

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

2010/CLE/GEN/FP/00090

BETWEEN

GILLIAN PAYNE
Plaintiff

AND

STRAND INVESTMENTS LIMITED
First Defendant

AND

CAFFERATA & CO
Second Defendant

AND

MICHAEL COLEMAN
Third Defendant

AND

JEREMY CAFFERATA
Fourth Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mrs. Gail Lockhart-Charles for the Plaintiff along with Mr. Ryan Elliott for the Plaintiff
Mr. Harvey Tynes QC along with Mrs. Tanisha Tynes-Cambridge for the Third Defendant

HEARING DATES: July 24, 2017 and May 22, 2018

SUBMISSIONS: September 15, A.D., 2017

REASONS

(for Judgment Order given on May 22, 2018)

Hanna-Adderley, J

Introduction

1. On May 22, 2018 I entered Judgment against the First and Third Defendants herein, made an Order filed on May 23, 2018, and indicated that the Reasons for my Judgment and the Order made would be delivered shortly thereafter. I apologize profusely for not having delivered the Reasons for my decision before now.

2. The Plaintiff ("**Mrs. Payne**") is a British citizen resident in the United Kingdom, who according to the Statement of Claim filed herein on April 26, 2010, was 72 years old when this action commenced in 2010.

3. Strand Investments Limited ("**Strand**") is a Bahamian International Business Company. At the time of the wrongdoing complained of in this action, the Fourth Defendant, Jeremy Cafferata ("**Mr. Cafferata**") was the sole registered Director of Strand. The claims against the Second and Fourth Defendants have now been settled but without compromising the claims against the First and Third Defendants. The terms of the settlement have been incorporated in a Tomlin Order and no relief is being sought against Cafferata & Co. and Mr. Cafferata. Strand failed to comply with an Order for discovery and failed to file a Witness Statement. Strand had been represented in these proceedings by the Firm Calendars & Co. but Callenders & Co. made a successful application to come off the record because of non-payment of fees and no other attorney has come on the record in its stead.

4. The Third Defendant Mr. Michael Coleman ("**Mr. Coleman**"), an English Solicitor, formerly a Partner in the English firm of Harkavys until his retirement in 2001, has been represented by Mr. Harvey Tynes QC along with Mrs. Tanisha Tynes-Cambridge of the Firm Tynes & Tynes throughout these proceedings, although Mr. Tynes QC and Mrs. Tynes-Cambridge last made an appearance before me on April 11, 2017 and have not appeared since then. No application has been made by the Firm to come off the Record for the Fourth Defendant to date and the Firms of Tynes & Tynes and Callenders & Co., the last known Registered Office of Strand, have continued to be served with the pleadings and Orders pertaining to every application filed by the Plaintiff. Mr. Coleman did not file a Defence and never appeared in person in connection with any of the applications heard by me nor did he attend the trial, although he did appear before the Deputy Registrar in 2012. Pursuant to Order 35 r 1 (2) of the Rules of the Supreme Court ("**the RSC**") I proceeded to hear the trial in the absence of the Second and Fourth Defendants.

Statement of Facts

5. The Plaintiff's claim against the Second Defendant and Third Defendant by the Statement of Claim filed April 26, 2010 is for the recovery or compensation of £2,970,992.51 transferred by the Plaintiff in or about March 2004 to Caffarata & Co. Briefly stated, the Statement of Claim (27 pages in total) alleges:

- 5.1 Mrs. Payne met Mr. Christopher Pan and Mr. Coleman from around 2002, and they proceeded to give her financial and legal advice from time to time.
- 5.2 Mrs. Payne relied on Mr. Coleman and reposed complete trust and confidence in him.
- 5.3 On Mr. Coleman's and Mr. Pan's advice, Mrs. Payne agreed to take steps to protect her assets.
- 5.4 Mrs. Payne attended a meeting (with Mr. Pan and Mr. Coleman) with Kleinfeld Law Firm ("**KLF**") in Miami on March 5, 2004, and agreed to KLF setting up an asset

protection scheme by way of a trust; the assets to be put within the scheme were to include up to £3.5 million of Mrs. Payne's cash and securities. The only fees agreed by Mrs. Payne were KLF's fee of US\$200,000.00 and a 3% fee to Boston Life and Annuity Company Limited ("**BLA**") on the value of the Trust's assets.

- 5.5 On March 6, 2004, Mr. Coleman telephoned Mrs. Payne and instructed her to send the cash funds for the trust to Cafferata & Co.
- 5.6 Between March 9 and May 6, 2004, Mrs. Payne duly transferred a total of £2,970,992.51 to Cafferata & Co.
- 5.7 At no time did Mrs. Payne give Cafferata & Co or anyone else any authority to make any payment out of the account.
- 5.8 From March 8, 2004, Mr. Coleman (directly and through Cafferata & Co) engaged in a false and misleading course of conduct whereby (1) the value of the assets Mrs. Payne had proposed putting into the trust was artificially inflated to around £15 million, to justify the extraction of larger fees by Mr. Coleman, (2) KLF's fee was inflated from US\$200,000.00 to £200,000.00, (3) BLA's fees were inflated from 3% of the trust's assets to 5% of the premium for the proposed insurance policy, with ongoing annual fees, (4) Mr. Coleman secretly agreed to share KLF's and BLA's fees, without Mrs. Payne's authority, (5) Mr. Coleman fabricated the existence of a fee agreement between Mrs. Payne and Strand of 10% of the supposed value of the trust's assets, and (6) Mr. Coleman granted a guarantee of Mrs. Payne's obligations, even though such a guarantee was unnecessary and Mrs. Payne had never agreed to it.
- 5.9 Cafferata & Co made unauthorised distributions, without Mrs. Payne's knowledge or approval, of all of her funds. Save for the sum of £604,389.00, which was credited to the proposed insurance policy to be held by the trust, all the monies were paid away in purported fees to Mr. Coleman, Strand, BLA, KLF and Cafferata & Co.
- 5.10 Mrs. Payne had not authorised any of the payments, and in particular had not authorised any fees (or purported fees) to be paid out of her cash funds. In any event, BLA's and KLF's fees were not in fact due in light of the failure of the asset protection scheme.
- 5.11 In the premises, Cafferata & Co held Mrs. Payne's cash funds on resulting, alternatively constructive trust for her and are liable to account as trustee, and Cafferata & Co's payments out of Mrs. Payne's funds were in breach of trust.
- 5.12 Further, Strand and Mr. Coleman acted dishonestly in knowingly assisting Cafferata & Co's breaches of trust, and are liable to account as constructive trustees; further or alternatively, were dishonest when they knowingly received sums from Mrs. Payne's funds, and are liable to account as constructive trustees on that basis.
- 5.13 To the extent that Strand held any interest in the funds transferred by Mrs. Payne, it took held those funds on resulting alternatively constructive trust for Mrs. Payne and was in breach of trust, and Mr. Coleman was liable to account as constructive trustee for knowing assistance and/or knowing receipt in respect of such breach of trust by Strand.
Further or alternatively, Mr. Coleman owed fiduciary duties to Mrs. Payne and, in breach of fiduciary duty and/or breach of trust, received payments out of her monies without her knowledge or approval, and is liable to account as constructive trustee in respect of them;

- 5.14 Further or alternatively, Mr. Coleman intermeddled in the trust and/or was a quasi-trustee in respect of the trust of Mrs. Payne's monies, and is liable as constructive trustee to account for all sums received by him and/or Strand, and to make good the losses suffered by the trust fund by the payments he directed or authorised.
- 5.15 Further, Mr. Coleman, Strand, Cafferata & Co and/or Mr. Cafferata wrongly and with intent to injure and/or cause loss to Mrs. Payne conspired together (and with KLF and BLA) to defraud Mrs. Payne and conceal such fraud and its proceeds, as a result of which Mrs. Payne has suffered loss and damage equal to the amounts of the payments or overpayments made.
- 5.16 Further or alternatively, Strand and Mr. Coleman are liable to make restitution of such of Mrs. Payne's monies as they received.
- 5.17 Finally, Mrs. Payne is entitled to trace the proceeds of any payment made in breach of trust or fiduciary duty into the hands of whomsoever has received them as may appear upon an account or inquiry.
- 5.18 Accordingly, the claim is for (1) declarations that the Defendants are liable to account as trustees for the sum transferred by Mrs. Payne, less any credits, (2) damages for conspiracy, (3) equitable compensation, (4) restitution of payments received, (5) simple or compound interest pursuant to the Civil Procedure (Award of Interest) Act 1992 or in equity, and (6) all necessary and proper accounts and inquiries, including orders enabling Mrs. Payne to trace into such property as may now represent the payments made in breach of trust.

6. Having read the Witness Statements and Affidavit evidence, having heard the viva voce evidence at the trial and having considered and accepted the thorough written Closing Submissions laid over by Counsel for the Plaintiff, not only as to the submissions on the law but the succinct summary of the evidence, I made the following Declarations and Orders against the First and Third Defendants:

"IT IS HEREBY DECLARED THAT:

1. The total sum of £2,970,992.51 paid by the Plaintiff to Cafferata & Co between March 2004 and May 2004 was held by Cafferata & Co on resulting trust for the Plaintiff.
2. The total sum of £1,212,500.00 received by the Third Defendant out of the funds referred to in paragraph 1 above between March 2004 and June 2004 was held by the Third Defendant on constructive trust for the Plaintiff.
3. The sum of £616,037.66 received by the First Defendant out of the funds referred to in paragraph 1 above in February 2005 was held by the First Defendant on constructive trust for the Plaintiff.
4. The Plaintiff is entitled to trace the sums referred to in paragraphs 1 to 3 above respectively (and any profits derived by either the First or the Third Defendant therefrom) into their traceable proceeds and is entitled to an equitable charge upon the assets representing those traceable proceeds to secure the First and Third Defendants' recovery of such sums (and such profits, if any).
5. The First and Third Defendants dishonestly assisted in the breaches of trust by which the sum referred to in paragraph 1 above was distributed by Cafferata & Co and are liable to account to the Plaintiff in respect thereof.

AND IT IS HEREBY ORDERED THAT:

6. Further to the declarations at paragraph 1 to 3 above, the First and Third Defendant do pay to the Plaintiff:
 - (a) in the case of the Third Defendant, the sum £1,212,500.00; and
 - (b) in the case of the First Defendant, the sum of £616,037.77.
7. Further to the declaration at paragraph 5 above the First and Third Defendants do pay to the Plaintiff:
 - (a) in the case of the Third Defendant, for the sum of £1,581,977.48; and
 - (b) in the case of the First Defendant, for the sum of £2,178,439.82.
8. The First and Third Defendants do each pay compound interest in equity upon the sums ordered to be paid by them pursuant to paragraphs 6 and 7 above, at the Central Bank of The Bahamas prime rate prevailing from time to time with yearly rests, from the following dates in respect of the following sums (and until payment or earlier discharge):
 - a. from 6 April 2004 in respect of the sum of £412,500.00 and from 25 June 2004 in respect of the sum of £800,000.00;
 - b. from 24 February 2005 in respect of the sum of £616,037.66;
 - c. from 24 March 2004 in respect of the sum of £100,000, from 6 April 2004 in respect of the sum of £337,500.00, from 6 April 2004 in respect of the sum of £100,000, and from 16 June 2004 in respect of the sum of £604,389.00;
 - d. Subject to credit being given, in respect of the principal sum upon which interest is to be calculated, for the sum of £176,515.03.00, from the date upon which that sum was received by or on behalf of the Plaintiff.
9. An inquiry be held (if necessary or appropriate) as to the true calculation of the interest payable by the First and Third Defendants under paragraph 8 above, as to which the Plaintiff shall have permission to apply.
10. The Plaintiff do have permission to apply to the Court for inquiries as to the following issues:
 - (a) whether the sum of £100,000.00 paid to Inspire Ltd out of the monies referred to at paragraph 1 above was ultimately paid over to or otherwise benefited the First or Third Defendant directly or indirectly;
 - (b) whether any monies eventually paid out of or deducted from the Plaintiff's funds sent to Boston Life and Annuity Company Ltd on 6 April 2004 and/or 16 June 2004 were ultimately paid over to or otherwise benefited the Third Defendant directly or indirectly;
 - (c) whether a transfer of US\$500,000.00 effected by the Second Defendant on 25 June 2004 to a US\$ Swiss bank account at UBS (account number 307081.60) in the name of W von Gerlach was made in whole or part using the funds held on trust for the Plaintiff referred to at paragraph 1 above; and
 - (d) whether all or any such sum was held by either or both the First and Third Defendants on trust for the Plaintiff or whether the First and Third Defendants should account to the Plaintiff in respect thereof.
11. The Plaintiff do have permission to apply to the Court for all necessary accounts directions and/or inquiries (a) to identify all dealings with the sums referred to at paragraphs 1 to 3 above and any further sums found to be held by the First and/or Third Defendants for the Plaintiff pursuant to the inquiries under paragraph 10 above (b) to identify the traceable proceeds thereof (c) to establish what, if any, profit was made by either or both of the First and Third Defendants from such

- dealings and (d) to enable the Plaintiff to recover from such traceable proceeds the sums and profits (if any) to which she is entitled by virtue of such dealings.
12. The Plaintiff do have permission to apply for all necessary further or consequential relief in light of the accounts and inquiries ordered pursuant to paragraphs 10 and 11 above.
 13. The First and Third Defendants do pay the Plaintiff's costs of these proceedings on the indemnity basis (such liability to be joint and several), to be taxed, if not agreed.
 14. The Plaintiff do have permission to apply for further directions and/or orders as to the proceedings between the Plaintiff and the First and Third Defendants brought under Claim number 2007/CLE/gen/FP/138 ("**the 2007 proceedings**"), and in particular as to their disposal and the parties' costs therein.
 15. Permission to the Plaintiff to apply for further and consequential relief, including without limitation:
 - (a) Orders for the delivery up by the First and Third Defendants and their representatives of all the Plaintiff's affidavits, statements and disclosed documents in these proceedings; and
 - (b) For the taxation of the Plaintiff's costs of these (and the 2007) proceeding.
 16. Permission to the Plaintiff generally to apply, with or without change of circumstances."

7. The Plaintiff Mrs. Payne, her witnesses Mr. Edward Allen Morehouse Brown, Mr. James McCartney and Mr. Jeremy Cafferata gave evidence at the trial. The Witness Statements were identified by each witness marked as Exhibits (Mrs. Payne's Witness Statement was marked "**Exhibit GP-1**", Mr. Brown's Witness Statement was marked "**Exhibit GP-2**", Mr. McCartney's Witness Statement was marked "**Exhibit GP-3**" and Mr. Caffarata's Witness Statement was marked "**Exhibit GP-4**". His Affidavit is Exhibit JC1 and the documents exhibited as "**JAC1**") and entered as their Evidence-in-chief and Mr. Caffarata gave additional viva voce evidence. Mr. Steven John Barker had filed his First Affidavit on 13 July, 2017 but was abroad and unable to be present at the trial. As there would be no cross-examination and pursuant to O.38, r.2(1)-(2) and O.38 r. 28 of the RSC I permitted his sworn Affidavit to stand as his evidence-in-chief (Mr. Barker's Affidavit was marked "**Exhibit GP-5**").

8. The First and Third Defendants did not attend the trial and did not challenge the evidence of the Plaintiff's witnesses at trial. The Defendants also did not file any Witness Statement evidence and did not call any witnesses at the trial despite being entitled to do so. In the circumstances, the Court is entitled to and accepts all of the evidence of the Plaintiff's witnesses as proven. The evidence contained in the Witness Statements, the viva voce evidence and documentary proof adduced in this action appear to be, were it not so unfortunate for the Plaintiff, the makings of a fascinating Hollywood film. In summing up the evidence (all un-contradicted) and in making my findings and conclusions, I have pulled together what I believe, from the evidence, has transpired between the parties since 2002.

Findings

9. In light of the evidence received at trial, the Court makes the following **findings of fact:**
 - 9.1 Mrs. Payne met Mr. Coleman in or around 2002. From time to time, he proceeded to act as her lawyer and give her legal advice. Mrs. Payne relied on Mr. Coleman, and reposed complete trust and confidence in him.

- 9.2 Mr. Coleman made use of his position and influence to persuade Mrs. Payne to transfer, between March and May 2004, a total sum of £2,970,992.51 to Cafferata & Co.
- 9.3 By and at Mr. Coleman's sole direction, Cafferata & Co proceeded to pay out Mrs. Payne's monies, without her authority or her knowledge, for Mr. Coleman's enrichment.
- 9.4 Mr. Coleman's misappropriation and dissipation of Mrs. Payne's monies was dishonest. He knew that Mrs. Payne had not authorised any of the payments he orchestrated, and proceeded to obscure or provide false pretexts for those misappropriations.
- 9.5 Despite taking reasonable steps in mitigation of her loss, Mrs. Payne has made limited net recoveries of her funds, and can only give a limited credit for the sum of £176,515.03.
- 9.6 Owing to Mr. Coleman's failure to give adequate discovery, Mrs. Payne is presently unable to trace her funds that remain unaccounted for beyond their immediate recipients, i.e. Mr. Coleman, Strand and/or Inspire Ltd.

10. The following are facts, inter alia, gleaned from Mrs. Payne's Witness Statement:

- 10.1 In about 2001, Mrs. Payne was introduced to Mr. Christopher Pan ("**Mr. Pan**"), then a senior investment adviser working at Merrill Lynch. In due course he started acting as a discretionary manager, investing approximately £1 million of Mrs. Payne's money and became one of Mrs. Payne's closest and most trusted advisers. She followed his advice in relation to financial matters, trusted it implicitly and never questioned his judgment.
- 10.2 It was Mr. Pan who introduced Mrs. Payne to the Third Defendant in these proceedings, Mr. Coleman, in 2002. Mr. Pan introduced Mr. Coleman as a retired lawyer who had sold his business and made lots of money.
- 10.3 Mr. Coleman started giving Mrs. Payne legal advice and assistance in 2002.
- 10.4 Mr. Coleman advised Mrs. Payne that she should protect her assets. Mr. Pan also approached Mrs. Payne promoting the idea that she should put all her investments into a trust. It was clear that Mr. Pan had spoken to Mr. Coleman, and Mr. Pan told her that her personal assets were now at risk and that she should put her assets into an offshore trust fund. While not very keen on the idea, Mrs. Payne decided to follow Mr. Pan's advice.
- 10.5 Mr. Pan then telephoned Mrs. Payne late one evening telling her that she absolutely had to get the trust fund set up, and that Mr. Coleman was really worried about the risk of certain claims that were a threat to her assets. Mr. Pan told Mrs. Payne that he knew a firm of specialist asset protection lawyers in Miami, FL. Mrs. Payne relied on Mr. Pan's advice and recommendation, and agreed to meet these lawyers in Miami. The meeting was arranged with some urgency for 5 March, 2004. Mrs. Payne and her husband, Alan arrived in Miami on 4 March, 2004, and it was arranged that they would meet Mr. Pan for breakfast in the hotel on the morning of 5 March, 2004, before the meeting.

11. The Witness Statements of Mrs. Payne and Alan Brown include and have established the following facts:

- 11.1 To their surprise, Mrs. Payne and Alan found Mr. Coleman having breakfast with Mr. Pan at their hotel in Miami on the morning of 5 March, 2004. Mr. Coleman claimed that he could perhaps "be useful" and subsequently attended the

meeting. Mrs. Payne had no objection to this, since he had helped her with her legal issues in the past, but was understandably confused as to why he was there.

- 11.2 It is clear from the entirety of the evidence of Mr. Cafferata that Mr. Coleman had been in close contact with Mr. Pan about the planned meeting. The meeting took place at the offices of KLF. Mrs. Payne, Alan, Mr. Pan and Mr. Coleman were met by Kimberly Barteau ("**Ms. Barteau**") of KLF, who was involved in subsequent arrangements.
- 11.3 The meeting itself was attended by Mrs. Payne, Alan, Mr. Pan and Mr. Coleman, and also Mr. Denis Kleinfeld ("**Mr. Kleinfeld**"), and Mr. Carl Linder ("**Mr. Linder**"), both of KLF, as well as Ms. Barteau; and by Mr. Rick May ("**Mr. May**") of Boston Life Assurance Company ("**BLA**"). Mr. May was not present at the start of the meeting but was passing by, and was called in by Mr. Kleinfeld to assist.
- 11.4 There is no detailed record of what was said at the meeting. However, Mrs. Payne's and Alan's evidence was consistent, credible and was not contradicted at trial, and ought to be believed.
- 11.5 The assets which were to be put into the trust were discussed: these were to include Pitt Manor and around 7-8 other UK properties, and Mrs. Payne's house in Majorca, Spain. Mrs. Payne also intended to realise £3 million of investments and add that cash to the trust. Although Mrs. Payne's pension fund (worth around £1.5 million) was discussed, Mrs. Payne was against it being added to the trust. Mrs. Payne understood the total figure to be around £7.5 million worth of assets.
- 11.6 Mrs. Payne made clear that she wanted Mr. Pan to manage the assets of the trust, as she had trusted his financial advice for some time and he had been managing other funds of hers.
- 11.7 Mr. May explained how BLA would work with KLF and about an insurance policy. Mrs. Payne understood that all the assets which she wanted to put in trust would be owned by a BLA policy, which would in turn be owned by the trust. Mr. May also explained that her properties would have to be mortgaged to protect them, and that they would need drive by valuations for each of them. Mr. May also suggested that some development land at Pitt Manor be included. Mrs. Payne was however skeptical about its inclusion as no planning permission had yet been granted nor was likely to be.
- 11.8 Mr. Coleman's involvement at the meeting was limited, but significant. He said very little until the discussion turned to protectors and jurisdiction. Mr. Coleman said that the trust would need a protector. Mrs. Payne wanted Mr. McCarthy to be the protector, but was dissuaded on the basis that the protector should not be resident in England. It was decided that the identity of a suitable protector would be decided later. At no point during the meeting was the First Defendant, Strand mentioned. Mr. Coleman did mention that the work needed to be done quickly. The location of the trust was discussed towards the end of the meeting. Mr. Kleinfeld suggested Liechtenstein, but Mr. Coleman favoured Belize; Nevis and the BVI were also mentioned. Again, the point was left to be decided later and Mrs. Payne said she would be guided by their advice.
- 11.9 Towards the end of the meeting, the discussion turned to fees. Alan asked all those present how much the whole exercise was going to cost. Mr. Kleinfeld responded that KLF would be due a one-off fee of "200,000.00", i.e.

US\$200,000.00. The only other person in the room to mention fees was Mr. May of BLA. While his explanation does not seem to have been very clear, Mrs. Payne and Alan understood that BLA's fee would be 3% of what Mrs. Payne was putting into the trust. Mrs. Payne calculated this at £250,000.00 based on her estimate of the assets to go in. Alan calculated a similar figure. Critically, as Mrs. Payne and Alan both recall, after these fees were discussed Alan looked at everyone else in the meeting room, and no one other than Mr. May or Mr. Kleinfeld said anything.

- 11.10 The meeting concluded with Mrs. Payne giving the go-ahead to set up the trust fund with KLF and BLA. Mrs. Payne was told that the cash funds would need to be transferred to an account belonging to the trust. Mr. Kleinfeld said that they would need to come back to his office in a few days to sign the legal papers once they had been prepared; that meeting was in due course fixed for Monday 9 March 2004, Mrs. Payne's last day in Miami.
- 11.11 Mr. Pan and Mr. Coleman left to go to the airport together, and told Mrs. Payne that they would make a decision on the way where to send the money to, and Mr. Coleman would then telephone Mrs. Payne to let her know.
- 11.12 Mr. Coleman called the next day, 6 March 2004 to tell Mrs. Payne that she needed to send her cash funds for the trust to Cafferata & Co. He gave her their account details on the telephone, which she wrote. This was the first occasion Mrs. Payne had heard the name Cafferata. She did not give any thought as to why she was being asked to send the money to Cafferata & Co, but presumed that this had been discussed and agreed with Mr. Pan and that Cafferata & Co would proceed to transfer the funds into the trust that was being set up by KLF, as had been discussed at the meeting. Critically, it was Mr. Coleman, not KLF, who told her to send the funds to Cafferata & Co.
- 11.13 Mrs. Payne and Alan returned to KLF's offices for a short meeting on 9 March 2004, to sign the paperwork that had been prepared. This included The Payne 2004 Family Trust ("**the Trust**") document, and other documents, including a document appointing Strand as the initial protector of the Trust. However, none of the documents were explained to Mrs. Payne, who was told that she did not need to read them and should simply sign. Accordingly, Mrs. Payne did not notice Strand's name at the time. In any case, she knew nothing about Strand, nor that Mr. Coleman had any involvement in the trust or was linked to Strand.
- 11.14 Further, as directed by Mr. Coleman, Mrs. Payne proceeded to transfer her cash funds for the Trust to Cafferata & Co. Between 9 March 2004 and 16 March 2004, Mrs. Payne arranged for the transfer of a total £2,533,155.51 to Cafferata & Co. The total amount sent by Mrs. Payne to Cafferata & Co was £2,970,992.51 broken down as follows:

Date	Amount
09/03/04	£1,000,036.00
10/03/04	£357,000.00
11/03/04	£35,078.53
11/03/04	£722,723.45
15/03/04	£143,635.15
16/03/04	£274,682.38
06/05/04	£437,837.00

Total **£2,970,992.51**

11.15 Mrs. Payne believed that the money would be managed by Mr. Pan as he was intended to be responsible for investing the cash sums [Exhibit GP-1 paragraph 71] and had been told at the March 5, 2004 meeting that the money would need to be paid over to an account held by the Trust [Exhibit GP-1 paragraph 63]. There is no evidence that Mrs. Payne intended Cafferata & Co (or Strand, or Mr. Coleman) to receive the money beneficially. On the contrary, Mrs. Payne understood that the money would be held to her order until it was paid over to the Trust at her direction.

11.16 At no stage did Cafferata & Co send Mrs. Payne any form of confirmation or receipt for her funds; indeed, she had no contact with Cafferata & Co at all. I am satisfied from the evidence [Exhibit GP-1 paragraphs 71-72] [Documents at Exhibit GMP1/p.97-108] that the payments referred to above were all received into Cafferata & Co's account.

12. The Court is satisfied on the evidence that Mr. Coleman made use of his position and influence as Mrs. Payne's trusted legal adviser to insinuate himself into the Miami meeting with KLF and, in the guise of assisting Mrs. Payne in establishing the Trust, put himself in a position where he was able to direct where Mrs. Payne should transfer her funds to. Mrs. Payne followed his directions and transferred the total sum of £2,970,992.51 to Cafferata & Co between March and May 2004.

13. The evidence adduced at Trial shows that Mrs. Payne did not know (and Mr. Coleman did not tell her) that Mr. Coleman was a long-standing associate of Mr. Cafferata and Cafferata & Co. Jeremy Cafferata's Witness Statement and viva voce evidence shows that although Mr. Cafferata was not himself a partner in Cafferata & Co (a firm owned by his father and brother), he operated a corporate services business sharing Cafferata & Co's office-space, used Cafferata & Co's accounts to handle his own clients' funds, and used Cafferata & Co's letterhead of his own. Mr. Cafferata confirmed the details of this long association in his evidence key elements of which can be briefly summarised as follows:

13.1 Mr. Cafferata met Mr. Coleman in around 1993, and Mr. Cafferata and Mr. Coleman became friends socially, in fact, they holidayed abroad together and Mr. Cafferata would look after Mr. Coleman's beach villa.

13.2 In 1994, Mr. Coleman asked Mr. Cafferata to incorporate an International Business Corporation for him. Mr. Cafferata reserved the name Strand on 27 July, 1994, and incorporated on 29 July, 1994 with pro forma Memorandum and Articles of Association. The authorised capital was USD 5,000 divided into 5,000 shares, but only two shares were issued. These were held by Mr. Cafferata and his father's secretary, Joanne Sawyer, on trust for Mr. Coleman. Mr. Cafferata was appointed Strand's President, Secretary and Director at its first meeting on July 29, 1994.

13.3 Strand's shares were subsequently transferred to a Mr. George Walker and to Mr. Coleman, respectively, on Mr. Coleman's instructions. Mr. Cafferata knew virtually nothing of Mr. Walker; no money was ever distributed to him, and Mr. Walker is now deceased. Instead, Strand was used by Mr. Coleman as his own company, and Mr. Cafferata followed his directions at all times. Mr. Cafferata was clear in his oral evidence that Strand was owned beneficially by Mr. Coleman "one hundred percent".

13.4 Mr. Cafferata was equally clear that Mr. Coleman "directed" him, for instance by instructing what correspondence he should send to third parties. All decisions

about Strand were made by Mr. Coleman. There was no formal agreement or power of attorney in place, but Mr. Cafferata considered that they were one and the same, and that Strand was just a company which he used as a corporate name for his own business deals.

14. Mr. Cafferata identified several examples in his evidence of Strand being used by Mr. Coleman to channel his own personal interests and of Mr. Coleman using Cafferata & Co to shift money for the benefit of Mr. Coleman or his associates.

15. Further, Mr. Cafferata set up another company for Mr. Coleman on 15 May 2000 in The Bahamas, called Westerham Property Company Ltd ("**Westerham**"). The shares were again held by Mr. Cafferata and Ms. Sawyer. Mr. Coleman explained that he was going to use Westerham to buy a property in England, for himself and his wife, Emma. Mr. Cafferata is Westerham's director.

16. Mr. Coleman and his wife located a property in Somerset called Manor Farm, to be bought by Westerham. On October 23, 2001, a sum of just under £100,000.00 was received into Cafferata & Co's client account from English solicitors, Clifford Harris & Co (being the money said to be 'owed' to Strand by Mr. Coleman and paid out of the proceeds of 21 Bulstrode Street). These funds were used towards the purchase price of Manor Farm (ostensibly for Westerham), which was purchased for £585,000.00. Mr. Cafferata does not know where the balance of those funds (ostensibly paid by Westerham) came from. The inference is that they were supplied by Mr. Coleman, who was to all intents and purposes controlling Westerham (as he also controlled Strand).

17. Following the incorporation of Westerham, Mr. Coleman as purported settlor, and Mr. Cafferata and his wife Rebecca as purported trustees, executed a trust deed ("**the Westerham Trust**"). The trust purported to settle the entire share capital of Westerham, and all the issued share capital of Strand (even though Mr. Coleman was the registered proprietor of only 50% of it) on trust for Mr. Coleman during his lifetime, his wife Emma, his children Alexandra and Emma and their respective issue.

18. Although the Westerham Trust purported to create a trust of the shares in Westerham, the reality (as Mr. Cafferata revealed in oral examination) was that:

- 18.1 The shares in Westerham were not transferred to Mr. Cafferata and his wife as trustees;
- 18.2. Instead the shareholders of Westerham continued to hold those shares as nominees for Mr. Coleman;
- 18.3. No trustee meetings were ever held for the Westerham Trust;
- 18.4. No monies were ever paid to the trustees of the Westerham Trust to finance the purchase of Manor Farm (or at all), and that Manor Farm was instead paid for out of funds held beneficially for Mr. Coleman;
- 18.5. At Mr. Coleman's direction, Mr. Cafferata told the vendor's solicitors that the purchase monies to buy Manor Farm were beneficially owned by his wife, Rebecca, and were her savings and earnings. As Mr. Coleman knew, that was untrue, and Mr. Coleman intended to deceive someone with it;
- 18.6. Mr. Coleman's pattern of behaviour in his dealings with Mr. Cafferata was to disguise ownership of assets.

19. Based on the evidence outlined above and given at trial it follows and is found that the Westerham Trust was a sham trust, which was not acted upon and was simply intended to conceal the true position, which was that Westerham was and continued to be beneficially owned and controlled by Mr. Coleman.

20. It is clear from the evidence that by March 2004, Mr. Coleman had managed to engineer a position where Mrs. Payne, at Mr. Pan's prompting, was setting up a trust fund she did not fully understand and had not been properly advised on, and was to send around £3 million in cash assets to Cafferata & Co, where Mr. Coleman would be in a position to control the funds through Mr. Cafferata, who was well-accustomed to doing whatever Mr. Coleman asked of him. Mr. Coleman involved Mr. Cafferata in a complex scheme to confuse and obfuscate the arrangements agreed at the meeting on 5 March, 2004, to create fictitious 'fees' and inflate others for his own personal benefit, and eventually to syphon off the substantial majority of Mrs. Payne's cash funds for his own gain. The evidence adduced at trial shows and it is found that at Mr. Coleman's orchestration and sole direction, and without Mrs. Payne's knowledge or consent, the funds she had paid over to Cafferata & Co and which were being held for her were paid out as follows:

- (1) £100,000 was transferred to KLF on 24 March 2004;
- (2) £337,500 was transferred to BLA on 6 April 2004;
- (3) £100,000 was transferred to a UBP account for Inspire Ltd (said to be Mr. Pan's company, but about which there is no hard information before the Court), account number B6069371, on April 6, 2004;
- (4) £412,500 was transferred to Mr. Coleman's Swiss bank account (in the name of W von Gerlach), account number 2000003119404, on April 6, 2004;
- (5) £604,389.00 was transferred to BLA on 16 June 2004
- (6) £800,000.00 was transferred to Mr. Coleman's GBP Swiss bank account at UBS, in his own name (not W von Gerlach), account number 307081.61, on 25 June 2004
- (7) £616,037.66 (less the sum referred to below at (8), if (which is unclear) that payment used Mrs. Payne's funds) was transferred to Strand's bank account at UBP, account number 3003361, on February 24, 2005
- (8) US\$500,000 was transferred to Mr. Coleman's USD Swiss bank account at UBS (in the name of W von Gerlach), account number 307081.60, on June 25, 2004 (i.e. before the payment at (7) above) [**Exhibit JC-1 paragraphs 78, 85-87**] [Document at Exhibit **JAC1/p.252**].

21. Further on the evidence adduced at trial, which is accepted, it is found that:

- 21.1 Mr. Coleman was clearly enriched to the tune of £1,828,537.66. Of this,
 - (a) At least £1,212,500 was paid to him directly: and
 - (b) £616,037.66 was paid to Strand, a company he controlled and owned.
- 21.2 Mr. Coleman was also on balance likely to have been enriched as follows:
 - (a) By the sum of £100,000.00 apparently paid to Inspire Ltd (said to be Mr. Pan's company).
 - (b) By the sum of U\$500,000.00 transferred to Mr. Coleman's USD Swiss bank account.
- 21.3 The grand total of the payments made was £2,970,426.66. This accounts for all of Mrs. Payne's funds save for £565.85. It is likely this amount was paid in transfer fees.

22. Mrs. Payne's evidence, which was clear and un-contradicted, and is accepted, was that she did not authorise the payment of any fees out of the monies she sent to Cafferata & Co, and had no knowledge that those sums were being deducted. The only payment even arguably made with her authority was the £604,389.00 sent to BLA; but as Mrs. Payne expected the monies to be provided to Mr. Pan for investment and no one obtained her authority for that transfer, even this payment was unauthorised by Mrs. Payne.

23. The Court therefore concludes that, by exploiting his hidden association with Cafferata & Co, and his ability to direct Mr. Cafferata, Mr. Coleman procured the payment away of all of Mrs. Payne's monies without her authority or her knowledge, and in so doing enriched himself (directly or indirectly) with up to £1,928,537.66 of Mrs. Payne's money.

24. Mrs. Payne's case is that Mr. Coleman's course of conduct was from beginning to end dishonest. In short, Mr. Coleman stole the majority of Mrs. Payne's money and knowingly misapplied the balance. Then he tried to cover his tracks.

25. Mr. Coleman failed to disclose to Mrs. Payne his close and long-standing relationship with Cafferata & Co and Mr. Cafferata; that Mr. Cafferata was accustomed to doing what Mr. Coleman directed him to do; or that he had used Cafferata & Co, and entities created by them namely Strand, Westerham and the Westerham Trust, to channel his personal interests and obscure the true ownership of assets.

26. Mr. Coleman also hid his involvement in setting up the Miami meeting. He told Mrs. Payne, untruthfully, that he was "just in the area" and had dropped in to see if he could be "useful". The reality, as he told Mr. Cafferata, was that he had set up the meeting with Mr. Pan.

27. The only fees which Mrs. Payne agreed to pay in respect of the Trust were KLF's fee of US\$200,000.00, and a 3% fee to KLF which she understood would amount to £250,000.00. At the Miami meeting on 5 March 2004, Alan asked what fees would be due, and Mr. Coleman stayed silent. Further, the only fee agreements Mrs. Payne ever reached with Mr. Coleman were: (1) the fee of £50,000 paid for his advice on removal of the Colleges' trustees, and (2) a contingent 30% fee on the sale of CMS and/or Mergeprime (which sale never occurred). No subsequent fee agreement, oral or written, was ever negotiated afterwards for Mr. Coleman or Strand to be paid a fee by Mrs. Payne. Mr. Coleman was aware of this, since he was at the Miami meeting, and had personal knowledge of his earlier fee agreements with Mrs. Payne.

28. Despite this, within days of the Miami meeting on 5 March 2004, Mr. Coleman set to work to create an elaborate, multi-layered fraud on Mrs. Payne. This involved:

- (1) the creation of fictitious fees on behalf of Strand and Cafferata & Co;
- (2) inflating BLA's fees, without Mrs. Payne's authority, from 3% to 5%, and agreeing to further annual charges in BLA's favour;
- (3) artificially inflating the value of Mrs. Payne's funds for the Trust, simply in order to "justify" a higher fee;
- (4) agreeing secret side-deals with KLF and BLA by which Mr Coleman was to share their fees, and another secret side-deal with Mr. Pan by which Strand was to receive kick-backs from commission earned by Mr. Pan;
- (5) fabricating the need for a guarantee to be given to BLA from Mr. Coleman as a pretext to justify the fees being paid to Strand; and
- (6) the orchestration of correspondence on all sides, which saw Mr Coleman dictate letters to be sent by Cafferata & Co, and also the replies which he wished BLA to send back to Cafferata & Co.

29. In so doing, Mr. Coleman generated an extensive false paper trail in an effort to justify his misappropriation of Mrs. Payne's money.

30. On 8 March 2004, having returned from Miami, Mr. Coleman met with Mr. Cafferata and told him the Miami meeting had been a success and that he should expect to receive about £3.2 million shortly from Mrs. Payne, which was going to be put into a trust and invested by Mr. Pan. Mr. Coleman then dictated a letter on Cafferata & Co letterhead, which was signed by Mr. Cafferata and sent to Mr. Kleinfeld. The letter stated:

"I am a director of [Strand] and Cafferata & Co also represents Strand.

I understand that you on Friday met with Gillian Payne for whom you now act together with her husband Alan Browne and Michael Coleman who represented Strand and Christopher Pan who represented Inspire Ltd.

You are arranging to set up a trust with Gillian Payne as the Donor as an asset protection measure the principal ultimate asset of the trust being a life policy with a value of £15 million UK with [BLA]. The policy is being purchased by Gillian Payne by transfer of liquid cash and the grant by her to the insurance provider of legal mortgages over her UK and Spanish property.

I attach a simplified schedule of real property which I understand is to be secured together with Mrs. Payne's estimates of value.

Mrs. Payne is transferring sterling cash to us on behalf of Strand and then on to your sterling account for the trustees...

Your agreed fee is £200k together with a 3% insurance commission on the value of the policy and underlying securities, i.e. £450k. You have agreed to pay to Strand 50% of the fee and commission and we should be obliged if you would confirm this to us.

Strand has agreed a fee of 10% of assets protected i.e. £1,410,000. We propose to retain that from the cash funds and to provide to the trustees Strand's receipt for that sum. Please confirm that this is in order.

Please confirm that you are now preparing the Trust, the underlying Nevis Company and making arrangements with the Insurance Company...

[Strand] is to be the initial protector of the Trust and will sign an appointment of their replacement and resignation. The appointee is to be Inspire Ltd..."

31. It is accepted on the evidence that, though he signed the letter, Mr. Cafferata, had no knowledge whatsoever of the matters stated in it and simply did as Mr. Coleman asked. He assumed that the alleged 10% fee was Mr. Coleman's and that he wanted to keep the fee out of his own name, as he had done before.

32. It is also accepted on the evidence that, Mrs. Payne did not see this letter at the time, and would not have agreed to it if she had.

33. Mr. Kleinfeld wrote a short letter in reply on 9 March 2004, confirming the agreement to share KLF's fee and the insurance commissions on a 50/50 basis, and that the appropriate documentation was being prepared. The letter was silent as to the other alleged 'fees'. Mr. Kleinfeld did not, as he should have done, confirm what Mr. Coleman and Cafferata & Co were telling him with his client, i.e. Mrs. Payne.

34. Mr. Cafferata passed on this letter and other correspondence from KLF to Mr. Coleman, and in this way Mr. Coleman continued to dictate correspondence to be sent by Cafferata & Co to KLF and/or BLA, purportedly on behalf of Strand, thereby disguising his involvement and his orchestration of affairs from behind the scenes.

35. Further, at Mr. Coleman's requests, Mr. Cafferata signed a number of documents connected with the Trust, including a letter on behalf of Strand accepting the office of protector, and a letter to Cititrust International Inc ("Cititrust") the Belizean Trustee of the Trust, directing them to appoint London and Capital as investment adviser to the Trust. Once again, Mrs. Payne had no knowledge of these matters.

36. Mr. Cafferata also took steps to allocate the payments made by Mrs. Payne to Cafferata & Co to the "M Coleman re G Payne" ledger. Three such payments, made between 9-11 March 2004 which Mr. Cafferata thought totalled £2,079,712.41, were so allocated at Mr. Coleman's direction. However, Mr. Cafferata mistakenly allocated the smaller payment of £35,078.53 to a Strand ledger. The payment on 15 March 2004 of £143,635.15 was similarly mis-recorded. Mr. Cafferata did allocate the 16 March 2004 transfer of £274,682.38 to the "M Coleman re G Payne" ledger. After taking account of bank charges, the amount paid in and booked on the "M Coleman re G Payne" ledger as at 16 March 2004 was £2,354,389.25. The correct figure should have been in the order of £2,533,102.93. Mrs. Payne's final payment of £437,992.51 was not made until 6 May 2004 (and was also, as it turned out, misallocated by Mr. Cafferata).

37. Between 15 March and early April 2004, Mr. Coleman engineered various further increases in his 'fees' and set in motion the disbursement of Mrs. Payne's monies:

- (1) On 15 March 2004, Mr. Coleman prepared a letter for Mr. Cafferata to send to Ms. Barteau. The letter claimed that Mr. Coleman and Mr. Kleinfeld had spoken and agreed that instead of transferring £200,000 to KLF, it had been agreed that Cafferata & Co would simply transfer £100,000 and keep the other £100,000. Mr. Coleman did not discuss this conversation with Mr. Cafferata but simply had him send the letter.
- (2) Mr. Coleman also dictated a letter for Paul Russell at UBP in Nassau, which seemed to confirm that Mr. Pan's company, Inspire Ltd, was to benefit from the £100,000.00 under the fee-sharing agreement. This was obviously inconsistent with the correspondence with KLF by which Strand was the recipient, and is another illustration of Mr. Coleman's duplicity. As noted, a payment of £100,000.00 was made to Inspire Ltd out of Mrs. Payne's funds, but Mrs. Payne does not know Mr. Coleman benefited from that payment directly or indirectly.
- (3) On 22 March 2004, a series of emails were exchanged between Mr. May, Ms. Schreiner (also of BLA) and Mr. Kleinfeld. Mr. May sent Ms. Schreiner a revised stated "as Kleinfeld's have agreed a higher initial fee of 5% with Michael Coleman". Mr. May then set out revised wording and co-ordinates for an invoice for the initial fee, which it was intended to send to Mr. Cafferata. This read as follows:

"Re Contract for Payne

Our initial fee, as agreed, in respect of this transaction, is UK£750,000. We understand that you are now in funds for this and would be obliged if you would arrange two bank transfers as follows:

Please send UK£337,500 to:

[insert here our bank details – it can be our

USD UBS account]

And please send UK£412,500 to:

UBS AG
Paradeplatz6
CH-8098 Zurich
Switzerland

Account no 248098-61T
Account name W Von Gerlach
Bank clearing: 0206

SWIFT: UBSWCHZH80V"

- (4) The Swiss bank account details were in fact Mr. Coleman's and Mr. Cafferata confirms that the account beneficiary was not "W Von Gerlach" but Michael Coleman.
- (5) Mr. May proceeded to state that the first payment was to be shared as to 0.75% (i.e. £112,500) to KLF and 1.5% (i.e. £225,000) to BLA. Mr. Coleman was now to receive (through his Swiss bank account) all of £412,500. Mr. May then forwarded the email and details to Mr. Kleinfeld.
- (6) Later on 22 March 2004, Mr. Coleman prepared a draft letter. This was intended to be sent by BLA to Mr. Cafferata, and it followed the same format as Mr. May's email of the same date. It appears that Mr. Coleman had seen Mr. May's email. It was typical of Mr. Coleman's modus operandi that he was dictating a letter for BLA to send to Mr. Cafferata, which as it also appears he then had Mr. Cafferata send to KLF, who then forwarded the draft to BLA, who finally sent a final version to Mr. Cafferata.
- (7) The draft letter prepared by Mr. Coleman differed from Mr. May's draft in two respects. First, the letter purported to record that a fee of 5% for BLA had been agreed at the Miami meeting. This of course was not true, and was a deliberate lie by Mr. Coleman to disguise the fact that he had engineered an increase in BLA's fees (for his own benefit) without Mrs. Payne's knowledge or consent. Second, Mr. Coleman added a paragraph to the effect that "We [i.e BLA] further confirm that whilst we consider that the first legal charges on Mrs. Payne's real estate is likely to give sufficient security for the non-paid part of the policy, we nonetheless require a third party guarantee. Mr. Michael Coleman has agreed to give his guarantee of Mrs. Payne's liability." BLA had requested nothing of the sort, and the reality was that Mr. Coleman was inventing a pretext to seek to justify the exorbitant 'fees' he was about to extract from Mrs. Payne's funds. It was subsequently confirmed to Mr. McCarthy orally, and in writing by BLA, that there was no requirement for a guarantor, and that Mr. Coleman's involvement in setting up the Trust had been minimal. Indeed, there is no evidence that any liability from Mrs. Payne to BLA was ever owed or even contemplated, for which a guarantee could have been given.
- (8) At Mr. Coleman's direction and without reading it, Mr. Cafferata faxed the draft letter to Mr. Kleinfeld (not Mr. May). Then, on 25 March 2004, Ms. Barteau faxed Mr. May informing him of a delay in converting Mrs. Payne's funds into US dollars, and attaching the draft letter prepared by Mr. Coleman, as sent by Mr. Cafferata. Ms. Barteau asked Mr. May to prepare the letter and send it on behalf of BLA.
- (9) Mr. Cafferata received the signed letter from BLA, using Mr. Coleman's prepared wording, on 1 April 2004 and duly passed it on to Mr. Coleman. A revised version with updated bank details was sent the following day, which again Mr. Cafferata simply passed on to Mr. Coleman.
- (10) Meanwhile, Mr. Coleman set in motion the payment of KLF's share of its 'fee' of £100,000.00 out of Mrs. Payne's funds at Cafferata & Co, even though Mrs. Payne had not agreed to a fee of £200,000.00 (as opposed to US\$) and had never authorised the deduction of any fees from those funds. £100,000.00 was eventually sent to KLF on 24 March 2004. A further payment instruction was prepared by Cafferata & Co – presumably, again, on Mr. Coleman's instructions –

to transfer the other £100,000 share to the UBP account for Inspire Ltd (Mr. Pan's supposed company), which money was sent on 6 April 2004. Further payments were made (again, by inference at Mr. Coleman's direction) by Cafferata & Co on 6 April 2004 to BLA in the sum of £337,500.00 and to Mr. Coleman's Swiss bank account in the sum of £412,500.00, i.e. as set out in the letter drafted by Mr. Coleman and which had been sent by BLA. As at 6 April 2004, the total balance of the funds which had been transferred across by Mrs. Payne and allocated to the "M Coleman re G Payne" ledger stood at £1,404,389.25 taking into account all the transfers out and associated costs.

- (11) At around this time, Mr. Cafferata received from Mr. Pan (on 22 March 2004) an email confirming an "investment strategy" for Mrs. Payne, and offering to pay to Strand (i.e. Mr. Coleman) a one-off 2% payment on receipt by London & Capital, and 0.6% of the annual management fee charged. Mr. Cafferata sent a reply drafted by Mr. Coleman the following day indicating Strand's agreement. Since Mrs. Payne had no knowledge of Strand's or Mr. Coleman's involvement, she cannot have been told of this scheme between Mr. Coleman and Mr. Pan for secret kickbacks on monies which Mrs. Payne was trusting Mr. Pan to invest in her best interests. On 13 April 2004 Mr. Pan sent through a formal agreement, which at Mr. Coleman's direction Mr. Cafferata signed and returned, providing for broadly similar fees for Strand.
- (12) On 5 April 2004, Mr. Coleman came into Cafferata & Co's offices and was in a great rush to have letters sent out to Ms. Barteau enclosing the guarantee which Mr. Coleman had instructed BLA to request of him, and a covering letter to go to Ms. Schreiner at BLA. The guarantee document purported to guarantee the non-existent liability from Mrs. Payne to BLA, up to the sum of £10 million.

38. It is clear not only that the 'fees' extracted by Mr. Coleman were never agreed to by Mrs. Payne, but also that she was completely unaware of the correspondence passing between Cafferata & Co, KLF and BLA during this period.

39. Far from being kept fully informed of these exchanges, Mrs. Payne was simply asked, in late March 2004, to send to BLA and KLF a banker's reference, proof of address and a list of the relevant properties to place in the trust (despite Mr. Coleman having purported to supply a list in Cafferata & Co's letter of 8 March 2004). This information she duly supplied, with Alan's assistance.

40. On her return to the UK, Mrs. Payne set in motion the grant of mortgages over her UK and Spanish properties, as she had been advised was necessary at the Miami meeting. She instructed English solicitors recommended by Mr. Pan, and her Spanish lawyer, and steps were taken for the grant of the mortgages. It appears on the evidence that from mid-April 2004, Alan on Mrs. Payne's behalf was following up and searching to find out whether the BLA policy had been put in place, but could not get a clear answer.

41. Further, BLA obtained a drive-by valuation of Mrs. Payne's UK properties, from Savills Estate Agents. Savills' top-end valuations came to a total of only £4,070,000.00, which was far lower than the fabricated figures Mr. Coleman had put in Cafferata & Co's 8 March 2004 letter and put no present valuation on the Pitt Manor development land.

42. Despite this, on receipt of the valuation on 30 April 2004, Mr. May at BLA took steps to inflate the value of the Trust fund (as Mr. Coleman had done) by setting "the mortgages set at 20% above maximum price shown and at UK£3 million for the development land". The evidence demonstrates that this was never properly explained to Mrs. Payne.

43. On around 11 or 12 May 2004, Mrs. Payne attended at her solicitors' offices executed the English mortgage documents, which were in favour of a company called Cottage Hills LLC ("**Cottage Hills**"). Mrs. Payne was simply asked to sign the documents. The mortgage of Mrs. Payne's Majorca villa stalled, however, in light of concerns expressed by her Spanish lawyer as to whether it would be enforceable under Spanish law.

44. By 21 May 2004, Alan was still following up and searching to discover whether the BLA policy had been put in place and for confirmation that Mrs. Payne's monies were being transferred to Mr. Pan to be invested.

45. On 24 May 2004 Mr. Coleman prepared a further two draft letters for Mr. Cafferata to send. Once again, Mr. Coleman's drafted letters seemingly from independent solicitors, Cafferata & Co (but which in fact Mr. Cafferata simply rubber-stamped) with a draft letter for BLA to send back to Cafferata & Co (which Mr. Cafferata would, on receipt, then simply pass on to Mr. Coleman). In this way, Mr. Coleman sought to conceal his involvement in the communications, and sought to write both sides of the correspondence to suit his own purposes.

46. The first draft letter was a covering letter from Mr. Cafferata to Ms. Barteau at KLF, and stated:

"Kim I understand that all real estate matters in Europe have been put in place and that Rick May of Boston Life would like funds transferred to his company after deduction of fees being your firm agreed fee and the 5 agreed fees of each of Boston and Strand.

I am happy to oblige but would appreciate receiving written instruction from Boston in the attached form. I understand that Mr May is in Florida this week and plans to visit you and Mr Kleinfeld on Wednesday. I also understand that he is visiting his BVI office this Friday.

I should be obliged if you would pass the attached draft to him and ask that he arrange for his office to engross the letter and fax it to me so that I may arrange the transfer of the baalance [sic] of funds."

47. The second draft which was the 'draft' referred to in the first letter and was for BLA to execute and return, read as follows:

"Dear Mr. Cafferata

We confirm that whilst arrangements have taken longer than expected charges are now well under way to being concluded over Mrs. Paynes UK and Majorca real estate and that in conclusion of this matter the balance of funds after deduction of Mr Kleinfelds agreed fee and the 5% agreed fees of each of Boston Life and your client should be transferred to us at our account details set out below..."

48. Mr. Cafferata had Ms. Sawyer prepare the letters as requested by Mr. Coleman and sent them by fax to Ms. Barteau on 25 May 2004.

49. Mr. Coleman's draft letters were false and dishonest, as he well appreciated:

- (1) At no time had Mrs. Payne agreed that any fees could be deducted from the investment monies sent to Cafferata & Co.
- (2) Mrs. Payne had not agreed a 5% fee for BLA, and had not agreed any kind of fee for Strand.

50. Further there was no logical reason why Cafferata & Co, who had received monies directly from Mrs. Payne, should seek BLA's authority for transfer of funds. It was Mrs. Payne's authority

which should have been sought: she gave no such authority and knew nothing of the 25 May 2004 letters. Mr. Coleman's purpose in asking for BLA's instructions was clearly to set up a false paper-trail in purported justification of 'fees' he had extracted for his own personal benefit.

51. Mr. Coleman arrived in The Bahamas shortly after 7 June 2004 and during his visit met with Mr. Cafferata. The purpose of this meeting was to tell Mr. Cafferata how to deal with the balance of Mrs. Payne's funds. At that meeting:

- (1) Mr. Coleman told Mr. Cafferata to arrange for £800,000.00 to be sent to his Swiss bank account at UBS.
- (2) Mr. Coleman calculated the balance to be sent to BLA, after deduction of the £800,000.00 he wanted for himself, as £604,389.25.
- (3) Mr. Coleman therefore drafted a letter to send to BLA, in an effort to justify the retention of an additional £50,000.00. This letter was sent by Mr. Cafferata on 14 June 2004 and claimed that Cafferata & Co were retaining £50,000 for their own fees. No such fee had been agreed with Mrs. Payne, and Mr. Cafferata frankly admitted that there was no such fee, that the supposed £50,000.00 was never paid to or retained by Cafferata & Co, and that it was wrong to send the letter in those terms. The reality was that Mr. Coleman invented yet another fiction as a pretext to take more of Mrs. Payne's money.
- (4) In fact, Mr. Coleman and Mr. Cafferata made a mistake in their calculations: the balance of Mrs. Payne's funds at Cafferata & Co was significantly higher. Mr. Cafferata thought that the balance of Mrs. Payne's funds, after the earlier dispersals of £950,000.00 in March 2004, was around £1,404,389.25. However, Mr. Cafferata's figure failed to take into account three transfers received by Cafferata & Co from Mrs. Payne which, instead of being allocated to the "M Coleman re G Payne" ledger had instead by mistake been allocated to the "Strand #2" ledger. These were payments of £35,078.53 (sent on 11 March 2004 but recorded as received on 15 April 2004), £437,837.00 (sent and received on 6 May 2004) and £143,629.59 (sent on 15 March 2004 but recorded as received on 7 May 2004).
- (5) As a result, Mr. Cafferata and Mr. Coleman failed to spot that a further sum of £616,546.12 had yet to be accounted for, and that sum was not dealt with by them in early June 2004.

52. Following the meeting, Mr. Cafferata took steps to transfer £604,389.00 to BLA, which was sent on 16 June 2004.

53. On 25 June 2004, Mr. Cafferata arranged for the transfer of £800,000.00 of Mrs. Payne's funds to Mr. Coleman's Swiss bank account at UBS.

54. On 22 June 2004, Mr. Coleman transferred US\$520,000.00 from his UBS account to Cafferata & Co, which was allocated to the M Coleman USD ledger. On 25 June 2004 (the same date as the £800,000.00 transfer) Mr. Cafferata arranged a transfer back to Mr. Coleman of US\$500,000.00, to his UBS account. In his evidence, Mr. Cafferata explained that he thought this transaction was connected with Mrs. Payne, and speculated that the sum of \$500,000.00 was the equivalent of Mrs. Payne's fourth payment on 16 March 2004. The balance of US\$50,000 was used on various apparently unrelated expenses.

55. The Court can and does infer from the evidence that the purported imposition of annual charges by BLA was orchestrated by Mr. Coleman, purporting to act as Mrs. Payne's agent.

56. In August 2004 onwards, Mrs. Payne sought to make contact with Mr. Pan to find out what was happening with her funds as she had expected but had not received any statements or paperwork. Mr. Pan advised Mrs. Payne that he had not received any money and that BLA were holding up getting it to him. It was not until around 16 November 2004 that an account for Cottage Hills (the beneficiary of the mortgages and the subsidiary whose shares were to be held by the Trust) was set up at Stanford Bank so that the funds could be transferred by BLA. Alan, on behalf of Mrs. Payne, continued to pursue Mr. Pan (who was becoming increasingly elusive) and also Ms. Barteau for updates as to the funds.

57. The Court is satisfied on the evidence, which is uncontradicted, that Mr. Coleman fabricated and inflated fees, entered into secret deals to share or obtain further fees, and generated a false paper-trail, as a pretext for his theft of Mrs. Payne's monies.

58. On discovery of the fraud, Mr. Coleman relied on the false paper-trail he had created and took steps to dissipate the remainder of Mrs. Payne's funds.

59. On or around 7 December 2004, Mrs. Payne discovered that only a small fraction of her funds, i.e. the sum of £604,389.00 out of total funds sent of £2,970,992.51, had actually been paid over to BLA. She also learnt that after deduction of ongoing fees BLA were claiming only £533,074.00 remained.

60. At this point, Mrs. Payne asked Mr. McCarthy to assist, and in early January 2005 he took over investigations. In the meantime, KLF engaged in correspondence with Cafferata & Co and Mr. Coleman in an effort to discover what had happened to Mrs. Payne's monies.

61. As summarised below, the evidence shows that Mr. Coleman then sought to rely on the false paper-trail he had created and, when he realised that he and Mr. Cafferata had overlooked around £616,000.00 of Mrs. Payne's monies in June 2004, he took steps to misappropriate that final sum.

62. Ms. Barteau telephoned Cafferata & Co on 21 December 2004 (when Mr. Cafferata was away) and followed up with an email requesting a complete accounting of what had happened to the monies Mrs. Payne had sent to Cafferata & Co.

63. Mr. Cafferata sought Mr. Coleman's input, who the next day asked to be sent copies of all the correspondence between KLF and BLA so that he could draft a full reply. In the meantime Mr. Cafferata was instructed to send a holding response to the effect that funds had been received "on behalf of [Strand]" (which was false) and that of those funds, £200,000.00 went towards KLF's fees, £750,000 to BLA's fees, £750,000 towards Strand's fees and £50,000 to Cafferata & Co's fees, with the balance paid to BLA. Though relying on the false paper-trail he had created over March to June 2004, Mr. Coleman clearly failed to realise (as noted above) that this failed to account for all of the funds Mrs. Payne had sent.

64. KLF continued to follow up for a response: Mr. Kleinfeld called the following morning, and also tried (without success) to contact Mr. Coleman. Mr. Cafferata sent the holding response suggested by Mr. Coleman later that day.

65. On 28 December 2004, Mr. Coleman emailed Paul Russell at UBP (copying in Mr. Cafferata). The purpose was to have a bank account set up for Strand, in both GBP and USD. While Mr. Coleman did not explain to Mr. Cafferata why he was sending this email now, it seems likely that Mr. Coleman had begun to realise that not all of Mrs. Payne's funds had been accounted for, and wanted to take steps to extract those that remained. This is borne out by the matters set out below.

66. Mr. Cafferata's holding response did not deter KLF. On 30 December 2004, Mr. Linder wrote asking for Strand to produce its fee agreement with Mrs. Payne. Of course, no such document existed to be produced. Mr. Cafferata forwarded the letter to Mr. Coleman.

67. Mr. Coleman prepared a draft response, which he sent to Mr. Cafferata (twice) on 3 and 4 January 2005, and which Mr. Cafferata sent out to KLF on 5 January 2005. The letter essentially sought to "buy time". It claimed that all the various fees (i.e. KLF's, BLA's and Strand's) were discussed and agreed at a meeting in March 2004 at KLF's offices, and suggested that Mr. Coleman discuss matters with Mr. Kleinfeld when he was available, in late January 2005. The claim that all fees had been discussed and agreed was, of course, false: Mr. Coleman had instead (as set out above) conspired to invent, inflate and takes shares of various 'fees' for his own personal benefit.

68. On 6 January 2005 Mr. Russell of UBP reverted to Mr. Coleman, saying that the relevant paperwork for Strand's new account was being sent. Mr. Coleman suggested the initial deposit was likely to be around £500,000.00.

69. Mr. Coleman's attempts (through Mr. Cafferata) to avoid KLF did not work. On 7 January 2005, Mr. Cafferata emailed Mr. Coleman reporting that Ms. Barteau and Mr. Kleinfeld had had a very angry telephone call with Ms. Sawyer. Mr. Cafferata asked Mr. Coleman what he should do. Mr. Coleman instructed him not to take part in a conference call (which KLF were requesting) and that he (Mr. Coleman) would deal with the problem. Mr. Coleman then proceeded to draft two more letters for Mr. Cafferata to send which persisted in the fiction that fees totaling £1.75 million had been properly disbursed, and the balance sent to BLA, and asking KLF to explain "what the issue" was. The second letter referenced a discussion with Mr. Kleinfeld in which Mr. Kleinfeld supposedly confirmed there was no issue as to the fees charged, and once again suggesting Mr. Coleman meet KLF in late January 2005. Mr. Coleman told Mr. Cafferata that he was going to fly to Freeport on 27 January 2005 to go through the figures at Cafferata & Co's offices.

70. Around this time, KLF appeared to have formed the view (wrongly) that the discrepancy had arisen from Strand taking a full 10% fee upfront, instead of an initial 5% fee followed by an additional 5% at the conclusion of the litigation in England. It is clear from a note written by Ms. Barteau that KLF were concerned with keeping Mrs. Payne "off their back" and on Mr. Coleman's.

71. Mr. Kleinfeld responded to Mr. Cafferata along the same lines on 10 January 2005, suggesting the issue was as to how and when Strand's fees were to be paid; and asked that Mr. Coleman and Mr. Cafferata contact Mrs. Payne to provide a full account. A telephone call followed the same day in which KLF repeated their (incorrect) suggestion that the discrepancy was due to Strand taking an upfront 10% fee. Mr. Cafferata emailed Mr. Coleman later that day and, having reviewed the correspondence, noted that KLF and BLA had never confirmed that Strand's fees were agreed. Such confirmation had not been given, of course, because KLF and BLA had no authority to do so, and had not even spoken to Mrs. Payne about them, although it seems that Mr. Cafferata was not aware of this at the time.

72. Ms. Barteau pursued Cafferata & Co for an account on 19 January 2005. Again, Mr. Cafferata replied with wording supplied by Mr. Coleman. This seized on KLF's suggestion that the issue related simply to the terms of payment of Strand's fees and repeated that Mr. Coleman was willing to attend a meeting to explain with a full copy of the accounting requested. Ms. Barteau replied stating that Mr. Kleinfeld wanted Mr. Coleman and Mr. Cafferata to meet Mrs. Payne in London to settle matters. Mr. Cafferata forwarded this to Mr. Coleman, who once again prepared a response suggesting that Mr. Cafferata had had no direct contact with Mrs. Payne (which was true) and that she had not sought to contact Mr. Coleman (which was not: he did not answer her call). A number of further emails were exchanged, including from Mr. Coleman directly, the upshot of which was that Mr. Coleman promised to try to contact Mrs. Payne and perhaps meet with her in London. One point of note is that in an email of 23 January 2003, Mr. Coleman denied that Mrs. Payne was either his or Mr. Cafferata's client; KLF duly picked up on this and, in an email sent by Ms. Barteau the next day, asked why he and Mr. Cafferata were paid fees if

neither of them represented Mrs. Payne. There was no good answer to this point, since Mrs. Payne had never agreed to pay either Mr. Coleman, or Cafferata & Co, or Strand, any fees whatsoever.

73. On 28 January 2005, Mr. Coleman met with Mr. Cafferata to discuss how to respond to KLF regarding Mrs. Payne's money. Mr. Cafferata told Mr. Coleman that he was very troubled because the fees taken were very large, and he did not understand the relationship between the parties, or what had been agreed and why. Mr. Coleman told him not to worry, and said they could rely on the 8 March 2004 letter, and KLF's silence in relation to Strand's fee. While Mr. Cafferata seems not to have realised the true position at the time, this was of course a nonsense, since the 8 March 2004 letter had been drafted by Mr. Coleman and had introduced a series of falsehoods to serve as a pretext for the theft Mr. Coleman later perpetrated.

74. Mr. Coleman also said they could rely on his guarantee (to BLA), which justified his fee. This, again, was a fiction, which Mr. Coleman had introduced into a letter he then asked BLA to send back to him, and was again nothing but a pretext for his theft of Mrs. Payne's monies.

75. Mr. Coleman and Mr. Cafferata then went through the accounts and ledgers, with a view to justifying why the figure of £604,389.00 had been transferred to BLA. Mr. Coleman essentially dictated to Mr. Cafferata. It was at this time that Mr. Cafferata finally realised that he had overlooked two payments from Mrs. Payne (being £437,837.00 and £143,935.15), which had instead been allocated to the Strand No 2 ledger, and that as a result the balance of £604,389.00 which Mr. Coleman had come to in June 2004 was short. Mr. Cafferata did not spot the third missed payment (of £35,079.53) at the time. It seems that by this time Mr. Cafferata had become thoroughly confused as to what had been and should have been done. Mr. Coleman told him not to worry and that he would deal with the unaccounted payments in a letter to KLF.

76. As indicated, Mr. Coleman drafted another letter for Mr. Cafferata to send to KLF, which Mr. Cafferata duly sent on 28 January 2005. The letter claimed that Cafferata & Co had only received four payments prior to June 2004. This was false, as Mr. Coleman now knew that earlier payments had simply been overlooked. The letter recited the 'fees' deducted totaling £1.75 million, including the fictitious fees to Strand and Cafferata & Co totaling £800,000.00 (which was money Mr. Coleman had simply paid to himself) and the inflated fee of £750,000.00 to BLA (of which Mr. Coleman had received the lion's share), as well as KLF's fee (mis-stated, as it had been throughout, as £200,000.00 instead of \$200,000.00). The letter then claimed that (only) two further transfers had been received from Mrs. Payne on 6 and 7 June 2004, totaling £581,524.02. This ignored the third 'missing' payment of £35,078.53, which Mr. Cafferata had not yet spotted. Accordingly, the balance which Cafferata & Co should have accounted for was £616,692.55. Mr. Coleman's letter then went on to perpetuate his false claim that this balance was held by Strand "against the balance of the fee i.e. 5% of assets ultimately saved".

77. It seems that by this point Mr. Coleman had picked up on the inconsistencies in the correspondence he had generated, and in particular between his current position and the letter of 8 March 2004. He therefore had Mr. Cafferata say (in the 28 January 2005 letter) that:

"In my first letter to Mr. Kleinfeld in this matter dated 8th March 2004, I recounted what I understood had been agreed the previous Friday [i.e. at the Miami meeting]. I notice that I have misunderstood the arrangement in part as I see that I referred to a 3% fee for Boston Life and not the correct figure of 5%. I also make reference to a 10% fee for Strand of £1,410,000.00 this being referable to the assets total rather than the premium of 15 million.

I also had not then clarified that the fee was 5% initially of the 15m and then a further 5% of the assets saved, but rather singly the figure of 10%.

In his letter to me of 7 June 2004 Rick May said "the balance of funds after the deduction of Mr Kleinfeld's agreed fee and the 5% agreed establishment fee [emphasis added] charged by Boston and your client (Strand) should be transferred to us at our account."

This was received as a result of my letter to you of 25 May enclosing a draft instruction that I required on behalf of Strand.....

I trust that not only does the foregoing set out the full accounting to your satisfaction but that you will be reminded that my clients fee and its means and timing of payment were clearly set out in correspondence".

78. This passage is yet another example of Mr. Coleman's dishonest conduct. As he well knew, (1) there had been no mention of any fee to Strand at the Miami meeting, (2) the BLA fee discussed had been 3%, and the agreement to increase had been reached by Mr. Coleman (as documented above) some weeks later, (3) the contradiction between the 'fee' being initially stated as 10% of assets, and subsequently as two staged payments of 5% of the premium, was not the result of any 'clarification' but was instead the gradual evolution of Mr. Coleman's lies, (4) Mr. May had not in fact confirmed Strand's fee, but only a single "establishment fee" of 5% to be shared between BLA and Strand.

79. Mr. Coleman told Mr. Cafferata to sign and send the letter, and that he should not worry as he (Mr. Coleman) would sort things out with Mr. McCarthy.

80. Far from resolving matters, Mr. Cafferata's letter provoked a reply from KLF on 1 February 2005 demanding that the sum of £1,391,619 be transferred to BLA and disputing that there was any agreement to pay Strand a fee. Mr. Cafferata was concerned that the problem was not going away. On Mr. Coleman's instructions, he replied the next day, suggesting that Mr. Coleman meet with Mrs. Payne in London and complaining about the 'change of position' on the basis that KLF had supposedly confirmed in their correspondence that there was no issue as to fees. Mr. Kleinfeld welcomed the idea of a meeting directly with Mrs. Payne.

81. At around the same time, Mr. Coleman continued to take steps to set up a bank account for Strand at UBP through Mr. Russell. In the forms, Mr. Coleman represented that he was the beneficial owner of Strand (which was true, in light of Mr. Cafferata's evidence). Mr. Coleman was named as the sole signatory on the account, and subsequently took steps to ensure that Mr. Cafferata did not receive any account statements.

82. Mr. Russell replied on 15 February 2005 saying that he awaited the hard copy documents, and understood the urgency in opening the account. Mr. Coleman did not explain the need for urgency to Mr. Cafferata, but did tell him that he wanted the balance of Mrs. Payne's funds to be transferred to the new account.

83. On 17 February 2005, Mr. Cafferata sent letters to Mr. Russell giving a reference for Mr. Coleman, and advising that the initial deposit of funds would be £585,000.00. The letter to Mr. Russell described the funds as representing "commission earned in a recent legal transaction", which was Mr. Coleman's description.

84. On 24 February 2005 Cafferata & Co sent instructions for the sum of £616,037.66 to be transferred to Strand's new bank account at UBP. Mr. Cafferata made clear in his evidence that this was the balance of the monies received from Mrs. Payne which had been allocated to the Strand No 2 ledger. The UBP account was under Mr. Coleman's sole control; in this way, Mr.

Coleman ensured that the last of Mrs. Payne's funds at Cafferata & Co was syphoned off for his personal benefit. Mr. Coleman then tried to cover his tracks by instructing Mr. Cafferata to re-designate the "M Coleman re G Payne" ledger as part "Strand Investment Ltd #2", to suggest (contrary to the true position) that the monies somehow belonged to Strand.

85. Between March 2004 and February 2005, Mr. Coleman set about creating a paper-trail to justify his misappropriation of Mrs. Payne's monies; but, because of a miscalculation, that paper-trail left a £616,000 shortfall. When Mr. Coleman discovered the shortfall – and in the face of Mrs. Payne's claims that her money be returned or accounted for – he proceeded to misappropriate the remaining funds, and create a new fiction, namely that Strand was holding them against the balance of its final fee.

86. It is clear from the above that when Mr. Coleman realised that he had failed to fully clean out Mrs. Payne's funds from Cafferata & Co he set about buying time with KLF and Mrs. Payne, and took steps to put Mrs. Payne's remaining funds into a UBP account which he alone controlled, instead of accounting to Mrs. Payne. In so doing, Mr. Coleman without doubt acted dishonestly.

87. The reality was that, far from protecting Mrs. Payne's assets, the Trust and the broader asset protection scheme failed to achieve any real advantage for her and in fact put her assets at risk.

88. Of the cash assets forwarded to Cafferata & Co, the vast majority was either misappropriated by Mr. Coleman or taken in fees. Out of the £2,970,992.51 which Mrs. Payne transferred in cash to Cafferata & Co, she has only recovered £176,515.03. Accordingly, the effect of the asset protection plan was that Mrs. Payne lost 94% of the cash assets she was seeking to protect.

89. While the Trust was valid as a trust, its only valuable asset was intended to be a policy issued to Cititrust by BLA. There is no evidence that such a policy was issued, or was effective; in fact, it was a meaningless and ineffectual document. The only other asset paid into the Trust was the small initial fund of \$3,000.00.

90. The evidence is and Counsel Mrs. Lockhart-Charles, submitted that there have been English proceedings instituted by Mrs. Payne which have determined that the mortgages of the UK properties which was part of this investment scheme had no practical or commercial effect and ordered the removal of the Mortgages from the English Land Register. That the Spanish property was never brought into the scheme as the mortgage could not lawfully be registered. Had the scheme worked, it was submitted, the scheme would have given rise to adverse inheritance tax consequences. In fact, as appears from the evidence that Mr. Coleman sought to "blackmail" Mrs. Payne into giving up her claim by highlighting this potential risk.

91. Mr. Coleman was a retired but (as is un-contradicted) experienced English solicitor. It is more than likely that he either knew, or willfully closed his eyes to the fact that the Trust and the scheme achieved nothing of any value for Mrs. Payne. Mr. Coleman subsequently relied on the risk of an inheritance tax liability in an effort to blackmail Mrs. Payne, which suggests he knew (at least) that the scheme was defective in this respect.

92. It is further evidence of Mr. Coleman's dishonesty that, following his final misappropriation of Mrs. Payne's funds in February 2005, he took almost every conceivable step either to prevent or frustrate legal proceedings or otherwise avoid having to repay Mrs. Payne's monies. As shown by the detailed evidence summarised below:

- (1) Mr. Coleman used a variety of threats and blackmail to put Mrs. Payne off from bringing or continuing legal proceedings.
- (2) Mr. Coleman drew out settlement discussions with Mr. McCarthy at great length, despite having no genuine intention to reach a settlement.

- (3) Having stalled for time, Mr. Coleman disclosed confidential information about the Trust and the asset protection scheme to Mrs. Payne's litigation opponents, and sought (unsuccessfully) to persuade them to have Mrs. Payne's assets frozen, in the hope that this would prevent her from bringing legal proceedings against him.
- (4) Mr. Coleman illegally hacked into Mr. McCarthy's emails and proceeded to make further threats against Mrs. Payne in reliance on the confidential information he had obtained.
- (5) Mr. Coleman sought to blackmail Mrs. Payne into giving up her claim by pretending that he had not yet given all his information to Mrs. Payne's litigation opponents in England.
- (6) Mr. Coleman cynically tried to delay these and the 2007 proceedings in the hope that the matter would not reach a trial, or that Mrs. Payne would die before a trial took place.
- (7) Mr. Coleman has still not given any discovery in these proceedings, and is in breach of the Injunction Order of 7 July 2017, and as a result continues to conceal his assets and the ultimate destination of Mrs. Payne's remaining funds.
- (8) Mr. Coleman has recently taken steps to dishonestly put his assets beyond the reach of his creditors.

93. The exchange of correspondence between KLF and Mr. Coleman (using Cafferata & Co as his mouthpiece) led to a meeting between Mrs. Payne, Mr. McCarthy and Mr. Coleman on 14 February 2005, in a café in Marylebone Lane. The meeting lasted about 10 minutes. Mr. Coleman claimed that it was all a mistake, but when Mr. McCarthy asked him if he was going to return Mrs. Payne's money, he point blank refused. He then warned Mrs. Payne that she should "think very carefully" before bringing a claim against him and that there would be disadvantages, particularly in relation to her tax affairs, if the existence of the Trust came out in open Court. Mr. Coleman was quite threatening, and both Mr. McCarthy and Mrs. Payne were shocked. This was, quite simply, an attempt by Mr. Coleman to blackmail Mrs. Payne into keeping quiet by suggesting that the very scheme he had advised she should execute was somehow illegal.

94. Similarly, at a meeting on 30 March 2005, Mr. Coleman warned Mr. McCarthy that Mrs. Payne should be "very careful" as she was open to a very large inheritance tax liability, but that if Mr. Coleman's offer were accepted, he would "show to everyone's satisfaction" that there was no tax liability.

Analysis and Conclusions

95. Mrs. Payne's pleaded case is that Mr. Coleman acted knowingly, deliberately and dishonestly in stealing Mrs. Payne's money, and in particular when (a) conspiring with Strand, Mr. Cafferata and others to defraud Mrs. Payne with intent to cause her loss, (b) knowingly assisting Cafferata & Co's (alternatively Strand's) payment away of her funds in breach of trust, (c) knowingly receiving Mrs. Payne's monies paid away in breach of trust, and (d) acting in breach of his fiduciary duties by enriching himself at Mrs. Payne's expense. Strand, which was at all times controlled by Mr. Coleman and which is imputed with his knowledge, was likewise dishonest.

96. In light of the evidence, which is accepted, and Mr. Coleman's conduct in the present proceedings the Court is satisfied that each and every one of the Particulars of Dishonesty pleaded [**Statement of Claim at paragraph 77**] is proved.

97. The Court further finds that the only sum which Mrs. Payne needs to give credit for is the sum of £176,515.03, being monies recovered by her from BLA out of the sum of £604,389.00 transferred by Cafferata & Co in June 2004. As this sum was recovered from BLA, it is not

relevant to the claims that Mr. Coleman and Strand should account for monies they received, but is only relevant to Mrs. Payne's claims for damages and/or equitable compensation for loss of her overall fund.

98. The Court is satisfied that:

- (1) Mrs. Payne paid a total of £2,970,992.51 to Cafferata & Co, to be held to her order;
- (2) At Mr. Coleman's direction, Mrs. Payne's monies were then dispersed with the result that:

- (a) £1,212,500.00 was paid to Mr. Coleman directly, into his Swiss bank account(s);
- (b) £616,037.66 was paid to Strand, a company he controlled and owned, into its UBP bank account in Nassau, The Bahamas;
- (c) £100,000.00 was paid to Inspire Ltd, into a UBP bank account. That company was apparently associated with Mr. Pan, but (in the absence of discovery from Mr. Coleman and prior to further inquiries and accounts) the Court cannot be sure whether in reality those monies benefited Mr. Coleman either directly or indirectly;
- (d) It is possible that a further US\$500,000.00 was sent to Mr. Coleman directly, into his Swiss US\$ bank account; but whether this transfer used Mrs. Payne's funds is still unclear owing to Mr. Coleman's failure to give discovery;
- (e) The other payments (to KLF and BLA), totaling £1,041,889.00 did not immediately benefit Mr. Coleman either directly or indirectly (although, as noted above, an inquiry is needed to establish whether Mr. Coleman did receive funds deducted by BLA from the funds it received).

(3) Mrs. Payne has exhausted recovery as against KLF and BLA, which leaves the funds transferred variously to Mr. Coleman, Strand and Inspire Ltd.

(4) The Court does not know what has happened to these remaining funds, because Mr. Coleman and Strand (which he controls) are in breach of their obligations to give discovery under the Court's order dated 23 June 2017, and Mr. Coleman is also in breach of his obligations under the Injunction Order dated 7 July 2017 (and in particular paragraph 6(d) of that order, which required Mr. Coleman to give discovery in relation to the relevant bank accounts).

(5) What is clear is that Mr. Coleman has consistently taken steps to conceal his ownership of assets and his control of properties (Westerham's purchase of Manor Farm for Mr. Coleman's use being a good example). It is therefore possible, though the Court cannot be sure without ordering further accounts and inquiries, that Mrs. Payne may be able to trace her monies into other assets owned by Mr. Coleman or by his associates, once full discovery has been given by Mr. Coleman and Strand (and possibly any third parties into whose hands the monies were passed). In particular, Mr. Coleman should be compelled to give complete disclosure and explain the acquisition of the following assets/businesses:

- (a) Manor Farm, which he owns beneficially through Westerham;
- (b) 14 Fortune Cay Club, Gunport Boulevard, Freeport, The Bahamas. Mr. Coleman admits that he is co-owner of this property in his IVA proposal, but the circumstances of its acquisition are unknown;
- (c) Apartment 314, 5401 Collins Avenue, Miami Beach, Florida 33140 USA. Mr. Coleman claims that this property was acquired in 2010 for him and his girlfriend, Anna Geor;

- (d) Mr. Coleman's possible business interests in Malaysia, The Gambia and/or China (as referred to in his IVA proposal); and
- (e) A New Zealand hotel business operated by Ormlie Lodge (2013) Ltd, of which Mr. Coleman was a director until 15 April 2016. It is possible, if not likely, that Mr. Coleman also holds some beneficial interest in the company.

Further Findings

99. The Court makes the following findings in favour of Mrs. Payne:

99.1 By reason of his position as sometime lawyer for Mrs. Payne, and/or in acting as her agent in dealing with the monies to be paid into the Trust, Mr. Coleman was acting as a fiduciary and owed Mrs. Payne fiduciary duties.

99.2 The monies received by Cafferata & Co from Mrs. Payne were held on resulting trust for her.

99.3 All of the payments made by Cafferata & Co out of Mrs. Payne's funds were made without her authority or consent and were payments in breach of trust.

99.4 In breach of his fiduciary duties, Mr. Coleman acquired Mrs. Payne's property and/or made secret commissions from his position as her fiduciary agent, and accordingly he held the monies he received from Mrs. Payne's funds on constructive trust for her.

99.5 Alternatively, Mr. Coleman intermeddled as a trustee de son tort or quasi-trustee in the trust of Mrs. Payne's monies held by Cafferata & Co, and so holds the monies he received from those funds on constructive trust for her.

99.6 In the further alternative, Mr. Coleman stole Mrs. Payne's monies, and so holds the stolen monies he received on constructive trust for her.

99.7 At all material times Strand was beneficially owned by Mr. Coleman and controlled by him absolutely; insofar as it received monies from Mrs. Payne's funds it stands in the same position as Mr. Coleman and holds them on constructive trust for her.

99.8 Mr. Coleman and Strand are therefore liable as constructive trustees to restore the constructive trust funds to Mrs. Payne and/or to pay equitable compensation representing the amount of those funds.

99.9 Mr. Coleman and Strand dishonestly assisted in Cafferata & Co's breaches of trust and/or knowingly received monies paid out by Cafferata & Co in breach of trust, and are liable to give equitable compensation for Mrs. Payne's losses and/or to account as constructive trustees for their receipts.

99.10. Mr. Coleman, Strand and others conspired together to cause loss to Mrs. Payne by unlawful means, by defrauding Mrs. Payne and concealing that fraud and/or by the payment away of her funds in breach of trust.

99.11. Mrs. Payne is entitled to trace the proceeds of any payment made out of the sums held by Cafferata & Co, Mr. Coleman and/or Strand on resulting or constructive trust; and the Court grants Mrs. Payne permission to apply for consequential accounts and inquiries to discover the whereabouts of her unaccounted-for funds.

99.12. The Court orders compound interest in equity; alternatively simple interest under the Civil Procedure (Award of Interest) Act 1992.

99.13. The English IVA purportedly approved by Mr. Coleman's creditors is an irrelevance to these proceedings.

The Law

100. Having read and accepted the Submissions of Mrs. Lockhart-Charles filed herein the legal principles relied on are discussed below:

Fiduciary Duties

101. As Millett LJ explained in **Bristol and West Building Society v Mothew** [1998] Ch 1, 18:

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."

102. As a matter of general principle, therefore, where the circumstances give rise to a relationship of trust and confidence, a fiduciary relationship will exist carrying with it the fiduciary obligation of loyalty in all its facets.

103. As submitted by Mrs. Lockhart-Charles, there is an extensive body of authority as to whether particular relationships are fiduciary in nature. There are two relationships of particular significance to this case:

103.1 It is uncontroversial that a solicitor owes fiduciary duties to his client. Indeed that relationship has been described as "one of the most important fiduciary relations known to our [English] law": Jackson & Powell on Professional Liability (8th edn) para 11-015.

103.2 Generally speaking, an agent owes to his principal a duty of loyalty, which attracts fiduciary obligations: Bowstead & Reynolds on Agency (20th edn) para 6-033. It is right to say that not every 'agent' will be a fiduciary, and that "the facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal": **Phipps v Boardman** [1967] 2 AC 46, 127. Thus even an introducing agent may owe fiduciary duties, especially if they have authority to make and receive communications on behalf of their principal; and an agent with knowledge of and power over his principal's affairs may for that reason owe fiduciary duties: Bowstead & Reynolds, para 6-037.

104. In this case, it is clear that Mr. Coleman acted as Mrs. Payne's legal adviser in relation to certain disputes in the UK. He gave her advice, and she agreed to pay fees for that advice. It was out of this position that Mr. Coleman suggested she take steps to protect her assets, and because of his position as her legal adviser that Mrs. Payne was willing for him to attend the Miami meeting. Further, it was only because Mr. Coleman was her trusted legal adviser that Mrs. Payne followed his instructions as to where she should send her funds for investment into the Trust.

105. Further or alternatively, Mr. Coleman acted as Mrs. Payne's agent in relation to her transfer of funds for the Trust, in circumstances which gave rise to fiduciary obligations. Mr. Coleman undertook to act as go-between with Mr. Pan, to decide with him (on her behalf) where the funds would go and then to inform her of their destination. He went further in the months that followed, purporting to communicate as her agent with KLF and BLA, e.g. by agreeing to inflate KLF and BLA's fees. As a matter of fact, Mr. Coleman had knowledge of and power over Mrs. Payne's affairs in relation to the Trust, which he subsequently exploited for his personal gain. The Court finds that he owed her fiduciary duties as agent, as well as her lawyer.

106. Mrs. Lockhart-Charles submitted and I accept that a useful illustration from the authorities is found in **North American Land and Timber Co Ltd v Watkins** [1904] 1 Ch 242. In that case, it was found that the defendant was a fiduciary agent (indeed, a trustee) of the plaintiffs for the investment of their money in the purchase of prairie lands (and was liable to account for the profit he had personally made on their investment). Kekewich J held that "**the defendant himself suggested investment in prairie instead of in timber lands, and, having urged the company to remit him funds for the purposes of such investment, accepted the remittances when made for those purposes. It is impossible for him now to say that he was not the agent of the company for the employment of the money remitted to him for the purposes which he had recommended, and in connection with which he accepted the money remitted.**" In this case, Mr. Coleman urged Mrs. Payne to transfer her funds to Cafferata & Co, where he was able to exercise complete control over them. As submitted by Mrs. Lockhart-Charles, it is difficult to see any distinction in principle between the two factual situations.

Resulting Trust

107. Mrs. Lockhart Charles submitted that a resulting trust will ordinarily arise in two circumstances. First, where A makes a voluntary payment to B, there is a presumption that A did not intend to make a gift to B; the money is held on resulting trust for A. She contended that the presumption can be rebutted, for example by direct evidence A's intention to make an outright transfer. Secondly, where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest, a resulting trust will arise. She referred the Court to **Westdeutsche Landesbank Girozentrale v Islington LBC** [1996] AC 669, 708.

108. Mrs. Lockhart-Charles further submitted that in **Twinsectra Ltd v Yardley** [2002] 2 AC 164 at [100], Lord Millett further explained the 'Quistclose'-trust as an instance of the second class of resulting trust. That typically in such cases, money is paid by a lender to borrower on the basis that it is to be used for a specific purpose only. As the transfer does not exhaust the beneficial interest, she contended and I accept, that a resulting trust arises on transfer in favour of the lender.

109. As the evidence shows, in this case:

- (1) Mrs. Payne transferred legal title to the combined sum of £2,970,992.51 to Cafferata & Co. The payment was a voluntary one – i.e. Cafferata & Co did not provide any consideration for the payment, and nor did anyone else – and there is no evidence to suggest that Mrs. Payne intended Cafferata & Co (or Strand) to take the money beneficially.
- (2) The evidence is that Mrs. Payne did not intend this, but expected the money to be held to her order. More specifically, she expected the money only to be transferred to Mr. Pan to be managed, and not that Cafferata & Co would be free

to apply it for any purpose they chose; nor did Mrs. Payne authorise any payments to be made out of her funds [**GP-1 at paragraph 88**].

110. In the said circumstances the Court finds that a resulting trust arose in favour of Mrs. Payne when Cafferata & Co received the funds. There is no evidence to rebut the presumption of resulting trust given that Cafferata & Co (and, insofar as relevant, Mr. Coleman and Strand) were volunteers.

111. Further the Court finds that Mrs. Payne transferred the monies to be used for a specific purpose only, namely their onward transmission to Mr. Pan for investment. As this specific purpose did not exhaust the beneficial interest (and was never achieved), the funds were in any case held on resulting trust for her.

112. As Mrs. Payne's monies were impressed with a resulting trust on their receipt, she is entitled to trace those monies which were paid out in breach of trust into their traceable proceeds in the hands of Mr. Coleman, Strand and Inspire Ltd. However, for the reasons set out below, those funds **also** became subject, as was submitted by Mrs. Lockhart-Charles, to (true) constructive trusts when received by Mr. Coleman and/or Strand.

Breach of trust

113. It is clear on the evidence, which is un-contradicted and accepted, that Mrs. Payne did not authorise any payments to be made from the monies she transferred to Cafferata & Co [**GP-1 at paragraph 88**]. The only purpose she had authorised was a transfer to Mr. Pan for investment. None of the transfers of 'fees' fell within that authority, and even the transfer of £604,389 to BLA fell outside it, since the funds were not transferred directly to Mr. Pan for him to manage.

114. Since the payments made by Cafferata & Co were not consistent with the terms and purpose of the resulting trust for Mrs. Payne, and were not authorised by her, it is clear that they were made in breach of trust. Mrs. Lockhart-Charles referred the Court to: **Lewin on Trusts** (19th edn) paras 39-002, 39-004.

Constructive Trust

115. The law is clear that, where a fiduciary acquires property beneficially owned by principal in breach of fiduciary duty, he will hold that property on constructive trust for his principal: **Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd** [2012] Ch 453, [88]-[89]:

"...a beneficiary of a fiduciary's duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary. [emphasis added]

116. Mrs. Lockhart-Charles submitted and I accept that although the **Sinclair** case has now been overruled by the Supreme Court in **FHR European Ventures LLP v Cedar Capital Partners LLC** [2015] AC 250, this aspect of the decision remains good law. That the Supreme Court in **FHR** at [46]-[51] went further and held (overruling **Sinclair**) that a bribe or secret commission obtained by an agent in breach of his fiduciary duties was held on constructive trust for his principal (whether or not the test cited from **Sinclair** above was satisfied).

117. The constructive trust in such cases is a 'true' constructive trust: in other words, the monies received by the agent are impressed with a trust in favour of the principal which creates proprietary rights in equity, and not simply a personal claim to an account: see **FHR European Ventures LLP v Mankarious (No 2)** [2013] 2 BCLC 1 (CA), [75]-[76].

118. As the evidence shows, and I accept, Mr. Coleman received the following sums from Mrs. Payne's funds at Cafferata & Co:

- (1) (At least) £1,212,500 was paid to Mr. Coleman directly from the funds held by Cafferata & Co; and
- (2) (Up to) £616,037.66 was paid to Strand, a company he controlled and owned.

119. Further, it is possible (though the Court cannot be sure due to Mr. Coleman's failure to give discovery) that the £100,000.00 paid to Inspire Ltd in fact benefitted Mr. Coleman either directly or indirectly. From KLF's point of view, that money was a secret commission to be paid by KLF, without Mrs. Payne's knowledge or consent. It is also possible (but the Court again cannot be sure due to Mr. Coleman's breach) that the transfer of US\$500,000.00 to Mr. Coleman's Swiss bank account used Mrs. Payne's monies (and if it did, the payment to Strand referred to above used a correspondingly smaller amount of Mrs. Payne's funds). It is also possible that Mr. Coleman benefited from further sums received via BLA in respect of annual charges or other deductions from the funds BLA received. Further inquiries are needed to establish the full position on these items.

120. Given that, in fact, all the monies received by Mr. Coleman (directly or indirectly through Strand and, possibly, Inspire Ltd) were paid directly out of Mrs. Payne's funds, as was submitted by Mrs. Lockhart-Charles, there can be no doubt that they fall within the principle identified in **Sinclair** and **FHR**; further insofar as they were not direct payments, they were clearly secret commissions which were never authorised by Mrs. Payne.

121. As a fiduciary, I accept that Mr. Coleman owed duties of loyalty pleaded at [**Statement of Claim at paragraph 81**]: see **Bristol and West Building Society v Mothew** [1998] Ch 1, 18, above. As was submitted by Mrs. Lockhart-Charles and I accept, these included a duty to act in good faith in the best interests of Mrs. Payne; not to put himself in a position where his personal interest did or might conflict with Mrs. Payne's; and not to make a secret profit from his position.

122. The payments made by Cafferata & Co, which Mr. Coleman directed and orchestrated, were clearly not made in good faith in the best interests of Mrs. Payne, but were made to line the pockets of (principally) Mr. Coleman and (incidentally) his co-conspirators. It is equally clear that Mr. Coleman's personal interest conflicted with his duty and that he made a secret profit, since Mrs. Payne was entirely unaware of the dissipation of her funds. I therefore find that in receiving those funds, Mr. Coleman was in breach of his fiduciary duties. It follows from the authorities of **Sinclair** and **FHR** that he held the funds he received on constructive trust for Mrs. Payne.

123. From the facts established, Mr. Coleman had de facto control of the monies held on resulting trust by Cafferata & Co for Mrs. Payne, because of his influence over Mr. Cafferata. Mr. Cafferata's evidence was quite candid: he did as he was directed to do by Mr. Coleman [**Transcript, p.16, l. 5-18**]. It is clear from his evidence that Mr. Coleman exercised his influence by directing Mr. Cafferata (and Cafferata & Co) as to how the trust funds should be dealt with.

124. Accordingly, as submitted by Mrs. Lockhart-Charles, in the alternative to the constructive trust arising from breach of fiduciary duty, the Court can, and does find, that Mr. Coleman intermeddled in the administration of the resulting trust of Mrs. Payne's funds, and became a

trustee de son tort. Mrs. Lockhart-Charles further contended that alternatively, Mr. Coleman was a quasi-trustee: while not formally a trustee, he had control of Mrs. Payne's monies held by Cafferata & Co. As to these propositions, see Lewin on Trusts, paras 7-017, 7-018 and 42-101. Citing from the last-mentioned paragraph:

"The principle is that a person who assumes an office ought not to be in any better position than if he were what he pretends: he is accountable as if he had the authority which has been assumed."

125. Mr. Coleman can be said to have assumed the office of trustee which was for Cafferata & Co and/or Mr. Cafferata to carry out, in that he assumed full control of the monies Mrs. Payne had paid over, and directed how they were to be dealt with. Having pretended to have authority to deal with those funds, he cannot be in any better position than if he actually were.

126. As the evidence has shown, the simple reality was, as submitted by Mrs. Lockhart-Charles and which I accept, that Mr. Coleman stole Mrs. Payne's money. Having directed her to pay it to Cafferata & Co, he procured payments to himself, to Strand and Inspire Ltd which he knew she had not authorised, and would not have authorised. I find that he did so dishonestly and fraudulently.

127. There is now extensive authority to the effect that where money is obtained by fraud or is stolen, equity imposes a constructive trust on the fraudulent recipient: Lewin on Trusts, para 7-029. Mrs. Lockhart-Charles referred the Court to two authorities:

127.1 In **Westdeutsche Landesbank Girozentrale v Islington LBC** [1996] AC 669, 716, Lord Browne-Wilkinson stated as follows:

"I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: Stocks v Wilson[1913] 2 KB 235, 244; R Leslie Ltd v Sheill [1914] 3 KB 607. Moneys stolen from a bank account can be traced in equity: Bankers Trust Co v Shapira [1980] 1 WLR 1274, 1282C-E: see also McCormick v. Grogan (1869) LR 4 HL 82, 97."

127.2 Those propositions were endorsed more recently in **Bank of Ireland v Pexxnet Ltd** [2010] EWHC 1872 (Comm), [55]-[57].

128. Accordingly, in the further alternative she submitted, which I accept, the Court has ample reasons to find that the monies received by Mr. Coleman and Strand (and possibly also Inspire Ltd, if Mr. Coleman benefited from the £100,000.00 it received) were obtained by fraud and/or were stolen, and were impressed with a constructive trust in favour of Mrs. Payne.

129. The position of Strand is essentially indistinguishable from Mr. Coleman's. As the evidence shows, Strand was Mr. Coleman's corporate creature. While it cannot be said (and is not pleaded) that Strand (as opposed to Mr. Coleman) owed Mrs. Payne fiduciary duties, it is pleaded that, insofar as Strand had any interest in the funds transferred by Mrs. Payne, they were held on constructive trust. This is a position advanced by Mrs. Lockhart-Charles which I accept.

130. Since Strand must be fixed with Mr. Coleman's dishonesty, it was fully aware that Mrs. Payne's funds were being dissipated fraudulently and/or stolen. To the extent that Strand received Mrs. Payne's funds (i.e. up to the amount of £616,037.66, being the payment into its UBP bank account), those funds were also impressed with a constructive trust in favour of Mrs. Payne. This I accept.

131. It follows that Mr. Coleman and Strand were (true) constructive trustees of the sums they respectively received out of Mrs. Payne's funds which (to the best of Mrs. Payne's present knowledge) was:

1. The sum of £1,212,500 which Mr. Coleman received; and
2. The sum of £616,037.66 which Strand received.

132. Mrs. Payne asked Mr. Coleman and Strand to return those funds; in breach of trust, they have refused.

133. Mrs. Lockhart-Charles submitted and I accept, that the basic rule is that the constructive trustee must restore or pay to the trust estate either the assets which have been lost by reason of the breach of trust, or compensation for such loss; if specific restitution is not possible, the trustee must pay sufficient compensation to put the estate back in the position it would have been in but for the breach of trust: Lewin on Trusts, para 39-010.

134. It follows then that Mr. Coleman and Strand are liable to pay over the funds of £1,212,500.00 and £616,037.66, respectively, alternatively to pay compensation in those amounts. Further Mrs. Payne is entitled to trace the proceeds of those trust funds.

135. It follows from the analysis above that:

1. Cafferata & Co held Mrs. Payne's funds on resulting trust;
2. Each of the payments made out of those funds was in breach of trust;
3. Mr. Coleman and Strand (his corporate creature) assisted each of those breaches of trust (and were dishonest in so doing);
4. Mr. Coleman and Strand received £1,212,500 (or more) and £616,037.66 respectively out of those misapplied trust monies (knowing they were being paid away in breach of trust); and
5. Mr. Coleman (who was also the controlling mind of Strand), directed and orchestrated those payments and acted dishonestly throughout.

136. It is Mrs. Payne's case that Mr. Coleman and Strand are accordingly liable for dishonest assistance or knowing receipt.

137. As submitted by Mrs. Lockhart-Charles, the requirements for dishonest assistance is authoritatively stated in Lewin on Trusts:

"The general requirements of liability for dishonest assistance are as follows:

- 1. There is a trust.**
- 2. There is a breach of trust by the trustee of that trust.**
- 3. The defendant induces or assists that breach of trust.**
- 4. The defendant does so dishonestly. "[para 40-014]**

138. Mrs. Lockhart-Charles submitted, and I accept, that Mrs. Payne's claim for dishonest assistance applies whether or not the Court should find the existence of a constructive trust. It is clear considering the following that both Mr. Coleman and Strand are liable for dishonestly assisting Cafferata & Co's breaches of trust:

1. Mr. Coleman did not simply induce or assist the breaches of trust: he procured them, directing the payments to be made.

2. Further, Strand induced and assisted each of the breaches of trust because Mr. Coleman used Strand and Strand allowed itself to be used as an integral part of his dishonest scheme: thus it was Strand which represented itself (through Mr. Cafferata) as the entity entitled to a fee of 10% of the value of the funds, and as being entitled to share in KLF's and BLA's fees; and Strand, as the 'protector' put forward by Mr. Coleman, played a continuing role in the dissipation of Mrs. Payne's funds through the asset protection scheme.
3. Mr. Coleman's dishonesty (and therefore Strand's) have already been considered above.

139. Mrs. Lockhart-Charles argued that the dishonest assister's liability, where the breach of trust is the dissipation of trust assets, is co-terminous with that of the trustee, namely to restore the trust monies to the fund. This I accept. As was stated in **Bell v Hickley** [1980] 1 WLR 1217, 1236: **"a trustee who has himself defrauded his beneficiaries by taking trust moneys for his own purposes is liable to restore the moneys he has taken... a third party who has made himself liable as a constructive trustee by assisting with knowledge of the trust in a misappropriation of trust moneys by the trustee, whether for his own benefit or for the benefit of someone else, can be in no better position than an express trustee."**

140. Applying those principles to the facts of this case:

- (1) As pointed out by Mrs. Lockhart-Charles, Mr. Coleman is liable to account in dishonest assistance so as to restore to the Trust funds the monies paid away by the breaches of trust he induced and assisted. Mr. Coleman directed each and every payment in breach of trust, and is therefore liable to restore the entire trust fund, subject only to credit for that amount of the fund which Mrs. Payne recovered from the monies sent to BLA, namely £176,515.03. Mr. Coleman's personal liability for dishonest assistance is therefore to pay the sum of £2,794,477.48 (with interest). As this liability exceeds his liability to restore the funds held by him as constructive trustee (or in knowing receipt), it follows that the Court should give judgment for the additional amount, i.e. £2,794,477.48 minus £1,212,500 = £1,581,977.48. This I accept and gave such order.
- (2) Strand is also liable to account in dishonest assistance so as to restore to the funds the monies paid away by the breaches of trust it induced and assisted. It is submitted by Mrs. Lockhart-Charles that Strand was as a matter of fact involved in every breach of trust:
 - a. It was Strand that claimed to be entitled to a share of KLF's and BLA's fees. Strand knew, through Mr. Coleman, that Mrs. Payne had not authorised the payment of either of those fees (insofar as they were even due) out of her monies. It therefore induced breaches of trust in respect of the totals of both those fees (£950,000.00).
 - b. Strand also represented itself as being entitled to a fee of £750,000.00 (though this was actually paid to Mr. Coleman), and claimed to be entitled to retain the balance of Mrs. Payne's funds (£616,037.66). Its position induced those payments in breach of trust (totaling £1,366,037.66).
 - c. Finally, while Strand did not claim to be entitled to the £604,389.00 that was sent to BLA, Strand voluntarily (through Mr. Coleman) took on

the role of 'protector' of the Trust, and in so doing played an active part in the asset protection scheme, which was the vehicle for the dissipation of Mrs. Payne's funds. On that basis, Strand either induced or assisted that payment, in breach of trust, by continuing to participate in the asset protection scheme.

I accept these submissions, and accordingly, it is held that Strand's liability is also to restore the entire trust fund, giving credit only for the sum which Mrs. Payne recovered from the monies paid to BLA; so that Strand's personal liability for dishonest assistance is also to pay the sum of £2,794,477.48 (with interest). This liability exceeds its liability to restore the funds held by it as constructive trustee (or in knowing receipt), and it follows that the Court should and did give judgment for the additional amount, i.e. £2,794,477.48 minus £616,037.66 = £2,178,439.82.

141. An unlawful means conspiracy is committed **"where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage. It is not necessary for the injured party to prove that causing him damage was the main or predominant purpose of the combination but that purpose must be part of the combiners' intentions"**: Clerk & Lindsell on Torts (21st edn) para 24-98, approved by Baxendale-Walker v Middleton [2011] EWHC 998 (QB) at [60].

142. The evidence shows and the Court finds that, Mr. Coleman and Strand conspired together to commit various unlawful acts – namely, breaches of trust and of fiduciary duty, theft and fraud – with the intention to cause damage to Mrs. Payne – since it was her funds that were the target the unlawful misappropriations.

143. The Court therefore finds that Mr. Coleman and Strand are liable in damages for all loss suffered by Mrs. Payne by reason of the unlawful means conspiracy, whether or not it was foreseeable, including consequential losses: see by analogy **Smith New Court Securities Ltd v Citibank NA** [1997] AC 254. Since Mrs. Payne has lost the entire value of the trust fund, save for the limited amount recovered from BLA, damages should be assessed in the same amount as would be required to restore the trust fund, i.e. £2,794,477.48.

144. Tracing was authoritatively described by Lord Millett in these terms in **Foskett v McKeown** [2001] 1 AC 102, 127:

"Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner."

145. Where property is held on trust, a beneficiary may choose to undertake a tracing exercise and, on completion of that exercise, assert a continuing beneficial interest in the traceable proceeds of his property. As Lord Millett stated in **Foskett** at 127, **"a beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice."**

146. Further, as was advanced by Mrs. Lockhart-Charles, where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset, or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money (including any profit made from any dealings with it): **Foskett**, above, and **FHR European Ventures LLP v Mankarious** [2016] EWHC 359 (Ch) at [32].

147. The Court finds that:

1. The monies which Mrs. Payne paid to Cafferata & Co were held on resulting trust for her.
2. The monies which were received by Mr. Coleman (£1,212,500) and Strand (£616,037.66) were impressed with a constructive trust in favour of Mrs. Payne.
3. Mrs. Payne has a continuing beneficial interest in those funds and their traceable proceeds, which will bind every person taking trust property or its traceable proceeds except for a bona fide purchaser for value without notice.

148. In practical terms, Mrs. Payne has already exhausted recovery in relation to that part of her monies that were paid away to KLF and BLA. The monies that remain unaccounted for are those that were paid to Mr. Coleman, Strand and Inspire Ltd.

149. Mrs. Payne is therefore entitled to trace the value of those funds into and through the payments received by Mr. Coleman (directly and, possibly, through Inspire Ltd) and Strand, and from those payments into any further traceable proceeds, and either claim ownership of those traceable proceeds or enforce a charge against those proceeds to secure her proprietary claims against Mr. Coleman and Strand.

150. Owing to Mr. Coleman's failure to give discovery and breach of the Court's orders, Mrs. Payne is presently unable to establish the existence and whereabouts of the traceable proceeds of those funds. The Court can and does order accounts and/or inquiries to be taken in order to establish how Mr. Coleman and Strand dealt with the payments they received out of Mrs. Payne's funds: see **FHR European Ventures LLP v Mankarious** [2016] EWHC 359 (Ch).

151. Further, the Court cannot be sure (because of Mr. Coleman's and Strand's failures to give discovery and abide by the information provision requirements of the Injunction Order) (a) whether the sum of £100,000.00 paid to Inspire Ltd was ultimately for the benefit of Mr Coleman, (b) whether any monies paid out of the funds paid to BLA (e.g. by way of annual charges) were paid away for the benefit of Mr. Coleman, and (c) whether the transfer of US\$500,000.00 used Mrs. Payne's monies. The Court therefore considers it appropriate to order inquiries as to these issues so that Mrs. Payne can establish the extent of Mr. Coleman's and/or Strand's liability to account.

152. Mrs. Payne is in principle entitled to an award of interest upon any money award in her favour. The basis and rate of interest depends on the underlying cause of action. The Court finds that it is appropriate in the circumstances. It is submitted by Mrs. Lockhart-Charles that the Court should award compound interest in equity in respect of Mr. Coleman's and Strand's liability to restore the constructive trust funds, and also flowing from Mr. Coleman and Strand's dishonest assistance.

Compound interest in equity

153. The award of interest under the equitable jurisdiction of this Court follows the position under the equitable jurisdiction of the Chancery Division in England and Wales.

154. In equity, the Court has an inherent jurisdiction to award interest as relief ancillary to equitable remedies, including the taking of an account, equitable compensation and disgorgement of profit, as laid down in **Wallersteiner v Moir (No 2)** [1975] QB 373 (CA). **Wallersteiner** has been approved and applied by the Courts of first instance and the Appellate Courts of The Bahamas: see **IOS Ltd (in liquidation) v Numeros SA** [1985] BHS J No 76. In that case, Georges CJ stated as follows at [14]:

"In Equity, a trustee who committed a breach of trust was, however, always liable to make good the trust funds with interest. Such a trustee could

also be liable to account for profits attributable to the employment of the funds and if it could not be made to appear what profits were attributable to such employment he has made to pay trade interest on them. This applied to the trustee and all those who were accomplices with him in the breach of trust... This was a necessary consequence of the obligation to make full restitution."

155. On the evidence adduced at trial the Court finds that Mr. Coleman and Strand are liable to restore the funds they received as constructive trustees (or pay equitable compensation for their value); and to account as though they were constructive trustees for their dishonest assistance, in the additional sums set out above. The Court in its discretion finds that it is appropriate to order that compound interest is paid on those sums from the dates on which they were paid away by Cafferata & Co in breach of trust, namely on various dates between March 2004 and February 2005, until payment.

156. I granted the Plaintiff costs against the First and Third Defendants on an indemnity basis. Order 59 Rule 3 of the RSC gives the court a wide discretion as to costs.

157. In **EMI Records v Ian Wallace Ltd** (1983) 1 Ch 59 it was held that the court has power in contentious proceedings to order the unsuccessful party to pay the successful party's costs on bases other than party and party common fund basis. Those other bases include orders on the indemnity basis as well as on the solicitor and own client basis.

158. Upon considering an application for costs to be awarded on a full indemnity basis Mr. Justice Rattee in **Atlantic Bar & Grill Limited v Posthouse Hotels Ltd** [2000] C.P. Rep. 32 adopted the following observations of Knox J in **Bowen-Jones v Bowen-Jones** [1986] 3 All ER 163:

"The circumstances in which an order for indemnity costs can be made, while an open ended discretion so far as the rules are concerned, is obviously one which must be exercised on judicial principles."

Having then cited various authorities, His Lordship went on to say:

'In summary, the position appears to be that, where there are circumstances of a party behaving in litigation in a way which can be properly categorized as disgraceful, or deserving of moral condemnation, in such cases an order for indemnity costs may be appropriate.'

Newman J went on to say:

"There may be cases otherwise, falling short of such behavior in which the Court considers it appropriate to order indemnity costs. The threshold of qualification which a party would appear to have to establish is that there has been, on the party to be impugned by such an order, some conduct which can be properly categorized as unreasonable, and I would add to that it can be categorized as exceptional. There are varying ways in which the course of litigation, parties to it could be categorized as having behaved unreasonable, but one would not, simply as a result of that, decide that they should pay costs on an indemnity basis."

159. In **Excelsior Commercial and Industrial Holdings v Salisbury Hamer Aspden & Johnson(a firm) and another** [2002] EWCA Civ 879, at paragraph 32 analyzed Lord Woolf analyzed the circumstances in which indemnity costs may be awarded:

“[32] I take those two examples only for the purpose of illustrating the fact that there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to Mr. Davidson’s submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances when they should not. In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.”

160. It is accepted that costs are in the discretion of the court. However, the general rule is that costs follows the event and when considering whether to order costs on an indemnity basis the Court has to take into consideration all the circumstances of the case. **Bartlett v Barclays Bank Trust Co. Ltd. (No. 2)** 1980 Ch 515 at 547.

161. Mr. Coleman and Strand failed to give discovery and abide by the information provision requirements of the Injunction Order of July 2017 which contributed to the delay and protraction of these proceedings, as well as behaviour contemptuous in nature, and which was designed to frustrate these proceedings.

162. Having taken all the circumstances of the case into consideration, including the fact that the Plaintiff’s application for costs on an indemnity basis has not been opposed, the Court ordered that the First and Third Defendants do pay the Plaintiff’s costs on an indemnity basis.

This 25th day of June , 2020

Petra M. Hanna-Adderley
Justice