreed with Mr Amos during cross-examination that neither of the children had ever completed a tax return in relation to the money they received from the Trust.

218. The Trust Summaries themselves include an item called "Money transferred to M Limited". The husband told me that this was a reference to the means by which the company accounts were reconciled in relation what he described as "black money". M Limited is a Z country company which is a wholly owned subsidiary of C Limited . Its core business is property development in Z country. It acquired its portfolio of properties in Z country by means of inter-company loans from C Limited in London. Property prices in Z country are fixed, so he told me, by the government according to both size and the area in which they are situated. Because of the way in which the local property market works in Z country, the purchase price which appears on the contract for sale (being the official government value for the property) will often be different from the (higher) price which is demanded by, and paid to, the seller. He told me that this was a commonplace occurrence and was a recognised convention in the Z country property market. As a result, since its creation in 2003, M Limited has built up a debt which is due to its parent company, C Limited . This debt exists purely as an entry in the formal accounts of M Limited: there is no intention that it should be repaid. It represents no more than the *actual* price paid for the individual properties which make up the Z country portfolio as compared with the (lower) contract price which appears in the books. In order to strip this 'debt' out of the accounts, a notional dividend was declared albeit never paid out. The husband accepted that these (often substantial) sums were not actual payments nor ones which could be described as benefitting the children in any way. They were, on his account, no more nor less than accounting devices to "square the books". These figures were also reflected in a document described as a 'C Limited Fund nominal activity DIRECTORS ACCOUNT' for the year ended 31 March 2014. At face value, this document appears to show that the husband owes a sum of £1.317 million to the company although, as the husband is neither a shareholder nor a director of C Limited , he has no entitlement to have borrowed this money. It was, he said, by and large a reflection of the manner in which the company's auditors "parked" the "black money" which was stripped out of M Limited.

219. For the purposes of these proceedings, the husband has produced a summary of his annual spend on discharging the wife's credit cards. The summary covers the period from September 2007 (the month after the Trust was set up) to January 2015. Over a seven and a half year period, the total spend was just over £232,600. However, he maintains that the individual Trust Summary documents are contemporaneous documents compiled individually by the team of six in his accounts department in the weeks after each individual company's financial year end. These were sent to both Mr HJ and EW in X country in order for him to sign off the annual audited accounts.

220. Mr HJ, the companies' auditor based in Q City, X country, has filed a statement in these proceedings. In that statement, he says that he has been aware of the existence of The ABC Trust since 2007 and has a copy of the 2007 Trust Deed in his files. Essentially, he confirms what the husband told me about the manner in which the material is collated in London for the purposes of preparing the annual accounts. He described his role in this way:

> "6. … During the course of the audit I liaise with the London office and mostly with [the husband], providing to me all relevant information and explanations to material queries which arise during the audit process. I also contact the London based accountants and auditors, TTZ, regarding audit matters relating to C Limited 's subsidiaries. On completion of the audit, the financial statements are approved by the shareholders and signed by the Board of Directors. Any dividends are declared in Board of Directors meeting and approved by shareholders of C Limited .
>
> 7. Any amounts paid by C Limited directly to the joint account in [the husband's and wife's] names are recorded by C Limited 's Board of Directors in C Limited 's accounts as a debit in the shareholder's current account, on the grounds that those funds relate to the funding of their daughters' [M's and L's] expenses. Those amounts were covered by dividends declared by the Board of Directors."

221. As will be evident, Mr HJ's written evidence is silent in relation to the treatment of "the black money". His evidence is therefore not on all fours with that which the husband gave during the course of his cross-examination and re-examination. I was due to hear from Mr HJ who was scheduled to make himself available for cross-examination via a video link with the court from X country. We did not reach him in time for his allotted slot at the end of the first week. Mr Amos was keen to ensure that he was duly "lined up" for an appearance via the video link at the beginning of the second week. Mr Glaser had made his enquiries and had been informed that he did indeed attend where he was supposed to be on the morning of 19 December 2016 but had to leave by lunchtime. Later that afternoon, I was told by Mr Glaser that the husband had received a telephone call on his mobile telephone from Mr HJ's daughter who relayed the information that her father was with his doctor at a local clinic because of "heart palpitations". I was given the name of his doctor and told that he was willing to give evidence the following day if he felt well enough to do so.

222. The following morning Mr Glaser served a hearsay notice indicating an intention to rely on Mr HJ's written evidence in his absence. That notice was accompanied by a certificate from his cardiologist which is dated 19 December 2016 and records the following:

> "The above named patient visited me urgently due to chest discomfort and tachycardia palpitations. The ECG revealed sinus tachycardia. Instructions have been given and the indicated cardiac check-up has been scheduled. Sick leave of two (2) days has been provided."

223. Mr Amos and his team were naturally highly suspicious about this development occurring as it did at the precise time when Mr HJ was about to give his evidence to this court. Whilst I do not intend to make any adverse findings about the truth or otherwise of the contents of the medical certificate, I am certainly not persuaded that Mr HJ's rather timely absence from the proceedings was caused solely by his apparent indisposition. It may be that he was aware that he was likely to be asked questions about the "black money" (of which he must have been aware) which might have put him in a difficult position professionally. I know not. But his absence has certainly not helped me to get to the bottom of the truth or otherwise of Mr Amos' submission that the Trust Summaries produced by the husband are themselves mere fictions which have been created purely and simply for litigation purposes. To be fair to Mr Amos, he described them as "retrospective creations" by the husband and his team.

224. I confess that I have found this aspect of the case a difficult one. I have given myself an appropriate *Lucas* warning. Having found that the husband has been untruthful in one aspect of his evidence to this court does not necessarily mean that he is lying to me about other aspects. I listened to him carefully as he was taken through the accounting material. I accept that there is a process which is undertaken every year by his book-keeping team in the London offices. This much would be necessary to prepare the detailed accounts which are sent to the auditor and to EW. I can see from the material he has produced in relation to the credit card summaries that a detailed analysis of documents going back several years has been undertaken. The evidence in relation to the accounting procedures which relates to M Limited and the corresponding debt which has built up in the books over the years has been explained by the husband in terms of the treatment of the "black money", a practice or system which he tells me is widely recognised and acknowledged in Z country even by the government. I do not have any evidence about that because it is not an explanation which he has provided before. But, on balance and notwithstanding the rather timely absence of Mr HJ, I am prepared to accept his evidence that the several Trust Summaries which have been included in the court bundle are not documents which have been dishonestly fabricated for the purposes of this litigation. I accept that there was indeed an annual internal reconciliation process by which expenditure which could be said to be referable to the children was "stripped out" of the various

individual company accounts and treated as expenditure by C Limited. I have not been shown the individual company accounts which have been produced over the years but I am assured by Mr Glaser that all the relevant documents have been disclosed to the wife's legal team within the many lever arch files of disclosure which have been made available by the husband. Indeed, he has produced for me what he has described as a "master list" of all the documents produced up to the end of May 2016. Mr Amos accepts that the husband has provided primary evidence to substantiate the payments which he says were made for the benefit of the children but maintains his point that there is nothing to demonstrate that the Trust was the provenance of those payments.

225. I do accept that, if they exist, there remain several files or documents which have yet to be produced by EW on the husband's behalf and these are set out separately in the email which Miss Faggionato sent to Mr Warwick on 13 June 2016. These were the subject of my own order for further disclosure on 14 December 2016 and that order has been complied with by PH only in part. It may well be that much of this information lies in the sole control of EW and forms part of the information contained on the files he has removed from the office or otherwise kept securely to himself. I am also prepared to accept that the slim clip of documents provided to Mr Amos and his team on 26 April 2016 in response to the request made by the wife's solicitors in their letter dated 7 April 2016 for the underlying documents used to produce the Trust Summaries is certainly not evidence from which one can extract a comprehensive tracing exercise of payments made. They do, nonetheless, support to some extent the husband's case that significant sums were expended on behalf of the girls in terms of flights and other accommodation and living expenses. I accept that many of the payments are simply shown by amounts or "allocations" without any narrative description as to the reason for those payments but they are nonetheless evidence of benefit received by the children. Given my finding that there was on an annual basis some (albeit loose) form of internal reconciliation by the company book-keepers in relation to these sums, is that evidence which supports the existence of a Trust arrangement which the husband believed to be genuine and for the benefit of the girls ? In my judgment, the mere fact that the process of allocating out the children's expenses on an annual basis was undertaken does indeed provide some support for the husband's case, and particularly in circumstances where I have found that this was not an exercise undertaken by the husband retrospectively in an attempt to create documents which did not exist before this litigation started. The fact that the *actual figures* in those Trust Summaries may not be an accurate reflection of all sums paid for their *exclusive* benefit does not mean without more that I can or should ignore the Trust Summaries as evidence of his belief that he had effectively transferred his interest in C Limited and D Limited into The ABC Trust for their benefit.

226. Mr Amos has produced for the purposes of his closing submissions an "Allocations table" which helpfully sets out on a single sheet of paper all direct and indirect payments which can be collected from the information provided by the husband to date. Over the years between 2007 and 2015, these amount to just over £2.25 million of which approximately £604,000 are direct payments to the girls and

the balance paid indirectly for their benefit. Together, the £2.25 million is made up of payments made directly to the children; the mortgage payments made in respect of the Z country family home; money sent to the wife's account in Z country and the discharge of her credit card expenses. Thus, what it appears the husband has done in the post-separation years is to treat the financial support which was available to his children from the Trust as relieving him, at least in part, of the obligation to provide for them financially. Whereas Mr Amos submits that this expenditure was simply coming from a generous father with the Trust a mere fiction, the husband invites me to accept that his actions over the years in separating out the children's expenditure was a natural consequence of the arrangements which were put in place when the Trust was created in August 2007 for their benefit. Regardless of whether or not the accounting process has been entirely accurate, and despite the fact that it may have included indirect elements of support for the wife during periods when the children were no longer living at home on a full-time basis, the husband's case is that there is evidence from which I can properly infer that he considered the 2007 Trust to have been a genuine and valid disposition of his interest in the C Limited shares which he owned at the time.

227. When I pressed Mr Amos on this point during the course of his closing submissions, he said that the single most important piece which was missing from this jigsaw on the husband's case was any request from the husband for reimbursement from the Trust of the money which had been paid out by him or by any of the other companies from which he had extracted funds for the children's expenses. But that submission presupposes that it was *his* money which he was spending. That is not his case. In effect, I accept that he was shifting the burden of the children's support away from his own personal resources and onto the resources available to the Trust. On his case, those trust resources included the financial benefits generated by ownership of the C Limited shares. There was clearly an element of "creative accounting" in the means by which the children's expenses were allocated as expenses of C Limited but I do not accept that deficiencies in that accounting process can necessarily be relied upon as evidence which is fatal to the existence of a genuine trust arrangement as between the husband and Y Trustees Limited/EW in 2007.

228. In this context, Mr Amos places significant reliance on my ability in this case to draw a series of adverse inferences against the husband particularly in the light of the pleaded case advanced by Mr Warwick on behalf of the second and third respondents that "no dispositions have ever been made by The ABC Trust to [the children]". Mr Amos points to the fact that this sits uncomfortably with the case now advanced by the husband in relation to the treatment of the sums paid out for their benefit through the company's internal accounting procedures. He says, in terms, that this is a new case which he is running and that inconsistency should lead me into the territory of adverse inference. However, as long ago as October 2015 when his Points of Reply to the wife's original Particulars of Claim on this preliminary issue were filed, it was – as I see from the face of the pleading – the husband's case that he had visited X country at least once a year and often more frequently to attend EW's offices and report to him on the payments which had been made for the benefit of the children and his management of C Limited and D Limited. He refers in that pleading to the fact that the C Limited annual accounts were finalised through EW who was also shown the accounts of other (non-trust) companies. Each of these meetings is relied on by the husband as evidence of communications

between him and EW in relation to the operation of The ABC Trust for the benefit of the children.

Formalities

229. Mr Amos relies on a further, and quite separate, factor as pointing towards the 'sham' nature of the 2007 Trust. In support of his submission that everything simply carried on after 2007 as before in terms of the husband's day to day operation of the family businesses, he points to the fact that his 50% interest in D Limited was never formally transferred to Y Trustees Limited or otherwise placed under the control of the Trustee. This submission involves a consideration of both fact and law.

230. The husband accepts that he never took steps to transfer the formal ownership of his 50% of the D Limited shares into the name of the trustee (Y Trustees Limited) but he has told me that he always regarded his shares as being impressed with the terms of the 2007 Trust.

231. In order to deal with this point, I return to the terms of the Trust Deed itself. The Trust Fund is set out in the second schedule to the Deed. In addition to the shares in C Limited , there is a specific reference to "the shares held by the Settlor in D LIMITED". Clause 2(a) requires the trustee at the behest of the husband as Settlor "to hold the Trust Fund upon trust as to investments or property other than money in their absolute discretion". It is common ground that, as at 3 August 2007, the husband was both the legal and beneficial owner of 50% of the shares in D Limited. Mr Warwick has described the 2007 Deed as "an express lifetime declaration of trust". That is a description with which I agree. Within the authorities bundle is an extract from *Lewin on Trusts, 19th Edition (2015)*, para 3-004 of which reads as follows:-

> "The first method of creating a trust is for the settlor to declare himself to be a trustee of property belonging to him. If the property is in his own name, he simply makes a declaration. If the intended trust property is held by nominees or other trustees for the settlor he directs the nominees or trustees to hold it on the intended trusts."

232. Mr Warwick submits that the 2007 Trust Deed can properly be construed as a formal and irrevocable declaration by the husband that his shares in D Limited were to become part of the Initial Trust Fund, as set out in the Second Schedule. At any time, Y Trustees Limited could have required him to effect the transfer of the shares into its name. On this construction, the husband held the legal title to his 50% of the shares throughout but, since 3 August 2007, he has held those shares on trust for Y Trustees Limited. During the course of his oral evidence, he told me that he was prepared to transfer them across as and when he was asked to do so. Thus, in terms, this is one sense a purely technical point which goes to the formalities under which the trust property was formerly vested. All the

evidence which I have set out at some length earlier on in my judgment in relation to the accounting procedures operated by the various companies suggests that the husband himself has had no direct benefit from D Limited since 2007. I suppose the only 'benefit' to him might be said to be the mitigation of his own liability to provide financially for the girls from his own resources.

233. Mr Amos has challenged the proposition that the self-declaration of trust of the D Limited shares in the 2007 Trust Deed is sufficient for these purposes. I shall have to decide whether, as a matter of construction, the terms of the Deed on their face can amount to a sufficient declaration of trust. In this respect, Mr Amos has taken me to the judgment of Arden LJ in *Shah v Shah* [2010] EWCA Civ 1408. The issue in that case was whether or not a potential donor of shares had effectively perfected the gift in favour of his brother so as to vest the legal and beneficial title in the done. The case turned on the formalities employed to complete what the donor brother believed to be his outright gift of the shares to his brother. The documents relied on in the *Shah* case were the signed stock transfer form and an accompanying letter. The relevant passage in the letter read as follows:

> "This letter is to confirm that out of my shareholding of current 12,500.00 in the above company I am as from today holding 4,000 shares in the above company for you subject to you being responsible for all tax consequences and liabilities [arising] from this declaration and letter."

234. The issue which then arose was whether, as the trial judge had found, the letter coupled with the signed stock transfer form (registration of which would operate to transfer the legal title to the shares), was sufficiently clear and unequivocal evidence of an intention to create a trust in the brother's favour or whether the letter was no more than a statement of an intention to make a gift. In the latter event, it was an incompletely constituted gift and equity would not come to the aid of the potential donor so as to complete the gift. At paragraph 13 of her judgment, Arden LJ said this:

> "In interpreting a document, the court should not have regard to the subjective intention of its maker but to the intentions of the maker as manifested by the words he has used in the context of all the relevant facts. Here there is no doubt that Mr Dinesh Shah manifested an intention that the letter should take effect forthwith: see the words "as from today". To give effect in law to those words, there has to be a disposition only of a beneficial interest, since, for the reasons given above, legal title [of the shares] did not pass until registration. The parties clearly intended registration to take place in due course because otherwise Mr Dinesh Shah would not have simultaneously have executed and delivered a stock transfer form. Judged objectively, did the words used convey an intention to give a beneficial interest there and then or an intention to hold that interest for Mr Mahendra Shah until registration ? Mr Dinesh Shah used the words "I am … holding" not, for example, the words "I am assigning" or "I am giving" and the concept that he *holds* the shares for Mr Mahendra Shah until he loses that status on registration can only be given effect in law by the imposition of a trust. Accordingly Mr Dinesh Shah must be taken in law to have intended a trust and not a gift. Added to that, as Norris

> J points out, he calls the document "a declaration" in his letter, which is more consistent with its being a declaration of trust than a gift."

235. Her Ladyship went on to refer to, and quote from, the earlier decision of the Privy Council in *T Choithram International SA v Pagarani* [2001] 1 WLR1. In that case the donor signed the trust deed setting up a charitable foundation and then simply made an oral declaration of gift of all his wealth to the foundation. The Privy Council held that the gift to 'the foundation' could only properly be construed as a gift to the purposes declared by the trust deed and administered by the trustees. Lord Browne-Wilkinson interpreted the disposition as an effective declaration of trust on this basis:

> "*Although equity will not assist a volunteer; it will not strive officiously to defeat a gift* [my emphasis per Arden LJ]. …. Although the words used by TCP are those normally appropriate to an outright gift – "I give to X" – in the present context there is no breach of the principle in *Milroy v Lord* if the words of TCP's gift (ie to the foundation) are given their only possible meaning in this context. The foundation has no legal existence apart from the trust declared by the foundation trust deed. Therefore the words "I give to the foundation" can only mean "I give to the trustees of the foundation trust deed to be held by them on the trusts of the foundation trust deed". Although the words are apparently words of outright gift they are essentially words of gift on trust…… But, it is said, TCP vested the properties not in *all* the trustees of the foundation but only in one … Since equity will not aid a volunteer, how can a court order be obtained vesting the gifted property in the whole body of trustees on the trusts of the foundation ? In their Lordships' view there should be no question. TCP has, in the most solemn circumstances, declared that he is giving (and later that he has given) property to a trust which he himself has established …. All this occurs in one composite transaction taking place on 17 February. There can in principle be no distinction between the case where the donor declares himself to be sole trustee for a donee or a purpose and the case where he declares himself to be one of the trustees for that done or purpose. In both cases his conscience is affected and it would be unconscionable and contrary to the principles of equity to allow such a donor to resile from his gift.' (See [2001] 1 WLR 1 at 11-12.)"

236. In *Shah*, having set out that paragraph of Lord Browne-Wilkinson's judgment in the *Pagarani* case, Arden LJ went on to quote from a previous judgment she had given in a case called *Pennington v Waine* [2002] 2 BCLC 448:

> "[61] Accordingly the principle that, where a gift is imperfectly constituted, the court will not hold it to operate as a declaration of trust, does not prevent the court from construing it to be a trust if that interpretation is permissible as a matter of construction, which may be a benevolent construction. The same must apply to words of gift. An equity to perfect a gift would not be invoked by giving a benevolent constructions to words of gift or, it follows, words which the donor used to communicate or give effect to his gift."

237. She went on to say, in paragraph 22 of *Shah*,

> "…. It is not difficult to make a gift of shares but it may take time to complete the gift by registration of the shares in the donee's name. One of the ways of making an immediate gift is for the donor to declare a trust. In my judgment that is what happened in this case. … It is therefore unnecessary to consider whether the March letter was an incompletely constituted gift or if it was completed by the act of registration so that it cannot now be challenged on the grounds that the March letter was an incomplete gift."

238. In this case, and subject to my overall conclusions in relation to the issue of sham, I have no difficulty in finding as a matter of construction that the self-declaration of trust which appears on the face of the August 2007 Trust Deed in Recital A was exactly that. The husband, as settlor, put his hand to a document in which he declared (i) his wish to make the settlement; and (ii) that he has "transferred or delivered to the Trustees *or otherwise placed under their control* the property specified in the Second Schedule", (i.e. the shares in C Limited – insofar as they were beneficially his to give – and his 50% interest in D Limited). As the extract from *Lewin* makes clear, there are no specific formalities required for a self-declaration of trust: *"If the property is in his own name, he simply makes a declaration"*. Other than a requirement to identify the property to be settled, he need do no more in the case of a self-declaration. The husband here has declared in the context of a formal legal document that he is giving property to a trust which he himself has established. On one view it would be unconscionable and contrary to the principles of equity to allow him to resile from his gift. His evidence is that he has no intention of resiling. He acknowledges that, if Y Trustees Limited calls for the formal legal transfer of the shares, he will sign the necessary stock transfer form forthwith. They will not become the legal owners until the shares have been registered but I am satisfied that the husband holds those shares, and has been holding them since 3 August 2007, on trust for Y Trustees Limited.

239. The fact that no stamp duty was paid on the 2007 Trust at the time of its creation is dealt with by the single joint expert, Mr P. He confirms that under X country law, an unstamped legal document in not invalid per se but is inadmissible until it is stamped. He says in his report (para 1.3),

> "… it is not uncommon for documents of private nature (such as a trust deed) to be left unstamped until they are required for court proceedings or for presentation before other governmental authorities."

Mr Amos makes the point that EW did not, in the first instance, submit the correct form to the X country Bar Association when he attempted to register the Trust for the purposes of this litigation after Miss Loizou's visit to his offices in September 2015. The husband was shown on the form as one of the trustees. An amended form was substituted and the registration went ahead. It seems to me that these are essentially administrative acts which do not go to the essential validity of the Trust; they are merely relied on as part and parcel of the wife's case in relation to 'intention'. Similarly, I am not persuaded that there is anything in the point that the children were not formally notified at the time of their status as beneficiaries of the Trust. Mr P has himself confirmed that there is nothing in this point.

D. My conclusions in relation to "sham": was this a valid Trust ?

240. Taking all this evidence in the round and standing back from the obvious heat which this litigation has generated, I am not persuaded that the wife has made out her case as a matter of law that The ABC Trust was (and is) a sham. In this context it is important to distinguish between *motive* as distinct from *intention*. It is plain from *National Westminster Bank v Jones* to which I have already referred that even an artificial transaction which is put in place for the purpose of asset protection will not necessarily be cast aside as a sham and of no legal effect if all the parties to that transaction genuinely *intended* the agreements incorporated into the document in which they appear to take effect. It is sufficient for these purposes that the parties intended their agreements to be given effect in the form in which they are recorded, and the courts will not enquire into their motives for so intending. It is an established legal principle undisturbed by anything which has been said in the more modern authorities to which I have referred that 'if what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it': see Megarry J (as he then was) in *Miles v Bull* [1969] 1 QB 258 at 264. As Munby J made clear in *A v A*, in order to establish that the 2007 Trust was a sham, the wife must establish on the balance of probabilities that each of the husband and EW *intended* that the trust assets would be held on terms other than those set out in the 2007 Trust Deed and that each of them intended to give a false impression of the position to third parties.

241. Mr Amos, on her behalf, can undoubtedly point to aspects of apparent dishonesty on the part of the husband. The creation of the 2014 Trust Deed and the (admittedly) false representations (on the husband's case) made to the Gamma Bank is an obvious target. I have already found that EW was implicated in that misrepresentation because it was he who prepared the false Trust Deed whilst assuring the husband that it would have no legal effect whatsoever because of the irrevocable nature of the 2007 Trust. But it seems to me that I have to examine carefully the circumstances of that transaction before moving straight to a conclusion that these two individuals will say whatever might be expedient in a given set of circumstances so long as it meets their own ends, and that is evidence which I can therefore use to impugn the legal integrity of the 2007 Trust. It might well be a breach of trust on the part of Y Trustees Limited / EW to put forward representations in a subsequent trust deed which are inconsistent with the primary trusts with which they are fixed. My task has been to stand back and survey the wide canvass of evidence with which I have been presented. That canvass covers over nine years and many thousands of pages of documents, as I have already said. I have rehearsed much of it in my judgment. In one sense the very fact that EW had privately reassured the husband that there was no need to settle any further deeds after the 2014 Trust in order to protect the children's position as beneficiaries of the 2007 Trust is powerful evidence in itself that he, as a lawyer, regarded the terms of the 2007 Trust as inviolable.

242. The husband himself had sought advice from EW as to how he might transfer the benefit of his shares to the children. Those discussions were initiated in 2005 and carried on through 2006. EW suggested the mechanism of a trust as he confirmed directly to Miss Loizou. This was no doubt part and parcel of his daily professional practice as a corporate lawyer. He had taken the husband's instructions and had drafted trust documentation for his consideration many months before the final version of the Trust Deed was executed. The husband may well have had in his mind at the time the fact that

his marriage was foundering. He may well have considered that an acceleration of his intention to benefit his children might have the collateral effect of protecting family assets from future claims by the wife since they would by then be beneficially owned by the girls, but I am satisfied that when he put his hand to the final version of the Trust Deed on 3 August 2007, he did so in the knowledge, expectation and with the intention that he was transferring his shares to the trustee for the children's future benefit. I can find nothing in the evidence which leads me to a conclusion other than that EW shared that intention. Whether or not there had been some discussion between the two of them prior to that point in time to the effect that transferring the shares into trust might be a sensible precaution given the state of the marriage, I know not. I am prepared to accept that EW had a poor impression of the wife and her entitlement to share in the fruits of what he may have regarded as the husband's labours. But that takes the matter no further as a matter of law if in fact each intended the trust terms to take effect. I have already referred to the fact that some years later the husband was representing to the Bank in an apparently entirely straightforward manner that the children were the beneficial owners of C Limited . He had by that stage, as I have found, instituted an internal accounting system whereby monies spent on the girls or for their benefit were attributed as expenses for the account of C Limited as property which was held on trust for their benefit. Imperfect and flawed as that accounting system might have been, it nonetheless lends evidential support to the husband's earlier intentions at the time the Trust was set up.

243. There is one further point with which I need to deal before moving on. Mr Amos sought to develop a submission arising out of a decision of Charles J in *Carman (Trustee of the Estate in Bankruptcy) v Yates and others*. I have already referred to this case in paragraph 175(c) of my judgment. In that case, his Lordship was considering the validity or otherwise of the beneficial ownership of a property which a trustee in bankruptcy claimed to be available to meet the claims of a husband's creditors. The case turned on whether or not the transfer of his interest in that property to his wife and mother-in-law was a sham transaction. Having set out the familiar propositions of law with which I have already dealt in my judgment, his Lordship said this at paragraph 219:

> "(f) a conclusion that a document, agreement or provision is a sham or pretence does not make it void, or of no effect, for all purposes. Rather if there is a sham or pretence:
>
> (i) the parties will not be able to rely on it as representing the true position as to the rights and obligations they have created and the court can ignore it in determining what those rights are; and
>
> (ii) as against an innocent third party it cannot lie in the mouths of the pretenders to assert to the disadvantage of that innocent third party that the transaction is a sham, or pretence, and thus of no effect."

244. Thus, as part of his opening skeleton argument, it was said by Mr Amos on behalf of the wife that, in relation to the (admittedly sham) 2014 Trust Deed, the husband must now be presumed to be fixed by his representation that he was the beneficial owner of the C

Limited shares. As the innocent third party, the wife is entitled to rely on the representation made in the later Trust Deed and he cannot now in this litigation advance a contrary case. I agree with Mr Warwick that this is not a free-standing point of law but rather part of the jurisprudence in relation to the issue of sham transactions. It is quite clear from the judgment of Munby J in *A v A* that a trust which is not initially a sham cannot subsequently become a sham. I have found that The ABC Trust which was set up in August 2007 was not a sham and it therefore seems to me that nothing which was said or done subsequently in 2014 can make it a sham. The husband could not give away in 2014 that which was not his to give. For my part, I do not consider there is any further forensic mileage in the *Carmen* point although I can well understand why Mr Amos has included it as part of his initial assault on the integrity of the 2007 Trust.

E. What was it that the husband transferred into the 2007 Trust for the benefit of the children ?

245. The matter does not end there for the purposes of the preliminary issue which I am determining because it is necessary now to consider what it was that the husband actually transferred into the ownership or control of the trustees when he signed the Trust Deed on 3 August 2007. I have already reached my conclusions in relation to his 50% shareholding in D Limited. What then of the shares in C Limited ?

246. It is common ground and accepted by both Mr Glaser and Mr Warwick that the husband could not give to the trustees that which was not his to give. Thus, I turn now to consider the wife's case that she was the beneficial owner of 50% of the shares in C Limited from the outset. This is a simple question of fact but its unravelling has not been straightforward.

247. In support of her case, the wife relies on a fundamental assertion that these family businesses were ones in which they both worked hard and that, as the corporate vista expanded, they shared a common intention that she was to be an equal owner with the husband. In relation to the C Limited shares, she relies on the existence of a specific written agreement signed by both in 1994 with Mr and Mrs R that her sister-in-law would hold the legal title to 50% of the C Limited shares on trust for her (the wife's) benefit. She points to contemporaneous documentation prepared at the time when C Limited was incorporated which suggests a division of the original issued share capital into two separate portions to be held by two separate nominees. She points to the recent development of the 2002 draft Trust Deeds prepared on the husband's instruction which appear to acknowledge that she had, or should have, a 50% interest in C Limited .

248. Mr Glaser has mounted a vigorous assault on each of these limbs of her case in relation to beneficial ownership and thus I set out below my specific findings in relation to the evidence which I heard. To an extent, I have already dealt with the wife's contributions to their various business enterprises both during the early years of the marriage in London and later when she was effectively running the Z country end of the property lettings

business through M Limited during the period when she was living in T City with the children.

249. Their journey as business partners (and I use the phrase loosely at this juncture) began towards the end of 1991, some three years before C Limited was incorporated. In November that year, they set up the previous incarnation of B Limited and the wife was working full-time in the business whilst the husband was employed elsewhere on a full-time basis. I accept that he spent as much time working in the business with the wife as he could but they needed his income from his salaried employment in order to make ends meet in those early days. B Limited was incorporated in London at more or less the same time as C Limited (the following month in March 1994). The parties were 50/50 shareholders and each was a director. The husband has explained why C Limited was set up in X country: he wished to expand the family business and saw significant tax advantages to trading offshore.

250. In this context, it is relevant to remember that some four years later when D Limited was incorporated in April 1998, she became a 50/50 shareholder with H within a matter of months when Mr V transferred his shares in unequal proportions to equalise their joint interest in that company. In January 2001, the husband and wife became equal shareholders in F Limited, the holding company for G Limited. Under that corporate structure they operated and ran a chain of five hotels in London. When the Z country corporate limb of C Limited was incorporated in June 2003, the husband and wife were 50/50 shareholders. I accept that not all of the corporate entities were transferred into equal joint ownership: the catering company is one such example where the wife held a minority interest although she had initially held a 50/50 interest with the husband.

251. I do not place any particular significance on the fact that the wife was unable to deal with Mr Glaser's questions in cross-examination about the detailed day to day operation of the companies or the individual nature of the documents which she had signed over the course of many years. In reply to each of his questions, she told me that she would need to see the document in question in order to confirm that the signature was hers. Whether or not she took an active role in the day to day 'paper' administration of these companies, I am satisfied that she was involved in their operation insofar as the demands of the family would allow. It may be that, on occasions, the husband signed documents on her behalf. I make no findings in this respect save to say that her evidence on this point did not dissuade me from the clear impression I have about the work which she did.

252. As to the events of 1994, the wife told me during the course of her oral evidence about the concerns she had about tax issues and whether or not they were trespassing into the realms of tax evasion as opposed to tax avoidance. Those are not her words; they are mine. That was the sense of her evidence to me. She said that at the meeting in 1994 she had said to the husband *"is it alright ? is it legal, all this that we are doing ?"* She told

me that there had been discussions at the time and thereafter when she made her unhappiness with the nominee arrangement with Mr and Mrs R clear to the husband. We know that on 7 February 1994, three days before the incorporation of C Limited , I & Co had secured the necessary permission from the central bank of X country. The letter from the Bank is clear: it is quite specific in its terms that J Nominees Limited and J Secretarial Limited (both corporate X country residents) would be acting as nominees for the *"non-residents" who* would each hold 500 shares *"as nominee of a non-resident individual"*. Mr Glaser seeks to persuade me that the fact that there were two shareholders does not point to the fact that there were two beneficial owners. It is correct that Mr P has confirmed that in 1994 it was a requirement for a private company registered in X country to have at least two shareholders. He goes on to say that the fact that there may be two legal shareholders does not *automatically* indicate the existence of two beneficial owners. That is as may be but, in my judgment, it is not a complete answer to the point. It is just as possible in this case that there were two beneficial owners; indeed, the development of the unincorporated English lettings business before that point and the incorporation of B Limited the following month lends credence to the wife's case about their respective intentions at the time that they were operating to all intents and purposes as business 'partners' albeit that their respective roles in the business were different.

253. Furthermore, I have the wife's account of the meeting in X country with Mr and Mrs R. That account appears in her written evidence and she was asked about it during the course of her oral evidence. She told me that they all travelled together in the car to the lawyer's office. There is no doubt in her mind that she signed paperwork which confirmed her beneficial interest in 50% of the shares in C Limited . She recalls signing paperwork for the Bank in order to open the company's bank account in X country. Mr Glaser seeks to cast doubt on her recollection about these events because she could not recall whether the meeting took place in Q City or in P City. He describes her evidence as "wholly unconvincing". He points to the fact that the husband has consistently said that there was no such agreement in 1994. He points to the existence of the 2002 draft documents and asks why these would have been produced if documents to this effect had been signed in 1994.

254. One of these parties is being untruthful about these events. This does not seem to me to be an issue of misremembering long distant events. I do not have any documents from I & Co whose role in all of this appears to have been limited to drafting C Limited 's Memorandum & Articles of Association. That firm has responded to enquiries about documentation produced at the time by referring the husband's lawyers to the accountant, Mr GG, who had a more significant role in the incorporation of C Limited .

255. The wife told me that the husband was lying about these events. This was the husband's response to questions put to him in cross-examination by Mr Amos:

> "Q. …Does it follow … that the account which [your wife] gave to the learned judge in her evidence describing the car ride with the four of you, your

brother-in-law, your sister…, [your wife] and yourself – never mind whether it was Q City or P City for the present purposes – does it follow that that car ride is an invention by her and that she is lying about it ?

A. I believe so.

Q. Right. Okay. An invention by her and it must follow you say she is lying about that.

A. Maybe she remembers something. I'm not saying lying. I mean that I never been ….
Q. It is quite important. I know you do not like the word lying and we can find a different one if you prefer, but it is deliberately saying something that is not true.

A. Yes. I can't remember going with [the wife] to a solicitors, signing, as [she] explaining [in] Q City, any documents. They all been done with I & Co by fax and with envelopes….

Q. Does it follow that you also say that her description of a signing where there was four or you, you and [she] signing as the principal parties and your sister and brother-in-law also signing, she has told the learned judge that very clearly, and do you say that must be deliberately not true, in other words [she is] lying ?

A. Yes." *[Transcript: 16.xii.2016, page 103 to 105]*

256. I have not heard any oral evidence from the wife's sister-in-law, Mrs R, or from EW about these events and what EW might or might not be holding within the files of documents which he has removed from the office or otherwise placed securely under lock and key. It is right to record once again his written evidence which is that he has produced all the relevant material from his files which relates to beneficial ownership of the C Limited shares. The wife told me that she had discussed these events with Mrs R *"but she cannot give any of this away because it is her brother and she feels that she doesn't want to" [Transcript: 14.xii.2016, page 114]*.

257. I have found that the husband misled me about the existence of a second, signed separation agreement and I have explained why I have rejected his evidence on this point. I regret that I must also reject his evidence in relation to the events of 1994. I accept the wife's evidence that there was a meeting with someone in X country in the context of the incorporation of C Limited (or shortly thereafter) and that she signed some form of document which confirmed that the shares in J Nominees Limited which were transferred to Mrs R four months after the incorporation of C Limited were shares which were held beneficially for her, as they had been by J Nominees Limited. I know not what became of the document or whether it still exists but I am entirely satisfied that she is telling me the truth about these events. I accept that there was a short period of time after the incorporation of the company when the two "shelf" entities held the legal title to the shares before the transfer into the names of Mr and Mrs R. It is not the wife's case that

she recalls signing documents in February 1994 when the company was set up. Her recollection, which I have accepted, relates to the time when the extended family members became involved. We know from contemporaneous documents that legal ownership of the first 500 shares passed to Mrs R in June 1994. The wife refers to the car journey to the solicitors as having occurred "in the holidays". As I have said, I know not what document was signed but I accept it was, in one form or another, an acknowledgment that she was the beneficial owner of 50% of the shares in C Limited .

258. What then of the 2002 Deeds which came to light only as a result of EW's late disclosure just before the original hearing in June last year ?

259. The deeds were prepared by EW on the instructions of the husband. At that point in time, the family was considering a move to Z country. There were no indications at that stage that the marriage was in difficulties. The recitals to the draft Deed clearly identify the wife (as "Grantor") as an individual who *"is beneficially interested and entitled to Five Hundred shares (500) fully paid up shares … numbered from 001 to 500"* in C Limited and that those shares are *"now held by the Trustee"* (identified as Mrs YR) [my emphasis]. It goes on to record the wife's entitlement to have the said shares registered in her name forthwith. Clause 1(h) records the Trustee's clear obligation to hold the shares for the wife absolutely. Mr Glaser submits that I can ignore the construction which the wife seeks to place on that document. He says that it is no more nor less than standard wording which EW includes in all of his nominee or bare trust deeds. Furthermore, he submits that EW's written evidence suggests that he drafted the deeds in 2002 not to reflect the current position (as the wife would have it) but instead to reflect a change of beneficial ownership which was then contemplated on the husband's instructions.

260. In similar vein, Mr Glaser submits that the fax which TU sent to husband on 16 May 2002 is evidence which suggests that there was never the settled intention that the wife should become a beneficial owner of 50% of the C Limited shares. This fax refers to EW's instruction to secure a permit from the central bank of X country and mentions only the husband's name in the context of share ownership. That, says Mr Glaser, points towards EW's belief that only he was entitled to a beneficial interest in the shares. It seems to me that this submission carries very little, if any, weight. First, there is incontrovertible evidence in the form of the draft 2002 Deeds that the husband had given clear instructions to EW in relation to recording formally the wife's beneficial entitlement in the company's shares. Secondly, EW himself was not present during the meeting with Mr and Mrs R when, as I have found, her beneficial interest was formally recorded in documentary form. Unless, as the wife suspects, he is part and parcel of a deliberate attempt to conceal crucial documents from this court – and, in his absence, I have made no findings in this respect – his subjective belief takes the matter no further in the light of my specific finding in relation to the family meeting in 1994.

261. None of this deflects me from my finding in relation to the wife's beneficial interest in 50% of the C Limited shares. I approach the evidence of EW with some circumspection because Mr Amos did not have the opportunity to cross-examine him as to the circumstances of his instructions from the husband in 2002. By the time he prepared his statement for these English proceedings, EW was fully aware of the disclosures which had been made by TU. He had secured an injunction against her and one of the reasons

for his concerns was the adverse impact of her revelations on the husband's position in these English proceedings. There was very significant resistance by the husband's legal team to the admission of the 2002 documents into these proceedings and that issue was only resolved in May 2016 when Moylan J ruled on the waiver of privilege issue. It seems to me that it would not be appropriate for me to go any further in terms of my findings against EW because he has not had the opportunity to give evidence to me and submit himself for cross-examination. For these purposes I am prepared to accept that he is gravely ill with a diagnosis of stage 4 cancer. That notwithstanding, I am not prepared to follow Mr Glaser down the path of accepting blindly that everything which EW has put before this court is necessarily an accurate reflection of the whole truth in relation to his dealings with these matters. I do not need to make adverse findings in this respect because there is sufficient evidence elsewhere to satisfy me in relation to the wife's interest in C Limited , not least of which is my finding that she is a reliable witness as to the truth.

262. For the sake of completeness, I do not regard the letter from the Bank written in 2005 concerning the personal guarantees which were required from the husband and Mr and Mrs R or the Bank letter written in 2008 concerning B Limited's borrowing as guaranteed by C Limited to assist me one way or another. Certainly, I do not regard the absence of a reciprocal request of the wife to take the matter much further forwards in terms of its evidential value on this issue. By that stage, she had been based primarily in the family home in T City for some years and I know not what representations the husband had made to the Banks in this context. It is highly likely in my judgment that he would have told them that the wife did not have a beneficial interest in any event and that representation, whatever his subjective belief, runs wholly counter to my finding in this respect that, in 2005 and 2008, the wife owned the beneficial interest in 50% of the shares in C Limited

F. My findings in relation to the issues to be determined

263. My findings are as follows:-

1. *Whether, prior to August 2007, the shares in C Limited were owned*
    a. *50% by the husband and 50% by the wife; or*
    b. *100% for the husband*
    whether in law and/or in equity.

    Prior to August 2007, the shares in C Limited were beneficially owned as to 50% by the husband and 50% by the wife. Until 15 June 1994 the legal interest in the wife's 50% of the shares (numbered 001 to 500) was held by J Nominees Limited. With effect from 15 June 1994 the legal interest in those numbered shares was held on trust for the wife absolutely by Mrs YR.

2. *Whether, subject to the issue of sham, the Deed of Settlement dated 3 August 2007 had the effect of settling into The ABC Trust the husband's beneficial interest in (a) D Limited and/or (b) C Limited (and its subsidiary companies).*

The Deed of Settlement dated 3 August 2007 had the effect of settling into The ABC Trust the husband's beneficial interest in (a) 50% of the shares in D Limited and (b) 50% of the shares in C Limited . Subject to the Trustee exercising the power which it holds (with the consent of the Protector) to add to the class of beneficiaries, the beneficial interest in those shares is now held for the children of the family.

3. *Whether The ABC Trust, in particular the Deed of Settlement dated 3 August 2007, is a sham.*

Neither The ABC Trust nor the Deed of Settlement dated 3 August 2007 is a sham transaction as a matter of law.

4. *Whether, if The ABC Trust is not a sham and the husband's interest in C Limited was settled into that Trust, he now holds the beneficial interest in the shares of C Limited by virtue of the Deed of Trust dated 21 March 2014.*

The Deed of Trust dated 21 March 2014 is a sham transaction and of no legal effect.

5. *What was the effect if any (in law and in equity) of the transfer on 20 March 2014 of the entire shareholding in C Limited to Ms PH and the Deed of Trust dated 21 March 2014.*

The transfer of the legal ownership of the shares in C Limited to Miss PH and the registration of her ownership of those shares in the 'Register of Certificates' on 20 March 2014 was effective to transfer the legal title of the C Limited shares into her sole name. In equity, she holds those shares as to 50% for the children of the family in accordance with the terms of The ABC Trust and as to 50% for the wife whose beneficial interest in the shares was unaffected by the terms of the Deed of Settlement dated 3 August 2007.

6. *Whether, prior to 3 August 2007, the respondent had informed the wife that he intended (as he asserts) to divest his interest in C Limited (and its subsidiary companies) to the children.*

At no stage prior to 3 August 2007 did the Respondent inform the wife that he intended to divest his interest in C Limited (and its subsidiary companies) to the children.

7. *Whether, prior to the commencement of these proceedings:*

a. The husband had informed the wife that he had (as he asserts) settled his interest in (a) D Limited and/or (b) C Limited (and its subsidiary companies) into trust; or
b. Whether she had otherwise become aware that this had happened.

At no stage prior to the commencement of these proceedings did the husband inform the wife that he had settled his interest in either D Limited or C Limited (and its subsidiary companies) into trust. She did not become aware of the existence of The ABC Trust until it was referred to in a letter sent by T & Co to her solicitors on 20 November 2014. She did not see a copy of the Trust Deed until it was sent with a copy of the husband's Form E on 19 December 2014.

8. Whilst not asserted by any party did the 2006 Deed of Settlement take effect ?

Neither the first nor the second versions of the draft Deeds of Trust dated 2006 took effect.

9. If the 2006 Deed of Settlement took effect, what is the impact on the Deed of Settlement dated 3 August 2007 ?

This question has no relevance in the light of my finding in relation to Issue 8.

G. Section 37(2)(a) of the Matrimonial Causes Act 1973

264. I decline to make any order in the exercise of my discretion under s 37(2)(a) of the Matrimonial Causes Act 1973. As I have already pointed out earlier in my judgment, this is essentially a 'fall back' position adopted by the wife as a 'hedge' to her primary case that The ABC Trust is a sham entity. As a result of my forensic analysis of all the evidence in this case, I have determined that she retains a beneficial interest in 50% of the shares in C Limited . She is entitled to declaratory relief to that effect and is entitled to call for an immediate transfer into her name of 50% of the shares which are currently held in the name of the Third Respondent, Miss PH.

265. I decline to hold that that Deed of Settlement executed on 3 August 2007, otherwise known as The ABC Trust, constitutes a reviewable disposition for the purposes of s 37 of the 1973 Act. On the wife's case the parties had not even separated when it was set up and there were no proceedings or any indication of a financial claim on her part until over seven years later. In these circumstances, I fail to see how the transfer of the husband's 50% interest in D Limited and C Limited into the Trust can be said to have been undertaken for the purposes of defeating her claims in the context of an application for financial remedy orders. The statutory

presumption does not apply and my findings in any event have left her in a position where she currently holds a 50% interest in both D Limited and C Limited . Given the present value of those shareholdings, and for the purposes of this preliminary issue hearing, this is not a case where section 37 is engaged in any event.

H. Concluding remarks

266. I appreciate that the parties and their respective legal teams will need time to reflect upon my judgment. I acknowledge the potential difficulties which were flagged up by Mr Amos during the course of his closing submissions in relation to jurisdiction and whether or not the second and third respondents should be taken to have submitted to the jurisdiction of the English court for the purposes of enforcement or any other reason(s). I did not hear argument in relation to these matters and I decline to make any findings at this stage in relation to these matters.

267. I have commented more than once in this hearing about the calibre of the legal teams and I refer in this context to both counsel and their instructing solicitors. I remain hopeful that the parties will now find a way forward to avoid the need for a second lengthy and expensive court hearing. The factual parameters of the second round of this litigation will have changed as a result of my findings. There needs to be serious reflection on both sides. Absent an overall settlement, that negotiation (judicially led on a private basis or fixed by the court for a further FDR hearing) must be considered as part and parcel of any directions order which flows from my judgment. In either event, I suspect we may need to convene for a further directions hearing before matters proceed and I shall leave the parties' advisers to liaise with my clerk in order to fix a short hearing.

268. As I conclude this judgment, I wish to thank counsel again for the invaluable assistance which they provided in terms of their written and oral advocacy. The quality of that advocacy across the board was outstanding.
