Neutral Citation Number: [2022] EWCA Civ 43

Case No: CA-2021-000441
(Formerly A3/2021/0292)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Mr Justice Fancourt
[2021] EWHC 60 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2022

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ASPLIN
and
LORD JUSTICE POPPLEWELL

- -

Between:

(1) MARK BYERS **(2) HUGH DICKSON** **(as joint liquidators of Saad Investments Company Limited)** **(3) SAAD INVESTMENTS COMPANY LIMITED** **(in liquidation)**	**Claimants/ Appellants**
- and -	
THE SAUDI NATIONAL BANK	**Defendant/ Respondent**

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- -

Jeff Chapman QC, David Murray and Adam Cloherty (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Appellants**
Andrew Onslow QC, Brian Green QC, Alan Roxburgh, Edward Harrison and Sarah Tulip (instructed by **Latham & Watkins (London) LLP**) for the **Respondent**

Hearing dates: 13-17 December 2021

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Approved Judgment

This judgment was handed down remotely at 10:30am on Thursday 27 January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Newey:

1. This is the judgment of the Court. All three of us have contributed to it.

2. The appeal is brought by the claimants against the dismissal by Fancourt J ("the Judge"), in a judgment dated 15 January 2021, of their claim for knowing receipt. The appeal raises issues as to, first, whether such a claim depends on the claimant having had a continuing proprietary interest in the property in question when in the hands of the defendant and, secondly, whether such an interest existed in the present case having regard to the relevant Saudi Arabian law.

3. The claimants are Saad Investments Company Limited ("SICL"), a company registered in the Cayman Islands, and its joint official liquidators, Mr Mark Byers and Mr Hugh Dickson. The Grand Court of the Cayman Islands made a winding-up order against SICL on 18 September 2009 pursuant to a petition presented on 30 July 2009. The Cayman Islands proceedings were recognised by the English Court as foreign main proceedings pursuant to the Cross Border Insolvency Regulations 2006 by orders made on 20 August and 25 September 2009.

4. On 14 August 2013, Mr Byers, Mr Dickson and Mr Stephen Akers, who at the time was also one of SICL's liquidators, issued proceedings against Samba Financial Group ("Samba"), a Saudi Arabian bank, whose assets and liabilities were transferred on 1 April 2021 to the defendant, the Saudi National Bank ("SNB", formerly the National Commercial Bank). The claim challenged the transfer to Samba in September 2009 by Mr Maan Al-Sanea of shares in five Saudi Arabian banks ("the September Transfer"). Mr Al-Sanea was registered as the owner of the shares ("the Disputed Securities") either (in the case of four of the five banks) at the Saudi Arabian Securities Depository Centre or (in the fifth case) on the bank's register of shareholders, but the liquidators alleged that he had come to hold the shares on trust for SICL as a result of various transactions in 2002-2008 ("the Six Transactions"). The shares were said to have been worth about US$318 million at the date of the September Transfer.

5. The liquidators' proceedings were based on section 127 of the Insolvency Act 1986, rendering void unless the Court otherwise orders "any disposition of the company's property" made after the commencement of its winding up. That case eventually foundered when the Supreme Court held in judgments given on 1 February 2017 (*Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424) that "for the purposes of section 127 of the Insolvency Act 1986 there was no disposition of any rights of SICL in relation to the shares by virtue of their transfer to Samba" (to quote from paragraph 57 of Lord Mance's judgment). However, the Supreme Court considered that the liquidators should be given the chance to apply to the High Court for permission to re-amend their particulars of claim. The liquidators then sought to re-formulate their existing claim as one for knowing receipt of trust property, but the attempt failed and the proceedings were dismissed on limitation grounds: see *Akers v Samba Financial Group* [2019] EWCA Civ 416, [2019] 4 WLR 54. In the meantime, though, on 31 May 2017, the claimants had issued new proceedings, again alleging knowing receipt, and it was that claim which came on for trial before the Judge in October 2020 and with which we are concerned now. The receipt relied on was the legal transfer of the Disputed Securities into Samba's name. There was no pleaded claim of any antecedent agreement to transfer, or of any receipt of rights under such an agreement as being receipt of property founding a claim in knowing receipt.

6. The trial was of limited scope. Samba had failed to comply with an order for disclosure and, as a result, had been debarred from defending the claim otherwise than on specific grounds which the Judge had decided in a judgment dated 8 April 2020 could fairly be tried without the missing disclosure. As the Judge noted in paragraph 19 of the judgment now under appeal ("the Judgment"), the effect of his April 2020 decision was that "all factual questions other than the content of Saudi Arabian law and the valuation issues were deemed to have been resolved in accordance with the claimants' pleaded case". In the circumstances, the only substantive issues which fell to be determined at the trial were those identified in paragraph 4 of the Judgment, namely:

> "i) Whether the effect of Saudi Arabian law, as the governing law of the September Transfer, was to extinguish SICL's rights in the Disputed Securities even if Samba had knowledge of SICL's interest ('**the Saudi Arabian Law Issue**');
>
> ii) Whether the claim, pleaded by the claimants as governed by Cayman Islands or English law, must fail if SICL's interest was so extinguished ('**the Law of Knowing Receipt Issue**');
>
> iii) The value of the Disputed Securities at the date of the September Transfer and at the date of judgment – in reality, this was only a dispute about whether a 'block discount' should be applied to the quoted prices of the Disputed Securities on the Saudi Arabian stock exchange on those days ('**the Valuation Issue**')".

7. Having regard to the Judge's April 2020 decision, the following allegations by the claimants were (and are) to be taken to be true:

   i) Until the September Transfer, Mr Al-Sanea held the Disputed Securities on trust for SICL under Cayman Islands law as the law governing their relationship in respect of the Disputed Securities, Cayman Islands law being materially identical to English law;

   ii) The purpose of the September Transfer was to discharge indebtedness of Mr Al-Sanea to Samba;

   iii) Samba knew that Mr Al-Sanea was holding the Disputed Securities on trust for SICL; and

   iv) "a reasonable bank in [Samba's] position would have appreciated that (alternatively would or ought to have made inquiries or sought advice which would have revealed the probability that) … the September Transfer was a breach of trust; and/or … Samba recklessly failed to make such inquiries about the September Transfer … and the Disputed Securities as an honest and reasonable bank would make".

8. At trial, Samba did not dispute that the knowledge which it was alleged to have had was "sufficient in principle to establish the overarching requirement for knowing receipt liability, namely that 'the recipient's state of knowledge should be such as to

make it unconscionable for him to retain the benefit of the receipt'" (see paragraph 32 of the Judgment). As, however, the Judge noted in paragraph 33 of the Judgment, "neither in the re-amended particulars of claim nor in the amended reply to Samba's amended defence have the claimants alleged that Samba acted dishonestly" and so the claimants "in argument – though at times they came close to alleging that Samba was an accessory to theft of the Disputed Securities – did not (and could not) argue that their pleaded case could be taken as an allegation of dishonesty, such as would be required to establish liability as a constructive trustee for dishonest assistance in a breach of trust".

9. The Judge determined both the Law of Knowing Receipt Issue and the Saudi Arabian Law Issue in favour of Samba and, accordingly, dismissed the claim. He concluded in paragraph 117 of the Judgment that, "absent a continuing proprietary interest in the Disputed Securities at the time of Samba's registration, the claim in knowing receipt as pleaded will fail" and, in paragraph 206, that "SICL had no continuing proprietary interest in the Disputed Securities after the September Transfer capable of supporting a claim against Samba in knowing receipt".

10. The Judge nevertheless went on to consider the Valuation Issue, viz., "whether, in valuing the Disputed Securities, there should be a discount ('block discount') from the quoted market price on the relevant dates for each of the substantial holdings in the five banks, and if so the size of each discount". The Judge explained that, had he reached a different conclusion on liability, he would have agreed with Samba that a block discount was applicable in the case of each of the holdings comprised in the Disputed Securities.

11. The claimants now challenge the Judge's decision in this Court. They contend that the Judge erred in relation to each of the three issues he identified in paragraph 4 of the Judgment. In short, it is their case that (a) the claimants did not need to have a continuing proprietary interest in the Disputed Securities to succeed in their knowing receipt claim, (b) in any event, SICL's interest in the Disputed Securities was not in fact extinguished as a matter of Saudi Arabian law and (c) the Judge was also mistaken in thinking it appropriate to apply a "block discount".

The Law of Knowing Receipt Issue

Introductory

12. In *Barnes v Addy* (1874) LR 9 Ch App 244, Lord Selborne LC said at 251-252:

> "[The responsibility of a trustee] may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with

> knowledge in a dishonest and fraudulent design on the part of the trustees."

13. The final three lines of this dictum are reflected in the two species of ancillary liability (or liability as a "constructive trustee") referred to as "knowing receipt" and "dishonest assistance". Liability for "dishonest assistance" arises where a person dishonestly procures or assists in a breach of trust or fiduciary duty. While "the standard by which the law determines whether [a mental state] is dishonest is objective", negligence does not suffice. For a defendant to be liable for dishonest assistance, his mental state has to have been such as "by ordinary standards … would be characterised as dishonest" (see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, at paragraph 10, and also *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391). However, there is no requirement that the defendant should have received property to which the trust or fiduciary obligation has ever attached.

14. Turning to "knowing receipt", Hoffmann LJ said in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, at 700, that, to establish such a claim, a claimant must show:

> "first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty".

15. The last of these ingredients was the subject of consideration by the Court of Appeal in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 ("*Akindele*"). It was there held that "[t]he recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt" (per Nourse LJ, with whom Ward and Sedley LJJ agreed, at 455). Nourse LJ pointed out at 448 that, "[w]hile a knowing recipient will often be found to have acted dishonestly, it has never been a prerequisite of the liability that he should".

16. Before *Akindele* was decided, it was sometimes suggested that liability for knowing receipt was restitutionary. Thus, in *El Ajou v Dollar Land Holdings plc* at first instance ([1993] 3 All ER 717) Millett J, at 736, described knowing receipt as "the counterpart in equity of the common law action for money had and received" and said that "[b]oth can be classified as receipt-based restitutionary claims". Similarly, Lord Nicholls observed in *Royal Brunei Airlines v Tan* [1995] 2 AC 378, at 386, that liability for knowing receipt is "restitution-based" and, writing extra-judicially in Cornish, *"Restitution Past, Present and Future"* (1998), said this at 238-239:

> "Restitutionary liability, applicable regardless of fault but subject to a defence of change of position, would be a better-tailored response to the underlying mischief of misapplied property than personal liability which is exclusively fault-based. Personal liability would flow from having received the property of another, from having been unjustly enriched at the expense of another. It would be triggered by the mere fact of receipt, thus recognising the endurance of property rights. But fairness would be ensured by the need to identify a gain, and by making change of position available as a defence in suitable cases when, for

> instance, the recipient had changed his position in reliance on the receipt."

17. That view has not prevailed, however. In *Akindele*, Nourse LJ noted at 456 that, at Court of Appeal level, it would have been a "fruitless exercise" to present an argument based on Lord Nicholls' suggestions and added this:

> "While in general it may be possible to sympathise with a tendency to subsume a further part of our law of restitution under the principles of unjust enrichment, I beg leave to doubt whether strict liability coupled with a change of position defence would be preferable to fault-based liability in many commercial transactions, for example where, as here, the receipt is of a company's funds which have been misapplied by its directors."

In *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36, [2018] Bus LR 1595 ("*DD Growth*"), a Privy Council case, Lords Sumption and Briggs, with whom Lord Carnwath agreed, commented in paragraph 58 that recovery on the ground of unjust enrichment is "conceptually … very different" from recovery on the footing of knowing receipt, explaining:

> "A common law liability in restitution depends on the defendant having been unjustly enriched by the receipt. The liability of a constructive trustee is essentially a custodial liability comparable to that of an express trustee, which is imposed on him because he has sufficient knowledge to affect his conscience."

Further, the Courts have continued to treat the passage from Hoffmann LJ's judgment in *El Ajou v Dollar Land Holdings plc* quoted in paragraph 14 above, as explained in *Akindele*, as an accurate summary of the essential requirements of a knowing receipt claim notwithstanding its inclusion of "knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty": see e.g. *Charter plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] Ch 313, at paragraph 7, *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 ("*Arthur*"), at paragraphs 32 and 33, and *Akita Holdings Ltd v Attorney General of the Turks & Caicos Islands* [2017] UKPC 7, [2017] AC 590, at paragraph 13.

18. Liability in knowing receipt thus derives from the combination of "the beneficial receipt … of assets which are traceable as representing the assets of the plaintiff" and "[t]he recipient's state of knowledge" having been "such as to make it unconscionable for him to retain the benefit of the receipt". Neither is enough on its own. While it is essential that the defendant should have "received the property of another", liability is not considered to be "triggered by the mere fact of receipt"; there must also be unconscionability. On the other hand, dishonesty is not required: the fact that the defendant must have received relevant property makes a lesser test of fault appropriate.

19. A recipient need not necessarily have had any knowledge or even notice of any breach of duty at the point of receipt to be liable for knowing receipt. As Millett J said in *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 ("*Agip*"), at 291, a person who has received trust property transferred to him in breach of trust can incur liability *either* if he received it with notice that it was trust property and that the transfer to him was a breach of trust

or "if he received it without such notice but subsequently discovered the facts". What matters is that the recipient's state of knowledge should have become "such as to make it unconscionable for him to *retain* the benefit of the receipt" (to quote, with emphasis added, from Nourse LJ in *Akindele*, at 455).

20. A recipient will, however, escape any liability if he no longer has the property by the time he learns of the relevant breach of duty. In *Agip*, Millett J observed at 290 that "even a volunteer who has received trust property cannot be made subject to a personal liability to account for it as a constructive trustee if he has parted with it without having previously acquired some knowledge of the existence of the trust". Likewise, Lloyd LJ explained in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 ("*Independent Trustee Services*"), at paragraph 76, that "to the extent that, before she had notice of the claim to the funds, [a Mrs Morris] had disposed of any of the money without receiving traceable proceeds, she would not be liable to the trustee". Knowledge and possession must thus coincide for liability to arise.

21. Mr Jeff Chapman QC, who appeared for the claimants with Mr David Murray and Mr Adam Cloherty, suggested that it can suffice for liability that the defendant *benefited* from trust property regardless of whether he actually *received* such property. A defendant could thus, Mr Chapman submitted, be liable for knowing receipt if, say, a trustee had wrongfully spent trust money on a holiday for the defendant albeit that none of the money had ever passed through the defendant's hands.

22. In our view, however, that is not correct. Success in a knowing receipt claim depends, as it seems to us, on establishing, as Hoffmann LJ's summary indicates, "beneficial receipt by the defendant of assets which are traceable as representing the assets of the [claimant]". A defendant must have received trust assets, not just benefited from them. As the Court of Appeal said in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499, at paragraph 89, "receipt of trust property is the gist of the action". See too e.g. *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652, at 671, and *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, at paragraphs 18-19.

23. There is, however, no requirement that a defendant should still have the property in question by the time a knowing receipt claim is brought. In fact, such a claim is most obviously likely to be useful where the defendant no longer has the property. If the defendant yet retains the property, the claimant may be able to recover it by asserting proprietary rights rather than by making a personal claim for knowing receipt. In *Re Montagu's Settlement Trusts* [1987] 1 Ch 264, Sir Robert Megarry V-C distinguished at 276 between "the equitable doctrine of tracing" and "liability as a constructive trustee", pointing out that "if the recipient of trust property still has the property or its traceable proceeds in his possession, he is liable to restore it unless he is a purchaser without notice". In *Arthur*, Sir Terence Etherton, giving the judgment of the Privy Council, said in paragraph 34:

> "When considering relief for the consequences of knowing receipt it is necessary to distinguish between proprietary and personal remedies. The beneficiaries or innocent trustees will pursue a proprietary claim by following the trust property wrongly transferred or tracing its inherent value into something substituted for it: *Foskett v McKeown* [2001] 1 AC 103, 127–129 (Lord Millett). The claim for personal liability is for the recipient

> to account as a constructive trustee and will usually only be necessary where following or tracing is not possible because, for example, the property has been acquired by a bona fide purchaser for value without notice or has been dissipated and is otherwise no longer identifiable."

24. The question raised by the Law of Knowing Receipt Issue is whether a knowing receipt claim is possible where, although the defendant has or had property which was formerly trust property, the claimant never had a proprietary claim in respect of it against the defendant. As the quotations from Sir Robert Megarry V-C and Sir Terence Etherton indicate, that may be so where the recipient of trust property is a bona fide purchaser for value.

25. A proprietary claim against a recipient of trust property may be impossible, too, as a result of overreaching, the process by which trusts are transferred to other property. *Lewin on Trusts*, 20th ed. (2020), explains in paragraph 44-014:

> "The beneficiaries will not be able to assert a proprietary remedy against trust property transferred by the trustees to a third party, even though the transfer involves a breach of trust, if, despite the breach of trust, the transfer is effective to overreach the trusts and equitable powers in favour of the beneficiaries, so that the property transferred is freed from those trusts and powers which attach instead to the proceeds of sale or other property acquired in exchange for the property transferred. Where the interests of the beneficiaries are overreached in this way, any proprietary remedy of the beneficiaries must be asserted against the traceable proceeds of the property transferred, not the property transferred followed into the hands of any direct or indirect recipient of it."

In the case of land, section 2 of the Law of Property Act 1925 provides for any equitable interest to be overreached on a conveyance to a purchaser of a legal estate in land if, among other things, the conveyance is made by trustees and the proceeds of sale are paid to at least two trustees or a trust corporation. In that connection, section 27(1) of the 1925 Act states:

> "A purchaser of a legal estate from trustees of land shall not be concerned with the trusts affecting the land, the net income of the land or the proceeds of sale of the land whether or not those trusts are declared by the same instrument as that by which the trust of land is created."

26. Statutory intervention may also preclude the assertion of a proprietary claim against a recipient of trust property in other ways. The regime established by the Land Registration Act 2002 provides an obvious example. Where registered land is subject to a trust, a transferee for valuable consideration will take free of the beneficiaries' interests even if he had notice that the transfer was in breach of trust unless the beneficiaries were in actual occupation at the time of the disposition. That follows from section 29 of the 2002 Act, subsection (1) of which provides:

> "If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration."

The Judgment and the parties' cases

27. The Judge concluded in paragraph 114 of the Judgment that "a claim in knowing receipt, where dishonest assistance is not alleged, will fail if, at the moment of receipt, the beneficiary's equitable proprietary interest is destroyed or overridden so that the recipient holds the property as beneficial owner of it". A knowing recipient, the Judge said in paragraph 116, "must have held trust property, not property to which from the moment of receipt he had good title": "[i]t is of the essence of such a claim that the beneficiary asserts that the recipient has, or had, the beneficiary's property". The reason for a transferee to be liable for knowing receipt, the Judge observed in paragraph 110, "is that the transferee has knowingly dealt with (or retained) property that belongs to the trust inconsistently with his duty" and "[i]f the property is not trust property, there cannot be liability of that kind". The Judge considered there to be "a consistent line of case law" where it has either been decided that "a claim in knowing receipt cannot succeed unless the claimant has a continuing proprietary interest following the impugned transfer" or that has been assumed to be correct: see paragraph 74. In paragraph 106, he concluded that "absent dishonesty or a pre-existing equity, a registered transferee of land, whose title has priority under the [Land Registration Act 2002] over the equitable interest of the beneficiary, is not liable in knowing receipt, even if he has knowledge that the transfer was made in breach of trust".

28. Mr Chapman submitted that the Judge had wrongly introduced an "additional requirement, previously unknown to the law," into a knowing receipt claim. The Judge's approach, Mr Chapman maintained, was justified by neither authority nor principle. Knowing receipt is a species of equitable wrongdoing in which liability is based on the defendant's *fault*, viz. receiving trust property in circumstances which make it unconscionable for the defendant to retain the benefit of the receipt. The defendant's conscience, Mr Chapman said, is equally affected whether or not the effect of the relevant transfer happens to be to override the beneficiary's equitable proprietary right in the assets. The policy considerations likely to underlie a registration scheme (such as the importance of third parties being able to rely on accuracy of the register) may well warrant the overriding of the beneficiary's *proprietary* claim to the relevant assets, but this has no effect at all on the equity of the situation as between the beneficiary and the (ex hypothesi) guilty transferee, who has unconscionably received the property with knowledge of the beneficiary's interest. Likewise, the fact that trust interests have been overreached need not preclude a knowing receipt claim. The right of a beneficiary to bring a personal claim for knowing receipt is not dependent or parasitic on any property right he might have. Further, the Judge was mistaken in his analysis of the scope for knowing receipt claims in the context of registered land.

29. In contrast, Mr Brian Green QC, who, appearing with Mr Andrew Onslow QC, Mr Alan Roxburgh, Mr Edward Harrison and Ms Sarah Tulip, argued this part of the appeal for SNB, supported the Judge's decision. The liability of a knowing recipient, Mr Green said, is a personal liability for breach of a duty to deal with property that he has received

as if he were a trustee of it. The imposition of such a duty can, Mr Green submitted, be justified only where the recipient has received property which remains trust property in his hands. A claim in knowing receipt involves the assertion of a trust interest against a third party, and the fact that a knowing receipt claim is one in personam does not change the fundamental point that a property right is required to maintain such a claim against a third party. The claim is founded on the defendant's wrongful failure to give effect to the core custodial duty to restore the property when the unconscionability of its retention is apparent. If the position under the Saudi Arabian lex situs (recognised and given effect by English private international law) is that Samba obtained good title to the Disputed Securities, free of SICL's equitable proprietary interest, notwithstanding knowledge of that interest and of Mr Al-Sanea's breach of trust, it would be illogical for English law to treat Samba's receipt as nevertheless giving rise to a personal obligation to return the shares or account for their value. Further, the Judge was correct both in his treatment of the authorities to which he referred and his analysis of the position as regards registered land.

Authorities

30. In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, shares in Berlitz, a company incorporated in New York, which were held by Bishopsgate as nominee for Macmillan were wrongfully used to secure loans to the Maxwell group of companies. Macmillan sought relief against banks which claimed to have security interests having priority to its own interest. The relevant shares having been sold, Macmillan's writ asked for "compensation and/or damages for breach of constructive trust" (see 981). Millett J, the trial judge, summarised the parties' positions as follows at 983:

> "Macmillan seeks both proprietary and personal relief, claiming restitution of the proceeds of sale of the shares and equitable compensation for loss …. Each of the defendants claim to have been, or in the case of Shearson Lehman to have derived title through, a bona fide purchaser for value of the shares without notice of Macmillan's interest."

31. Millett J identified the "question for determination" at 983 as "whether Macmillan retained an interest in the shares superior to that of any of the defendants and is accordingly entitled to the corresponding part of the proceeds of sale". He explained at 990:

> "There is no doubt that the Berlitz shares in which the defendants claim security interests are the selfsame shares in which Macmillan's beneficial interest formerly subsisted. That is not in dispute. The question is whether any of the defendants has acquired an interest in those shares which is superior to that of Macmillan."

32. Millett J concluded at 987 that "the question whether any of the defendants is a bona fide purchaser for value without notice must be determined in accordance with the law of New York" and so, having regard to expert evidence on New York law, that "the critical question is whether the defendant acted honestly and in good faith when it took delivery of the certificate or whether it did not act in good faith because it knew or

suspected that Macmillan was the beneficial owner of the shares or that the transfer was otherwise improper". On the facts, Millett J found that, approaching matters on that basis, each bank either was, or derived title from, a bona fide purchaser for value without relevant notice, with the result that the action was dismissed.

33. In the course of his judgment, Millett J said at 988 that it was "manifestly correct to characterise Macmillan's claim as lying in restitution", but distinguished in that context between "the unjust enrichment of the defendant which is occasioned by depriving the plaintiff of his property" and "enrichment which results from a wrong done to the plaintiff by the defendant". Millett J said of the distinction at 988-989 that it was "that drawn by equity between the claim of an equitable owner to recover his property, or compensation for the failure to restore it, from a person into whose hands it has come and a claim by a plaintiff in respect of a breach of fiduciary obligation owed to him" and continued:

> "In the former case [the plaintiff] relies upon his continuing equitable interest in the property under an express or resulting trust; in the latter upon an equity between the parties which may in appropriate circumstances give rise to a constructive trust. The distinction, which is crucial, may have been lost sight of in the language of some of the more recent decisions on knowing receipt."

34. Macmillan's claim, Millett J said at 989, "is of the former kind". He went on:

> "In respect of the Berlitz shares there was no relationship of any kind between Macmillan and any of the defendants. There is no equity between them. In the absence of such an equity, any liability of the defendants to restore the shares or their proceeds to Macmillan or to pay compensation for their failure to do so must be based upon Macmillan's continuing equitable ownership of the shares. In the language of restitution, Macmillan's claim must rest upon 'an undestroyed proprietary base.' Such a claim cannot succeed against a party who has under the applicable law acquired a title to the shares which is superior to that of Macmillan."

After noting *Norris v Chambres* (1861) 29 Beav 246, affirmed 3 De GF & J 583, Millett J said that, "[i]f by [the lex situs], the transfer to the defendant extinguished the plaintiff's interest notwithstanding the defendant's notice, the plaintiff no longer has any proprietary interest upon which he can base his suit in England".

35. At 990, Millett J said:

> "In my judgment, Macmillan's claim is properly to be characterised as a restitutionary claim which depends upon establishing a continuing proprietary interest in the subject matter of the claim; each of the defendants claims to have acquired a security interest in that subject matter which is superior to Macmillan's interest; and the question at issue is whether any of the defendants can identify a particular act or

> event which had the result of extinguishing Macmillan's interest or postponing it to that of the defendant."

36. Millett J thus regarded Macmillan's claim as depending on whether it had a "continuing proprietary interest" in the Berlitz shares and, hence, on whether each bank was, or derived title from, a bona fide purchaser without notice. In other words, a bank which was a bona fide purchaser without notice could defeat Macmillan's claim against it *because it would have taken free of Macmillan's interest*.

37. Mr Chapman dismissed Millett J's decision as irrelevant to the Law of Knowing Receipt Issue on the basis that it concerned the bona fide purchaser defence to a proprietary claim. If the writ encompassed a personal claim in knowing receipt, Mr Chapman said, the edited version of Millett J's judgment to be found in the report does not reveal what happened to it. *Macmillan*, Mr Chapman argued, was simply an action by which an equitable owner sought to vindicate its proprietary rights in misapplied trust assets.

38. In our view, however, Millett J's analysis cannot be discounted in this way. The terms of the writ were apt to refer to a personal claim ("compensation and/or damages for breach of constructive trust") and, as we have already mentioned, Millett J spoke at 983 of Macmillan seeking "both proprietary and personal relief"; at 988, of "*[e]ven* [Macmillan's] claim to the return of the Berlitz shares or their proceeds in specie, … which can loosely be described as proprietary", implying the existence of another claim which could not be so described; and, at 989, of liability "to restore the shares or their proceeds to Macmillan *or to pay compensation for their failure to do so*" (emphasis added). Further, the category of unjust enrichment claim to which Millett J thought Macmillan's claim belonged (viz. "the unjust enrichment of the defendant which is occasioned by depriving the plaintiff of his property") is very far from confined to proprietary claims.

39. Mr Chapman also submitted that the claim brought by Macmillan would no longer be characterised (if it ever would have been) as a claim based on unjust enrichment. There is force in that: the reference in the writ to compensation/damages for "breach of constructive trust" must, we think, have included a knowing receipt claim and, as we have said, such a claim is not now seen as one for unjust enrichment. What that means, however, is that Millett J considered the availability of knowing receipt claims against the banks to depend on defeating their bona fide purchaser for value without notice contentions.

40. When *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* reached the Court of Appeal, Millett J's decision was affirmed on different grounds, the Court of Appeal considering that "an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (lex situs)" (to quote from Staughton LJ at 405) rather than, as Millett had thought, the lex loci actus. Consistently with Millett J's analysis, however, the issue in the case was taken to be "whether the defendants have a defence on the ground that they were purchasers for value in good faith without notice of Macmillan's claim" (see 398-399). Moreover, it was recognised that Macmillan's claims were not exclusively proprietary: Staughton LJ noted at 398 that Macmillan's claims "are *to some extent* proprietary" (emphasis added) and that counsel for Macmillan "points out that Macmillan claim not only a declaration as to

their proprietary rights, but also an order that the defendants restore the shares to Macmillan and compensation or damages".

41. Millett J's judgment was referred to approvingly by Peter Gibson LJ in *Lightning v Lightning Electrical Contractors Ltd* (2009) 1 TLI 35 ("*Lightning*", a 1998 decision). In that case, the plaintiff, who was resident in England, brought proceedings against a company also resident in England, for a declaration that land in Scotland was held on trust for him. The company disputed the jurisdiction of the English Court, but the Court of Appeal allowed the claim to proceed. In his judgment, Peter Gibson LJ, with whom Henry LJ agreed, said at 38:

> "As is pointed by Millett LJ when sitting at first instance at *Macmillan Inc v Bishopsgate Trust (No 3)* [1995] 1 WLR 978 at page 989 (commenting on *Norris v Chambres* (1891) 29 Beavan, 246, affirmed 3 De Gex Fisher and Jones 583), where a plaintiff invokes the in personam jurisdiction of the English court against a defendant amenable to the jurisdiction and there is an equity between the parties which the court can enforce, the English court will accept jurisdiction and apply English law as the applicable law, even though the suit relates to foreign land. In contrast if the equity which is asserted does not exist between the parties to the English litigation, for example where there has been a transfer of the property to a third party with notice of an equity but by the *lex situs* governing the transfer, the transfer extinguished the plaintiff's equity, the English court could not then give relief against the third party even though he is within the jurisdiction."

In the previous paragraph, Peter Gibson LJ had expressed the view that in certain authorities the English Court had "not unnaturally regarded English law as applicable to the relationship between the parties before it in the absence of any event governed by the *lex situs* destructive of the equitable interest being asserted". For his part, Millett LJ, who was also a member of the Court, said at 40:

> "I agree. If A provides money to B, both being resident in England, to purchase landed property in his own name but for and on A's behalf, and B does so, the consequences of that transaction are governed by English law. It would be absurd if they were governed by the law of the place where the property in question happened to be located.
>
> Such a rule would lead to bizarre results if, for example, A's instructions were to buy properties in more than one jurisdiction, for the consequences of the same arrangement might then be different in relation to the different properties acquired. It would also lead to bizarre results if A left it to B's discretion to choose the property to be acquired, since that would give B the unilateral power to decide on the legal consequences of the transaction which he had entered into with A."

42. Mr Chapman rightly pointed out that *Lightning* did not involve any issue as to whether a personal claim for knowing receipt could run in the absence of a continuing proprietary interest. Even so, we agree with Mr Green that the decision lends support to his case. The Court of Appeal took it that the English Court could not grant relief against a third party who had notice of an equity when it was transferred to him if "by the *lex situs* governing the transfer, the transfer extinguished the plaintiff's equity".

43. Mr Chapman suggested that Millett LJ's judgment was consistent with his case. However, Millett LJ was not retreating from what he had said in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*. He was commenting on the law governing the relationship between the parties to a "trust", not suggesting that the lex situs could be ignored when considering the impact of a trust on a third party.

44. Both sides sought support for their cases in *Arthur*. The central issue in that case, as Sir Terence Etherton said in paragraph 2 of his judgment, was "whether the Torrens system of land registration, as enacted in the Turks and Caicos Islands' Registered Land Ordinance ('the RLO'), precludes a claim that the registered proprietor of land is a constructive trustee of the land by virtue of his knowledge that the transfer was in breach of trust or fiduciary duty". The Privy Council gave an affirmative answer on the strength of a provision in the RLO to the effect that registration of a person as a proprietor did not exonerate the person from any duty or obligation to which he was subject "as a trustee".

45. At paragraph 38 of his judgment, Sir Terence Etherton said:

> "Although the claims to personal and proprietary relief are separate, the appellant in the present case seeks to defeat them both by the same argument resting on the provisions of the RLO which, he asserts, have the effect that the appellant never received any trust property since any trust was eliminated at the moment of registration. The respondent has not sought to argue that, even if the proprietary claim is barred by the provisions of the RLO, the personal claim can nevertheless be advanced. Both sides appear to have proceeded on the assumption that knowing receipt claims, even though for personal relief, are properly viewed as a vindication of pre-existing property rights and are parasitic on those property rights and so are inappropriate against a purchaser who takes free from the prior trust interests by virtue of the Torrens system in question: see *'Knowing Receipt and Registered Land'* by Matthew Conaglen and Amy Goymour in Constructive and Resulting Trusts ([ed. Charles Mitchell, 2010])."

46. The assumption by the parties to which Sir Terence Etherton referred clearly accords with Mr Green's case, but Mr Chapman said that there was more than a hint that the Privy Council did not consider the assumption to be correct. In our view, this passage offers no assistance to either party in the present case. Sir Terence Etherton was simply recording the basis on which argument had proceeded, not expressing any view, or even giving a hint, as to whether the parties' assumption was well-founded.

47. The previous paragraph of Sir Terence Etherton's judgment is of more significance than paragraph 38. Sir Terence Etherton said in paragraph 37:

> "The recipient's personal liability to account as a constructive trustee by virtue of knowing receipt means that the recipient is subject to custodial duties which are the same as those voluntarily assumed by express trustees: see *'Remedies for Knowing Receipt'* by Charles Mitchell and Stephen Watterson in Constructive and Resulting Trusts (ed. Charles Mitchell, 2010). The recipient's core duty is to restore the misapplied trust property."

48. The book chapter by Charles Mitchell and Stephen Watterson which Sir Terence Etherton cited argues that "when the courts say that a knowing recipient is 'personally liable to account as a constructive trustee', they mean exactly what they say: because of the circumstances in which knowing recipients acquire title to the misapplied property, Equity fixes them with custodial duties which are the same as some of the duties which are voluntarily assumed by express trustees" (page 130). The recipient's "primary duty, and generally his only duty, is to restore the property immediately, so that the trust can be reconstituted and duly administered" (page 149). With regard to the requirement that a defendant must have received trust property before he can be liable in knowing receipt, the authors say at pages 157-158:

> "we would stress that the reason why this matters is not because the defendant must have been unjustly enriched, but because liability for knowing receipt depends on the defendant owing custodial duties as a trustee of the property. The strict insistence on receipt of property does not make sense, except on this assumption; and it helps to explain why knowing receipt should not be collapsed into either the wrong of dishonest participation in a breach of trust, or into a liability in unjust enrichment. If the only reason why it mattered that a defendant had received title to the property was to establish that the defendant had been enriched, then liability in 'knowing receipt' could be expected to arise in a much wider category of case, including, for example, cases where a defendant has never received any property, but has been enriched as a result of property having been used for his benefit, as in discharge of his debts. Yet the courts have specifically denied that 'receipt' has this extended meaning."

Earlier in the chapter, at page 117, the authors explain that the beneficiaries' equitable interest in either the original trust property or a substitute "ends when the property is transferred pursuant to an authorised sale (in which case their interest is overreached), or is transferred in an unauthorised transaction to a bona fide purchaser for value without notice, or is consumed or otherwise destroyed".

49. As we see it, a key premise underlying Mitchell and Watterson's account of knowing receipt is that the beneficiaries still had an equitable interest in the relevant property at a time when the defendant had knowledge of the breach of trust. It is the existence of that equitable interest which gives rise to the custodial duties to which Sir Terence Etherton referred. In particular, it is incumbent on a recipient with knowledge of a

breach of trust "to restore the property immediately" because the beneficiaries have equitable rights to it. Conversely, it is inapt to talk of a custodial duty, or a duty to restore, if the recipient acquires full and unencumbered title as a result of the transaction by which he receives the property. The need, on this understanding of the law, for the beneficiaries to retain an equitable interest can also be seen in *Goff & Jones, "The Law of Unjust Enrichment"*, 9th ed. (2016), of which Mitchell and Watterson are two of the three editors, at paragraph 8-196:

> "A recipient will [incur liability for knowing receipt] if he received the misapplied assets or their traceable proceeds beneficially, *in circumstances where he cannot claim to take free of the beneficiaries' interests*, and if he knows that the assets have been transferred to him in breach of trust at the time he receives the assets, or if not, then at some later time *whilst he still holds the assets or their traceable proceeds*" (emphasis added).

50. Lloyd LJ analysed the law in a similar way in *Independent Trustee Services*, citing among other things Mitchell and Watterson's chapter in *"Constructive and Resulting Trusts"*. In *Independent Trustee Services*, the trustee of various pension schemes alleged that money paid to the respondent had been misappropriated from the schemes. Lloyd LJ said in paragraph 81:

> "Thus, if the respondent had not given value for the payment, she would, in my view, have been a trustee of the money, that is to say a constructive trustee, holding it on trust for the beneficiaries under the pension fund trusts. She would have been under no relevant duty as regards the money until she had notice of the interest of the beneficiaries. Once she had such notice, *she would be under a duty not to part with the remaining funds (and the traceable proceeds in her hands of any which had already gone) otherwise than by restoring them to or for the benefit of the beneficiaries*, in the present case by payment to the new trustee, the claimant. That is the equivalent of the relief to which the claimant would be entitled by way of its proprietary claim" (emphasis added).

51. The proposition that a person liable as a knowing recipient will have been subject to "custodial duties" also finds support in other recent cases. In *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 ("*Williams*"), Lord Sumption (with whom Lord Hughes agreed) said in paragraph 31:

> "The essence of a liability to account on the footing of knowing receipt is that the defendant has accepted trust assets knowing that they were transferred to him in breach of trust and that he had no right to receive them. His possession is therefore at all times wrongful and adverse to the rights of both the true trustees and the beneficiaries. No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. *His sole obligation of any*

practical significance is to restore the assets immediately" (emphasis added).

Likewise, Lords Sumption and Briggs said in the passage from paragraph 58 of their judgment in *DD Growth* already quoted that "[t]he liability of a constructive trustee is essentially a custodial liability comparable to that of an express trustee".

52. Mr Chapman argued that the passage in *Williams* quoted above supported his submission that the essence of liability in knowing receipt is simply receipt of assets transferred in breach of trust, with the requisite knowledge, that being what "therefore" made the recipient's possession wrongful and adverse to the interests of the true trustees and beneficiaries. We do not consider that the passage carries the implication for which Mr Chapman contends. To the contrary, the emphasis on the sole obligation of practical significance being one of restoration assumes some continuing proprietary interest in the property to be restored.

53. Mr Chapman further submitted that the explanation of the law given in the Mitchell and Watterson book chapter was wrong. In that connection, he pointed out that the book pre-dated *Williams*, which, he said, shows liability for knowing receipt to be based on the commission by the defendant of an equitable wrong. He relied in this respect on passages in *Williams* in which Lord Sumption, at paragraph 9, described both dishonest assisters and knowing recipients as "persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets" and said that "[t]he intervention of equity in such cases does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets" and "is purely remedial".

54. However, views very similar to those voiced by Lord Sumption had been expressed before Mitchell and Watterson wrote their book chapter, notably in a case quoted in the chapter, *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, in which Millett LJ referred at 413 to "the distinction between an institutional trust and a remedial formula" and said at 409 of the class of "constructive trust" to which the liability of a knowing recipient belongs that such a person "never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff". Further, the Supreme Court's decision in *Williams* has not caused Mitchell and Watterson to alter their analysis (see e.g. Goff & Jones, *"The Law of Unjust Enrichment"*, at paragraph 8-201, and *Underhill and Hayton: Law of Trusts and Trustees*, 19th ed. (2018), at paragraphs 98.5 and 98.33), and similar views have been expressed by other commentators notwithstanding *Williams* (see e.g. Chambers, *"The End of Knowing Receipt"* (2016) 2(1) CJCCL 1, Virgo, *"The Principles of Equity & Trusts"*, 3rd ed. (2018), at 596, *Hanbury and Martin: Modern Equity*, 22nd ed. (2021), at paragraph 25-008, and *Lewin on Trusts*, at paragraphs 42-044 and 42-083). In any event, we cannot see that Mitchell and Watterson's analysis of the law conflicts with *Williams*. To say, as Lord Sumption did in *Williams*, that knowing recipients "never assumed and never intended to assume the status of a trustee" and that equity's intervention "does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets" is not inconsistent with Mitchell and Watterson's conclusion that "Equity fixes [knowing recipients] with custodial duties" or with it being essential to a knowing receipt claim that the defendant should not have taken free of the beneficiaries' interests. Lord

Sumption himself spoke of the possession of a defendant having been "wrongful and adverse to the rights of both the true trustees and the beneficiaries" and of a defendant having an obligation "to restore the assets immediately".

55. Turning to the Supreme Court decision in *Akers v Samba* ("*Akers v Samba* (SC)"), the leading judgment was given by Lord Mance, with whom Lords Neuberger, Sumption, Toulson and Collins all agreed. In paragraphs 20-22, Lord Mance said this:

> "20. It is established by Court of Appeal authority (and was not challenged on this appeal) that, where under the lex situs of the relevant trust property the effect of a transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise subsist, that effect should be recognised as giving the transferee a defence to any claim by the beneficiary, whether proprietary or simply restitutionary: *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. In that case, bona fide chargees for value of shares situated in New York and held on trust for Macmillan were thus able, by application of New York law, to take the shares free of Macmillan's prior equitable interest of which the chargees had had no notice. As will appear, I do not consider that any different position would result under the Convention [i.e. the Convention on the Law Applicable to Trusts and on Their Recognition, scheduled to the Recognition of Trusts Act 1987].
>
> 21. That does not mean that a common law trust cannot or will not exist in respect of shares, simply because the lex situs may treat a disposition of the shares to a third party as overriding any interest of the beneficiary in the shares. A trust existed in respect of the shares in issue in *Macmillan v Bishopsgate* until they were disposed of under the lex situs by transfer to bona fide purchasers for value without notice. But a common law trust can also exist in respect of shares, such as the Saudi Arabian shares presently in issue, even though Saudi Arabian law does not recognise equitable proprietary interests at all and may not (though this has not been investigated) give any effect at all to a common law trust.
>
> 22. A common law court concerned with Cayman Islands trusts in respect of Saudi Arabian shares will give them their intended effect to the greatest extent possible, having regard to the overriding effect of any disposition under their lex situs. This is so both at common law and under the Convention. Thus, as between the immediate parties to the present trusts, Mr Al-Sanea and SICL, Mr Al-Sanea cannot deny the validity or effect of the trusts, or assert a right to deal with assets subject to a trust or their proceeds as his own, simply because Saudi Arabian law does not recognise the trusts as giving rise to the separate equitable proprietary interest that would exist if the shares were situated in, say, the United Kingdom or Cayman Islands. If Mr Al-Sanea were to be the subject of bankruptcy proceedings or a

> receivership in the United Kingdom or Cayman Islands, it is equally clear that his creditors could not claim that the Saudi Arabian shares formed part of his estate in bankruptcy."

In paragraph 28, Lord Mance noted that in *Lightning* Peter Gibson LJ had "recognised that the lex situs can, under the principle recognised in *Macmillan v Bishopsgate* [1996] 1 WLR 387, have a significance in the case of a third party transfer"; in paragraph 34, Lord Mance said that it is "clear … , that in the eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction, the law of which does not recognise trusts in any form"; and, in paragraph 42, Lord Mance said:

> "I would regard the present trusts not only as intended to create, but also as creating equitable proprietary interests in the Saudi Arabian shares, enforceable at common law at least as between SICL and Mr Al-Sanea and anyone else other than a transferee from Mr Al-Sanea in circumstances giving the transferee a good title under Saudi Arabian law".

56. Lord Mance thus distinguished between the position of a trustee and that of a third party. A trustee such as Mr Al-Sanea cannot deny the validity or effect of a trust on the basis that the jurisdiction in which the assets are situated does not recognise trusts or equitable proprietary interests. On the other hand, "where under the lex situs of the relevant trust property the effect of a transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise subsist, that effect should be recognised as giving the *transferee* a defence to *any* claim by the beneficiary, whether proprietary or simply restitutionary" (emphasis added in each case). In other words, the availability of even a personal claim against a third party transferee depends on the continued existence of an equitable interest.

57. For his part, Mr Chapman sought support for his case in passages from the judgments of Lord Neuberger and, especially, Lord Sumption. In paragraph 63, Lord Neuberger said:

> "As Lord Mance JSC … points out, where the legal owner transfers the legal estate to a bona fide purchaser for value with no notice of the beneficial interest in breach of trust, the person who owned the beneficial interest does not by any means lose all its other rights. In particular, it retains all its personal rights against the trustee, ie the party who sold the legal estate. In other words, following the transfer of the shares in this case, SICL retained its personal rights against Mr Al-Sanea, but (assuming Samba was a bona fide purchaser for value without notice and subject to section 127), SICL lost any proprietary rights or interest it had in the shares."

58. In our view, there is no inconsistency between this passage and Lord Mance's judgment or, indeed, SNB's case. It does not follow from the fact that SICL retained personal rights against Mr Al-Sanea that it also has or had such rights against SNB.

59. Turning to Lord Sumption's judgment, Mr Chapman stressed paragraphs 83 and 86, where Lord Sumption said:

> "83. There are a number of reasons why the proprietary interest of the beneficiary may not be effective or enforceable. Obvious examples include cases where the property or its traceable proceeds have been transferred to a bona fide purchaser for value without notice; and cases where the property has been consumed or destroyed, or has ceased to be traceable. But that will not affect the beneficiary's personal rights, if any, against the trustee or his amenability to personal remedies. Those rights will remain enforceable, for example by an action for the restoration of the trust assets or for equitable compensation for their loss. The personal and proprietary rights of the beneficiary exist independently, and neither is dependent on the continued existence of the other. For this reason, the beneficiary's proprietary interest in property is of limited practical importance. It is relevant only as between the beneficiary and a third party, or for the purpose of asserting a prior claim to specific assets in an insolvency. Even then, equity acts in personam by requiring the trustee to perform his trust or a relevant third party to account.
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> …
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> 86. In *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 736–737, the question was whether the recipient of trust money was accountable as a constructive trustee on the footing of knowing receipt when before reaching him the property had passed through the hands of persons in a number of civil law jurisdictions where equitable interests were not recognised and the legal owner was treated as having the entire interest in the property. The reason was that, as between the alleged constructive trustee and the beneficiary, the former's amenability to personal remedies was unaffected by any issue as to existence of rights in rem …. A similar analysis was applied by the Court of Appeal in *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 TLI 35 and more recently by Roth J in *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch)."

60. Mr Chapman pointed to Lord Sumption's reference to the "personal and proprietary rights of the beneficiary exist[ing] independently", "neither [being] dependent on the continued existence of the other", and to the alleged constructive trustee's amenability to personal remedies in *El Ajou v Dollar Land Holdings plc* being "unaffected by any issue as to existence of rights in rem". However, (a) it can be seen from Lord Sumption's reference to "the beneficiary's personal rights, if any, against the trustee or his amenability to personal remedies" that the "personal rights" on which he was focusing in paragraph 83 were those against a trustee, (b) the reference in paragraph 86 to the amenability of the "alleged constructive trustee" to personal remedies must be read in the context of the justification which Millett J himself gave in *El Ajou* for considering the "temporary repose" of assets in civil law jurisdictions to be immaterial, (c) Lord Sumption agreed with Lord Mance's judgment, endorsed *Lightning* in paragraph 86 and, in paragraph 87, referred to the availability to Samba of "the usual

equitable defences" and (d) Lord Sumption was anyway only one of the five members of the Court.

61. *Courtwood Holdings SA v Woodley Properties Ltd* [2018] EWHC 2163 (Ch) ("*Courtwood*") points in the same direction as *Akers v Samba* (SC). In paragraph 201 of that judgment, Nugee J quoted from a judgment he had given earlier, on the first day of the trial. In paragraph 59 of that latter judgment, he had said:

> "The foundation of the claim in knowing receipt … is that a person has got their hands on property which belongs to somebody else …. If that is the analysis … the foundation of that is that the assets do not belong in equity to the recipient; and the foundation of the fact that the assets do not belong to the recipient in equity is that the transfer by which the assets were transferred is a flawed transfer. It may be a voidable transfer, it may indeed, for example if a company's assets are disposed of in a way that is *ultra vires*, be an entirely void transfer. But what gives the equity to the claimants is not the knowledge of the defendants by itself, or antecedent breaches of duty, but the fact that the transaction which is impugned is not one which transfers a good title to the recipient. It is in those circumstances that the recipient, unless a *bona fide* purchaser for value without notice, is liable, if he still has the property, to give it back, and can be made liable to account as constructive trustee, whether he still has the property or not, if he received it in circumstances that make his receipt unconscionable."

62. Finally, it is relevant to refer to views which have been expressed about the availability of knowing receipt claims in the context of registered land. As already mentioned, section 29 of the Land Registration Act 2002 has the consequence that a transferee for valuable consideration of registered land will take free of prior beneficial interests even if he had notice that the transfer was in breach of trust unless the beneficiaries were in actual occupation at the time of the disposition. Moreover, section 26(1) provides for "a person's right to exercise owner's powers in relation to a registered estate or charge … to be taken to be free from any limitation affecting the validity of a disposition". However, section 26(3) states that the section "has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition)".

63. The explanatory notes for the 2002 Act said this about section 26:

> "58. The effect of section 26 is that a disponee is entitled to proceed, in the absence of such an entry, on the basis that there are no limitations on the owner's powers and the disponee's title cannot be called into question. Under *subsection (3)*, however, the disposition will not be rendered lawful. Disponors who have acted beyond their powers can, therefore, be called to account, and a disponee may not escape liability if privy to the disponor's conduct.

> 59. For example, where the disposition is in fact unlawful, the consequences of that unlawfulness can be pursued so long as these do not call into question the validity of the disponee's title. The example may be given of trustees of land, A and B, who had limited powers of disposition, but who failed to enter a restriction in the register to reflect this fact. If they transferred the land to a buyer, C, in circumstances that were prohibited by the trust, they would commit a breach of trust. Furthermore, although C's title could not be impeached, the protection given by the section does not extend to any independent forms of liability to which she might be subject. Thus if C knew of the trustees' breach of trust when the transfer was made, she might be personally accountable in equity for the knowing receipt of trust property transferred in breach of trust."

The notes reflected in this respect paragraph 4.11 of the preceding Law Commission report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271).

64. As Mr Chapman pointed out, the explanatory notes contemplated that a transferee with an unimpeachable title might nonetheless be vulnerable to a knowing receipt claim. However, Matthew Conaglen and Amy Goymour, in another chapter in *"Constructive and Resulting Trusts"* (ed. Mitchell, 2010), *"Knowing Receipt and Registered Land"*, concluded at page 181 that "in situations where trust property is registered land and the trustee transfers title to that land in breach of trust, if the disposition was made for valuable consideration so that the transferee can claim the benefit of section 29 of the Land Registration Act 2002 to avoid the beneficiaries' pre-existing equitable interests in the land, the transferee ought also to be immune from a personal claim for knowing receipt". At page 177, they said:

> "In summary, knowing receipt should be inapplicable against a registered purchaser who can claim the benefit of section 29. In general terms, outside the context of registered land, the knowing receipt claim is parasitic on the proprietary nature of the beneficiaries' equitable interests in the trust property: it is a claim to vindicate those property rights once they are no longer able to be vindicated *in specie*. The purpose served by such claims runs directly counter to the purpose of section 29, which is to protect purchasers from the effect of pre-existing interests irrespective of whether the purchaser has notice of those interests. Although it seeks to achieve that purpose merely by 'postponing' the pre-existing interests to those of the registered purchaser, it would undermine the function of section 29 if that were used as a reason to allow the personal claim in knowing receipt where proprietary interests are no longer enforceable."

65. In comments on *Arthur*, Martin Dixon and Nicholas Hopkins both differed from Conaglen and Goymour. Dixon said in a note ([2012] Conv 439, at 445):

> "Speaking for myself, I have some difficulty in accepting that a personal claim is excluded in cases where the proprietary claim

> fails due to land registration. First, even if it is true that personal liability in knowing receipt requires a 'proprietary base' before the claim can be established, that is not the same as saying that the proprietary base must be maintained for it to succeed. If it were otherwise, there would not be much point in having a personal claim at all, because it would rarely be more useful than the proprietary claim. Secondly, liability in knowing receipt is not available against a bona fide purchaser for value because they are not 'knowing', not (I would suggest) because being such a purchaser kills the proprietary base for the claim. If this is correct, then the fact that a land registration statute might kill the proprietary base for the claim (which it did *not* in *Arthur*) does not protect a 'knowing' recipient from personal liability. These are, however, deep and treacherous waters, and they form part of a larger argument about the nature of receipt based liability."

Hopkins said ([2013] Conv 61, at 66):

> "Technically, personal liability is sufficiently distinct from proprietary liability (both in its operation as a claim against the person and its threshold of knowledge) that there appears to be no reason why statutory protection against the proprietary claim should affect the personal one. As a matter of policy, protection from a proprietary claim makes recourse to personal liability all the more essential. To put it the other way, it is difficult to see why a recipient of property with knowledge that it has been transferred in breach of trust or fiduciary duty should be able to use legislative protection from a proprietary claim to shield themselves from alternate liability. To do so appears tantamount to using statute as a cloak for fraud."

66. Further, the Law Commission has maintained the view it expressed in its 2001 report. In its 2018 report, *"Updating the Land Registration Act 2002"* (Law Com No 380), with Professor Hopkins as one of its Commissioners, the Commission said this:

> "5.147 We also comment on the point of the effect of section 26 more generally. We reiterate that section 26 only operates for the benefit of preventing the validity of a disponee's title from being questioned. Section 26 does not prevent beneficiaries from claiming personally against trustees for breach of trust. It also does not prevent beneficiaries from making personal claims against disponees ….
>
> 5.148 Section 26(3) specifically provides:
>
> > This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of the disposition).

> 5.149 In our 2001 Report we explained that, despite owner's powers, knowing receipt claims could continue to be made against disponees:
>
> > Although C's title cannot be called into question, the protection given by [section] 26 does not extend to any independent forms of liability to which she might be subject. Thus if C knew of the trustees' breach of trust when the transfer was made, she might be personally accountable in equity for the knowing receipt of trust property transferred in breach of trust.
>
> 5.150 Our provisional proposal was couched in similar terms. We note that the matter is not beyond doubt; in particular, the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* held (in respect of equivalent Australian legislation) that recipient liability could not be imposed against a defendant who had statutory protection against the beneficiaries' equitable interests. However, the Privy Council has expressed the opposite view.
>
> 5.151 We have ensured that our recommendation and our clause to amend the LRA 2002 do not disturb this effect of section 26. Section 26, under the LRA 2002 and under our recommendations, is no impediment to any personal claims that a beneficiary of an equitable interest has, either against the trustees or the disponee; it solely operates to prevent the validity of the disponee's title from being questioned."

67. The case cited in paragraph 5.150 of the report as authority for the proposition that "the Privy Council has expressed the opposite view" is *Arthur*, in which, in our view, the Privy Council did not in fact do so. However, the Commission also relied in support of its view on *Haque v Raja* [2016] EWHC 1950 (Ch), where, in the course of a judgment in which he concluded that an interim proprietary freezing order should not be continued, Henderson J said:

> "46. I now turn to the alternative way in which the claimant puts his claim against Mr Khan, namely as an accessory to a dishonest breach of trust by Ms Raja. On this basis, the claimant seeks to make Mr Khan liable as a constructive trustee on the ground of his receipt of the Property with the requisite degree of knowledge of the alleged breach of trust and/or fiduciary duty by Ms Raja. The necessary degree of knowledge in cases of 'knowing receipt' is that it 'should be such as to make it unconscionable for [*the recipient*] to retain the benefit of the receipt': see *BCCI (Overseas) Ltd v Akindele* [2001] Ch 537 (CA) at 455E per Nourse LJ, with whom Ward and Sedley LJJ agreed.
>
> 47. If the requisite degree of knowledge on the part of Mr Khan is established, his liability as a constructive trustee arises

> as a matter of law and attaches to the Property while it remains in his ownership. It is a liability which affects his conscience directly, and is not dependent upon the survival of the claimant's original beneficial interest as one which binds the Property in his hands. This way of putting the claim is therefore unaffected by the technicalities of overreaching and land registration, as [counsel for Mr Khan] rightly accepted. It follows that the critical issue on this part of the case is whether, on the facts, there is a serious question to be tried."

68. Henderson J thus accepted that the availability of a knowing receipt claim was "not dependent upon the survival of the claimant's beneficial interest" and so was "unaffected by the technicalities of overreaching and land registration". However, the point was conceded and does not appear to have been the subject of argument. As the Judge put it in paragraph 101 of the Judgment, counsel for Mr Khan "had better arguments to pursue on an interim hearing".

Conclusion

69. While it may be legitimate to refer to knowing receipt as a species of equitable wrongdoing, it is not based exclusively on fault. For liability to arise, the defendant must also have received trust property or, as Hoffmann LJ put it in *El Ajou v Dollar Land Holdings plc*, "assets which are traceable as representing the assets of the plaintiff".

70. As Mitchell and Watterson pointed out, receipt of trust property cannot be required just to establish that the defendant has been enriched. Were that the sole concern, someone who had benefited from trust property in some other way (say, because the defendant's spouse had wrongfully spent trust money on a holiday for them both) could be expected to be vulnerable to a knowing receipt claim, but that is not the case. In fact, even a person who has received trust property and himself used it to fund a holiday will not be liable for knowing receipt if he had no knowledge of any breach of duty until after the money had been expended. Unconscionability must coincide with possession of trust property for liability to arise.

71. Of course, there might be said to be an ambiguity in the proposition that, for a knowing receipt claim to succeed, the defendant must have received trust property. It might mean either that the property in question has to have been subject to a trust when in the defendant's hands or that it suffices that the property was so subject up to the point it was transferred to the defendant. However, it is hard to see why such significance should be attached to the requirement for receipt of trust property if it were enough that the property should have been subject to a trust before it reached the defendant. If all that mattered was that the claimant should once have had an interest in the property, why should a defendant be liable for knowing receipt if he still had it when he learned that it had been transferred to him in breach of trust but escape liability entirely, regardless of any issue as to unconscionability, if he had already exhausted it through personal expenditure? Why should it be crucial that the defendant had possession of property that had been subject to the relevant trust if it never had to be so subject when held by the defendant?

72. Take a case in which there has been overreaching. Property was formerly comprised in a trust, but on being sold to the defendant it was freed from the trust, which instead attached to the proceeds of sale. Mr Chapman argued that the defendant could potentially be liable for knowing receipt. However, it is not obvious why the fact that the property transferred to the defendant happened to be trust property in the past should expose him to the possibility of a knowing receipt claim when (a) the overreaching principle is that the property in the hands of the recipient is freed from any trust encumbrance and that substitute property has become subject to the trust, (b) the defendant could not have been liable for knowing receipt if he had benefited from the property without receiving it and (c) the price paid by the defendant might have been a full one.

73. A transferee will also take free of equitable interests if he is a bona fide purchaser for value without notice. Mr Chapman accepted that a knowing receipt claim is not available against such a person, but, echoing Dixon, he attributed that to the transferee not being "knowing" rather than to the absence of a proprietary basis for such a claim. The cases, however, show otherwise. In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*, bona fide purchase for value without notice was considered to give the defendants a good defence to any claim by Macmillan, including one for knowing receipt, not because it would mean that their retention of the shares was not unconscionable, but because the banks would have taken free of Macmillan's interest. In Millett J's view, a "continuing proprietary interest" was crucial.

74. That a "continuing proprietary interest" is a prerequisite of a knowing receipt claim is also indicated by *Lightning*, *Akers v Samba* (SC) and *Courtwood*. As we have said, in *Lightning* the Court of Appeal took it that the English Court could not grant relief against a transferee if under the lex situs the claimant's equity was extinguished by the transfer. In *Akers v Samba* (SC) Lord Mance, giving the leading judgment, saw *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* as establishing that, "where under the lex situs of the relevant trust property the effect of a transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise subsist, that effect should be recognised as giving the transferee a defence to any claim by the beneficiary" and *Lightning* as recognising that, as a result, the lex situs can "have a significance in the case of a third party transfer". In *Courtwood*, Nugee J considered the foundation of a knowing receipt claim to be that "the assets do not belong in equity to the recipient" and that "what gives the equity to the claimants" is "the fact that the transaction which is impugned is not one which transfers a good title to the recipient".

75. The cases in which the Courts have accepted that knowing recipients have "custodial" obligations, including in particular an obligation to restore the property, also tend to suggest that, to succeed in a knowing receipt claim, a claimant must have had a proprietary interest in the property when it was in the hands of the defendant. It makes sense to think of a knowing recipient owing such duties in circumstances where the property is subject to an interest having priority to the recipient's. It is much more difficult to see why a recipient should be bound to "restore" property or otherwise to have "custodial" responsibilities in respect of it if he has an unimpeachable title to it.

76. This accords with the mental element required to establish liability in knowing receipt, which, as the passage quoted above from *Akindele* makes clear, is that the state of knowledge of the recipient makes it unconscionable for him to *retain* the property. If the law treats the receipt of the property as conferring unencumbered title on the

recipient, it is difficult to see why retention should be regarded as unconscionable. It is not the *receipt* which must be unconscionable; indeed the constructive trust duty may arise where the recipient has done nothing which could be described as unconscionable, as for example where he receives property in ignorance of any trust and is only later informed of it whilst still in possession: at that very moment of after-acquired knowledge, when possession and knowledge coincide, the duty as a constructive trustee immediately arises notwithstanding that the recipient has at that stage done nothing unconscionable. That is so if and because subsequent retention by him (or disposal) would be unconscionable. This illustrates the fallacy in Mr Chapman's submission that the equitable wrong which gives rise to liability for knowing receipt is made out merely by receipt of property in breach of trust coupled with the requisite knowledge that the transfer is such a breach: the submission wrongly treats the knowledge element as unconscionability of receipt, whereas it is unconscionability of retention.

77. Turning to the scope, if any, for knowing receipt claims to be brought in the context of registered land, *Arthur* illustrates the importance of the particular terms of the relevant statutory regime. In England, that regime is to be found in the Land Registration Act 2002 and the arguments advanced by, on the one hand, Conaglen and Goymour and, on the other, the Law Commission in part turn on sections 26 and 29 of that statute, on which we do not need to comment. What we would say is that the views expressed in the last sentence of paragraph 5.150 of the Law Commission's 2018 report do not have a sound basis in authority.

78. In all the circumstances, it seems to us that the Judge was right to conclude that a knowing recipient "must have held trust property, not property to which from the moment of receipt he had good title" and that "a claim in knowing receipt, where dishonest assistance is not alleged, will fail if, at the moment of receipt, the beneficiary's equitable proprietary interest is destroyed or overridden so that the recipient holds the property as beneficial owner of it". That conclusion is, as the Judge said, borne out by "a consistent line of case law" in which it has either been decided that "a claim in knowing receipt cannot succeed unless the claimant has a continuing proprietary interest following the impugned transfer" or that has been assumed to be correct.

79. In short, a continuing proprietary interest in the relevant property is required for a knowing receipt claim to be possible. A defendant cannot be liable for knowing receipt if he took the property free of any interest of the claimant. It follows that, as the Judge held, "absent a continuing proprietary interest in the Disputed Securities at the time of registration, the claim in knowing receipt as pleaded will fail".

The Saudi Arabian Law Issue

The Judgment

80. The Disputed Securities were shares in five Saudi Arabian joint stock companies, all of them large banks, whose transfer to Samba was effected by registration. The shares in four of them were publicly listed on the Tadawul, the Saudi stock exchange. Shares in the fifth, National Commercial Bank ("NCB"), were not so listed at the time of the September Transfer, although they were by the time of the Judgment. As unlisted securities, the NCB shares were governed by different registration arrangements. In the light of his conclusion on the Knowing Receipt Issue, the question for the Judge

was whether as a matter of Saudi Arabian law, as the lex situs of the shares, the transfer to Samba left SICL with an interest in the shares which the English Court would characterise as a subsisting proprietary interest.

81. The Judge found that although the Saudi Arabian Courts would recognise a form of ownership interest in SICL prior to the transfer, the registration of the shares in Samba's name was conclusive of full and exclusive ownership rights thereupon vesting in Samba. On the appeal, the claimants challenge the second part of this finding, contending that the Judge was wrong to find that the registration left SICL without the form of ownership interest enjoyed prior to the transfer. By a respondent's notice, SNB challenges the first part of this finding, contending that the Judge was wrong to find that prior to the transfer SICL had any form of ownership interest which Saudi Arabian law would recognise. Although the respondent's notice point is logically prior to the point in the appeal, the parties addressed their arguments first and primarily to the argument in the appeal on the effect of registration, recognising that on the Judge's findings on the Knowing Receipt Issue, the claimants must succeed on this issue for the appeal as a whole to succeed. We shall adopt the same approach.

82. The Judge explained the reasons for his conclusions in a careful and detailed section of the Judgment running to 88 paragraphs. The following summary is sufficient for the purposes of this appeal.

83. The Courts of the Kingdom of Saudi Arabia do not apply foreign law. They would seek to give effect to the Six Transactions in accordance with the Saudi Arabian Courts' view of Saudi Arabian law. There is no distinction in Saudi Arabian law between legal and beneficial ownership as such. Therefore the beneficial interest of SICL under English/Cayman law would not have been recognised as such by the Saudi Arabian Courts.

84. The relevant legislation in Saudi Arabia governing the ownership of shares in joint stock companies at the time of the September Transfer was article 102 of the Companies Regulation 1965 ("CR") which provided that shares are transferred by registration in the shareholders' register maintained by the company (other than bearer shares with which we are not concerned). Article 102 of CR applied the Capital Market Regulation 2003 ("CMR") to the transfer of shares listed on the Tadawul. Chapter four of CMR provides for the establishment of the Securities Depository Centre ("the SDC"), which by article 26 is the only entity in the Kingdom of Saudi Arabia authorised to operate transfers and registration of ownership of securities traded on the Tadawul. Article 25 of CMR requires the Capital Market Authority ("CMA") to establish a committee, known as the Committee for the Resolution of Securities Disputes ("CRSD") which has jurisdiction over disputes falling under CMR and the other rules, regulations and instructions issued by CMA and the Tadawul with respect to public and private actions. Article 21 of CMR provides that, subject to authorised exceptions, listed securities can only be traded in the SDC. Article 27 provides that all transfers of listed securities are to be registered in the records of the SDC, and that such registration serves as "conclusive evidence and proof of ownership" against all third parties, subject only to the provisions of article 27(d). Article 27(d) permits an application to be made to the SDC to correct or amend the register if there is "an error in the information entered into the registry". The ability of SICL to challenge Samba's exclusive ownership of the listed shares in four of the five banks depended entirely on whether it could obtain rectification of the register pursuant to article 27(d) of CMR.

85. At paragraph 173, the Judge divided the relevant questions into three:

> "(i) Would Saudi Arabian law characterise SICL's rights as being those of an owner of the shares, or only those of a person to whom Mr Al-Sanea owed personal obligations under an agreement (in other words: how would the Six Transactions be understood and characterised in a Saudi Arabian Court) ('characterisation')?
>
> (ii) If the answer is 'the interest of an owner', does Islamic law (and therefore Saudi Arabian law) in principle provide a remedy for SICL against a third party purchaser of SICL's property, if the third party knew of the lack of authority of Mr Al-Sanea to sell ('remedy against third party')?
>
> (iii) If the answer to (ii) above is that such a remedy would in principle exist, whether the effect of the Saudi Arabian legislation governing share registration is to preclude that remedy against a registered proprietor in a case such as this, where SICL's interest derives from an unregistered, off-market transaction ('effect of registration')?"

86. The Judge said that as the legislation governing share ownership is part of the law of Saudi Arabia and is to be interpreted consistently with Islamic law, it might be artificial to separate out issues (ii) and (iii), but that doing so was nevertheless a convenient way of analysing the difference between the experts.

87. On the characterisation issue, the Judge preferred the evidence of the claimants' expert, Professor Mallat, that a Saudi Arabian judge would regard the Six Transactions as more than just a contract between SICL and Mr Al-Sanea, and instead as making SICL the underlying owner of the trust property. Saudi Arabian law has embraced the concepts of true underlying ownership, and registration in the name of a front or nominee, in the context of capital markets and banking legislation, and takes account of the fact that these same questions arise in the context of trusts and similar 'offshore' legal structures. A Saudi Arabian judge would be able to use a variety of imprecise analogues in Islamic law to understand the intended effect of the Six Transactions, namely that SICL would be the real owner and Mr Al-Sanea the front with fiduciary obligations. A Saudi Arabian judge would not be likely to treat SICL's interest as being only a matter of contract between it and Mr Al-Sanea: he would characterise SICL's interest under lawful Cayman Islands trusts as an ownership interest, not merely a contractual right.

88. As regard the second issue, remedy against third party, the Judge addressed it as a matter of Islamic law ignoring for the time being the statutory provisions for registration of shares. As such it was a broad question of Islamic law about the extent to which an owner's rights can be vindicated where he has suffered harm, not against the person who directly caused the harm but against someone who received the property with knowledge of the lack of authority. Basic norms of Islamic law suggest that there should be a valid claim, and a Saudi Arabian Court would probably provide a remedy to recover the property against the party with knowledge.

89. In relation to the third issue, the Judge rejected the evidence of SNB's expert, Mr Haberbeck, in his written report, that only a 'clerical error' would be corrected under article 27(d) of CMR; but accepted his evidence that article 27(d) could only be used to correct something that had gone wrong within the SDC system itself; it could never be used to give effect to a transaction that had taken place outside the system, since the whole purpose of the SDC register was to ensure that only authorised and registered transactions take place affecting title to shares, in order to maintain the reliability and transparency of the register. To admit claims based on extraneous dealings would undermine the whole basis of the authorised registration system, reflected in its purposes set out in article 5 of CMR.

90. Mr Haberbeck supported his view that article 27(d) could only be used to correct something that had gone wrong within the SDC system by reference to eight cases where the CRSD had declined to accept jurisdiction over disputes about shares unless the disputed transactions had been conducted in accordance with the applicable rules of CMR and delegated legislation issued thereunder. The Judge recognised that a party seeking to challenge ownership could in principle, as a matter of jurisdiction, bring a claim before a Saudi Arabian Court, rather than the CRSD; but held that there was no persuasive evidence that any Court in Saudi Arabia would have allowed the purposes of the Tadawul to be compromised by directing Samba to transfer the Disputed Securities to SICL's nominees or otherwise by recognising SICL's ownership; and that it was probable that no Court or committee other than the CRSD would accept a claim to assert SICL's ownership, since, as was common ground, a claim to upset Samba's title had to be brought under article 27(d).

91. As to the NCB shares, under article 102 of the CR registration is prima facie evidence of ownership, and until displaced is conclusive as to ownership. There is nothing to prevent a claim for rectification of the share register if the claimant has a sufficient basis for it; and before the September Transfer, as between SICL and Al-Sanea, the CR would have permitted SICL to have Mr Al-Sanea replaced as registered owner by another nominee. However that could not occur after transfer to a third party. Registration of title was conclusive in favour of the third party purchaser, just as it was for listed shares under CMR.

92. The Judge also considered whether under Saudi Arabian law there would be a personal claim for compensation against Samba after the September Transfer (i.e. a claim mirroring in its essentials a knowing receipt claim under English law), describing this as uncharted territory. He said that he was unable to decide that it was probable that a case against Samba for compensation would succeed; but in any event such claim would be premised on the loss of SICL's property, not an assertion of continuing proprietary rights.

93. The Judge therefore concluded that SICL had no continuing proprietary interest in the Disputed Securities after the September Transfer capable of supporting a claim against Samba in knowing receipt.

94. The Judge's findings of the effect of Saudi Arabian law were explained by reference to the evidence which he heard. The reports of Professor Mallat and Mr Haberbeck ran to some 300 pages, with some 2,500 pages of exhibits, including numerous cases and other Saudi Arabian materials. The experts were cross-examined for two court days, during which the Judge also asked questions of them from time to time. The Judge

explained his assessment of Professor Mallat and Mr Haberbeck as witnesses, and his approach to their evidence, as follows. The Judge said that having heard both experts being cross-examined at length, and seen the way in which they answered questions, and explained some of the cases referred to, had given him significant help in assessing the credibility of their opinions. There was also, as regards CMR and associated legislation, an inherent likelihood of certain evidence about it being correct because the purpose of the legislation was not in dispute: it was designed to support an efficient, transparent, secure and reliable stock exchange on a modern western model, and to facilitate competition with other such markets, to which objectives uncertainty or insecurity would be inimical.

95. Professor Mallat was immensely knowledgeable about Islamic law and fundamental tenets of English, French and Roman law; he gave evidence about Islamic law with some authority. However he did not have relevant knowledge of litigation in Saudi Arabia and was not well-placed to speak with real authority on the application and effect of CR and CMR and related legislation, or on practice in the CRSD or the Commercial Court or relevant committees in Saudi Arabia. Further, the Saudi Arabian case law on which he relied was not always to the point or fully analysed. The Judge felt uneasy about relying on Professor Mallat's opinions on the approach that would likely be taken by the CRSD in particular, and Saudi Arabian Courts more generally, to claims adverse to registered shareholders and to the operation of the SDC, CR, CMR and associated statutes, because he had no relevant experience of those matters.

96. Mr Haberbeck was not an Arab and did not speak or read Arabic fluently. He was not qualified as a lawyer in Saudi Arabia or any Middle Eastern country and his Arabic was not good enough to act as an advocate or to understand everything that was said in hearings, although he was able to follow them. On the other hand he had been a practitioner in Saudi Arabia for 32 years, with a practice largely involving commercial cases on behalf of international clients. He had considerable practical experience and knowledge of Saudi Arabian law as practised in the Courts of that country including the Board of Grievances, the Commercial Court, the Committee for Resolution of Banking Disputes and the CRSD. He himself drafted pleadings in cases before these tribunals, except the CRSD, and was currently involved in 25 cases in the CRSD. He had experience in the attitudes and approach of judges in those tribunals and experience of cases in Saudi Arabia raising issues of ownership and share registration. He had a detailed and complete understanding of the cases which were relied upon by both expert witnesses in support of their opinions.

97. In respect of both Professor Mallat and Mr Haberbeck, there were inconsistencies between their evidence at trial and what each had said in reports submitted for the purposes of the s. 127 jurisdictional dispute. Those inconsistencies led the Judge to exercise caution about what parts of their evidence he felt able to accept. Subject to that caution, he would give more weight to the evidence of the expert who was likely to have greater experience and expertise in relation to the particular matter or question. In general on the basic principles of Islamic law and the way in which they would be understood and applied by a Judge in a particular context, Professor Mallat, as a scholar and Arabic speaker with wider experience of Islamic law in practice across the Middle East, was likely to be more reliable in his assessment; whereas Mr Haberbeck was much better placed to provide an informed and reliable opinion on how in practice the CRSD, the Commercial Court and various judicial committees in Saudi Arabia would apply the capital markets and companies legislation.

The approach to findings of foreign law

98. On the appeal, SNB submitted that this Court should be very slow to interfere with these findings of fact by the trial judge, based on the expert evidence which he had heard, whilst arguing that this did not apply to its respondent's notice point. Conversely, the claimants contended that such an approach was applicable to prevent the Court from interfering with the Judge's findings on the respondent's notice point, but inapplicable to its arguments on the appeal. We were referred to a large number of authorities, but the principles are not really in doubt.

99. The general approach to the review of a trial judge's findings of fact on an appeal to this Court, and the reasons for it, were set out in the well-known judgment of Lewison LJ in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraph 114:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc* [1997] R.P.C. 1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 W.L.R. 1325 ; *Re B (A Child) (Care Proceedings)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 W.L.R. 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
>
> i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii. The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

100. In *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, Lord Reed said at paragraph 67:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

101. Similar caution applies on an appeal against a trial judge's assessment or evaluation of expert evidence: *Wheeldon Bros Waste Ltd v Millenium Insurance Co Ltd* [2018] EWCA Civ 2403, [2019] 4 WLR 56 at paragraph 11.

102. In *Walter Lilly & Co Ltd v Clin* [2021] EWCA Civ 136, [2021] 1 WLR 2753, Carr LJ referred to these and subsequent authorities and summarised the approach at paragraph 85:

> "In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:
>
> (i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support.
>
> (ii) Where the finding is infected by some identifiable error, such as a material error of law.
>
> (iii) Where the finding lies outside the bounds within which reasonable disagreement is possible."

103. Foreign law is a question of fact which the trial judge is required to determine on the basis of the evidence deployed by the parties. The task for the judge is to determine what the highest available Court in the foreign jurisdiction would decide if the point had come before it: *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428 at paragraph 34. The *FAGE* approach remains the starting point in any appeal from such a determination of foreign law (ibid paragraph 36). However it may be qualified, because a question of foreign law has been described as "a question of fact of a peculiar kind": *Parkasho v Singh* [1968] P 233, 250. In *Macmillan Inc v Bishopsgate Investment Trust (No 4)* [1999] CLC 417, Evans LJ giving the judgment of this Court said:

> "12. So we come to consider what the court's approach should be when the trial judge has heard expert evidence as to foreign law and made findings which are challenged on appeal. What difference does it make that these are findings of fact but of a

> 'peculiar kind' because they are concerned with issues of foreign law?
>
> 13. In our judgment, the answer varies according to the nature of the issue which arises in the particular case and the kind of decision which the trial judge and now the Court of Appeal is called upon to make. Sometimes the foreign law, apart from being in a foreign language, may involve principles and concepts which are unfamiliar to an English lawyer. The English judge's training and experience in English law, therefore, can only make a limited contribution to his decision on the issue of foreign law. But the foreign law may be written in the English language; and its concepts may not be so different from English law. Then the English judge's knowledge of the common law and of the rules of statutory construction cannot be left out of account. He is entitled and indeed bound to bring that part of his qualifications to bear on the issue which he has to decide, notwithstanding that it is an issue of foreign law. There is a legal input from him, in addition to the judicial task of assessing the weight of the evidence given. The same applies, in our judgment, in the Court of Appeal. When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English lawyer, then the court is as well placed as the trial judge to form its own independent view."

104. Mr Chapman relied on this qualification to submit that this Court is as well placed as the Judge to decide what article 27(d) of CMR meant, because there was no issue between the experts as to the Saudi Arabian principles of construction. We cannot accept this submission. Where the foreign law is in the form of a provision in a code, statute or other written source, the task of the Court remains one of determining how the foreign Courts would interpret and apply it, based on the evidence of the expert witnesses. Generally speaking the Court's task is not to address how it would itself interpret and apply the provision; the wording of the provision is to be considered only as part of the evidence and as a help to decide between conflicting expert testimony: see *A/S Tallinna Laevauhisus v Estonian State Steamship Line* (1946) 80 Ll L Rep 99 at 107; *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 at 298; and *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755, [2010] 2 WLR 805 at paragraph 69. There is a qualification to this general principle, recognised in *Macmillan Inc v Bishopsgate Investment Trust (No 4)*, and applicable to a first instance Court as well as on appeal, where the nature of the foreign law issue means that the English Court's expertise approaches that of any foreign law expert, for example where the foreign law is written in the English language and involves concepts similar to English law and familiar to English judges; or where the foreign Courts would be influenced by the English Courts' decisions on the issue: see *King v Brandywine Reinsurance Co (UK) Ltd* [2005] EWCA Civ 235, [2005] 2 All ER (Comm) 1 at paragraph 68.

105. However, there is no scope for applying any such qualification to the general principle in this case. The only authorised texts of CMR and CR are in Arabic and the trial judge had to work from an agreed translation, albeit that in the case of CMR it was one

published by the CMA. Saudi Arabian law is an Islamic system of law, whose concepts and principles are far removed from the common law familiar to English judges. The interpretation and application of CR and CMR fell to be determined not only under this unfamiliar system of law, but also against the background of practice and culture in the capital markets in Saudi Arabia, with which again the English Courts have no inherent familiarity. There were, moreover, numerous Saudi Arabian Court decisions prayed in aid by both experts in support of their contentions as to how the provisions would be interpreted and applied to the facts of the present case. The Judge needed the assistance of extensive expert evidence to explain and explore these cases in order to determine the foreign law issues before him, and referred to a number of them in the Judgment as lending support, or not, to the views of the witness who sought to rely on them. For example his critical finding that article 27(d) of CMR could not apply to "errors" arising outside the CRSD system was based in part on his acceptance that Mr Haberbeck's view was supported by the eight cases upon which he relied in this respect. It would have been both wrong in principle, and impossible in practice, for the Judge to approach the task as one of interpreting the provisions for himself as a matter of construction. It would be equally wrong for this Court to seek to do so. This is a case in which the *FAGE* approach applies: this Court should be slow to interfere with the Judge's findings of fact on Saudi Arabian law and should only do so in accordance with the principles applicable generally to findings of fact made by a trial judge who has based his findings on evidence from witnesses.

The claimants' arguments

106. Mr Chapman first submitted that because it was common ground that Saudi Arabian law did not recognise the concept of an equitable interest, the effect of a transfer of shares by registration was logically incapable of extinguishing it: Saudi Arabian law could not extinguish that which it did not recognise in the first place. This is to confuse the respective roles of English and Saudi Arabian law in the issue at stake. The Saudi Arabian law question required the Court to determine what ownership rights SICL had in the shares, if any, as a result of the transfer to Samba by registration. That is the role of the lex situs governing property rights. The English law question is then whether such ownership rights as SICL had after the transfer were properly to be characterised as a sufficient proprietary interest to support the personal cause of action in knowing receipt. The question was not, as is inherent in Mr Chapman's submission, whether as a matter of Saudi Arabian law the transfer extinguished an English law concept of an equitable interest. The role of the lex situs is to identify what rights exist, not how they would be characterised under English law, as Millett J explained in *Macmillan v Bishopsgate Investment Trust plc (No 3)* at 1001B-C:

> "Legal estates and equitable interests are, of course, concepts of English law which may not have their counterparts in the jurisprudence of other legal systems. Where, therefore, a question arises whether a transaction in England and governed by English law created a legal estate or an equitable interest in foreign property such as shares in a foreign corporation, then recourse must be had to the foreign law in order to ascertain, not how the interest resulting from the transaction would be characterised by that law, but what rights are conferred by that law on the owner of the interest. Once the nature of the interest

> is known, its characterisation as legal or equitable must be determined in accordance with English law."

107. Mr Chapman next submitted that in assessing what rights SICL had following, and as a result of, transfer by registration of the shares, the Judge fell into error in treating the issue as determined by what remedies SICL might have against Samba in respect of the shares. The submission was, essentially, that the focus should have been on the rights, not the availability of remedies. In our view this is an unfair criticism of the Judge's reasoning and conclusions. His essential reasoning was that the registration of the shares in Samba's name was conclusive of Samba's ownership unless and until the register was rectified; that SICL could not have the register rectified; and that if it could not have the register rectified, it had no ownership rights. That is not to conflate rights and remedies: it is to decide that the absence of any available remedy for SICL to rectify the register left the register as conclusive of ownership in Samba's favour. The Judge found in terms that after the transfer SICL had no property interest in the shares as a matter of Saudi Arabian law.

108. Mr Chapman next submitted that there was an inconsistency between the Judge's finding on the issues identified in paragraph 173(i) and (ii) on the one hand, and paragraph 173(iii) on the other: having found that SICL had a form of ownership interest recognised by Saudi Arabian law prior to the transfer, and that Islamic law principles would in principle provide a remedy to SICL against Samba after the transfer, it necessarily followed that Saudi Arabian law must recognise a property interest in the shares vested in SICL after the transfer. We can see no such inconsistency in the Judge's findings. He recognised that issues (ii) and (iii) were really aspects of a single question but addressed them separately as a convenient way of analysing the expert views. Issue (ii) addressed the position in respect of property generally and as a matter of principle, and was always subject to the more particular examination in relation to shares, and the Saudi Arabian provisions affecting transfer of ownership in shares, which the Judge addressed extensively under the heading of issue (iii). There was nothing inconsistent in the Judge's process of reasoning and conclusion that, in respect of property generally and in principle, SICL might have a remedy against Samba after transfer, but that there could be no such ownership rights in respect of registered shareholdings.

109. Mr Chapman further submitted that the Judge's conclusion on article 27(d) was inconsistent with the plain language of the provision: once it was accepted that "error" was not confined to clerical errors, there was no warrant for reading into the provision words which were not there, namely that the error had to be within the SDC system. This is to treat the exercise for the Judge, and for this Court, as one of freestanding construction applying English law principles, which is the wrong approach. The Judge was bound to ask how the provision would be interpreted and applied by Saudi Arabian Courts; he did so and reached his conclusions by reliance on the testimony of an expert witness experienced in the practice of those Courts who supported his view with case law and recourse to the statutory purposes of the system.

110. Mr Chapman further criticised the Judge's reasoning in relation to the interpretation of article 102 of CR, which he held would not permit rectification any more than would article 27 of CMR in relation to listed shares. However, the Judge's conclusion on the evidence was that registration of unlisted shares was conclusive as to ownership absent rectification, just as with listed shares. He was entitled to accept Mr Haberbeck's view

that rectification would not have been available against Samba after transfer, and to reject Professor Mallat's contrary view, which as the Judge observed was supported by nothing other than assertion that the position was the same as for listed securities under CMR. This could provide no support once the Judge had rejected Professor Mallat's view that that was the position under CMR for listed securities, for the reasons he gave.

111. Mr Chapman made a number of more granular criticisms of certain paragraphs in the Judgment. For example he sought to argue that the Judge had failed to give effect to an alleged concession by Mr Haberbeck; and had unfairly treated what Professor Mallat had said as a concession. We were referred to a few isolated passages in the transcript of their evidence. We are not persuaded that the passages we were shown support the criticisms. But in any event, we were shown only a fraction of the evidence adduced at trial, and did not have the advantage which the trial judge enjoyed of hearing the witnesses give evidence and explain the material. Even a transcript does not fully convey the nuance, tone and full meaning of what can be conveyed orally in the witness box. The claimants' reliance on snippets of transcript in this way was impermissible "island hopping" in the memorable phrase of Lewison LJ.

112. In summary, Mr Chapman's points, even taken cumulatively, do not come close to satisfying the criteria for this Court to interfere with a judge's findings of fact on foreign law in a case of this kind. The conclusions of the Judge in this case were reasonably open to him on the evidence he heard, and there is nothing in his clear and detailed reasoning which suggests he was wrong in his conclusions.

The respondent's notice point

113. In the light of our conclusion that the Judge cannot properly be criticised for the findings which he determined adversely to the claimants, the respondent's notice point does not arise, and we do not propose to address it.

The Valuation Issue

114. The final question in this appeal was termed the "Valuation Issue" and it was concerned with whether the Judge erred as a matter of principle in his conclusion that a block discount should be applied when determining the objective value of the Disputed Securities for the purposes of an account on the footing of knowing receipt, or when valuing the benefit obtained and retained by SNB. In the light of our conclusions in relation to the Knowing Receipt Issue and the Saudi Arabian Law Issue, the question of valuation does not arise. However, for the sake of completeness we consider it in outline below.

115. To be clear, the claimants' claim was not for the return of the Disputed Securities but for an account of their value on either the date of the September Transfer or the date of judgment, together with income derived from them and interest.

116. Before the Judge and before us, SNB accepted that the claimants' claim, therefore, is for substitutive performance and Mr Onslow, on behalf of SNB, argued that this requires it to pay the objective value of the Disputed Securities being their market value on a sale which, in the light of the size of the holdings and the expert evidence which the Judge accepted, would be reduced by a block discount. Mr Chapman, on behalf of the claimants, on the other hand, contended that SNB is required to reconstitute the trust

fund as if there had been no misappropriation. As a result, he says that the objective value of the Disputed Shares is what it would cost to purchase them in the market rather than their value on a hypothetical sale. It is accepted that a block discount would not arise in relation to such a purchase.

117. Before turning to the Judge's approach to the expert evidence, it is helpful to remind oneself of the nature of the Disputed Securities, the way in which they have been dealt with and the definitions which the Judge adopted in relation to the valuation exercise.

118. The Disputed Securities comprise large holdings of shares in five Saudi Arabian banks, including Samba itself. The holdings, as at the September Transfer, were: Arab National Bank - 889,797 shares; Banque Saudi Fransi – 4,248,146 shares; NCB – 2,129,250 shares; Samba – 7,130,044 shares; and Saudi British Bank – 3,319,346 shares. At the date of the September Transfer, all of the shares, save those in NCB, were listed and publicly quoted on the Tadawul. All of the companies are now publicly quoted on the Tadawul: see paragraph 126 of the Judgment.

119. As at 31 January 2020, being the valuation date taken by the experts as the date of judgment for the purposes of exposition of the block discount issue, the number of shares in each holding and the percentage of the relevant bank's issued equity represented by the holding were as follows: Arab National Bank - 2,053,375 shares being 0.14% of the issued equity; Banque Saudi Fransi – 7,080,242 shares being 0.59% of the issued equity; NCB – 4,258,500 shares being 0.14% of the issued equity; Samba – 15,844,541 shares being 0.79% of the issued equity; and Saudi British Bank – 6,638,691 shares being 0.32% of the issued equity: see paragraph 208 of the Judgment.

120. On Mr Al-Sanea's transfer of the Disputed Securities to Samba, it credited Mr Al-Sanea's account with the market value of the Disputed Securities on the date of transfer. That amounted to some 801 million Saudi riyals (paragraph 2 of the Judgment). SNB still holds the Disputed Securities. Mr Chapman informed us that as at 9 December 2021 the Disputed Securities were valued at US$407.7 million and that that figure would be reduced by some US$21.5 million if a block discount were applied.

121. As mentioned in paragraph 2 above, Samba's assets and liabilities have now been transferred to SNB. It was not suggested that this affected the claim for substitutive performance and we shall assume that nothing material turns on it.

122. The Judge noted at paragraph 4(iii) of the Judgment that the only dispute in relation to the Valuation Issue was whether a "block discount" should be applied to the quoted prices for the Disputed Securities on the Saudi Arabian stock exchange on either the date of the September Transfer or the date of judgment. In answering that question he had to determine whether, in fact, the objective value of the Disputed Securities in the circumstances was their market value, their investment value or liquidation value. He rejected both an investment value and a liquidation value. There is no appeal in relation to the liquidation value and, although one of the claimants' grounds of appeal touched upon the appropriateness of investment value, it was not pursued in oral argument. The Judge's reasoning in relation to each basis of valuation feeds into his conclusions about the application or otherwise of a block discount and, therefore, it is important to understand it in full.

123. As the Judge pointed out at paragraph 209 of the Judgment, "market value" is defined in International Valuation Standard ("IVS") 104 as:

> " … the estimated amount for which an *asset* or *liability* should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

Investment value on the other hand is defined in IVS 104 as:

> " … the value of an asset to a particular owner or prospective owner for individual investment or operational objectives. Investment Value is an entity specific basis of value. Although the value of an asset to the owner may be the same as the amount that could be realised from its sale to another party, this basis of value reflects the benefits received by an entity from holding the asset and, therefore, does not involve a presumed exchange. Investment Value reflects the circumstances and financial objectives of the entity for which the valuation is being produced. It is often used for measuring investment performance." [224]

Liquidation value is defined in IVS 104 as:

> " … the amount that would be realised when an asset or group of assets are sold on a piecemeal basis. Liquidation value should take into account the costs of getting the assets into saleable condition as well as those of the disposal activity."

An orderly liquidation basis is then defined as being:

> " … the value of a group of assets that could be realised in a liquidation sale, given a reasonable period of time to find a purchaser (or purchasers), with the seller being compelled to sell on an as-is, where-is basis. The reasonable period of time to find a purchaser (or purchasers) may vary by asset type and market conditions."

Both Mr Steadman FCA, SNB's valuation expert, and Mr Worsnip FCA, on behalf of the claimants, also adopted the IVS definition of a block discount from which the Judge did not demur. It is as follows:

> "The adjustment that is sometimes applied when the subject asset represents a large block of shares in a publicly-traded security such that an owner would not be able to quickly sell the block in the public market without negatively influencing the publicly traded price."

124. The Judge noted at paragraph 210 of the Judgment that "[w]here small numbers of shares are to be sold on an active public exchange, the price per share can readily be taken to be the quoted reference price on the day in question" but that "where a large

block of shares is to be sold on a single day, the reference price is unlikely to be obtainable, at least where the size of the block far exceeds the average daily traded volume ('ADTV') for that stock, as is the case for each of the holdings of the Disputed Securities".

125. He went on to state that "[t]he market has insufficient liquidity to absorb the sale of the holding without a bespoke transaction or transactions at a negotiated price. If the entirety of a large holding is to be sold on a particular day, a discount may well be required to achieve the sale." Furthermore, "[i]f the holding is to be sold in smaller parcels of shares over a longer period, there may still be an impact on price from the cumulative volume being sold, depending on the liquidity in the market and the impact (if any) on sentiment from large volumes of sales, and the seller is further exposed to the risk (but not the certainty) of a fall in the share price from other causes before the shares are fully sold" (paragraph 211 of the Judgment). The Judge accordingly concluded, also at paragraph 211, that "[t]he amount of the block … discount is therefore likely to reflect the alternatives that are reasonably available to the seller. The seller will not willingly accept a lower price than they can realise by other means."

126. The first question the Judge posed was whether as a matter of law, when seeking to identify the objective value of an asset in connection with a trustee's liability for substitutive performance, a measure of value based upon what could be realised for the asset in a transaction was inappropriate. He stated that, if that were the case, the proper measure of value would have to be the holding or investment value and that investment value would be a value specific to the trust which may have (or have had) as its objective the holding of the asset, with no intention of selling it: paragraph 224 of the Judgment.

127. He reasoned that he was unable to conclude that the measure of liability for substitutive performance must always be the investment value of the misappropriated asset because, amongst other things, "[t]here are likely to be many cases in which market value at the valuation date is higher than the long-term holding value of the asset" and "[m]any trust assets may be held otherwise than to achieve investment or operational objectives": paragraph 225 of the Judgment. He continued as follows:

> " … I do not agree with the claimants' arguments that an assumed transaction in the property in question is wrong in principle as a basis for assessing the objective value of trust assets. In many cases, market value will be the most appropriate basis on which to assess the objective value of the property; however, market value is not necessarily the right basis of valuation in every case."

He went on to reject the argument that investment value would be appropriate on the facts of this case: paragraph 227.

128. The Judge then stated that he did not accept that market value was automatically the appropriate basis to adopt in order to determine the objective value of the Disputed Securities and that the purpose of the valuation must be borne in mind: paragraph 229 of the Judgment. He determined at paragraph 230:

> "The purpose of the valuation in this case is to estimate (in the sense in which IVS 104 uses that word) in money terms the sum that will put the trust in the same position as if the misapplied property were still held for its benefit. The most appropriate basis of value should therefore be used to achieve that objective."

129. The Judge concluded at paragraph 236 of the Judgment:

> " … when valuing trust property, the court should adopt a basis of value that properly reflects the nature of the property as trust property. The monetary equivalent of the trust property is the money that would be realised by a trustee on a sale that was authorised by its powers of management, not in breach of trust. Only in that way will the defaulting trustee have restored the position of the trust, if not *in specie* then the full monetary equivalent of the trust property. If a notional sale on the transaction assumed in the standard definition of market value would be a breach of trust (*e.g.* because it would fail to avoid a diminution in the price that could reasonably be avoided, or because it would otherwise not obtain the full value of the trust property) that assumed transaction must be the wrong basis of value. On the other hand, if an alternative strategy could not reasonably achieve a better price, or if market value would itself reflect the price that should be obtained by the trustee, then market value is likely to be the right basis of value. Where the claimants go wrong is to assume or conclude that the true block discount resulting from the market value sale hypothesis could be avoided by pursing a different realisation strategy."

130. The Judge had already set out his impression of the expert witnesses in relation to valuation at paragraphs 213-216 of the Judgment. He stated that his impression was that Mr Worsnip on behalf of the claimants "was taking rather extreme positions in order to support the argument that an orderly liquidation basis of value was appropriate, and in particular that no adjustment on such a valuation was required for the risk of movement in the market over time adverse to the seller; and further, that even if market value was the right basis of value to take, there could in principle be no block discount on such a valuation either": paragraph 215 of the Judgment. On the other hand, he found Mr Steadman on behalf of SNB to be an impressive witness and his explanations for the use of the market value basis and the type of put option model to be very persuasive. However, he was left with the impression that not enough objectivity and scepticism had been applied to the results of various models and that too much machinery and not enough objective judgment went into Mr Steadman's percentage discounts: paragraph 216.

131. The Judge went on to address the expert valuation evidence in more detail. In summary, his approach was as follows:

    i) He rejected Mr Worsnip's opinion that there would be no block discount because the tendency of a sale of a large block of shares to depress the market price would be matched by the upwards pressure on price that a willing buyer

of a large block will have because there is no requirement to assume, contrary to the known facts, that on the valuation date there is a buyer who is willing to buy a large block of shares at the reference price or above: paragraph 237 of the Judgment;

ii) Having set out the opposing views about the effect of "dribbling out" the shares in each of the holdings in small quantities each day at paragraphs 237-241, the Judge stated that Mr Worsnip for the claimants was wrong to assume that dribbling out shares over a protracted period at a rate of 20-25% of ADTV could not itself impact on price and that Mr Worsnip had not given effect to the liquidation basis because he had assumed that there was no allowance required for the risk of the share value falling after the valuation date before a sale could be concluded: paragraphs 243 and 244. Instead, the Judge accepted Mr Steadman's evidence that "with listed securities there is always a risk of a fall in price and risk carries with it a cost, which impacts on value": paragraph 242;

iii) He concluded that in carrying out his fall back valuation, Mr Worsnip had not, in fact, given effect to the liquidation basis of value he purported to apply because he assumed that there is no allowance required for the risk of the share value falling after the valuation date before a sale could be concluded and because he assumed that the dribbling out of shares would have no impact on the share reference price: paragraph 244; and

iv) Instead, he accepted the approach to determining market value adopted by Mr Steadman on behalf of SNB which was to calculate the appropriate discount from the valuation date reference price to reflect the cost of the other alternatives available to the seller having accepted that the only viable alternative was the "dribble out" option and the model suggested by Joseph Estabrook in chapter 7 of Reilly & Schweihs, *Handbook of Advanced Business Valuation* (2000): paragraphs 245-248, 249 and 250.

132. The Judge's reasoning at paragraphs 249 and 250 was as follows:

> "249. Both hypothetical seller and hypothetical buyer in a market value negotiation are assumed to be knowledgeable and prudent, and so will be well-informed about the seller's alternatives to agreeing a price for a single transaction on the valuation date. I accept Mr Steadman's evidence that any block discount in the market is likely to reflect the parties' knowledge of the likely cost of the alternatives available to the seller, though it will not necessarily be identical to that cost, otherwise there is no incentive to the seller to sell to the buyer and the buyer would lose out on the bargain. If market value is determined in this way, as Mr Steadman proposes, it does not give rise to a discount that could reasonably have been avoided by a trustee selling the Disputed Securities: it gives rise to a discount that does not exceed the cost and exposure of any alternative course open to the trustee. That being so, Mr Steadman's use of market value as a basis of valuation is not open to the claimants' criticism that its assumptions are incompatible with the duties and powers that Samba would have as a trustee of the Disputed Securities.

> 250. For these reasons, I consider that the market value basis of valuation propounded by Mr Steadman is the appropriate basis of value in this case. In that context, the Black- Scholes put option model used by Mr Steadman as a component of the discount is clearly the right model for a market value valuation: it would be necessary to guarantee the receipt of the valuation date price over an extended dribble out period. The Finnerty model is appropriate only if one is seeking to guarantee sale of a large holding at whatever might be the reference price on a future date. However, the orderly liquidation value is inappropriate because it will expose the seller to a much greater" discount to reflect price uncertainty, delay and the risk of a fall in the market from extraneous factors. Mr Worsnip's dribble out strategy is therefore better seen as the means of seeking to identify the approximate amount of a block discount than as a measure of liquidation value."

133. The Judge concluded that, doing the best he could in the light of all the evidence, he should reduce Mr Steadman's discounts by 30% across the board: paragraph 263 of the Judgment. On that basis, the Judge set out what he considered to be the appropriate block discount for each of the tranches of shares at paragraph 264.

134. We have set out some of the Judge's approach to the expert evidence because it is interwoven with his reasoning. It is not for us to replicate the Judge's task and evaluate the expert evidence ourselves in order to re-determine the Valuation Issue. Were this issue still to be determined, we would be concerned solely with whether the Judge had made an error of law and principle in his approach to the valuation of the Disputed Securities and to the application of a block discount, in particular.

135. As we have already mentioned, it is unnecessary for us to decide this issue. We would not, however, wish to be taken to have endorsed the Judge's conclusions. It seems to us that there is a persuasive argument for saying that, where a trustee has elected to receive the value of an asset rather than its return *in specie*, the sum which is necessary to restore or re-constitute the trust fund will often at least be best determined by reference to the cost of the asset had it been *purchased* by the trustee rather than what the asset would have fetched on a *sale*. That might be said to be the measure most likely to put the trust fund back into the position it would have been in if the misappropriated asset had still been held for the benefit of the beneficiaries and, in the present case, to represent the full monetary equivalent of the trust property. It was accepted that a block discount would not apply to the market value ascertained by reference to the purchase price.

136. We agree with the Judge that one must adopt a basis of valuation which reflects the nature of the property in question and all of the relevant circumstances. Even so, it can be cogently contended that the Judge was mistaken in thinking the application of a block discount appropriate. Were the Judge's approach correct, the amount which a person in knowing receipt of trust property in the form of shares would be required to pay by way of compensation for breach of ancillary liability would seem to be less the greater the percentage stake that the misappropriated shares represent in comparison with the company's issued share capital.

137. We should also add that we are not necessarily endorsing the view that the relevant securities should be valued as if they were all purchased or, for that matter, were all sold on a single day or should have been subject to "dribble out" or, for that matter, "dribble in".

Conclusion

138. The appeal will be dismissed.