

Case Note

Knowing receipt: the ‘continuing proprietary interest’

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Abstract

The principal question for the Court of Appeal in *Byers v The Saudi National Bank* was whether a claim in knowing receipt can succeed against a defendant who has received assets transferred in breach of trust, even though the effect of the transfer to the defendant was to extinguish or override the beneficiary's equitable proprietary interest. The judgment also considers the proper approach of an appellate court to a trial judge's findings on issues of foreign law.

Introduction

Where trust assets are transferred by the trustee to a third party in breach of trust, the trust beneficiary may assert a proprietary claim to the assets in the hands of the third party. Such a claim will succeed if the third party still holds the assets and cannot show that he has taken free of the beneficiary's interest under the applicable law of priorities. Alternatively, the beneficiary may assert that the third party has incurred personal liability as a knowing recipient, because the third party either knew of the breach of trust at the time of the transfer, or discovered while the assets were still in his possession that the transfer had been in breach of trust. An important advantage of the personal claim is that it may succeed where the proprietary claim is no longer available because the third party has

dissipated the assets. But can the personal claim succeed in a case in which a proprietary claim was never available, because the effect of the transfer to the third party was to extinguish or override the beneficiary's proprietary interest?

Where the proprietary effects of the transfer are governed by general equitable principles, the third party will take free of the beneficiary's proprietary interest only if the third party is a bona fide purchaser for value without notice. But there are other circumstances in which, notwithstanding knowledge of the breach of trust, the third party may have taken free of the beneficiary's interest. This may occur, for example, under a statutory title registration system, or where a foreign property law is applicable, or where the beneficiary's interest is overreached. In these situations, does the fact that the third party received the assets with knowledge that the transfer was a breach of trust entitle the beneficiary to a personal remedy in knowing receipt, even though the third party has obtained unencumbered title to the assets?

In *Byers v The Saudi National Bank*,¹ the Court of Appeal (Newey LJ, Asplin LJ and Popplewell LJ) held, dismissing the claimants' appeal against the decision of Fancourt J in *Byers v Samba Financial Group*,² that a ‘continuing proprietary interest’ is required for a knowing receipt claim to be possible. In other words, the claimant must have had an interest in the relevant property that survived the transfer to the defendant.

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1. [2022] EWCA Civ 43, [2022] 4 WLR 22. The judgment of the Court of Appeal, to which all three members of the Court contributed, was delivered by Newey LJ.

2. [2021] EWHC 60 (Ch). For a discussion of the decision of Fancourt J, see A Roxburgh, ‘Knowing receipt: a question of priorities’ (2021) 27 T & T 344.

A defendant who takes the property free of any interest of the claimant cannot be liable in knowing receipt.

The Samba/SNB litigation

The claim in *Byers* was brought by the joint official liquidators of Saad Investments Company Ltd ('SICL'), and by SICL itself, against Samba Financial Group ('Samba'), a Saudi Arabian bank. As a result of a merger which took place after the trial, but before the case reached the Court of Appeal, Samba ceased to exist, and its assets and liabilities were transferred to The Saudi National Bank ('SNB'). SNB was accordingly substituted for Samba as the respondent to the appeal.

SICL is a company incorporated in the Cayman Islands. According to the claimants, Mr Maan Al-Sanea, a Saudi Arabian citizen who was the chairman of SICL's board of directors, held substantial shareholdings in five Saudi Arabian banks, including Samba, on trust for SICL pursuant to various agreements and declarations of trust into which Mr Al-Sanea and SICL entered between 2002 and 2008. In September 2009, Mr Al-Sanea transferred substantial shareholdings in the same five banks to Samba, in partial discharge of his own liabilities to Samba, including his liabilities as guarantor of SICL.

In 2013, SICL and its liquidators brought proceedings against Samba in England, in which they asserted that the shares transferred by Mr Al-Sanea to Samba included shares held on trust for SICL, with a value in excess of US\$300 million. They sought a declaration that the transfer was void under section 127 of the Insolvency Act 1986 because it was a disposition of SICL's property made after the commencement of its winding-up. That claim failed in 2017, when the Supreme Court held in *Akers v Samba Financial Group*³ that the transfer of legal title by the trustee did not constitute a disposition of the beneficiary's equitable interest within the meaning of section 127.

Following the judgment of the Supreme Court, SICL and its liquidators brought a second claim in which they

alleged for the first time that Samba had known at the time of the transfer that the shares were held on trust for SICL, that a reasonable bank in Samba's position would have appreciated that the transfer was a breach of trust, and that Samba had recklessly failed to make inquiries about the transfer. They sought to hold Samba liable for knowing receipt under English or Cayman Islands law.

Samba denied the allegations of knowledge and pleaded numerous other defences. However, most of the issues raised by Samba's defence, including the factual questions as to whether Samba took with knowledge of the trusts, or was put on inquiry as to whether the transfer was a breach of trust, could not be tried because Samba was unable to provide complete disclosure of documents and as a result was required to defend the claim only on grounds that did not depend on disclosure. The trial therefore proceeded on the basis that SICL had held equitable proprietary interests in the disputed shares prior to the transfer, that Samba was not permitted to dispute the allegations of knowledge and failure to inquire, and that the personal claim against Samba was governed either by English law or by Cayman Islands law, which was not alleged to be different from English law in any relevant respect.

The decision of the trial judge

The effect of the transfer of the shares to Samba on property rights in the shares fell to be determined by Saudi Arabian law as the *lex situs* of the property. Samba's case at trial was that, under Saudi Arabian law, the effect of the transfer was that Samba obtained entire and unencumbered ownership of the shares. Further, Samba argued that, as a matter of English or Cayman Islands law, a claim in knowing receipt cannot succeed where the claimant's equitable proprietary interest has been extinguished or overridden by the transfer to the defendant.

The trial judge, Fancourt J, accepted those arguments. On the issue of English law, he held that, absent a continuing proprietary interest in the shares at the

Law of the state
where assets are
located, for the
purpose of conflicts
of law/jurisdictional
disputes.

3. [2017] UKSC 6, [2017] AC 424.

time of Samba's registration, the pleaded claim in knowing receipt would fail. On the issue of Saudi Arabian law, he held that SICL had no continuing proprietary interest in the shares following the transfer capable of supporting a claim in knowing receipt. The Judge therefore dismissed the claim.

In case his decision were to be reversed on appeal and Samba were to be found liable to pay compensation to SICL, the Judge also considered a third issue concerning the valuation of the shares. The Judge held that the listed shares were not to be valued solely by reference to the quoted market price per share on the valuation date, but that a 'block discount' should be applied to reflect the fact that the size of each of the shareholdings was such that a sale of the whole shareholding on a given date would have required a bespoke transaction at a discounted price.

The appeal

The claimants appealed to the Court of Appeal on all three issues. They argued that it was not necessary for them to show that SICL had a continuing proprietary interest in the shares after the transfer to Samba in order for the claim in knowing receipt to succeed, that in any event as a matter of Saudi Arabian law SICL's interest in the shares was not extinguished by the transfer, and that the Judge was wrong to accept that a block discount should be applied in the valuation of the shares.

The judgment of the Court of Appeal

The law of knowing receipt

The Court of Appeal dealt first with the question of English law as to whether a claim in knowing receipt can lie against a recipient who has taken free of the claimant's equitable interest in the trust property.

The Court began its analysis with some introductory observations about liability in knowing receipt, starting with the statement of Hoffmann LJ in *El Ajou v Dollar Land Holdings plc*⁴ that, in order to establish a claim in knowing receipt, a claimant must show:

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

The last of these requirements was considered by the Court of Appeal in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*,⁵ where it was held that the recipient's state of knowledge must be ‘such as to make it unconscionable for him to retain the benefit of the receipt’ but that dishonesty is not a prerequisite of liability.

Thus liability in knowing receipt derives from the combination of receipt of trust property and a state of knowledge on the part of the recipient that makes it unconscionable for him to retain the benefit of the receipt. The recipient need not have known of the breach of trust at the point of receipt, since liability may arise where after receiving the property the recipient acquires the requisite knowledge. But a recipient will escape liability if he no longer has the property by the time he learns of the breach of trust. As the Court put it in *Byers*, ‘[k]nowledge and possession must . . . coincide for liability to arise’.

Further, since receipt of trust property is the ‘gist of the action’,⁶ the defendant must have received trust assets and not merely benefited from them. For example, there would be no liability in knowing receipt where a trustee had wrongfully spent money on a holiday for the defendant but none of the money had ever passed through the defendant's hands.

4. [1994] 2 All ER 685, 700g.

5. [2001] Ch 437, 455E.

6. *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 [89].

Against this background, the Court turned to consider whether a knowing receipt claim was possible where, although the defendant has or had property which was formerly trust property, the claimant never had a proprietary claim in respect of it against the defendant. Upholding the decision of the trial judge on this issue, the Court held that a claim in knowing receipt cannot succeed in those circumstances. It is necessary for the claimant to have had a continuing proprietary interest in the relevant property after the transfer to the defendant. The main elements in the reasoning that led to this conclusion were as follows.

Receipt of trust property

The Court of Appeal recognised that there might be said to be an ambiguity in the proposition that, for a knowing receipt claim to succeed, the defendant must have received trust property. It might mean either that the property in question had to have been subject to a trust when in the defendant's hands or that it sufficed for the property to have been so subject up to the point when it was transferred to the defendant.

Yet, as the Court of Appeal pointed out, it was difficult to see why such significance should be attached to the requirement for receipt of trust property if it were enough that the property had been subject to a trust before it reached the defendant. Why, the Court asked, should it be crucial that the defendant had possession of property that had been subject to the trust if it never had to be so subject when held by the defendant?

The Court posited the example of a case of overreaching, in which on a sale of property the purchaser took free of the beneficiary's interest, which instead attached to the proceeds of sale. The claimants argued that the

purchaser could potentially be liable in knowing receipt, but the Court found it 'not obvious' that this could be so, given that the effect of overreaching is to free the property from any trust encumbrance, and that the purchaser could not have been liable for knowing receipt if he had merely benefited from the property without receiving it.⁷

On the other hand, the claimants accepted that a knowing receipt claim would not lie against a bona fide purchaser for value without notice. While they explained this on the ground of the bona fide purchaser's lack of knowledge of the trust, the Court of Appeal noted that in *Macmillan Inc v Bishopsgate Investment Trust plc (No. 3)*⁸ Millett J considered that bona fide purchase for value without notice provided a defence to a knowing receipt claim because the defendants had taken free of Macmillan's interest. In other words, even apart from questions of knowledge and unconscionability, the fact that the bona fide purchaser takes free of the claimant's interest precludes a claim in knowing receipt.⁹

Authorities on the 'continuing proprietary interest'

The Court of Appeal agreed with the view of Fancourt J that there was a consistent line of case law in which it had either been decided that a claim in knowing receipt cannot succeed unless the claimant has a continuing proprietary interest following the impugned transfer or that had been assumed to be correct. The Court referred in particular to four previous decisions: *Macmillan*,¹⁰ *Lightning v Lightning Electrical Contractors Ltd*,¹¹ *Akers*¹² and *Courtwood Holdings SA v Woodley Properties Ltd*.¹³

In *Macmillan*, proprietary and personal claims were brought against three banks by Macmillan, which

7. As is stated in L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (T Fletcher ed, 20th edn, Sweet & Maxwell 2020) para 42-047: 'The general effect of overreaching is to exclude a knowing receipt claim in relation to the property transferred in breach of trust, because the transfer frees the property from the interests and powers in favour of the beneficiaries'.

8. [1995] 1 WLR 978.

9. To similar effect, see *Lewin on Trusts* (n 7) para 42-044: 'If the beneficial title does pass to the recipient there is no occasion for the imposition of liability in equity on the recipient under the knowing receipt head of constructive trusteeship'.

10. [1995] 1 WLR 978.

11. (2009) 23 TLI 35.

12. [2017] UKSC 6, [2017] AC 424.

13. [2018] EWHC 2163 (Ch).

claimed to be the beneficial owner of shares that had been pledged to the banks without Macmillan's consent. Millett J held as follows:

'In respect of the Berlitz shares there was no relationship of any kind between Macmillan and any of the defendants. There is no equity between them. In the absence of such an equity, any liability of the defendants to restore the shares or their proceeds or to pay compensation for their failure to do so must be based upon Macmillan's continuing equitable ownership of the shares. In the language of restitution, Macmillan's claim must rest upon "an undestroyed proprietary base." Such a claim cannot succeed against a party who has under the applicable law acquired a title¹⁴ to the shares which is superior to that of Macmillan.'

The Court of Appeal in *Byers* was satisfied that the claims in *Macmillan* had included a claim in knowing receipt, the outcome of which, in the view of Millett J, depended on Macmillan being able to defeat the banks' contention that they had taken free of Macmillan's interest. Further, when *Macmillan* had reached the Court of Appeal, it had held, consistently with Millett J's analysis, that the issue in the case was whether the banks had a defence to both the proprietary and personal claims on the ground that they were purchasers for value in good faith without notice of Macmillan's claim.¹⁵

In *Lightning*, Peter Gibson LJ cited with approval the judgment of Millett J in *Macmillan* and stated that, in a case in which property is transferred to a third party with notice of an equity but, by the *lex situs* governing the transfer, the transfer extinguished the equity, the court would not give relief against the third party.¹⁶

In *Akers*, Lord Mance (with whose judgment the other members of the Supreme Court agreed) held that the decision of the Court of Appeal in *Macmillan* established

that, where under the *lex situs* of the relevant trust property, the effect of the transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise subsist, that effect should be recognised as giving the transferee a defence to 'any claim by the beneficiary, whether proprietary or simply restitutive'.¹⁷ Hence, as the Court of Appeal concluded in *Byers*, the availability of even a personal claim against a third party transferee depends on the continued existence of an equitable interest following the transfer.

Finally, in *Courtwood*, Nugee J held that, in a knowing receipt claim, 'what gives the equity to the claimants is not the knowledge of the defendants by itself, or antecedent breaches of duty, but the fact that the transaction which is impugned is not one which transfers a good title to the recipient'.¹⁸

The custodial and restorative obligations of a knowing recipient

The Court of Appeal in *Byers* derived further support for its conclusion that a continuing proprietary interest is required for a successful claim in knowing receipt from cases which describe the obligations of a knowing recipient as 'custodial' and 'restorative'. In *Arthur v Attorney General of the Turks and Caicos Islands*,¹⁹ Sir Terence Etherton stated that the knowing recipient is 'subject to custodial duties which are the same as those voluntarily assumed by express trustees'; in *Williams v Central Bank of Nigeria*,²⁰ Lord Sumption said that the knowing recipient's 'sole obligation of any practical significance is to restore the assets immediately'; and in *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd*,²¹ Lord Sumption and Lord Briggs described the liability of a knowing recipient as 'essentially a custodial liability comparable to that of an express trustee'.

14. [1995] 1 WLR 978, 989C.

15. [1996] 1 WLR 387, 398H-399A (Staughton LJ).

16. (2009) 23 TLI 35, 38.

17. [2017] UKSC 6, [2017] AC 424 [20].

18. [2018] EWHC 2163 (Ch) [201].

19. [2012] UKPC 30 [37].

20. [2014] UKSC 10, [2014] AC 1189 [31].

21. [2017] UKPC 36, [2018] Bus LR 1595 [58].

As the Court of Appeal observed, while it makes sense to think of a knowing recipient owing such duties in circumstances where the property is subject to a prior interest, it is much more difficult to see why a recipient should be bound to restore property, or have custodial responsibilities in respect of it, if his title to it is unimpeachable.

Unconscionability of retention

A related point was that, as was established in *Akindele*, the mental element required to establish a claim in knowing receipt is that the state of knowledge of the recipient makes it unconscionable for him to retain the property. The Court of Appeal considered that 'if the law treats the receipt of property as conferring unencumbered title on the recipient, it is difficult to see why retention should be regarded as unconscionable'.

Land registration

The Court of Appeal noted that differing views had been expressed about the availability of knowing receipt claims against a registered proprietor of land. Section 29 of the Land Registration Act 2002 has the consequence that a transferee for valuable consideration of registered land will take free of prior equitable interests, even if he had notice that the transfer was in breach of trust, unless the beneficiaries were in actual occupation at the time of the disposition. In a number of its reports,²² the Law Commission had suggested that a transferee of registered land with statutory protection against the beneficiaries' equitable interests might nevertheless be exposed to a claim in knowing receipt, and the view of the Law Commission was reflected in the Explanatory Notes

to the 2002 Act.²³ On the other hand, Conaglen and Goymour had analysed the issue and reached the opposite conclusion.²⁴

The Court of Appeal found it unnecessary to determine the effect of registration under the 2002 Act on claims in knowing receipt. The Court did, however, note that the Law Commission had been incorrect to treat *Arthur* as authority supporting its view on the point.

Conclusion

For the reasons summarised above, the Court of Appeal decided that a continuing proprietary interest is required for a knowing receipt claim to be possible. A defendant cannot be liable in knowing receipt if he takes the property free of any interest of the claimant.

The effect of the transfer under Saudi Arabian law

The Court of Appeal then turned to consider the challenge to the Judge's finding that, on an application of Saudi Arabian law, SICL had no continuing proprietary interest in the shares following the transfer to Samba.

The transfer of the shares in the five banks was effected by registration of the shares in Samba's name, either (in the case of the four banks whose shares were publicly listed) at the Securities Depository Centre (SDC) established by the Saudi Arabian Capital Market Regulation of 2003, or (in the case of the fifth bank) in the bank's register of shareholders in accordance with the Saudi Arabian Companies Regulation of 1965.

The Judge had held that the registration of Samba as the owner of the listed shares was conclusive unless and until the SDC register was rectified, and that the register would not be rectified in order to give effect to off-

22. Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998) para 3.48; Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 4.11; Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) paras 5.149–150. See also M Dixon, 'Knowing Receipt, Constructive Trusts and Registered Title' (2012) 76 Conv 439; N Hopkins, 'Recipient Liability in the Privy Council' (2013) 77 Conv 61.

23. Explanatory Notes to the Land Registration Act 2002, para 59.

24. M Conaglen and A Goymour, 'Knowing Receipt and Registered Land' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 159.

market transactions such as those between Mr Al-Sanea and SICL. As to the unlisted shares, the Judge was similarly not satisfied that it would be possible for SICL to obtain rectification of the register of shareholders against Samba on the ground that Mr Al-Sanea had transferred the shares without authority. These conclusions were based on the expert evidence on Saudi Arabian law heard at the trial, in particular concerning the effect of certain provisions in the Companies Regulation and the Capital Market Regulation relating to registration and its consequences.

The claimants invited the Court of Appeal to reach its own view of the effect of the Saudi Arabian legislation, based on agreed translations of the statutes. They argued that the Court of Appeal was in as good a position as the Judge to undertake this exercise, since there had been no issue between the expert witnesses as to Saudi Arabian principles of statutory construction.

The Court of Appeal firmly rejected this argument, pointing out that in general the task of the court is not to decide how it would itself interpret and apply a foreign statute, but instead to determine, on the basis of expert evidence, how the courts of the foreign jurisdiction would interpret and apply the statute. The wording of the statutory provision was to be considered only as part of the evidence and as an aid in deciding between conflicting expert testimony.²⁵

This principle was qualified in cases where the nature of the foreign law issue meant that the expertise of the English court approached that of a foreign law expert, for example where the foreign law was written in English or involved concepts similar to English law, as well as in cases where the foreign courts would be influenced by decisions of English courts on the issue.²⁶

But the Court of Appeal held that no such qualification could apply here. The interpretation and application of the legislation fell to be determined under an

unfamiliar system of law and against the background of practice and culture in the capital markets in Saudi Arabia, with which again the English court had no inherent familiarity. The expert witnesses had relied on numerous decisions of the Saudi Arabian courts in support of their respective contentions and the Judge had needed their assistance in explaining these cases in order to determine the issues before him.

The Court therefore held that it would have been 'wrong in principle, and impossible in practice, for the Judge to approach the task as one of interpreting the provisions for himself as a matter of construction' and that it would be equally wrong for the Court of Appeal to seek to do so.

The Court of Appeal could only interfere with the Judge's findings of fact on Saudi Arabian law in accordance with the principles applicable generally to findings of fact made by a trial judge based on evidence from witnesses.²⁷ Those criteria were not satisfied, since the Judge's conclusions were reasonably open to him on the evidence that he had heard, and there was nothing in his clear and detailed reasoning to suggest that his conclusions were wrong.

Share valuation

Although Samba had retained the disputed shares, SICL and its liquidators did not seek the return of the shares *in specie*. Instead, they claimed payment of their value, either at the date of the transfer in 2009 or at the date of judgment, together with the amount of any dividends or other income earned on them.

Fancourt J had rejected the claimants' argument that the measure of liability for substitutive performance must always be, or at least should on the facts before him be, the holding or investment value of the misappropriated asset, rather than a measure based on what

25. See *A/S Tallinna Laevauhisus v Estonian State Steamship Line* (1946) 80 Ll Rep 99, 107; *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289, 298; and *Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755, [2010] 2 WLR 805 [69].

26. See *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417 [12]-[13]; and *King v Brandywine Reinsurance Co (UK) Ltd* [2005] EWCA Civ 235, [2005] 2 All ER (Comm) 1 [68].

27. As to those principles, see *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 [114]; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 [67]; and *Walter Lilly & Co Ltd v Clin* [2021] EWCA Civ 136, [2021] 1 WLR 2753 [85]. In essence, as Carr LJ said in *Walter Lilly*, the finding of fact must be plainly wrong if it is to be overturned.

could be realised for the asset in a transaction. The shares were not alleged to have been held on a long-term investment strategy. If they had not been transferred to Samba, they would have been subject to realisation in the course of SICL's liquidation. **The Judge therefore concluded that a 'market value' basis of valuation should be applied.** A valuation on that basis of the listed shares would involve a block discount because, although it required an assumption that a transaction would take place between a willing buyer and a willing seller, there was no requirement to assume that the buyer would be willing to buy a large block of shares at the quoted price per share, contrary to known facts about average trading volumes.

In the light of the Court of Appeal's decision on the other issues, it was unnecessary for the Court to decide whether the Judge had been correct on the question of the block discount. However, while not deciding the point, the Court expressed some doubt about the Judge's conclusions. The Court stated:

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

Discussion

The judgment of the Court of Appeal in *Byers* provides clarity as to the nature of liability in knowing receipt. As the Court said, while it may be legitimate to refer to knowing receipt as a species of equitable wrongdoing, it is not based exclusively on fault.

Liability derives from the combination of the receipt of assets in which the claimant has a continuing proprietary interest with knowledge on the part of the defendant that makes it unconscionable for him to retain the benefit of the receipt. The claim cannot succeed against a defendant who has taken free of the claimant's interest.

In cases where the proprietary effects of the transfer are governed by foreign law, this may have the consequence that a third party who receives assets transferred in breach of trust is not liable as a knowing recipient, even though he knew of the breach of trust, because under the *lex situs* of the assets the transfer gave him unencumbered title to the assets, free of the beneficiary's interest. But that is a proper reflection of the recognition given by English private international law to the laws of foreign countries as governing the proprietary effects of transfers of assets situated in their territory. That recognition would be substantially undermined if the English court were to hold that the recipient in such circumstances, despite having obtained unencumbered title under the applicable law of property, was nonetheless under a personal obligation immediately to return the assets or pay their value as compensation.

This does not necessarily mean that the beneficiary is without a remedy, since if the conduct of the third party has been dishonest then a claim in dishonest assistance may be available, which does not depend on the retention of a proprietary interest by the beneficiary, or indeed on the transfer of any assets to the defendant.

The judgment also reaffirms the established principles on which the court determines questions of foreign law. With limited exceptions, such as cases where the foreign law is written in English and involves concepts similar to English law, the court should not undertake its own construction of a foreign statute, but should seek to determine with the assistance of expert evidence how the courts of the foreign jurisdiction would construe and apply it, using the wording of the statute only as part of the evidence and as an aid to deciding between conflicting expert evidence. An appellate court will be slow to interfere with findings of fact on foreign law

made by a trial judge based on the evidence of expert witnesses.

Having decided to dismiss the appeal, the Court of Appeal did not ultimately determine whether Fancourt J had been wrong in law to hold that, if Samba had been liable in knowing receipt, a block discount should be applied in the valuation of the listed shares. Nonetheless, it expressed reservations about that aspect of the Judge's decision on the ground that, in a case where the claim is for the value of an asset rather than its return *in specie*, the best measure of the sum necessary to restore the trust fund might be the cost of purchasing the asset rather than the amount that the asset would have fetched on a sale.

It will be recalled, however, that the shares were not alleged to have been held on a long-term investment strategy and that, if they had not been transferred to Samba, they would have been subject to realisation in the course of SICL's liquidation. If the block discount point were to arise again in another case on similar facts, the answer to the Court of Appeal's reservations might be that, in circumstances where the beneficiary does not wish to have assets restored to the trust *in specie*, the measure of compensation should not be the notional cost of restoring assets that will not in fact be restored, but instead the value that could have been realised from a sale of the assets on the relevant valuation date.

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