Michaelmas Term
[2023] UKSC 51
On appeal from: [2022] EWCA Civ 43

JUDGMENT

Byers and others (Appellants) *v* Saudi National Bank (Respondent)

before

Lord Hodge, Deputy President
Lord Briggs
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
20 December 2023

Heard on 12 and 13 July 2023

Appellants
Jonathan Crow KC
James Knott
(Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP)

Respondent
Brian Green KC
Alan Roxburgh
(Instructed by Latham & Watkins (London) LLP)

LORD HODGE (with whom Lord Leggatt and Lord Stephens agree):

1. I am very grateful to Lord Briggs and Lord Burrows for setting out the facts and for the reasoning by which they conclude that the appeal must be dismissed. They agree that a claim in knowing receipt cannot succeed once the claimant's proprietary equitable interest in the property in question has been extinguished or overridden. I agree. Lord Briggs and Lord Burrows agree that the case law, although containing pointers in favour of their conclusion, does not provide a definitive answer in this case, and that they must decide the matter as a matter of equitable principle. Again, I agree. Because they have come to this conclusion by slightly different reasoning, it may be useful if I summarise what has been agreed as determining the outcome of the appeal. This is only a summary of agreed matters and the reader will find the reasoning in the judgments of Lord Briggs and Lord Burrows.

2. First, it is well established that the transfer of trust property by a trustee to a bona fide purchaser for value without notice extinguishes or overrides the proprietary equitable interest of the cestui que trust (the trust beneficiary) and this is so even if the trustee in so doing acts in breach of trust. (Lord Briggs paras 18 & 20, Lord Burrows para 156).

3. Secondly, if the bona fide purchaser for value without notice later becomes aware that the property was transferred in breach of trust, this does not resuscitate the claimant's proprietary equitable interest. That interest also is not revived when the original purchaser transfers the property to a further transferee, who, at the time of the transfer, is aware that there has been a breach of trust. On the other hand, if the subsequent transferee were the defaulting trustee, he or she would not be released from the trust obligations but would hold the asset for the beneficiary. (Lord Briggs paras 23-24, Lord Burrows paras 167-171.)

4. Thirdly, a claim in knowing receipt cannot succeed in the circumstances which I have outlined in paras 2 and 3 above because the claimant's proprietary interest has been extinguished or overridden. (Lord Briggs 23-24, Lord Burrows para 172 & 201.)

5. Fourthly, this conclusion cannot be displaced by comparing the claim in knowing receipt to a claim for dishonest assistance. The latter claim is ancillary to the liability of the trustee and renders the assister liable as an accessory. The former claim is significantly different. A personal claim in knowing receipt against a transferee is closely linked to a proprietary claim for the return of the property. A personal claim in knowing receipt comes into play when the transferee, who is not a bona fide purchaser for value without notice, no longer has the property, such as when the transferee transfers, dissipates or destroys the property in question and thereby prevents a proprietary claim (Lord Briggs paras 41-42, 46, Lord Burrows paras 145-149).

6. Fifthly, the extinction or overriding of a proprietary equitable interest by the time when the recipient receives the property defeats a proprietary claim. As Lord Briggs observes, given the close link between the proprietary claim and the personal claim in knowing receipt, it would be logically inconsistent for the law to allow the personal claim in knowing receipt to survive where the proprietary claim has been defeated by the lack of a continuing proprietary equitable interest. (Lord Briggs para 44, Lord Burrows paras 158-159, 172 & 201.)

7. Sixthly, applying this reasoning to the facts of this case, the operation of Saudi Arabian law, which was the law applicable to the property or the transaction, has the effect that Saad Investments Co Ltd's ("Saad") proprietary equitable interest was extinguished by Mr Al-Sanea's transfer to Samba Financial Group ("Samba") of the securities which he held in trust for Saad and the registration of those securities in Samba's name. This is so, notwithstanding Mr Al-Sanea's breach of trust and any knowledge which Samba had that the transfer was in breach of trust.

8. The difference in reasoning between Lord Briggs and Lord Burrows is that Lord Briggs analyses a claim in knowing receipt as ancillary to a proprietary claim while Lord Burrows categorises a claim in knowing receipt as an "equitable proprietary wrong". This difference does not alter their shared conclusion that a claim in knowing receipt is precluded where the claimant's proprietary equitable interest has been extinguished or overridden by the time when the recipient receives the property. In the absence of more focussed argument from the parties on this issue, I would prefer not to adopt Lord Burrows' categorisation but would leave the argument as to categorisation for another case in which the matter is examined more fully in argument.

9. Subject to the above, for the reasons common to the judgments of Lord Briggs and Lord Burrows, I would dismiss the appeal.

LORD BRIGGS:

Introduction

10. This appeal is about the equitable personal claim in what is generally called knowing receipt. It usually arises where a trustee ("T") transfers trust property beneficially owned by the claimant ("C") to the defendant ("D") in breach of trust, and D learns about that breach before disposing of the property by transfer to a third party or by dissipation or destruction of it. In such a case although, after disposal, dissipation or destruction of the property by D, C can no longer pursue a proprietary claim that D transfer the property to C, (or if appropriate back to T or to a new trustee), D incurs a personal liability to account or pay compensation to C as if D were

a trustee of the property. From the moment when D learns of the breach of trust, D comes under a personal obligation to restore the trust property to its equitable owner, and to act as its custodian in the meantime. That obligation, together with the concomitant liability to account, is often described as a form of constructive trusteeship. The single issue to be decided on this appeal is whether an equitable claim in knowing receipt depends (among other things) upon C retaining an equitable proprietary interest in the property transferred to D at the time when it reached D's hands before D either transferred, dissipated or destroyed the property. This case is (perhaps) unusual in that D knew at the time of its receipt of the property that T was transferring it in breach of trust and has been sued in knowing receipt without having transferred, destroyed or dissipated it. The proprietary claim to the property which would usually arise on those facts is defeated (as held by the Court of Appeal and is now common ground) by the fact that the transfer from T to D had the effect under the applicable foreign law of giving D clear title to the property, free from C's beneficial interest in it.

11. The extended written and oral submissions on this issue (which have been of the highest order) have forced the court to revisit the most basic equitable principles which underlie a claim in knowing receipt, not least because it cannot be said that the issue has ever been squarely addressed by this court or its predecessor, although both sides rely on what they say are persuasive dicta. The question is: what purpose does equity's imposition of knowing receipt liability fulfil? Is it the best available vindication of C's continuing beneficial ownership of the subject property, when that interest has been interfered with or destroyed by D as legal owner after becoming aware of it, by a disposal of the property (by transfer, dissipation or destruction)? Or is it equity's response to the apparent unconscionability of the recipient D treating the property as its own after learning that the property has been transferred to it in breach of trust? If the former, C's continuing beneficial ownership of the property until its destruction (or impairment) by D's disposal of the property may be said to be of the very essence of the claim. If the latter, then it may not matter that the method of transfer by T to D has, under the relevant applicable law, conferred upon D clean title to it, free from any antecedent equitable interests, including C's earlier beneficial ownership.

The Facts

12. The facts which have given rise to this issue may be shortly stated. The appellants are Saad Investments Co Ltd ("SICL"), a company registered in the Cayman Islands, and its joint 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 (SI 2006/1030) by orders made on 20 August and 25 September 2009.

13. By a number of transactions between 2002 and 2008, a Mr Maan Al-Sanea ("Mr Al-Sanea") came to hold shares in five Saudi Arabian companies ("the Disputed Securities") on trust for SICL, under various trusts governed by Cayman Islands law (for these purposes being materially identical to English law).

14. On or about 16 September 2009, Mr Al-Sanea transferred the Disputed Securities to a Saudi Arabian financial institution, the Samba Financial Group ("Samba") ("the September Transfer"), the purpose of the transfer being to discharge debts owed by Mr Al-Sanea to Samba. He did so in breach of trust. At the time of Samba's receipt of the Disputed Securities it knew that Mr Al-Sanea was holding the Disputed Securities on trust for SICL. 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.

15. The governing law of the September Transfer was Saudi Arabian law, which does not recognise a distinction between legal and beneficial ownership as such. As a matter of Saudi Arabian law, the effect of the September Transfer (and in particular the registration of the Disputed Securities in Samba's name) was that SICL had no continuing proprietary interest in the Disputed Securities following the transfer. Samba retained the Disputed Securities and was the sole defendant at the time of the trial. Subsequently its assets and liabilities have become vested in the respondent the Saudi National Bank, but nothing turns on that.

The Issue before this Court

16. Samba (and now the respondent as the successor to its assets and liabilities) maintains, and has persuaded the courts below (Fancourt J [2021] EWHC 60 Ch and the Court of Appeal [2022] EWCA Civ 43; [2022] 4 WLR 22, consisting of Newey, Asplin and Popplewell LJJ) that the overriding of SICL's equitable beneficial interest in the Disputed Securities by the registration of Samba as their owner was fatal not merely to any proprietary claim by SICL but also to a personal claim in knowing receipt against Samba. The appellants say that the claim in knowing receipt does not require any such continuing equitable interest in the property in dispute. All it requires is that Samba knew that the Disputed Securities were transferred to it in breach of trust, so that it would be unconscionable for Samba to use them for its own benefit.

17. The detailed analysis of this issue by both the courts below focussed primarily (and perfectly properly) on the state of the authorities, on the footing that if the requirement for a continuing equitable interest in the subject property was part of the ratio of an earlier decision, at least in the Court of Appeal or above, then they were

bound by it. This court is not so bound, and in the light of some dicta in the reported cases which might be said to support the appellants' case, I prefer to begin by considering the question as a matter of basic equitable principle. As will appear, that analysis leads me to a provisional conclusion that the courts below were right in the answer they reached. My own analysis of the authorities affirms that conclusion.

Basic Principles of Equity

18. It is convenient at the outset to set metes and bounds to this battlefield by describing some of the relevant equitable principles which bear on this issue, and which are either common ground or beyond realistic challenge. The first concerns the very nature of an equitable interest in property. By contrast with a legal interest or estate, which is good against all the world, an equitable interest is (statute or foreign law apart) good against all the world except a bona fide purchaser for value of the legal estate without notice of that interest, a person traditionally given the name equity's darling. For brevity I will use that phrase in what follows. Thus, at common law (by which I include the principles of equity) an equitable interest in specific property is unaffected by the transfer of the property in breach of trust to a volunteer, or even to a purchaser for value if the purchaser has notice of the equitable interest (see *Pilcher v Rawlins* (1872) L.R. 7 Ch. App. 259 and as summarised by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669, 705). If the interest in question amounts to full beneficial ownership then such a purchaser may have bought a pup, but their remedy will lie (if at all) only against the vendor or their own advisors.

19. The next basic principle concerns the ways in which an equitable interest in specific property (including full beneficial ownership) may cease to affect that property, without any consent or other action by the equitable owner. The first and most common is where the trustee (in whom the legal title is vested) has power under the terms of the trust to dispose of the property free of the equitable interest. This may be a power to dispose by way of sale, but it may include power to dispose to a volunteer (eg by the exercise of a power of appointment). In such a case the original equitable interest is said to be overreached. Typically the previous equitable interest of the beneficiary C in the subject property will transfer to the proceeds of its sale, but this is neither a condition for overreaching, nor an inevitable consequence, eg where the trustee disposes of the property by the exercise of a power of appointment which generates no proceeds at all (see the explanation by Peter Gibson LJ in *State Bank of India v Sood* [1997] Ch. 276, 281 by reference to Charles Harpum Overreaching, Trustees' Powers and the Reform of the 1925 Legislation [1990] CLJ 277).

20. Secondly, as already mentioned, the equitable interest will cease to affect the property on its sale to equity's darling, even if the sale amounted to a breach of trust. I will call this the overriding rather than overreaching of the equitable interest. In that

context the element in the requirement that the purchaser take the property "without notice" means without notice of the equitable interest which would otherwise continue to affect the property after the transfer. Notice (or even knowledge) that the property was previously subject to C's equitable interest would not on its own be enough, unless the purchaser knew, or had notice, that the sale by the trustee was in breach of trust, and therefore incapable of overreaching that equitable interest. It is only if the purchaser has notice of an equitable interest which would not be overreached by the sale that he/she would lose the protection of being equity's darling. Thus knowledge or notice that the transfer involved a breach of trust is generally the equivalent of knowledge or notice of a continuing equitable interest.

21. Thirdly, C's equitable interest will cease to affect the subject property if the mode of disposition of the legal title is such that, under the law applicable either to the property or to the transaction, the transferee takes free of it, even if the property is transferred in breach of trust. This may occur in a purely English law context where the property in question is land and the proceeds of sale are paid to two trustees or to a trust corporation: see section 2 of the Law of Property Act 1925, or registered land where, in bare outline, Parliament has chosen to replace notice with registration as the governing criterion for the survival of most equitable interests (other than those supported by occupation). Or it may be the consequence of applicable foreign law, such as, in the present case, the law of Saudi Arabia in relation to the transfer of title to shares by registration: see *Akers v Samba Financial Group* [2017] UKSC 6; [2017] AC 424 discussed below. Again I will call this a form of overriding rather than overreaching, but there is no magic in the distinction.

22. It is common ground that the ability of C to vindicate his or her equitable interest by a proprietary claim, even while the property remains in the hands of D, will be defeated by any of the above types of transfer by the trustee ("T") to D. This is for the very simple reason that all three types of transfer have the effect of destroying C's equitable interest in the property. C simply cannot say to D: "give me back my property". The property has become beneficially owned by D, free from (or in priority to) any proprietary claim by C. D can simply say: "no, it's now mine".

23. It is also well settled that the first two types of transfer also preclude any later claim against D in knowing receipt. The first of course involves no breach of trust or unconscionable conduct by anyone. But the second (transfer in breach of trust to equity's darling) does, at least on the part of T. Nonetheless it is I think clear that after such a transfer, the subsequent acquisition by the transferee D of knowledge that the transfer had involved a breach of trust by T gives rise to no liability in knowing receipt. It is in issue whether this is because, after the transfer to D (being equity's darling), D has a title freed for ever from C's equitable interest, or because, having acquired the property as equity's darling, later knowledge that a breach of trust was involved does not make it unconscionable for D to continue to treat the property as

his/her own. The latter explanation is proffered by the appellants, the former by the respondent.

24. Some help in answering that question as a matter of principle may be gained by focussing on the position of a transferee ("X") of former trust property from equity's darling ("D") when X knows of the breach of trust committed by the transfer by T to D. It is well settled that, dishonesty apart, X nonetheless takes free of any claim (personal or proprietary) by the original beneficial owner ("C"), unless X is the original trustee ("T") (see *Wilkes v Spooner* [1911] 2 K.B. 473, 483, and *In re Stapleford Colliery Co; Barrow's Case* (1880) 14 Ch D 432 CA, discussed below). This must be because the transfer to D frees the property for all time from C's beneficial interest. It has been overridden. D gets a clear title to the property, and so do D's successors in title. But if the property comes back into the trustee T's hands, T holds it on trust for C, not by way of knowing receipt but because that is what T always undertook to do. T's re-acquisition of the property is treated as his making good the breach of trust in parting with it in the first place. Thus X may be a volunteer to whom D has given the property, but still takes free of C's original beneficial interest, by the overriding effect of the transfer to D. In sharp contrast a volunteer ("V") who receives a transfer direct from T (acting in breach of trust) immediately holds it subject to C's equitable proprietary claim regardless of knowledge or notice, and to a personal claim in knowing receipt once V learns of the breach of trust.

25. By contrast the approach of the appellant, on which everything depends on the unconscionability of using property for one's own benefit after receiving it in consequence of a known earlier breach of trust, would tend to expose X to a knowing receipt claim. X is not equity's darling, and may even be a pure volunteer. X receives the property knowing of the breach of trust involved in its transfer by T to D. This approach would not treat C's equitable interest as having been overridden, but merely suspended in its effect for as long as the property remained in the hands of equity's darling D.

26. In my judgment this supposed suspensory effect of a transfer to equity's darling is contrary to basic equitable principle. The whole purpose and effect of the doctrine of equity's darling is to confer full beneficial ownership of the property upon the bona fide purchaser of the legal title for value without notice of an adverse equitable interest. The ordinary effect of a transfer of legal title to a purchaser is to confer beneficial ownership. Equity stops short of interposing equitable interests in derogation of that outcome, because it regards a bona fide purchaser of the legal title without notice as having the better right to ownership. The earlier equitable interest is overridden, once and for all. For equity to impose liability in knowing receipt upon equity's darling, on subsequently learning of the breach of trust, or on a successor in title to equity's darling, would seriously detract from the full beneficial ownership which equity treats a purchaser without notice as acquiring (see *Harrison v Forth*

(1695) Prec. Ch. 51; 24 ER 26), and from the once and for all effect of the principle that an equitable interest may, in defined circumstances, be overridden.

27. I therefore consider it to be clear on basic equitable principle that the remedy of knowing receipt has no role to play once the claimant's equitable interest has either been overreached or overridden by a transfer to equity's darling.

28. It is thus only the third type of transfer, which may conveniently be called overriding by operation of law, that opens up the present battlefield. The question is, where the law applicable either to the property or to its transfer gives the defendant a clean title to it, and one which is good against any proprietary claim, can the aggrieved beneficiary still say, before or after the defendant has disposed of it for his own benefit: "you must return it to me, account to me or pay me equitable compensation for its loss".

Uncertainties about Knowing Receipt

29. That question is by no means the only arguable uncertainty about the equitable principles relating to knowing receipt. It is convenient to mention three others, which are not for resolution on this appeal. The first is the relationship between knowing receipt and unjust enrichment, a matter about which the court requested, and received, brief oral submissions. It divides into two parts. The first is whether the pleaded and proven facts could support a claim in unjust enrichment, alongside a claim in knowing receipt. The second is whether the equitable doctrine of knowing receipt should be treated as subsumed in or replaced by unjust enrichment. Counsel were united in discouraging the court from exploring down either of those roads. Unjust enrichment had not been pleaded as a cause of action by the appellants, nor had its constituent factual elements been proved, nor had the respondent therefore been given the opportunity to advance any potential defences.

30. Counsel were also united in submitting that the general thrust of the judicial dicta in the reported cases was inimical to any subsuming or replacement of knowing receipt in or by unjust enrichment. Those dicta begin with *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 685A-D and end with the joint opinion of myself and Lord Sumption in *DD Growth Premium 2X Fund v RMF Market Neutral Strategies* [2017] UKPC 36; [2018] Bus LR 1595, 1610, para 58:

> "Conceptually these two proposed bases of recovery are very different. 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".

This is not the occasion for that question to be further reviewed.

31. The second area of uncertainty is how the knowing receipt remedy, which in its traditional form depends upon there being an original trust of the relevant property and a split between legal title and beneficial ownership, works in relation to the many reported cases in which a company (or its liquidator) seeks to pursue the remedy after a transfer of company property at the behest of its directors acting in breach of fiduciary duty. In such a case the company starts out as legal and beneficial owner of the misapplied property. Courts of equity have proceeded upon an analogy between the control which directors as fiduciaries have over company property, and the title which trustees have to trust property, so that a misapplication of the company's property by the directors leaves the beneficial ownership with the company, for the purpose both of equitable proprietary claims and claims in knowing receipt. The best-known attempts to explain this conundrum are to be found in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1575-1577 per Ungoed-Thomas J and in *Belmont Finance Corpn v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405, per Buckley LJ. It is not a point which arises for resolution in this case, because there was of course a traditional trust of the Disputed Securities at the outset, with a split between legal title and beneficial ownership between Mr Al-Sanea and SICL.

32. Nonetheless, as will appear, the absence of the traditional pre-existing trust basis for the application of a knowing receipt remedy in the cases of corporate misfeasance was prayed in aid by Mr Jonathan Crow KC for the appellants, in support of his main submission that knowing receipt has nothing to do with a continuing equitable proprietary interest of the claimant in the trust property after receipt by the defendant. For his part Mr Brian Green KC for the respondent initially submitted that to build a thesis on that anomaly in a case where it did not arise would be to let the tail wag the dog. Under further questions from the court, he submitted that the analysis in *Belmont* and *Selangor* demonstrated the court's perception of a need to base knowing receipt liability on the recognition of a continuing equitable interest in the company. I will in due course explain why my own reading of those authorities leads me to the same conclusion.

33. The third area of possible uncertainty concerns the precise boundaries and content of the requirement to show what is now called "knowledge" necessary to trigger the recipient's personal liability to account or pay equitable compensation under the doctrine of knowing receipt. It used to be called notice, even by some of the most distinguished equity judges, but it is now common ground that it is knowledge rather than mere notice that is required. This much is inherent in the phrase "knowing

receipt". The uncertainty lies on the boundaries of what may amount to knowledge, and in particular whether there is a category of knowledge called "constructive knowledge". That uncertainty does not arise in this case, because the process whereby the appellant came to establish its factual case, involving as it did the barring of the respondent from contesting most of the pleaded facts due to its failure to give disclosure, produced the result that whatever was the knowledge precisely required, Samba had it. That part of the requirements for establishing liability in knowing receipt is therefore established beyond the respondent's ability to challenge it.

34. But the submissions in the present appeal suggest that there may be a separate area of uncertainty, namely whether the knowledge requirement in a particular case is a flexible requirement based upon the concept of unconscionability, or whether there is a single fixed knowledge requirement which applies in every case. An inherent part of the appellants' proposed definition of the basis of knowing receipt liability is an essentially flexible approach to the knowledge requirement, being that the state of knowledge must, on the facts of the particular case, be such as to render it unconscionable for the recipient to retain the property for its own use and benefit.

35. This is not the occasion to wrestle, in the absence of it mattering, and of full submissions, with the first of those uncertainties, namely whether the requirement for knowledge may be satisfied by constructive knowledge. But the second uncertainty, whether the knowledge requirement imposes a distinct separate test or whether it is just a flexible aspect of the requirement to demonstrate unconscionability, does feed into the necessary analysis of the parties' main submissions.

A Provisional Conclusion by reference to Basic Principle

36. Returning to the central issue, and again from the perspective of basic principle, the obvious question which arises, if a claim in knowing receipt is closed off as the result of the overreaching of the claimant's equitable interest, or its being overridden by a transfer to equity's darling, is why should the opposite result follow if the claimant's equitable interest is overridden by a transfer which, under its proper law, is also designed to give the recipient a clean title? Mr Crow's main submission in answer is that liability in knowing receipt is not about, or based on, matters of equitable title at all, but rather about equity's historic role as the enforcer of the obligations of conscience. He backs up that submission by copious references to judicial dicta which, he says, make that clear in express terms. I will return to them later. Secondly he submits that, were liability in knowing receipt to be closed off by any form of overriding by foreign law, then the result would be a money launderer's charter.

37. I have not found either of those submissions to be persuasive. Of course it is true that one of the fundamental purposes of equity is to impose carefully measured

constraints upon unconscionable conduct otherwise permitted by the law: see eg *Guest v Guest* [2022] UKSC 27; [2022] 3 W.L.R. 911. And equity generally acts in personam rather than in rem. But equity nonetheless achieves that purpose by the laying down of well-understood principles (rather than hard rules) which have, over time, enabled purely equitable personal rights to harden into property rights, in the form of equitable interests, extending to full beneficial ownership. The classic example is an equitable lease. A person with an agreement for lease has an equitable in personam claim for specific performance against the contracting landlord which is now recognised as a full equitable property right: see *Walsh v Lonsdale* (1882) 21 Ch D 9.

38. The same applies to the rights of beneficiaries under a trust. While they may originate from a personal undertaking of the trustees to apply their legal rights in relation to specific property for the benefit of the beneficiaries, no one doubts that the beneficiaries' rights are equitable interests in the trust property, which may be enforced where appropriate by both proprietary and personal claims, not only against the trustees, but also against anyone else into whose hands legal title to the trust property has passed. But the inexorable consequence of the hardening of equitable personal rights into interests in property is that they have to take their proper place in a sophisticated system of priorities which regulates the question which interests prevail where two or more come into apparent conflict. Thus competing equitable interests take priority generally from their respective dates of creation. But an equitable interest gives way to the later acquisition of the legal title by equity's darling. And the priority of equitable interests under trusts is regulated by the principles of overreaching and overriding which I have described.

39. Three important features of equity's respect for priorities need to be emphasised. The first is the essential fragility of a purely equitable interest, because of its vulnerability to being overreached, or overridden even by a trustee acting in breach of trust. The second is that the equitable principles are always vulnerable to being overridden or replaced by statute, as has happened under the English system of land registration, and by many Torrens systems overseas where registration is the origin, not merely the evidence, of title. The third is that equity recognises the need to balance its function to restrain unconscionable conduct, in the context of equitable property rights, by the need to respect the public interest in the certainty and therefore marketability of title.

40. While the regulation of unconscionable conduct may be the underlying purpose of many equitable principles, the extent to which unconscionability acts as a determining factor in the operation of those principles in particular cases varies widely. Where in the broken-down personal relations within a family a non-contractual promise to transfer property in the future has led to detrimental reliance, unconscionability may play a large part in moulding the remedy to be given to the reliant party: see again *Guest v Guest (supra)*. But where the competition is between

legal and equitable interests in marketable property the underlying objective of regulating unconscionable conduct needs to take second place to the established principles regulating priorities. The dictates of predictable title would be nullified if in every case of competing priorities the outcome depended on the endlessly variable views of different chancery judges about what the dictates of conscience required on the unique facts of that particular case. The same principled approach answers the appellants' related submission that the knowledge requirement is only a flexible aspect of the need to demonstrate unconscionability. Issues as to priority in title to property need to be resolved on a more predictable basis than that.

41. The answer to Mr Crow's second submission (about the money launderer's charter) is that the parallel remedy based on dishonest assistance is not at all based upon any continuing equitable interest. The liability for dishonest assistance is a truly ancillary liability, ancillary that is to the breach of trust by the trustee, which renders the assister liable as an accessory to the same extent as the trustee. There is no requirement that the assister has even received trust property. Most cases of cross-border fraud will involve dishonesty by all concerned in a common design.

42. Knowing receipt is sometimes also called a form of ancillary liability, but it is not in my view ancillary to the liability of the trustee. Rather it is ancillary to the proprietary claim which will generally enable the continuing equitable beneficial owner to recover the trust property where it has passed into the hands of someone other than the trustee, without the equitable interest having been overreached or overridden. The personal remedy in knowing receipt comes to the rescue if the transferee then transfers, dissipates or destroys the property after learning of the breach of trust, so as to prevent the pursuit of a proprietary claim. In such a case the claimant's equitable interest still subsisted at the time when the transferee learned of the breach of trust, so that the later transfer, dissipation or destruction of the property was a breach of the restorative and custodial duty which then bound him.

43. There is therefore in my judgment no principled answer to the question why a claim in knowing receipt should survive any process whereby the claimant's equitable interest has been overreached or overridden, so as to give the transferee a clean title. There are powerful reasons of principle why it should not. First and foremost there is a deep-rooted contradiction between having clean title and being under an obligation to restore the property to someone else, to look after it in the meantime, and to account for any use of the property inconsistent with those duties. If the recipient is able to say "the property is mine" how can he or she be subject to duties designed to protect the equitable beneficial interest of someone else?

44. Secondly there is a serious lack of logic in the view that while overreaching or overriding may kill off the equitable interest necessary to maintain a proprietary claim, it nonetheless leaves in place a claim in knowing receipt, with the same liability

to return the property to the claimant as if there was a proprietary claim. That is precisely the position alleged by the Appellants in the present case, since Samba had not transferred, dissipated or destroyed the Disputed Securities when the knowing receipt claim was introduced by amendment.

45. Thirdly the proposition that the overriding of any continuing equitable interest by a foreign law applicable to the property or to the transaction leaves intact the claim in knowing receipt fails to give appropriate respect to the primacy of that foreign law in regulating title to the property in the hands of the recipient. This is because it is destructive of the clean title to the property that the applicable foreign law may confer, and does confer in the present case. This factor was a weighty matter in the analysis of Fancourt J at first instance, and I consider that he was right to give it significant weight.

46. Fourthly to align knowing receipt liability with dishonest assistance as a form of liability based upon fault arising from a connection with the breach of trust, but a lesser fault than dishonesty, appears to create a two-tier structure of fault-based ancillary liability with no apparent justification for doing so. By contrast the existence of a knowing receipt liability against a transferee of legal title where the transaction in issue did not clear off the claimant's equitable interest, as ancillary to a proprietary claim which has only been lost to the claimant by the conduct of the recipient after learning of the breach of trust (and therefore the non-overreaching or overriding of that interest), makes logical sense and does good equity.

47. Finally, in the absence of any original fiduciary relationship between the claimant and the defendant, or other relationship giving rise to equitable obligations between them, or fraud, why should a transferee with a clear title unaffected by any equitable interest of the claimant have any liability in equity to the claimant? There is simply no equity between them capable of giving rise to an equitable claim. This may be little more than another way of expressing the first point, but it does accord closely with the prevailing analysis in the leading authorities.

The Authorities

48. The many reported cases on knowing receipt liability need to be read with a number of cautionary points in mind. The first is that, with one possible exception, all of those in which a liability in knowing receipt was established (and several where it was not) were cases in which the claimant did have a continuing equitable interest in the property in dispute at the time when the defendant learned of the breach of trust. Therefore the courts were not concerned even to consider, let alone decide, whether the continuation of such an equitable interest was a condition for liability.

49. Secondly, a significant group of cases (which I shall call the corporate cases) dealt with knowing receipt liability in the absence of any pre-existing traditional trust or, therefore breach of trust, or any pre-existing equitable interest. But they proceeded on the basis that a division between the former legal title and beneficial interest of the claimant company occurred at the moment of the breach of fiduciary duty by the directors in misappropriating the relevant company property, so that knowing receipt liability could be determined as if there had been both a trust of the property and a continuing beneficial interest in it, which the company continued to enjoy.

50. Thirdly there is to be found from time to time a certain looseness in the use of language to describe equitable concepts, such as constructive trusts, tracing, knowledge and notice, that can make it hard to be certain of the precise meaning of certain (sometimes famous) dicta from distinguished equity judges. And some of the dicta even appear sometimes to contradict dicta by the same judge in an earlier case.

51. All these cautionary points mean that care needs to be taken to analyse some of the relevant dicta, and in particular by close attention to context. When that is done I do consider that the authorities, taken as a whole, tend to support my foregoing analysis of the present question, and that the courts below were correct to reach the same conclusion.

52. Chronologically, the unavoidable starting point for any analysis of knowing receipt, and indeed for dishonest assistance, as equitable doctrines, is *Barnes v Addy* (1874) LR 9 Ch App 244. This is because, although Lord Selborne LC, giving the leading judgment in the Court of Appeal, plainly did not think he was making any new law but rather stating well-settled principle, he brought the twin doctrines to life as it were fully grown without enabling the reader to tell which earlier authorities he had in mind, and counsel for the successful respondent was not called upon.

53. The issue before the Court of Appeal was whether two solicitors, who had acted for trustees in connection with dispositions of the trust property in alleged breach of trust, could be made liable for the loss of the trust property at the suit of the beneficiaries, the trustee principally in default having gone bankrupt. The breaches of trust did not involve any overreaching or overriding of the beneficiaries' equitable interests. More to the point the solicitors had neither received the trust property nor done anything dishonest. Lord Selborne's concern was therefore to explain why the solicitors could not be made liable, rather than to lay down with any precision the conditions for liability in knowing receipt or dishonest assistance. His famous dictum is as follows, at pp. 251-252:

> "Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout

> the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility 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."

54. One point deserves noting at this early stage. It is that, as the key criterion for liability in what is now called knowing receipt, Lord Selborne identifies those who "*receive and become chargeable with some part of the trust property*" rather than knowledge of the breach of trust or any other kind of fault. The implication is that the property should still be trust property in the recipient's hands, rather than (for example) property which has been freed from any equitable interest of the beneficiaries by overreaching or overriding.

55. No analysis of the knowing receipt doctrine would be complete without some reference to *In re Diplock* [1948] Ch 465 in which numerous distributions were made in breach of trust by administrators in the mistaken belief that a gift to "*charitable or benevolent objects*" was a valid charitable residuary bequest. Personal and proprietary claims were made to recover the distributions for the benefit of the deceased's next of kin. Mr Crow submitted that nowhere in the analysis of the personal claim by the Court of Appeal (at pp 478-479) is there any express statement about the need for there to be a continuing equitable interest in the claimant at the time when the defendant receives knowledge (there described as notice) of the breach of trust. But the defendants were, as the Court of Appeal pointed out, all pure volunteers so that the requirement for a continuing equitable interest was plainly satisfied. Furthermore, what we would now call the knowing receipt claim was not even argued at first instance, and only "*somewhat faintly argued*" in the Court of Appeal. *In re Diplock* therefore affords no significant assistance on the question before this court.

56. It is convenient now to look in more detail at the two main cases in which the doctrine of constructive trusts has been explained as being applicable to company property misapplied by directors in breach, not perhaps of trust, but of fiduciary duty. The first is *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, a decision at first instance by Ungoed-Thomas J. After the assets of the subject

company had been realised for cash, substantial parts of that cash were misapplied by the directors toward financing the purchase of the company's shares, contrary to section 54 of the Companies Act 1948. At the direction of the Board of Trade the company sought to recover the money misapplied from the recipients, the directors and from the company's bankers. The constructive trust claims against the banks were based upon dishonest assistance rather than knowing receipt (see p1580 F-G), so the case is not a useful repository of learning about the need for a continuing equitable interest of the claimant. But it contains the first in-depth analysis of how constructive trusteeship can be established in connection with the misapplication of company money. At pp1575-1577 the judge reaches the clear conclusion that, although not in all respects like trustees of a strict settlement, directors are to be regarded as trustees of company money under their control, so that a misapplication of it (ie other than for the proper purposes of the company) amounts to a breach of trust. After reviewing *In re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407, 426, *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq. 474,479, *In re Lands Allotment Co* [1894] 1 Ch 616, 631, 637-639 and *In re Forest of Dean Coal Mining Co* (1878) 10 Ch D 450, 452-453 he said:

> "So, in my view, in general as in this case, a credit in a company's bank account which the directors are authorised to operate are moneys of the company under the control of those directors and are held by them on trust for the company in accordance with its purposes."

57. Mr Crow drew our attention to passages in Ungoed-Thomas J's judgment in which he described constructive trusteeship (of the *Barnes v Addy* type) as nothing more than a formula for equitable relief, (at p 1582), and constructive trust as arising because of the conduct complained of, (at p 1579), in support of his submission that knowing receipt was not concerned with the vindication of a continuing equitable interest. But these general observations, made in a case about alleged dishonest assistance, do not (and were not intended to) bear upon the question before this court.

58. One looks almost in vain in *Selangor v Cradock* for an explanation of how there can be a trustee-beneficiary relationship between the directors and the company when both legal title and beneficial ownership are (as they almost invariably are) vested in the company. A little more help is to be derived from *Belmont Finance Corpn v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393. That was a knowing receipt case, in the sense that, although dishonest assistance and knowing receipt were both pleaded, only the knowing receipt case succeeded, and that only in the Court of Appeal. It was another case of misappropriation of company money by its directors, in breach of section 54. Giving the leading judgment, Buckley LJ sought to explain how a *Barnes v Addy* type of constructive trust could arise in the absence of a pre-existing trust. At p 405 he said:

> "A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust (*Re Lands Allotment Co*, per Lindley and Kay LJJ). So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company *unless he has some better equity.* He becomes a constructive trustee for the company of the misapplied funds." (emphasis added).

59. Both Ungoed-Thomas J and Buckley LJ relied upon the same passage from the judgment of Kay LJ in *In re Lands Allotment Co* [1894] 1 Ch 616, 637-639, where he said:

> "I conceive that the directors of every company being the managing agents of a trading concern have considerable authority and power in dealing with outstanding debts due to the concern [. . .] but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust […] directors are not always trustees. As directors they are not trustees at all. They are only trustees qua the particular property which is put into their hands or under their control, and which they have applied in a manner which is beyond the powers of the company, I conceive that qua such fund they are constructive trustees, or trustees by implication of law."

60. The above dicta fall short of providing a completely neat and satisfying explanation of how the knowing receipt doctrine works in relation to the property of companies. It is common ground that there is no pre-existing trust or separation of legal title from beneficial interest for as long as legal title remains vested in the company. Mr Crow submits that the repeated application of the knowing receipt doctrine to such a situation demonstrates that a continuing equitable interest in the misapplied property cannot be an essential condition for its operation. In response, once he squarely addressed the point, Mr Green submitted that equity applied the

knowing receipt doctrine by treating corporate property as subject to a trust by analogy. Later he firmed up his analysis by submitting that a trust, with a concomitant splitting of legal title from the company's continuing beneficial interest in the misapplied property occurred at the moment of the transfer which constituted the misapplication. Legal title passed to the transferee, but the equitable beneficial interest remained with the company. Therefore the company retained the equitable interest sufficient to support a proprietary claim to the property or its traceable proceeds, and a knowing receipt personal claim against any recipient who had received the property with notice of the misapplication, subject to any overriding of its equitable interest in the meantime.

61. I consider that Mr Green's final submission on this issue is correct. It best fits with all the dicta summarised above. First, the analysis in *In re Lands Allotment* speaks of the trust arising when the misapplication of company property takes place. The same analysis is also supported by Millett J in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 290 D-F. Secondly Ungoed-Thomas J is at pains to emphasise that this is a real trust and not just a breach of fiduciary duty treated like a breach of trust merely by analogy. Thirdly and decisively Buckley LJ implicitly recognises a continuing equitable interest remaining in the company after the transfer because of his acknowledgment that the company's knowing receipt claim may be defeated by a recipient with a better equity. That would of course include equity's darling, and that is I think what Buckley LJ had in mind.

62. This final point is, quite independently of the need to make sense of the corporate property problem, a clear indicator that a successful outcome to a knowing receipt claim depends upon a contest between equitable priorities, ie between a continuing equitable interest of the claimant and such interest as the recipient may have acquired. That is what Millett J said about a knowing receipt claim in *Agip v Jackson (supra)* at p 292 as part of his explanation contrasting knowing receipt and dishonest assistance. He said:

> "The basis of liability in the two types of cases is quite different; there is no reason why the degree of knowledge required should be the same, and good reason why it should not. Tracing claims and cases of 'knowing receipt' are both concerned with *rights of priority* in relation to property taken by a legal owner for his own benefit; cases of 'knowing assistance' are concerned with the furtherance of fraud." (My emphasis).

63. The next important case on knowing receipt chronologically is *In re Montagu's Settlement Trusts* [1987] Ch 264. The tenth Duke of Manchester received from trustees of a family settlement various family chattels which should have been held on

trust. He disposed of some of them during his lifetime and after his death the eleventh Duke sought an account in respect of them on the basis of knowing receipt by the tenth Duke. The claim failed because Sir Robert Megarry VC decided that the tenth Duke lacked the requisite knowledge. The case is famous for Sir Robert's conclusion that knowledge rather than mere notice was the required mental condition for knowing receipt. The tenth Duke was of course a pure volunteer in relation to the chattels which he received, so no question of overreaching or overriding of the interests of the beneficiaries could have arisen, nor therefore any doubt that those beneficiaries retained an equitable beneficial interest in the chattels sufficient if necessary to support a claim in knowing receipt.

64. Nonetheless Mr Crow placed reliance on the analytical basis whereby the Vice Chancellor reached his decision about the requirement for knowledge of the breach of trust. The judgment was given in two parts, on 21 December 1983 and 29 March 1985, with further argument on the constructive trust in between. The passages relied upon by Mr Crow all appear in the second judgment, but they need to be read in conjunction with this short dictum in the first, at p 272:

> "The question is not merely whether a person is to take a property subject to an equity but whether the full burden of trusteeship is to be imposed on him by construction of equity."

At p 277 in the second judgment he said:

> "It seems to me that one must be very careful about applying to constructive trusts either the accepted concepts of notice or any analogy to them. In determining whether a constructive trust has been created, the fundamental question is whether the conscience of the recipient is bound in such a way as to justify equity in imposing a trust on him."

At p 278 he said:

> "Third, there seems to me to be a fundamental difference between the questions that arise in respect of the doctrine of purchaser without notice and constructive trusts. As I said in my previous judgment, ante, pp 272H—273B:

> ‘The former is concerned with the question whether a person takes property subject to or free from some equity. The latter is concerned with whether or not a person is to have imposed upon him the personal burdens and obligations of trusteeship. I do not see why one of the touchstones for determining the burdens on property should be the same as that for deciding whether to impose a personal obligation on a man. The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a man's conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee.’

> I can see no reason to resile from that statement, save that to meet possible susceptibilities I would alter ‘man’ to ‘person’. I would only add that there is more to being made a trustee than merely taking property subject to an equity.”

Summarising his conclusions at p 285, the Vice-Chancellor set out eight principles. The first two deserve quoting:

> “(1) The equitable doctrine of tracing and the imposition of a constructive trust by reason of the knowing receipt of trust property are governed by different rules and must be kept distinct. Tracing is primarily a means of determining the rights of property, whereas the imposition of a constructive trust creates personal obligations that go beyond mere property rights.

> (2) In considering whether a constructive trust has arisen in a case of the knowing receipt of trust property, the basic question is whether the conscience of the recipient is sufficiently affected to justify the imposition of such a trust.”

65. These dicta certainly impose a higher mental element (knowledge rather than mere notice) as the criterion for imposing personal trustee-like liabilities on the recipient of trust property, by comparison with liability to answer a purely proprietary claim to the return of the property. But they come nowhere near to stating that the underlying requirement of a continuing equitable interest in the claimant which is of the essence of a proprietary claim is somehow dispensed with as a condition for the

more burdensome personal liability in knowing receipt, viewed as at the time of receipt. That question simply did not arise in the *Montagu* case.

66. These dicta were in due course trenchantly affirmed by the Court of Appeal in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437. But first it is necessary to consider the earlier decision of the Court of Appeal in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685. At first instance ([1993] 3 All ER 717) a complex knowing receipt claim in respect of the proceeds of a fraud which had been laundered through several jurisdictions failed before Millett J because he found on the facts that the corporate recipient of the money lacked the requisite knowledge. The Court of Appeal reversed that decision for reasons concerned with the attribution of knowledge to corporations with which we are not here concerned. But in passing Hoffmann LJ provided the following short and often quoted description of the requirements of a knowing receipt claim, at p 700:

> "This is a claim to enforce a constructive trust on the basis of knowing receipt. For this purpose the plaintiff 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."

Surprisingly both sides prayed this dictum in aid in support of their rival cases. It is therefore necessary to consider closely exactly what Hoffmann LJ meant by the words he used. He was proffering a general description of the conditions for establishing personal liability in knowing receipt, in a context in which the main issue before the Court of Appeal was whether the plaintiff could satisfy the third condition. The present case is about the second condition, namely whether the appellants can show that Samba beneficially received the Disputed Securities and whether they were "*traceable as representing the assets of*" SICL.

67. There is no doubt that Samba beneficially received the Disputed Securities. This is because it became common ground that "*beneficial receipt*" simply excludes a purely ministerial receipt, like that of a bank clearing money for a customer. Samba received the Disputed Securities in or towards settlement of a debt. The more difficult question, about which the parties diverged, is the meaning of the phrase "*assets which are traceable as representing the assets of the plaintiff*" and in particular the requirement imposed by the inclusion of "*traceable*". Mr Green submitted that this necessarily required the plaintiff to show a continuing equitable beneficial interest in the assets at the time of their receipt by the defendant. Mr Crow submitted that "*traceable*" in this context merely required the plaintiff to show that the assets

received by the defendant were the same as, or the proceeds of, the plaintiff's assets, which he said was plainly satisfied in relation to the Disputed Securities.

68. In my judgment Mr Green is clearly right about this. Although lawyers use and misuse the word "*tracing*" in a variety of ways it is in substance an evidential technique by which a claimant identifies property in which he claims a beneficial interest, for the purpose of pursuing a proprietary claim to the property or its proceeds or, usually where a proprietary claim has become impossible due to the conduct of the defendant, a personal claim in knowing receipt: (see per Lord Millett in *Foskett v McKeown* [2001] 1 AC 102, 127 and Snell's Equity 34th ed (2019) at para 30-051). Strictly tracing is the process whereby the claimant locates a substituted asset in which he claims a beneficial interest, whereas following is the process whereby the claimant locates the original asset in the hands of a stranger. But both are commonly referred to as tracing, and I have no doubt that Hoffmann LJ was using tracing in that combined sense as including following in the passage under consideration.

69. It is well settled that neither tracing nor following can be pursued against property in the hands of equity's darling: see again Snell (op. cit.) at para 30-055. This is because the claimant's beneficial interest in the property has been extinguished (as explained above). Thus if Hoffmann LJ was using tracing in that way, his second condition for the pursuit of a claim in knowing receipt clearly contemplates that the claimant must be able to assert a continuing equitable beneficial interest in the subject property at the time of its receipt by the defendant. If the claimant can do so, then the asset will be traceable property. If not, then there can be no tracing (or following) the asset into the defendant's hands and neither a proprietary nor a knowing receipt claim will be available.

70. That the property should be traceable was relevant to the issues before the Court of Appeal in *El Ajou* because the appellants were (albeit unsuccessfully) challenging the respondent's case that the relevant property was traceable. Nonetheless it was not an appeal in which there was any assertion that the claimant's interest had been extinguished by overreaching or overriding. It was however a case in which the claimant's money had been laundered through a number of offshore civil law jurisdictions. At first instance it was submitted that this must have extinguished the plaintiff's equitable interest, but Millett J rejected this on the basis that no foreign law to that effect had been pleaded or proved: see [1993] 3 All ER 717, 736. He added (obiter) that even if it had been it would have been of no avail, because the claim in knowing receipt was a receipt-based restitutionary claim for which the governing law was the country where the defendant received the money, and the defendant had received the money in England. If by that observation Millett J meant that a knowing receipt claim could be based upon receipt in England after the claimant's beneficial interest had been overridden by a transaction taking place abroad, according to the applicable foreign law, then I would respectfully disagree. In my view, for reasons already given, once the claimant's beneficial interest in the property has been

extinguished, then any successor in title will equally be free from a knowing receipt claim, although if the property returns to the hands of the original trustee, he or she will hold it again on the original trusts. Of course if all the parties to the offshore transactions alleged to have cleared off the claimant's equitable beneficial interest are co-conspirators in the same fraud, then they will not be permitted to rely for that purpose upon their own wrong.

71. Much the most important and controversial case for present purposes is *Macmillan Inc. v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 (Millett J); [1996] 1 WLR 387 (CA). Shares belonging to the Delaware incorporated plaintiff but held by the first defendant as nominee (ie on bare trust) were misapplied in favour of several other defendants, in each case pursuant to transactions taking place in New York, where the shares were located. The shares (or most of them) were still in the hands of the defendants when the plaintiff sued to recover them, by a proprietary claim, coupled with a claim for equitable compensation against the recipients.

72. The law of New York provided that a transferee of the shares for value without notice took a clean title free from any beneficial interest of the plaintiff. Both Millett J and the Court of Appeal, albeit for different reasons, decided that New York law was the law applicable to the transactions under which the shares reached the hands of the defendants, and that those transactions thereby extinguished the plaintiff's equitable interest in them, or at least gave the defendants a prior right of ownership, because the defendants had no notice of the plaintiff's interest. Both the proprietary and personal claims therefore failed. Both courts treated the issue between the parties as one of competing priorities as between interests in the shares.

73. The case is of importance for present purposes because of the way in which Millett J explained his conclusion that the issue between the parties was to be characterised as one of priorities between competing proprietary interests. He said this, at pp 988 – 989:

> "In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the claim: it is necessary to identify the question at issue. The English law of restitution makes a fundamental distinction 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. In the first category of case the plaintiff's restitutionary claim is said to have a proprietary base. The enrichment of the defendant is at the direct expense of the plaintiff and is matched by a corresponding diminution of his assets. The plaintiff brings

> the claim in order to recover his own property and must succeed, if at all, by virtue of his own title. In the latter class of case his claim arises from a breach of fiduciary or other obligation on the part of the defendant. The distinction is 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. In the former case he 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. Macmillan's claim is of the former kind. 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." (emphasis added)

74. After fending off a submission that his analysis conflicted with his own judgment in *El Ajou v Dollar Land* (supra), he concluded at p 990:

> "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. In my judgment the defendants have correctly characterised the issue as one of priority."

75. There is a striking similarity between the facts of *Macmillan* and this case. In both cases a trustee for the claimant company misapplied foreign situated shares beneficially owned by the claimant by transactions abroad which, under the applicable foreign law, had the effect of giving the recipients clear title, or at least superior title, to the shares, over any equitable beneficial interest of the claimant. That was in the *Macmillan* case sufficient to defeat both the proprietary claims to the return of the shares and personal claims for compensation in equity for breach of constructive trust by the recipients. In terms of ratio the key outcome in *Macmillan* was that foreign law governing the relevant share transactions was effective to defeat a purely equitable claim against defendants amenable to the jurisdiction of the English court, by overriding the equitable interest which had until then subsisted in the shares in favour of the claimant.

76. But the authority of *Macmillan* for present purposes is diminished by two factors. The first is the way in which Millett J (perhaps following the fashion of the time) sought to clothe equitable claims in the language of restitution and unjust enrichment. This was in my view a distraction. The relevant question is however whether a claim in knowing receipt is, like a proprietary claim, dependent upon the claimant having a continuing equitable interest in the subject property when it reaches the hands of the defendant.

77. It is I think possible to look through Millett J's invocation of the law of restitution to discern a principled basis for his view that an "undestroyed proprietary base" was a necessary element in both a personal and a proprietary claim. His focus was on the difference between an equitable claim based upon a pre-existing relationship recognised by equity (such as trustee and beneficiary or fiduciary and client) and a claim against a stranger between whom and the claimant there was no prior equity, the latter claim being necessarily based upon the claimant's continuing equitable interest in (or equitable ownership of) the subject property. Leaving aside dishonest assistance, where the defendant is truly liable as an accessory to the trustee with the prior equitable relationship, I consider that this distinction is sound in principle. It explains why for example (as explained above) a beneficiary may claim against an original trustee who reacquires the subject property after disposing of it to equity's darling in breach of trust, but not against a successor in title to equity's darling who has no prior relationship in equity with the claimant. The equity against the original trustee arises directly from the trustee / beneficiary relationship between them. By contrast all other successors in title to equity's darling are strangers, between whom and the claimant there is no equity at all.

78. The second diminishing factor is that the case was mainly about a proprietary rather than a personal claim. This was much relied upon by Mr Crow, who went so far as to submit that there was no real personal claim at all, not least because the defendants retained the shares (or their security interests in them) when the claim was made. Even if there were an additional personal claim against the defendants, there

was no analysis in the judgments of the requirements for a knowing receipt claim, or any discussion of the authorities about them. There is some force in this submission. Nonetheless the judgments do mention the parallel personal claim for compensation in equity for breach of constructive trust, and it was pleaded. Since no allegation was made of dishonest assistance, it is hard to see what could justify such a claim other than knowing receipt. By way of analogy with the present case, the Disputed Securities remained in the hands of Samba when the present claim was brought. It seems to me counter-intuitive to think that the claimant can in such a case avoid the need to show a continuing equitable interest in the subject property (which it is accepted is a requirement for a proprietary claim) just by choosing to sue only in knowing receipt.

79. In the end this court is not concerned with the question whether the *Macmillan* case contains a binding ratio, but rather with the question what light it sheds upon the question of principle which we have to decide. Viewed in that way I consider that Millett J's judgment does assist in the manner which I have described. The defendant to a knowing receipt claim is just as much a stranger to the claimant, with no prior relationship recognised by equity, as is a recipient against whom a purely proprietary claim is made. I need say little about the reasoning of the Court of Appeal, because they were hearing only a preliminary issue about identifying the applicable law, which did not on its own call for analysis of the issue before this court.

80. The remaining authorities may be addressed more briefly, beginning with *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 TLI 35. This was a resulting trust claim arising from the payment by the claimant of the purchase price of a property in Scotland bought in the defendant's name. Scots law was alleged not to recognise a resulting trust, but the Court of Appeal held that English law applied, and the claim succeeded. At p 38 Peter Gibson LJ endorsed the principled analysis by Millett J in *Macmillan* which I have described above*,* noting in particular that, in the absence of a pre-existing equity between the parties, the claimant will be forced to rely upon a continuing equitable interest in the property which may be vulnerable to being extinguished by the *lex situs. Lightning v Lightning* is of some help in lending the authority of the Court of Appeal to Millett J's analysis in *Macmillan*, but it is not a knowing receipt case and adds little original analysis of its own.

81. In *BCCI v Akindele* [2001] Ch 437 the defendant received a net US$6.679m of the claimant companies' money pursuant to a fraudulent scheme by the employees of one of them. A claim to recover the money failed due to the defendant's lack of the requisite knowledge, for either dishonest assistance (then still called knowing assistance) or knowing receipt. It is relied upon by the appellants for the ringing endorsement by the Court of Appeal of the reasoning of the Vice Chancellor in *In re Montagu's Settlement Trusts* for imposing something more than notice as the basis for liability in knowing receipt. At p 455 Nourse LJ concluded:

> "For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt."

82. In my view, for the reasons already given, so flexible a test of the requirement for knowledge wrongly elevates unconscionability from an equitable objective into an unruly and unpredictable test for liability, with unacceptable adverse consequences for certainty in resolving issues as to priority of title to property. Mr Crow relied upon the case as one of a number in which the prevention of unconscionability is elevated to the cardinal purpose of the knowing receipt doctrine, freed from any need to base the claim on a continuing equitable interest. But at p 448 Nourse LJ had already cited with approval Hoffmann LJ's summary of the three conditions for liability in knowing receipt in *El Ajou*, and there was no doubt that, on the facts, the claimants did demonstrate the necessary continuing equitable interest.

83. In *Angove's Pty Ltd v Bailey* [2016] UKSC 47; [2016] 1 WLR 3179, 3191-3192, paras 27-29 there are trenchant dicta from Lord Sumption JSC to the effect that the establishment of any kind of constructive trust other than by way of dishonest assistance depends as an essential requisite upon there being identifiable trust property (or its traceable proceeds) in the hands of the recipient which are not available to him as part of his general assets. In his view a constructive trust by way of knowing receipt cannot be used in English law as a form of remedial constructive trust by way of remedy for unconscionable conduct. Where the claimant's original equitable beneficial interest in the subject property has been overreached or overridden, so as to give the recipient a clear title, then the recipient plainly is entitled to treat the property as being available to him as part of his general assets.

84. I turn next to the authorities about the effect of overriding upon a transfer of trust property in breach of trust to equity's darling, when the property is later transferred on to a recipient with notice. The story starts with this citation from Ashburner's Principles of Equity, upon which Vaughan Williams LJ based his judgment in *Wilkes v Spooner* [1911] 2 KB 473, 483:

> "A purchaser for valuable consideration without notice can give a good title to a purchaser from him with notice. The only exception is that a trustee who has sold property in breach of trust, or a person who has acquired property by fraud, cannot protect himself by purchasing it from a bona fide purchaser for value without notice."

Vaughan Williams LJ relied (as did Ashburner) upon a longer statement of the same principle in *Barrow's Case* (1880) 14 Ch D 432, 445 per Jessel MR.

85. That principle was recently affirmed by the Court of Appeal in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195; [2013] Ch 91, 115 per Patten LJ at paras 47-49. It is established beyond question as a long standing equitable principle, and demonstrates how rigorous is the extinction of the beneficiary's former equitable interest when that which was originally trust property is transferred in breach of trust to equity's darling.

86. Brief reference is also necessary to the very few authorities about the effect of other kinds of overriding of an equitable interest in property. In *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30, Crown land in the Turks and Caicos Islands was sold in alleged breach of fiduciary duty at the direction of the responsible minister and came to be registered in the name of the defendant under the Torrens system of land registration introduced into the Islands by the Registered Land Ordinance. Section 23 of the Ordinance provided, subject to certain exceptions, that registration with absolute title gave the registered proprietor clear title to the land, free from all other interests and claims. The Crown sought to recover the land by an equitable proprietary claim and in the alternative compensation by way of knowing receipt. The defendant applied to have the claim struck out, relying on section 23, but failed at all levels, including the Privy Council. Section 23 was subject to the proviso that nothing in the section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee ("proviso (i)").

87. After reviewing the main authorities on knowing receipt Sir Terence Etherton giving the advice of the Board noted, at paragraph 38, that it was common ground that, if section 23 barred a proprietary claim then it also barred a personal claim in knowing receipt, on the basis that:

> "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."

In the end Sir Terence advised that it was at least arguable that, read with other provisions of the Ordinance, proviso (i) did permit both proprietary and personal claims to be pursued by the Crown against the defendant as registered proprietor.

88. The *Arthur* case is therefore an example of a situation in which, but for proviso (i), a statutory form of overriding of an equitable interest would have been sufficient to preclude a claim in knowing receipt. But it lacks the weight of persuasive authority because the critical point in issue in the present case went by concession. That outcome is however powerfully supported by Matthew Conaglen and Amy Goymour's chapter on Knowing Receipt and Registered Land in Mitchell on Constructive and Resulting Trusts (2010), which examines the effect of the English Land Registration Act 2002 on a claim in knowing receipt.

89. The opposite conclusion was reached by Henderson J, applying the Land Registration Act 2002, in *Haque v Raja* [2016] EWHC 1950 (Ch). The claimant Mr Haque alleged that he had been the beneficial owner of a property held on resulting trust for him by the first defendant, Ms Raja, who had sold it at an undervalue (and therefore in breach of trust) to the second defendant Mr Khan, who had been registered at HM Land Registry as proprietor with absolute title. Section 29 of the 2002 Act contained provision similar to that of section 23 of the Turks and Caicos Ordinance, but without proviso (i). Mr Haque made a proprietary claim for the return of the property which the judge held, on an interim application to discharge an injunction against Mr Khan, was defeated by section 23. But he held that Mr Haque's alternative claim in knowing receipt was not so affected. At para 47 he said:

> "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 Ms Williamson 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."

In the event the judge concluded that, for different reasons, the knowing receipt claim against Mr Khan had no real prospect of success, and he therefore discharged the injunction.

90. Here at last is a dictum on precisely the point in issue in this appeal, and at face value wholly supportive of the appellants' case, that liability in knowing receipt is not dependent upon the survival of an equitable beneficial interest of the claimant at the time when the property in issue comes into the defendant's hands. But just like the dictum to the opposite effect in the *Arthur* case, it appears to have been the subject of

a concession. The only knowing receipt authority cited to the judge was *BCCI v Akindele* from which (perhaps because of the concession) it might have been thought that the requisite unconscionable knowledge at a time when the defendant still held the subject property was the only condition for liability.

91. It will be apparent from what I have already said that I consider that the dictum in para 47 of the judgment in *Haque v Raja* is simply wrong. It runs counter to the whole thrust of the decisions on knowing receipt which I have reviewed above, including *Barnes v Addy, Belmont v Williams, El Ajou v Dollar Land, Macmillan v Bishopsgate* and *Angove's v Bailey.* More to the point it runs contrary to the analysis on basic equitable principle set out at the beginning of this judgment, and contains nothing beyond bare assertion to fortify it. By contrast the contrary reasoning of the same judge, by then sitting in the Court of Appeal after hearing full argument in *Davies v Ford* [2023] EWCA Civ 167, paras 77-82, in which he followed the decision of the Court of Appeal in the present case, suggests that it was the concession rather than any considered analysis of his own which prompted his dictum in *Haque v Raja.*

92. In their written case counsel for the appellants placed great reliance upon the decision of this court in *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189, although it is fair to say that their reliance upon it was somewhat muted in Mr Crow's oral submissions. It was an important decision about the construction of section 21 of the Limitation Act 1980, in the context of a claim based upon a fraud upon the claimant, in which the defendant bank was alleged to have become involved by way of dishonest assistance or knowing receipt. But it was not a case about the conditions for the establishment of knowing receipt liability. The decision was that a constructive trustee by way of dishonest assistance or knowing receipt was not a "trustee" within the meaning of section 21(1)(a), so that the ordinary six year limitation period applied to the claim. Nowhere is there any consideration of, let alone decision about, the question whether a claim in knowing receipt depends upon the claimant retaining an equitable interest in the subject property at the time of its receipt by the defendant. As in so many of the other authorities, that continuing equitable interest subsisted on the alleged facts, because no event was identified by which it could have been overreached or overridden.

93. The appellants endeavoured in their written case to extract from the *Williams* case an analysis of the constructive trust arising from knowing receipt as not a "true trust" and therefore as not needing to be based upon any continuing equitable interest of the claimant in the subject property. But the definition of "true trust" for the purposes of the Limitation Act 1980 was not based upon whether there was a division between legal title and beneficial interest. Rather it was based upon the difference between a trust deliberately undertaken, whether by agreement, common intention or by someone de facto assuming the role as a trustee de son tort on the one hand, and constructive trusteeship which the law imposes on strangers by reason of their participation (by dishonest assistance or knowing receipt) in a breach of trust, but

without intending thereby to assume trustee-like responsibilities: see eg per Lord Sumption at para 9. The passage cited above from Lord Sumption's judgment in *Angove's v Bailey* is wholly incompatible with the appellants' attempt to interpret the *Williams* case as implying that a knowing receipt trust does not depend upon the claimant's retention of an equitable beneficial interest in the subject property. In truth *Williams* says nothing about that question at all.

94. The respondent placed some reliance on dicta in *Akers v Samba Financial Group* [2017] AC 424, when this litigation first reached this court. At that stage knowing receipt had not been pleaded, and it had yet to be decided whether the law applicable to the transfer of the Disputed Securities to Samba had the effect of overriding SICL's beneficial interest. Rather, the claimants sought to invalidate the transfer of the Disputed Securities to Samba as a disposition of SICL's property contrary to section 127 of the Insolvency Act 1986. This court held that the transfer involved no disposition of the company's property within the meaning of section 127. This was because, on the transfer of legal title to the Disputed Securities to Samba, SICL's equitable beneficial interest was either preserved or overridden. In neither case did that involve a disposition of SICL's interest.

95. Mr Green pointed to seven dicta in *Akers v Samba* which he submitted showed that the overriding of a beneficial interest by the law applicable to the transfer of the legal title was treated by this court as effective to bar all equitable claims by the beneficiary against the recipient thereafter, apart from dishonest assistance. The relevant passages are at paras 20, 22, 28, 42, 48, 51 and 54. They involve an uncritical acceptance that *Macmillan v Bishopsgate* decided that point, an approval of *Lightning v Lightning* and a general endorsement of the proposition which Mr Green seeks to derive from them. But it appears from para 20 that this proposition was not at that stage challenged by the appellants. They had yet to plead knowing receipt, and the battle as to the effect of the applicable law was yet to be fought. Nor is there (unsurprisingly) any in-depth analysis of the basis of a knowing receipt claim. No equitable claim was being made. It follows that these dicta are of limited weight in the resolution of the issue now before this court, after SICL's amendment to plead a claim in knowing receipt against Samba.

96. That concludes my review of the main relevant authorities. Many others were cited, but none surmounted that threshold of relevance which calls for them to be addressed in this already long judgment. Taken as a whole I consider that they are generally supportive, although not decisive, of the issue before this court in favour of the respondent. That is how they were analysed by the courts below, and I consider that they were right to do so.

Conclusion

97. The personal liability of a recipient of trust property in knowing receipt, who has no pre-existing relationship with the claimant capable of giving rise to an equity between them, does depend upon the claimant having a continuing equitable interest in the property when it reaches the hands of the defendant. If it has been overreached or overridden (including by the foreign law applicable to the transfer to the defendant), then there is no equity which the claimant may assert against the defendant, and the claim in knowing receipt must fail.

98. I would therefore dismiss the appeal.

LORD BURROWS:

1. Introduction

99. The law on "knowing receipt" has perplexed judges and academics alike for several decades. In this case, we are required to examine some important aspects of that law in the context of a paradigm situation where, at the start of the story, there is a trust. The central issue can be expressed as follows. If a trust asset has been transferred to a defendant in breach of trust, and the transfer confers unencumbered legal title to the asset on the defendant, can the defendant be held liable to the claimant, the beneficiary under the trust, for knowing receipt? Put another way, is it an essential element of knowing receipt, where there is a transfer to a defendant of an asset in breach of trust, that the claimant, the beneficiary under the trust, has a continuing equitable proprietary interest in the asset received by the defendant?

100. It is helpful to clarify at the outset that it would not be appropriate in this judgment to try to deal with all aspects of the law on knowing receipt. In particular, there are two important matters that have not been in issue on this appeal.

101. First, the parties have agreed that, whatever level of knowledge a defendant is required to have for knowing receipt, it is satisfied in this case. In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 ("*BCCI v Akindele*"), the Court of Appeal (Nourse LJ, with whom Ward and Sedley LJJ agreed) adopted a test of whether it was unconscionable for the defendant to receive or retain the asset in question. With respect, and as many commentators have emphasised, that terminology of "unconscionability" has unhelpfully obfuscated the answer to the important question of whether the required knowledge for knowing receipt extends beyond actual knowledge to include constructive knowledge. That question is one of law to be decided once and for all and the answer to it does not vary depending on the

facts. But resolution of that question is not now before us and we have heard no submissions on it.

102. Secondly, as Jonathan Crow KC, counsel for the appellants, made clear in response to a written question from the court prior to the start of the hearing, the appellants have not sought in any way to base their claim on the law of unjust enrichment. That was not how their claim was pleaded and unjust enrichment has not been relied on in their submissions. The appellants are therefore not arguing that knowing receipt can be rationalised, in at least some situations, on the basis of unjust enrichment; nor are they arguing that they have a claim in unjust enrichment that sits alongside the law on knowing receipt. Although I shall briefly return to unjust enrichment in the context of tracing and at the end of this judgment, the relevance, if any, of unjust enrichment to knowing receipt is not a matter before us.

103. I should further make clear that, throughout this judgment, I shall be using the orthodox language of an equitable "proprietary" right or interest as arising under a trust. The parties' submissions were framed using that orthodox language and it would be difficult to engage with those submissions by adopting different language. I recognise that there has long been a debate as to the nature of a trust and whether it is misleading to characterise the beneficiary under a trust as having an equitable proprietary right or interest. It might therefore be said by some that the central issue in this case should be recast in different language because the concept of an equitable proprietary right or interest is flawed. This debate (see, for example, FW Maitland, *Equity: A Course of Lectures* (1909) Lecture IX)) has been revived by the work of Ben McFarlane and Robert Stevens through their "right against a right" analysis of what orthodoxy calls an equitable proprietary right or interest: see Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 J Eq 1. I have also found helpful on the debate as to the nature of equitable proprietary rights, Richard Nolan, "Equitable Property" (2006) 122 LQR 232; and Eleni Zaccaria, "The Nature of the Beneficiary's Right under a Trust" (2019) 135 LQR 460. It would be inappropriate in this judgment to add my views to that debate. Suffice it to say that, as a practical matter, I see no real difficulties with continuing to use the orthodox language of an equitable proprietary right or interest as arising under a trust. Even if there is an element of metaphor being employed, I do not regard that as an impediment to the correct application or understanding of the law.

104. There has been a deluge of academic (or extra-judicial) writing on knowing receipt in recent times. I have found the following articles or chapters particularly helpful: Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in William Cornish, Richard Nolan, Janet O'Sullivan, Graham Virgo (eds), *Restitution: Past Present and Future* (1998) chapter 15; Lionel Smith, "W(h)ither knowing receipt" (1998) 114 LQR 394; Peter Birks, "Receipt" in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) chapter 7; Charles Mitchell and Stephen Watterson, "Remedies for Knowing Receipt" and Matthew Conaglen and Amy

Goymour, “Knowing Receipt and Registered Land” in Charles Mitchell (ed), *Constructive and Resulting Trusts* (2010) chapters 4 and 5; Robert Chambers, “The End of Knowing Receipt” (2016) 2 Canadian Journal of Comparative and Contemporary Law 1; and William Swadling, “The Nature of Knowing Receipt” in Paul Davies and James Penner (eds), *Equity, Trusts and Commerce* (2017) chapter 13.

2. The factual and procedural background

105. The appellants (who were the claimants at first instance) are Saad Investments Co Ltd ("SICL"), a company registered in the Cayman Islands, and its joint liquidators, Mark Byers and Hugh Dickson ("the liquidators"). The Grand Court of the Cayman Islands made a winding-up order against SICL on 18 September 2009. The respondent is the Saudi National Bank ("SNB"), a Saudi Arabian bank, which is the successor in title to the assets and liabilities of another Saudi Arabian bank, Samba Financial Group ("Samba") (which was the defendant at first instance), pursuant to a transfer on 1 April 2021.

106. By a number of transactions between 2002 and 2008, a Mr Al-Sanea came to hold shares in five Saudi Arabian companies on express trusts for SICL. Those trusts were governed by Cayman Islands law and it is not in dispute that that law is materially the same as English law. On or about 16 September 2009, Mr Al-Sanea transferred the shares (“the September transfer”), in breach of trust, to Samba in order to discharge personal debts owed by Mr Al-Sanea to Samba. As I understand it, Samba still had those shares when these proceedings were commenced. At the time of Samba’s receipt of the shares, Samba knew that the shares were held on trust for SICL by Mr Al-Sanea. Moreover, in line with a judgment of Fancourt J, dated 8 April 2020 (*Byers v Samba Financial Group* [2020] EWHC 853 (Ch)), it was deemed to have been established (see para 109 below) that a reasonable bank in Samba's position would have appreciated (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 as an honest and reasonable bank would have made. The parties are agreed that, for the purposes of this appeal, the recipient’s level of knowledge was such as to satisfy whatever level of knowledge is required to make a defendant liable for knowing receipt (see para 101 above).

107. The governing law of the September transfer was Saudi Arabian law, the lex situs. It is not in dispute that Saudi Arabian law does not recognise, as such, the concept of a trust as involving a distinction between legal and equitable proprietary interests (or, as one might otherwise refer to it, a distinction between legal and beneficial ownership). As a matter of Saudi Arabian law, the effect of the September transfer, registering the shares in Samba's name, was that SICL had no continuing proprietary interest in the shares following the transfer. That is, SICL’s equitable

proprietary interest under the trust (recognised by applying English law) was overridden, or extinguished, by the registration transferring the shares to Samba (applying Saudi Arabian law as the governing law of the transfer of the shares).

108. The liquidators first issued proceedings against Samba on 14 August 2013, under 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 claim was dismissed when the Supreme Court in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 ("*Akers v Samba*") decided that, for the purposes of section 127, there was no "disposition" of any rights of SICL in relation to the shares by virtue of their transfer to Samba. The essential reasoning was that SICL's rights in respect of the shares held by Mr Al-Sanea on trust for SICL (in particular, SICL's equitable proprietary rights) had not been disposed of by the transfer of the legal title in the shares to Samba. True it was that, under Saudi Arabian law, the registration of those shares may have extinguished SICL's rights under the trust (just as would have been the case in English law, in the sense that SICL's equitable rights would have been overridden, had Samba been a bona fide purchaser of the legal title for value without notice). But the extinguishing of SICL's equitable rights was a separate matter from whether there had been a disposition of those rights. The Supreme Court decided that the extinguishing of SICL's rights under the trust did not constitute a disposition of those rights.

109. On 31 May 2017, the appellants issued these proceedings alleging knowing receipt. The knowing receipt relied on was the September transfer of the shares into Samba's name. The matters dealt with at the trial in October 2020, before Fancourt J, were of limited scope. This was because Samba had failed to comply with an order for disclosure and, as a result, was debarred from defending the claim otherwise than on specific grounds (which Fancourt J had decided, in April 2020, in *Byers v Samba Financial Group* [2020] EWHC 853 (Ch), could be tried fairly without the missing disclosure). The effect of Fancourt J's April 2020 decision was that all factual questions other than the content of Saudi Arabian law and issues as to the valuation of the shares were deemed to have been resolved in accordance with the appellants' pleaded case. That was the reason why the facts regarding Samba's knowledge at the time of its receipt of the shares were deemed to be as set out in para 106 above.

110. In the circumstances, there were three substantive issues that fell to be determined at the trial. First, whether the effect of Saudi Arabian law, as the governing law of the September transfer, was to extinguish SICL's rights in the shares even if Samba had knowledge of SICL's interest. This was referred to as "the Saudi Arabian law issue". Secondly, whether the claim for knowing receipt, pleaded by the appellants as governed by Cayman Islands or English law, must fail if SICL's interest was so extinguished. This was "the law of knowing receipt issue". Thirdly, what the value of the shares was 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 shares on the Saudi Arabian stock exchange on those days. This was “the valuation issue”.

111. Fancourt J, [2021] EWHC 60 (Ch), determined the first two issues, the Saudi Arabian law issue and the law of knowing receipt issue, in favour of Samba and, accordingly, dismissed the claim. In relation to the valuation issue, he concluded that, if it had been necessary to value the shares, it would have been appropriate to apply a “block discount” to reflect the market value achievable on a sale of such a large block of shares.

112. The appellants appealed. The appeal was dismissed by the Court of Appeal (Newey, Asplin and Popplewell LJJ) [2022] EWCA Civ 43, [2022] 4 WLR 22. The Court of Appeal agreed with Fancourt J on the Saudi Arabian law issue and the law of knowing receipt issue. It did not decide the valuation issue because it considered it unnecessary to do so given its conclusions on the first two issues.

113. The appellants sought, and obtained, from the Supreme Court permission to appeal solely in relation to the law of knowing receipt issue (which I shall hereinafter refer to as the “knowing receipt issue”).

3. The reasoning and decisions of the courts below on the knowing receipt issue

(1) Fancourt J

114. Fancourt J’s reasoning on the knowing receipt issue can be summarised as follows:

(i) He explained, at para 38, that the question at issue was:

> “whether, for a claim in knowing receipt to succeed, it is necessary for there to be an ‘undestroyed proprietary base’ to the claim, that is to say that the equitable interest of the claimant in the property is not destroyed or overridden at the moment of receipt, but the recipient thereafter - at least for a time, however short - holds property that belongs in equity to the claimant.”

(ii) Fancourt J explained that that question cannot normally arise under the English common law (which, in this sense, includes equity). This is because a purchase of the legal title by a bona fide purchaser for value without notice is

one of the very few ways (another is registration of title to land under the Land Registration Act 2002) by which an equitable proprietary interest is overridden or extinguished in English law; and by definition the bona fide purchaser of the legal title for value without notice (so-called "equity's darling") is not a knowing recipient. But that question here arose because, under the applicable foreign law (Saudi Arabian law) governing the transfer of the shares, Samba's legal title extinguished SICL's equitable proprietary interest.

(iii) Looking at the case law, it was Fancourt J's view that Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 ("*Macmillan"*) (upheld by the Court of Appeal [1996] 1 WLR 387) had decided that a knowing receipt claim rests on a continuing equitable proprietary interest. That decision was supported by obiter dicta of Peter Gibson LJ in *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 TLI 35 ("*Lightning"*) and of Nugee J in *Courtwood Holdings SA v Woodley Properties Ltd* [2018] EWHC 2163 (Ch) ("*Courtwood Holdings"*).

(iv) Section 29 of the Land Registration Act 2002, by which a purchaser for valuable consideration of registered land takes free of any earlier unprotected interests, unless the beneficiaries were in actual occupation at the time of the disposition, did not support the argument for the claimants that there is no need for a continuing equitable proprietary interest. Although there were conflicting views on the effect on a claim for knowing receipt of those statutory provisions, Fancourt J thought that the better view, as put forward by Matthew Conaglen and Amy Goymour, "Knowing Receipt and Registered Land" (referred to in para 104 above), is that those provisions prevent not only a proprietary claim against the purchaser but also a personal claim for knowing receipt against the purchaser.

(v) To summarise, quoting Fancourt J's words at paras 111-117:

> "In my judgment, the issue of principle – whether a knowing receipt claim that does not allege [dishonest assistance] requires the claimant to have a continuing proprietary base for it – is decided (in this court at least) by Millett J in the *Macmillan v Bishopsgate* case, which decision was approved by the Court of Appeal in that case. The claimant must be able to assert that the defendant received his property and was obliged to deal with it as if he were a trustee of it… If the recipient was from the outset entitled to deal with the property as his own, the claim cannot succeed. No other case has decided this question as part of its *ratio*, but the dicta of Peter Gibson LJ in the *Lightning* case and of

> Nugee J in the *Courtwood Holdings* case encapsulate the principle: the transfer cannot be one that gives the transferee good title in priority to the beneficiary's interest.… [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…. It is of the essence of [a knowing receipt claim] that the beneficiary asserts that the recipient has, or had, the beneficiary's property. That is so whether the claim is formulated as a proprietary or personal cause of action. In my judgment, a knowing recipient must have held trust property, not property to which from the moment of receipt he had good title. …I therefore decide the Law of Knowing Receipt Issue in favour of Samba and determine that, absent a continuing proprietary interest in the [shares] at the time of Samba's registration, the claim in knowing receipt as pleaded will fail."

(2) The Court of Appeal

115. The judgment of the Court of Appeal was given by Newey LJ on behalf of himself, Asplin LJ and Popplewell LJ. In respect of the knowing receipt issue, the court's reasoning, upholding Fancourt J, can be summarised as follows:

(i) A knowing receipt 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." (para 23)

(ii) Hoffmann LJ in *El Ajou v Dollar Land Holdings Ltd* [1994] 2 All ER 685 ("*El Ajou*"), at 700, set out that, to establish a claim for knowing receipt, 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."

But the Court of Appeal rejected counsel for the appellants' submission that Fancourt J had wrongly introduced into the law on knowing receipt, set out by Hoffmann LJ in *El Ajou*, a requirement previously unknown, namely a continuing equitable proprietary interest.

(iii) Millett J's decision in *Macmillan* directly supported Fancourt J's reasoning. In that case, a bona fide purchase of the legal title for value without notice gave the defendants a good defence to any claim by Macmillan, including one for knowing receipt, not because it would mean that their retention of shares was not unconscionable but because the defendants would have taken free of Macmillan's interest. According to Millett J, a continuing proprietary interest was crucial.

(iv) That a continuing proprietary interest is a prerequisite of a knowing receipt claim was also indicated by obiter dicta of Peter Gibson LJ in *Lightning* and of Nugee J in *Courtwood Holdings.* The Court of Appeal thought this was also supported by Lord Mance's leading judgment in *Akers v Samba*, at para 20 (this is set out at para 122 below).

(v) The description of the remedies for knowing receipt in the influential chapter by Charles Mitchell and Stephen Watterson, "Remedies for Knowing Receipt" (see para 104 above), which included reference to the knowing recipient having a custodial duty and a duty to restore the property, was viewed by the Court of Appeal as resting on a key premise 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. In Newey LJ's words: "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." (para 49)

(vi) It made sense for a knowing recipient to have a custodial duty, including a duty to restore the property, where the property was 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." (para 75)

(vii) No help could be gleaned from section 29 of the Land Registration Act 2002 because its effect turned on the particular terms of the statutory regime. The Court of Appeal noted the different views of Matthew Conaglen and Amy Goymour, on the one hand, and of the Law Commission, on the other hand, as to the impact of those provisions on a claim for knowing receipt but thought it unnecessary to make any comment on them.

(viii) Overall, Fancourt J's reasoning and conclusion had the support of what had been decided or assumed in a consistent line of case law and was correct. At para 79, Newey LJ concluded:

> "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."

4. The case law

116. It is clear, and was not in dispute between the parties, that, in respect of the knowing receipt issue, there is no authority directly on the point at this level of court. In any event, the reliance by Fancourt J and the Court of Appeal on some earlier cases as deciding or supporting the decision they reached is, in my view, not entirely free from difficulty. Ultimately, therefore, the knowing receipt issue has to be answered by an analysis of principle.

117. Nevertheless, it is helpful initially to look at the three main cases relied on by the lower courts, and which were at the forefront of the submissions on the cases made in this court by Brian Green KC, counsel for the respondent. These are, most importantly, Millett J's decision in *Macmillan*, which Fancourt J interpreted as having decided the issue, but also obiter dicta in *Lightning* and *Courtwood Holdings*. I shall then turn to the three main cases relied on by Mr Crow: Hoffmann LJ's statement of principle in *El Ajou* which formed the basis of Mr Crow's submissions; the Supreme Court's decision in *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 ("*Williams*"), on which Mr Crow also placed great emphasis; and obiter dicta of Henderson J in *Haque v Raja* [2016] EWHC 1950 (Ch) ("*Haque*") which, on their face, support the appellants' case.

(1) The three main cases relied on by the lower courts and by counsel for the respondent

(a) *Macmillan*

118. An action was commenced by Macmillan Inc (a wholly owned subsidiary of an English company, Maxwell Communications Corporation, previously controlled by Robert Maxwell) to recover 10.6m shares (representing a controlling interest in a New York company) from the defendants who were various parties into whose hands the shares had come. The shares had been held by Bishopsgate Investment Trust Plc as bare trustee for Macmillan Inc. Since the action had been commenced, 3.8m of the

shares had been recovered and the return of a further 1m was being negotiated. By the time of the trial, the action was therefore concerned with the remaining 5.8m shares. Those shares had been sold (during the trial with the cooperation of all parties) for a sum in excess of $137m. It was held by Millett J that, applying New York law (as the place of the transaction), the defendants were able to rely on the bona fide purchaser for value without notice priority rule to defeat the claims.

119. Two factors make Millett J's judgment in *Macmillan* difficult to analyse for our purposes. The first is that he expressly categorised all the claims as "restitutionary" (pp 998 and 990) but it is not clear what he meant by this (not least because he accepted that one of the claims was a personal claim for compensation for loss); and it is also unclear whether his reference to restitution meant that he regarded unjust enrichment as underpinning all (or at least some of) the claims being made. The second complicating factor is that the statement of claim (see the reference to the statement of claim in the summary given prior to the judgment at [1995] 1 WLR 978, 981) did not refer expressly to knowing receipt or to a liability to account as a constructive trustee which would have been the traditional ways of pleading a claim for knowing receipt.

120. It is clear that what was principally being claimed and focussed on was the proprietary claim for the return of the shares or, given that the shares had been sold, to the proceeds of sale (which were presumably being treated as the traceable substitute of the shares). But there was an additional claim, set out in the statement of claim, for "compensation … for breach of constructive trust". It would appear that that was referring to a personal claim for knowing receipt although it is conceivable that it was referring to a claim for dishonest assistance (for the law on dishonest assistance, see below para 147). If it is correct that a claim for knowing receipt was being made, the references by Millett J to the need for an equitable proprietary base were being applied not only to the proprietary claim but also to the personal claim for knowing receipt; and his decision that the claims failed because the defendants were bona fide purchasers for value without notice, or had taken a transfer from someone who was, applied to both the proprietary claim and the claim for knowing receipt.

121. There was an appeal, [1996] 1 WLR 387, purely on the conflict of laws point and there was no determination of the precise claim being made. It was accepted that the issue in question was about the title to the shares. Millett J's decision on the conflict of laws issue, that New York not English law governed the application of the bona fide purchase defence and hence the title to the shares, was upheld but was reached by a different route ie the Court of Appeal applied the lex situs of the shares whereas Millett J had applied the law of the place of the transaction.

122. It is significant that Lord Mance, giving the leading judgment in *Akers v Samba,* did appear to interpret Millett J's judgment, as upheld by the Court of Appeal,

as authority for there needing to be a continuing equitable proprietary interest for a knowing receipt claim (although that was not the issue before the Supreme Court: see para 108 above). Hence Lord Mance said at para 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."

123. Again some clarity was lost because there was no explicit reference to knowing receipt. But I tend to agree with the submission of Mr Green that by the phrase, "simply restitutionary", Lord Mance was referring to a personal claim for knowing receipt.

124. In summary, while not entirely clear, the decision of Millett J in *Macmillan,* which was upheld by the Court of Appeal but without further analysis of the personal claim, does appear to be an authority in favour of the respondent's submissions.

(b) *Lightning*

125. *Lightning* was concerned with the "in personam" jurisdiction of the English court to decide an equitable claim in respect of an alleged resulting trust of land in Scotland. The lower courts, and Mr Green in his submissions, sought to place some weight on the following obiter dicta of Peter Gibson LJ, with whom Henry LJ agreed, at p 38:

> "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."

126. In my view, the relevance of those obiter dicta to the issue we have to decide is tangential. In particular, no question was raised in that case as to knowing receipt and the obiter dicta may be interpreted as applying purely to the proprietary claim in issue in the case and not to a personal claim for knowing receipt.

(c) *Courtwood Holdings*

127. In *Courtwood Holdings*, the claimant alleged that several defendants received legal title to a farm, or the proceeds of its sale and other profits, knowing of breaches of fiduciary duty by the agent of the previous owner. That claim for knowing receipt failed because the sale of the farm to the first defendant was not a direct result of the alleged breach of fiduciary duty, as was required by the decision of the Court of Appeal in *Brown v Bennett* [1999] 1 BCLC 649. In what were, therefore, obiter dicta, Nugee J explored the basis of a claim in knowing receipt. Contrasting the law on dishonest assistance, he said at para 201:

> "The foundation of the claim in knowing receipt seems to me quite different. It is that a person has got their hands on property which belongs to somebody else… [In other words] the foundation …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."

128. Nugee J then referred to *Lewin on Trusts*, 19th ed (2015), at para 42-044 (the same passage appears in the current 20th ed (2020) at para 42-044):

> "A breach of trust is usually essential because it is the basis on which the beneficial title is retained by the beneficiaries and does not pass to the recipient. If the beneficial title does

> pass to the recipient there is no occasion for the imposition of liability in equity on the recipient under the knowing receipt head of constructive trusteeship."

129. Plainly that passage from Nugee J's judgment, backed up by the citation from *Lewin on Trusts*, firmly supports the case for the respondent. But they were obiter dicta only.

(2) The three main cases relied on by counsel for the appellants

(a) Hoffmann LJ's statement of principle in *El Ajou*

130. In para 115(ii) above, I have set out the statement of principle by Hoffmann LJ in *El Ajou.* That statement, setting out three necessary requirements for a claim in knowing receipt, has been relied on in numerous subsequent cases. Mr Crow, especially in his oral submissions, relied heavily on it. He argued that this was the definitive statement of the requirements for knowing receipt and yet it said nothing about any need for a continuing equitable proprietary interest. Had Hoffmann LJ, and the subsequent courts relying on his statement, thought that that extra element was needed, they would have said so. I reject that submission for three reasons.

131. First, it is clear that the statement is not a comprehensive statement of all the law on knowing receipt. For example, it does not mention after-acquired knowledge. Yet it is clear law that a defendant can be held liable for knowing receipt if the defendant still retains the assets at the time that it acquires the relevant knowledge even though that was subsequent to receipt (and assuming that, at the time of receipt, the defendant was not a bona fide purchaser of the legal title for value without notice: see paras 167-171 below).

132. Secondly, it is not at all surprising that Hoffmann LJ did not mention the need for a continuing equitable proprietary interest because this can hardly ever arise as a problematic issue in the English common law applying to knowing receipt, as made clear by Fancourt J (see para 114 (ii) above).

133. Thirdly, the requirement of a continuing equitable proprietary interest is in any case arguably implicit in Hoffmann LJ's reference to the assets being "traceable as representing the assets of the plaintiff".

(b) *Williams*

134. In this case, money was held by a solicitor in a client account on trust for the claimant client. In breach of trust, the solicitor released $6,020,190 to the defendant. It was alleged that the defendant was liable for dishonest assistance and/or knowing receipt. The question was whether, under section 21(3) of the Limitation Act 1980, a limitation period of six years applied to those claims or whether they had no limitation period by reason of section 21(1). It was decided that there was a six-year limitation period.

135. The essence of the reasoning was that, for the purposes of the Limitation Act 1980 section 21, there is a distinction to be drawn between "true trustees" (see Lord Sumption's judgment at paras 9, 30-31), falling within section 21(1) where there is no limitation period, and knowing recipients (or dishonest assisters) who are not true trustees but are treated, for the purposes of equitable relief, as if they are trustees and fall within section 21(3) with its six-year limitation period.

136. Mr Crow drew on that distinction to submit that it showed that liability for knowing receipt does not rest on a continuing equitable interest because, if it did, the recipient would be a true trustee and, applying the Supreme Court's reasoning, knowing receipt would have fallen, but did not, within section 21(1). His written submission on this point was expressed in the following way:

> "It follows that if a claimant in knowing receipt is always required to prove that they retained a proprietary interest in the property in the defendant's hands, a claim in knowing receipt will always involve an allegation that the defendant either was at some stage, or remains, a true trustee of the relevant property."

137. I reject that submission for two main reasons. First, *Williams* was concerned with interpreting section 21 of the Limitation Act 1980. That is a notoriously difficult provision to interpret and it cannot be assumed that the division of trusts that was drawn by the Supreme Court (and by courts in other cases) for the purposes of making sense of that provision has general application.

138. Secondly, it is a non sequitur for Mr Crow to argue that a requirement of a continuing equitable proprietary interest necessitates that the recipient is a "true trustee" so that section 21(1) would be applicable, contradicting the decision in *Williams*. On the contrary, the knowing recipient is plainly not an express trustee and has not assumed any fiduciary obligations. A requirement of a continuing equitable proprietary interest may be said to be consistent with treating the knowing recipient as

a constructive trustee and the reasoning of the Supreme Court is that such a constructive trustee is not a "true trustee" for the purposes of section 21 and therefore falls within section 21(3) and not section 21(1).

139. It follows from my rejection of Mr Crow's submissions on *Williams* that, in my view, neither the decision nor the reasoning in *Williams* lends support to either party's case.

(c) *Haque*

140. In *Haque*, in the context of deciding whether a freezing injunction should be continued against the defendant, the issue arose as to whether there was a serious question to be tried that the claimant (who was the beneficiary under a trust) had a proprietary claim, or a knowing receipt claim, against the defendant in respect of a house that the defendant had bought at a low value knowing that it was being sold to him in breach of trust. The defendant took good title to the house because the claimant had failed to register his interest in the house, and was not in actual occupation, so that section 29 of the Land Registration Act 2002 did not protect the claimant. Henderson J therefore held that the claimant's proprietary claim could not succeed. As regards the personal claim for knowing receipt, Henderson J held that there was no reasonable prospect of the claimant successfully proving the defendant's requisite knowledge as pleaded so that that claim would also fail.

141. However, the importance of the case for our purposes is that, at the start of his analysis of knowing receipt, Henderson J said that the fact that the proprietary claim would fail did not in itself rule out the knowing receipt claim. At para 47, he said of knowing receipt:

> "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 the defendant] rightly accepted."

142. On the face of it, this obiter dictum directly supports the submissions for the appellants. However, it should be noted that the defendant's counsel was conceding the point and it would appear that there was little, if any, argument about it. That the obiter dictum was based on the concession may be thought to be supported by the fact that, subsequently in the Court of Appeal in *Davies v Ford* [2023] EWCA Civ 167, after hearing argument on the point, Sir Launcelot Henderson (with whom Asplin and Macur LJJ agreed), at paras 74-95, took the opposite view to the one he had taken in

Haque (without mentioning that case). Admittedly, he was by then bound by the decision of the Court of Appeal in this case but he expressed the view, at para 95, that the Court of Appeal in *Byers* was restating "well-established principles".

(3) Conclusion on the case law

143. My conclusion is that, overall, the case law tends to support the respondent's case. However, only *Macmillan* can be regarded as a decision on the point and even that is not entirely clear. In any event, there is no decision on the point at the level of this court. As I have already flagged (see para 116 above), it is therefore imperative to answer the knowing receipt issue as a matter of principle. I now turn to that analysis of principle.

5. The principled answer to the knowing receipt issue

144. I shall assume initially that one is dealing, as on the facts of this case, with the paradigm situation where, at the start of the story, there is an express trust. I am therefore confining myself to where a trust asset, of which C is the beneficiary, is in breach of trust by T, the trustee, transferred to the knowing recipient, D.

(1) Knowing receipt distinguished from dishonest assistance

145. Like dishonest assistance, knowing receipt is best viewed as an equitable wrong (if one puts to one side any unjust enrichment analysis of knowing receipt: see para 102 above). The distinction between those two ways in which a stranger to a trust (ie a non-trustee) may be held liable in relation to a breach of trust committed by the trustee was first overtly recognised by Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244. In a well-known passage, he said at pp 251-252:

> "[S]trangers 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."

146. There have been many subsequent cases which have refined Lord Selborne's description which explains why, today, we can refer to the two wrongs, for shorthand, as knowing receipt and dishonest assistance. But it is important to recognise that the two types of wrong fundamentally differ.

147. Dishonest assistance - more fully, dishonestly procuring or assisting a breach of trust (or other fiduciary duty) which, it is now accepted, need not be a dishonest or fraudulent breach of trust (or fiduciary duty) - is an accessory equitable wrong. It corresponds to accessory liability in the law of tort. After *Royal Brunei Airlines v Tan* [1995] 2 AC 378 (and the subsequent clarification in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, as to what dishonesty here means) the law on dishonest assistance is well-settled and clear.

148. Knowing receipt is significantly different. Although it is like dishonest assistance in being linked to another's wrong – a breach of trust (or breach of fiduciary duty) – it is not a form of accessory liability and is not an accessory wrong. As I shall explain in more detail under the next subheading, in the context of where there has been a breach of trust (or breach of fiduciary duty) by another, it can be helpfully viewed as the equitable analogue of the tort of conversion because it is a proprietary wrong concerned with interference with equitable proprietary rights, albeit that that analogy is a loose one because, unlike the tort of conversion, it requires knowledge and does not impose strict liability. The distinction between dishonest assistance and knowing receipt may also perhaps be compared to the distinction, in criminal law, between, on the one hand, aiding abetting counselling and procuring a crime, and, on the other hand, handling stolen goods.

149. In an illuminating analysis, Paul Davies, *Accessory Liability* (2015) pp 91-92, makes clear that knowing receipt, unlike dishonest assistance, is not a form of accessory (or participatory) liability. He writes (footnotes omitted):

> "It has sometimes been argued that receipt-based claims should be considered together with assistance liability because both are premised upon participation in a primary wrong… However, it is suggested that the better view is that liability in knowing receipt is not participatory at all. Simply receiving misapplied property is inherently passive. It does not necessarily contribute to the primary wrong, and may occur long after the primary breach of duty, once the property has passed through many hands… There are further dissimilarities with assistance-based claims. For instance, the source of a receipt-based claim lies in the realm of property, which is different from participatory accessory liability…"

150. Before moving on from the distinction between dishonest assistance and knowing receipt, it should be noted that on particular facts a defendant may be concurrently liable for both. That is, the particular knowing receipt may also constitute the wrong of dishonest assistance. This will be so, for example, where the receipt of

trust assets by the defendant is part of a dishonest plan between the trustee and the defendant. Again, this point is well made by Paul Davies, *Accessory Liability* (2015) pp 92-93:

> "Any amalgamation of assistance and receipt-based liability is unhelpful and could potentially have a distorting effect on each area. However, the two types of claim may both arise from the same set of facts. For example, if a defendant offered to receive misapplied property in order to facilitate a fraudulent scheme, such as money laundering, then the defendant might be liable not only for any subsequent receipt of trust property, but also as an accessory for participating in the primary breach of trust: the communication of a willingness to accept misapplied trust property may have encouraged or induced the primary wrong. But even though these two claims may be brought concurrently, it is important to remember that they do not rest upon the same basis."

(2) The nature of knowing receipt as an equitable wrong

151. What is the precise nature of knowing receipt viewed as an equitable wrong? In the context of where there has been a breach of trust (or breach of fiduciary duty) by another, it can be helpfully seen, as I have just indicated, as the equitable analogue of the tort of conversion albeit that the analogy is a loose one because it does not impose strict liability. It is a proprietary wrong that is constituted by the defendant knowingly interfering, by receipt or retention, with the equitable proprietary rights of the claimant.

152. That this is the correct analysis of knowing receipt was set out 25 years ago, in a characteristically perceptive article, by Lionel Smith, "W(h)ither knowing receipt?" (1998) 114 LQR 394. The main focus of that article was to reject the view (associated most famously with Peter Birks, although Birks later modified his approach: see his book chapter referred to in para 104 above) that knowing receipt can be rationalised as an example of unjust enrichment. But in the course of that rejection, Smith made a number of insightful comments that are directly relevant to the case before us. At pp 394-396 he wrote as follows:

> "It appears that the best view of knowing receipt is that it is equity's analogue to the common law's claim in conversion…

> Probably the main reason for thinking that knowing receipt is equity's conversion is the focus on proprietary rights which the claim demands… [A] wrongful interference with [proprietary] rights in the past appears to be of the essence of the claim… Clearly, if the defendant was a bona fide purchaser of a legal interest for value without notice of the plaintiff's pre-existing equitable rights, the defendant is not liable in knowing receipt…
>
> One way to identify that which the law considers a wrong is that it will generate liability for consequential losses. …. It seems clear that a knowing recipient whose actions caused losses greater than the value received could be made liable to repair such losses. There is a hint of this in the old language: he is 'liable to account as a constructive trustee'. That means that he must render an account of what he did with the property, as if he were an express trustee; and he will be personally liable (as though in breach of trust) to the extent that his account shows improper management of the fund…
>
> Again, a defendant who receives property without the requisite mental state is not liable; but he will become so if he acquires that mental state while he still holds the property (or its traceable proceeds) …This 'supervening liability' is consistent only with knowing receipt as equity's conversion, since it presupposes a continuing proprietary right in the plaintiff with which the defendant interferes, his interference changing from non-culpable to culpable at a time when the proprietary right still endures."

153. It might at first sight be thought that the better (or at least an alternative) analogue for knowing receipt is the economic tort of causing loss by unlawful means (for that tort, see *Clerk & Lindsell on Torts* 24th ed, (2023) paras 23-80 – 23-100). However, on closer inspection it is clear that they are not analogous. That economic tort requires the use of "unlawful means" by the defendant with the intention to harm the claimant. There are no equivalent requirements in relation to knowing receipt. The defendant may be merely the passive recipient (albeit with the requisite knowledge) of the asset transferred by the trustee. A defendant (D) who knows that a party to a contract with C is breaking its contract with C in order to benefit D does not commit the tort of causing loss by unlawful means by accepting that benefit. That should be contrasted with where D was procuring or inducing the breach of contract: in that situation, analogously to dishonest assistance, there would be accessory tortious liability (see *Clerk & Lindsell on Torts* paras 23-19 – 23-63).

154. Another way of explaining the point that knowing receipt is a proprietary wrong is to turn round Mr Crow's emphasis throughout his submissions on the need for the receipt to be unconscionable. A receipt cannot be said to be unconscionable for the purposes of establishing a wrong (I put to one side unjust enrichment) where a defendant is doing nothing more than receiving an asset that belongs to the defendant beneficially.

(3) The logical consequence of the nature of the wrong

155. It is a logical consequence of the nature of the wrong of knowing receipt that the conferral of unencumbered title on the recipient does defeat the knowing receipt claim. There are two essential steps in the reasoning:

> (i) As I have explained, knowing receipt, as an equitable wrong, comprises knowingly interfering with the equitable proprietary rights of the claimant by receiving or retaining, with the requisite knowledge, an asset transferred in breach of trust (or breach of fiduciary duty), in which the claimant has an equitable proprietary interest.
>
> (ii) It follows from the nature of that wrong that the claimant must have a continuing equitable proprietary interest in the asset when it is received or retained by the defendant with the requisite knowledge. There will be no such wrong where the transfer confers unencumbered title in the asset on the defendant recipient.

156. I should add here that it is not in dispute in this appeal that, by reason of Saudi Arabian law, the registration of title to the shares did confer unencumbered title on Samba. It has not been suggested, for example, that the registration might have left unaffected equitable proprietary interests. In other words, it is not in dispute that the registration of title has had an equivalent effect in Saudi Arabian law (albeit more naturally described as "extinguishing" rather than "overriding" equitable proprietary interests) as would have been the case in English law if the shares had been purchased by a bona fide purchaser of the legal title for value without notice. It has also not been suggested that there are different policy considerations that we must consider in respect of the Saudi Arabian registration scheme. Nor, similarly, has it been suggested that the answer to the issue before us turns on the interpretation of the particular provisions of the Saudi Arabian share registration scheme. Put shortly, the question in dispute is not about whether unencumbered title has been conferred and does not turn on a question of statutory interpretation. It is rather about the effect as a matter of English common law (including equity) that that conferral of unencumbered title has on the claim for knowing receipt.

(4) The link between the equitable personal claim and the equitable proprietary claim

157. There is a further aspect of the correct principled answer to the question in this case which I have not so far mentioned. Once one recognises that knowing receipt is an equitable proprietary wrong that depends on the claimant having a continuing equitable proprietary interest in the asset received, or retained, by the defendant, it becomes clear that the personal knowing receipt claim has the same essential proprietary basis as the equitable proprietary claim to the asset. So, if the defendant still retains the asset, in which the claimant has a continuing equitable proprietary interest, the claimant is entitled to an equitable proprietary remedy for the return of that asset. But if the defendant no longer retains the asset, the claimant still has a personal claim for knowing receipt provided the claimant had a continuing equitable proprietary interest, and the defendant had the requisite knowledge, at the time of the defendant's receipt or retention.

158. The equitable personal and proprietary claims are therefore fundamentally linked. Both are defeated if the defendant takes legal title to the asset unencumbered by equitable interests, as where, for example, the defendant is equity's darling. It follows that I reject one of Mr Crow's central submissions that the personal and proprietary claims rest on very different foundations and are, for that reason, to be sharply distinguished.

159. On the facts of this case, Samba still had the shares at the time the claim was commenced. It follows from what has just been said about the link to the proprietary claim – and the rejection of Mr Crow's submission that the personal and proprietary claims rest on very different foundations - that there is an obvious weakness in the claim for knowing receipt brought by the appellants. That weakness is exposed if one asks, "Why did not the appellants bring an equitable proprietary claim for the return of the shares?" Presumably the answer is that, in respect of that proprietary claim, it would be very clear that the conferral of unencumbered title on Samba would defeat the claim. But given the linkage between the personal and proprietary claims, it would equally be odd if the appellants could turn from inevitable failure, if they had made a proprietary claim to the shares, to success in a knowing receipt claim. The reason the equitable proprietary claim would here fail is the same reason why the personal claim in knowing receipt should fail.

(5) Further support from the law on equitable tracing

160. In *Foskett v McKeown* [2001] 1 AC 102 ("*Foskett*") Lord Millett, giving the leading speech, made clear that tracing is different from following. Following is concerned with where the same asset goes from one person to another. Tracing, in contrast, is concerned with identifying a new asset as a substitute for the original asset.

Lord Millett explained that tracing is neither a claim nor a remedy. Rather it is the process by which the law treats one asset as the substitute for another. The equitable tracing rules have traditionally been understood to be less restrictive than the common law tracing rules (eg in permitting tracing into a mixed fund) albeit that, not least because tracing is merely a process, drawing that distinction between common law and equitable tracing is hard to defend in principle (as was recognised in obiter dicta of Lord Millett and Lord Steyn in *Foskett* [2001] 1 AC 102, 113, 128-129).

161. Tracing may be necessary not only where the claimant brings an equitable proprietary claim seeking the return of a substitute asset but also where the claimant brings a claim in knowing receipt and the relevant asset received (or retained) is a substitute asset. See, eg, the second of Hoffmann LJ's principles in *El Ajou* set out at para 115(ii) above; and as Lord Millett said in *Foskett,* at p 128, "The successful completion of a tracing exercise may be preliminary to a personal claim … or a proprietary one". It is instructive to see that the debate in the case before us may be regarded as linked to the debate as to how one explains claims (or, one might say, remedies) consequent on equitable tracing.

162. It was laid down in *In re Diplock* [1948] Ch 465, 530, 536-537, 540, that, at the start, the claimant who seeks to invoke equitable tracing rules needs to have an equitable proprietary interest. As Graham Virgo succinctly puts it in *The Principles of Equity and Trusts* 5th ed, (2023) p 615:

> "Tracing at [common law] is relevant where the claimant has a legal proprietary base; the equitable tracing rules apply where a claim is founded on an equitable proprietary base."

163. As regards the claims (or remedies) at the end of the tracing process, Lord Millett in *Foskett* reasoned that an equitable proprietary claim to a traced asset, as was in issue in that case, rests on a continuing beneficial interest. He said at pp 127 and 129:

> "Having completed this [tracing] exercise, the plaintiffs claim a continuing beneficial interest in the insurance money…. The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment… A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds everyone who takes the property or its traceable proceeds except a bona fide purchaser for value without notice… [T]he plaintiffs seek to vindicate their property rights, not to reverse unjust enrichment…".

164. Lord Millett also indicated that the claimant making an equitable proprietary claim must make an election whether to follow and claim the original asset (if it still exists) or to trace and claim the substitute asset (the claimant cannot have both).

165. Mr Green and the courts below barely mentioned tracing or *Foskett* to support their reasoning. In contrast, Mr Crow happily embraced *Foskett* while arguing that what was said in that case was perfectly correct for an equitable proprietary claim but was irrelevant to a personal claim for knowing receipt. However, it would appear that, if Lord Millett's analysis in *Foskett* is correct, the requirements for, and application of, equitable tracing add further support to the principled position that has been set out above. That is, where the claim for knowing receipt rests on a substitute asset having been received or retained, equitable tracing, according to Lord Millett in *Foskett*, requires the claimant to have had (at the time of receipt or retention) a continuing equitable proprietary interest in that substitute asset.

166. Some commentators (most notably Peter Birks, *Unjust Enrichment* 2nd ed, (2005) pp 34-36) have suggested that the reasoning of Lord Millett in *Foskett*, as encapsulated in the passages set out in para 163 above, is problematic and that there is a preferable unjust enrichment explanation for proprietary (and personal) claims (or remedies) after equitable tracing. But neither party sought to challenge the reasoning in *Foskett* and, as I have already made clear, Mr Crow was not seeking to rely on the law of unjust enrichment as a possible rationalisation of the law on knowing receipt (whether tracing is, or is not, involved).

(6) After-acquired knowledge and bona fide purchase without notice

167. A further and very powerful argument in favour of the correct legal position being that favoured by the lower courts concerns after-acquired knowledge and equity's darling. The argument rests on the legal position being that the defendant's knowledge of the breach of trust, after the asset has been acquired by the defendant or another as a bona fide purchaser for value of the legal title without notice, does not render the defendant liable for knowing receipt: ie knowledge of the breach of trust does not count once legal title has passed to equity's darling. Although not mentioning knowing receipt as such, this principle was accepted in, for example, *Re Stapleford Colliery Co* (1880) 14 Ch D 432, 445; *Wilkes v Spooner* [1911] 2 KB 473, 483; and *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91, [2012] EWCA Civ 195, paras 47, 48 and 89-91.

168. There are two variant fact situations on the same theme. In the first situation, the defendant has acquired the relevant asset, transferred in breach of trust, as a bona fide purchaser of the legal title for value without notice. At the time of acquisition, the defendant did not have the requisite knowledge that the asset was being sold in breach of trust. Let us assume that the defendant subsequently acquires that knowledge while

still retaining the asset. There is no possible claim for knowing receipt against the defendant. As is said in *Lewin on Trusts,* 20th ed, (2020) para 42-083:

> "If he is a bona fide purchaser for value of a legal estate without notice, he will take the property free from the equitable interest of the beneficiaries and so cannot become a constructive trustee on the basis of after-acquired knowledge."

169. In the second situation, equity's darling transfers the relevant asset to the defendant, who has the requisite knowledge that the asset was transferred to equity's darling in breach of trust. Hence the following passage from Jamie Glister and James Lee, *Hanbury and Martin: Modern Equity* 22nd ed, (2021) para 25-008 which also refers to the first situation:

> "[K]nowing receipt cannot lie when the claimant does not have an equitable right in property that the defendant receives. So, if a recipient takes property as a bona fide purchaser for value without notice of the breach of trust, she will be protected from a knowing receipt claim even if she is later made aware of the property's provenance. She could even transfer the property on to someone who was always aware of the initial breach and that second recipient would not be liable in knowing receipt. This is because the claimant's equitable right had already been extinguished."

170. Mr Crow pointed to the exception to this extinguishment or overriding recognised in the cases set out in para 167 above. That exception arises where the defaulting trustee reacquires the property from a third party bona fide purchaser of the legal title for value without notice. But in that situation, the ordinary liability of a trustee, both to proprietary and personal claims, is revived and the defaulting trustee is rightly being denied the ability to shelter behind another's bona fide purchase. The defaulting trustee assumed the obligations of a trustee in relation to the asset and the trustee should not be released from those obligations by its own breach of trust. The trustee would otherwise be taking advantage of its own wrong. If therefore the trustee re-acquires the asset, the trustee cannot deny, by relying on the intermediate transfer to a third party having cleared the title, that it is holding the asset on trust for the beneficiary.

171. It follows from this that I agree with the following written submission made by Mr Green:

> "Where the proprietary effects of a transfer of trust property by a trustee are governed by general equitable principles, the third party transferee will take free of the beneficiary's equitable interest if the third party is a bona fide purchaser of the legal estate or interest for value without notice of the beneficiary's equitable interest. It is plain that … a knowing receipt claim is not available against such a bona fide purchaser.
>
> One reason for this is that, by definition, the recipient lacks knowledge of the breach of trust at the time of the transfer. *But a more fundamental reason* is illustrated by the fact that the bona fide purchaser does not become liable in knowing receipt even if he later discovers the breach of trust while still in possession of the property. He is not liable *because he has taken free of the beneficiary's equitable interest*."

(7) Conclusion on the principled position

172. For all these reasons, my conclusion is that the principled answer to the knowing receipt issue is that, at least in the context of a trust at the start of the story, as on the facts of this case, liability for knowing receipt is dependent on the claimant, the beneficiary under the trust, having a continuing equitable proprietary interest. There can be no liability for knowing receipt once unencumbered legal title in the asset has been conferred on the defendant.

173. I should add two points for completeness. First, I reject Mr Crow's submission that acceptance of the respondent's case would have the unfortunate policy consequence of incentivising fraudsters to route assets to third parties through jurisdictions where the law extinguishes equitable proprietary interests, thereby escaping the reaches of an English knowing receipt claim. In my view, subject to there being evidence to the contrary, I would expect the relevant criminal law (as enforced by international cooperation) to act as a better disincentive to such conduct than the civil law. However, even confining oneself to civil law, in such a situation, where the third party is working with the trustee, there is no reason to think that the English law on dishonest assistance would be an inadequate deterrent to such planning; and that equitable wrong is not dependent on the continuation of an equitable proprietary interest. Furthermore, acceptance of Mr Crow's submission might be thought to require the courts in this jurisdiction to depart from the principle of comity. In any event, I do not accept that a policy concern of this kind can possibly undermine the force of the principled contrary view set out above.

174. Secondly, in answering the question of principle, I have derived no assistance from considering sections 26 and 29 of the Land Registration Act 2002. The question as to whether a knowing receipt claim can be brought where there has been registration of title under that Act ultimately turns on statutory interpretation of those particular provisions. Although our decision in this case will be of central relevance in answering that question, there is no need for us to go on to decide it in this case and, like the Court of Appeal (see para 115 (vii) above), I therefore prefer to say nothing further about it.

6. What if there is no trust at the start of the story?

(1) Directors and Ministers of the Crown

175. Although there was no mention of this in the courts below, it is worth considering whether the application of knowing receipt, in cases where, in contrast to the facts of this case, there is no trust at the start of the story, might throw doubt on the principled analysis that has been put forward above. After concerns expressed by the court that there had been little focus on this in the appellants' written submissions, Mr Crow in the oral hearing did ultimately submit that a continuing equitable proprietary interest cannot be a requirement for liability for knowing receipt because knowing receipt has been applied in situations where the relevant assets are not initially held on trust.

176. Two situations were drawn to our attention (there may be others) where liability for knowing receipt has been held to arise in circumstances where an asset has been transferred to the defendant in breach of a fiduciary duty even though, at the start, the claimant had no equitable proprietary interest in the asset under a trust.

177. The first, and most prominent in the case law, is where a director (or other officer) of a company, in breach of fiduciary duty to the company, has misapplied assets of the company by transferring them to the defendant. There are many cases that exemplify the application of the law on knowing receipt in this situation (although in some of the cases, the claim failed because, for example, the defendant's requisite knowledge could not be proved). They include *In re Lands Allotment Co* [1894] 1 Ch 616; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1574-1577; *Belmont Finance Corpn v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246; *Agip (Africa) Ltd v Jackson* [1991] Ch 547, 567-568; *El Ajou; BCCI v Akindele*; and *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), paras 1487–1488.

178. The second situation is where a Minister of the Crown, in breach of fiduciary duty to the Crown, has misapplied Crown land by transferring title to that land to the

defendant. The application of the law on knowing receipt in this situation is exemplified by, for example, *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30, and *Akita Holdings Ltd v Attorney General of the Turks and Caicos Islands* [2017] UKPC 7, [2017] AC 590.

179. The common feature of these two situations is that in neither of them is there a trust at the start. A director of a company does not hold the assets of the company on trust for the company: rather the company has legal title to those assets. Similarly, a Minister does not hold title to Crown land on trust for the Crown: the Crown has legal title to Crown land.

180. Mr Green, focusing on the director/company situation, submitted that this situation presents no problem for a "continuing equitable proprietary interest" requirement for knowing receipt because it has always been recognised that this situation should be treated as analogous to cases where there is a trust. As far as the conferral of unencumbered title is concerned, knowing receipt in this situation must be subject to a requirement that is analogous to there being a continuing equitable proprietary interest. Any other approach would involve, as Mr Green put it, "the tail wagging the dog".

181. I agree with the general thrust of that submission. It would be incoherent, whether viewed as a matter of logic or policy, for a defendant to be in a different position, as regards knowing receipt, in the non-paradigm situation than in the paradigm situation where there is a trust at the start. Therefore in the two situations referred to in paras 177-178 above, if unencumbered title passes to the defendant, the analogous application of the law that would apply in the paradigm situation requires that there can be no liability for knowing receipt.

182. When pressed as to the principled or conceptual basis for the drawing of the analogy he was relying on, Mr Green submitted that, for the limited purposes of equitable relief, the director (or other fiduciary) should be regarded, at the point of committing the breach of fiduciary duty in relation to the assets, as a constructive trustee of the assets. It would then follow that, immediately prior to the receipt by the defendant, the claimant would have an equitable proprietary interest but one that existed under a constructive, rather than an express, trust.

183. Certainly some past cases have not seen any problem in simply treating the director/company situation as if there were a trust prior to, or at the time of, the breach of fiduciary duty comprising the transfer of the asset. For example, in *In re Lands Allotment Co* [1894] 1 Ch 616, in the context of deciding whether statutory limitation periods applied to directors who had misapplied the company's assets, Lindley LJ said, at p 631:

> "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control…"

And Kay LJ said this at pp 638-639:

> "[Directors] are only trustees qua the particular property which is put into their hands or under their control, and which they have applied in a manner which is beyond the powers of the company. I conceive that qua such fund they are constructive trustees, or trustees by implication of law…"

184. Similarly, in *Belmont Finance Corpn v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405, Buckley LJ said the following:

> "A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust (*Re Lands Allotment Co*, per Lindley and Kay LJJ). So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity."

185. Mr Green submitted, and I agree, that "unless he has some better equity" would precisely cover the transfer of unencumbered title to the stranger whether by registration, as in our case, or because the recipient (or someone from whom the recipient acquired the asset) is a bona fide purchaser of the legal title for value without notice. The same result of denying a claim for knowing receipt would therefore be reached in the company situation as where there had been a true trust from the start.

186. Again in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at para 1487, Lewison J said:

> "Although a company is the legal and beneficial owner of its own assets, there is no difficulty in classifying property belonging to a company as trust property for the purpose of knowing receipt, where the company's property has been alienated by its directors in breach of their fiduciary duty."

187. There are also discussions along similar lines to those in the above cases in, for example, *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1575-1577 (per Ungoed-Thomas J); in *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] BCC 729, paras 25-26 (per Chadwick LJ); and in the Australian case of *Bell Group Ltd v Westpac Banking Corp (No 9)* [2008] WASC 239, (2008) 225 FLR 1, paras 4750 – 4804 (per Owen J).

188. My conclusion is that Mr Green's use of analogy is consistent with the willingness of courts in past cases to decide that the relevant assets of the company are subject to a trust, best viewed as a constructive trust, prior to receipt by the defendant. It follows that the fact that there may be no trust at the start of the story (ie no express trust) does not undermine the principled analysis of knowing receipt put forward above.

(2) Knowing receipt, directors and companies, and contractual principles

189. In respect of directors (or other officers) and companies there is an additional problem that merits consideration. It concerns the relationship between contractual principles and knowing receipt. It is highlighted by the case of *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846 ("*Criterion*"). Although this case did not feature in the submissions at trial of either party, and was not mentioned by the courts below, this court requested, and has been assisted by, post-hearing written submissions on the relevance of the case. I have also been helped by a case-note on *Criterion* by Robert Stevens, "The Proper Scope of Knowing Receipt" [2004] LMCLQ 421 and by an article by Matthew Conaglen and Richard Nolan, "Contracts and Knowing Receipt: Principles and Application" (2013) 129 LQR 359.

190. Let us assume that a director has been acting in breach of fiduciary duty to a company in dealings with another party (D); and that a purported but invalid contract has been made and executed with D by the company. There are two main possible analyses of the relevant legal principles (even putting to one side the possibility that legal title in any tangible asset transferred to D has not passed to D so that there is a possible claim by the company for, for example, the tort of conversion).

191. First, as a matter of contract law, any purported contract between the company and D will be void where the director as agent has not bound the company because the director had neither actual nor apparent authority (taking into account the Companies Act 2006, section 40) to make the contract on behalf of the company. It is also conceivable that in some situations, although for ease of exposition I put these alternatives to one side in the analysis that follows, the contract is, for example, voidable (as where the director has made a misrepresentation to the company of which D had notice) or illegality affects the contract (eg the company may be providing financial assistance for the purchase of its own shares). Where the contract is void, the company may have (common law) restitutionary remedies against D in the law of unjust enrichment (imposing strict liability but subject to a change of position defence) to recover the value of benefits conferred on D under the void contract with the unjust factor being, for example, want of authority or failure of basis.

192. Secondly, and alternatively, it would appear that, where the purported contract is void, the company can claim an equitable proprietary remedy to recover the asset transferred to D or a personal remedy for knowing receipt by D of the asset transferred in breach of fiduciary duty.

193. On the facts of *Criterion*, Criterion, through its directors, had entered into a "poison-pill" agreement with a partner company, Oaktree. That agreement required Criterion, in certain events, to buy out Oaktree on favourable terms to Oaktree. The aim of the agreement was to put off a potential takeover of Criterion. Criterion subsequently sought to set aside the agreement which was an executory agreement. The lower courts thought that the correct principles to apply were those of the law on knowing receipt. That is, the directors had acted in breach of fiduciary duty to the company and, depending on its state of knowledge, Oaktree was a knowing recipient. The House of Lords held that that had been a wrong approach. The purported contract here was executory and the sole question was whether that executory contract was valid. That was to be determined by contractual agency principles (and hence turned on whether the directors had actual or apparent authority to bind the company). It had nothing to do with knowing receipt not least because no assets of the company had been transferred to Oaktree. Lord Scott, giving the leading speech, said the following at para 27:

> "My Lords, I must express my respectful disagreement with the approach both of Hart J and of the Court of Appeal to the critical issue in this case. This is neither a case of 'knowing receipt' nor one of 'knowing assistance'. The word 'receipt' in the expression 'knowing receipt' refers to the receipt by one person from another of assets. A person who enters into a binding contract acquires contractual rights that are created by the contract. There may be a 'receipt' of assets when the contract is completed and the

> question whether there is ‘knowing receipt’ may become a relevant question at that stage. But until then there is simply an executory contract which may or may not be enforceable. The creation by the contract of contractual rights does not constitute a ‘receipt’ of assets in the sense that a ‘knowing receipt’ involves a receipt of assets. The question whether an executory contract is enforceable is quite different from the question whether assets of which there has been a ‘knowing receipt’ are recoverable from the recipient. To confuse these two questions is likely to lead, and in the present case has, in my opinion, led, to further confusion. It is fair to say, however, that it appears to me that the courts below dealt with the case on the basis on which it was presented to them by counsel. It was indeed presented to your Lordships as being a case to which the principles of ‘knowing receipt’ ought to be applied.”

It was further held that the issue of the directors’ authority was not one that could be resolved on the appeal before the House of Lords.

194. All that is relatively straightforward. But, while agreeing with Lord Scott, Lord Nicholls, with whom Lord Walker agreed, went on to launch a more wide-ranging attack on the Court of Appeal’s decision in *BCCI v Akindele*, which, as we have seen (para 101 above), is the leading case on the modern test of knowing receipt being whether the receipt or retention is “unconscionable”. Lord Nicholls said at paras 3-4:

> “Unfortunately, in the courts below [the] ‘want of authority’ issue was approached on the basis that the outcome turned on whether Oaktree's conduct was unconscionable. This seems to have been the test applied by the Court of Appeal in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 both to questions of ‘want of authority’ and to liability for what traditionally has been labelled ‘knowing receipt’.
>
> I respectfully consider the Court of Appeal in *Akindele's* case fell into error on this point. If a company (A) enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A. If the directors of A were acting for an improper purpose when they entered into the agreement, A's ability to have the agreement set aside depends upon the application of familiar

> principles of agency and company law. If, applying these principles, the agreement is found to be valid and is therefore not set aside, questions of 'knowing receipt' by B do not arise. So far as B is concerned there can be no question of A's assets having been misapplied. B acquired the assets from A, the legal and beneficial owner of the assets, under a valid agreement made between him and A. If, however, the agreement is set aside, B will be accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the assets in question, A will have a personal claim against B for unjust enrichment, subject always to a defence of change of position. B's personal accountability will not be dependent upon proof of fault or 'unconscionable' conduct on his part. B's accountability, in this regard, will be 'strict'.
>
> Either way, therefore, whether the … agreement is set aside or not, questions of unconscionability do not arise on Criterion's application for summary judgment."

195. On the face of it, Lord Nicholls' speech may be thought to indicate that the leading case of *BCCI v Akindele* (which concerned an executed contract) and all other cases on directors acting in breach of fiduciary duty to their companies, by entering into contracts with defendants under which the company's assets have been transferred to the defendants, have been wrongly reasoned in so far as they have applied the law on knowing receipt.

196. If Lord Nicholls was going so far, in my respectful view he was going too far. The better view is that in these types of situations, there are various possible claims in line with the analysis set out in paras 191-192 above. For example, it may be decided that, applying contractual agency principles, the contract is void and, in respect of benefits conferred on the defendant by the company, there may then be (common law) restitutionary remedies reversing the defendant's unjust enrichment at the company's expense. But alternatively, if the contract is void, the company may choose to bring an equitable proprietary claim if the traceable asset is still retained or a personal claim for knowing receipt based on the defendant having knowingly received the company's assets transferred in breach of fiduciary duty.

197. In any event, in *BCCI v Akindele* there would have been a complication in applying contractual principles. This was because the relevant payment was made by a third party rather than by the contracting company. The facts were that a contract was entered into between International Credit and Investment Co (Overseas) Ltd ("ICIC")

and Chief Akindele for the purchase of shares in BCCI Holdings. Another company within the BCCI Group, BCCI (Overseas) Ltd, paid Akindele $16.679 million owing under that contract. Unknown to Akindele, this was part of a fraudulent scheme by officers of the BCCI Group enabling BCCI Holdings to buy its own shares. The Court of Appeal dealt only with knowing receipt and did not embark on any contractual analysis. But given that the relevant purported contract was between ICIC and Akindele and not between BCCI (Overseas) Ltd and Akindele, it is understandable that the Court of Appeal confined its attention to the knowing receipt claim based on the breach of fiduciary duty by the directors of BCCI (Overseas) Ltd to that company by the transfer of the assets of that company to Akindele. For the same reason it is far from clear that Lord Nicholls' criticism of the Court of Appeal can be supported. It would appear that Lord Nicholls's reasoning has not subsequently been relied on in the case law as casting doubt on the approach to knowing receipt in *BCCI v Akindele*; and in *Thanakharn v Akai Holdings Ltd* [2010] HKCFA 64, at para 128, Lord Neuberger, sitting in the Hong Kong Court of Final Appeal, described Lord Nicholls' criticism as "an uncharacteristically obscure remark". It may be, therefore, that Homer nodded. Of course, this is not to deny that the "unconscionability" test adopted in *BCCI v Akindele* is unsatisfactory for the different reason set out in para 101 above.

198. The upshot for our purposes is that, as is common ground between the parties in their post-hearing written submissions, the *Criterion* case does not materially affect the issues in this appeal.

7. A footnote on unjust enrichment

199. I have made clear (see para 102 above) that the appellants have not sought to make any claim in the law of unjust enrichment. Nevertheless, in seeking to assist the court, Mr Crow, prior to the start of his main oral submissions, did helpfully indicate that, in principle, the appellants might have succeeded in an unjust enrichment claim had it been pleaded. He suggested that Samba had been enriched by the receipt of the shares, that that enrichment might be said to have been at the expense of SICL, and that the unjust factor might have been the "want of authority" of Mr Al-Sanea. If successful, it is clear that an unjust enrichment claim would impose strict liability, subject to the principal defence of change of position, so that the knowledge of Samba would have been irrelevant to establishing the prima facie claim (although it might have come back in as being relevant to the change of position defence).

200. That there should be such an unjust enrichment claim, separate from and lying alongside any claim for the equitable wrong of knowing receipt, was powerfully argued by, for example, Lord Nicholls and Peter Birks in their book chapters referred to in para 103 above (although for a contrary view, see, for example, Lionel Smith, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 LQR 412). However, even if there had been a prima facie strict liability unjust enrichment claim

on the facts of this case, it is arguable that, as a matter of policy, the registration of title in Samba's name would have been a defence to the claim. This is because just as, in a three-party situation, bona fide purchase of a legal title for value without notice is a defence to an unjust enrichment claim (as recognised in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580) so one can argue that there should be an analogous defence to a claim for unjust enrichment where unencumbered title to the shares was conferred on the third party by registration of title. See generally Peter Birks, *Unjust Enrichment* 2nd ed, (2005) pp 242-244; Charles Mitchell, Paul Mitchell, and Stephen Watterson (eds), *Goff & Jones on Unjust Enrichment* 10th ed, (2022) paras 29-12 to 29-17.

8. Conclusion

201. I conclude that, where there has been the transfer of an asset to a defendant in breach of trust, there can be no claim for knowing receipt where the claimant, the beneficiary under the trust, has no continuing equitable proprietary interest in the asset received by the defendant.

202. For all these reasons, I would dismiss the appeal.