Attacks on trusts in civil law jurisdictions

Michael J. Ashdown*

Abstract

Modern trust litigation is distinctly international, but what happens when jurisdictions without an established law of trusts become embroiled in claims following the misapplication of trust assets? This article considers how the involvement of such non-trust jurisdictions affects claims to trace or follow equitable property rights, and in respect of dishonest assistance and knowing receipt. The latter is of particular significance in view of the 2022 decision of the Court of Appeal in *Byers v Saudi National Bank*—now headed for the Supreme Court—which held that actual, beneficial receipt is required to found a knowing receipt claim.

*

Modern trust litigation commonly has a distinctly international flavour: it is relatively uncommon for a substantial trust dispute about a sizeable fund to have no connection to any other jurisdiction, whether through the residence of beneficiaries, trustees or settlor, the location of trust assets, the law selected to apply to the trust in accordance with the original trust instrument, or otherwise. Where a claim is brought against the trustees or a third party this international dimension may give rise to questions of jurisdiction and choice of law, especially where the trust law of the potentially relevant jurisdictions differs in an important respect e.g. the length of any applicable limitation period. But where one of these jurisdictions is a civil law jurisdiction which does not recognise the existence of trusts at all (referred to in this article as a "non-trust jurisdiction"), this can raise more fundamental questions.

This article will focus on the involvement of non-trust jurisdictions in the claims which typically follow a misapplication of trust assets, namely proprietary claims to recover trust assets from third parties, dishonest assistance claims, and knowing receipt claims. The latter is of particular pertinence in view of the Court of Appeal's decision last year in *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22, which concerned a knowing receipt claim against a Saudi Arabian bank (and in relation to which permission to appeal to the Supreme Court was given on 3 October 2022). In looking at each type of claim in turn, this article will focus in particular at the extent to which such a claim—which would succeed in England, or another jurisdiction with a developed law of trusts—can be thwarted by the involvement of a non-trust jurisdiction.

Proprietary claims to recover trust assets

In relation to proprietary claims, the central question is whether it is possible to recover trust assets (or their traceable proceeds) which have passed through, or remain located in, a non-trust jurisdiction. Or put another way: can a defendant to a proprietary claim assert the non-existence of trusts in a relevant jurisdiction as a complete defence to a proprietary claim?

In a purely domestic case, the court would address three key questions. First, has there been a relevant

*Michael J. Ashdown, Wilberforce Chambers, 8 New Square, Lincoln's Inn, London WC2A 3QP, UK. Email: mashdown@wilberforce.co.uk

https://doi.org/10.1093/tandt/ttad021
Advance Access Publication 5 May 2023

breach of trust? There is no proprietary claim against a recipient where the transfer is a wholly proper one e.g. pursuant to a valid exercise of a power of appointment. Second, can the claimants trace their property into the hands of the defendant? This is where the familiar rules about substitutions and mixed funds come in. Third, does the defendant nevertheless have an impregnable title to the property representing the traceable proceeds of the trust assets e.g. because he or she is a *bona fide* purchaser for value without notice of the breach of trust[1] (or, if the property is registered land, is protected by section 29 of the Land Registration Act 2002).

Where there is an international element, the Court is still interested in answering these questions, but must establish which law applies to each. The starting point will be the law applicable to the trust. Where the trust is an express trust,[2] that will be worked out in accordance with the Convention On The Law Applicable To Trusts And On Their Recognition ("the Convention"), as set out in the Schedule to the Recognition of Trusts Act 1987. This will ordinarily be the law expressly chosen by the settlor.[3] Where there is no express choice, there may be an implied choice. Where there is no choice at all, article 7 of the Convention provides for the trust to be "governed by the law with which it is most closely connected".

The governing law of the trust will ordinarily provide the answer to the first and second questions. As to the first, article 8 of the Convention provides for the governing law to apply to the rights, duties and powers of the trustees, and their relationship with and liability to the beneficiaries. It follows that whether there has been a breach of trust is to be answered by reference to the governing law.

On the second, there is no clear authority on the choice of law rule for tracing. This is perhaps unsurprising given the well-known dictum of Lord Millett that "neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property . . .".[4] But *Dicey, Morris & Collins: Conflict of Laws* ("Dicey") takes the view that whether it is possible to trace into a particular should be governed by the "*lex causae*",[5] which, in the sort of claim envisaged here, may be the governing law of the trust.[6] This also appears to be the intended effect of the first sentence of article 11(3)(d) of the Convention, which provides that recognition of a trust "shall imply in particular—. . . (d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets".

The third question is different, because it is fundamentally about property rather than breach of trust: has the defendant obtained an impregnable title as a matter of property law, notwithstanding the existence of the breach of trust and the claimants' ability to trace into whatever property is now in the hands of the defendant? Article 11(3)(d) of the Convention continues (after the sentence already quoted): "However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum." What this appears to mean is that—perhaps unsurprisingly—the property question must be answered by reference to the property choice of law rule, namely the application of the *lex situs*.[7] This was confirmed, *obiter*, by Lord Mance in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 at [20], holding that: It is established by Court of Appeal authority (and was not challenged on this appeal) that, where under the lex situs of the relevant trust property the effect of a transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise subsist, that effect should be

第三個問題是不同的，因為它是關於財產而不是違反信任的根本問題：儘管存在違反信任，並且索賠人有能力追蹤被告現在掌握的任何財產，但作為財產法問題，被告是否獲得了堅不可摧的所有權？

1. *Foskett v McKeown* [2001] 1 AC 102 at 128.
2. Pursuant to article 3 of the Convention, which provides that the Convention applies only to "*trusts created voluntarily and evidenced in writing*". Section 1(2) of the Recognition of Trusts Act 1987 extends the scope of the Convention for English law purposes to "*any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere.*" But for present purposes, this article is concerned only with express trusts falling within article 3.
3. Article 6 of the Convention.
4. *Foskett v McKeown* [2001] 1 AC 102 at 128.
5. *Dicey, Morris & Collins: Conflict of Laws* (16th edn) at 36-098.
6. Though this is very uncertain: it could also be said to be the *lex situs* of the assets claimed.
7. See *Dicey, Morris & Collins: Conflict of Laws* (16th edn) at 29-057.

recognised as giving the transferee a defence to any claim by the beneficiary, whether proprietary or simply restitutionary: *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387.

Where, then, does this leave the claimants who wish to bring a tracing claim to obtain the traceable proceeds of English trust property which are now to be found in, or to have passed through, a non-trust jurisdiction?

First, it is clear from the Supreme Court's decision in *Akers v Samba* [2017] UKSC 6, [2017] AC 424 that there can be a valid English law trust where the trust assets are located in a non-trust jurisdiction. Lord Mance followed the earlier decision of Roth J in *Luxe Holding Ltd v Midlands Resources Holding Ltd* [2010] EWHC 1908 (Ch) in holding (at [34]) that "It is clear therefore, that in the eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction, the law of which does not recognise trusts in any form".

Second, it is likewise clear that it does not matter that the property has merely passed though a non-trust jurisdiction. In *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717,[8] Millett J rejected (at 736–37) the submission that tracing through non-trust jurisdictions was not possible, holding that "the plaintiff's ability to trace his money in equity is dependent on the power of equity to charge a mixed fund with the repayment of trust moneys, not upon any actual exercise of that power" and further that: An English court of equity will compel a defendant who is within the jurisdiction to treat assets in his hands as trust assets if, having regard to their history and his state of knowledge, it would be unconscionable for him to treat them as his own. Where they have passed through many different hands in many different countries, they may be difficult to trace; but in my judgment neither their temporary repose in a civil law country nor their receipt by intermediate recipients outside the jurisdiction should prevent the court from treating assets in the legal ownership of a defendant within the jurisdiction as trust assets.

Third, and most importantly, this does not mean that the non-trust jurisdiction is irrelevant. In some cases, the trust property (or traceable proceeds) will do more than merely pass through. In some cases, there will be a transaction in the non-trust jurisdiction which, in accordance with its law, confers on the recipient (typically a purchaser) an impregnable title.

The existence of such rules is hardly surprising: English law has such rules in the form of the *bona fide* purchase without notice rule, and section 29 of the Land Registration Act 2002. It used to have the doctrine of sale in market overt (abolished as recently as 1995). Other jurisdictions' rules may look different, but they represent the same kind of policy choice: that in certain defined cases a purchaser should be protected, even as the expense of the previous owner. Consequently, where there is a disposition of trust property (or its traceable proceeds) and the *lex situs* confers on the disponee an impregnable title which overrides any prior rights to the property, that will defeat a proprietary claim.[9]

Dishonest assistance

In sharp contrast to the position in relation to proprietary claims, dishonest assistance is fundamentally a species of equitable wrongdoing, said to be akin to a common law tort. In the leading case of *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, Lord Nicholls held that "A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation".[10] There is no need for the dishonest assistant ever to have received, or even to have had contact with, any trust property.

It is perhaps unsurprising, therefore, that the common law applied the tort choice of law rules.[11] It is likely that the same result would now follow from the Rome II Regulation on the Law Applicable to Non-Contractual

8. Although Millett J was reversed by the Court of Appeal, that did not concern this aspect of his judgment: [1994] 2 All ER 685.
9. See *Akers v Samba* [2017] UKSC 6, [2017] AC 424 at [20]-[21]. See also: *Lewin on Trusts* (20th edn) at 44-062; *Dicey, Morris & Collins: Conflict of Laws* (16th edn) at 29-057.
10. *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 392.
11. *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [223].

Obligations.[12] Article 4(1) provides for the application of "the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred". This may not be entirely straightforward to work out on the facts on a dishonest assistance claim: it may be the place where misappropriated trust assets were prior to their misappropriation, or where they are received by a dishonest assistant.[13] In some cases, a close link between the dishonest assistance and the underlying trust, and breach of trust, may lead to the application of article 4(3), which provides that where the wrong is "manifestly more closely connected" with another jurisdiction, that law may apply. This could provide a basis, in some cases, for applying the governing law of the trust, ascertained in accordance with the Convention.

In consequence, there is limited scope for the involvement of a non-trust jurisdiction to cause the kind of fundamental difficulty that can arise in relation to proprietary claims. A well-advised claimant will doubtless, where possible, seek to avoid a finding that the applicable law is that of a non-trust jurisdiction, where other connecting factors are available. But even where it is, it does not automatically follow that an alleged dishonest assistant would not be liable if the applicable law is that of a non-trust jurisdiction, such as where the non-trust jurisdiction does recognise a liability for procuring, assisting or conspiring in relation to the misappropriation of another's property. Difficulties of enforcement may arise if the dishonest assistant is out of the jurisdiction, but they are just the normal difficulties of international litigation, and are not peculiar to trust disputes involving non-trust jurisdictions.

Knowing receipt

Finally, we turn to the law of knowing receipt, which is the context in which the issues this article is concerned with have most recently been considered. Before turning to the Court of Appeal's decision last year in *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22 it is important to appreciate how multi-jurisdiction knowing receipt claims operate.

The starting point is the English law of knowing receipt. This is described by the authors of *Lewin on Trusts* as comprising six elements:[14]

1. There is property subject to a trust.
2. The property is transferred.
3. The transfer is in breach of trust.
4. The property (or its traceable proceeds) is received by the defendant.
5. The receipt is for the defendant's own benefit.
6. The defendant receives the property with knowledge that the property is trust property and has been transferred in breach of trust, or if not a bona fide purchaser of a legal estate without notice, retains the property, or deals with it inconsistently with the trust, after acquiring such knowledge.

These requirements are not particularly controversial. But the characterisation of the knowing receipt claim remains disputed. It is clear that it is not simply an incident of the proprietary claim to recover the trust property, since a knowing receipt claim fails against an innocent volunteer without notice: *Re Montagu's Settlement Trusts* [1987] Ch 264.[15] But it is far from clear whether knowing receipt is fundamentally about (i) liability for wrongdoing by the recipient, who commits an equitable wrong when he or she receives, retains or deals with property known to have been transferred in breach of trust, or (ii) restitution for unjust enrichment, the recipient being enriched at the beneficiaries' expense, but having a defence of innocent change of position where he or she has disposed of the trust property without knowledge of the breach of trust. Despite some judicial support for the unjust enrichment

12. The Rome II Regulation is retained in English law for the time being pursuant to section 3 of the European Union (Withdrawal) Act 2018, as amended by The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 SI 2019/834.
13. *Dicey, Morris & Collins: Conflict of Laws* (16th edn) at 36-061.
14. *Lewin on Trusts* (20th edn) at 42-023.
15. *Re Montagu's Settlement Trusts* [1987] Ch 264 at 276.

approach,[16] it is apparent that fault-based liability for wrongdoing is ascendant at present.[17]

This tension in English domestic law leads to a potential difficulty in applying choice of law rules: is the applicable rule the tort/delict rule in article 4 of the Rome II Regulation, or the unjust enrichment rule in article 10? Dicey's view is that, though there is uncertainty, the better view is that the unjust enrichment rule applies. Assuming the parties are not habitually resident in the same country (in which case the law of that country applies under article 10(2)), the applicable law, pursuant to article 10(3), will be "the law of the country in which the unjust enrichment took place", which will usually be where the assets transferred in breach of trust were received (or, in cases where subsequent dealing following innocent receipt is relied upon, where that subsequent dealing took place). That choice of law can, however, be displaced by the governing law of the trust if it can be established, pursuant to article 10(4), that the "non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with" the country subject to that governing law.

Against this background, what is the significance of the involvement of a non-trust jurisdiction in an international knowing receipt claim? If the applicable law is the law of a non-trust jurisdiction, there must be a serious question as to whether any claim akin to a knowing receipt claim would be available at all: that would depend on the domestic law of that jurisdiction. The more practically important, and perhaps more interesting, question though is how the involvement of a non-trust jurisdiction can have an impact even when the law applicable to the knowing receipt claim is English law (or the law of another jurisdiction with an established law of trusts which includes claims for knowing receipt).

The answer is that, even where the knowing receipt claim is governed by English law, it can go to the very heart of the claim, namely the question of whether the defendant has received trust property at all.

The defendant who is sued in England in respect of his or her receipt of trust property in a non-trust jurisdiction can say: "What trust property? I have an impregnable title to this property, conferred by the law of the jurisdiction in which I obtained it." That may well be correct as a matter of the domestic law of the place of receipt. But is it a defence before the English court?

In *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22, the Court of Appeal said "yes". The claimants were Saad Investments Company Ltd (SICL), a Cayman Islands company, and its joint liquidators. They alleged that shares in a Saudi Arabian bank had been held on trust for SICL by Mr Maan Al-Sanea, and that in breach of trust Mr Al-Sanea transferred the shares to Samba Financial Group ("Samba") and had them registered in Samba's name. The defendant had subsequently assumed the assets and liabilities of Samba.

The issues at trial before Fancourt J were limited because Samba had failed to comply with a disclosure order and was debarred from defending except on specific grounds. The claimants pleaded that the applicable law of the knowing receipt claim was the law of England or the Cayman Islands. The defendant, although not disputing that its state of knowledge was sufficient to establish liability in knowing receipt (and dishonesty was not alleged), contended (i) that the effect of Saudi Arabian law, which was said to govern the transfer of the shares to Samba (as *lex situs*), was to extinguish SICL's rights in the shares, and (ii) that if SICL had no continuing proprietary interest in the shares, it could have no claim in knowing receipt. Fancourt J acceded to both of these submissions and dismissed the knowing receipt claim.[18]

The Claimants appealed. On the effect of Saudi Arabian law, the Court of Appeal found no proper basis for interfering with Fancourt J's findings. As to whether

16. See e.g. *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 386 per Lord Nicholls: "*Recipient liability is restitution-based; accessory liability is not.*"

17. See *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 455–56. Nourse LJ considered that the knowing recipient is liable where the "*recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt*" (at 455) and expressed concern about a possible unjust enrichment analysis, doubting "*whether strict liability coupled with a change of position defence would be preferable to fault-based liability in many commercial transactions, for example where, as here, the receipt is of a company's funds which have been misapplied by its directors*" (at 456).

18. The defendant also raised a defence relating to the valuation of the shares, but that is not relevant to the points discussed in this article, and so is not considered.

a continuing proprietary interest is needed to found a knowing receipt claim, the Court of Appeal began by considering the nature of a knowing receipt claim in English law, holding that:

> Liability in knowing receipt thus derives from the combination of "the beneficial receipt . . . of assets which are traceable as representing the assets of the plaintiff" and "the recipient's state of knowledge" having been "such as to make it unconscionable for him to retain the benefit of the receipt". Neither is enough on its own. While it is essential that the defendant should have "received the property of another", liability is not considered to be "triggered by the mere fact of receipt"; there must also be unconscionability. On the other hand, dishonesty is not required: the fact that the defendant must have received relevant property makes a lesser test of fault appropriate.[19]

It therefore rejected the argument that actual receipt was not required, and that "it can suffice for liability that the defendant benefited from trust property regardless of whether he actually received such property".[20] There must be actual, beneficial, receipt, even if the recipient has subsequently parted with the assets (this being the key difference from the purely proprietary claim, which seeks assets still in the defendants' hands, without proof of wrongdoing being required).[21]

On the central issue, whether a continuing proprietary interest is required, the Claimants alleged that Fancourt J had introduced this as an "additional requirement, previously unknown to the law".[22] The nub of the Claimants' analysis[23] was that knowing recipient is "a species of equitable wrongdoing in which liability is based on the defendant's fault" and that the recipient's conscience is affected just the same whether or not the effect of the transfer to the recipient has the effect of overriding the beneficiary's proprietary right in the property transferred. It was said that "the right of a beneficiary to bring a personal claim for knowing receipt is not dependent or parasitic on any property right he might have".

This was rejected by the Court of Appeal, for reasons which can helpfully be considered under four headings.[24]

First, as a matter of authority the Court of Appeal considered that the need for a continuing proprietary interest was already established. The Court of Appeal relied on the decision of Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 that a personal (i.e. knowing receipt) claim as well as a proprietary claim could be defeated by the *bona fide* purchaser defence, and this had been implicitly endorsed by the Court of Appeal [1996] 1 WLR 387.[25]

It also noted that this approach appeared to have been confirmed by Lord Mance JSC in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 who held that:

> It is established by Court of Appeal authority (and was not challenged on this appeal) that, where under the lex situs of the relevant trust property the effect of a transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise subsist, that effect should be recognised as giving the transferee a defence to any claim by the beneficiary, whether proprietary or simply restitutionary: *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387.[26]

Second, the Court of Appeal relied upon the analysis of knowing receipt set out by Professors Charles Mitchell and Stephen Watterson in "Remedies for Knowing Receipt" in *Constructive and Resulting Trusts* (2010), noting that this analysis had been adopted by Sir Terence Etherton MR in *Arthur v Attorney General of*

19. *Byers v Saudi National Bank* at [18].
20. *Byers v Saudi National Bank* at [21]–[22].
21. *Byers v Saudi National Bank* at [23].
22. *Byers v Saudi National Bank* at [28].
23. *Ibid.*
24. NB that this is done here for the purpose of exposition: the Court of Appeal does not separate its reasons in this way.
25. *Byers v Saudi National Bank* at [38]–[40]
26. *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 at [20]. See *Byers v Saudi National Bank* at [55]–[56].

the Turks and Caicos Islands [2012] UKPC 30, holding that: "The recipient's personal liability to account as a constructive trustee by virtue of knowing receipt means that the recipient is subject to custodial duties which are the same as those voluntarily assumed by express trustees: see "Remedies for Knowing Receipt' by Charles Mitchell and Stephen Watterson in Constructive and Resulting Trusts (ed Charles Mitchell, 2010). The recipient's core duty is to restore the misapplied trust property."[27]

The analysis set out by Professors Mitchell and Watterson is, in essence, that when a recipient is made liable "as a constructive trustee" this is not just an analogy, or an archaic form of words. It means what it says: "because of the circumstances in which knowing recipients acquire title to the misapplied property, Equity fixes them with custodial duties which are the same as some of the duties which are voluntarily assumed by express trustees."[28] The Court of Appeal noted that it is a "key premise underlying Mitchell and Watterson's account of knowing receipt is that the beneficiaries still had an equitable interest in the relevant property at a time when the defendant had knowledge of the breach of trust".[29]

The existence of the "custodial duties" they describe is also supported by *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 at [81], where Lloyd LJ referred to the duty of a recipient of trust property who has notice of the beneficiaries' interest "not to part with the remaining funds (and the traceable proceeds in her hands of any which had already gone) otherwise than by restoring them to or for the benefit of the beneficiaries", and by *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at [31], where Lord Sumption JSC said in relation to a knowing recipient that "[h]is sole obligation of any practical significance is to restore the assets immediately".

Third, the Court of Appeal considered how the law of knowing receipt would operate if there was no requirement of a continuing proprietary interest, and concluded that "it is hard to see why such significance should be attached to the requirement for receipt of trust property if it were enough that the property should have been subject to a trust before it reached the defendant".[30] The Court asked rhetorically:

> If all that mattered was that the claimant should once have had an interest in the property, why should a defendant be liable for knowing receipt if he still had it when he learned that it had been transferred to him in breach of trust but escape liability entirely, regardless of any issue as to unconscionability, if he had already exhausted it through personal expenditure? Why should it be crucial that the defendant had possession of property that had been subject to the relevant trust if it never had to be so subject when held by the defendant?[31]

Fourth, the Court of Appeal concluded that it was difficult to see how a recipient with an impregnable title could be said to owe a duty to "restore" the property received. In the absence of such a duty, it is not at all obvious why retention of the property received would be unconscionable.[32] If retention is not unconscionable then, following *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 455 where the Court of Appeal held that the knowing recipient is liable where the "recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt", there is no knowing receipt claim at all.

The Court of Appeal therefore dismissed the appeal on this ground.

Did the Court of Appeal get it right? Permission to appeal to the Supreme Court was given on 3 October 2022, so this is not the end of the story. But in my view the Court of Appeal was correct. It is easy to criticise the Court of Appeal's decision as uncommercial, and giving a free ride to thieves and fraudsters who can arrange their affairs in a non-trust jurisdiction to be able to

27. *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30 at [37], cited in *Byers v Saudi National Bank* at [47].
28. C Mitchell & S Watterson "Remedies for Knowing Receipt" in *Constructive and Resulting Trusts* (2010) at p130.
29. *Byers v Saudi National Bank* at [49].
30. *Byers v Saudi National Bank* at [71].
31. *Ibid.*
32. *Byers v Saudi National Bank* at [75]–[76].

defeat any knowing receipt claim. But in addition to the powerful reasons given by the Court of Appeal and explored above, there seem to me to be three supplemental reasons to reject such criticisms.

First, because in my view it follows from the Court of Appeal's analysis, and the work done by Professors Mitchell and Watterson which the Court of Appeal relied upon, that the knowing receipt claim exists at all as a means of vindicating equitable property rights. It is in that respect perfectly orthodox, and akin to the tort of conversion, which uses a personal claim for damages to protect property rights.

Second, because equity already has a powerful remedy against third parties who interfere but do not receive, namely dishonest assistance. If knowing receipt did not require actual receipt the high bar set by the requirement of dishonesty could be circumvented in many cases. Depending on the facts, other personal claims may also be available, such as economic torts.

Third, because the law should not be distorted to protect claimants in the English courts from the rules of other legal systems with which the claim has a proper connection. In particular, if a trust chooses to hold assets in a non-trust jurisdiction, it is knowingly exposed to the additional risks that entails. The beneficiaries may not have made that choice, but they are bound by the trust structure to accept the decision of the trustees. Cases where a non-trust jurisdiction is involved only following and by reason of a breach of trust are less common.

Finally, what are the implications for the sort of claim this article is concerned with (assuming that *Byers v Saudi National Bank* is good law and likely to be upheld in the Supreme Court)? The answer is really a short one: knowing receipt claims have the same vulnerability as proprietary claims where the trust assets (or their traceable proceeds) are to be found in a non-trust jurisdiction. The effect of any disposition of those assets will be governed by the *lex situs*, and if the effect of such a disposition is to confer an impregnable title, that will rule out a knowing receipt claim on the same basis that it precludes a proprietary claim to the assets (or their traceable proceeds).

There is no clever way of avoiding this outcome: vulnerability is increased by proximity, so the simple answer is to ensure that trust assets are, so far as possible, kept well away from non-trust jurisdictions. Trusts should only acquire assets in non-trust jurisdictions voluntarily after a thorough assessment of the all risks and benefits of doing so. Where the worst happens, the focus of any claim against a third party may have to be on dishonest assistance, and other forms of "pure" wrongdoing, rather than proprietary and knowing receipt clams that can more readily be defeated by steps taken in the non-trust jurisdiction.

Michael J. Ashdown *is a barrister at Wilberforce Chambers, whose practice comprises all aspects of trusts, probate and estates, and related tax and professional negligence matters, together with pension schemes and commercial trusts and fiduciaries, both in England and Wales and offshore. Chambers & Partners 2023 describes Michael as "absolutely superb". Email: mashdown@wilberforce.co.uk.*