Dubai Islamic Bank v Charles Ridley

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	07 June 2016
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Text

[2016] JRC 102

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

Between
Dubai Islamic Bank
Plaintiff
and
Charles Ridley
Defendant
Cititrust (Jersey) Limited
Party Cited

Advocate D. R. Wilson **for the Plaintiff**.

Advocate J. C. Turnbull **for the Defendant**.

Authorities

Royal Court Rules 2004, as amended.

Dicey, Morris & Collins, The Conflict of Laws, 14 th and 15 th Editions.

Corefocus Consultancy Limited v Cronk [2013] JRC 194 .

Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC [2013] EWHC 3186 (Comm) .

Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC [2013] EWHC 3781 (Comm) .

Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC [2011] EWHC 2718 (Comm) .

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46 and [2014] A.C. 160.

Lapidus v Le Blancq [2013] 2 JLR 308 .

Haden-Taylor v Canopius [2015] (1) JLR 224 .

Re Esteem Settlement [2002] JLR 53 .

Re the S Trust [2011] JLR 375 .

Halpern v Halpern [2008] QB 195 .

The Al Wahab [1984] A.C. 50 .

Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co [1987] 3 WLR 1023 .

Islamic Investment Co Isa v Transorient Shipping Ltd (The Nour) [1999] 1 Lloyd's Rep 1 .

Musawi v Re International UK Limited [2007] EWHC 2981 .

Harding v Wealands [2007] 2 A.C. 1 .

Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] EWCA Civ 19 ; [2004] 1 WLR 1784 per Potter LJ at [54]–[55].

Halpern v Halpern [2007] EWCA Civ 291 ; [2008] QB 195 per Waller LJ at [29].

Federal Republic of Brazil and another v Durant International Corpn and another [2015] 3 W.L.R. 599 .

House of Spring Gardens Ltd v Waite & Ors [1991] 1 Q.B. 241 .

Westdeutsche Landesbank v Islington [1996] A.C. 669 .

Shalson v Russo [2003] WHC 1637 .

Boys v Chaplin [1971] A.C. 356 .

MacMillan Inc v Bishopsgate Investment Trust Plc (No.3) [1996] 1 W.L.R. 387 .

Nolan v Minerva Trust and Others [2014] JRC 078A .

Strike out — application by the plaintiff to strike out parts of defendant's amended answer — Conflicts of Laws — restitution and Tracing claims and Pauline Action — proper law of the contract, Estoppel — chose jugee — course of action estoppel, issue estoppel, abuse of process. Pauline Action.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my decision in respect of an application by the plaintiff to strike out parts of the defendant's amended answer under Rule 6/13 of the Royal Court Rules 2004, as amended ("the Rules"). In the alternative the plaintiff seeks summary judgment against the defendant in respect of the same paragraphs of the amended answer.

2 Whilst the summons also sought to invoke Rule 7/8 of the Rules which permits the Royal Court to determine any question of law or construction at any stage, the questions of law the plaintiff sought to invoke were in respect of the same paragraphs of the defendant's amended answer which the plaintiff also sought to strike out and/or sought a summary judgment. I informed the parties that I did not possess jurisdiction under Rule 7/8 of the Rules to decide questions of law because Rule 7/8 is one of the provisions listed in Schedule 1 to the Rules where references to the Royal Court do not include references to the Judicial Greffier. As Master I am a delegate of the Judicial Greffier and therefore do not possess any power under Rule 7/8.

3 That does not mean that in the context of a strike out application, I cannot consider questions of law. I explored this issue in *Corefocus Consultancy Limited v Cronk* [2013] JRC 194 at paragraphs 15 to 18 as follows:-

> ***"15. Mr Goulborn did raise a preliminary point that I could not construe the agreement at the heart of the plaintiff's application for summary judgment under the Rule 7/1 of the Royal Court Rules. He contended that I had no power to do so and referred me to paragraph 14/1/16 of the Rules of The Supreme Court (1999 Edition) as follows:-***
>
> " ***Application of Order 14 – the scope of 0.14 proceedings is determined by the rules and the Court has no wider powers than those conferred by the rules nor any additional statutory power to act outside and beyond the rules or a residual or inherent jurisdiction to grant relief where it is just to do so (see per Neill L.J. in*** *C.E. Heath Plc. v. Ceram Holding co.* [1988] 1 W.L.R. 1219 ***at 1228*** ; [1989] 1 All E. R. 203***at 210.*** Parker L.J. made clear in*Home and Overseas Insurance Co. Ltd v. Mentor Insurance Co. (U.K.) Ltd (In Liquidation)* [1990] 1 W.L.R. 153, 158, ***that the purpose of 0.14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.*** If the defendant's only suggested defence is a point of law and the court can see at***once that the point is misconceived (or, if arguable, can be shown shortly to be plainly unsustainable) the plaintiff is entitled to judgment.*** 0.14 proceedings should not be allowed to become a means for obtaining, in effect, an immediate trial of the action, which will be the

case if the court lends itself to determining points of law or construction that may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision. It is only if an arguable question of law or construction is short and depends on few documents that 0.14 procedure is apposite (*Balli Trading v. Afalona Shipping, The Coral* [1993] 1 Lloyd's Rep. 1, (CA). ***See also****Crown House Engineering Ltd v. Amec Products Ltd* (1989) 48 B.L.R. 32. ***On the other hand, if a suitable question of law or construction arises which can finally determine the whole action, an application under 0.14A should be made, preferably in the same summons, or where appropriate, orally in the course of hearing the 0.14 summons***.

A respondent to a summons under 0. 14 or 0.14A where an appointment of half a day or more has been fixed, who wishes to contend such application is an abuse, should attend on the assigned master to request an early appointment to determine such contention. The person attending must be sufficiently briefed to be able to explain the basis thereof to the Master."

16. Mr Goulborn contended that any question of construction of an agreement that arose was a matter to be dealt with under Rule 7/8 of the Rules. He stated that there was no such application before me .

17. In relation to these objections, I agree that Rule 7 just like Order 14 in England should not be allowed to become a means of obtaining an immediate trial of an action and that I should not lend myself to determine points of law or construction that may take hours or even days before I am able to arrive at a final decision .

18. However, I consider that if an argument advanced by a party is misconceived or plainly unsustainable or the question is short and only depends on a few documents that I do have power under Rule 7/1 decide the issue."

4 I have adopted the same approach in relation to the plaintiff's applications.

Background

5 Before addressing the details of the issues before me it is appropriate to set out the background to these proceedings. In doing so it is right to record that there is significant disagreement between the parties on what has gone before and its effect. This part of my judgment is therefore intended only to set the scene in respect of the plaintiff's applications and should not be taken to be definitive findings of fact in respect of what has occurred previously, unless otherwise indicated in this judgment. I have also endeavoured as far as possible to indicate areas of disagreement both in this summary and more generally in this judgment.

6 The present proceedings follow on from proceedings brought by the plaintiff in England in 2010 (the 'English Proceedings'). In the English Proceedings the plaintiff claimed as a debt $432 million from five defendants including the defendant in the present proceedings. The defendant in the present proceedings was the third defendant in the English Proceedings. In addition the plaintiff claimed that certain shares held by another defendant (PSI Energy Holding Company BSC, a Bahraini company ("PSI")) were in equity the plaintiff's property.

7 The claims in the English Proceedings were brought on the basis of a restructuring agreement dated 19 th August, 2007, ("the RSA").

8 The RSA is lengthy and therefore I only intend to refer to certain provisions for the purposes of this decision. The material parts are:-

> *"1. Definitions*
>
> *In the Restructuring Agreement, except where a different interpretation is necessary in the context*.
>
> " *Proceeds Asset*
>
> *any asset with a realisable market value of $10,000 (or any other currency), whether held by the CCH Corporate Guarantors, the CCH individual Guarantors or otherwise, materially funded by the Advances whether directly or indirectly and whether or not in accordance with the terms of the Agency Agreements*."

9 The Agency Agreements are those defined in Schedule 1 to the RSA. I refer to the relevant terms of the Agency Agreements later in this judgment.

10 'Advances' is defined as meaning funds advanced under the Agency Agreements. The definition of 'CCH individual guarantors' included the defendant to the present proceedings.

11 Clause 12.4 of the RSA provided as follows:-

> " *In consideration of the CCH Corporate Guarantees, the CCH individual Guarantees and the covenants to enter into the Security Documents the Bank hereby agrees, to irrevocably waive and compromise any and all claims, whether existing or future, known or unknown, it has or may have against each of the Guarantors arising from or in connection with the Agency Agreements and the transactions contemplated by the Agency Agreement whether or not funds were appropriated in accordance with the terms of the Agency Agreement, provided that any claims in respect of Proceeds assets shall not be waived or compromised unless expressly done so in writing by the bank*."

12 The definition of Guarantor also included the defendant to the present proceedings.

13 Clause 27 defined the parties' agreement on the governing law of the RSA and on jurisdiction as follows:-

> " *This Restructuring Agreement is governed by and shall be construed in accordance with English Law, save insofar as inconsistent with the principles of Sharia Law*.
>
> *Jurisdiction*
>
> *The parties submit to the exclusive jurisdiction of the English Courts with respect to all disputes arising out of or in connection with the terms of this Restructuring Agreement.* The parties agree that the courts of England are the most appropriate and convenient courts to settle disputes and accordingly no party to this Restructuring Agreement will argue to the contrary."

14 According to the plaintiff, the RSA was entered into following the uncovering of a serious fraud on the plaintiff including by the defendant. The plaintiff alleges that the fraud related to a series of trade finance transactions entered into pursuant to the Agency Agreements referred to above.

15 The plaintiff's claim in the English Proceedings succeeded following trial for the reasons set out in a judgment of Flaux J. dated 6 th December, 2013, between the plaintiff and PSI and four other defendants, including the defendant reported as *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2013] EWHC 3781 (Comm). In this judgment I refer to this decision as the December Judgment.

16 Prior to the December judgment, on 23rd October, 2013, Flaux J issued a judgment in this matter reported as *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2013] EWHC 3186 (Comm) following a ruling he made during the trial. I refer to this decision as the October Judgment.

17 At an earlier stage in the English proceedings Hamblen J. on 24 th October, 2011, refused the plaintiff's application for summary judgment reported at *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2011] EWHC 2718 (Comm) which I will refer to as Hamblen J's judgment. I set out the material parts of Hamblen J's judgment, the October Judgment, and the December judgment below.

18 The plaintiff's claim in the English Proceedings succeeded for the reasons set out in the December judgment where Flaux J. held that the defendant along with the other defendants were personally liable as guarantors. In his conclusion at paragraph 202.(1) Flaux J. stated:-

" ***The second and third defendants' defences to the Bank's claim to be paid the sums outstanding under the RSA all fail and the Bank is entitled to judgment against each of them for those sums outstanding***."

19 The amount outstanding was US $432 million.

20 The plaintiff contends that one of the defences advanced and rejected was the denial of a fraud on the plaintiff. It argues that in the December Judgment Flaux J. held in clear terms that there was a fraud and the defendant was a party to it. The defendant argued that any finding of fraud was not part of the issues Flaux J had to decide and therefore was not binding on him.

21 In the December Judgment, Flaux J also ruled that the plaintiff was entitled to a declaration that certain shares were held on trust for the plaintiff which declaration the plaintiff contends followed on from the finding of fraud.

22 The material parts of the December Judgment relevant to the present application are the following paragraphs:-

> ***"10 The defences live at the end of the trial and thus the issues in dispute in relation to which the court needs to make findings and reach conclusions can be summarised as follows:-***
>
> ***(1) The second and third defendants formally still deny the underlying fraud.*** For reasons which are set out at the end of the next section of the judgment, to the extent that that defence is persisted in, it is not open to the second and third defendants .
>
> ***(5) The second and third defendants contend that because the Bank took steps to enforce its security over the lease owned by Plantation in circumstances where there was no Plantation Enforcement Event within the meaning of the RSA, the second and third defendants were discharged from their liability as guarantors and from their liability to indemnify the Bank under the RSA*** .
>
> ***(7) The first and second defendants contend that the Bank is not entitled to trace monies into the Afren shares*** .
>
> ***The fraud on the Bank and its discovery***
>
> ***11 From November 2002 onwards the Structured Finance Department of the Bank entered into a series of Agency Agreements with the fifth defendant and its associated company, CCH plc (referred to collectively as "CCH") as the means by which short-term trade finance would be provided to exporters.*** It is not in accordance with Islamic principles for the Bank to provide trade finance by way of short-term interest bearing loans.

Accordingly the model used was so-called murabaha agreements whereby the Bank itself (through CCH as its agent) would buy the goods from the exporter, then, again through CCH as its agent, would sell the goods to the purchaser. The difference between the purchase price and the sale price represented the Bank's profit on the transaction. The agency arrangements with CCH succeeded similar arrangements dating back to the 1980s under which the third defendant (who had long-standing business interests in the Gulf) and his then business partner, Guvan Nil, the fourth defendant's father, did murabaha deals with the Bank. After Mr Nil senior died in 2000, the fourth defendant ***became the third defendant's business partner and they did murabaha deals with the Bank through CCH, which they incorporated at around that time*** .

12 Under the Agency Agreements, once CCH had put the contractual arrangements in place, the Bank was to remit the funds required into an account in the name of CCH. The fact that funds flowed through CCH, rather than directly between the Bank and the exporter and purchaser respectively, enabled the fraud to be perpetrated. The third defendant admitted the fraud and his part in it at meetings with Mr Hugh Lyons and Mr Neil Dooley of the Bank's solicitors, Lovells (to whom I will refer as Hogan Lovells, the name by which they are now known), on 26 and 28 November 2007. He admitted that the fraud on the Bank had started in about 2003. It was very simple: the third defendant had arranged with the second defendant for one of the second defendant's companies to generate fictitious requests for trade finance for ostensible but in fact non-existent supply contracts which were submitted to CCH's office in Germany. False documentation in respect of the transaction would be drawn up by CCH in Germany and submitted to the Bank for financing. The third defendant said he and the fourth defendant had agreed to divide the proceeds of the fraud between themselves equally .

14 Following those meetings with the second and third defendants, Mr Dooley prepared detailed meeting notes. Both Mr Lyons and Mr Dooley gave evidence at trial. In their respective witness statements they summarised the admissions made and confirmed the accuracy of the meeting notes. Both were impressive and honest witnesses. It is striking that, although both were cross-examined by Mr Mallin and Mr Mills on behalf of the second and third defendants respectively, neither was challenged in any way about their evidence as to the admissions of fraud made by those defendants at the meetings or as to the accuracy of the meeting notes. In the circumstances, although both defendants formally deny participation in the fraud, that position is untenable and it is clear that they were both fully implicated .

16 I found the fourth defendant a most unsatisfactory witness, mendacious and evasive and I reject his evidence that he was not party to and was unaware of the fraud. Mr Lyons and Mr Dooley were not challenged in cross-examination that, as recorded in the meeting note, at their meeting the third defendant had told them in terms that the fourth defendant was fully aware of the fraud. Furthermore, the fourth defendant clearly received a substantial part

of the Bank's money pursuant to the fraud. The third defendant's disclosure pursuant to the RSA (which the fourth defendant adopted) was that the fourth defendant received US$857,000 .

17 Irrespective of the admissions made, even a cursory examination of the documentation created by the second defendant's companies and CCH demonstrates that it cannot relate to genuine transactions. The range of goods ostensibly sold by PSI Middle East is staggering: jetting pumps, bunker fuel, packing machines, chiller plants together with vast quantities of aluminium sheet and steel beams. There are discrepancies in price both between different transactions and in comparison with market prices. For example PSI sold aluminium sheet at some US$500 per metric ton and Seymour also sold aluminium sheet for settlement the same day at over US$2,700 per metric ton, both “sales” at a time when the LME spot price was about US$2,400 per metric ton .

18 Furthermore, as Mr Anderson QC rightly submitted, the fact that these were not genuine transactions is demonstrated by the complete absence of the sort of shipping documentation which could and would be readily produced for genuine international trade: bills of lading, letters of credit, evidence of payment by the buyers and so forth. That there was a fraud and that the second, third and fourth defendants actively participated in it, is irrefutable .

The Conditional Assignment

34 As provided by clause 8.2(a) of the RSA Plantation was obliged to provide the Bank as security a first ranking charge by way of conditional assignment of the Lease. The Conditional Assignment which was also dated 19 August 2007 was made between Plantation, the Bank and DTDC. Under clause 2.1, the Lease was to be assigned to the Bank if, in the reasonable opinion of the Bank, a Plantation Enforcement Event had occurred and a written notice to that effect was served upon DTDC by the Bank. That Conditional Assignment was governed by UAE and Dubai law and subject to the exclusive jurisdiction of the Dubai courts. This led to the contention by the defendants that the effect of the Bank giving such notice and perfecting the assignment was to extinguish the debt as a matter of UAE/Dubai law. I held that contention was unsustainable in the judgment I handed down on 23 October 2013, essentially on the ground that UAE/Dubai law was irrelevant because the debt and its recoverability are governed by English law under the RSA and, as a matter of English law, the Conditional Assignment was a charge or mortgage as the opening words of clause 8.2(a) make clear. Accordingly, the giving of notice and the subsequent taking of possession of the land by the Bank has not extinguished or reduced the debt because the Bank has not realised the value of the security by a sale or otherwise .

The claim against the first defendant

> ***194 The Bank's case is that monies advanced by the Bank were misappropriated by the second defendant, through his company the first defendant, to make an investment of US$750,000 in a British Virgin Islands company called Black Merlin Energy Limited, leading to a holding of 3.75 million shares in that company and to make a loan of US$4 million to that company.*** By an agreement dated 20 September 2007 (so after the date of the RSA) an agreement was entered into between the first defendant and Black Merlin for the debt (which with interest was just over US$4 million) to be extinguished and the first defendant issued with 13,333,333 shares in Black Merlin. In a corporate restructuring, all 17,083,333 of the first defendant's shares in Black Merlin were converted into a holding of 6,230,291 in Afren, an English registered company. As Mr Anderson QC pointed out, none of those facts were challenged at trial by the first or second defendants .
>
> ***195 The Bank advances its claim to those shares in Afren as the traceable proceeds of the fraud in two ways.*** First on the basis that since they represent monies originally subject to a fiduciary duty in favour of the Bank, which were misapplied in breach of that fiduciary duty, they are in equity the Bank's property. Second, by receiving and/or assisting in the dissipation of the Bank's money which is trust property, the first defendant is liable both in dishonest assistance and knowing receipt and is under an obligation to pay equitable compensation to the Bank equivalent to the value of those shares."

23 Prior to the December Judgment the plaintiff had issued the present proceedings in Jersey, in relation to a Jersey Law trust ("the Trust") settled by the defendant. Firstly, the plaintiff asserted a proprietary claim to assets held by the Trust on the basis that they were traceable proceeds of fraud. Secondly, since 2015, the plaintiff has sought to set aside assets transferred into the Trust by the defendant by means of a Pauline action.

24 The proceedings in Jersey, when first issued in 2012, contained injunctions. Following amendments concerning the injunctive relief granted, the proceedings did not progress until after determination of the English proceedings and the issue of the December judgment and also because of difficulties the defendant faced in finding representation and giving instructions due to his imprisonment in Dubai.

25 The first group of paragraphs of the amended answer the plaintiff seeks to strike out relates to a series of pleadings based on Sharia Law. This is because all of the Agency Agreements (bar one) were governed by English Law but subject to a qualification *"to the extent that they werecompatible with Sharia Law"* or similar wording to the same effect. The defendant therefore claims that Sharia Law is capable of operating as part of the proper law of the agency agreements (see amended answer paragraphs 16.2, 22.3.2, and 22.3.3), that Sharia Law restricts the remedies available to the plaintiff (see amended answer paragraph 22.3.6), and that there is a Sharia Law defence to the plaintiff's proprietary claims (see answer paragraph 22.3.8).

26 In argument Mr Turnbull made it clear that the defendant was not arguing by reference to Sharia Law that trust or fiduciary duties could not be owed. Rather the defendant was contending that the plaintiff was not entitled to pursue any proprietary tracing claims on the basis of breaches of trust or fiduciary duties alleged to be owed. Paragraph 22.3.8 of the amended answer stated as follows:-

> " *From discussions with Sharia lawyers held on a pro-bono basis (in which privilege resides and is no way waived), it is Mr Ridley's understanding that under Sharia Law principles:-*
>
> *The Bank is not entitled to pursue any proprietary tracing claims on the basis of the breaches of trust or fiduciary duties that are alleged if and to the extent that any loss occasioned by such breaches has been compensated as a matter of Sharia Law;*
>
> *The Bank was so compensated as at the date it took title to Plantation with the result that it now has no entitlement to pursue any proprietary tracing claim against the Trust, or the companies or accounts to which the Trust holds its assets, to the extent they are based on the fiduciary or trust relationships allegedly created by the agency agreements*"

27 The reference to Plantation is a reference to a special purpose vehicle Plantation Holdings (FZ) LLC ("Plantation") described in paragraph 6 of the October judgment as follows:-

> " ***According to the account provided to the Bank and its solicitors by the third defendant at the time the fraud was discovered, the costs of the Refinery Project escalated and CCH attempted to trade out of its difficulties by investing more of the Bank's monies in other unauthorised but shorter term projects.*** These included the Plantation Project under which in January 2004, Mr Arthur Fitzwilliam had obtained a lease (hereafter referred to as "the Lease") of 1.86 square kilometres of desert land on the outskirts of Dubai (forming part of Dubailand) from the Dubai Development and Investment***Authority.*** A special purpose vehicle, Plantation Holdings (FZ) LLC ("Plantation"), was incorporated (in which Mr Fitzwilliam held a 70% shareholding and the second defendant held a 30% shareholding on behalf of himself and the third defendant, in equal shares) to carry out the Plantation Project, which was to be a world class polo and equestrian centre, with a hotel and luxury residential villas and apartments. It is clear that several million dollars of the Bank's monies were absorbed into the Plantation Project in an unauthorised fashion, notwithstanding which, at the time the RSA was entered in August 2007 (and indeed a year later when the Bank enforced its security) the Project was still in its early stages and construction had barely started, with only some road infrastructure completed and polo fields laid out."

28 In other words the defendant argues:-

(i) The remedies sought in the present proceedings are contrary to Sharia Law;

(ii) The plaintiff has already been compensated as a matter of Sharia Law at the date it took title to Plantation.

29 The relevant paragraphs in respect of Sharia Law issues the plaintiff seeks to strike out in the amended answer are paragraphs 16.2, 22.3.2, 22.3.3, 22.3.5, 22.3.6, 22.3.7, 22.3.8 and the second sentence of paragraph 30.

30 The second part of the amended answer the plaintiff seeks to strike out concerns pleas by the defendant that seek to challenge the conclusions of the December Judgment that there was a fraud and that the defendant was party to it. The relevant parts of the answer are paragraphs 13.2.3 to 13.2.5, 15 (save insofar as it relates to paragraphs 11.4, 13.2.1 and 13.2.2), 18, 19.1, 19.3, 19.4, 22.5, 22.6, 23 (insofar as it relates to paragraphs 13.2.3 to 13.2.5 and 22.5.4), the final sentence at paragraph 29, paragraph 31, the final sentence at paragraph 32.2 and paragraphs 39.1 and 76.2.

31 In respect of this part the plaintiff, in addition to the December Judgment at paragraphs 12 and 14 to 18 set out above, relies on the admission made by the defendant recorded at paragraph 4 of Hamblen J's judgment which states as follows:-

> ***"4 In the second witness statement of Mr David Mills made with the authority of Mr Ridley it is stated as follows:***
>
> " ***Mr Ridley, whose career has been predominately in trade finance in the Middle East, was party to a receivables fraud pursuant to trade financing arrangements made by the Bank with the Fifth Defendant, CCH (Europe) GmbH, and its parent company in 2002.*** That fraud involved the presentation to the Bank of false documentation.
>
> ***The fraud was brought to the attention of the Bank in 2007 by Mr Ridley himself, who recognised the failure of the genuine business schemes in which the Bank's funds had been invested to generate the revenues necessary to repay the Bank.*** The fraud forms the background to the two agreements of the summer of 2007, but the Bank in comprehensive terms (cl. 12.4 of the RSA) waived and compromised all its claims against Mr Ridley and the other parties. The purpose of the RSA was to ensure that the Bank was repaid all that was owed.""

32 The summons further seeks to strike out paragraph 32.3 of the amended answer which provides as follows "as to the third sentence the outstanding balance under the RSA was extinguished by virtue of the Bank taking title to Plantation. As a consequence of this the Bank has no further rights against CCH Corporate or the Guarantors including Mr Ridley under the RSA. There is therefore no requirement from Mr Ridley to make payment following receipt of the bank's notice of demand."

33 In the defendant's skeleton argument filed for the hearing on 8 th February, 2016, the defendant accepted that, by his answer, he was not asking the Royal Court to determine whether or not he was liable under the RSA. At paragraph 55.6 of his skeleton the defendant stated:-

> " *Instead Mr Ridley has set out his belief on the unenforceability of the RSA after the bank took title to Plantation so as to put in context the reasons why he agreed to give a guarantee in the first place and subsequently declined to meet the bank's demand for payment under the RSA*."

34 In my judgment paragraph 32.3 stands to be dealt with on the same basis as the Sharia Law issue raised by the defendant i.e. the argument that the plaintiff was compensated as at the date it took title to Plantation (see paragraph 23.8 of the amended answer set out above) and I propose to deal with this part of the plaintiff's application on this basis.

Procedural developments in respect of the plaintiff's summons

35 In respect of the history of this application it is right to record that while proceedings were commenced in 2012, including the granting of injunctions, the proceedings were adjourned *sine die* until 2015 when the proceedings were progressed following determination of the English proceedings. It was only in 2015 that the plaintiff pleaded the Pauline action. The amended answer was filed on 24 th July, 2015, and a reply filed on 30 th October, 2015. On 18 th November, 2015, I gave directions for the plaintiff to issue the present summons and related directions in respect of the filing of evidence (to the extent permitted on strike out applications) and the filing of skeleton arguments as recorded in an Act of Court dated 18 th November, 2015.

36 I also set out the oral hearings that took place and the written submissions that were filed by the parties.

37 The application first came before me for hearing on 8 th February, 2016, by which time the plaintiff and the defendant had exchanged skeleton arguments and the plaintiff had filed a further responsive skeleton argument.

38 At the conclusion of the hearing on 8 th February, 2016, I reserved my judgment but gave directions relating to filing of further submissions in writing. In my email of 10 th February, 2016, I therefore stated as follows:-

> " *I write further to the hearing yesterday when I reserved my judgment.* The purpose of this email is to confirm the orders I made at the conclusion of the hearing in relation to the filing of further submissions.

Firstly both parties are file by 5.00 p.m. Friday, 26 February 2016 their written submissions and authorities on what system of law applies to the proprietary claim underpinning the tracing claim which brought by the plaintiffs bearing in mind that a matter of Jersey law a tracing claim is a property law claim see Re Esteem [2002] JLR 53 .

Secondly, these contentions may address the issue of what creditor/debtor relationship underlies the claim for a Pauline action. Again by reference to *Re Esteem* [2002] JLR 53 *a Pauline action is a claim in restitution*.

As part of any submissions filed, you may address why Sharia Law applies to such a claim or not is the case may be, including referring back to arguments already filed on Estoppel or abuse of process.

You may also address the effect of Sharia Law, on the law of any proprietary claim underpinning the tracing action or the Pauline action and the rival contentions as to why Sharia Law does or does not extinguish such a claim.

Each party may file a skeleton in reply to the above skeleton such skeleton in reply to be filed by 5.00 p.m. Friday, 4 March 2016.

Also by 5.00 p.m. Friday, 26 February, 2016 the defendant is permitted to file its submissions on Masawi v Re International Bank (UK) Limited [2007] EWH Civ 2981 *setting out its criticisms of the reasoning of Mr Justice David Richards in that case*.

The plaintiff may file written submissions in response to the defendant's criticisms of the Masawi decision, by 5.00 p.m. Friday, 4 March 2016.

Following the filing of these written contentions which should be accompanied by any authorities not already supplied, I will reach a decision on the plaintiff's application, unless I consider that a further oral hearing is necessary to address any issues raised in the supplementary submissions filed."

39 As part of the submissions received following this email, it became clear that the plaintiff was also seeking to strike out the relevant parts of the defendant's answer that alleged that the plaintiff was also pursuing a claim in the tort of deceit and the defendant's consequential averments.

40 Paragraph 22.7 of the amended answer which the plaintiff seeks to strike out provides as follows:-

"22.7 Further or alternatively:-

22.7.1. Under Jersey conflicts of law principles the Bank may only rely upon any tortious claims arising from deception to the extent that they satisfy the requirements of double action ability.

22.7.2. In relation to the alleged deception practised upon the Bank, this will require the Bank to prove that such deception was actionable under the law of the UAE (that being the place where the alleged wrongful acts took place and/or which has the most significant relationship with the occurrence), as well as under the laws of Jersey.

22.7.3. It is Mr Ridley's intention to seek permission to adduce expert evidence on UAE law at the same time as, or prior to, the filing and service of the witness statements upon which he wishes to rely.

22.7.4. From discussions with UAE lawyers held on a pro bono basis (in which privilege resides and is in no way waived), it is Mr Ridley's understanding that:

There can be no tortious claim under UAE law, whether in respect of a personal or proprietary remedy, to the extent that loss has been extinguished as a matter of UAE law;

Such extinction of loss occurred when the Bank took title to Plantation and therefore the Bank no longer has any actionable claims based upon any deception practised by CCH."

41 Submissions were received in accordance with the directions I had issued. Following their receipt I further indicated that I wished an oral hearing to take place where I wanted to be addressed on:-

(i) Whether the tracing claim was limited to Proceeds Assets as defined in the RSA;

(ii) The basis of the Pauline action by reference to Clause 12(4) of the RSA;

(iii) Whether the claim in the tort of deceit had been compromised by Clause 12(4) of the RSA;

(iv) Why the lack of rights or remedies available under Sharia Law is a question of construction of the Agency Agreements;

(v) On the assumption it is arguable as a matter of Jersey Private International Law that Sharia Law is capable as operating as part of the law of the Agency Agreements whether such an argument amounts an issue estoppel or an abuse of process.

42 I further gave directions on the time allowed to each party to address me on the above points. The second hearing took place on 21 st April, 2016.

The Issues

43 By reference to the issues raised by the parties in the various skeleton arguments and oral

submissions made by both counsel for which I express my gratitude, I set out below the issues I consider I need to determine in respect of the plaintiff's application. There was, however, no dispute on the applicable principles to be considered on a strike out application which I have considered in a number of cases including *Lapidus v Le Blancq* [2013] 2 JLR 308 at paragraphs 20 to 23 and *Haden-Taylor v Canopius* [2015] (1) JLR 224 at paragraphs 105 to 110. I have reminded myself of the relevant principles in relation to this application. To the extent that the plaintiff seeks summary judgment, I have reminded myself of the principles I set out in the *Corefocus* decision at paragraphs 8 to 14. In this case the two applications stand or fall together i.e. if there is no basis to strike out the relevant parts of the defendant's answer, it follows that there is no basis to grant summary judgment in this case. The arguments advanced before me are not whether or not the defence raised is probable or shadowy. In this case the issues before me are questions of law or construction. If the answer to the issues I have to determine is plain and obvious then any applications will succeed. If the answer is not plain and obvious and is complex (see paragraph 3 above) then any application will fail.

44 Bearing these principles in mind, the issues I have to determine are as follows:-

(i) What is the governing law underlying the plaintiff's tracing claim?

(ii) To the extent that the law underlying the tracing claim is English Law, as a matter of Jersey Private International Law, should Jersey have regard to English Private International Law as the law underlying the tracing claim?

(iii) Should Jersey Private international Law have regard to Sharia Law (a) as choice of law, (b) by way of incorporation or (c) as a matter of construction?

(iv) What is the effect of clause 12(4) of the RSA in respect of the tracing claim?

(v) What did Flaux J decide in relation to Sharia Law?

(vi) What are the Jersey Law principles on cause of action and issue estoppel and how do these interrelate with the contention that parts of the amended answer amount to an abuse of process?

(vii) Do the defences raised or any of them by reference to Sharia Law amount to cause of action estoppel, issue estoppel or an abuse of process?

(viii) What approach should be taken in respect of the Agency Agreement governed by German law?

(ix) What did Flaux J decide in relation to fraud?

(x) What is the effect of any finding of fraud?

(xi) Does the defendant's challenge to the plaintiff's claim in fraud amount to a cause of action estoppel, an issue estoppel or an abuse of process?

(xii) What is the nature of the plaintiff's Pauline action?

(xiii) What is the effect of clause 12(4) of the RSA on the Pauline action?

(xiv) Is the plaintiff's Pauline action sufficiently pleaded?

(xv) What is the plaintiff's claim in deceit?

(xvi) Is the plaintiff entitled to bring a claim in deceit?

(xvii) Should paragraph 22.7 of the amended answer be struck out?

45 These questions at times flow into each other and so I have addressed these issues and the plaintiff's application using the broad headings of Sharia Law, Estoppel, Fraud, the Pauline Action, and Deceit before setting out my final conclusion.

Sharia Law and the tracing claim

46 In reaching my decision in terms of whether or not the defendant can plead reliance on Sharia Law to resist the plaintiff's tracing claim I start by reference to what is meant by tracing. In *Re Esteem Settlement* [2002] JLR 53. Sir Michael Birt, Deputy Bailiff as he then was defined what was meant by tracing at paragraphs 93 and 94 as follows:-

> ***"93. We begin by saying what we mean by tracing. It is not the same as "following." Following is the process whereby property is identified and pursued in its original form as it moves from person to person. The exercise of tracing is the response of a number of jurisdictions to the problem that arises when the thing in question can no longer be located because it has been substituted by something else. See Smith, The Law of Tracing, at 6 (1997):***
>
> " ***Tracing identifies a new thing as the potential subject matter of a claim, on the basis that it is the substitute for an original thing which was itself the subject matter of a claim.*** The new thing, as a substitute, stands in the place of the old thing, and therefore can be subject to the same claims."
>
> ***Or as Lord Millett put it in*** (*Foskett v. McKeown (10)* [2001] 1 A.C. at 127):
>
> " ***The process of ascertaining what happened to the plaintiffs' money involves both tracing and following.*** These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner."

94. It is clear that, under English law, tracing is part of the law of property, not part of the law of unjust enrichment. Thus in Foskett Lord Millett said (ibid.):

" ***The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment.*** There is no 'unjust factor' to justify restitution (unless 'want of***title' be one, which makes the point).*** The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable.' Such concepts, which in reality mask decisions of legal policy, have no place in the law of property."

In the same case, Lord Browne-Wilkinson made it clear that (ibid., at 109) "it is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary." It is a question of, as he put it (ibid.), "hard-nosed property rights.""

47 Paragraphs 102 to 104 are also relevant and state as follows:-

"102. The upshot is that there is no Jersey authority which suggests that tracing should not be part of our law, and such authority as there is suggests that tracing does form part of Jersey law. Although accepting that our law of property has very different roots from that of England, there would appear to be no practical difficulty or any objection of principle to recognizing tracing of movable property. On the contrary, in our judgment, there are strong policy reasons for doing so. Tracing offers an effective method of vindicating and safeguarding proprietary rights, particularly in cases of fraud. It has proved a useful tool in English law .

103. Furthermore, art. 50(3) of the 1984 Law expressly recognizes the ability to trace to assets into which trust property has been converted. There would be no logic in allowing tracing in cases of a constructive trust arising from breach of an express trust but disallowing it in cases of a constructive trust arising from fraud by a person owing another type of fiduciary obligation, e.g. a company director .

104. Accordingly, we hold that PKT Consultants (24) and Royal Bank of Scotland (27), although they did not have the benefit of the full argument which we have had, were correctly decided in holding that the principle of tracing forms part of the law of Jersey where there is an underlying proprietary interest on the part of the claimant ."

48 Thus Jersey law follows English law in permitting tracing and for the most part there is no difference between the two systems of law; there is, however, one important distinction in that English law applies the 'first in; first out' rule to tracing monies in a mixed bank account,

whereas Jersey law applies the apportionment method (see *Re Esteem* at paragraphs 105–111). I explore the relevance of this difference later.

49 The plaintiff's tracing claim seeks to recover what is said to be the proceeds of a fraud. In *Re Esteem* as a matter of Jersey law Sir Michael Birt also considered whether the victim of fraud had an equitable proprietary interest in the proceeds of fraud. He answered that question at paragraph 90 of his judgment as follows:-

> ***"90. The constructive trust has been used by the courts of England and other jurisdictions as a mechanism to assist in fashioning appropriate remedies to deal with problems of commercial fraud. It accords with the interests of justice. If the fraudster does not hold the property on constructive trust, the victim has to prove his claim alongside ordinary creditors of the fraudster because the assets belong to the fraudster and would be available for such creditors. We have no doubt that Jersey law should draw on the experience of English law and other jurisdictions to impose a constructive trust in a case such as the present. We think that in Jersey too, when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient so that the victim has a proprietary interest in such property*** ."

50 Despite the breadth of paragraph 90, Sir Michael Birt expressed certain reservations about the breadth of the above general principle at paragraphs 91 and 92 as follows:-

> ***"91. In reaching this conclusion, we recognize the dangers of too liberal an imposition of constructive trusts. Although the observation was made in the context of resulting trusts rather than constructive trusts, the House of Lords in Westdeutsche (29) counselled against "the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs"*** ([1996] A.C. at 704). ***But that would not be the consequence of holding that a constructive trust exists in circumstances such as the present.*** On the contrary, we would merely be adopting what has long been the position in many other jurisdictions.
>
> ***92. We appreciate that the recognition of constructive trusts in such circumstances may raise questions concerning art. 10(2)(a)(iii) of the 1984 Law, which provides that a trust shall be invalid to the extent that "it purports to apply directly to immovable property situated in Jersey." That will be for decision on another occasion but, as at present advised, we think it is strongly arguable that that provision does not apply to constructive trusts. Articles 29 and 50 refer to "property," which is defined by art. 1(1) to mean "property of any description wherever situated." It is hard to envisage that Jersey law would accept that, if a trustee, in breach of trust, uses trust moneys to purchase Jersey immovable property for his own benefit, he should be permitted to hold that immovable property free***

from any trust for the beneficiaries. In any event, any concerns about Jersey immovable property are not sufficient, in our judgment, to negate the general principle which we have described ."

51 The complexity in the present case is that the underlying claim that gives rise to the plaintiff's proprietary claim, save in one respect, relies on breaches of the Agency Agreements which are all governed by English law "insofar as not contradicting with the tenents and precepts of Islamic Sharia" or *"to the extent that such laws do not conflict with the principles of Islamic Sharia"*. The exception to this is that one agreement is governed by laws of Germany, again subject to the qualification "to the extent that such laws do not conflict with the principles of Islamic Sharia". Both counsel agreed that the proprietary claim and therefore the ability to trace flowed from the Agency Agreements.

52 Both also agreed that the English law to be considered was the domestic law of England i.e. excluding its conflicts of laws rules and that the question how far Jersey law recognised Sharia law was therefore a matter of Jersey Private International law not English Private International law. In one sense this agreement is right but it also lead the parties into error on how Jersey law should decide what system of law should be applied.

53 In relation to how to approach the issue of what system of law should be applied to the tracing claim, a useful starting point is the judgment of Staughton L.J. in *MacMillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 W.L.R. 387. Staughton L.J. commenced his judgment by stating as follows:-

" ***In any case which involves a foreign element it may prove necessary to decide what system of law is to be applied, either to the case as a whole or to a particular issue or issues.*** Mr. Oliver, for Macmillan Inc., has referred to that as the proper law; but I would reserve that expression for other purposes, such as the proper law of a contract, or of an obligation. Conflict lawyers speak of the lex causae when referring to the system of law to be applied. For those who spurn Latin in favour of English, one could call it the law applicable to the suit (or issue) or, simply, the applicable law.

In finding the lex causae there are three stages. First, it is necessary to characterise the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to moveable property? Or interpretation of a contract?

The second stage is to select the rule of conflict of laws which lays down a connecting factor for the issue in question. Thus the formal *392 validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to moveables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law .

Thirdly, it is necessary to identify the system of law which is tied by the

connecting factor found in stage two to the issue characterised in stage one. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial .

In an ideal world the answers obtained in these three stages would be the same, in whatever country they were determined. But unfortunately the conflict rules are by no means the same in all systems of law. In those circumstances a choice of conflict rule may have to be made. It is clear that, in general, the second and third stages are to be determined by the law of the place where the trial takes place (lex fori). That law must tell one what the connecting factor is for the issue before the court, and what system of law it points to. But the first stage, characterisation of the issue, presents more of a problem. In Dicey & Morris, The Conflict of Laws, 12th ed. (1993), vol. 1, p. 35 there is this passage:

" ***The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical.*** The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result."

Fortunately the next sentence reads: "They appear to have had almost no influence on the practice of the courts in England." The authors conclude, at p. 44:

" ***The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to becharacterised.*** On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created."

Later, at p. 47: "the way lies open for the courts to seek common sense solutions based on practical considerations ."

Before leaving these preliminary matters, I would add that if at all possible the rules of conflict should be simple and easy to apply. One might say that all rules of law should be of that character; but we have less control over rules of domestic law. The litigant who is told by his advisers that his case may or may not involve the application of a foreign system of law, and that he must be armed with expensive expert evidence which may, in the event, prove unnecessary, deserves our sympathy. For many years even cases of tort/delict involved uncertainty and the analysis of five different speeches in the House of Lords. Academic writers of distinction concern themselves with conflict, not surprisingly since it is a subject of great intellectual interest. We must do our best to arrive at a sensible and practical result ."

54 In the present case, applying Staughton L.J.'s three stage test, the issue was characterised by the parties as being whether the plaintiff has a right to trace to recover property from the defendant where it could be shown that the property sought to be recovered fell within the definition of Proceeds Assets in the RSA.

55 In respect of the second stage the parties further agreed the connecting factor to determine the proper law was the law of the Agency Agreements i.e. English law (bar one agreement) but excluding any reference to English Private International law principles.

56 In respect of the third stage (and where most disagreement arose) while both parties agreed that the proper law of the Agency Agreements (save in one respect) was English law, the parties disagreed about the relevance of Sharia law.

57 The question of how Jersey law approaches this issue was considered in *Re the S Trust* [2011] JLR 375 in respect of restitutionary obligations. In the context of an application for declarations that certain transfers of property into trust were voidable, the following question was posed by Sir Philip Bailhache:-

> ***"12 What is perhaps not quite so clear is what law should be applied to the transfer by the representor of the trust assets to the trustee.*** The answer to that question is important because the proper law of the transfer will govern the issue of whether the transfer may be declared voidable on the ground of mistake ."

58 In paragraph 13 Sir Philip summarised the two alternatives namely English law and Jersey law and then continued at paragraph 14 as follows:-

> ***"14 The most relevant rule of Jersey private international law (as in England) is the rule for restitutionary obligations.*** The rhetorical question is: With which jurisdiction does the restitutionary obligation have the closest and most real connection? Counsel for the representor drew our attention to a passage from Dicey, Morris & Collins, 2 The Conflict of Laws, 14th ed. (2006), a work which has often been treated as authoritative in this court. Rule 230 provides, para. 34R–001, at 1863:
>
> ***"(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation*** .
>
> ***(2) The proper law of the obligation is (semble) determined as follows:***
>
> ***(a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;***
>
> ***(b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);***

(c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.""

59 On the facts Jersey law was held to apply.

60 Rule 230 was drawn from the 14th Edition of Dicey, Morris & Collins at Chapter 34. There are relevant and helpful passages explaining Rule 230. I start by reference to paragraph 34–038 as follows:-

> " ***It is suggested that equitable claims of the defendant fall within the scope of Rule 230.*** The question then arises as to how to apply the Rule to such cases. The application of the law of the place of enrichment, without significant modification, has been approved and applied in England and in Singapore, and may be considered the dominant view. But the slenderness of the authority for it has been judicially noticed, and there is some judicial support for an approach, in some cases at least, which accords greater significance to the parallel with other causes of action to which different choice of law rules apply. So, if the nature of the claim is that a wrong has been done which is analogous to a tort, from which the defendant has made a profit, it might be appropriate for the place of the enrichment to be one factor, but not necessarily a dominant factor, in the identification of the proper law of the obligation to make restitution. This would mean that greater emphasis might be placed on the law under which the relationship between the relevant parties was created, or which governed the relationship between them, than on the fact that the enrichment occurred in a particular place.
>
> ***Similarly, if the defendant is in a contractual relationship with and makes a profit from his position, his liability to disgorge that enrichment may be most closely connected with the law applicable to the contract*** . (emphasis added)
>
> ***The law chosen was therefore that which governed the contract between employer and employee, and which was also that of the place where the dishonest abuse of that contract took place.*** The place where the enrichment occurred does not appear to have been regarded as significant ."

61 In respect of claims for breach of fiduciary duty (and in this case the allegation of fraud is said to have arisen on the basis of a breach of fiduciary duty) Dicey 14th edition at paragraph 34–042 states:-

> " ***Fiduciary duties.*** A particular difficulty arises if the defendant is alleged to have acted in a manner which, in English law, would be regarded as a breach of fiduciary duty, the correct approach is to determine the nature of the cause of action, and the duties of the defendant, by reference to the proper law. If that law itself knows the concept of the fiduciary, then its law may be applied to

determine whether a fiduciary relationship exists, the nature of the duties imposed and the obligation of the defendant to disgorge enrichment, even though English law might not necessarily regard a fiduciary relationship as arising in the circumstances."

62 There is also a section dealing with constructive trusts and tracing at paragraphs 34–044 to 34–049 the entirety of which I set out:-

> ***"34–044 — Constructive trusts and tracing.*** Difficult questions may arise if the law applicable to the obligation to restore the benefit pursuant to clause 2(c) of the Rule is the law of a common law country which seeks to rectify the unjust enrichment by means of a constructive trust. Problems may also arise if that law allows a claimant to follow property into the hands of a third party, or to "trace" the property or its value when it has been substituted for other property, or mixed with property belonging to another .
>
> ***34–045 — The essential problem is principally one of classification.*** If the claimant is able to rely on the choice of law rules which deal with transfers of property in order to show that the defendant has his property, he will be able to rely on that law to follow and identify his property, and enforce his title to it, and no question will arise of enforcing an obligation that the defendant make restitution out of property which belongs to the defendant. But if the claimant cannot follow and make out a claim of title to property, and relies on the law identified by clause (2)(c) that law may recognise that the defendant is under a restitutionary obligation and give effect to it by means of a constructive trust. If the property in question has changed its form through mixture or substitution, that law may allow the claimant to "trace" and claim the property in its new form .
>
> ***34–046 — On the footing that the law identified by clause (2)(c) of the Rule applies to substantive issues, but not to procedural ones, which are for the lex fori, it is necessary to decide whether the imposition of a constructive trust and the ability to trace assets through mixture or substitution are matters of substantive law or procedural law*** .
>
> ***34–047 — The following submissions are made.*** First, the existence of the obligation to restore the benefit is determined by the law which is applicable by virtue of clause (2)(c) of this Rule. There would seem to be no doubt as to the correctness of this submission. Secondly, but more tentatively, that law will provide the legal concept by which the obligation to restore the benefit is secured. Thus if the proper law of the obligation provides for the imposition of a constructive trust or for the possibility of identifying assets through mixture or substitution, the English court should, in principle, apply the relevant concept of the proper law, at least to the extent that the concept which obtains in the proper law is properly characterised as substantive. Thirdly, whether the concept is characterised as substantive or procedural is a matter for English ***law as the lex fori, but in arriving at the correct classification the English court should, it is submitted, have regard to the function which the concept serves in the***

context of the foreign legal system. The classification adopted of analogous concepts in English domestic law should not be determinative for choice of law purposes. So, for example, it may be that the foreign law describes a constructive trust or the ability to trace as a “remedial” device. Moreover, in English domestic law, it has been said of tracing that “In truth, tracing is a process of identifying assets; it belongs to the realm of evidence. It tells us nothing about the legal or equitable rights to the assets traced.” This is on the basis that a person who can identity assets through mixture or substitution cannot actually claim them unless he can also show a claim to the original assets, and may yet be defeated by the acquisition of title by a third party purchaser. But such description should not mislead the English court into thinking that the concept is “procedural” for the purposes of the conflict of laws if the function of the relevant foreign rule is to create substantive rights or, in the case of tracing, is a necessary step to the assertion of substantive rights .

34–048 — Fourthly, it follows that an English court should recognise and give effect to a constructive trust, and permit the claimant to trace assets through mixture or substitution, in circumstances where neither possibility would exist in English law, by applying the proper law to these matters. Fifthly, if the relevant substantive law is English, in that England is the place of the enrichment or the receipt, English tracing rules will certainly apply” As to these, the fact that the money may have passed through other jurisdictions which would not have recognised the concept of equitable ownership is irrelevant, for these intermediate laws are not the lex causae, and English rules of tracing in equity do not require there to have been a fiduciary relationship arising under each law through whose jurisdiction the funds were passed. But as equity operates in personam, it is required that the defendant be within the jurisdiction of the court. Sixthly, recognition of the foreign right or “remedy” may be subject to the limitation that such recognition may be denied if the English court can grant no remedy which is appropriate to give effect to it, though this position should only be taken if either there is no available English remedy to enforce the foreign right or if the foreign “remedy” has no functional counterpart in English law. In such circumstances the English court may appropriately characterise the foreign concept as procedural. But the characterisation is arrived at by considerations of practical convenience rather than by a mechanical distinction between “right” and “remedy .

34–049 — Similarly, if it is argued that a defendant, who in a domestic case would be required to hold property on constructive trust, is nevertheless not liable, on the ground that the law of the place of the enrichment, or other lex causae, does not recognise the principles of constructive trusteeship, the argument is misconceived. The appropriate analysis is to ask whether, under the lex causae, the defendant owes obligations which would impose on him under that law a liability to disgorge a benefit. If so, an English court may hold him liable as constructive trustee when giving remedial effect to the substantive right arising under the lex causae .” (Emphasis added)

63 While this section appears to be a commentary on clause 2(c) of Rule 230, footnote 49 to this commentary in paragraph 34–044 states:-

> " ***A constructive trust arises in circumstances which are not concerned with rectifying unjust enrichment.*** For example a constructive trust may arise pursuant to a specifically enforceable contract. In such a case, the law applicable to the contract should determine whether the trust arises. But the principles stated in the following paragraphs as to the application of the proper law to questions concerning constructive trusts are equally applicable to such a case."

64 In the present case, the parties agree that the law applicable to the contracts i.e. the Agency Agreements should determine whether an equitable proprietary interest arises, subject to the question of whether or not Jersey Private International law should recognise the Sharia law defences raised.

65 Adopting the analysis at paragraph 34–047 onwards and applying them to the present case the following emerges:-

(i) The existence of the obligation to restore the benefit is agreed as being determined by the law of the Agency Agreements.

(ii) The law of the Agency Agreements will provide the legal concept by which the obligation to restore the benefit is secured.

(iii) In this case, where English is the law of the Agency Agreements, English law provides for the imposition of a constructive trust and/or tracing and therefore the Jersey court should in principle apply English law as the proper law of those Agency Agreements governed by English law. English law recognises a right to trace to enforce an equitable proprietary interest.

(iv) The Royal Court should recognise and give effect to a tracing claim based on a constructive trust, if permitted by English law, even where neither possibility would exist as a matter of Jersey law. In this case the ability to trace in fact under Jersey law goes further than English law which supports why the Jersey court should recognise and give effect to any tracing claim permitted under English law as the proper law of the obligation. This may lead to the conclusion that the English tracing law rules would have to be applied, but that is a matter for argument at trial (see paragraph 48 above).

(v) As noted at the conclusion of paragraph 34–049 of the 14th edition of Dicey, the appropriate analysis for the Agency Agreements governed by English law is to ask whether English law would impose on the defendant in the present proceedings, a liability to disgorge a benefit. If so, the Royal Court may hold the defendant liable as constructive trustee by giving effect to a substantive right arising under English law.

66 Since the 14th Edition, Rule 230 was substantively re-written in the 15th Edition of Dicey, in chapter 36. Rule 230 has therefore now become Rule 257. It is important to note that Rule 257 is based on a regulation of the European Union known as the Rome II Regulation which does not bind Jersey. Nevertheless, the developments in Rule 257 are still of interest in relation to acting as a guide as to how I should approach the application to strike out the defendant's reliance on Sharia law. Rule 257 provides as follows:-

> " ***RULE 257 – (1) A non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, which concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict which is closely connected with that unjust enrichment, is governed by the law which governs that relationship***.
>
> ***(2) Where the law applicable cannot be determined on the basis of clause (1) and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country applies*** .
>
> ***(3) Where the law applicable cannot be determined on the basis of clauses (1) or (2), the law of the country in which the unjust enrichment took place applies*** .
>
> ***(4) Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in clauses (1), (2) and (3), the law of that other country applies*** .
>
> ***(5) Notwithstanding clauses (1)-(4) above, the parties may agree to submit a non-contractual obligation arising out of unjust enrichment to the law of their choice*** ."

67 Like its predecessor, the 15th Edition of Dicey also contains useful commentary. At paragraph 36–005 the learned authors set out the rationale for Rule 257. Significantly, it distinguishes an obligation to make restitution as an independent obligation from remedies in contract or tort with the result that claims in restitution should be characterised as independent in the context of private international law rules. Paragraph 36–005 contains the following:-

> " ***Background to the law applicable to obligations arising out of unjust enrichment.*** It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution. The obligation to restore the "unjust enrichment or unjust benefit" is imposed by law. Accordingly it should be

characterised as an independent obligation both in the context of domestic law and in the context of the conflict of laws.

The law of unjust enrichment has assumed a greater prominence in the realm of English domestic law, as a result of an increasing acceptance by courts in common law countries that unjust enrichment can be described and organised as a coherent and independent category within the law of obligations. Increasingly too, international elements are present in cases involving the recovery of the proceeds of fraud and other wrongful dealing. Even so, the English common law choice of law rules in this area were formulated comparatively recently and were still in a state of development. Particular difficulties surrounded the determination of the ambit of these rules; and the classification of claims that in English domestic law would be regarded as equitable in nature ."

68 At paragraph 36.008 the 15th Edition of Dicey refers back to Rule 230 of the 14th Edition as follows:-

" ***The position prior to the entry into force of the Rome II Regulation.*** The position prior to the advent of the Rome II Regulation is set out in Rule 230 of the 14th edition of this work and is summarised only briefly here. The Rule there stated was that the obligation to restore the benefit of an enrichment obtained at another person's expense was governed by the proper law of the obligation. In determining the proper law of the obligation further guidance, intended to be applied flexibly, was given as to the general principle in certain particular cases. Hence, the common law rules were formulated as follows:-

(a) If the obligation arose in connection with a contract, its proper law was the law applicable to the contract;

(b) If it arose in connection with a transaction concerning an immovable (land), its proper law was the law of the country where the immovable was situated (les situs);

(c) If it arose in any other circumstances, its proper law was the law of the country where the enrichment occurred .

Although the authorities which approved the Rule were comparatively few, in other cases it was accepted without discussion. Certainly, no English decision held the Rule to be wrong. Nevertheless, its application gave rise to complexity; especially where equitable claims were concerned. It is likely that those difficulties will be exacerbated under the Rome II Regulation, as the courts endeavour to fit equitable obligations within the rubric of the European autonomous meanings of legal concepts in the Regulation ."

69 Again the learned authors debate what is meant by unjust enrichment at paragraph 36–012:-

" ***In English law, unjust enrichment at the expense of the claimant (unjust enrichment by subtraction) is an aspect of the law of restitution.*** Previous editions of this work adopted common law choice of law rules for restitution, rather than specifically for obligations arising out of unjust enrichment. The exact contours of the law of restitution are a matter of debate and there are, in particular, disagreements as to whether restitution for wrongdoing and proprietary restitution are distinct claims, or are examples of a wider concept of unjust enrichment. "Unjust enrichment" is a term widely used elsewhere in Europe and is more appropriate than "restitution" for the purposes of a European Regulation. (emphasis added)

Inevitably, the characteristic of obligations arising out of unjust enrichment is that they are concerned with the disgorgement of a benefit, which necessarily requires one to have some regard to the remedy sought. Under the Regulation, however, it is nonetheless the nature of the obligation, and whether it arises out of unjust enrichment, which falls to be classified ."

70 Dicey also considers tracing at paragraph 36–096 to paragraph 36–099 as follows:-

"36–096 – Tracing. It may be necessary for a person to demonstrate that the assets received by the defendant are the claimant's property. If the question is whether the claimant was the original owner of that property, or whether his equitable interest is defeated by, for example, a bona fide purchaser for value without notice, the question is one of property law .

36–097 – Greater difficulty arises where the question is whether the claimant's property can still be identified in hands of the defendant. If the claimant is able to rely on the choice of law rules which deal with transfers of property in order to show that the defendant has his property, he will be able to rely on the same choice of law rule to "follow" that property if it has not changed its form one person to another. Where property has changed its form, the question may arise whether the claimant's original property can be "traced" through mixture or substitution. In English domestic law, it has been said of 'tracing' that, in truth, tracing is a process of identifying assets; it belongs to the realm of evidence. It tells us nothing about the legal or equitable rights to the assets traced. This is on the basis that a person who can identify asset through mixture or substitution cannot actually claim them unless he can also show a claim to the original assets, and may yet be defeated by the acquisition of title by a third party purchaser. But such a description should not lead to tracing being classified as "procedural" as tracing may be a necessary step to the assertion of substantive rights .

36–098 – The better view is that the lex causae should determine whether a party can trace and that tracing should not be subject to an independent choice of law rule. Frequently, this will lead to the application of property choice of law rules, where a legal or beneficial owner of property asserts that his

rights have not been defeated by mixture or substitution. But it may not inevitably do so. For instance, a claim for damages for knowing receipt should, for choice of law purposes, be classified as a non-contractual obligation. If, according to the law governing that obligation, it is necessary to show that the recipient did actually receive the traceable proceeds of the claimant's property through mixture of substitution, it is suggested that that ***law's rules of tracing should apply, so as not to distort the coherent application of that law and not to lead to recovery where it would not be possible by the lex causae because the assets are, by that law, untraceable*** .

36–099 – When tracing in equity, the fact that the money may have passed through other jurisdictions which would not have recognised the concept of beneficial ownership is irrelevant, for these intermediate laws are not the lex causae. Where English law is the lex causae, the rules of tracing in equity do not require there to have been a fiduciary relationship arising under each law through whose jurisdiction the funds were passed, or for the concept of a trust to be known in each legal system." (emphasis added)

71 The commentary in the 15th Edition of Dicey therefore follows on and develops from the commentary in the 14th Edition, leading to the conclusion that the law of the claim or the applicable law (referred to as the *lex causae*) should determine whether a party can trace and that tracing should not be subject to an independent choice of law rule of Jersey law applied by the Royal Court as the law of the forum or court where the dispute is to be resolved.

72 Both parties in oral argument however focussed on the question of whether Jersey Law should recognise Sharia Law and therefore whether or not the plaintiff was entitled to trace was a matter to be decided by the application of Jersey Private International Law principles. In other words would Jersey Law be prepared to recognise and apply Sharia Law as a defence to the claim? As the point had not been considered under Jersey Law both parties referred me to different English decisions in respect of their rival contentions for and against the recognition of Sharia Law.

73 The plaintiff argued that it is clear that Sharia law cannot operate as a national system of law and only a national system of law can operate as the proper law of the contract, see *Halpern v Halpern* [2008] Q.B. 195 at paragraph 21 and *The Al Wahab* [1984] A.C. 50 at pages 61, 62 and 71, 72. The plaintiff's arguments were advanced on the basis of the English common law position, ignoring the effect of the Contracts (Applicable Law) Act 1990 and the various conventions on the law applicable to contractual obligations signed on 19 th June, 1980, (the Rome Convention) and 17 th June, 2008, (Rome I) and the law applicable to non-contractual obligations signed on 11 th July, 2007, (Rome II).

74 The defendant in response contended that there are a number of authorities that recognised that any system of law which was not that of any given state and specifically

Sharia law could be provided for in a governing law clause – see *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co* [1987] 3 WLR 1023 and *Islamic Investment Co Isa v Transorient Shipping Ltd (The Nour)* [1999] 1 Lloyd's Rep 1. The defendant also sought to distinguish the cases relied upon by the plaintiff on the basis they did not consider the authorities referred to by the defendant and that the authorities relied upon by the plaintiff were applying a European Union convention or Regulations which did not assist to ascertain the common law position in England or Jersey.

75 In its written submissions in response the plaintiff further argued that the present issue was on all fours with a first instance English decision at common law, which is said to have held that a non-state law cannot operate as the proper law of a contract, (see *Musawi v Re International UK Limited* [2007] EWHC 2981 at paragraph 19). The defendants in their supplemental skeleton following the hearing on 8 th February, 2016, argued that *Musawi* contained significant errors of analysis and did not reflect the English common law position (see paragraphs 24.1–24.13 of the supplemental skeleton argument of the defendant following the hearing on the 8 th February, 2016).

76 In relation to these arguments, I have concluded that they are not appropriate matters that can be resolved on a strike out or a summary judgment application. They are clearly arguable and competing points of view which could only be resolved following a full trial and by appropriate expert evidence on English law being put before the Royal Court.

77 However, I have also concluded that this argument is based on a series of cases relating to ascertaining the law of a contract. If the plaintiff's claim had been in respect of a Jersey law contract which was said to be subject to the principles of Sharia law what such a provision might mean, by reference to the English cases cited above, would be an arguable matter for trial. That is not however the issue before me. What I have to consider is what law underpins the plaintiff's claim to require the defendant to account for property and whether or not the courts in Jersey should recognise and give effect to that law. That law, save in one respect, was agreed as being English law. The disagreement related to the reference to Sharia law qualifying the choice of English law in the choice of law clause.

78 In this case it is clear that English law recognises that the plaintiff has a right to trace and ignores Sharia law. That can be seen from paragraph 11 of Flaux J.'s October Judgment where he stated as follows:-

> ***"11 Finally, under clause 27 of the RSA, that Agreement was governed by and construed in accordance with English law "save in so far as inconsistent with the principles of Sharia law".*** As a matter of English law, that proviso is of no effect, as a religious law can never apply as the applicable law , ***so that in construing the RSA, Sharia law is irrelevant: see the decisions of the Court of Appeal in****Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC* [2004] EWCA Civ 19; [2004] 1 WLR 1784***per Potter LJ at [54]–[55] and****Halpern v Halpern* [2007] EWCA Civ 291; [2008] QB 195***per***

Waller LJ at [29]. By clause 27, all disputes under the RSA were also subject to the exclusive jurisdiction of the English courts."

79 This decision cites two Court of Appeal authorities relied on by the plaintiff. I accept that these decisions are the English Court applying English private international law as modified by European Union law. However, this does not matter. The connecting factor to whether or not the plaintiff can trace is agreed as being the law of the contracts between the parties (in this case the Agency Agreements) i.e. English law save in respect of one agreement.

80 Yet the oral arguments of the parties require the Royal Court to attempt to ascertain from a Jersey law perspective the English law position while ignoring English Private International Law. This produces an unnecessary complication and leads to an absurdity when dealing with a question of whether English law, as the law of the claim, gives the plaintiff a right to trace. The Royal Court would be asked to determine whether or not the plaintiff had a right to trace without applying the entire system of law that the English court would apply and could deny the plaintiff a right which English law as the law of the claim recognises. To be fair to the plaintiff, in its written submissions on the applicable law dated 16 th February, 2016, did contend that its claim *"flows from the agency agreements"* and cited *Macmillan* and the *S Trust* to argue that English law should be applied.

81 In my judgment the analysis contained in Dicey, Morris & Collins 15th Edition at paragraph 36 that the right to trace should not be subject to the choice of law rules of the forum court (i.e. Jersey law in this case) is the obvious conclusion to the complexities that the arguments put before me otherwise create. In other words the plaintiff has a right to trace because the law of the contracts, which it is agreed is the basis of the plaintiff's equitable proprietary interest, grants the plaintiff such a right. It is not for the Royal Court, as the forum hearing the dispute, to review whether or not there is such a right by applying its own private international law to import a system of law, i.e. Sharia law in this case, which English law would not recognise. There may be public policy exceptions to this approach but no such issue is raised in the context of this application.

82 In reaching this conclusion a distinction therefore has to be drawn between the situation when the Royal Court as the forum court is asked to determine the law of a contract where the Royal Court will apply Jersey private international law principles (whatever they might be) to ascertain the law of the contract and when the Royal Court is asked to recognise and give effect to a form of restitutionary claim to enforce property rights. The latter type of claim is in effect a request to give effect to ownership or property rights recognised under the law of another system. The role of the Royal Court is to ascertain the legal system whose law is to be applied based on the approach set out in Rule 230 cited in *S Trust*. This approach is a question of recognition of the law of another country rather than ascertaining the law of an agreement. In my view it is unarguable that the assertion of an equitable proprietary interest and a right to trace falls within the ambit of Rule 230 as a form of restitutionary claim. I therefore agree with the plaintiff that, applying rule 230 as set out in the *S Trust* decision,

the law of the plaintiff's claim (save in one respect) is English law without any qualification based on Sharia law principles.

83 It is right to mention that during the course of argument Advocate Turnbull indicated in respect of paragraph 11 of the October Judgment that Flaux J did not hear argument on the views he expressed and it was not necessary for him to make the observations he did in order to determine the application made before him by the defendant (which was to amend the defence to adduce expert evidence in respect of UAE/Dubai Law). Assuming in the defendant's favour that is correct, Flaux J's statements at paragraph 11, with respect to him, simply refer to the authorities of *Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC* and *Halpern* which are clear and which in terms of representing the current English law position including English Private International Law, cannot be doubted. Flaux J's conclusion is therefore not surprising.

84 For the sake of completeness, I should also make it clear that where a plaintiff under the law of a country has a proprietary claim, but the law of that country does not recognise a right a to trace, it is a matter for another day, whether the Royal Court in those circumstances as a matter of Jersey law would recognise or give effect to such a right. This issue does not however arise in the present case.

Incorporation

85 If I am wrong on the above analysis I have also concluded in any event that the references to the principles of Sharia law are insufficient to incorporate Sharia law. This is clear from paragraph 51 of the *Beximco* case [2004] 1 WLR 1784 where Potter LJ stated:-

> ***"51 The doctrine of incorporation can only sensibly operate where the parties have by the terms of their contract sufficiently identified specific "black letter" provisions of a foreign law or an international code or set of rules apt to be incorporated as terms of the relevant contract such as a particular article or articles of the French Civil Code or the Hague Rules.*** By that method, English ***law is applied as the governing law to a contract into which the foreign rules have been incorporated*** ."

86 He then continued at paragraph 52:-

> ***"52 The general reference to principles of Sharia in this case affords no reference to, or identification of, those aspects of Sharia law which are intended to be incorporated into the contract, let alone the terms in which they are framed.*** It is plainly insufficient for the defendants to contend that the basic rules of the Sharia applicable in this case are not controversial. Such "basic rules" are neither referred to nor identified. Thus the reference to the "principles of… Sharia" stands unqualified as a reference to the body of Sharia law generally. As such, they are inevitably repugnant to the choice of English

law as the law of the contract and render the clause self-contradictory and therefore meaningless ."

87 While therefore a choice of Sharia law as forming part of the law of a contract (but not a restitutionary claim) is arguable under Jersey private international law principles (but irrelevant for the reasons set out above), the alternative argument that Sharia law is incorporated by reference is not arguable. The observations of Potter LJ on incorporation do not depend on the wording of any English statute or convention.

88 The same conclusion was also reached by a different constituted Court of Appeal in *Halpern v Halpern* where at paragraph 33 where Waller, LJ stated:-

" ***It may be that for actual incorporation it is necessary to identify "black letter" provisions, but that seems to me to be another way of saying that there must be certainty about what is being incorporated***."

An aid to construction

89 It was also contended in the alternative by the defendant that Sharia law would operate as an aid to construction. This submission was also based on the *Halpern* case where the English Court of Appeal in respect of Jewish law, having rejected arguments that Jewish law could apply as the law of the contract because of the effect of Rome Convention and having rejected Jewish law as too being uncertain to be incorporated, Potter LJ then considered if a question of construction arose and continued at paragraph 34 as follows:-

"34 Points which are said to arise outside questions of interpretation e.g. duress, mistake, frustration and the consequences thereof will be a matter of English law as the applicable law of the contract. But as an aid to interpretation (and in my view not simply because some ambiguity can be identified), the context of the compromise, including the fact that it was settling disputes, the subject of an arbitration, which was applying Jewish law, could make Jewish law material. I say "could" only because apart from two matters – the interpretation of clause 4 and the question whether the executor brothers were taking on personal responsibility – no question of interpretation has been identified as arising and even in those areas there has not been any evidence of pleading suggesting that Jewish law would dictate any different interpretation than English law ."

90 On the basis it is arguable that Jersey law would take the same approach, Advocate Turnbull contended that Sharia law was relevant to the construction of the Agency Agreements governed by English law and whether the parties intended that the plaintiff could pursue a proprietary tracing claim having taken title to an asset.

91 These submissions were made in response to the plaintiff's argument that no question of

construction arose because how far the plaintiff would be allow to trace was a matter for Jersey law as the law of the forum. It was therefore a matter of Jersey law not a Sharia law question whether or not to grant a remedy on the basis of a proprietary claim.

92 Advocate Turnbull therefore cited by way of rebuttal to the plaintiff's argument the decision of *Harding v Wealands* [2007] 2 A.C. 1 and the remarks of Lord Hoffmann at paragraph 24 as follows:-

> " ***In applying this distinction to actions in tort, the courts have distinguished between the kind of damage which constitutes an actionable injury and the assessment of compensation (i e damages) for the injury which has been held to be actionable.*** The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. ***On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy***."

93 Advocate Turnbull contended that the Sharia law principle upon which the defendant relied i.e., that the Bank had no cause of action because it had already been compensated by taking title to the Plantation land arguably operated as an elimination of the plaintiff's cause of action as a matter of substantive law and was not therefore a form of limit on quantum or other restriction on a remedy available. He therefore argued that the law which determined whether or not the plaintiff might pursue a proprietary claim at all, after it took title to Plantation on the basis of the alleged breaches of fiduciary duty and trust, was inseparable from the law which determined the conduct which gives rise to liability. This led to the conclusion that the plaintiff should not be permitted to claim in Jersey in respect of the matters for which civil liability was excluded under the law governing the proprietary claim (i.e. English law subject to Sharia law) once it took title to Plantation.

94 The flaw in this argument is that, assuming that the right to trace is not a remedy but is part of the law of the claim, the law governing the proprietary claim is English law as Flaux J has already determined, applying *Beximco* and *Halpern*. The arguments advanced by Advocate Turnbull again therefore require me to apply English law but to ignore the approach the English Court would take applying its private international law rules. The question of construction identified therefore returns to the issue I have already considered, namely that the defendant's argument that Sharia law should be referred to as a matter of construction of the Agency Agreements, leads to an invitation to the Jersey court to reach a

conclusion that the English court would never reach. Flaux J has therefore already decided the question of construction.

95 Alternatively if the right to trace is only a remedy then no question of construction requiring Sharia law evidence arises as the remedy is a matter of Jersey law for the reasons advanced by Advocate Wilson. However I consider that the better view is that the right to trace is part of the law of the claim and it is this law that governs the question of whether a plaintiff enjoys a right to require a defendant to disgorge property belonging to another (either in law or in equity).

96 Finally, and in any event I do not consider that the issue raised by the defendant is a question of construction of the Agency Agreements and what was intended at the time the Agency Agreements were entered into. I have referred to the Agency Agreements as the parties were in agreement that it was the law of the Agency Agreements that give rise to the plaintiff's claim. I accept that Sharia law might be relevant as noted at paragraph 54 of *Beximco* as to how the plaintiff, as a bank based in Dubai, held itself out as doing business. However that is not the issue in dispute. No provision was identified that required construction or interpretation. It was also not argued that a fiduciary duty could not arise under the Agency Agreements. Furthermore, paragraph 22.3.8 of the Amended Answer states that by taking title to Plantation this meant that the plaintiff had been *"compensated as a matter of Sharia law"*. That is not a question of construction but reliance on an express provision of Sharia law. With respect to Advocate Turnbull reliance on a question of construction was therefore an attempt to bring in an express provision of Sharia law by the back door.

97 My reasoning therefore means that the defences of Sharia law including paragraph 32.3 raised must be struck out.

98 I now turn to clause 12(4) of the RSA and whether the release in it prevents the tracing claim. This point can be dealt with shortly because Advocate Wilson accepted that the tracing claim was limited to claims in respect of Proceeds Assets as defined in clause 12(4). However, at present it is only implicit that the plaintiff's proprietary claim at part G of the re-amended order of justice is a claim to assets representing Proceeds Assets. I consider that the plaintiff must make it clear that each of the contributions referred to in paragraph 16 of the re-re-amended order of justice which are challenged for the reasons set out in part G of the re-re-amended order of justice, are claims that fall within the definition of Proceeds Assets by way of further amendment. The orders required to achieve this are set out in the conclusion to this judgment.

99 Beyond making it clear that the matters already pleaded are said to amount to Proceeds Assets, I do not consider it necessary for the plaintiff to have to provide any further particulars beyond the matters already pleaded. Whether therefore the sums claimed represent Proceeds Assets and how the Royal Court reaches that conclusion will be a matter for evidence and submission at trial. Such submissions may include inviting the

Royal Court to draw inferences on the basis of the approach approved by the Privy Council in *Federal Republic of Brazil and another v Durant International Corpn and another* [2015] 3 W.L.R. 599 and [2016] AC 297.

Estoppel

100 I now turn to consider Advocate Turnbull's argument that no matters were decided by Flaux J in respect of Sharia law and any points he decided were matters of UAE/Dubai law. This leads to a consideration of cause of action estoppel, issue estoppel and abuse of process.

101 I have already set out at paragraph 78 above what Flaux J decided in respect of Sharia law, at paragraph 11 of his October judgment. I also note that this judgment has not been appealed. Flaux J at paragraphs 9 and 34 of his December judgment repeated that English law was the law of the RSA referring back to his October judgment. This judgment has also not been appealed.

102 Nevertheless in case I am wrong on the effect of paragraph 11 of the October judgment I must review what Flaux J did decide. The relevance of this argument is that the defendant wishes to contend that by accepting title to Plantation the plaintiff has no entitlement under Sharia law to pursue a proprietary tracing claim against the Trust and this is a question that has not been decided.

103 In Flaux J's October judgment, Flaux J dealt with a defence raised in the English proceedings that any liability under the RSA had been discharged by the fact that the debt due under the RSA was satisfied by the plaintiff's appropriation of Plantation as security. Reliance was placed on the law of the UAE/Dubai.

104 In refusing the application to amend to allow UAE/Dubai law to be pleaded, Flaux J proceeded on the assumption the lease was worth more than the amount outstanding at the date of appropriation in 2008, and as a matter of UAE law this lead to a discharge of the debt due under the RSA. However, Flaux J stated that the position under UAE law was:-

> ***".. irrelevant and does not provide a defence to those defendants in the present proceedings*** ."

105 This conclusion was for the reasons set out in paragraphs 38 and 39 of Flaux J's October judgment as follows:-

> ***"38 The first principle is that where a debt is governed by English law, as in the present case, the question whether the debt has been discharged is also a matter for English law.*** Where English law would not regard the Bank having taken possession of the Plantation land without having in any sense

realised its value by a sale as discharging the debt, the fact that a foreign law (whether as the lex loci situs of the land constituting the security or otherwise) would regard the debt as discharged does not provide the debtor with a defence .

39 Thus, it is well-established that an obligation to pay under a contract governed by English law is not extinguished by the fact that a foreign bankruptcy law (which is not the applicable law of the relevant debt or contractual obligation) would regard the obligation as discharged: see the decision of the Court of Appeal in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 899 ***followed and applied many times since, most recently by Teare J in*** *Global Distressed Alpha Fund v PT Bakrie Investindo* [2011] EWHC 256 (Comm) ; [2011] 1 WLR 2038***at [11]–[13] (where the earlier authorities are summarised) and [25]–[27] (refusing an invitation not to follow the***Antony Gibbs***case) and by myself in***Erste Bank v Red October [2013] EWHC 2926 (Comm)***at [126]***."

106 Flaux J at paragraph 42 also indicated that the defendants could not raise the defences because they were not party to the contract (called the Conditional Assignment), pursuant to which the Bank took title to the lease.

107 Advocate Turnbull in the present case sought to differentiate the present pleading by contending that because his client was party to the RSA, in addition to Flaux J's October judgment not dealing with matters of Sharia law but UAE law, as a party to the RSA his client could argue that Sharia law was part of the applicable law of the relevant contractual obligation under RSA.

108 To consider these submissions it is necessary to review what is meant by *res judicata*, cause of action estoppel, issue estoppel and abuse of process all of which were considered by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2013] UKSC 46, [2014] A.C. 160 in the following extracts which it is appropriate to set out in full:-

"17 Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover

further damages: see *Conquer v Boot* [1928] 2 KB 336 . ***Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment.*** Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the***underlying cause of action: see****King v Hoare* (1844) 13 M & W 494, 504***(Parke B).*** At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties:*Duchess of Kingston's****Case*** (1776) 20 State Tr 355. ***"Issue estoppel" was the expression devised to describe this principle by Higgins J in****Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561***and adopted by Diplock LJ in****Thoday v Thoday* [1964] P 181, 197–198. ***Fifth, there is the principle first formulated by Wigram V-C in****Henderson v Henderson* (1843) 3 Hare 100, 115, ***which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.*** Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

18 It is only in relatively recent times that the courts have endeavoured to impose some coherent scheme on these disparate areas of law. The starting point is the statement of principle of Wigram V-C in *Henderson v Henderson* 3 Hare 100, 115 . ***This was an action by the former business partner of a deceased for an account of sums due to him by the estate.*** There had previously been similar proceedings between the same parties in Newfoundland in which an account had been ordered and taken, and judgment given for sums found due to the estate. The personal representative and the next of kin applied for an injunction to restrain the proceedings, raising what would now be called cause of action estoppel. The issue was whether the partner could reopen the matter in England by proving transactions not before the Newfoundland court when it took its own account. Wigram V-C said, at pp 114–116:

" ***In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence,***

or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the***parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time … Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled.*** The question then is, whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

19 Wigram V-C's statement of the law is now justly celebrated. The principle which he articulated is probably the commonest form of res judicata to come before the English courts. For many years, however, it was rarely invoked. The modern law on the subject really begins with the adoption of Wigram V-C's statement of principle by the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 . ***Yat Tung was an appeal from Hong Kong, in which the appellant sought to unsuccessfully avoid the exercise by a mortgagee of a power of sale in two successive actions, contending on the first occasion that the sale was a sham and that there was no real sale, and on the second that the sale was fraudulent.*** Lord Kilbrandon, giving the advice of the Board, distinguished at pp 589–590 between res judicata and abuse of process:

" ***The second question depends on the application of a doctrine of estoppel, namely res judicata.*** Their Lordships agree with the view expressed by McMullin J that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no 969, any formal repudiation of the pleas raised by the appellant in no 534. Nor was Choi Kee, a party to no 534, a party to no 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."

Lord Kilbrandon referred to the statement of Wigram V-C in *Henderson v Henderson* ***as the authority for the "wider sense" of res judicata, classifying it as part of the law relating to abuse of process*** .

20 The implications of the principle stated in *Henderson v Henderson* ***were more fully examined by the House of Lords in*** *Arnold v National Westminster Bank plc* [1991] 2 AC 93 . ***The question at issue in that case was whether in operating a rent review clause under a lease, the tenants were bound by the construction given to the very same clause by Walton J in earlierlitigation between the same parties over the previous rent review.*** The Court of Appeal had subsequently, in other cases, cast doubt on Walton J's construction, and the House approached the matter on the footing that the law (or perhaps, strictly speaking, the perception of the law) had changed since the

earlier litigation. Lord Keith of Kinkel began his analysis by restating the classic distinction between cause of action estoppel (p 104D–E), and issue estoppel (p 105D–E):

" ***Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.*** In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened …"

" ***Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue***."

The case before the committee was treated as one of issue estoppel, because the cause of action was concerned with a different rent review from the one considered by Walton J. But it is important to appreciate that the critical distinction in Arnold was not between issue estoppel and cause of action estoppel, but between a case where the relevant point had been considered and decided in the earlier occasion and a case where it had not been considered and decided but arguably should have been. The tenant in Arnold had not failed to bring his whole case forward before Walton J. On the contrary, he had argued the very point which he now wished to reopen and had lost. It was not therefore a *Henderson v Henderson* ***case.*** The real issue was whether the flexibility in the doctrine of res judicata which was implicit in Wigram V-C's statement extended to an attempt to reopen the very same point in materially altered circumstances. Lord Keith of Kinkel, with whom the rest of the committee agreed, held that it did .

22 *Arnold v National Westminster Bank plc* [1991] 2 AC 93 ***is accordingly authority for the following propositions.*** (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided ***in order to establish the existence or non-existence of a cause of action.*** (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised .

23 It was submitted to us on behalf of Virgin that recent case law has re-categorised the principle in *Henderson v Henderson* 3 Hare 100 ***so as to treat it as being concerned with abuse of process and to take it out of the domain of res judicata altogether.*** In these circumstances, it is said, the basis on which Lord Keith qualified the absolute character of res judicata in *Arnold v National Westminster Bank* ***by reference to that principle is no longer available, and his conclusions can no longer be said to represent the law*** .

24 I do not accept this. The principle in *Henderson v Henderson* ***has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before.*** There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in the *Yat Tung* ***case*** [1975] AC 581 . ***The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them***, *Johnson v Gore-Wood & Co* [2002] 2 AC 1, ***in which the House of Lords considered their effect.*** This appeal arose out of an application to strike out proceedings on the ground that the plaintiff's claim should have been made in an earlier action on the same subject matter brought by a company under his control. Lord Bingham of Cornhill took up the earlier suggestion of Lord Hailsham of St Marylebone LC in *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145, 157***that that the principle in****Henderson v Henderson****was "both a rule of public policy and an application of the law of res judicata".*** He expressed his own view of the relationship between the two at p 31 as follows:

" *Henderson v Henderson****abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them.*** The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current***emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.*** The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing

attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

The rest of the committee, apart from Lord Millett, agreed in terms with Lord Bingham's speech on this issue. Lord Millett agreed in substance in a concurring speech. He dealt with the relationship between res judicata and the *Henderson v Henderson* ***principle at pp 58–59 as follows:***

" ***Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it.*** In*Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, ***Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel.*** As May LJ observed in*Manson v Vooght* [1999] BPIR 376, 387, ***it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter.*** But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented."

25 It was clearly not the view of Lord Millett in *Johnson v Gore-Wood* ***that because the principle in*** *Henderson v Henderson* ***was concerned with abuse of process it could not also be part of the law of res judicata.*** Nor is there anything to support that idea in the speech of Lord Bingham. The focus in *Johnson v Gore-Wood* ***was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run (Mr Johnson's counsel conceded that he and his company were privies, but Lord Millett seems to have doubted the correctness of the concession at p 60D–E, and so do I).*** Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 110G , ***"estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process."***""

109 Applying these principles as being the position under the law of Jersey I have firstly considered whether a cause of action estoppel, or issue estoppel arise. In reaching my conclusion it was clear that Flaux J in his October judgment was focusing on issues of UAE/Dubai law and was focusing on those issues in respect of a different contract governed by English law i.e. the RSA and not the Agency Agreements.

110 However, the effect of the argument advanced is the same. Flaux J decided that the governing law of the RSA was English law. The governing law of the Conditional Assignment was also English law. Flaux J further decided that the fact that the law of the UAE (which was not the applicable law of the relevant contract) would regard the obligation as discharged was irrelevant. From the perspective of English law, it is clear that exactly the same analysis would apply to the defence now being run under Sharia law. English law as I have found it is the law of the contractual obligation that gives rise to the plaintiff's equitable proprietary claim. It would therefore also be irrelevant to whether or not monies due under the Agency Agreement would be extinguished because of a principle of Sharia Law. It also does not matter that the present claim is a proprietary claim rather than a personal claim; it was not argued that the English law position is any different for proprietary claims arising out of a contract than for personal claims.

111 In any event, it is also clear from Flaux J's October Judgment that the argument the defendant now wishes to run, (i.e. by taking title under the RSA that the plaintiff is obliged to give credit for the value of Plantation in 2008, and therefore any monies due to the plaintiff have been extinguished), was an argument that the defendant was running in the English proceedings. This can be seen from paragraphs 18 to 20 of the October Judgment. The argument run was on the basis of UAE/Dubai law but it is clear that the argument is the same. What then occurred in the English proceedings was a volte-face because the evidence of the UAE/Dubai expert was that there had been unlawful misappropriation of the Plantation land by the plaintiff. Flaux J noted that this *volte-face* was unexplained and then stated in paragraph 29 of the October judgment that the pleading for which he had given permission to amend was unsustainable. The permission to amend which had been given was to allow the defendants in the English proceedings including the present defendant, to plead that by taking title to the Dubai land under the RSA the plaintiff's indebtedness was repaid in full.

112 This is the argument that the defendant now wishes to run in Jersey, having initially sought to run effectively the same defence in England and then abandoned the same. Raising a defence and then abandoning it where there is no material difference between the arguments sought to be advanced under UAE/Dubai law and Sharia law as matters have been put before me is therefore a cause of action estoppel or alternatively an issue estoppel or alternatively an abuse of process. In my judgment, it is a point which could have been raised. There is no material difference between UAE and Sharia law on this issue. If I am wrong on this point it is an issue estoppel because the same argument has been raised in previous proceedings and no argument has been advanced that there are any circumstances which justify the point being allowed to be contended at this stage. The conclusions of Flaux J's October judgment were re-emphasised in Flaux J's December

judgment and neither judgment has been appealed.

113 Even if I am wrong and it is not a cause of action estoppel or an issue estoppel because the defendant now relies on the argument to defend a proprietary claim and invokes Sharia law rather than the law of the UAE, it is certainly in my view an abuse of process to run the same defence that title was extinguished by taking title to Plantation where that defence was abandoned without explanation. The defendant is simply seeking to invoke a principle under Sharia law which is no different in reality to the principle he sought to advance in the hearing before Flaux J in October save that now he relies on the defence in respect of a proprietary tracing claim arising out of a contract not a personal debt claim.

114 The defendant is not therefore permitted to run this defence in the present proceedings. This conclusion applies whether or not my analysis is correct that Jersey law should not have regard to Sharia law as a defence to the plaintiff's tracing claim because it is a matter of English law whether or not the plaintiff can assert a right to trace. Each of my conclusions that a cause of action estoppel is established, alternatively that an issue estoppel is established, alternatively that there is an abuse of process means that the relevant parts of the amended answer must be struck out.

The Agency Agreement governed by German law

115 In respect of the Agency Agreement governed by German law, each party criticised the other for not pleading matters of German law. The defendant suggested that because German law had not been pleaded by the plaintiff it must therefore be presumed to be the same as the law of Jersey; accordingly, in respect of the Agency Agreement governed by German law, I should permit the defendant to contend that any proprietary claim had been extinguished by virtue of the plaintiff taking title to Plantation. However, in this case, I cannot ignore that Germany is subject to the same European Union law as the United Kingdom. Accordingly I cannot proceed on the assumption that German law is the same as Jersey law because I am aware of the European Union law which suggests that German law is the same as English law. The defendant has also not pleaded that German is different from English law and no expert evidence to this effect was produced. Once the parties have had the opportunity to consider the terms of this judgment, however it would not be unfair, given that the plaintiff has not pleaded German law either, to allow the defendant an opportunity to amend its amended answer to plead that German law is different from English law having regard to the conclusions I have reached in this judgment. Such an amendment would need to be supported by expert evidence.

The claim in fraud

116 In relation to the application to strike out those parts of the amended answer by which the defendant sought to challenge the conclusions of Flaux J in the English proceedings that there was a fraud, it is necessary to evaluate what was in issue in the English proceedings

and what was decided by Flaux J's December judgment.

117 I start by reference to the pleadings in the English proceedings. In the re-amended particulars of claim, the fraud was summarised as operating by reference to the matters set out in paragraphs 13.1 to 13.5 as follows:-

> *"13.1 Mr Ridley and/or Mr Nil, acting pursuant to the conspiracy between themselves and Mr Cornelius pleaded at paragraph 32D below, caused to be created false documentation which purported to show an underlying sale transaction in respect of which the seller wished to obtain trade financing from by CCH Europe.* The purported "seller" was in each case one of six companies controlled by Mr Cornelius as set out in the table below.
>
> *13.2 The false documentation was presented to the Bank, which then released funds to CCH Europe.* Those monies were in turn remitted to the purported "seller", namely one of the six companies controlled by Mr Cornelius.
>
> *13.3 In fact the purported sale transactions were fictitious.* In this way, the Misapplied Funds were fraudulently diverted to Mr Cornelius' six companies.
>
> *13.4 Certain of the Misapplied Funds were used to "repay" the Bank in respect of sums previously remitted in respect of fictitious transactions so as to deceive the Bank into believing that those fictitious transactions were genuine and to keep the balance outstanding to the Bank within the limits permitted by the Agency Agreements.* The remainder of the Misapplied Funds were used to purchase various assets and/or diverted to various other companies, including companies controlled by Mr. Ridley.
>
> *13.5 The US$330 million referred to in paragraph 12.2 above had been diverted to Mr Cornelius' six companies as follows:*
>
> *Company US$(Millions)*
>
> *Aject 48.4*
>
> *Gulf Lotus 84.7*
>
> *Kifaru Resources 41.4*
>
> *Logistical 33.3*
>
> *PSI (and PSI Middle East LLC) 64.1*
>
> *Seymour 58.0*
>
> *Total 329.9*

118 The plaintiff also pleaded at paragraph 14 that it retained equitable title to monies which

the fifth defendant to the English proceedings failed to apply in accordance with and for the purpose of carrying out the Agency Agreements. Paragraphs 14.1 to 3 provide as follows:-

> *"14.1 These monies were obtained from the Bank by deception and/or in breach of the fiduciary duty owed by CCH Europe*.
>
> *14.2 Alternatively, CCH Europe did not apply these funds in accordance with the Agency Agreement or for the specified purpose of funding trade financing contracts*.
>
> *14.3 Accordingly, the Bank has at all material times retained equitable title to such monies and the proceeds therefore unless and until such time that any such property were to pass to a bona fide purchaser for vale without notice*."

119 In his amended defence the defendant described his role at paragraph 4 as follows:-

> " *Mr Ridley was, at all material times, an advisor to the managing director of CCH Europe, Mr Nil.* Prior to the date of the RSA Mr Nil was in control of CCH Europe and/or CCH International. It is expressly denied, if it be alleged, that prior to the date of the RSA Mr Ridley was involved in the operation of the Agency Agreements and/or the management and/or operation of the business of CCH Europe and/or CCH International. Mr Ridley acted as a broker introducing business to Mr Nil who would consider and decide whether or not such business was suitable for the CCH companies. As far as Mr Ridley is aware the operation of the Agency Agreements was conducted by CCH Europe and/or CCH International."

120 In response to paragraph 13 of the re-amended particulars of claim the defendant pleaded as follows:-

> " *a. Any documentation provided to the Bank was prepared on behalf of and presented by CCH Europe and/or CCH International as pleaded at Paragraph 9 of the Amended Particulars of Claim*.
>
> *b. It is admitted that monies were remitted to the seller companies identified in Schedule 1 to the Amended Claimant's Voluntary Information*.
>
> *c. It is denied that any of the monies identified in Schedule 1 to the Amended Claimant's Voluntary Information were used to repay the Bank as alleged or at all*.
>
> *d. It is denied that any monies are outstanding to the Bank in respect of transactions prior to 2007. If and insofar as the Bank seeks to recover sums in relation to matters which did not form part of the claim made in the Dubai Criminal Court such claims are statue barred as a matter of Dubai and UAE Federal Law. Mr Ridley will refer to and rely on Article 298 of the Civil Law of the UAE State Deferral Law no 5 of 1985*.

e. It is denied that Mr Ridley acted as alleged in Paragraph 13. Mr Ridley repeats Paragraph 4 above."

121 He made no admission in respect of paragraph 14.

122 He also pleaded the following at paragraph 17, 18 and 19:-

"17. Pursuant to Clause 12.4 of the RSA the Bank irrevocably waived and comprised any and all claims, whether existing or future, known or unknown, it had or might have against Mr Ridley arising from or in connection with the Agency Agreements and the transactions contemplated in accordance with the terms of the Agency Agreements whether or not funds were misappropriated in accordance with the terms of the Agency Agreements. In the premises, unless and until the Court declares that the RSA is void and that Clause 12.4 is of no effect the allegations contained in Paragraphs 12, 13 and 14 are vexatious and/or an abuse of the process of the court and/or are otherwise likely to obstruct the just disposal of the proceedings and in any event disclose no claim against Mr Ridley.

18. For the avoidance of any doubt it is expressly denied that Mr Ridley is guilty of the offences with which he has been convicted in the Criminal Court in Dubai. Such convictions are currently the subject matter of an appeal. The question of Mr Ridley's guilt or otherwise under the Laws of the UAE are matters for the Courts of the UAE and are not matters to be determined by this Court or canvassed by the parties in this Court (or in correspondence related to this action) in accordance with English Law. Mr Ridley has made and makes no admissions in these proceedings in respect of any allegations of fraud made by the Bank either in these proceedings or for the purposes of the criminal proceedings in the UAE.

19. Paragraph 15 is admitted. The RSA was a settlement agreement between the parties under which the relationships between the parties were to be regulated both in relation to the past and in relation to the future. Mr Ridley will refer to and rely upon the RSA for its full terms and effect."

123 By the time of the trial, the position in relation to allegations of fraud was summarised by the plaintiff in its skeleton argument at paragraphs 89 and 90 as follows:-

"89. Until the amendments made recently, Mr Cornelius (but none of the other Defendants) maintained that the RSA was void ab initio as a matter of Dubai law as being beyond the capacity of the Bank (Dubai law, as the law of the place where the Bank is incorporated, governing questions of its corporate capacity). Now that that case has been abandoned, it is accepted by all the effective parties to this action that the RSA is a valid and effective agreement (although points are still made about what it means, whether there is an estoppel arising from pre-signature discussions, and whether the RSA should

be rectified – those are addressed in section 4.2 below).

90. It was principally – although not exclusively – against that possibility that the claim based on fraud was advanced. Now that it is accepted that the RSA is a valid and enforceable contract, the fraud only arises (i) as a matter of background, in order to explain why it was that the RSA was entered into; (ii) on the Bank's claim that it held an equitable charge over the BMEL shares and so holds an equitable charge over the Afren shares (paragraph 104 below); (iii) on the Bank's claim to trace into, and assert an equitable title to, the Afren shares; and (iv) related to the third issue, on the Bank's claim against PSI based on dishonest assistance and knowing receipt."

124 I have set out the pleadings and the skeleton argument because they put in context the observation recorded at paragraph 10 of Flaux J's December judgment set out at paragraph 22 above where he recorded the defences live as at the end of trial.

125 There was also an argument in the English proceedings advanced by the first and second defendants, but not the defendant to the present proceedings, that the plaintiff was not entitled to trace monies (see paragraph 10(7) of the December judgment).

126 As is recorded at paragraph 12 of the December judgment, the fraud was admitted by the defendant. That evidence was not challenged at trial as is recorded at paragraph 14 which led Flaux J to conclude "In the circumstances, although both defendants formally deny participation in the fraud, that position is untenable and it is clear that they were both fully implicated." The reference to both defendants includes a reference to the defendant in the present proceedings.

127 I note that the defendant in his affidavit filed in opposition to the present application disputes that he ever made any admission to the plaintiff of the fraud (see paragraph 71) and in paragraph 97 disputes the notes of a meeting where he is said to have admitted the fraud and also argues that it would be illogical to admit a fraud having entered into the RSA. Mr Lyons' position in his first affidavit, sworn in support of the plaintiff's application, is that the defendant had revealed to the plaintiff prior to him being instructed and had confirmed to Mr Lyons that of the sums advanced by the plaintiff approximately US 150,000,000 had been used for the purposes of trade financing and approximately US 340,000,000 had been wrongfully diverted into long term capital projects.

128 Returning to the December judgment Flaux J at paragraph 17 and 18 also considered the position irrespective of the admissions made which conclusion is set out in the final sentence of paragraph 18 "that there was a fraud and that the second, third and fourth defendants actively participated in it, is irrefutable." The third defendant is the defendant in the present proceedings. Flaux J therefore ruled there was a fraud on two different bases. The third affidavit of the defendant only addresses the first of these grounds i.e. whether or not he made any admissions. Otherwise his affidavit at length explains why the plaintiff's

evidence in the English proceedings on his admissions was not challenged and complains about the lack of detail about the fraud (see paragraph 90) and when it occurred (see paragraph 91).

129 Flaux J at paragraphs 194 and 195 describes the plaintiff's claim to trace shares against the first defendant; the ability to trace was put in one of two ways, the first of which is relevant to the present proceedings, and to the application before me. Flaux J at paragraph 195 stated:-

> ***"195 First on the basis that since they represent monies originally subject to a fiduciary duty in favour of the Bank, which were misapplied in breach of that fiduciary duty, they are in equity the Bank's property.*** Second, by receiving and/or assisting in the dissipation of the Bank's money which is trust property…"

130 The only defence put forward to this claim was that the plaintiff by the terms of the RSA had released any such claim, a defence which Flaux J rejected for two reasons. The second of those reasons is that the shares the plaintiff sought to trace were within the definition of Proceeds Assets. At paragraph 197 Flaux J therefore stated as follows:-

> ***"197 Second, the proviso to clause 12.4 of the RSA makes it clear that the waiver of any claims against the Guarantors does not apply to claims in respect of Proceeds Assets: "provided that any claims in respect of Proceeds Assets shall not be waived or compromised unless expressly done so in writing by the Bank".*** Clearly the shares in Afren are "Proceeds Assets" since they are an asset: "materially funded by the Advances, whether directly or indirectly.""

131 Flaux J therefore decided there was a fraud. It was clearly necessary for that decision to be made in order to decide the plaintiff's tracing claim. Flaux J further decided that any asset that fell within the definition of a Proceeds Asset was an asset that in equity was the plaintiff's property. Flaux J further decided that the defendant had admitted that the fraud had started about 2003 which evidence was unchallenged.

132 Advocate Turnbull for the defendant argued that it was not necessary for Flaux J to make any findings in respect of fraud. The real issue was whether the defendant was liable under the RSA which was a personal claim. However, this submission does not mean that the issue of fraud was not live in the proceedings to which the defendant in the present proceedings was a party. The issue I have to decide is whether the defendant in the present proceedings is entitled to challenge the findings of fraud by Flaux J which the defendant disputes in his third affidavit as I have noted above. At present the defendant's amended answer is a combination of denying the effect of Flaux J's judgment, putting the plaintiff to proof of the fraud and in his final sentence at paragraph 29 specifically denying that the defendant has ever admitted having committed fraud. I observe that the defendant does not expressly deny the fraud but the defendant denies that he admitted the same.

133 In reaching my conclusion, again, my starting point is Clause 12.4 of the RSA. This provision preserved a right in favour of the plaintiff to bring any claims in respect of Proceeds Assets as defined in the RSA. Such claims still had to be proved. An essential element of the plaintiff's ability to trace against the first defendant was therefore dependant on a finding of fraud. Without a finding of fraud and therefore a finding that the plaintiff held equitable title over the shares as a Proceeds Asset, the plaintiff could not trace to recover the shares. The defendant in the present proceedings was therefore clearly on notice that Flaux J was going to be invited to make findings of fraud by reference to what was set out at paragraphs 89 and 90 of the plaintiff's opening skeleton argument. The evidence relied on for a finding of fraud was also known to the defendant in part to include admissions made by him. Despite knowing about how the case was going to be presented, the defendant in the present proceedings, in the English proceedings, chose not to challenge the evidence of his admissions.

134 The answer to Advocate Turnbull's submissions depends on whether or not the above position amounts to a cause of action estoppel, issue estoppel or an abuse of process applying the reasoning of Lord Sumption in Virgin Atlantic set out above.

135 Starting with cause of action estoppel, in my judgment the plaintiff has not established that cause of action estoppel applies. By reference to the definition of cause of action estoppel of Lord Keith in *Arnold v National Westminster Bank* cited in the *Virgin Atlantic* case at paragraph 20, the cause of action in the later proceedings has to be identical to that in the earlier proceedings. The cause of action against the defendant is not identical to claims in the English proceedings. I agree with Advocate Turnbull that the claim against the defendant in the English proceedings was a personal claim, for non-payment under the RSA; it is not a proprietary or tracing claim against him.

136 However it is clear that the doctrine of issue estoppel does apply to the defendant's present pleading in response to the allegations of fraud. The definition of Lord Keith of issue estoppel also cited in the *Virgin Atlantic* case bears repetition. He defined issue estoppel as follows:-

> " ***Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue***."

137 In the English proceedings the finding of fraud was a necessary ingredient to the tracing claim. The defendant in the present proceedings was party to those proceedings and could have challenged the evidence adduced in respect of the admissions he made but chose not to do so. As Lord Sumption put it in *Virgin Atlantic* at paragraph 22, "if the relevant point was not raised the bar will usually be absolute if it could with reasonable diligence and

should in all the circumstances have been raised." It is clear from the English proceedings that evidence of fraud was going to be adduced including the present defendant's admissions (see the plaintiff's skeleton argument referred to at paragraph 123 above). The defendant in the present proceedings could with reasonable diligence have challenged the admissions relied upon. In addition, by the time of the trial in the English Proceedings, the present action had been issued in Jersey so the defendant was clearly on notice of the proprietary claim and the allegations of fraud against him. The defendant therefore should have challenged the admissions of fraud when adduced for a relevant issue namely a tracing claim when there was also a tracing claim against him already issued albeit in Jersey rather than in England. The decision not to challenge the admissions in the English proceedings can only therefore be tactical. Accordingly it is not appropriate for the defendant in the present proceedings to seek to put the plaintiff to proof of the fraud when he has already had an opportunity to do so where the issue of fraud was relevant to part of the claim in England and where the defendant must have known that it was relevant to the present claim. The issue estoppel that I have found arises means that the defences raised must be struck out as an abuse of process.

138 If I am wrong on the above analysis, the tactical approach taken by the defendant in the present proceedings in not challenging the evidence of admissions made by him in the English proceedings is an abuse of process. Advocate Wilson in his final reply reminded me of the decision of the Court of Appeal in *House of Spring Gardens Ltd v Waite & Ors* [1991] 1 Q.B. 241 and the section headed abuse of process at page 254 line E to 255 line D:-

> " ***Abuse of process***
>
> ***The judge did not find it necessary to deal with the question of abuse of process.*** In my opinion the same result can equally well be reached by this route, which is untrammelled by the technicalities of estoppel. The categories of abuse of process are not closed: see *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529, 536 , ***where Lord Diplock said:***
>
> " ***My Lords, this is a case about abuse of the process of the High Court.*** It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."
>
> ***That was a case where the court would not permit a collateral attack on the decision of a court of competent jurisdiction.*** The principle has recently been applied in this court to analogous cases, where issues of fact have been

litigated exhaustively in sample cases; it is an abuse of process for a litigant, who was not one of the sample cases, to re-litigate all the issues of fact on the same or substantially the same evidence: see *Ashmore v. British Coal Corporation* [1990] 2 Q.B. 338 .

The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court, it having been tried and determined by Egan J. in Ireland. In my judgment it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to re-litigate matters which have twice been extensively investigated and decided in their favour in the natural forum, but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. The Waites have not appealed Sir Peter Pain's judgment, and they were quite right not to do so. The plaintiffs will no doubt proceed to execute their judgment against them. What could be a greater source of injustice, if in years to come, when the issue is finally decided, a different decision is in Mr. McLeod's case reached? Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause ."

139 The position is no different in respect of the present proceedings and it would not be in the interests of justice and public policy to allow the issue of fraud to be litigated again in the Royal Court, it having been tried and determined by Flaux J. The defendant's approach is therefore an abuse of process and must be struck out. To permit this defence would require the plaintiff to re-litigate matters which have been admitted by the defendant, not challenged by him, and decided in the plaintiff's favour. Flaux J's judgment has also not appealed. There is also the risk of a potential inconsistent decision should the matter be re-litigated in Jersey. There is no difference between the conclusions of Stuart-Smith LJ in the *House of Spring Gardens* case and the present position.

140 In relation to this part of my decision I should make it clear that my conclusion only relates to the defendants' challenge to the allegations of fraud and the admission that the fraud took place from 2003. The arguments in respect of the Pauline Action and the *tort* of deceit and what the plaintiff claims in those parts of his pleading are separate issues, which I deal with later in this judgment. At the conclusion of this judgment I also set out the effect of the decision I have reached on the defendant's amended answer and what steps the parties should then take.

The Pauline Action

141 I now turn to consider that part of the defendant's amended answer and submissions relating to the Pauline Action in light of my conclusion that the defendant cannot challenge the findings of fraud of Flaux J.

142 I start by reference to what is a Pauline Action. This was considered in the *Re Esteem Settlement* decision. Paragraph 11 of the head note states as follows:-

> " ***Jersey law recognized that a transfer undertaken in fraud of creditors could be set aside if the creditor could prove (a) that the intention of the debtor was to defeat his creditors; and (b) their actual defeat, as the debtor was insolvent as a result of the act which was challenged, if he were not already insolvent before the act***."

143 The way the Pauline Action claim is pleaded is set out at paragraphs 27P to 27T of the re-re-amended order of justice as follows:-

> *"27P. By reason of the Defendant's participation in the fraud, the Plaintiff had those claims against him pleaded in paragraphs32A to 32G of its Re-Amended Particulars of Claim in the English Proceedings. Those causes of action arose on diverse dates between the commencement of the fraud in 2002 and 2007. The Plaintiff therefore falls to be treated as having been a creditor of the Defendant prior to the date of each of the contributions into the Trust referred to in paragraph 16 above.*
>
> *27Q. The extent of the Defendant's liability in respect of the causes of action referred to in paragraph 27P above always materially exceeded the total value of the Defendant's assets and he was therefore at all material times insolvent once such causes of action were taken into account.*
>
> *27R. It is to be inferred that the Defendant made or caused to be made each of the contributions to the Trust referred to in paragraph 16 above with the dishonest intent of causing prejudice to the Plaintiff. The Plaintiff relies, without limitation, on the following facts and matters:*
>
> *as found by Mr Justice Flaux in the English Proceedings, the Defendant was a knowing participant in a multi-million dollar fraud (see in particular, paragraphs 11–23 of the judgment dated 6 December 2013);*
>
> *the Defendant must have appreciated that if the Plaintiff discovered the fraud (which was not unlikely, in view of the way it operated, as described by Mr Justice Flaux in paragraphs 17 and 22 of the judgment dated 6 December 2013), it would have a claim for millions of dollars against him;*
>
> *it is to be inferred that the Defendant must have appreciated that there was a substantial risk of the Plaintiff discovering the fraud and taking proceedings against him;*
>
> *it is to be inferred that the Defendant must have believed that the contribution to the Trust of assets would have the effect of shielding the same from his creditors, and in particular the Plaintiff.*
>
> *it is therefore to be inferred that the Defendant must have made (or caused or*

procured to be made) each of the contributions to the Trust referred to in paragraph 16 above with the intent of putting them beyond the reach of the Plaintiff.

27S. The Plaintiff further relies on the fact that the Defendant failed properly to comply with his obligation to give disclosure of his assets under the RSA, and his failures referred to in section F above, in support of the inference referred to in paragraph 27R above. The Plaintiff will say that the inference to be drawn is that the Defendant concealed (by failing to disclose when required to do so) the position in relation to the Trust because he appreciated that his actions in relation to it were dishonest.

27T. by reason of the foregoing, if and insofar as the Plaintiff does not succeed in its proprietary claim, it is entitled to have the contributions to the Trust referred to in paragraph 16 above set aside and to vest title to the same in the Defendant. The Plaintiff further claims an order that the assets of the Trust be transferred to it alternatively that if and insofar as they are not already in cash, they be converted into cash by the trustee and paid to the Plaintiff."

144 Advocate Turnbull took a number of objections to this pleading. He argued that the claims pleaded at paragraphs 32A to 32G of the re-amended particulars of claim were only claims in the alternative in the event that Flaux J determined a defence raised by another defendant that the RSA was void. By the time of the trial, as recorded in the plaintiff's skeleton argument set out above, it was accepted by all parties that the RSA was a valid and effective agreement. The English proceedings did not therefore determine the alternative claims pleaded at paragraphs 32A to 32G of the plaintiff's re-amended particulars of claim. The English proceedings further did not determine when those causes of action arose. Accordingly it had not been established in the English Proceedings that the plaintiff was a creditor of the defendant at the time the defendant made contributions into the Trust. Those contributions were made on various dates between June 2005 and June 2007 as set out at paragraph 16 of the plaintiff's re-re-amended order of justice. Whether or not the defendant was allowed to challenge the assertions of fraud generally, it was also a live issue as to when the plaintiff became a creditor of the defendant and how much was said to be owed by the defendant to the plaintiff. None of these matters had been resolved by Flaux J.

145 Advocate Wilson put the plaintiff's claims as follows:-

(i) Firstly, he argued he could bring a Pauline Action in respect of any asset that fell within the definition of Proceeds Assets under the RSA as an alternative to tracing if for some reason his client was not permitted to trace. In such circumstances, any transfer of a Proceeds Asset into the Trust which could not be traced could still be set aside on the basis of Pauline Action.

(ii) In addition, his clients contended that any transfer of money into the trust could still be set aside, as long as by the time of the transfer the defendant was indebted to the

plaintiff as a result of the fraud and it was established that the transfer was made to defeat the defendant's creditors.

(iii) He accepted that the Royal Court would need to decide what amount was owed by the defendant to the plaintiff following the fraud and the date on which that money was owed.

(iv) He further accepted that as part of any Pauline Action he would need to demonstrate insolvency. For the Royal Court to make a finding of insolvency, it would need to determine how much money was owed by the defendant to the plaintiff and the date on which such a sum came to be owed.

(v) He argued that Clause 12.4 did not operate as a release of the right to bring a Pauline Action and it made no difference that the underlying cause of action had otherwise been released by the RSA.

146 To evaluate these rival contentions, again I return to what was decided by Flaux J in his December judgment. I have already concluded that he made a finding of fraud which was an essential element of one part of the issues before him and therefore the defendant in the present proceedings cannot challenge that finding because an issue estoppel arises or alternatively it would be an abuse of process to permit the defendant to make such a challenge.

147 I record in passing that while at paragraph 4 of Hamblen J's judgment, Hamblen J refers to the second witness statement of Mr David Mills referring to the defendant bringing the fraud to the attention of the plaintiff in 2007, Mr Ridley in his third affidavit filed in opposition to the present application referred at paragraph 107 to a third witness statement of Mr Mills, where he says Mr Mills stated “nothing I have said should be taken as any kind of admission on his part; I was never authorised to do any such thing, and have no locus or right of any kind to do so. To quote me as saying he was “the architect” of the fraud lacks any basis.”

148 In reaching my decision I have therefore disregarded the reference to the second witness statement in the judgment of Hamblen J. It is therefore only the finding of fraud by Flaux J's December judgment that has led to the conclusion I have reached.

149 Flaux J further decided that the defendant admitted the fraud began in about 2003 (see paragraph 12 of Flaux J's December judgment).

150 In my judgment for the same reason that the defendant cannot challenge the finding of fraud by Flaux J, the defendant cannot challenge the finding that he admitted that the fraud took place in 2003. Such a challenge is prevented because an issue estoppel arises or it is alternatively an abuse of process for the reasons I have given.

151 However that is as far as Flaux J's December judgment goes. It did not decide how much was due to the plaintiff from the defendant at the time of the transfer to the Trust the subject of this action and at what point in time any sum fell due as a result of the fraud. To be fair to Advocate Wilson he did not contend otherwise and accepted that in order to show insolvency his client would have to prove what was due from the defendant and by when as a result of the fraud. I would add that the re-re-amended order of justice at paragraph 27P in the final sentence simply refers to the plaintiff falling to be treated as having been a creditor prior to the date of each of the contributions without specifying when the plaintiff became a creditor and for how much.

152 Paragraph 27Q simply states that “the extent of the defendant's liability in respect of the causes of action referred to in paragraph 27P always materially exceeded the total value of the defendant's assets and he was therefore at all material times insolvent once such causes of action were taken into account.”

153 In this paragraph the plaintiff appears to be saying that as soon as its claim in fraud arose, the plaintiff had an immediately binding constructive trust in his favour, over the defendant's assets and therefore any transfer of assets made to the Trust could be the subject of a Pauline Action. This followed from the observations of Birt, Deputy Bailiff at paragraph 90 of *Re Esteem* set out at paragraph 49 above. These observations themselves reflected the remarks of Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington* [1996] A.C. 669 at 716 cited at paragraph 82 of *Esteem*.

154 In response to this contention Advocate Turnbull drew to my attention to the decision of Rimer J in *Shalson v Russo* [2003] WHC 1637 and the section at paragraphs 108 to 119 where Rimer J reviewed the more general proposition of Lord Browne-Wilkinson set out at at paragraph 82 of *Re Esteem* cited above and stated “as to Lord Browne-Wilkinson's more general proposition in the second paragraph that property obtained by fraud is automatically held by the recipient on a constructive trust for the victim of fraud, I respectfully regard the authorities he cites as providing less than full support for it. At any rate, they do not in my view support the proposition, that property transferred under a voidable contract induced by fraud will immediately (and prior to any decision) be held on trust for the transferor.” Paragraphs 112 to 119 of *Shalson v Russo* then set out Rimer J's detailed reasoning in support of his view.

155 The difference between the position of Lord Browne-Wilkinson and Rimer J is that, based on the approach taken *Westdeutsche Landesbank v Islington*, an immediately binding constructive trust arises, whereas in *Shalson v Russo*, where a contract is induced by fraudulent misrepresentation, it is only rescission of the contract that allows a claim to be brought to trace because only then does the beneficial title, which had passed to the person making the fraudulent misrepresentation, re-vest in the other party to the contract to whom the misrepresentation was made.

156 This distinction under English law was explored in *Nolan v Minerva Trust and Others*

[2014] JRC 078A at paragraphs 146 to 162. At paragraph 151 Commissioner Hunt stated:-

> " ***In our view it is <u>not</u> the law of Jersey that a constructive trust arises immediately if a contract has been procured by a fraudulent misrepresentation.*** On the contrary, the law of Jersey is, we conclude, the same as English law so that (save in the case of a Halley trust) a constructive trust will not arise out of a contract which has been procured by a fraudulent misrepresentation unless and until the contract has been rescinded."

157 Commissioner Hunt reviewed *Halley v The Law Society* and what was meant by a Halley Trust at paragraphs 152 to 154 of his judgment as follows:-

> ***"152 The Claimant in*** *Halley v The Law Society* [2003] EWCA Civ 97 ***sought to recover a sum deposited in the client account of a solicitor, in whose practice the Law Society had intervened on the grounds of suspected dishonesty.*** Mr Halley claimed that the sum represented commission paid in connection with (in his words) high yield investments programmes or (in the Society's words) bank instrument frauds. The judge at first instance found that the sum claimed was derived from fraud, in that the bank instruments for which the commission was paid were worthless, as Mr Halley and his colleagues were aware. The Court of Appeal upheld the judge's decision to dismiss Mr Halley's claim, albeit on grounds different from those relied on by the judge .
>
> ***153 Carnwath L.J. (with whom Mummery L.J. and Hale L.J. agreed) concentrated on the Law Society's submission that the "contract" into which the client of Mr Halley entered was no more than "a dishonest device to obtain money".*** As he explained (at para.45):"
>
> " ***The submission, as I understand it, is that this is not simply a case of a valid contract being induced by fraud; but that the fraud so infected the whole transaction that it had no legal effect at all.*** The "contracts" were in reality no more than devices to extract money by fraud; in Mr Dutton's words —
>
> " ***The "agreements" were fictitious contracts.*** They were as the judge found merely part of an elaborate charade (or mechanism) by which the loser was persuaded to part with his money."
>
> ***The position, accordingly, is said to be "akin to theft".*** Where property is stolen, no beneficial interest passes to the thief. Mr Dutton submits that the same applies where money is extracted by fraud, otherwise than under a legally enforceable contract ."
>
> ***He considered the case of*** *Twinsectra Ltd. v Yardley* [2002] 2 AC 164 ***and continued as follows:-***
>
> ***"47. In my view, however, there are important distinctions between that case and the present. In that case, there was a straightforward contract of loan, under which legal and beneficial interest in the money passed to Mr***

Yardley (subject only to a "purpose" trust, which does not affect the present argument). The contract may have been induced by the fraud, but it was not itself the instrument of fraud. In this case, the contract has been held to be the instrument of fraud, and nothing else. The elaborate documentation was, in the words of the judge, "no more than a vehicle for obtaining money by false pretences" (para 119). … .

48. In such a case, it is meaningless to impose a requirement for the fraudster to be notified of "rescission". From the fraudster's point of view there is nothing to rescind; for practical purposes, he has parted with nothing of value and incurred no obligations; the victim is left with some documents which, from the outset, were known and intended by the other party to be worthless. …. Subject to any direct authority, I see no reason why it should not be regarded as a simple case of "property obtained by fraud", in Lord Browne-Wilkinson's terms ."

Carnwath L.J. concluded that there was no direct authority to the contrary and therefore upheld the Law Society's submission .

154 Mr Santos-Costa submitted by reference to *Esteem and Republic of Brazil v Durant International Corporation* [2012] JRC 211 ***that the decision of the Court of Appeal in Halley also represented the law of Jersey.*** Mr Preston agreed, as do we. The key question, therefore, is whether the arrangement in question between Joan and Mr Walsh can properly be described as, in the words of Carnwath L.J., "the instrument of fraud, and nothing else" ."

158 The issue I have to decide is whether the defendant is entitled to say that a Halley Trust does not arise and whether or not it is arguable that the contractual arrangements between the plaintiff and CCH were the instrument of fraud or whether there is a valid contract which the plaintiff was entitled to rescind on the basis of fraudulent misrepresentation. On the plaintiff's own case it was not aware of the fraud until the summer of 2007. Accordingly, it could not have elected to rescind the Agency Agreements before this date.

159 Furthermore, Mr Lyons in his affidavit at paragraph 16 accepts that approximately US 150,000,000 was used for the purposes of trade financing. In other words in part monies advanced under the Agency Agreements were not fraudulent transactions. In light of paragraph 16, it is difficult to conclude that the fraud found by Flaux J. went to the entirety of the Agency Agreements so that they had no legal effect at all when Mr Lyons accepts at paragraph 16 that they had effect for some transactions.

160 However, that is not the end of the matter. This is because the Agency Agreements themselves simply define how CCH Europe as the agent appointed would act as agent. The Agency Agreements in particular defined how the agent for the plaintiff would buy and sell commodities based on funds provided by the plaintiff. The Agency Agreements were

also all in broadly similar terms. For the purposes of this judgment I therefore simply set out clauses 5–4 to 5–7 of an Agency Agreement (which clauses were in all the agreements in broadly the same terms) as follows:-

> *"5–4–1 The Agent shall send an Offer Letter to the supplier to purchase the commodities.* Such letter shall set out the following:-
>
> > *Quantity and general description of the commodities*
> >
> > *Cost price*
> >
> > *Shipment delivery terms 'FOB, CIF, C&F, FAS'*
> >
> > *Value Date*
> >
> > *Settlement instructions*
>
> *5-4-2 Upon receiving the Offer Letter described in Clause (5-4-2-0 THE Supplier shall send to the Agent, by facsimile message an acceptance letter confirming its acceptance to sell the commodities to the Agent and stating the following details:-*
>
> > *Quantity and general description of the commodities*
> >
> > *Cost price*
> >
> > *Shipment delivery terms 'FOB, CIF, C&F, FAS'*
> >
> > *Value Date*
> >
> > *Settlement instructions*
>
> *5–5 Following the purchase of the Commodities by the Agent on behalf of the Principal in the manner described on Clause (5–4) of this Agreement, the Agent shall sell them (as agent of the Principal) to the Ultimate Buyer and the Agent shall notify the Principal in writing of the following:-*
>
> > *Quantity and General description of the Commodities*
> >
> > *Name of Buyer*
>
> *Purchase Price (including cost price and the profit as more specifically described in Appendix (I) attached hereto).*
>
> *5–6 The Agent shall ensure that the Ultimate Buyer shall confirm to it that*
>
> *It has received the Commodities in good order and that they are conforming with the quantity, quality and description thereof and fit for the intended use and purpose.*
>
> *It irrevocably and unconditionally undertakes in writing in the Commodities'*

invoice(s) to remit the Sale Price on the Maturity Date to the Agents account No. 020069300 at Deutsche Bank, Dusseldorf.

5–7 Immediately following remittance of the Sale Price as set forth in Clause (5–6-ii), the Agent shall remit the same to the Principal's account No. 400–806533 at J.P. Morgan Chase Bank, New York."

161 What this means is that each Agency Agreement was the basis for CCH Europe as agent to enter into a series of individual contracts where CCH Europe was to buy and sell commodities. In respect of these arrangements each sale and purchase by the agent on behalf of the plaintiff was a separate contract. Where any such contract was fictitious, what was stated to the plaintiff to be genuine contracts to sell and purchase a particular commodity, these contracts can only be described as an instrument of fraud. This is what Flaux J effectively concluded at paragraphs 17 and 18 of his December Judgment set out at paragraph 22 above.

162 Again, therefore the defence the defendant wishes to run in reliance on the *Shalson v Russo* analysis cannot apply. The defence is based on the premise that the plaintiff and the defendant entered into contracts of sale and purchase under the umbrella of the Agency Agreements which contracts were procured by fraudulent misrepresentation. However, the findings of Flaux J are clear that the sale and purchase transactions entered into by the agent on behalf of the plaintiff under the authority granted by the Agency Agreements were fictitious and were induced by fraud. The consequence of this finding is that such contracts had no legal effect at all. As it was put in *Halley*, the contracts to buy and sell commodities were "in reality no more than devices to extract money by fraud". Flaux J also found that the fraud was ***"irrefutable"***. An equitable proprietary interest in favour of the plaintiff therefore immediately arose over monies drawn down under an Agency Agreement in respect of any fictitious contract of purchase and associated contract of sale. For the defendant to argue that the plaintiff can only trace from 2007 when it became aware of the fraud based on the contracts of sale and purchase being based on fraudulent misrepresentation is obviously unsustainable in light of Flaux J's clear findings and therefore must be struck out. The fictitious contracts were never transactions at all as distinct from a genuine transfer of title brought about by fraudulent misrepresentation.

163 In reaching this conclusion, the plaintiff will still have to prove what amount it is entitled to claim under each fictitious contract of purchase (and the associated fictitious sale contract), it will have to distinguish between fictitious as opposed to genuine contracts, and what sums the defendant received out of the fraud which it is entitled to recover. The defendant is therefore entitled to put the plaintiff to proof of these matters; what the defendant cannot do is deny the mechanism of the fraud or deny that an equitable proprietary interest arises in respect of fictitious contracts of purchase and sale at the moment such contracts were concluded and funds drawn down from the plaintiff pursuant to them.

164 This analysis therefore leads to the conclusion that I accept the submissions of Advocate Wilson set out at paragraph 145 above.

165 My conclusion in respect of this part of the judgment, is therefore as follows:-

(i) The defendant cannot challenge the finding of fraud of Flaux J;

(ii) The defendant cannot challenge his own admissions that fraud took place from about 2003;

(iii) The Pauline Action claim is limited to transfers into the trust made with the intent of defeating claims by the plaintiff to Proceeds Assets;

(iv) It is a live issue as to what sums are owed by the defendant representing Proceeds Assets and when such sums were first owed;

(v) The plaintiff will have to establish insolvency at the time of any transfer. This may not be straightforward because it requires the Royal Court to decide what was owed by the defendant to the plaintiff as a result of the fraud and when and how much was owed at the time of any transfer into the trust challenged by the plaintiff.

(vi) There may also be arguments on the effect of clause 12(4) of the RSA on what is said to be due from the defendant to the plaintiff at any point in time where any such sum is not a Proceeds Asset.

The claim in deceit

166 Finally, I turn to deal with the issues relating to the claim in deceit. This part of my decision relates to whether or not the matters pleaded at paragraph 22.7 of the defendant's amended answer should be struck out. Paragraph 22.7 is set out at paragraph 39 above.

167 In his skeleton argument filed for the hearing on 8 th February at paragraph 9.1 the defendant stated “that he was entitled to raise by way of complete defence “that the Bank's claims based on deceit do not satisfy the Jersey conflicts of law requirement of double actionability because they could not be sustained in the UAE once the Bank took to title to Plantation and was compensated according to the law of the UAE”.

168 The plaintiff in its responsive written skeleton dated 4th March, 2016 pursuant to directions given on 8 th February, 2016 stated it was advancing a claim in deceit as one of the bases for its equitable proprietary claim. At paragraph 5 the plaintiff made it clear that it was not relying on the tort of deceit as a free standing cause of action but rather as the foundation of its claim to have retained an equitable title, and so be entitled to trace. The deceit arose in connection with a contract (i.e. the Agency Agreements) and therefore the proper law of the equitable proprietary claim was the law applicable to the contract i.e. English law. Neither Sharia law nor UAE law were relevant. To the extent therefore the plaintiff had advanced a claim in deceit, it was simply part of the basis entitling it to trace because monies had been obtained by deception. In his final oral submissions Advocate

Wilson explained this analysis arose from the finding of fraud because such a finding includes a finding of deception which therefore entitled the plaintiff to trace.

169 Advocate Turnbull's argument in response was that the plaintiff was invoking the tort of deceit which entitled the defendant to invoke the double actionability rule i.e. the rule that the tort must be actionable in Jersey and in any place where the tort was committed. The defendant argued that this was the law of the UAE being the place where either the alleged tortious acts took place or which had the most significant relationship with the acts. Advocate Turnbull contended that the position was that the English common law position was clear which should be followed as a matter of Jersey law as set out in *Boys v Chaplin* [1971] A.C. 356.

170 The conclusion I have reached is that if the plaintiff was pursuing a claim on the basis of the *tort* of deceit then the defendant would be entitled to invoke the principle of double actionability, as it is clearly arguable that this principle reflects the English common law position and therefore is the Jersey common law position.

171 However, that is not the claim that the plaintiff is bringing. The plaintiff's claim is to trace on the basis of a finding of fraud set out in Flaux J's December judgment. The finding of fraud is characterised as one of the bases upon which the plaintiff asserts the right to trace following on from the finding of fraud. To allow the defendant to adduce evidence of UAE law in respect of a claim in tort that the plaintiff is not in fact pursing in my judgment would be an abuse of process. The defendant would be adducing evidence of a matter that was irrelevant. I have found as set out above that it is unarguable that a constructive trust is imposed on any Proceeds Assets that were held by the defendant as a result of the fraud. The tort of deceit does not need to be established for such a constructive trust to be imposed. Such a trust arises because of the fraudulent act itself and the defendant receiving a Proceeds Asset (if this can be proved). Deception is involved in a finding of fraud, but it is not necessary to prove the tort of deceit in order to trace property obtained as a result of a fraud. Accordingly, the matters raised by paragraph 22.7 of the defendant's amended answer are irrelevant and must be struck out. It is an abuse of process and a waste of cost and expense for the parties and the Royal Court to allow evidence and argument to be adduced in respect of an irrelevant issue.

172 The matters set out in paragraph 22.8 also fall away in so far as they go beyond the matters pleaded at paragraph 12.3 of the amended answer.

Conclusion

173 In conclusion for the reasons set out in this judgment:

(i) Those parts of the defendant's amended answer which plead Sharia law set out at paragraph 29 above are struck out together with paragraph 32.3. However if so

advised the defendant within 28 days may apply to re-amend its answer to plead that German law would recognise Sharia law, such an application to be supported by expert evidence on German law.

(ii) Those parts of the defendant's amended answer set out at paragraph 30 above which seek to challenge the finding of fraud made by Flaux J and to put the plaintiff to proof of fraud are also struck out.

(iii) As the plaintiff is not pursuing a claim in the tort of deceit then paragraphs 22.7 and 22.8 of the amended answer are also struck out.

(iv) The plaintiff's tracing claim however is limited to assets representing Proceeds Assets, as is its Pauline Action. The plaintiff is therefore required within 28 days to either amend its case or to provide a further and better statement of its case defining which Proceeds Assets it is said are owed by the defendant and when the defendant received the same.

(v) The plaintiff is further required to particularise within 28 days which Proceeds Assets it either seeks to recover under the Pauline Action or alternatively which transfers into the Trust the plaintiff seeks to set aside as being made with the intent to defraud the plaintiff of its claims to Proceeds Assets.

(vi) the plaintiff shall particularise within the same period by what date or dates it says that the defendant was insolvent including setting out how much money was owed by the defendant to the plaintiff and the date or dates on which such sum(s) came to be owed.

(vii) To the extent the plaintiff seeks to argue that more was owed by the defendant than represents Proceeds Assets to establish insolvency the plaintiff shall either plead or file a further and better statement of case setting out the basis why any such additional sum or sums is or was owed, including addressing the effect of Clause 12(4) of the RSA on any allegation of insolvency.

174 Finally I repeat my thanks to both counsel and those assisting them for the detail of their submissions in relation to this application.