Shelton and Barby
Royal Court
27th November, 2014

JUDGMENT
47/2014

Dispute arising from the termination of a business relationship relating to a claim by the Plaintiff, and counterclaim by the Defendant that there was an oral agreement between them regarding shares held on trust.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between: **BARRY SHELTON** **Plaintiff**

-and-

ROGER BARBY **Defendant**

Hearing dates: 7th, 8th and 9th October 2014
Judgment handed down: 27th November 2014

Before: Richard James McMahon, Esq., Deputy Bailiff
Jurats: C H Le Pelley, T G Snell and T J Ferbrache

The Plaintiff was not represented.
Counsel for the Defendant: Advocate G S K Dawes

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009
Loi relative aux Preuves, 1865
In the matter of the Application of Rosedale (J.W.) Investments Limited [1995] JLR 123
The Lodging Houses (Registration) (Jersey) Law, 1962
Lido Bay Hotel Limited v Attorney-General (unreported, 9 July 1996)
The Fire Precautions (Jersey) Law, 1977
Attorney-General v Barra Hotel Ltd (unreported, 19 May 2000)
The Financial Services (Jersey) Law 1998
The Drug Trafficking (Jersey) Law 1998
The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000

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Anchor Trust Company Limited v Jersey Financial Services Commission [2005] JRC 148 and [2006] JCA 040
Jackson & Ors v Thakrar & Ors [2007] EWHC 2173 (TCC)
PDM Holdings (Jersey) Limited v Rockwood Investments Limited [2010] JRC 010
The Companies (Jersey) Law 1991
The Trusts (Guernsey) Law, 1989
Terré, *Droit civil: Les Obligations*, 11th ed. (2013)
Mayo Associates SA v Bank Cantrade (unreported, 17 December 1999)
Euro-Diam Ltd v Bathurst [1990] 1 QB 1
Tinsley v Milligan [1994] 1 AC 340
The Criminal Justice (Attempts, Conspiracy and Jurisdiction) (Bailiwick of Guernsey) Law, 2006

Introduction

1. Barry Shelton and Roger Barby were in business together. The present dispute arises from the termination of their business relationship. Mr Shelton, the Plaintiff, claims that when the entire shareholding in Anchor Trust Company (Guernsey) Limited was transferred from Anchor Trust Company Limited (hereafter referred to as "Anchor") to Mr Barby, the Defendant, there was an oral agreement between the Plaintiff and the Defendant that those shares would be held on trust for them in the same proportions as their beneficial interest in Anchor. Further, the Plaintiff alleges that the parties agreed that shares representing his beneficial interest would be transferred to him by the Defendant in the event that Anchor was successful in obtaining a licence from the Jersey Financial Services Commission or that, on any subsequent sale or transfer of the shareholding, the Defendant would account to the Plaintiff. The Defendant denies that any such trust came into existence.

2. This judgment has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008:

> *"(5) A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
> *(a) the Jurats' findings and decisions,*
> *(b) any dissenting findings or decisions made by different Jurats,*
> *(c) the identity of the Jurats making dissenting findings or decisions,*
> *(d) the Bailiff's findings, decisions and directions of law and procedure, and*
> *(e) the application of his findings, decisions and directions of law and procedure to the facts.*
>
> *(6) In this section "the Bailiff" means the person presiding over the proceedings."*

The Deputy Bailiff did not sum up to the Jurats in open Court but instead indicated that the Court would reserve its judgment and retired with the Jurats, as he is permitted to do under section 14(2) of the 2008 Law.

3. In this judgment, the findings of fact are the unanimous findings of the Jurats.

Procedural background

4. Although his Cause was settled by Advocate Mark Ferbrache, throughout these proceedings, the Plaintiff has represented himself. He has previously acted in person, or as an officer of a corporate entity, in proceedings elsewhere, and that experience showed in the manner in which he presented his case. The Defendant was represented by Advocate Dawes.

5. The Plaintiff's Cause was tabled and placed on the Rôle des Causes à Plaider on 4 January 2013. A Defence and Counterclaim was tabled on 1 February 2013. (It was subsequently amended on 30 May 2014.) The Plaintiff's Defences to the Counterclaim was tabled on 1 March 2013. The Plaintiff's Réplique is dated 24 September 2013 and the Defendant's Réplique on the Counterclaim is dated 1 October 2013. The parties' respective Dupliques are

dated 24 and 25 October 2013, although the Plaintiff's document really constitutes his responses to *Exceptions de Forme* raised in the Defendant's Réplique in the Counterclaim. The Plaintiff has also answered two other sets of *Exceptions de Forme* raised by the Defendant by way of documents dated 20 March 2013 and 30 May 2014.

6. The Plaintiff's pleaded case rests squarely on whether or not the alleged oral trust has been established. If it has, then the relief sought of an account of the profits made when the Defendant sold the shares in question in 2007 and payment to the Plaintiff of such amount owing to him follows, subject only to whether the Defendant's Counterclaim affects the amount alleged to be owed. That Counterclaim has been raised solely as a shield and not a sword. If the Plaintiff's action fails, the Counterclaim falls away, but if it succeeds, it is pursued by way of set-off.

7. The Defendant's primary defence is that the alleged oral agreement between the parties did not occur at all. Contrary to the Plaintiff's assertions that the circumstances surrounding the share transfer and the subsequent sale of the book of business of Anchor Trust Company Limited support his contention that the oral agreement existed, the Defendant points to the fact that these were agreements reached by them to enable the Plaintiff to extract what he could from what was, and became, a failing business. Alternatively, the Defendant submits that the Court should not lend its aid to the Plaintiff because his action is founded upon an illegal act (ie, the principle of *ex turpi causa non oritur actio*).

8. At the trial, evidence was given by the Plaintiff and he also tendered two short Affidavits of Benjamin Peter Bryant, sworn on 19 December 2012 and 16 September 2014, which had been served as hearsay evidence pursuant to a notice under the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009. The Defendant gave evidence, and also called Roberto Pizzuti and, to Christine Barby.

General directions

9. The Deputy Bailiff reminded the Jurats of their respective roles: the Deputy Bailiff remains the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed that they must accept his directions on the law and follow them.

10. The Deputy Bailiff directed the Jurats that the burden of proof in respect of his action is on the Plaintiff throughout. The standard of proof is the civil standard of the balance of probabilities and the Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Insofar as the Defendant sought to establish any fact, the burden of proof rested on him to prove it to the same civil standard. If it proved necessary to do so, when considering the Defendant's Counterclaim, the Deputy Bailiff reminded the Jurats that, for the purposes of the burden of proof, they should treat the Defendant as the plaintiff and the Plaintiff as the defendant.

11. The Deputy Bailiff further directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the witnesses, and which evidence they treated as reliable, and which they considered was not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the speeches they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts of this case, it is the Jurats' judgment alone that counts.

12. The Deputy Bailiff emphasised the need for the Jurats to have regard to the cases pleaded by the parties because these formed the basis of the dispute between them. The key issue for them was to decide whether the parties reached the oral agreement in 2003 as alleged by the

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Plaintiff or not. Evidence of events before and after the time of the alleged agreement might be regarded by them as relevant as to the credibility of a witness and so, in turn, lend support to or undermine the competing assertions about that agreement. The Deputy Bailiff reminded the Jurats that Article 37 of the *Loi relative aux Preuves*, registered on the Records of the Island on 8 July 1865, provides that good faith is always presumed and that the burden lies of he who asserts differently to prove it.

The facts

13. The Plaintiff qualified as an accountant in 1969. He also holds a degree in law and is an Associate of the Chartered Institute of Bankers. He practised as an accountant in Jersey under the style Shelton & Co. In 1993, he caused Anchor Trust Company Limited, of which he was a shareholder, to be incorporated in Jersey and ran a small trust company business through it. He also went into the hotel business and at one stage had interests in seven hotels, making him the third largest hotelier in Jersey.

14. The Plaintiff has been involved in various proceedings in Jersey. On 30 March 1995, the Royal Court of Jersey granted an application that he and several companies owned by him be declared *en désastre*, although that order was subsequently raised or recalled (see *In the matter of the Application of Rosedale (J.W.) Investments Limited* [1995] JLR 123). On 29 November 1995, the Royal Court of Jersey convicted the Plaintiff and a company of which he was the alter ego, Lido Bay Hotel Limited, of offences under the Lodging Houses (Registration) (Jersey) Law, 1962. These convictions followed pleas of not guilty, and the Plaintiff accepted that the evidence he gave to the Court at the trial must have been disbelieved. The convictions, and the sentences imposed on the Plaintiff, were all upheld by the Court of Appeal, which expressly found the following findings made by the Royal Court justified (*Lido Bay Hotel Limited v Attorney-General* (unreported, 9 July 1996), at p. 6):

> "*The Company, of whom Mr. Shelton, as we have said, is the alter ego, acted in full knowledge of the law. Mr Shelton was not a tyro. He had twenty years' experience. His companies were strapped for cash. He could not carry out the development (be they the greater or the lesser version proposed) and decided to move the guests out and turn the property over to a different form of earning potential.*
>
> *He must have known that the hotel was not registered. The warning signs were as clear as ever they could be.*"

A different company with which the Plaintiff was involved, Barra Hotel Ltd, was convicted of offences under the Fire Precautions (Jersey) Law, 1977 and, in its sentencing remarks (*Attorney-General v Barra Hotel Ltd* (unreported, 19 May 2000), at para. 3), the Royal Court of Jersey commented:

> "*The defendant company through its director, Mr Shelton, did not admit the infractions and signally failed to express any regret or remorse for the risks to which residents and others had been exposed. Mr Shelton drew the Court's attention to the financial circumstances of the defendant company and told us, in effect, that it was unable to pay any fine.*"

15. The Defendant practised at the Bar of England and Wales in the late 1960s and the late 1970s. Inbetween, he was the founder and shareholder of a mutual fund based in Switzerland. After a short spell breeding thoroughbred horses, the Defendant acted as legal adviser to a bank and identified an opportunity to establish a small business offshore. He caused Yale Corporate Services Limited (hereafter referred to as "Yale"), of which he was the shareholder, to be incorporated in Jersey in 1983. His wish to re-locate his home to Jersey at that time was thwarted by the rules then in place regarding residence, so instead he became permanently resident in Guernsey in 1988.

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16. In the mid-1990s, the Defendant engaged the Plaintiff as his personal accountant and also to do the books and accounts of Yale. That is how they became acquainted.

17. By the late 1990s, there were moves afoot in both Jersey and Guernsey to introduce further legislation affecting regulatory changes for the types of business with which the Plaintiff and the Defendant were involved. The Defendant recognised that, although Yale was moderately successful and gave him a modest profit, the costs of the new regime would have an adverse impact. Further, because the Defendant's main business interests at the time were not in Jersey, he found that the Plaintiff was interested in purchasing Yale to enable Anchor to expand to improve its own viability under the new regulatory framework. The Plaintiff valued Yale at approximately £300,000, being approximately one and a half times the value of one year's fee income. Rather than sell Yale for cash, the Defendant suggested a share exchange. In late 1998, the Defendant became a 20% shareholder in Anchor in return for his shareholding in Yale and became a director of Anchor, in respect of which he received fees of £60,000 per annum, consistent with the fees received by other directors.

18. The Defendant increased his shareholding in Anchor so that, by 2002, he owned 41.42% of the shares and the Plaintiff owned the other 58.58%. Both of their shareholdings were held indirectly through nominee companies. Declarations of trust of those respective shareholdings were made by the two nominee companies on 28 February 2002.

19. In accordance with the Financial Services (Jersey) Law 1998, as required, Anchor Trust Company Limited applied by 2 February 2001 to be registered to carry on trust company business. Accordingly, it benefited from the transitional provisions permitting it to carry on business pending determination of its application. During the course of the Jersey Financial Services Commission's consideration of that application, on 14 November 2002, under Article 30 of the 1998 Law, it appointed Stephen Platt as an inspector to investigate the affairs of that company. Production orders had also previously been served by the Jersey Financial Crimes Unit on Anchor under the Drug Trafficking (Jersey) Law 1998 in relation to certain of its clients and, in particular, Less Adderson who had been arrested in England for conspiracy to import controlled drugs. Mr Platt's draft final report, to which more detailed reference will be made in due course, was supplied under cover of a letter dated 22 June 2004.

20. In the meantime, the Defendant identified an opportunity to acquire a Guernsey-based trust business operating as a small group of companies with Balchan Management Limited as its principal entity (hereafter referred to as "Balchan"). The main beneficial owner of that business was Harry Ball, a person who the Defendant had known for around a decade. Although Mr Ball had envisaged working into his mid-70s, the introduction of licensing in Guernsey pursuant to the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 (hereafter referred to as "the Fiduciaries Law") led to him being prepared to sell Balchan. The 2000 Law was brought into force on 1 April 2001. Under the transitional provisions in section 59, a Bailiwick company such as Balchan was deemed to be a licensed fiduciary provided it had made an application for a fiduciary licence before 1 June 2001. Although the precise details of the licensing process have not been disclosed, Balchan must have made its application within the prescribed time.

21. The Defendant and the Plaintiff discussed the opportunity of acquiring Balchan, although the Plaintiff acknowledged that the Defendant was the prime mover in relation to this acquisition. They decided that it would be a good acquisition for Anchor. The Plaintiff regarded it as a good investment, stating that they "*had secured the business at a bargain price*", and recognised that there were tax advantages in structuring the acquisition in such a way that the cost was paid from the profits of the business. The terms proposed were that the purchase price to Mr Ball would be met through entering a consultancy agreement with him, under which Mr Ball would be paid an annual amount, increased each year to reflect positive changes in the cost of living index. The Defendant also saw the acquisition of Balchan as a means to obtain office premises in Guernsey.

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22. As a vehicle to acquire Balchan, Anchor incorporated Anchor Trust Company (Guernsey) Limited on 20 July 2001 as a wholly owned subsidiary. A Business Sale Agreement was then executed on 14 August 2001 under which all the shares in Balchan were acquired by Anchor Trust Company (Guernsey) Limited. The date of completion was modified under a novation in February 2002, by which the liabilities, obligations and rights of Anchor Trust Company (Guernsey) limited were novated to Balchan, a new consultancy agreement with Mr Ball was made, this time between Balchan and him, rather than with Anchor Trust Company (Guernsey) Limited. The novation agreement also made provision in relation to an ongoing, but time-limited, role as a director of Balchan for Simon Chandler (albeit that he then resigned from office on 27 September 2002). In effect, the purchase price for Balchan would thereafter be met from the income of that company itself. Mr Ball resigned as a director of Balchan on 15 February 2002. The Defendant was appointed as a director from the date Balchan was first acquired. The Plaintiff was never a director of Balchan and indeed acknowledged that he had never had any day-to-day involvement in Balchan.

23. From the Report and Financial Statements of Anchor for the year ended 30 April 2002, the unquoted investment represented by Balchan is recorded as a fixed asset of £109,110. The following year, the Report and Financial Statements recorded at Note 8:

> "*A wholly owned unquoted investment in Balchan Management Limited, which is not registered under the Financial Services (Jersey) Law 1998, was transferred to current assets in accordance with the provisions of FRS 2 where an interest in a subsidiary is held with a view to subsequent resale rather than be shown as a fixed asset. This adjustment has no effect on the profit and loss account. The carrying value of the investment in the balance sheet is £176,610 (2002: £109,110). The investment was sold in July 2003, in excess of cost, to Mr R. Barby (director and a beneficial owner of Anchor Trust Company Limited).*"

By the 2004 Report and Financial Statement, the relevant note explains that Balchan "*was sold in excess of book cost during the year to Mr R. Barby, director*" and the Defendant's director's loan had seen his status as a creditor of the company reducing from £218,591 in 2003 to just £982.

24. The profit and loss account of Anchor in its 2002 Report and Financial Statement records income of approaching £2 million for 2001 and £1,753,058, of which £1,472,702 was in respect of management fees, for 2002. For each year, directors' remuneration of £237,500 and £206,792 respectively was paid. Dividends of £750,000 and £550,000 were paid in respect of those years. The following year saw turnover down to £1,593,118 and profits and dividends falling significantly, perhaps as a consequence of a large increase in administrative expenses. For example, the dividend was down to £200,000. In the Report and Financial Statements for 2004, the 2003 figures were restated. This was the year in which Anchor's interest in Balchan was sold. Through this restatement, turnover dropped further to £1,234,627, resulting in a loss being incurred, but there had been recovery in 2004 so that turnover went up to £1,846,604, producing a small profit, from which a dividend of £50,000 was paid. For 2005, there was insufficient profit to be able to declare a dividend, although the company's income from management fees had held up reasonably well at a little over £1.5 million.

25. The Report and Financial Statements of Balchan for the year ending on 31 December 2002 records that, on 10 May 2002, the company's authorised share capital was increased by 75,000 ordinary shares of £1 each, issued at par. This was a cash injection from Anchor. As noted in the detailed profit and loss account, the fee income receivable went up from £283,188 in 2001 to £414,060, although the profits before taxation reduced from £49,000 to £4,956, largely as a result of paying consultancy fees of £66,279. By the following year, fees receivable had increased to £617,678 and the profit to £69,540. Directors' remuneration for that year was £120,000, up from £4,500 in 2002. By the end of 2004, the Defendant's wife,

Christine, had become a director of Balchan (with effect from 29 April), fees receivable had dropped to £572,844, directors' remuneration to £100,000 and the profit was slightly down at £68,136.

26. The Report and Financial Statements of Balchan for the year ending on 31 December 2006 shows that fees receivable in 2005 had risen to £769,843 and in 2006 to £1,321,392. Profits had risen to £146,940 in 2005 and to £392,899 in 2006. Directors' remuneration had also risen to £195,000 in 2005 and to £360,000 in 2006. By this time, Mr Pizzuti was also a director of Balchan. The document further records:

> "*During 2005, the Company acquired a substantial part of the business of Anchor Trust Company Limited, a company registered in Jersey. In December 2005, the company also purchased the business of Atlantic Western Management Limited, a Jersey registered company. Income attributable to this acquisition has accrued from 1 January 2006.*"

27. The categorisation of Anchor as a "high risk" applicant by the Jersey Financial Services Commission and its decision to appoint Mr Platt as an inspector showed that the process was likely to be a lengthy one. Because the licence application of Balchan and Anchor Trust Company (Guernsey) Limited to the Guernsey Financial Services Commission was not progressing as quickly as some others, the Defendant wondered whether the hold up was because of the difficulties their parent company, Anchor, was experiencing in Jersey. The Defendant raised the issue of severing Balchan's links from Anchor in May 2003. These discussions took place at the offices of Anchor in Jersey. The crux of this case is whether or not, in agreeing to the transfer of the interest in Balchan to the Defendant, the Plaintiff extracted an agreement that the shares transferred be held on trust for him, which is an issue to which we return in due course.

28. The shareholding in Anchor Trust Company (Guernsey) Limited was transferred from Anchor to two nominees of the Defendant, who made declarations of trust in his favour dated 4 June 2003. On the same day, albeit the letter was dated 3 June 2003, the Defendant wrote to the Deputy Director of Fiduciary Services and Enforcement at the Guernsey Financial Services Commission confirming that the severance he had undertaken to achieve had been effected. The Plaintiff accepted he was party to this information being supplied to the Guernsey Financial Services Commission.

29. There were clearly further discussions with the Deputy Director, who then wrote to the Defendant on 24 June 2003 indicating that the Commission "*would be prepared to grant full fiduciary licences … once [the] remaining links with Anchor Trust Company (Jersey) Limited [sic] have been severed*", adding, as the Defendant had requested:

> "*I should like to emphasise that, in making this decision, the [Assessment] Committee did not form any view on the fitness and propriety of Anchor Trust Company (Jersey) Limited or its principals, as it did not have the information or the need to do so. This decision does not therefore reflect on the "licenseability" of that business, which is entirely a matter for the Jersey Financial Services Commission.*"

A further letter dated 7 July 2003 was received by the Defendant at Balchan from the Deputy Director in which the grant of licences was confirmed, with the fee based on turnover of £462,000, being in the middle fee band, specified.

30. A ledger entry of Anchor in respect of the Defendant's loan account recorded that on 30 June 2003 £176,611.40 was debited from the account, with the narrative being "*Sell Balchan Management Limited – <u>Sold to Roger Barby</u>*". This amount reflects the purchase price associated with the transfer of the shares in Anchor Trust Company (Guernsey) Limited from Anchor into the names of the Defendant's nominees.

31. At around this time, Balchan also bought the book of business previously owned by Reginald Vian. The cost was £150,000 and was payable in differently sized tranches over a period of three years.

32. The Defendant stopped drawing any director's remuneration from Anchor at this time and regarded the acquisition by him of Balchan, for which he was responsible, as marking a severance between his business interests and those of the Plaintiff and Anchor, although he continued to be a shareholder in the latter and remained a director. The Plaintiff viewed it as a severance on the surface only, designed to demonstrate that he could not be regarded as a controller of Balchan, thereby facilitating the obtaining by it of the fiduciary licence for which it had applied.

33. By 2004, Anchor knew that it had serious problems with its application to the Jersey Financial Services Commission. This was a topic discussed from time to time by the Plaintiff and the Defendant. Those discussions led to a meeting at the Bohemia restaurant in Jersey on 1 September 2004. That meeting was also attended by Ben Bryant, who worked for Anchor and had been appointed as a director on 11 June 2004, and Steve Gidley, a compliance expert engaged by Anchor.

34. Prior to that meeting taking place, the parties had received the draft final report of Mr Platt. The content of that report was so negative towards Anchor that it was highly likely, if not inevitable, that its application for registration with the Jersey Financial Services Commission would be rejected. The whole content of that report speaks for itself but, by way of example, the first entry under the Executive Summary stated:

> "*Barry Shelton, the Managing Director and principal shareholder of Anchor Trust is a dominant individual whose influence within the business appears to be largely negative from a compliance and risk management perspective.*"

35. There was also a significant number of individual findings made by the inspector about the Plaintiff and how he failed to meet the standards required by the rules in place in Jersey, eg, in relation to suspicious transaction reports. The Plaintiff was the Money Laundering Reporting Officer of Anchor. The inspector stated:

> "*In my opinion, this is another example of Shelton failing to deal with the JFSC in an open and co-operative manner, in breach of section 6 of the JFSC Trust Company Business Codes of Practice. Shelton's lack of candour on the important issue of STR's evidences a lack of integrity in breach of section 1 of the JFSC Trust Company Business.*"

and further commented:

> "*The answers [in interview] provided by Shelton are unsatisfactory. They display what can best be interpreted as naivety for a man with experience of the type that he claims. Alternatively his approach can be seen to yet again demonstrate an unwillingness to be open and co-operative with the JFSC, in breach of section 6 of the JFSC Trust Company Business Codes of Practice. His answers also indicate a certain complacency about the manner in which companies and corporate services can be misused which I do not believe is appropriate for a person discharging the role of Managing Director, Compliance Officer and MLRO. In this regard Shelton did not display an appropriate level of competence in breach of section 3.1.1 of the JFSC Trust Company Business Codes of Practice.*"

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36. The inspector's report also commented that "*Shelton can ride rough shod over supposed due diligence procedures*" and that he "*appears to do as he pleases, notwithstanding compliance procedures*". It stated that:

> "*The concentration of power at Anchor rests with Shelton. This is not conducive with effective corporate governance or to effective risk control.*
>
> *I suspect that the only director who could have any degree of meaningful influence over Shelton would be his fellow shareholder, Barby. His influence on a day to day basis is virtually non-existent. He is said to be present for one day in every six weeks and also said to attend 50% of board meetings. Shelton's power at Anchor has been enhanced through his appointment as the Compliance Officer and MLRO. As a result I do not believe that Anchor has robust arrangements to guard against financial crime in breach of section 3.1.4 of the JFSC Trust Company Business Codes of Practice.*"

37. Anchor responded to the invitation to comment on Mr Platt's report by sending an 88 page document on 30 July 2004.

38. Against that background, the discussions between the Plaintiff and Defendant and their colleagues and advisers sought to identify an exit strategy in the event that the application to the Jersey Financial Services Commission was rejected. These discussions were intended to plan ahead rather than be faced at the time of rejection with the imminent closure of the business of Anchor and a fire sale. The conclusion reached was that Balchan would purchase as much of the book of business of Anchor as it could with the terms being that Anchor would retain any fees pre-paid in respect of the year in which the purchase took place (assumed to be 2005), which the parties accepted was typical for agreements of this nature in the Channel Islands at that time.

39. On 13 September 2004, the Director-General of the Jersey Financial Services Commission wrote to the Plaintiff at Anchor indicating that he was minded to recommend to the Commissioners that the application for registration be rejected. The letter invited, within a period of one month, any representations Anchor wished to make as to why that recommendation should not be made and explained the further rights of review available.

40. On 15 November 2004, the Plaintiff and the Defendant, as shareholders in Anchor, resolved that the Plaintiff would transfer 10% of the shares in the company to Mr Bryant. The effect of this would have been to reduce the Plaintiff's shareholding so that he was no longer the majority shareholder. In the event, the transfer of any shares to Mr Bryant did not take place.

41. On 24 November 2014, the Defendant wrote to the Guernsey Financial Services Commission to enquire whether the letter from the Director-General of the Jersey Financial Services Commission indicating that the recommendation in respect of the application of Anchor was likely to be negative had any impact on him in his position as the principal of Balchan. As a result of there being no view taken by the Guernsey Financial Services Commission about such matters, the inference drawn is that it did not require any change in status on the part of the Defendant, and he continued to be a director of Anchor for a few more months.

42. The Plaintiff and the Defendant attended a hearing before the Board of Commissioners of the Jersey Financial Services Commission on 12 January 2005. That hearing concluded on 2 February 2005. A letter dated 4 March 2005, which was a Friday, was sent to the Plaintiff at Anchor Trust Company Limited by the Chairman of the Jersey Financial Services Commission informing the company that the Board of Commissioners had decided to refuse the application for registration to conduct trust company business. That letter indicated that written reasons would be sent in due course.

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43. By late that same afternoon, an officer of the Jersey Financial Services Commission sent an e-mail to Mr Bryant requesting attendance at a meeting on the following Monday at either 10 am or 3 pm. The Subject field stated "*Issue of Directions*". Mr Bryant forwarded the message to the Plaintiff immediately on receipt.

44. On 7 March 2005, the Defendant flew to Jersey for an urgent meeting of the board of Anchor. Mr Bryant, who by that time was the managing director, was not present. The Plaintiff had everything ready for the Defendant to sign. The Minutes of that meeting show that it took place at 11.30 am. The meeting resolved:

> "***That*** *the Management and Control of all client companies and Trusts under the control of Anchor Trust Company Limited be transferred to Balchan Management Limited of Old Bank Chambers Grande Rue, St Martins, Guernsey with effect from 1pm today …*
>
> ***That*** *all of Anchors Liabilities and Assets be assigned to Shelton & Co with immediate effect*
>
> ***That*** *the balance of funds held within the Anchor office Accounts in the sums of £190,000.00 and US$148,000.00 be transferred to Shelton & Co Bank Accounts for value today.*
>
> ***That*** *the following dividends be declared to the shareholders of the Company for value today:*
>
> *£82,840.00 to Nat West Guernsey re Mr R Barby*
>
> *£117,160.00 to First Direct Bank re Mr B Shelton*".

The clear inference is that the shareholder directors of Anchor Trust Company Limited chose to meet to give effect to the agreement in principle that had been reached at the meeting on 1 September 2004 and, at the same time, to decide how to deal with the remaining assets of the company by way of declaring a dividend and transferring away its remaining funds to the Plaintiff's accountancy practice before they attended at the Jersey Financial Services Commission that afternoon.

45. The meeting at the Jersey Financial Services Commission took place a few minutes after 3 pm that day. The Deputy Director-General served on Anchor and its directors a set of directions in respect of "*the orderly winding up or sale of the trust company business*". These included the immediate appointment of two partners of Deloittes as co-signatories. A further requirement was that a Cessation of Business Plan needed to be provided by 7 April 2005.

46. Anchor lodged its notice of appeal against the refusal of the Jersey Financial Services Commission on 9 March 2005. The matter came before the Royal Court of Jersey on 23 March 2005, at which time it was also seized of a Representation dated 16 March 2005 made by the Jersey Financial Services Commission complaining about the failure to adhere to the directions issued on 7 March 2005. A number of undertakings were given to that Court, which included:

> "*Mr Barry Shelton shall swear and file an Affidavit by close of business 30th March 2005 setting out with full particularity:-*
> *(1) the terms of all agreements, whether written or oral, between:-*
> *i. any of the Anchor Companies and Shelton & Co;*
> *ii. any of the Anchor Companies and Balchan;*
> *iii. any of the Anchor Companies and Mr Shelton or his nominee;*
> *iv. Balchan and/or Mr Roger Barby and Mr Shelton or his nominee*

> *entered into since 1 August 2004: specifying all consideration or "cause" passing, together with all past or agreed future movements of assets and/or liabilities between any two of those specified individuals or entities in relation to the said agreements …*"

47. At this time, the Defendant and Mr Pizzuti on behalf of Balchan were in discussions with the Guernsey Financial Services Commission about its acquisition of the trusts and companies administered from Anchor. The letter from the Director of Fiduciary and Intelligence Services dated 30 March 2005 highlighted that the benefit of this arrangement appeared to be to suit the interests of the shareholders of Anchor in divesting that company of its business rather than the focus being on the benefit to Balchan in accepting it. He bemoaned the fact that Balchan had already executed the deeds appointing it as the new trustee before discussions had taken place with the Commission and before the directors had inspected the files associated with those appointments. He noted that the consequences for Balchan, in terms of numbers of entities being administered, would be an effective tripling of its business.

48. On 30 March 2005, the Plaintiff swore the Affidavit he had undertaken to the Royal Court of Jersey to lodge in the appeal proceedings of Anchor. By way of explanation, the Plaintiff deposed to his understanding of the basis of the agreement to transfer to Balchan the business of Anchor as follows:

> "*The "cause" or consideration for this transfer was discussed in the context of the present commercial climate for the trust industry in Jersey. The sale of books of business by smaller trust companies such as Anchor has become difficult to negotiate owing to the regulatory cost to the purchaser of assimilating the business acquired. Sale proceeds of one year's income are, so far as I am able to ascertain not unusual. Anchor therefore provisionally agreed with Balchan that its consideration would be Anchor's right to keep all of the fees for 2005 paid in advance (e.g. registered office fees, directors' fees and trustee responsibility fees) even though the responsibility for such work would be transferred to Balchan. As at the 4th March 2005 those fees turned out to amount to £461,006 … I must point out however, that not all of Anchor's business has been transferred to Balchan, for example where the prior consent of the protector of a trust is required.*"

49. The agreement between Anchor and Balchan for the transfer of the parts of the former's business to the latter crystallised into a written agreement dated 4 April 2005. That agreement recites that it reduces into writing the oral agreement made between the Plaintiff and Defendant on behalf of their respective companies on or about 1 September 2004. At around this time, the Defendant resigned as a director of Anchor. Save for the Plaintiff, the other directors of Anchor had also resigned by May 2005.

50. Mr Pizzuti, as a director of Balchan and its MLRO, met the Plaintiff just the once in the aftermath of the agreement for Balchan to acquire some of Anchor's former clients. Nothing was said to him by the Plaintiff, or anyone else, about the Plaintiff having any interest in Balchan. Mr Pizzuti and a representative from a regulatory and compliance consultancy firm that assisted with transfers of business between jurisdictions, reviewed the business subject to the transfer agreement to ensure that it was suitable for Balchan.

51. On 29 April 2005, Anchor executed an agreement with Herald Trust Company Limited, to which the Plaintiff and the Defendant were also parties, under which the remainder of Anchor's business was sold. The consideration given was stated to be "*a sum equal to one third of the gross income received by the Purchaser from Clients during the period of 36 months following completion*". The Plaintiff has confirmed in writing that £189,184 was received from Herald Trust Company Limited. A payment of £40,000 also fell to be made by Herald Trust Company Limited to Anchor by 23 December 2005 as a contribution towards the rent of its existing premises. The Plaintiff admitted that he did not account to the Defendant, who remained a shareholder of Anchor, for these monies when he received them

because it was at that time that the Defendant had refused to pay anything to him arising from the Balchan sale.

52. At around that time, Mr Pizzuti had a telephone conversation with Mr Bryant because there were concerns the latter was seeking to persuade former clients of Anchor not to move to Balchan, but instead to move to Herald Trust Company Limited. Mr Bryant's employment with Anchor ceased in May 2005 and he immediately commenced employment with Herald Trust Company Limited. During that conversation, nothing was said by Mr Bryant about the Plaintiff and the Defendant being business partners in Balchan.

53. A fax dated 16 August 2005 on Balchan headed paper was found by the Defendant's wife within the boxes of paper at their home. The Plaintiff suggested that this was a forgery because he had not received it and it purported to be sent to him at "*Herald Trust*", with which he had no connection, and did not have on its face the facsimile number to which it was sent. Further, unlike the practice the Plaintiff would have followed, it did not have attached to it any transmission report. The evidence given by Mrs Barby was that she did not even know if the document had been transmitted. The reference on it appears to show that it was typed by Emma Littlewood, which was also confirmed by Mr Pizzuti. It was simply a document found within the office at the time the Defendant sold Balchan, which had been put into boxes and moved to their house. She confirmed she had never sought to contact the Plaintiff at Herald Trust Company Limited.

54. When Balchan acquired business from Atlantic Western Management Limited, another trust company business in Jersey, pursuant to terms set out in an offer letter sent by the Defendant dated 23 August 2005, under which the purchase price was 125% of the fees paid in the twelve months preceding the transaction, Mr Pizzuti and the same regulatory and compliance representative carried out due diligence. As a consequence, Balchan acquired an additional 50 clients or thereabouts. Because Balchan had increased its business through this acquisition and the earlier acquisition from Anchor, it expanded its workforce by approximately three employees.

55. The Royal Court of Jersey dismissed the appeal brought by Anchor on 27 October 2005 (*Anchor Trust Company Limited v Jersey Financial Services Commission* [2005] JRC 148). It is unnecessary in this judgment to rehearse in any detail the reasoning of that Court in reaching its conclusion. One matter touched on, though, was the failure by the Plaintiff to answer accurately the question on his personal questionnaire "*Have you at any time during the last 10 years had your property declared en désastre …?*", to which the Plaintiff had answered "*No*", and which the Plaintiff had sought to explain away as insignificant because he had been advised that the recall on the same day could be treated as if it had never happened. The Court stated (at para. 164):

> "*It should have been obvious to any applicant that, if one had been declared en désastre (even for a day) the true answer to the question (have you ever been declared en désastre?) is "Yes, but it was recalled the same day". To answer simply "No" is both untrue and misleading. Even where a désastre has been recalled the same day, we could well understand the Board wishing to make some inquiry into the circumstances of the declaration of désastre in order to see if there was anything untoward which might influence its decision upon the suitability of the person in question to be involved in trust company business.*"

Apart from what were described as "*some minor matters*", the Court concluded that the findings of fact of the Board of Commissioners were reasonable, as was its conclusion, adding that the Jurats had concluded that refusal was "*the decision which they themselves would have reached*" (para. 190).

56. A further appeal to the Jersey Court of Appeal was dismissed on 17 March 2006 (*Anchor Trust Company Limited v Jersey Financial Services Commission* [2006] JCA 040). The Plaintiff appeared on behalf of Anchor. All 18 grounds of appeal advanced by him, covering procedural unfairness and reasonableness, were rejected. Vos JA (as he then was) delivering the judgment of the Court commented "*I am able also to say, in common with the Jurats in the Royal Court, that I would have reached the same decision as the Board if I had been in its position*" (para. 124).

57. On 9 July 2007, the Defendant sold his shares in Anchor Trust Company (Guernsey) Limited, and with them his interest in Balchan, to Fort Management Services Limited. The agreement stated that the purchase price for these shares would be £3,303,480, albeit that there might be some adjustment by reference to the net asset value of the company at completion. In the event, the Defendant agreed with Fort Management Services Limited that the price should be reduced and so received a total of £2,405,000 for those shares. The schedule of payments made to the Defendant extended into 2012.

58. On 29 August 2007, the Plaintiff wrote to the Defendant. In his letter he referred to the transfer of the legal title to Anchor's interest in Balchan having been passed to the Defendant at cost and that "*you assured me that any direct or indirect interest I had at that time would be held in trust by you for me*". The Plaintiff, therefore, indicated that he looked forward to hearing from the Defendant as to how the latter proposed "*to allocate the funds you received on the sale between you and me/Anchor*". No response was received from the Defendant.

59. Both the Plaintiff and the Defendant were involved in different ways in a very substantial piece of litigation in London, in the Technology and Construction Court, which resulted in a very long and detailed judgment being handed down by HH Judge Thornton QC on 10 October 2007 (*Jackson & Ors v Thakrar & Ors* [2007] EWHC 2173 (TCC)). The Plaintiff explained that he was tired after this experience and the battle he had fought with the Jersey Financial Services Commission and so had little appetite to pursue the Defendant further at that time.

60. That judgment, however, also contains a number of findings about the evidence given in the case by the Plaintiff. At para. 183, reference was made to "*how unreliable Mr Shelton's evidence was*". The Plaintiff acknowledged that the judge made critical comments about his evidence at paras. 343-346, including (at para. 345):

> "*Mr Shelton's attitude to shareholder loan entries in Glen's accounts is very good evidence of the fact that these entries recorded fictitious or non-existent loans in the first place, which would be a likely consequence of everything being beneficially owned by one person.*"

In relation to an indication by the Plaintiff that he would produce some further correspondence, which he then failed to do, the judge concluded (at para. 370):

> "*Mr Shelton never attempted to provide any such copies subsequently. I am satisfied that no such letters were ever written by Mr Shelton and that his reference to producing them at a later stage was a smokescreen invented due to his being under pressure when giving evidence because of the evasions and untruths he was having to give. He was, in other words, fobbing me and the claiming Parties off until he ceased to give evidence and then he would forget all about this correspondence.*"

Other examples of critical comments are at para. 416 ("*That evidence was yet another example of Mr Shelton deliberately turning a blind eye to the obvious when giving his evidence*") and para. 693, where the Plaintiff was described as having "*been less than forthcoming*". Finally, in relation to another part of his evidence, the judge stated (at para. 750):

> "*In assessing the accuracy of Mr Shelton's evidence and statement to the effect that a [sic] oral notification or oral notifications were given to Tesco prior to the appointment of the administrators, I take account of the fact that Mr Shelton's evidence generally about the circumstances in which the administrators were appointed and about his motivation for adopting or acquiescing in that appointment was lacking in candour and, at times, evasive. I am not therefore prepared to accept his uncorroborated evidence about this important matter, based as it is on an assertion that a conversation had previously taken place. Furthermore, the wording of the e-mail, couched in terms which suggests that it is the first intimation that Mr Shelton had given Mr Barby of the appointment, amounts to an admission by Mr Shelton that no previous notification had been given.*"

61. The Plaintiff received a tax refund of £50,716.46 from the States of Jersey in respect of Anchor on 8 November 2007. The Plaintiff did not inform the Defendant about this receipt and has not accounted to him for it.

62. On 20 January 2010, the Royal Court of Jersey gave judgment in an appeal from a decision of the Master in *PDM Holdings (Jersey) Limited v Rockwood Investments Limited* [2010] JRC 010 (which included a similar action brought by the same plaintiff against Aquarelle Investments Limited) in respect of an unless order relating to costs payable and the provision of security for costs. The claims were for reimbursement of monies paid out from Anchor Trust Company Limited through its banking arrangements. Anchor had assigned the benefit of the claims to the plaintiff, of which the Plaintiff in the present case and a Mr M Power were the directors, because Anchor "*did not and was not able to have a bank account*" (para. 13), albeit that this assignment was apparently made "*without any consideration or other terms*" (para. 5). PDM Holdings (Jersey) Limited did not have any assets other than the benefit of those claims and had been created for the specific purpose of bringing them. The actions were started on 2 November 2007 and October 2008 respectively. The two directors of the plaintiff company represented it on the appeal. The appeal was dismissed.

63. Anchor was struck off the Register of Companies in Jersey by virtue of Article 205 of the Companies (Jersey) Law 1991, as amended, and dissolved on 1 October 2010.

64. The Defendant received a letter dated 2 November 2010 from a firm of English solicitors retained by the Plaintiff referring to the sale of Balchan and the need for the Defendant to account to the Plaintiff in full for all sums due to him arising out of the sale, which was put at 58.58% of the net sale proceeds. That letter also stated:

> "*The agreement between you and our client was that if Anchor were able to obtain the requisite licence in Jersey the shares in Balchan would be transferred back into their previous ownership for the purpose of legal title, being you and our client. This did not transpire to be the case and it appears that Anchor ceased trading in March 2005.*"

The issues

65. The main issue for determination in this case is whose evidence is accepted and whose is rejected. This arises because the Plaintiff's case is founded on an alleged oral trust agreement. The Plaintiff's contention that this was a case about facts and figures is only a secondary consideration. Analysis of who derived what benefit at any time might lend support to or undermine the evidence given, but ultimately the existence or not of the alleged oral agreement can only be determined by the Jurats through them assessing the evidence given.

66. The Deputy Bailiff directed the Jurats that section 6 of the Trusts (Guernsey) Law, 1989, which was operative in 2003, provided that a trust could "*be created by oral declaration, by an instrument in writing (including a will or codicil), by conduct, or in any other manner*

whatsoever." It was common ground that the alleged agreement between the parties had not been set out in writing. Indeed, it was the Plaintiff's case that it was not appropriate to use an instrument in writing containing the type of declaration of trust that had been used in respect of the parties' beneficial interests in Anchor, and which the Defendant had used in respect of his shareholding in Anchor Trust Company (Guernsey) Limited, because this entailed the nominee agreeing to vote the shares in the manner indicated by the beneficial owner, which was precisely the level of control in Balchan that the Plaintiff sought to avoid demonstrating.

67. The Deputy Bailiff further directed the Jurats to consider carefully the Plaintiff's assertions that the agreement of Anchor to sell its interest in Balchan to the Defendant was not an arm's length transaction and was effectively at an undervalue. The Defendant highlighted the fact that the sale price was the costs incurred by Anchor plus £1. The purchase price had not been established by reference to the type of formula that had been used when Balchan was acquired from its previous owners, or when Anchor transferred its client base to Balchan and to Herald Trust Company Limited, or when Balchan acquired the business of Atlantic Western Management Limited. Although each of those transactions was based on a slightly different calculation, each purchase price was by reference to the fees paid over a specified period. The parties' decision not to consult lawyers, not to have a formal valuation prepared and not to undertake any specific due diligence, the Plaintiff's submission, all supported his contention that the only rationale for this was that he, the Plaintiff, was retaining the same level of indirect interest in Balchan that he had previously enjoyed as the majority shareholder in Anchor.

68. The Plaintiff submitted that there was further support for his assertion that the oral trust agreement existed in the time when the parties were considering how to address the distinct possibility that Anchor's application for registration with the Jersey Financial Services Commission would be rejected. Anchor, and particularly the Plaintiff as the majority shareholder, did not extract the same level of purchase price from Balchan as it did in respect of the transfer of business to Herald Trust Company Limited. According to the Plaintiff, this was precisely because he already knew that his investment in that part of Anchor's business was being protected and preserved because the Defendant held the shares in Anchor Trust Company (Guernsey) Limited on trust for him. Accordingly, the Deputy Bailiff suggested the Jurats should also consider carefully whether they found that the facts supported the Plaintiff's contentions and, if so, whether this in turn lent support to his assertion that there had been an oral agreement that the shares in Anchor Trust Company (Guernsey) Limited be held on trust for the Plaintiff.

69. Because the Plaintiff's case rests on an allegation of an oral agreement, this is a case in which the credibility of witnesses is central. As a result, the Deputy Bailiff directed the Jurats that the mere fact that other courts, and the inspector appointed by the Jersey Financial Services Commission, had regarded evidence given by the Plaintiff in the matters with which they were dealing to be evasive or unreliable did not automatically mean that his evidence at trial to this Court had to be categorised in the same manner. Rather, the Jurats were directed to form their own views on what the Plaintiff said in evidence and how he gave his evidence to decide whether they believed the key parts about there being a discussion that resulted in an oral declaration of trust. Having conducted that exercise, if the Jurats found that they did not accept the evidence of the Plaintiff, they might take comfort from the fact that their conclusion had been reached before in relation to the Plaintiff.

70. In relation to the Affidavit evidence of Mr Bryant, by reference to section 4 of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009, the Deputy Bailiff directed the Jurats that the weight to be accorded to Mr Bryant's evidence was a matter for them, having regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. The Jurats should bear in mind that there had been no opportunity for this evidence to be tested in cross-examination. They might ask themselves how far the evidence went, in any event, towards supporting the Plaintiff's case.

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71. The Jurats were reminded about the presumption of good faith derived from the 1865 Law. If they concluded that the oral agreement on which the Plaintiff's case is based had been proved to the requisite civil standard, they would need to proceed to consider whether the Defendant had established his alternative defence of *ex turpi causa non oritur actio*. However, if the Plaintiff did not satisfy them in relation to his claim, the action would fall to be dismissed.

Discussion

72. In relation to the evidence given by the witnesses other than the parties, the Jurats find that Mr Bryant's evidence should be afforded little weight. Mr Bryant was the Plaintiff's way of trying to hide the level of dominance the Plaintiff had been found to have in Anchor. He was promoted to a high level within Anchor as a result and benefited, when Anchor's registration application was rejected from being employed by Herald Trust Company Limited without there being any break. Accordingly, he has some motive to misrepresent matters. Moreover, his First Affidavit was only sworn more than seven years after the events in question. Further, as someone who was at that time also having dealings with the Defendant, the Jurats would have expected him to have ensured that the Defendant would agree to a similar declaration of trust in respect of any beneficial interest he would have acquired in Balchan. For a person in that industry not to have taken that step is regarded by the Jurats as telling. In any event, his evidence did not correspond to that given by the Plaintiff and so does not really take matters forward.

73. The Jurats found the evidence of Mr Pizutti credible and supportive of the Defendant's case. Although Mr Pizzuti may have become the Defendant's colleague at Balchan on the latter's acquisition of the shares, their ways have since parted and he had no need to come to Court and tell lies. His lack of knowledge of any arrangement relating to the Plaintiff's alleged beneficial interest in Balchan also supports the Defendant's case. In particular, as a director of Balchan at the time it purchased part of Anchor's book of business in 2005, he really should have been made aware of the existence of that arrangement had it existed. The Defendant himself was in a position of conflict being a director and shareholder of both the seller and purchaser and so Mr Pizzuti's role was to provide the director scrutiny of that transaction on behalf Balchan. The fact that he did not know about the alleged arrangement leads the Jurats towards the conclusion that the Plaintiff has invented it.

74. The evidence of Mrs Barby is also accepted by the Jurats as having been given honestly, with the consequence that the fax of 16 August 2005 is not regarded by them as a forgery but as a genuine document that was located at the offices of Balchan prior to the sale of that business to Fort Management Services Limited.

75. The Jurats, therefore, find that the Plaintiff made a false allegation that the fax was a forgery, which he no doubt intended as a means of damaging the credibility of the Defendant. Indeed, the Plaintiff appears to have some propensity for making unwarranted and wild allegations. During his evidence, he accused the Deputy Director-General of the Jersey Financial Services Commission of "*underhand dealing*". Shortly afterwards, he withdrew that suggestion.

76. The Jurats have formed the impression that the key evidence given by the Plaintiff in this case is not believable. The way he gave his evidence was, at times, evasive. The Plaintiff's recollections of key events were not as precise as might have been expected when it was so significant for him. He indicated that the parties agreed that the Defendant would hold shares on trust for the Plaintiff "*sometime in May 2003*". Only the two of them were present. This took place in Jersey at Anchor's offices, although the Plaintiff's evidence on that point was not as clear as it could have been. However, he also pointed out that the Defendant visited Jersey only approximately once every six weeks. There was no indication from him as to whether the discussion he alleged took place coincided with one of those visits (and, if so, the Jurats question why the Plaintiff could not be more precise about the date) or whether it was a special trip, such as occurred on 7 March 2005 when Anchor passed resolutions to facilitate the distribution of its assets before the directions expected from the Jersey Financial Services

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Commission were served and took effect. The vagueness of what was discussed and exactly what was said when this was, on the Plaintiff's case, the crunch moment in the relationship between the parties, leads the Jurats to conclude that the Plaintiff has failed to prove to the requisite standard that there was such a conversation in which an oral declaration of trust was made.

77. In that regard, the Jurats prefer the version of events given by the Defendant. The possibility of the parties unscrambling the transfer of shares in Balchan from Anchor to the Defendant was aired. Such an unscrambling was only to be contemplated in the event that Anchor secured its registration from the Jersey Financial Services Commission. That step was, of course, necessary before Anchor could continue to operate lawfully as a trust company business. The arrangement was insufficiently certain at that stage to be regarded as an enforceable agreement. If the pre-condition of Anchor being registered were satisfied, there then needed to be further discussion as to whether unscrambling should take place and, if so, on what terms.

78. Although the Defendant admitted that aspects of his witness statement were inaccurate, which had resulted from him not having had access at the time he prepared it to the documents that subsequently showed that some of his recollections were wrong, the Jurats do not regard those failings in memory as affecting their conclusion that they preferred the Defendant's account of what took place in 2003. Whilst it would have been better had no such errors crept in, the Jurats are satisfied that the evidence the Defendant gave was reliable and credible.

79. The Jurats are also satisfied that the circumstances surrounding events at that time do not support the Plaintiff's allegation that there must have been a secret oral trust representing his ongoing beneficial interest in Balchan. The Jurats reject the Plaintiff's assertion that he was not personally part of the problem faced by Anchor with its registration application. It is clear from reading the damning report of the inspector and the comments in the judgments of the Royal Court of Jersey and the Jersey Court of Appeal that the principal reasons for the Jersey Financial Services Commission rejecting Anchor's application were all associated with the Plaintiff. His influence permeated everything that Anchor did. The role of the Defendant might have been a counterbalance but was perceived not to be because of the Plaintiff's domination and his lack of appreciation of how to operate in a regulated environment.

80. Against that background and in light of the changing regulatory environment across the Channel Islands, the Jurats are satisfied that the sale by Anchor of its shareholding in Balchan had a commercial foundation. The purchase price reflected a repayment of the injection of capital that Anchor had made as well as all the other costs associated with it. The Defendant stopped drawing directors' remuneration from Anchor. The obligation to pay Mr Ball's consultancy fees out of Balchan was no longer an obligation within the Anchor group of companies. The sale by Anchor was properly recorded in its corporate documents as was the price paid for it and the Jurats find that the full terms of the transaction were reflected in this way.

81. The events thereafter also support the conclusion that no undisclosed trust agreement existed. By 2004, the directors of Anchor were well aware that its prospects of being registered by the Jersey Financial Services Commission were slim to non-existent. They needed, therefore, to have a strategy to maximise their returns on their investment in Anchor over the years. If they had waited until the registration application was refused, they would have been faced with the type of fire sale they feared. Indeed, the immediate imposition of directions by the Jersey Financial Services Commission is indicative of the level of external oversight and control that would follow rejection. The Jurats are satisfied that the discussions leading up to the lunch meeting at the Bohemia restaurant were founded on a clear understanding by them of the consequences if they failed to plan ahead. Consequently, the Jurats can infer that they considered what the best option for Anchor was in the event that the business of that company was going to be brought to an end.

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82. Although the actual events on 4 to 7 March 2005 show the urgency with which the parties had to act when informed that Anchor's application had been rejected, the terms of their exit strategy had been in place for approximately six months. The Plaintiff, in particular, knew that the sale of Anchor's book of business to Balchan would result in the fees already received by Anchor being retained. That was consistent with what the Plaintiff regarded as the commonplace arrangement for transfers of business within the Channel Islands at that time (as he stated in his Affidavit in the appeal proceedings before the Royal Court of Jersey). Further, the Jurats recognise that the clients of Anchor being transferred to Balchan at that time needed to have a fair amount of work done on their affairs, in terms of due diligence and re-building customer relations. These aspects would, in their view, have featured as part of the assessment of how much the purchase price was going to be.

83. The agreement to sell to Balchan formulated in September 2004 and effected on 7 March 2005 meant that there were assets available within Anchor for distribution. In the event, this resulted in payment of a generous dividend of £200,000 divided proportionately between the two shareholders, plus the transfer of the balance of funds held in Anchor to Shelton & Co (£190,000 and US$148,000). The loan accounts with Anchor were waived though notional payments of £117,451.41 to the Plaintiff and £24,935.33 to the Defendant as a bonus or fees. The amounts involved demonstrate that the lion's share of the available assets within Anchor went to the Plaintiff rather than the Defendant. This is contrary to the Plaintiff's assertion that he treated the Defendant fairly as his partner. The Jurats are satisfied that the Plaintiff sought to extract what he could from Anchor for his own benefit and that the Defendant did not object because he had regarded his acquisition of Balchan as the real severance of their respective business interests, meaning that Anchor was the Plaintiff's business.

84. The Plaintiff suggested that Balchan had acquired £1 million in fee income from Anchor and so had acquired that business at a considerable undervalue. However, the figures in the Report and Financial Statements of Balchan tell a different story. In the calendar 2004, which was the only full period when Balchan was operating away from Anchor and before acquiring additional business, the fees receivable were £572,844. The figure for 2005 was £769,843, no doubt reflecting that Anchor had retained some of the fee income that would otherwise have been received by Balchan for work undertaken by it because those fees had been pre-paid before the date of transfer of the relevant client. In 2006, that figure rose to £1,321,392. The fee income acquired as a result of buying the book of business of Atlantic Western Management Limited, which had occurred at the end of 2005, would have accounted for approximately £100,000 of that amount. In the view of the Jurats, there would inevitably have been a slight upward trajectory on Balchan's existing business. This means that the difference in fee income between 2004 and 2005, when Balchan did not have any, or at least the full, benefit of its acquisition of clients from Anchor, to 2006 is actually far closer to the level of fees Anchor was able to retain as having been pre-paid under the terms agreed between the parties for their respective groups of companies.

85. Taking into account all of these factors, the Jurats conclude that the transaction in 2005 was not as one-sided as the Plaintiff suggests. The consequence is that, rather than supporting the Plaintiff's case that the only real explanation for the series of transaction relating to Balchan and Anchor is that he and the Defendant had agreed that the Defendant would hold the beneficial interest in Balchan on trust for the Plaintiff, the reality supports the absence of anything at all in writing reflecting that alleged agreement. The Jurats, therefore, reject the Plaintiff's claim that any such oral agreement for which he has argued existed.

86. The Jurats note further that the Plaintiff played no part in the day-to-day running of Balchan once it was sold to the Defendant in 2003 and that he took no steps to make any enquiries about how things were going after the transfer of Anchor's business in 2005. During 2005 to 2007, the Plaintiff and Defendant saw each other as a result of the trial in the ***Thakrar*** case and yet the Plaintiff did not make any enquiry as to how his interest (on his case) in Balchan

was faring. Had his claim of an oral trust agreement been anything other than an invention, the Jurats are satisfied that the Plaintiff presented as someone who would have wanted to know something about what was going on. Accordingly, his acknowledged failure to make any enquiries until 2007, when he wrote following hearing that the Defendant had sold Balchan, is evidence from which the Jurats infer that the alleged oral agreement simply did not exist.

Ex turpi causa

87. In the light of those conclusions, the Jurats do not need to go on to consider whether they accepted that the Court should decline to assist the Plaintiff under the principle of *ex turpi causa non oritur actio*.

88. The Deputy Bailiff is satisfied that the principle exists as a matter of Guernsey law and so would have been a defence available to the Defendant had it needed to be considered. In doing so, he recognises that the origins of the doctrine are found in Roman law ("*nemo auditur propriam turpitudinem allegans*") rendered in French law as "*nul ne peut être entendu qui allègue sa proper turpitude*" (see, eg, Terré, *Droit civil: Les Obligations*, 11th ed. (2013), para. 428). The principle has been invoked in Jersey (see, eg, *Mayo Associates SA v Bank Cantrade* (unreported, 17 December 1999)). Indeed, in that case, Sir Godfray Le Quesne QC, sitting as a Commissioner of the Court, explained, by reference to *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, that:

> "*... an illegality involving one contract or transaction can have the effect of tainting the plaintiffs' claim under another related contract, so that the ex turpi causa defence still has to be considered in relation to his claim under the latter contract ...*".

That principle applies to the situation in the present case, where there is no alleged illegality in relation to the transaction that transferred the shares from Anchor into the names of the Defendant's nominees or in relation to the type of oral declaration of trust for which the Plaintiff has contended However, both are potentially affected by the further agreement which Advocate Dawes submits must also inevitably have been made between the parties under which the Defendant agreed not to inform the Guernsey Financial Services Commission that the Plaintiff continued to have a beneficial interest in Balchan.

89. In *Tinsley v Milligan* [1994] 1 AC 340, Lord Goff of Chieveley set out the principle as follows (at p. 356):

> "*... if A puts property in the name of B intending to conceal his (A's) interest in the property for a fraudulent or illegal purpose, neither law nor equity will allow A to recover the property, and equity will not assist him in asserting an equitable interest in it. This principle applies whether the transaction takes the form of a transfer of property by A to B, or the purchase by A of property in the name of B.*"

90. Unlike in many cases where the doctrine is invoked, this has been a case in which no one has given any evidence that such an agreement came into existence. The Plaintiff denies that there was any such agreement, as does the Defendant, albeit for quite different reasons. The Plaintiff cannot admit that there was a criminal conspiracy underlying the arrangements he asserts were made because to do so would be tantamount to inviting the Court to dismiss his action on the basis of the doctrine. The Defendant raises the doctrine as an alternative defence, but only does so if the Court rejects his primary contention relating to the existence of the alleged oral agreement creating the trust of the shares. In doing so, he has not suggested that there was any discussion about how he would deceive the Guernsey Financial Services Commission, but rather invites the Court to infer that such an agreement must have come into existence if the Plaintiff's version of events in May 2003 were to be accepted. In response to the possibility of that inference, the Plaintiff has pointed out that he had no intention to deceive the Jersey authorities, who were not interested in Balchan, nor the

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Guernsey authorities, who would only be interested in what the Defendant said because he was the maker of the statement who is the offender under section 46 of the Fiduciaries Law. In any event, there had been no evidence of what statements had been made to the Guernsey Financial Services Commission by, or on behalf of, the Defendant from which to assess whether there was the commission of an offence.

91. The Deputy Bailiff directed the Jurats to note the distinction drawn in the Fiduciaries Law to different types of controller in case it affected how they approached the Plaintiff's contentions. Section 58(1) defines "*Shareholder controller*" as "*a person who, alone or with associates, is entitled to exercise, or control the exercise of, 15 per cent or more of the voting power in general meeting of that company or of any other company of which that company is a subsidiary*". An "*indirect controller*" is defined in the same subsection as "*a person in accordance with whose directions or instructions any director of that company or of any other company of which that company is a subsidiary, or any controller of that company, is accustomed to act*". It was the Plaintiff's case that he had sought to create the position under which he had no voting power, because he had not, as was usual, sought the Defendant's agreement to vote his (the Plaintiff's) interest in any particular way, and he had deliberately kept his distance from the day-to-day control of Balchan to avoid any perception that he was still a controller for the purposes of the Fiduciaries Law. In those circumstances, whatever the Defendant had told the Guernsey Financial Services Commission was a matter of the Defendant and did not result from any criminal conspiracy to which the Plaintiff was a party.

92. The Deputy Bailiff further directed the Jurats that they should have regard to the requirements for a conspiracy set out in section 7 of the Criminal Justice (Attempts, Conspiracy and Jurisdiction) (Bailiwick of Guernsey) Law, 2006. There needed to be evidence of a person agreeing with another person or persons to pursue a course of conduct which, if carried out with their intentions, "*will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement*". In the conceptually difficult situation in the present case where neither party to the alleged conspiracy had given evidence of any agreement, the Deputy Bailiff suggested that the Jurats could consider if, in the circumstances where they accepted the Plaintiff's evidence and rejected the Defendant's evidence, they would also find themselves rejecting the Defendant's denial that there had been any discussions about how to deal with the Guernsey Financial Services Commission, thereby leaving it open to them to infer that there had been such discussions. Further, in that respect, they were to take into consideration that the Defendant enjoys a privilege against self-incrimination and, by advancing this alternative defence, would effectively be waiving that privilege.

93. In the event, because the Jurats find that the oral agreement to hold the shares on trust has not been proved by the Plaintiff, they have reached the conclusion that it is unnecessary for them to engage in the mental gymnastics required and make any findings in relation to the *ex turpi causa* defence.

Other matters

94. Because the Jurats have decided that the oral agreement on which the Plaintiff has claimed has not been established by him, and so dismiss the case, there is no need for them to make any findings about the Defendant's Counterclaim, which Advocate Dawes had confirmed had been raised only by way of defence rather than as an action to pursue in its own right. The Plaintiff had, in any event, not really opposed there being some account taken of monies received by him personally on behalf of Anchor, recognising that he had admitted receiving these amounts, albeit he argued that the adjustment involved when applying this by way of set-off would be quite small because these largely represented payments in respect of liabilities he had assumed.

Conclusions

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95. In the light of these findings, for the reasons given, the Court dismisses the Plaintiff's claim against the Defendant.

96. Unless the Defendant, in the light of that conclusion, wishes to seek leave to withdraw the Counterclaim, the Court will also formally dismiss the Counterclaim.

97. The Deputy Bailiff expects that costs of the action, to include the costs of raising the Counterclaim, will follow the event. That would be the usual order to make. If either party wishes to apply for a different outcome, the Court invites further submissions on the question of the costs of these proceedings. If no such submissions are forthcoming within 14 days of the handing down of this judgment, the order will be that the Plaintiff pays the Defendant's costs of these proceedings on the standard recoverable basis, to be taxed if not agreed.

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