George Raymond Zage III and another *v* Ho Chi Kwong and another [2010] SGCA 4

Case Number	: Civil Appeal No 3 of 2009
Decision Date	: 10 February 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Harry Elias SC, Doris Chia, Shanti Jaganathan and Toh Wei Yi (Harry Elias Partnership) for the appellants; Hri Kumar Nair SC, Gary Low and Wilson Wong (Drew & Napier LLC) for the respondents.
Parties	: George Raymond Zage III and another — Ho Chi Kwong and another

Equity

Trusts

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2009] 2 SLR(R) 479.]

10 February 2010 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the trial judge (the "Judge") who dismissed the claim by the appellants, George Raymond Zage III and his wife, Kaori Kathleen Zage, against the respondents, Ho Chi Kwong ("Ho") and Jewels DeFred Pte Ltd ("DeFred"), the fourth and fifth defendants in Suit No 375 of 2006 (see *George Raymond Zage III v Rasif David* [2009] 2 SLR(R) 479 ("the Judgment")). The claim below concerned the sum of $2,088,000 that the respondents received as payment from David Rasif ("Rasif"), a solicitor, for various pieces of jewellery and precious stones in 2006 (see the table at Annex A for the complete list of items purchased). Rasif subsequently absconded with all of these items. The appellants allege that the respondents are liable to them as constructive trustees as they had received the $2,088,000 knowing it was proceeds from a breach of trust and/or that they had dishonestly assisted Rasif in misappropriating this sum.

Background

2 Rasif was the sole proprietor of a law firm he founded, David Rasif & Partners ("DRP"). The appellants were purchasers of a property who engaged DRP to act for them in the transaction. To complete the purchase of the property they handed a cheque for the sum of $10,658,240 to Rasif on 23 May 2006. He, in turn, immediately deposited this cheque into the clients' account of DRP. Between 31 May 2006 and 2 June 2006, Rasif wrongfully withdrew $11,237,408 from the DRP clients' account, 94.09% of which was the appellants' money. Rasif *inter alia* employed this misappropriated sum to make two payments of $1,818,000 and $270,000 to the respondents in exchange for very substantial purchases of precious stones and jewellery. The first respondent, Ho, is a director and shareholder of the second respondent, DeFred, a retail jewellery shop located at the lobby of the Hyatt Hotel, Singapore.

3 Rasif first visited the DeFred showroom on the evening of 30 May 2006 along with another man. Two of the sales personnel, Lynn Lim Mui Ling ("Lynn") and Chng Ching Gek ("Maeco") knew Rasif by reputation as he had acted for their hairdresser in a previous matter. Lynn introduced Rasif to the DeFred sales assistant manager, Thomas Tan Hian ("Thomas"), who eventually took over the reins of the transaction. Rasif told Thomas he was interested in investing in diamonds of at least two carats and of a high colour grade – D, E or F, preferably a brilliant cut and accompanied by Gemological Institute of America ("GIA") certificates. Thomas showed Rasif various jewellery pieces with diamonds from the DeFred safe as well as photocopies of certificates of loose diamonds. As Rasif was leaving, Thomas suggested that he could source for more stones and then make a presentation to Rasif the next day at his office or home. Rasif agreed. Later, Thomas and Lynn briefed Ho on Rasif's visit. Ho then immediately contacted, amongst other suppliers, AA Rachminov Diamonds (Asia) Ltd in Hong Kong.

4 On 31 May 2006, photocopies of certificates attesting to various high grade loose diamonds were received by the second respondent by facsimile. Thomas and Lynn then proceeded to Rasif's Carpenter Street office to make a presentation of the various certificates and loose stones. After the presentation, Rasif agreed to buy 12 items (Annex A, items 1–12) and negotiated a price of $1,618,000 for all 12 items. These 12 items included five pieces of set jewellery he had seen the previous evening, as well as six diamonds and a 16.26ct sapphire that were acquired on the basis of certificates alone. He requested for urgent delivery by 2 June 2006 as he was due to leave for Bangkok. Thomas agreed but informed Rasif that delivery would be made only upon receipt of payment. He gave Rasif the details of DeFred's UOB bank account. After returning to the DeFred showroom, Thomas briefed Ho on what had transpired.

5 On 1 June 2006, Rasif called Thomas informing him that $1,818,000 had been transferred to the DeFred UOB account, *ie*, $200,000 more than the agreed price. Rasif explained that he transferred the $200,000 so that he could select some set jewellery pieces as gifts. Additional pieces were then identified by Thomas and Ho for sale to Rasif. That afternoon, Rasif arrived at the DeFred showroom with a telegraphic transfer slip from Malayan Banking Berhad (the "Maybank TT Slip") that evidenced the transfer of money. The Maybank TT Slip had the words "DAVID RASIF & PARTNERS", its address, account number and further below, the words "DAVID RASIF & PARTNERS – CLIENT'S ACCOUNTS" in a slightly smaller font but stamped in prominent blue ink. Thomas and Lynn have testified that Rasif showed them the Maybank TT Slip from a distance of about a metre, and that they could not examine the slip in detail. Rasif then selected 14 more pieces of set jewellery (Annex A, items 14–27). A new 'package price' of $1,780,350 was agreed upon for all 26 pieces. As such, there was an excess of $37,650 from the sum of $1,818,000 paid. Rasif requested for partial delivery that evening.

6 That afternoon, Ho was informed by a bank manager at UOB that the sum of $1,818,000 had been credited into DeFred's UOB bank account. Ho then authorised Thomas to inform Rasif that delivery of the selected items would be made that evening. Thomas also offered for sale a 25.16ct sapphire (Annex A, item 13) during his telephone conversation with Rasif. Thomas suggested that Rasif could issue a cash cheque for this item if he wanted to take delivery before leaving for Bangkok. As Rasif appeared interested to purchase this item, Thomas agreed to show it to Rasif when he delivered the purchased items at the lobby of the Mandarin Hotel at Orchard Road.

7 Later in the evening, Thomas, Lynn and Maeco delivered 20 out of the 26 pieces purchased by Rasif (Annex A, items 7–27) when they met at the lobby of the Mandarin Hotel. They also brought along the 25.16ct sapphire (Annex A, item 13) and a pearl necklace worth about $40,000 which they attempted to sell to Rasif to cover the excess of $37,650. Rasif was interested in the 25.16ct sapphire but not the pearl necklace. He negotiated with the DeFred staff and eventually agreed on a price of $270,000. Rasif made payment with a cash cheque, also from the same bank, Malayan

Banking Berhad, for $270,000 ("the Cash Cheque") (see Annex B) and took delivery of the 20 items and the 25.16ct sapphire. The Cash Cheque contained the words "DAVID RASIF & PARTNERS" and below it the words "DAVID RASIF & PARTNERS – CLIENT'S ACCOUNTS". Thomas later placed the Cash Cheque in the DeFred safe. The next morning, Thomas retrieved the Cash Cheque from the safe and handed it over to Ho. Ho then personally encashed it at the main Maybank branch at Maybank Tower. Immediately after that, Ho authorised Thomas to make the remaining delivery of the outstanding items. Thomas then arranged with Rasif for a convenient time to make this final delivery at Rasif's residence.

8 On 2 June 2006, Thomas and Lynn delivered the remaining six diamonds (Annex A, items 1–6) to Rasif at his residence at Trellis Towers, Toa Payoh. There, they met Rasif at the driveway of his apartment block, loading the boot of his car. They then made delivery of the remaining six pieces of jewellery to Rasif in the backseat of his car. Thomas testified that he brought Rasif through each supporting certificate and Rasif examined each piece with a loupe, a small magnifying glass used by jewellers.

9 Thomas and Lynn refunded Rasif $37,650 in cash and Rasif acknowledged receipt by signing upon a delivery order dated 2 June 2006. Unlike the first delivery order, there was no letterhead on it.

10 Ho never met Rasif personally. He claimed to be abroad during much of period of the transaction and to have been actively involved in a property deal in Johor Bahru, Malaysia. Nonetheless, he was clearly active behind the scenes in sourcing for stones from suppliers, as well as conveying instructions to Thomas over the course of the transaction. Moreover, Ho was the one who took delivery of the loose stones and the only person who made payments to the suppliers. We note that Ho was not cross-examined on whether he had previously handled transactions of such a substantial value.

The decision below

11 The Judge dismissed the appellants' claim. He found that the respondents had neither acted dishonestly nor received the money with knowledge of Rasif's breach of trust. The DeFred staff, like any ordinary retailer, viewed lawyers as trustworthy persons, and Rasif had impressed the DeFred staff that he was a reputable and knowledgeable lawyer, with some grasp about the value of diamonds. He had not been indiscriminate in his purchases and had actually bargained with the sales staff. It was unrealistic to expect the DeFred staff to ascertain whether Rasif had been shopping around with wholesalers before he approached DeFred. There was no reason for them to verify Rasif's background since he made payment before delivery. Doing so might actually have caused offence to Rasif and put off a potential customer. Further, such a practice could increase the costs and time required for completion of the transaction. Even if the DeFred staff knew or suspected that Rasif was not as savvy an investor as he sought to make himself out to be, this did not mean that they knew or ought to have known that (a) he was spending money indiscriminately and/or (b) he was spending ill-gotten gains.

12 The Judge rejected the appellants' submissions based on three cases involving the improper drawing of cheques (collectively termed as the "Agency Cheque Cases"): *John and others v Dodwell and Company, Limited* [1918] AC 563 ("*John v Dodwell*"); *Reckitt v Barnett, Pembroke and Slater Limited* [1929] AC 176 ("*Reckitt v Barnett*"); and *Nelson and Others v Larholt* [1947] 1 KB 339 ("*Nelson v Larholt*")(at [178] to [196] of the Judgment) . He distinguished *John v Dodwell* and *Reckitt v Barnett* on the basis that they imposed a strict liability on the recipient of a cheque drawn in breach of trust such that it did not matter if neither the payee of a cheque nor its staff realised the significance of certain words on a cheque, when the modern law of knowing receipt did not do so (see

below at [33]), and held that *Nelson v Larholt* was confined to its particular facts (see Judgment at [196]).

13 The Judge found that the DeFred staff did not have the opportunity to scrutinise the Maybank TT Slip since Rasif never handed it to them. When the initial payment was received, the Defred staff and Ho did not know that Rasif had effected the transfer from the DRP client's account. Any concerns about the fact that the initial payment by telegraphic transfer was $200,000 in excess of the agreed purchase price would have been quickly allayed by the explanation given by Rasif that he wanted to buy more items. In relation to the words on the Cash Cheque, the Judge unequivocally rejected the respondents' contention that Ho had a poor command of the English language. The Judge noted that Ho had been quoted in the newspapers as being conversant in English, spoke to international suppliers in English and had even attended a course on jewellery design in English conducted in New York for six months. He was an astute businessman and would have been able to read and understand the words on the Cash Cheque if he had paid attention to them. However, he accepted that neither Thomas nor Ho paid particular attention to the words on the Cash Cheque referring to the "CLIENT'S ACCOUNTS". Even if they had noticed such words, an honest retailer would not know or suspect that it was inappropriate for a lawyer to draw on his firm's clients' account to pay for the lawyer's personal expenses. Although Ho had some previous experience in engaging lawyers, the Judge found that he would not have known or suspected that Rasif had been involved in an impropriety.

14 Lastly, the Judge considered that even if DeFred was to be found liable for either dishonest assistance or knowing receipt, Ho would not be personally liable because he was never in contact with Rasif, and played only a limited role in the prevailing circumstances. There was no reason to lift the corporate veil.

15 We should add that in reaching this conclusion, the Judge had noted at [143] of the Judgment that much of what the appellants characterised as suspicious circumstances throughout the course of the trial were *not* pleaded, nor was there any application to amend the pleadings to include such new assertions. The Judge nonetheless, for completeness, considered the entire appellants' submissions as though the reasons for suspicions had been pleaded.

The parties' arguments on appeal

16 According to counsel for the appellants, Mr Harry Elias SC ("Mr Elias"), the respondents knew or ought to have known that there was a breach of trust by Rasif as the payments for the transaction were from the DRP clients' account. Mr Elias submitted that the Rasif transaction was unusual in several aspects. First, Rasif appeared to be in an unusual hurry to conclude the transaction, and selected, without much thought, a total of 27 items worth a very large amount, $2,088,000, over a short span of four days. He agreed to inflated prices quoted for some loose stones, and accepted old stock and jewellery with no investment value. When he made payment for the initial batch of items, he paid a further $200,000 via telegraphic transfer *in addition to* the purchase price. After he took delivery, he did not make a thorough inspection of them. Secondly, the respondents' conduct during the transaction showed that they were aware that Rasif was not an experienced investor. The amount sold to Rasif compared to DeFred's annual turnover was extraordinarily large, yet they did not enquire at all into Rasif's background, and charged inflated prices for some of the loose stones. Receipts were not provided, and there was a lack of information on the delivery orders. Thirdly, given Ho's background, knowledge and experience, he should have read and understood the words on the Cash Cheque stating that the cheque was drawn from DRP's "CLIENT'S ACCOUNTS". Thus, when the Cash Cheque was handed over to Thomas, the accumulation of suspicious circumstances should have alerted the respondents to the impropriety of Rasif's actions and the respondents should have stopped the transaction immediately.

17 On the other hand, Mr Hri Kumar SC ("Mr Kumar"), counsel for the respondents, made the following arguments. First, the appellate court should be slow to depart from the Judge's finding of fact that the respondents did not have the requisite knowledge that Rasif was acting in breach of trust when he purchased the precious stones and jewellery from DeFred. Secondly, the transaction was not unusual. DeFred had, many years ago, sold jewellery to royalty; and although DeFred was a retail jeweller, Rasif actually obtained a good price for the diamonds. It was common practice for retailers to sell by way of certificates, and the comparison to the previous turnover of DeFred should also be considered in the light of the broader market trend of an increasing demand for diamonds. Thirdly, Rasif played the role of a genuine investor well, and the DeFred staff trusted him because he was a lawyer. He was careful in choosing what to buy, and he examined the stones with a loupe himself. The Judge had queried Ho and found that he did not pay attention to the words on the Cash Cheque, but the fact that he did not pay attention was not "unconscionable". As the events unfolded, the transaction did not become more suspicious as the appellants alleged, but, on the contrary, less suspicious. By the time the Cash Cheque was drawn, the respondents did not pay much attention to it. Not many people outside the legal profession would have known what the words on the Cash Cheque meant. Despite Ho's past dealings with lawyers, he did not appreciate the significance of those words.

18 Finally, Mr Kumar submitted that Ho was not substantially involved in the transaction at all. Instead, he was involved in a commercial development project in Johor Bahru, Malaysia. He trusted Thomas and let him run the business in Singapore. According to Mr Kumar, although Ho did play some part in the transaction by sourcing for stones, this was merely a peripheral role.

The law

19 This appeal is primarily concerned with the respondents' liability as either recipients of the money from Rasif or accessories to Rasif's disposal of the appellants' money, *ie*, the two limbs of liability set out in *Barnes v Addy* (1874) LR 9 Ch App 244. The two limbs, as the Judge below correctly noted (at [15]), may overlap in certain situations. At the heart of the present appeal lies the issue of whether the respondents had the requisite knowledge under either the limb of dishonest assistance or knowing receipt, such that they are liable as constructive trustees to the appellants. With that in mind, we think it will be useful to outline the relevant legal principles.

Dishonest assistance

20 The elements of a claim in dishonest assistance are: (a) the existence of a trust; (b) a breach of that trust; (c) assistance rendered by the third party towards the breach; and (d) a finding that the assistance rendered by the third party was dishonest (see generally *Bansal Hermant Govindprasad and another v Central Bank of India* [2003] 2 SLR(R) 33 ("*Bansal*") and *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 2 SLR(R) 94 ("*Caltong*")). Neither the appellants nor the respondents disagree with the Judge's exposition of the law on dishonest assistance. Nonetheless, it will be helpful to survey the law because of recent developments in other common law jurisdictions since the law in this area was last considered by this court in *Bansal*. The modern starting point in assessing liability in this problematic area of the law remains the Privy Council decision of *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 ("*Royal Brunei Airlines*"), where Lord Nicholls lucidly pointed out that while dishonesty implies conscious impropriety and thus has a hint of subjectivity, "[t]he standard of what constitutes honest conduct *is not subjective*. *Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual*" [emphasis added] (at 389). Lord Nicholls's approach was adopted without qualification by this court in *Bansal* (at [30]).

21 However, the court in *Bansal* did not appraise two other relevant cases decided not long after *Royal Brunei Airlines*, namely *Twinsectra Ltd v Yardley* [2002] 2 All ER 377 ("*Twinsectra*"), a decision of the House of Lords and *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd and others* [2002] 2 SLR(R) 896 ("*Malaysian International Trading*"). In *Twinsectra*, the *Royal Brunei Airlines* standard of honesty was further elaborated upon by Lord Hutton (for the majority) where he said at [35]–[36] that:

> There is, in my opinion, a further consideration which supports the view that for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men. A finding by a judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor. Notwithstanding that the issue arises in equity law and not in a criminal context, **I think that it would be less than just for the law to permit a finding that a defendant had been 'dishonest' in assisting in a breach of trust where he knew of the facts which created the trust and its breach but had not been aware that what he was doing would be regarded by honest men as being dishonest**.
>
> It would be open to your Lordships to depart from the principle stated by Lord Nicholls that dishonesty is a necessary ingredient of accessory liability and to hold that knowledge is a sufficient ingredient. But the statement of that principle by Lord Nicholls has been widely regarded as clarifying this area of the law and, as he observed, the tide of authority in England has flowed strongly in favour of the test of dishonesty. Therefore I consider that the courts should continue to apply that test and that your Lordships should state that **dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people**, *although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct*.
>
> [emphasis added in bold and in italics]

The approach suggested in *Twinsectra* has been followed in Singapore by the High Court in *Malaysian International Trading*. There Lai Kew Chai J applied a "combined test" of an objective standard of honesty coupled with the subjective elements of the defendant's personal characteristics and knowledge.

22 It is pertinent to note that Lord Hutton's speech in *Twinsectra* has now been clarified by the Privy Council in *Barlow Clowes International Ltd (in liquidation v Eurotrust International Ltd* [2006] 1 All ER 377 ("*Barlow Clowes*"). The Privy Council in that case affirmed that *Twinsectra* did not depart from the objective standard of honesty laid down in *Royal Brunei Airlines*. Lord Hoffman stated at [15] that:

> Their Lordships accept that there is an element of ambiguity in [Lord Hutton's] remarks which may have encouraged a belief, expressed in some academic writing, that the *Twinsectra* case had departed from the law as previously understood and invited inquiry not merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that *his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct*. It did not require that he should have had reflections about what those normally acceptable standards were. [emphasis added]

It therefore seems quite settled following from Lord Hoffman's speech in *Barlow Clowes* that for a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them. The Judge below approved of this interpretation at [28]–[30] of the Judgment; we see no reason to depart from this analysis.

Knowing receipt

23 The elements required to establish knowing receipt are: (a) a disposal of the plaintiff's assets in breach of fiduciary duty; (b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and (c) knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty (see *Caltong* at [31], citing *El Ajou v Dollar Land Holdings plc and another* [1994] 2 All ER 685 at 700). As with dishonest assistance, the difficulty arises in determining precisely the degree of knowledge that is required for recipients of trust property to be fixed with liability. The test was restated by the landmark English Court of Appeal decision in *Bank of Credit and Commerce International (Overseas) Ltd and another v Akindele* [2001] Ch 437 ("*Akindele*"). Nourse LJ, after a comprehensive survey of the earlier authorities, held that "[T]he recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt" (at 455E). In order to better understand the ramifications of this formulation, a brief recapitulation of Nourse LJ's survey of the history of knowing receipt would be helpful.

24 Prior to *Akindele*, there was considerable confusion as to whether actual knowledge or constructive notice sufficed to ground liability for knowing receipt. One line of authorities from the English appellate courts (see *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246; *Agip (Africa) Ltd v Jackson and Others* [1990] Ch 265 and *Houghton and others v Fayers and another* [2000] 1 BCLC 511) suggested that constructive notice was sufficient. On the other hand, several judgments emanating from courts of first instance took the contrary position and maintained that only actual knowledge could justify the imposition of liability for knowing receipt (see *In re Montagu's Settlement Trusts* [1987] Ch 264; *Eagle Trust plc v S.B.C. Securities Ltd* [1993] 1 WLR 484 ("*Eagle Trust*") and *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700). In *Eagle Trust*, Vinelott J *inter alia* cited (at 503E) the famous passage by Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539 at 545 to justify this stricter approach:

> In dealing with estates in land title is everything, and it can be leisurely investigated*, in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country*. [emphasis added]

25 However, this vigorous debate had been earlier apparently glossed over in the well known judgment of Peter Gibson J in *Baden and others v Societe Generale pour Favoriser le Developpement du Commerce etc de l'Industrie en France SA* [1993] 1 WLR 509 ("*Baden*") where he accepted the suggestion of counsel in that case to categorise knowledge as: (a) actual knowledge; (b) wilfully shutting one's eyes to the obvious; (c) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (d) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (e) knowledge of circumstances which will put an honest and reasonable man on inquiry (the "*Baden* categories"). According to Nourse LJ, the first three *Baden* categories constituted or ought to be taken to constitute actual knowledge, while the latter two were instances of constructive knowledge. Nourse LJ called for the rejection of such artificial categorisation and the jettisoning of the divide between actual and constructive knowledge in knowing receipt cases. It seems to us that there is merit in Nourse LJ's suggestion to drop the Baden categorisation as (d) and (e) above incline towards equating negligence with knowledge. As

mentioned earlier, he suggested replacing this with the single touchstone of unconscionability.

26 Finally, in the Commonwealth jurisdictions of New Zealand and Canada, constructive notice was held to be sufficient for recipient liability to be imposed (see *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41 ("*Westpac Banking*") and *Citadel General Assurance Co et al v Lloyds Bank Canada et al* (1997) 152 DLR (4th) 411). Of particular significance is Richardson J's decision in *Westpac Banking* where he said (at 53):

> Clearly Courts would not readily import a duty to inquire in the case of commercial transactions where they must be conscious of the seriously inhibiting effects of a wide application of the doctrine. *Nevertheless there must be cases where there is no justification on the known facts for allowing a commercial man who has received funds paid to him in breach of trust to plead the shelter of the exigencies of commercial life*. In this regard there is a further consideration affecting the receipt of funds in discharge of indebtedness where, for example, a customer's account with a bank is overdrawn. Where the creditor is pressing for payment and thus both stands to benefit from the payment and designs and stipulates for that benefit, it will be less easy for the creditor to contend that the regular pressures of commercial life must be taken to have ruled out any need for inquiry. [emphasis added]

27 Against this broad backdrop of authorities, Nourse LJ regarded that the true purpose behind the previous attempts at categorisation of knowledge was actually to enable the court to determine whether the recipient's conscience was sufficiently affected such as to justify a finding of liability as a constructive trustee. This formulation would also resolve or at least, in Nourse LJ's words, pay "equal regard to the wisdom" of both Lindley LJ's decision in *Manchester Trust v Furness* on the one hand and Richardson J's decision in *Westpac Banking* on the other. Interestingly, Nourse LJ also considered but rejected Lord Nicholl's suggestion in his article (written extra-judicially), "Knowing Receipt: The Need for a New Landmark", from Cornish et al, *Restitution Past, Present and Future* (Hart Publishing – Oxford, 1998) at p 231 that the courts move from a fault-based regime of knowing receipt towards a consolidated unjust enrichment regime.

28 Following *Akindele*, the English Commercial Court held in *Papamichael v National Westminster Bank plc* [2003] 1 Lloyd's Rep 341 that actual knowledge was required for knowing receipt, but this view was roundly criticised as being "too narrow an interpretation of *Akindele*" by Carnwath LJ (at para 35) in the English Court of Appeal decision in *Criterion Properties Plc v Stratford UK Properties LLC and others* [2003] 1 WLR 2108 at 2120 (the House of Lords did not comment on the issue when the case went on appeal in *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846). Very recently, in *Charter plc and another v City Index Ltd* [2008] 1 Ch 313, Carnwarth LJJ reaffirmed that liability for knowing receipt depends on the defendant having *sufficient knowledge* of the circumstances of the payment to make it "unconscionable" for him to retain the benefit or pay it away for his own purposes (at 321G).

29 In Singapore, the High Court adopted *Akindele* in *Comboni Vincenzo and another v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020 ("*Comboni Vincenzo*"). Kan Ting Chiu J elaborated upon the concept of unconscionability as follows (at [64]):

> Unconscionability relates to the state of a person's knowledge. When a person knowingly assists in a breach of trust, or knowingly receives property in respect of which a breach of trust is committed, equity intervenes and constitutes him a constructive trustee. The knowledge could be actual knowledge, or it could be wilful avoidance of knowledge, *ie*, knowledge within the second and third *Baden* categories. But when there is no actual knowledge or wilful avoidance of the knowledge, and the person's awareness comes within the last two *Baden* categories, his

conscience should not be called into question. He will not be deemed a constructive trustee, and any liability on his part would be founded in tort or contract for his failure to discharge his tortious or contractual obligations.

The position taken in *Comboni Vincenzo* has since been followed by another High Court case, *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 at [44] .

30 More recently, in a Hong Kong Court of Appeal decision, *Akai Holdings Ltd (in liquidation) v Thanakharn KasiKorn Thai Chamkat (Mahachon)* [2009] HKCU 1176 (unreported) ("*Akai Holdings*"), Cheung JA comprehensively surveyed the authorities on knowing receipt throughout the UK and the Commonwealth and came to the conclusion that, although the test for knowledge is as laid out in *Akindele*, constructive notice as a doctrine could still be relevant in determining whether the conscience of the defendant was affected. In particular, Cheung JA relied on the English Court of Appeal decision in *MacMillian Inc v Bishopsgate Investment Trust Plc and others (No. 3)* [1995] 1 WLR 978 at 1000 (a case not cited in *Akindele*), where Millett J said:

> It is true that many distinguished judges in the past have warned against the extension of the equitable doctrine of constructive notice to commercial transactions (see *Manchester Trust v. Furness* [1895] 2 Q.B. 539, 545–546, *per* Lindley L.J.), but they were obviously referring to the doctrine in its strict conveyancing sense with its many refinements and its insistence on a proper investigation of title in every case. The relevance of constructive notice in its wider meaning cannot depend on whether the transaction is "commercial": the provision of secured overdraft facilities to a corporate customer is equally "commercial" whether the security consists of the managing director's house or his private investments. *The difference is that in one case there is, and in the other there is not, a recognised procedure for investigating the mortgagor's title which the creditor ignores at his peril*. [emphasis added]

31 Cheung JA in setting out his views also considered various academic viewpoints. This included an article by Charles Harpum, "The Stranger as Constructive Trustee" (1986) 102 LQR 114 at p 125("Harpum") where the author wrote that constructive notice could be applied, albeit in a modified form, for claims in knowing receipt because:

> *[i]n commercial dealings where "possession is everything and there is no time to investigate title," constructive notice will usually have no application, and this is particularly so in relation to sales of goods. However, the mere fact that a transaction is a commercial one, does not suffice to exclude a duty of inquiry from arising in any circumstances, regardless of ordinary business practices*. The pattern of inquiries to be followed by a person acquiring property for his own benefit is usually well known in advance, and provides a simple yardstick for determining whether a recipient does or does not have notice of a matter. Where a person does not receive property for his own benefit, that yardstick is absent. In such cases it is suggested that strict constructive notice should be inapplicable, because otherwise the equation with common law negligence which has been already been criticised, becomes inevitable. To decide ex post facto that inquires should have been made, may place intolerable burdens on persons dealing with fiduciaries. [emphasis added]

This viewpoint has also been forcefully expounded by David Fox in his article "Constructive Notice and Knowing Receipt: An Economic Analysis" (1998) CLJ 391 at p 395, where he wrote:

> Lindley L.J.'s comparison with land dealings is important. It assumes, quite unnecessarily, that constructive notice always entails the same detailed level of inquiry that purchasers of land were expected to observe. If notice meant only this, then there would indeed be compelling reasons

against introducing it into commerce. But the objection is too simple. It is not a plain choice between admitting notice at the full conveyancing standard and excluding it altogether. There is no reason in principle why the standard of inquiry should not vary from one kind of transaction to another. **The recipient of the property is only expected to act reasonably, given the exigencies and the customary practices of the situation in which he works**. Notice can be sensitive to the demands of commercial dealing where speed and security of transaction are important. Recent authority supports this more flexible view. *The conduct of a bank receiving a deposit of misappropriated trust money should be measured against the standard of inquiry that could reasonably be expected of a banker, not a purchaser of land*. Likewise the facts that raise the duty of inquiry may differ from one kind of property transfer to another. *Outside land transactions inquiries need not be made as a matter of routine. A commercial recipient may only be put on inquiry if the facts immediately known to him make it glaringly obvious that some impropriety is afoot*. [emphasis added in bold and in italics]

32 As candidly acknowledged by Nourse LJ when he formulated the test in *Akindele*, unconscionability is a malleable standard that is not free from difficulty in its application. The degree of knowledge required to impose liability will necessarily vary from transaction to transaction. In cases where there is no settled practice of making routine enquiries and prompt resolution of the transaction is required it seems to us clear that clear evidence of the degree of knowledge and fault must be adduced. We are also inclined to agree that the test, as restated in *Akindele*, does not require actual knowledge. This would be contrary to what we believe was the spirit and intent of Nourse LJ's formulation: it seems to us that actual knowledge of a breach of trust or a breach of fiduciary duty is not invariably necessary to find liability, particularly, when there are circumstances in a particular transaction that are so unusual, or so contrary to accepted commercial practice, that it would be unconscionable to allow a defendant to retain the benefit of receipt. The test of unconscionability should be kept flexible and be fact centred.

33 The Judge below distinguished *John v Dodwell* and *Reckitt v Barnett* on the basis that they imposed strict liability, which was at odds with the current position in law. We would agree with the basic proposition that the law of knowing receipt does not impose strict liability. However, it is debatable whether indeed these two cases stand for that proposition. It seems to us that upon closer analysis these are just cases where moneys were received with the knowledge that the authority to give was tainted. We now examine these cases.

34 In *John v Dodwell*, the manager of a firm was authorised to draw cheques on the firm's account with a brokerage. Meanwhile, the manager in his personal capacity bought shares from the same brokerage but paid for them using cheques drawn from the firm's account. The Privy Council formed the view that on the face of the cheques, the manager had, without showing any authority to do so, drawn cheques for his own purposes. The brokerage clerks must have appreciated that the firm was the drawer of the cheques, and so whatever they knew of the manager's real transactions, the brokerage had taken an "unmistakable and grave risk" by accepting the cheques (at 568–569). On this basis, the Privy Council decided that the brokerage had notice of the manager's breach of duty.

35 After this case came the decision of *Reckitt v Barnett*. There, a solicitor, Lord Terrington, holding the power of attorney to draw cheques for the management of the appellant's affairs abused this power to draw a cheque in payment of the solicitor's personal debt with the respondents. The cheque was signed "Sir Harold J. Reckitt, Bart., by Terrington his Attorney" (at 181). The House of Lords found that the respondents "had on the cheque plain notice that they were receiving the appellant's money, and they can be in no better position than if they had then asked to see and had been shown the authority under which Lord Terrington was acting. … It is a simple case of receipt by the respondents of the appellant's money with the knowledge that it was the appellant's money in

payment of Lord Terrington's debt" (at 182). As was the case in *John v Dodwell*, liability was found because of the recipients' deemed knowledge that there was a breach of duty by the drawer of the cheques. This approach is certainly not one of strict liability. While the language of unconscionability was not used, we think that it is fair to say that in such situations the conscience of the recipient is so affected that it cannot retain the benefit of the property received.

36 Finally, in *Nelson v Larholt*, a broadly similar case, the executor of an estate fraudulently drew cheques on the banking account of the estate to pay for his gambling debts. The cheques were signed by the fraudster as "G.A. Potts, executor of Wm. Burns decd" (at 340). Relying on *Reckitt v Barnett*, Denning J held, at 343–344:

> The law will therefore compel the defendant to restore the moneys to the estate unless he received the moneys in good faith and for value and without notice of the want of authority. … He must, I think, be taken to have known what a reasonable man would have known. If, therefore, he knew or is to be taken to have known of the want of authority, as, for instance, if the circumstances were such as to put a reasonable man on inquiry, and he made none, or if he was put off by an answer that would not have satisfied a reasonable man, or in other words, if he was negligent in not perceiving the want of authority, then he is taken to have notice of it.

37 It therefore seems plain to us that the courts have had no difficulty in imposing liability in appropriate cases if the defendant received payment made by a cheque which was drawn on another's account, if there was no clear basis for believing that the payment has been made with authority from the principal.

3 8 *Nelson v Larholt* was distinguished by Neill J in *Feuer Leather Corpn v Frank Johnston & Sons* [1981] Com LR 251 ("*Feuer Leather*"), and was cited by the Judge below as well as by the respondents in responding to the appellants' reliance on the Agency Cheque Cases. In *Feuer Leather*, the manager of a company sold various shipments of leather to the defendants in circumstances, the plaintiffs alleged, that would have drawn attention to the manager's breach of trust. In setting out the principles of law applicable, Neill J found that the test stated by Denning J had no general application. Although Denning J had specified that a defendant would be liable to return the moneys if he was merely negligent, this was over-stating the threshold of knowledge required because it was in fact not a case of negligence but one with sufficient evidence that the defendant knew of the want of authority. Neill J preferred the commonsense position suggested by Lindley LJ in *Manchester v Furness* that constructive notice should not be applicable to commercial transactions. Accordingly, he held that in transactions between merchants for the disposal of goods, only actual notice of the disposal of goods in breach of trust sufficed to make the defendant liable as a constructive trustee. The question of whether the defendant had actual notice must be answered by looking at the objective circumstances. A person ought to be deemed to have notice if he deliberately turned a blind eye, but the court should not expect the recipient of goods to scrutinise commercial documents such as delivery notes with great care, nor was there a general duty on the buyer of goods to make inquiries.

3 9 *Feuer Leather* remains the leading authority on knowing receipt in transactions involving the sale of goods (see P S Atiyah and John N Adams, *The Sale Of Goods* (Pearson, 11th Ed, 2005) at p 399). It is not inconsistent with *Akindele*. Even though Neill J purportedly rejected reliance on the doctrine of constructive notice in commercial transactions, it was clear that he regarded all the objective circumstances as being key to determining if the recipient of goods should be held liable for knowing receipt. As is clear from the discussion above, the doctrine of constructive notice evolved in relation to transactions in real estate, primarily as a means of resolving issues of priority between conflicting proprietary interests, and its wider application to other sorts of commercial transactions

has always been the subject of vigorous doctrinal debate. However, since *Akindele*, or more accurately *Westpac Banking*, it is equally apparent that our understanding of constructive notice should not be merely limited to its application as narrowly understood in a real estate context. Dealings with land are not any more or less 'commercial' in nature when compared to other transactions. The main difference is that investigations into title have historically evolved into becoming the settled practice in real estate transactions. Indeed, it was in this context that the doctrine of constructive notice arose. As perceptively noted by Lindley J in *Manchester Trust v Furness*, the primary obstacle to conducting investigations into title in transactions not involving real property is the amount of time available for such checks. It will often not make commercial sense to delay a transaction in return for that added certainty in title assuming of course, in the first place, that this can be practically done. However, judicial reluctance to expand the scope of liability in this thorny area should not preclude the court's consideration of the objective circumstances and the peculiar practices, if any, of each type of commercial transaction (bearing in mind the need for expediency and certainty in commerce) when assessing liability for knowing receipt. As astutely noted by Prof David Fox (above at [33]), the recipient of the property is only expected to act reasonably, given the exigencies and the customary practices of the situation in which he works. On our part, we see no reason not to impose liability even if *actual* knowledge that a breach of trust had occurred may be missing if all the prevailing circumstances warrant it. After all, merchants and businesses have a general obligation in law to conduct their businesses with probity.

40 For completeness, we ought to mention that one species of actual knowledge that was not explicitly analysed in *Baden* is the failure to *infer*. Harpum incisively observes at [122] that:

> The situation visualised here, is that of a person who knows all the facts relevant to a given matter, but who fails to appreciate their factual or legal significance. Correctly analysed, this is not a facet of constructive notice but of knowledge, because the doctrine of notice is "wholly founded on the assumption that a man does not know the facts." *It is not a failure to inquire that causes the person to be bound or liable, but a failure to appreciate or infer*. Indeed, he may be fixed with knowledge of this type even though he inquired as to the legal significance of the facts and was given an incorrect answer by his legal advisers. The facts must however necessarily lead to the inference alleged. Although this form of knowledge is not frequently articulated, examples of it are to be found both in cases on strangers and in other areas of the law. [emphasis added]

The article cited, as an example of liability in knowing receipt based on a failure to infer, Goff LJ's judgment in the case of *Belmont Finance Corporation v Williams Furniture Ltd and others (No 2)* [1980] 1 All ER 393. There, the company Belmont entered into an agreement with a company, City, to purchase shares of another company, but at the same time secured a loan that was secured on the capital of that same company. The arrangement was found to be in breach of the rule against purchasing shares with financial assistance. A claim in knowing receipt was made against one of the recipients of the funds dissipated through the arrangement. Goff LJ held that the chairman of Belmont knew of the facts which made the arrangement illegal even if he believed it to be a good commercial proposition and had sought legal advice; accordingly there was sufficient knowledge attributed to ground liability in knowing receipt.

41 With these principles in mind, we turn now to the issue of whether the respondents' state of knowledge was such that it would be unconscionable to allow them to retain the benefit of the payments.

Whether the respondents' state of knowledge made it unconscionable for them to retain the benefit of the payments

42 Plainly, in the course of the Rasif transaction, DeFred's management did not actually know that Rasif was a crooked lawyer planning to siphon off funds from his clients. Instead, the essence of the appellants' case was that the respondents *ought to have known* by distilling the unusual circumstances of the transaction and by connecting the discrete factual dots that Rasif was acting in breach of trust; in continuing to deal with Rasif they had exhibited a want of probity by assisting Rasif to dispose of his illegal proceeds. In fairness to the appellants, it can be said that there were indeed some circumstances surrounding the transaction which arguably might have given rise to cause for concern about the Respondent's knowledge about the probity of the transaction. Nevertheless, we cannot say after due consideration of the prevailing circumstances and the cumulative facts relied upon by Mr Elias, De Fred's management have clearly crossed the boundaries of reasonable commercial conduct in relation to the initial set of purchases by Rasif. Neither have the pertinent facts been adequately delved into or scrutinised during the trial. We now explain our reasons for this decision in further detail.

43 First, we pause to state that it would be clearly a stretch to label DeFred's actions as dishonest assistance. While there is often an overlap between accessory and recipient liability, it seems that this case should more appropriately be analysed under the principles of knowing receipt. While DeFred was in a very broad sense, involved in Rasif's laundering, this participation was more in the way of passive receipt than active assistance. Moreover, DeFred's state of knowledge was not dishonest. Dishonesty describes and qualifies action, not passive receipt (see Nolan, "How Knowing is Knowing Receipt", 2000 CLJ 59). The threshold of knowledge for knowing receipt and dishonest assistance, though very similar, still remain conceptually distinct. The present transaction should more appropriately be analysed under the rubric of knowing receipt.

44 We have given anxious consideration to the following facts which at first blush appear to call into question the knowledge the respondents had about the "irregular" nature of the transaction. The Rasif transaction was a windfall for DeFred by any measure. As far as the financial records of DeFred show, the Rasif transaction was significantly larger than its turnover for the previous year, and was also very substantial if compared to the value of the inventory kept by DeFred. The nature of the transaction was not that of a run-of-the-mill deal because Rasif was asking to buy diamonds for investment, whereas DeFred was ordinarily a retail jeweller. When Rasif first made payment via telegraphic transfer, he remitted $200,000 more than the price agreed upon. On the part of DeFred, it is odd that Ho chose to stay in the background throughout the transaction. Even if Thomas was a trusted employee, it is strange that Ho could not be bothered to introduce himself to Rasif, essentially his most important customer on record. Further, the documentation kept by DeFred for a transaction of this size was surprisingly sparse.

45 We accept that actual knowledge of Rasif's breach of trust is not necessary for liability in knowing receipt. Nonetheless, we cannot see any proper basis to disturb the findings of the Judge below. In the final analysis, we are not satisfied that the evidence showed that Rasif had conducted himself in a suspicious manner that ought to have invited further inquiries about the source of the funds. Nor does the evidence clearly show that the prices were patently marked up in such a manner as to indicate that the respondents were obviously attempting to take advantage of an improper set of transactions rather than to simply close with alacrity what appeared to be a good business deal. We accept the Judge's finding that Rasif had played the part of a genuine buyer well, and did in fact assuage any obvious concerns through his convincing performance of the role of a knowledgeable investor.

46 What transpired was, essentially, a simple transaction for the sale of (very expensive) goods. DeFred received payment in return for supplying a number of precious stones and jewellery pieces. Clearly, it is not the usual practice for jewellers and retailers in general, to ask their clients searching

questions about the source of their funds. As rightly pointed out by the Judge, indeed there are usually cogent reasons for *not* asking questions. Genuine clients would feel offended, the transaction might be unreasonably delayed, and costs incurred. Admittedly, in certain types of commercial transactions, there might well be a practice of exercising due diligence (as discussed above at [39]). For instance, financial institutions are subject to money laundering rules and have to tailor their business activities accordingly. In Singapore, unlike the United States and the United Kingdom, there are currently no rules that require jewellers, gem dealers and precious metal dealers to implement anti-money laundering programmes. Needless to say, real estate transactions that might involve lengthy investigations into title and the existence of conflicting interests do not set normative standards in transactions for the sale and purchase of goods. This is why the Judge quite correctly remarked that most honest retailers would not bother to check on the background or standing of their customers even for very large purchases (at [150] of the Judgment); there is simply no such general practice of making inquiries, and imposing such an invariable requirement on large transactions might jeopardise completion of large numbers of legitimate transactions. Further, Mr Elias was unable to tell us how the respondents could have discretely pursued any reasonable enquiries about the source of Rasif's funds. It must be reiterated that as far as the respondents were concerned, there were good reasons for them to conclude that Rasif was a respectable member of the community with the means to honestly complete the subject purchases – even if they might be considered substantial and or extravagant.

47 All in all, we do not think it would be fair to criticise the DeFred staff for their failure to query the source of Rasif's funds. Clients of luxury goods will often differ greatly in their shopping habits and in their outward manifestations of wealth. What is suspicious behaviour to one retailer may be reasonably interpreted as the eccentricities of the rich by another. It is absurd to suggest that businessmen should somehow draw an adverse inference against customers who live in certain residential areas or drive certain models of cars. Rasif appeared to be a good customer with a legitimate background who made prompt payment and bought several items. The legitimate priority of the DeFred staff would be in completing the sale to Rasif instead of micro-analysing or psychoanalysing their customer's conduct and reasons for the purchases in any great detail. In the same manner, a customer like Rasif who attempts to portray himself to be a sophisticated investor, albeit with some lapses in his portrayal of that role, would not ordinarily raise the suspicions of a reasonable salesperson. After all, not infrequently, customers pretend to have more knowledge than they actually have of what they are purchasing perhaps to fend off attempts by retailers to take advantage of them. As there was no fixed pattern or manner of conducting this particular type of commercial transaction, a court should be slow to conclude that the DeFred staff should have been put on their guard by most of the circumstances surrounding the Rasif transaction. After Rasif first made payment via telegraphic transfer, the Judge rightly found that the DeFred staff could not have read, from a distance, the words "CLIENT'S ACCOUNTS" on the Maybank TT Slip. All that was known to DeFred was that Rasif had transferred the purchase price of the goods he had previously chosen with an additional $200,000 that he claimed was for purchasing even more jewellery. The payment of a surplus sum may not have been the usual behaviour of a client, but Rasif pre-empted any questions when he provided a plausible explanation for this. Therefore, up to the point where Rasif wrote the Cash Cheque, there was nothing which could have signalled to the DeFred staff in any meaningful way that Rasif was acting in breach of trust.

48 Turning now to the Cash Cheque, an altogether different picture emerges. By the time the Cash Cheque was handed over to Thomas, the bulk of the money had been paid and most of the items delivered. We can see no plausible grounds on which to query the Judge's finding that it was unlikely that Thomas would have appreciated the significance of the Cash Cheque being drawn on a clients' account. The cross-examination of Thomas and the responses elicited do not suggest that Thomas knew or could have known that an inappropriate source of funds was being drawn upon to fund the

latest purchases. Thomas's sole role in receiving the cheque was ministerial; to hand the cheque over to Ho for the necessary steps and his decision as to when to release the items purchased by Rasif. Ho, on the other hand, on receiving the Cash Cheque was found by the Judge to be both able to read and understand the words on it. Despite this finding, puzzlingly, the Judge held that even if the respondents had noticed such words, an honest retailer would not know or suspect that it was inappropriate for a lawyer to draw on his firm's clients' account to pay for the lawyer's personal expenses(at [212] of the Judgment). On this point, we must respectfully disagree with the Judge. These are our reasons.

49 First, it bears mention that the Agency Cheque Cases concerned recipients of funds who clearly knew that payment was being made by an agent using funds of the principal (at [33]). Here, the respondents' original case was that it was not even clear that Rasif was using his client's moneys. On appeal, the respondents changed tack and argued that the respondents did not grasp the significance of the words on the Cash Cheque even if they knew what they meant in ordinary English. We do not think this argument is correct. The plain meaning of the words on the Cash Cheque indicated that it was an account containing moneys belonging to DRP's clients and not to him. There cannot be any other way of interpreting these words.

50 Secondly, while the exact mechanics or rules governing a solicitor's use of a client's account may not be known to or understood by all, the fact that a client's account is an account belonging to the *solicitor's clients* and not the solicitor must be plain to a sophisticated businessman such as Ho who is apparently also an experienced property player. In fact, as the Judge acknowledged (at [209] of the Judgment), Ho was a man of considerable business and international experience, even having his own construction company and buying real property in more than one jurisdiction. What was known to Ho at the material time was that Rasif was using moneys from an account belonging to his clients to pay for his own personal investments. This was not, on the face of it, a method of payment that a person with Ho's background and experience could properly regard as legitimate. It has not been suggested that Rasif had informed any of DeFred's staff that he was acting on behalf of any client in making the purchase. Indisputably, the words on the face of the Cash Cheque explicitly drew attention to the fact that the funds belonged not to Rasif, but his clients. Whether or not Rasif's withdrawal in fact turned out to be justified, Ho, and therefore the respondents, possessed all the facts necessary for him to conclude that Rasif had *prima facie* made an improper withdrawal of funds belonging to third parties to pay for the particular transaction.

51 Thirdly, we find it perturbing that even when armed with knowledge that Rasif was applying funds from his client's account, Ho did not pause to ask why Rasif was using funds from that particular account. There was now for the first time an obvious red flag being vigorously waved. This should have alerted the respondents to what was, on the face of it, an inappropriate withdrawal by Rasif. Blithely, disregarding this red flag, the cheque was, instead, immediately encashed by Ho. Taking into account all the objective circumstances, we think that DeFred's knowledge, imputed to it by Ho, that the Cash Cheque was drawn on the DRP's client account representing proceeds belonging to third parties made it unconscionable for it to retain the benefit of the Cash Cheque, see [32] and [40] above. We would, however, agree with the Judge that there were no circumstances justifying the lifting of the corporate veil. A question might arise as to whether Ho when he became aware that the cheque was drawn on DRP's clients' account should immediately have sensed that there was something wrong not only with the cheque but also with the earlier transaction and should have immediately tried to retrieve the jewellery that had been handed over to Rasif earlier. However, as this issue was not raised, there is no evidence as to whether any such attempt would have been futile or whether it would have imposed a liability on the respondents for not doing so.

Conclusion

52 We reiterate that courts should be very slow in imputing knowledge of wrongdoing when assessing the propriety of commercial transactions. In the absence of established commercial practices or obviously questionable conduct on the part of a counter-party, merchants are not ordinarily expected to make searching inquiries into their customers' source of funds. To demand such diligence in the course of ordinary commercial transactions would unduly constrict trading activities. That is why we are of the view that, up till the point when Rasif gave the Cash Cheque to Thomas, DeFred could not be said to have been in knowing receipt of the appellants' funds. In this case, Ho read and understood the meaning of the words "CLIENT'S ACCOUNTS" on the Cash Cheque. Therefore, DeFred is liable to account to the appellants as trustee for the sum transferred in the Cash Cheque *ie*, $270,000.

53 In the result, the appeal is allowed in part. On the issue of costs, we think that it is only right that the parties bear their own costs in relation to the appeal. None of the parties have been entirely successful in relation to the issues they have raised before us. The Judge's order of costs for the hearing below ought to be also varied in that Defred is to receive only half of the taxed costs for the hearing below. This follows from our decision that the appellants are entitled to recover the proceeds of the Cash Cheque from DeFred. As for Ho, even though we do not find him personally liable for knowing receipt, he was instrumental in the carrying out of the transaction from start to finish. He is therefore not entitled to any costs for the hearing below. The appellants' appeal deposit is to be returned to them.

Annex A: Items bought by Rasif (reproduced from [49] of the Judgment)

S/N	Item	Date seen/ location	Date selected/ location	Basis of selection	Date delivered/ location
1	Fancy Yellow Diamond 10.89ct (Item 22: 3AB 881 to 885)	31 May 2006 during presentation at DR's office	31 May 2006 at DR's office	Certificate (copy)	2 June 2006 at Trellis Towers
2	Fancy Yellow Diamond 10.70ct (Item 23: 3AB 886 to 890)	31 May 2006 during presentation at DR's office	31 May 2006 at DR's office	Certificate (copy)	2 June 2006 at Trellis Towers
3	Fancy Yellow Diamond 3.63ct (Item 24: 3AB 891 to 896)	31 May 2006 during presentation at DR's office	31 May 2006 at DR's office	Certificate and physical stock	2 June 2006 at Trellis Towers
4	Round Brilliant Diamond 5.05ct (Item 25: 3AB 897 to 901)	31 May 2006 during presentation at DR's office	31 May 2006 at DR's office	Certificate (copy)	2 June 2006 at Trellis Towers
5	Round Brilliant Diamond 3.50ct (Item 26: 3AB 902 to 906)	31 May 2006 during presentation at DR's office	31 May 2006 at DR's office	Certificate (copy)	2 June 2006 at Trellis Towers

6	Round Brilliant Diamond 2.12ct (Item 27: 3AB 907 to 911)	31 May 2006 during presentation at DR's office	31 May 2006 at DR's office	Certificate (copy)	2 June 2006 at Trellis Towers
7	Blue Sapphire 16.26ct (Item 3: 3AB 678 to 682)	30 May 2006 at DeFred's showroom 31 May 2006 during presentation at DR's office	31 May 2006 at DR's office	Certificate (copy)	1 June 2006 at Mandarin Hotel coffee lounge
8	Fancy Yellow Diamond Ring 5.17ct (Item 1: 3AB 643 to 661)	30 May 2006 at DeFred's showroom	31 May 2006 at DR's office	Certificate and physical stock	1 June 2006 at Mandarin Hotel coffee lounge
9	Oval Diamond Ring 5.02ct (Item 2: 3AB 662 to 667)	30 May 2006 at DeFred's showroom	31 May 2006 at DR's office	Certificate and physical stock	1 June 2006 at Mandarin Hotel coffee lounge
10	Diamond & Emerald Ring (EDR7214) (Item 5: 3AB 689 to 693)	30 May 2006 at DeFred's showroom	31 May 2006 at DR's office	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
11	Diamond Earrings (DE206/036) (Item 6: 3AB 694 to 724)	30 May 2006 at DeFred's showroom	31 May 2006 at DR's office	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
12	Pearl Earrings (SSPDE205/001) (Item 7: 3AB 725 to 732)	30 May 2006 at DeFred's showroom	31 May 2006 at DR's office	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
13	Blue Sapphire 25.16ct (Item 4: 3AB 683 to 688)	1 June 2006 at Mandarin Hotel coffee lounge	1 June 2006 at Mandarin Hotel coffee lounge	Physical stock and certificate	1 June 2006 at Mandarin Hotel coffee lounge
14	Diamond Ring (DR206/019) (Item 8: 3AB 733 to 748)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
15	Diamond Pendant (DP205/068) (Item 9: 3AB 749 to 757)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
16	Diamond Earrings (DE204/075) (Item 10: 3AB 758 to 771)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge

17	Diamond Pendant (DP205/068) (Item 11: 3AB 749 to 757)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
18	Diamond Earrings (DE204/075) (Item 10: 3AB 758 to 771)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
19	Diamond Earrings (DE206/043) (Item 13: 3AB 801 to 816)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
20	Diamond Ruby & Pink Sapphire Ring (RDR203/001) (Item 14: 3AB 817 to 820)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
21	Diamond Sapphire Ring (FDR206/037) (Item 15: 3AB 821 to 831)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
22	Diamond Earrings (DE205/064) (Item 16: 3AB 832 to 849)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	2 Certificates and Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
23	Diamond Earrings (DE8300) (Item 17: 3AB 850 to 854)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
24	Diamond Bracelet (DBG204/007) (Item 18: 3AB 855 to 862)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
25	Pearl Diamond Earrings (SSPDE205/009) (Item 19: 3AB 863 to 871)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge
26	Pearl Diamond Earrings (BSSPE9572) (Item 20: 3AB 872 to 873)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge

27	Pearl Diamond Brooch SSPDB0205/005 (Item 21: 3AB 874 to 880)	1 June 2006 at DeFred's showroom	1 June 2006 at DeFred's showroom	Physical stock	1 June 2006 at Mandarin Hotel coffee lounge

Annex B: The Cash Cheque