Supreme Court

Akers and others *v* Samba Financial Group

[2017] UKSC 6

2016 April 27, 28;
2017 Feb 1

Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Sumption, Lord Toulson JJSC, Lord Collins of Mapesbury

Company — Winding up — Disposition of property — Shares in Saudi Arabian banks purportedly held on trust for Cayman Islands company — Saudi Arabia not recognising trusts or division of legal and beneficial interests — Shares transferred to defendant following company's liquidation — Liquidators seeking declaration that transfer void disposition — Whether trust created and enforceable in respect of assets in jurisdiction not recognising trusts — Whether transfer of shares in breach of trust constituting "disposition of property" — Insolvency Act 1986 (c 45), ss 127, 436

Conflict of laws — Jurisdiction — Forum non conveniens — Shares in Saudi Arabian banks purportedly held on trust for Cayman Islands company — Shares transferred to defendant following company's liquidation — Saudi Arabia not recognising trusts or division of legal and beneficial interests — Company's liquidators seeking declaration that transfer void disposition — Whether Convention on the Law Applicable to Trusts and on Their Recognition applying to transfer — Recognition of Trusts Act 1987 (c 14), Sch, art 4

The liquidators of a Cayman Islands company sought a declaration under section 127 of the Insolvency Act 1986[1] that the transfer to the defendant of shares in various Saudi Arabian banks, purportedly held on trust for the company, was void as a "disposition of the company's property . . . made after the commencement of the winding up". The defendant sought a stay of the proceedings on the ground of forum non conveniens, contending, inter alia, that, since Saudi Arabian law did not recognise trusts or any division between legal and beneficial interests, the claim had no prospect of success. The Chancellor granted the stay. The Court of Appeal allowed the liquidators' appeal, holding that since Cayman Islands law recognised the division of the legal and beneficial interests in shares the trusts were arguably valid. On the defendant's appeal the Supreme Court invited further submissions as to whether there had been any "disposition" within section 127, even if the company had equitable and/or personal rights in respect of the shares.

On the appeal—

Held, allowing the appeal, that a trust could be created, exist and be enforceable in respect of assets located in a jurisdiction the law of which did not recognise trusts in any form; that, whilst the definition of "property" in section 436 of the Insolvency Act 1986 was wide enough to embrace both an equitable proprietary interest under a trust and a personal right to have the trust administered according to its terms, the transfer of the shares to the defendant could only be treated as void pursuant to section 127 of the 1986 Act if it amounted to a "disposition" of such property; that, where an asset was held on trust, the legal title remained capable of transfer to a third party, even though that might be in breach of trust, but the trust rights, including the right to have the legal title held and applied in accordance with the terms of the trust, were not thereby disposed of and continued to be capable of enforcement unless and until the disposition of the legal title had the effect under the lex situs of the trust asset of overriding the trust rights; that, if the trust rights were overridden, it was not because they had been disposed of by virtue of the transfer of the legal title but

[1] Insolvency Act 1986, ss 127, 436: see post, para 7.

because they had always been limited and, in certain circumstances, capable of being overridden, in particular by bona fide third party purchasers for value; and that, accordingly, for the purposes of section 127 there had been no disposition of any rights of the company in relation to the shares by virtue of their transfer to the defendant (post, paras 21–34, 38, 42, 51–57, 60, 62–65, 72–73, 78, 82–85, 87–88, 90, 92, 98, 103).

Lightning v Lightning Electrical Contractors Ltd (1998) 23 TLI 35, CA, *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch) and *Independent Trustee Services Ltd v GP Noble Trustees Ltd (Morris intervening)* [2013] Ch 91, CA approved.

Joint Administrators of Rangers Football Club plc, Noters 2012 SLT 599 considered.

Per curiam. Nothing in the Convention on the Law Applicable to Trusts and on Their Recognition, as scheduled to the Recognition of Trusts Act 1987, suggests that it was intended to be inapplicable to a trust simply because the trust was in respect of assets in a jurisdiction which does not recognise some form of separation of legal and equitable interests. Rather, the contrary is the case since one object of the Convention is to provide for the recognition of trusts in jurisdictions which do not themselves know the institution (post, paras 39, 102).

Decision of the Court of Appeal [2014] EWCA Civ 1516; [2015] Ch 451; [2015] 2 WLR 1281 reversed.

The following cases are referred to in the judgments:

Archer-Shee v Garland [1931] AC 212, HL(E)
Attorney General v Jewish Colonisation Association [1901] 1 QB 123, CA
Ayerst v C & K (Construction) Ltd [1976] AC 167; [1975] 3 WLR 16; [1975] 2 All ER 537, HL(E)
Baker v Archer-Shee [1927] AC 844, HL(E)
Berchtold, In re [1923] 1 Ch 192
Bristol Airport plc v Powdrill [1990] Ch 744; [1990] 2 WLR 1362; [1990] 2 All ER 493, CA
British South Africa Co v De Beers Consolidated Mines Ltd [1910] 2 Ch 502, CA
Corbett v Inland Revenue Comrs [1938] 1 KB 567; [1937] 4 All ER 700, CA
Deschamps v Miller [1908] 1 Ch 856
El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717; [1993] BCLC 735
Ewing v Orr Ewing (1883) 9 App Cas 34, HL(E)
Express Electrical Distributors Ltd v Beavis [2016] EWCA Civ 765; [2016] 1 WLR 4783, CA
Glasgow City Council v Board of Managers of Springboig St John's School [2014] CSOH 76; 2014 GWD 16-287, Ct of Sess
Independent Trustee Services Ltd v GP Noble Trustees Ltd (Morris intervening) [2012] EWCA Civ 195; [2013] Ch 91; [2012] 3 WLR 597; [2012] 3 All ER 210, CA
Inland Revenue Comrs v Buchanan [1958] Ch 289; [1957] 3 WLR 68; [1957] 2 All ER 400, CA
Joint Administrators of Rangers Football Club plc, Noters [2012] CSOH 55; 2012 SLT 599
Lake v Bayliss [1974] 1 WLR 1073; [1974] 2 All ER 1114
Leslie (J) Engineers Co Ltd, In re [1976] 1 WLR 292; [1976] 2 All ER 85
Leven and Melville (Earl), decd, In re; Inland Revenue Comrs v Williams Deacon's Bank Ltd [1954] 1 WLR 1228; [1954] 3 All ER 81
Lightning v Lightning Electrical Contractors Ltd (1998) 23 TLI 35, CA
Luxe Holding Ltd v Midland Resources Holding Ltd [2010] EWHC 1908 (Ch)
Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1996] 1 WLR 387; [1996] 1 All ER 585, CA
Mal Bower's Macquarie Electrical Centre Pty Ltd, In re [1974] 1 NSWLR 254

Marlborough (Duke of) v Attorney General (No 1) [1945] Ch 78; [1945] 1 All ER 165, CA
Philipson-Stow v Inland Revenue Comrs [1961] AC 727; [1960] 3 WLR 1008; [1960] 3 All ER 814, HL(E)
Saunders v Vautier (1841) 4 Beav 115
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669; [1996] 2 WLR 802; [1996] 2 All ER 961, HL(E)
Wright (SA & D) Ltd, In re; Denney v John Hudson & Co Ltd [1992] BCC 503, CA

The following additional cases were cited in argument:

Banco Santander Totta SA v Cia de Carris de Ferro de Lisboa SA [2016] EWHC 465 (Comm); [2016] 4 WLR 49
Barton, decd, In re [2002] EWHC 264 (Ch); [2002] WTLR 469
Bodley Head Ltd, The v Flegon [1972] 1 WLR 680
Cook Industries Inc v Galliher [1979] Ch 439; [1978] 3 WLR 637; [1978] 3 All ER 945
Foskett v McKeown [2001] 1 AC 102; [2000] 2 WLR 1299; [2000] 3 All ER 97, HL(E)
Glencore International AG v Metro Trading International Inc [2001] 1 Lloyd's Rep 284; [2001] 1 All ER (Comm) 103
Stichting Shell Pensioenfonds v Krys [2014] UKPC 41; [2015] AC 616; [2015] 2 WLR 289; [2015] 2 All ER (Comm) 97, PC
Ted Jacob Engineering Group Inc v Robert Matthew Johnston-Marshall & Partners [2014] CSIH 18; 2014 SC 579, Ct of Sess
Webb v Webb [1991] 1 WLR 1410; [1992] 1 All ER 17

APPEAL from the Court of Appeal

The claimants, John Akers, Mark Byers and Hugh Dickson, as joint official liquidators of Saad Investments Co Ltd, sought a declaration, under section 127 of the Insolvency Act 1986, that six transactions whereby shares held on trust for the company had been transferred to the defendant, Samba Financial Group, a Saudi Arabian bank, were voidable dispositions. The defendant applied for the claim to be stayed on the ground of forum non conveniens. On 28 February 2014 Sir Terence Etherton C [2014] EWHC 540 (Ch); 16 ITELR 808 granted the stay.

The claimants appealed. On 4 December 2014 the Court of Appeal (Longmore, Kitchin and Vos LJJ) allowed the appeal and lifted the stay [2014] EWCA Civ 1516; [2015] Ch 451.

On 31 March 2015 the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Hughes JJSC) allowed an application by the defendant for permission to appeal, pursuant to which it appealed. The issues for the Supreme Court, as set out in the parties' statement of agreed facts and issues, were (1) whether, on the proper construction of article 4 of the Hague Convention on the Law Applicable to Trusts and on Their Recognition, as given effect in England and Wales by the Recognition of Trusts Act 1987, the six transactions gave rise to any "preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee" such that the Convention did not apply to those issues; (2) if so, at common law which law determined those issues and what was the effect of that law in relation to the six transactions; (3) whether the fact that under Saudi Arabian law there was no means of creating separate legal and equitable proprietary interests in property was a provision of the law designated by the conflicts rules of the

A English forum which could not be derogated from by voluntary act for the purposes of article 15 of the Convention; (4) if so, whether the application of article 15 prevented recognition of the trusts; (5) if so, whether the court should give effect to the objects of the trusts by other means; (6) alternatively, whether it was appropriate for all the issues under article 15 only to be decided after a full evidential hearing; and (7) whether the claimants' claim had any real prospect of success.

B Following the hearing of the appeal, the Supreme Court invited supplementary written submissions from the parties on the questions (a) whether there had been any "disposition" within section 127, even if the company had equitable proprietary interests in the shares, and (b) why, if there had been, it could not also be said that there was such a disposition, even if the company only enjoyed personal rights in respect of the shares.

C The facts are stated in the judgment of Lord Mance JSC, post, paras 1–6.

Mark Hapgood QC, *Lord Pannick QC*, *Brian Green QC* and *Alan Roxburgh* (instructed by *Latham & Watkins (London) LLP*) for the defendant.

As a matter of English private international law, equitable proprietary rights cannot by declaration of trust be created in assets (specifically in D shares) situated in a foreign country where the lex situs does not recognise or permit the creation of such proprietary rights. This is a question of title to property, as to which the usual rule is that the lex situs is determinative. The application of the lex situs to the ownership of shares is settled law: see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. The dominance of the lex situs on questions of title to property has also E been recognised in other contexts: see *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284, paras 14–36 and *Stichting Shell Pensioenfonds v Krys* [2015] AC 616, para 15. The effect of the decision of the Court of Appeal is that (subject to the applicability of article 15 of the Convention on the Law Applicable to Trusts and on Their Recognition, as scheduled to the Recognition of Trusts Act 1987), a trust can, uniquely, create property rights in foreign assets unknown to the lex F situs. That introduces an arbitrary distinction under which the lex situs is applied to determine whether assets are alienable but not how they are alienable. That conclusion is neither supported by authority nor required by the Convention. The Convention, in particular by virtue of articles 4 and 15, leaves the determination of proprietary rights to the lex situs (as the law selected by common law principles of private international law), to the G exclusion of other laws including the governing law of the trust. The concept of a "trust" as defined in article 2 of the Convention refers to a legal relationship between the trustee and the beneficiary. The creation or disposition of property rights upon the establishment of a trust is treated under article 4 as antecedent to the relationship governed by the law selected by articles 6 and 7. Alternatively, the application of the governing law of the trust to the creation or disposition of property rights, in so far as that law is H inconsistent with the lex situs, is excluded by article 15. The Court of Appeal's decision is inconsistent with the Explanatory Report to the Convention prepared by Professor von Overbeck and with *Joint Administrators of Rangers Football Club plc, Noters* 2012 SLT 599, which should have been followed. The Court of Appeal erred in its interpretation

of the concept of "provisions [which] cannot be derogated from by voluntary act" in article 15, and as a result wrongly decided that it could not determine whether the impossibility of creating equitable proprietary interests under Saudi Arabian law was a non-derogable provision of that law which prevented the company from having acquired an equitable proprietary interest in the disputed shares. It should have held that it was a non-derogable provision of Saudi Arabian law and that it prevented the company from having acquired such an interest. Saudi Arabian law as the lex situs determined whether the company acquired any, and if so what, proprietary interest in the disputed shares under the alleged trusts, and since under Saudi Arabian law the company could not have acquired any proprietary interest in the disputed shares under the alleged trusts, the claim against the defendant, which was founded upon the allegation that the disputed shares were the company's property, had no real prospect of success. [Reference was made to *Ted Jacob Engineering Group Inc v Robert Matthew Johnston-Marshall & Partners* 2014 SC 579.]

Article 4 of the Convention excludes from the scope of the Convention preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee. The Court of Appeal erred in concluding that the words "acts by virtue of which assets are transferred to the trustee" are inapplicable to declarations of trust, as opposed to transfers of assets by a settlor to another person to be held in trust. The Court of Appeal misunderstood and/or failed to take proper account of the explanation of the application of article 4 to declarations of trust given in the von Overbeck Report. Applying the appropriate purposive construction, and paying proper regard to the von Overbeck Report, the words "acts by virtue of which assets are transferred to the trustee" encompass declarations of trust as acts effecting a change in the capacity in which assets are held by the settlor/trustee. The purpose of article 4 was to remove from the scope of the Convention issues as to the validity of acts of transfer into a trust, including declarations of trust. *Joint Administrators of Rangers Football Club plc, Noters* 2012 SLT 599 correctly decided that article 4 excludes from the scope of the Convention issues as to the validity of declarations of trust as alienations of property. The change in capacity which occurs upon a declaration of trust (if valid) may involve a separation of legal and equitable title (under a common law trust), or it may consist of a change whereby the assets, although still owned by the trustee, cease to be part of his private patrimony and become a fiduciary patrimony or ring-fenced fund (under some civil law systems). The validity of a transfer of property, or of an act which purports to change the capacity in which property is held, is a question of title to property which, being excluded from the Convention by article 4, is ordinarily to be determined by the lex situs in accordance with common law principles of private international law: see, in the case of shares, *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. Article 4 is expressly concerned with the validity of the transfer to the trustee or the change in the capacity in which the trustee holds the assets. But it necessarily also affects whether the beneficiary acquires any, and if so what, proprietary interest upon the creation of the trust. Where the lex situs applicable under article 4 regards the trustee's title as absolute and undivided, it is impossible consistently to hold that a separate equitable proprietary interest has passed to the beneficiary under the governing law of

A the trust. Thus, the question which by virtue of article 4 had to be answered by the Saudi Arabian lex situs was whether the declarations of trust validly effected any, and if so what, change in the capacity in which Mr Al-Sanea held the disputed shares or validly conferred any, and if so what, proprietary interest in the disputed shares on the company. The lex situs would not recognise the declarations (even if the trusts were putatively governed by Cayman Islands law) as changing the capacity in which Mr Al-Sanea held B the assets to that of the holder of a legal title from which the equitable title had been separated, or as conferring an equitable title on the company. Article 8 provides for the governing law of the trust to determine the validity, construction and effects of the trust. But article 8 is subject not only to article 15 but to the exclusion from the Convention under article 4 of issues as to the validity of acts of transfer to the trustee or by which the capacity in C which the trustee holds assets is altered. If, therefore, the lex situs does not allow a change in the trustee's capacity whereby the legal and equitable title is split, the attempt to pass an equitable title to the beneficiary under the governing law of the trust will not succeed.

The Court of Appeal's conclusion on the article 4 issue implies that it is possible for the company to have acquired a valid property right in the disputed shares under Cayman Islands law, thus implicitly accepting a D principle under which an English judge must recognise, and potentially make orders designed to enforce, property rights in foreign assets inconsistent with those recognised by the lex situs. Such a principle is unsatisfactory, and wrong, because it creates an obvious risk of irreconcilable judgments and undermines security of title. One of the main justifications for the consistent application of the lex situs to determine property rights is that it is the only E way to fulfil the need for security in international property transactions. At the stage when the trust is created, the law must be able to decide whether the beneficiary does or does not acquire an equitable proprietary interest in the assets unknown to the lex situs. Whether any such interest could survive a subsequent transfer of the property under the lex situs is a separate issue, although the very fact that the lex situs would ordinarily determine F proprietary rights on a subsequent transfer suggests that there cannot be a compelling justification for holding that, exceptionally, property rights inconsistent with the lex situs can be created at the earlier stage of the declaration of trust. Recognition that the lex situs determines questions of title to property, including whether the beneficiary of a trust acquires equitable title to the trust assets, does not make the declaration of a common law trust of assets in a non-common law country a futile exercise because G (a) the lex situs may recognise the declaration as sufficient to create a fiduciary patrimony or ring-fencing of the assets in the hands of the trustee, and (b) even if it does not, the application of the lex situs to questions of title to property does not affect the personal equitable obligations of the trustee under the governing law of the trust (see *Webb v Webb* [1991] 1 WLR 1410), nor does it affect the choice of law rules applicable to any claims in personam H against third parties. *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 does not assist on the issue in the present case.

Under Saudi Arabian law there is no means of creating separate legal and equitable proprietary interests in property and the courts apply only the law of Saudi Arabia. The Court of Appeal erred in failing to hold, in the light of those undisputed facts, that the impossibility of creating separate equitable

proprietary interests is a provision of Saudi Arabian law which cannot be derogated from by voluntary act within the meaning of article 15 of the Convention. A distinction is to be drawn between non-derogable provisions of the type referred to in article 15 ("domestic mandatory rules"); and a narrower class of provisions, referred to in article 16 ("international or overriding mandatory rules"). Non-derogable provisions or domestic mandatory rules are provisions from which the parties cannot opt out in a purely domestic context, while international mandatory rules are rules that a given system of law will apply even where, under its own conflicts rules, another law would otherwise be applicable to the matter in question. Having failed to appreciate that distinction, the Court of Appeal erred in holding that, in order to decide whether the impossibility of creating equitable proprietary interests was a non-derogable provision, further expert evidence would be required to determine whether there was anything stopping a Saudi Arabian citizen under Saudi Arabian law from declaring a trust of Saudi Arabian assets under a regime governed by another law. In so far as that implies that a non-derogable provision must consist of a rule prohibiting citizens from engaging in certain conduct, as opposed to a principle of law from which purported derogations are invalid, it is unjustified. There is no rule of English law which stops British citizens from making declarations of trust which fail for uncertainty or contracts which are unsupported by consideration. English law simply holds that the act is ineffective to create a valid trust or a binding contract. Since non-derogable provisions are those from which the parties cannot opt out in a purely domestic context, it is not relevant to inquire whether Saudi Arabian law would recognise a choice of Cayman Islands law as an effective means of derogating from the principle of indivisibility of title. Alternatively, and in any event, such a choice would not be recognised, since the Saudi Arabian courts will never apply or even consider foreign law. Whether Cayman Islands law would recognise a trust governed by Cayman Islands law as an effective means of achieving a derogation from the Saudi Arabian principle of indivisibility is irrelevant to the question whether that principle amounts to a non-derogable provision of Saudi Arabian law. Accordingly, in a purely domestic Saudi Arabian case the courts of Saudi Arabia would not recognise as effective a purported agreement by the parties to create a separate equitable title to property, and that is sufficient to show that the impossibility of creating a separate equitable title to property is a non-derogable provision of Saudi Arabian law within the meaning of article 15. Whether that non-derogable provision of Saudi Arabian property law is applicable, pursuant to article 15, to the question whether the company acquired an equitable proprietary interest in the disputed shares upon the creation of the alleged trusts is a pure question of law, which there was no reason for the Court of Appeal to decline to decide prior to a full trial of the action.

In the context of a Convention covering both civilian and common law systems it would not be appropriate to take a technical view of the concept of property in article 15(d). Article 15(d) would therefore include changes in capacity in which a person held assets if that change could have proprietary effects in an insolvency. Although article 15 specifies six matters to which, in particular, applicable non-derogable provisions may relate, including the transfer of title to property, the list is not exhaustive: see the von Overbeck

A Report, paras 138–139. It was not, therefore, essential for the defendant to show that the non-derogable provision relied upon fell within article 15(d), although it clearly does. It was sufficient that English private international law applies the lex situs to questions of ownership of shares. Therefore, if and in so far as the same result is not already achieved under article 4, the non-derogable provision of Saudi Arabian law that it is impossible to create
B separate equitable title is applicable pursuant to article 15 and it prevents the declarations of trust, even if the putative trusts were governed by Cayman Islands law, from being effective to alienate an equitable proprietary interest in the disputed shares to the company. Accordingly, the Court of Appeal should have held that the claim had no real prospect of success.

Mark Howard QC, *David Brownbill QC* and *Adam Cloherty* (instructed
C by *Morrison & Foerster (UK) LLP*) for the liquidators.

It is well established that a common law trust can be created over assets situated in a non-trust law country. Such trusts are created every day for both private and commercial/corporate finance purposes. If the defendant's proposition were correct it would destabilise an entire range of property interests throughout the world and beneficiaries' entitlements would be reduced to a mere personal claim against the trustee. Further, the
D Convention on the Law Applicable to Trusts and on Their Recognition, as scheduled to the Recognition of Trusts Act 1987, would be rendered pointless, since its primary function is to assist courts in non-trust states to recognise trusts over assets in those states. So far as English conflicts of laws is concerned, absent some legal incapacity or the existence of an applicable legal prohibition, parties are free to enter into lawful arrangements (whether
E in contract, trust or otherwise) under such law as they wish and an English court will give effect to those arrangements and the personal and proprietary consequences which they may have. The company and Mr Al-Sanea have entered into lawful and effective trust relationships under Cayman Islands law. The only question on the present appeal is whether the company had a proprietary interest in the shares within the wide meaning of section 127 of the Insolvency Act 1986 before the commencement of its insolvent
F liquidation. Should the defendant wish to seek validation of the disposition under section 127 at a later stage of the litigation, the burden of justifying validation, which will be a matter of English law, will be on it and it will require a detailed inquiry into the full facts, which can only be determined at trial.

"Property" is defined in section 436 of the 1986 Act in very wide terms:
G see *Bristol Airport plc v Powdrill* [1990] Ch 744, 759. The company's equitable proprietary interest in the disputed shares was plainly "property" for the purposes of that definition. The validity and effect of a trust, whether created by declaration or by transfer to a trustee, is governed by its proper or governing law: see article 8 of the Convention. The position at common law is the same: see *Duke of Marlborough v Attorney General (No 1)* [1945] Ch
H 78 and *Attorney General v Jewish Colonisation Association* [1901] 1 QB 123. The relevant trusts were valid under Cayman Islands law and, under that law, the effect of the trusts was that the company obtained an equitable proprietary interest in the shares. The company, therefore, had the necessary proprietary interest in the shares to engage section 127 with the result that the transfer to the defendant is void. The equitable proprietary interest of

the trust beneficiary is fundamental to the common law trust: see *Foskett v McKeown* [2001] 1 AC 102, 108–109 and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 705. Thus, if the liquidators establish the existence of a common law trust governed by Cayman Islands law, the company will have an equitable proprietary interest in the shares. That there was "property" for the purposes of the 1986 Act definition simply follows from the finding that there was a valid and existing trust of that type. [Reference was made to *Cook Industries Inc v Galliher* [1979] Ch 439.]

The Convention is simply a conflicts of laws provision. It does not create any substantive law and does not introduce the trust concept (common law or otherwise) into the domestic law of a signatory to it. The Convention's principal purpose is to provide a simple mechanism for choice of law rules for trusts and the recognition in non-trust (usually civil law) jurisdictions of trusts existing under the laws of trust (usually common law) jurisdictions. More particularly, the raison d'être of the Convention was, from the outset of the project, to ensure the effectiveness of common law trusts over civil law assets: see Professor von Overbeck's Explanatory Report to the Convention, paras 12, 14, 28, 134. Accordingly, the Convention does not imply that non-trust jurisdictions must introduce the trust concept into their domestic law, it simply provides that signatory non-trust jurisdictions will, as a matter of private international law, recognise and give effect to particular trusts, which undoubtedly exist under their governing law—and recognises and gives effect to those trusts qua the trusts they actually are. No assistance on the present issues can be gained from *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 and *Stichting Shell Pensioenfonds v Krys* [2015] AC 616, or from *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284, paras 14–36 and *Stichting Shell Pensioenfonds v Krys* [2015] AC 616, para 15.

The Court of Appeal's construction of article 4 of the Convention is plainly right. Article 4 means what it says. It is concerned only with a transfer of assets to the trustee, which cannot encompass a declaration by a trustee of assets which he already validly holds. The Court of Appeal had full regard to the travaux préparatoires and adopted the most purposive possible construction. Even if article 4 is engaged in a declaration of trust case, it simply means that the Convention does not apply to the relevant preliminary issue, viz the validity of the relevant act, namely the declaration of trust. Article 4 is not and cannot be dealing with validity in the sense of the validity of the trust itself (as a trust), since the validity and effects of a trust shall be governed by the law of the trust: see article 8 of the Convention. In any event, the choice of law machinery for determining the validity of the declarations of trust is not contained in the Convention but in the common law. The validity and effect of a trust is at common law (as in article 8 of the Convention) governed by the proper law of the trust. Common law courts will strive to give the maximum possible recognition and effect to trusts irrespective of where the assets are situate: see *Ewing v Orr Ewing* (1883) 9 App Cas 34, 40–41, 46; *Webb v Webb* [1991] 1 WLR 1410, 1418–1419; *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 TLI 35 and *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 736–737. The matter must proceed to trial in any event: both to determine

A the proper approach to choice of law at common law, and (if relevant) to determine the true effect of Saudi Arabian law and its application to the facts. In particular, even if (at common law) Saudi Arabian law governed the capacity of Mr Al-Sanea to declare the trusts, the court would still need to try the issue of whether, as a matter of Saudi Arabian law, a Saudi Arabian citizen in fact lacks the capacity to declare trusts governed by a foreign
B (i e Cayman Islands) law. [Reference was made to *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680, 688–689 and *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), para 32-170 et seq.]

The Court of Appeal's conclusion that it was not appropriate to determine on a stay or summary judgment application whether article 15 applied in the present case was a case management decision which should not be overturned. Article 15 requires the defendant conclusively to show
C that (i) there is a relevant rule of foreign law which cannot be derogated from by voluntary act: in other words a mandatory rule of Saudi Arabian law; and (ii) English conflicts rules (being the rules of the forum) would designate that Saudi Arabian rule as applying to a particular relevant issue. The defendant cannot establish that English conflicts rules would designate Saudi Arabian law as being remotely relevant to the validity of trusts which
D (on this hypothesis) are governed by Cayman Islands law. Article 15 cannot apply in the context of the creation of a trust because it assumes in terms that there is already a valid and existing trust (the effects of which it permits a court to modify in certain defined circumstances). But in any event, the limited evidence so far does not begin to establish the existence of any mandatory Saudi Arabian rule of a relevant type. The only
E apparent rule of Saudi Arabian law on which the defendant relies is the fact that, as a non-common law system, Saudi Arabian domestic law does not contain a distinction between legal and equitable interests. That is not a rule at all, it does not prohibit anyone from doing anything and, in any event, it has not been the subject of any evidence. In those circumstances a court could not decide that the evidence on the point was so clear and conclusive that the liquidators should be completely shut out from bringing
F their claim. In any event, the absence of a concept in a foreign law cannot amount to a mandatory rule, even on the defendant's interpretation of "mandatory". *Joint Administrators of Rangers Football Club plc, Noters* 2012 SLT 599 is a first instance Scots decision which sets no precedent for English conflicts of laws rules. It can, in any event, be distinguished, for the reasons given by the Court of Appeal [2015] Ch 451, paras 40–46, 51.
G [Reference was made to *In re Barton, decd* [2002] WTLR 469 and *Banco Santander Totta SA v Cia de Carris de Ferro de Lisboa SA* [2016] 4 WLR 49.]

Hapgood QC replied.

[Following the hearing of the appeal, the Supreme Court invited supplementary written submissions from the parties on the questions
H (a) whether there had been any "disposition" within section 127 of the Insolvency Act 1986, even if the company had equitable proprietary interests in the shares, and (b) why, if there had been, it could not also be said that there was such a disposition, even if the company only enjoyed personal rights in respect of the shares.]

Mark Hapgood QC, *Lord Pannick QC*, *Brian Green QC* and *Alan Roxburgh* in written submissions for the defendant.

Section 127 of the Insolvency Act 1986 adds nothing of substance to the liquidators' claim. If, as is contended by reference to the lex situs and articles 4 and 15 of the Convention on the Law Applicable to Trusts and on Their Recognition, the company had no equitable proprietary interest in the shares, that is an end of the liquidators' case. But even if the company is presumed to have had an equitable proprietary interest, that interest was extinguished (irrespective of whether it was purportedly disposed of, and if purportedly disposed of, notwithstanding any avoidance of its disposition by section 127) on an application of the lex situs pursuant to article 11(d) of the Convention and *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. The lex situs does not recognise the existence of equitable proprietary interests. As a matter of fact, Mr Al-Sanea transferred the legal title to the disputed shares to the defendant. Whether that disposal had the effect of overriding any equitable proprietary interest of the company is an ordinary question of priorities. If English law were applicable, the question of priorities would be settled by asking whether the defendant was a bona fide purchaser of the disputed shares without notice of the company's equitable proprietary interest. In fact, under article 11(d) of the Convention, Saudi Arabian law is applicable, and under Saudi Arabian law the defendant's interest would prevail. The question of priorities has nothing to do with section 127. It is only if one makes the further assumption that when Mr Al-Sanea transferred the legal title to the disputed shares to the defendant there also occurred a purported disposition to the defendant of the company's alleged equitable proprietary interest, that section 127 is relevant at all. Thus the liquidators' claim proceeds on the further assumption that Mr Al-Sanea's transfer of the legal title to the disputed shares was accompanied by a purported disposition of the company's equitable proprietary interest in the disputed shares. Even on the assumption that the company continued to hold an equitable proprietary interest in the disputed shares (either because there was no disposition, or because a disposition was void under section 127), there would then arise the ordinary question of priorities, as to whether the defendant has taken free of that interest. Article 11(d) of the Convention is unambiguous: 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. Under the choice of law rules of the English forum, the law applicable to issues of priorities is Saudi Arabian law as the lex situs of the disputed shares: see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. Under Saudi Arabian law the company's alleged equitable proprietary interest would not be recognised at all. It is not necessary to address the question of whether the defendant was a bona fide purchaser of the disputed shares for value without notice of the company's alleged equitable proprietary interest, although the defendant would maintain that it was. Accordingly, the defendant is entitled to succeed in the present appeal, even if the court is minded to hold that Saudi Arabian law, as the lex situs, does not determine in the defendant's favour the preliminary issue of whether trusts governed by Cayman Islands law could have created equitable proprietary interests in the disputed shares at all.

A The prior existence of an equitable proprietary interest enjoyed by the company is fundamental to the liquidators' claim that the company's property in the disputed shares was disposed of, such that there is something material for section 127 to bite on by way of avoidance of disposition. That alleged property interest is exclusively attributable to the company's having equitable proprietary interests under trusts governed by Cayman Islands law. The breadth of the definition of "property" in section 436 of the 1986 B Act does not assist the liquidators. The fact that an in personam right possessed by the company against Mr Al-Sanea would be the "property" of the company within the meaning of section 436 does not mean that it is a right of property (i e a proprietary interest) in the disputed shares: it remains a personal right against Mr Al-Sanea which is not enforceable against the defendant. The existence of such a personal right cannot make the disputed C shares the property of the company such that a disposition of the shares would fall within section 127. By virtue of article 4, or alternatively article 15, of the Convention, the liquidators cannot establish that the company had an equitable proprietary interest at all, since Saudi Arabian law as the lex situs of the disputed shares does not recognise such an interest. The answer to the fundamental question of whether an equitable proprietary interest could have come into existence cannot depend on the answer to a D subsequent question, namely, whether, if any such interest did come into existence, it was overridden when Mr Al-Sanea transferred the disputed shares to the defendant.

Even if section 127 is assumed to be engaged so as to avoid a disposition of the company's equitable proprietary interest, the question of whether the defendant takes free of that interest is a question of Saudi Arabian law under E article 11(d) of the Convention and *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. An English court would almost certainly validate a disposition under section 127 in a case where the disponee was a bona fide purchaser for value without notice, but that is not the relevant issue for present purposes. The issue of whether there has been a disposition of any such equitable proprietary interest is not to be confused with the issue of whether any such interest has been extinguished under the F applicable law relating to priorities upon the transfer of the legal estate by the person in whom the legal estate is vested. If it is assumed that Mr Al-Sanea committed a breach of trust by dealing with the legal title to the disputed shares inconsistently with the company's interest, the company might be entitled to bring an in personam claim against Mr Al-Sanea for breach of trust. It is not correct that the company's only remedy would be a G claim against the defendant to have the legal title to the disputed shares restored to Mr Al-Sanea (or otherwise at the company's direction). Moreover, if the company had only personal rights under the alleged trusts in relation to the disputed shares, it would be necessary for the company to establish a personal cause of action in order to obtain any such restitutionary remedy against the defendant. From an English law standpoint, the question would be whether the defendant was a knowing recipient of the disputed H shares, and so a constructive trustee having a liability to account in relation to them. Any such claim would be time-barred if governed by English law. In any event, the liquidators have brought no claim based on knowing receipt, or on any analogous cause of action. Furthermore, the liquidators specifically accepted at the hearing that, if the defendant's case is successful,

the court should not decline to reinstate the stay ordered at first instance on the basis of any hypothetical claim which the company might conceivably seek to assert against the defendant. Were such a claim to be advanced, it would prima facie be governed by Saudi Arabian law (as the law of the country in which the alleged unjust enrichment—i e the receipt of the disputed shares—took place). Any proceedings in England in relation to it, therefore, would be subject to a compelling case for a stay on the basis that Saudi Arabia would clearly be the most appropriate forum. In the premises, any hypothetical possibility that the liquidators might seek to establish a personal liability against the defendant on grounds of knowing receipt or any other comparable cause of action should be disregarded.

The second issue raised by the court is essentially a question for the liquidators. However, it arises whether or not one is in the territory of section 127 and the answer is also the same regardless of section 127: even if the company had an equitable proprietary interest, it would have been extinguished by the transfer of the disputed shares to the defendant under the lex situs. The limit of what section 127 is able to achieve in the present context is the avoidance of a disposition of an equitable proprietary interest if one was purportedly made. Section 127 does not go on to determine the question of priorities consequent on a recognition that even if the company had an equitable proprietary interest, none the less legal title to the disputed shares is in a "third party holder" for the purposes of article 11(d). Under English choice of law rules, that question of priorities is a matter for the lex situs.

Mark Howard QC, *David Brownbill QC* and *Adam Cloherty* in written submissions for the liquidators.

The defendant cannot avoid the application of section 127 of the Insolvency Act 1986: all post-petition dispositions of the company's property are rendered void, automatically, by operation of the section. Such void dispositions can be validated only by subsequent order by the court, and the court will validate only if, in the light of all the evidence, it is in the interests of the company's creditors as a whole to do so. Validation is a second stage process, requiring an application by the defendant. No such application has been or could be made at this stage and no issue in relation to validation can arise on the present appeal.

The liquidators bring their claim under section 127. Under that section and, therefore, on the appeal the only issue is whether there has been a disposition of the company's property after the commencement of its winding up. The transfer of the shares to the defendant constituted a disposition of the company's property. The transfer occurred after the commencement of the company's liquidation and is, therefore, void. The transfer of the shares constituted a disposition of the company's property by virtue of the company's interest in the shares. On the facts accepted for the purposes of the appeal, the company's interest in and equitable ownership of the shares is undeniable, the shares being held on trusts governed by Cayman Islands law under which the company acquired absolute beneficial interests. No separate disposition of the company's equitable interest as such was necessary; the disposition of the shares was itself a disposition of the company's property. Even if (but for section 127) the transfer would have had the effect of overriding the company's interest, the destruction of that

A interest would itself have been a disposition of the company's property for the purposes of the section, again, rendering the transfer void. Section 127 is a provision of English law and is unaffected by any application of foreign law to the transaction: otherwise the section could be evaded with ease.

The company's rights against Mr Al-Sanea to require that the shares be delivered to the company's order constituted "property" within the
B definition in section 436 of the 1986 Act. That right was undoubtedly extinguished, and therefore disposed of, upon the transfer of the shares to the defendant. Accordingly, the transfer of the shares was a disposition of the company's rights against Mr Al-Sanea and was, therefore, void. The issue is not whether the company has some continuing parallel claim against the defendant or Mr Al-Sanea; it is whether the transfer of the shares to the defendant constituted a disposition of the company's property—it did and it
C was, accordingly, void under section 127.

The issue of validation under section 127 arises only because the section renders the relevant disposition (the transfer of the shares to the defendant) void. Validation is solely concerned with what is in the interests of the company's creditors as a whole. It is not concerned with (i) any question of priorities, (ii) the effect of the transfer under Saudi Arabian law,
D (iii) article 11(d) of the Convention, or (iv) whether or not the defendant can establish bona fide purchaser status. No issue of validation arises on the present appeal; the sole issue is whether there has been a post-petition disposition of the company's property—there has been and the appeal should be dismissed on that basis.

The court took time for consideration.

E

1 February 2017. The following judgments were handed down.

LORD MANCE JSC (with whom **LORD NEUBERGER OF ABBOTSBURY PSC, LORD SUMPTION, LORD TOULSON JJSC** and **LORD COLLINS OF MAPESBURY** agreed)

F **1** This is an appeal from an order of the Court of Appeal (Longmore, Kitchin and Vos LJJ) [2015] Ch 451 dated 4 December 2014, which set aside an order of Sir Terence Etherton C 16 ITELR 808, dated 28 February 2014 staying the present proceedings. The points raised are novel and difficult, and the focus of submissions has shifted at each instance.

2 The proceedings are brought by a Cayman Islands company, Saad
G Investments Co Ltd, in liquidation, ("SICL") and its joint official liquidators ("the liquidators"), appointed as such in winding up proceedings commenced in the Cayman Islands on 30 July 2009. The English Companies Court has recognised the Cayman Islands winding up proceedings as a foreign main insolvency proceeding by orders under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030). The proceedings are against Samba Financial Group ("Samba"), which was served as of right within the
H jurisdiction on 19 August 2013, but which then applied for the proceedings to be stayed. The ground then given was that "there exists another forum which is clearly and distinctly more appropriate" than England. In the course of the appeals leading to the Supreme Court, the ground has effectively transmuted into a case that SICL's claim has no prospect of

success, for a reason or reasons which will appear. The parties have argued the appeal, and the Supreme Court will address it, on that basis. A

3 Before the Supreme Court many of the issues which required attention below are no longer relevant. The appeal can as a result be approached on the basis of assumed facts and matters which can be shortly stated. They include the following.

4 Mr Al-Sanea, a Saudi Arabian citizen and resident closely involved with SICL, was the legal owner of shares, valued at around US$3 18m, in five Saudi Arabian banks, one of them Samba itself. He was registered as their owner in the Saudi Arabian Securities Depositary Centre. SICL claims that Mr Al-Sanea had agreed to hold these Saudi Arabian shares at all material times on trust for SICL. The trusts arose allegedly as a result of six transactions. In the first transaction in 2002, Mr Al-Sanea by share sale agreement agreed to transfer to SICL the "beneficial ownership" of the relevant shares, but to continue to hold the legal title "in order to comply with legal requirements in Saudi Arabia". In a second transaction in 2003, Mr Al-Sanea agreed to hold "legal ownership of [the relevant] shares as nominee for SICL in order to comply with the legal requirements in Saudi Arabia". In the remaining four transactions, in respectively 2006, 2007 and on two occasions in 2008, Mr Al-Sanea made declarations of trust for SICL in respect of the relevant shares. B C D

5 It is now common ground, for the purposes of this appeal, that all six transactions by which Mr Al-Sanea purported to constitute himself a trustee for SICL can be treated as subject to Cayman Islands law. It is also common ground that the law of Saudi Arabia, where the shares are sited, does not recognise the institution of trust or a division between legal and equitable proprietary interests, although it does recognise a different institution, amaana, the precise implications of which have not been explored in evidence. E

6 On 16 September 2009, Mr Al-Sanea transferred all the Saudi Arabian shares to Samba, purporting thereby to discharge personal liabilities which he had towards Samba.

7 The present proceedings are brought by SICL and the liquidators against Samba in reliance on section 127 of the Insolvency Act 1986, which provides: F

> "*Avoidance of property dispositions, etc*
>
> "In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void." G

By section 436 of the 1986 Act the concept of "property" is defined in wide terms:

> " 'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property; . . ." H

8 In the courts below, and when the matter first came before the Supreme Court, the critical issue was identified as being whether SICL had equitable proprietary interests in the shares in respect of which Mr Al-Sanea

had purportedly constituted himself trustee. It appears to have been assumed that, if SICL had such interests, then they were disposed of by Mr Al-Sanea's transfer of title in the shares to Samba. Samba's submission was that SICL could have no such equitable proprietary interests, since the law of Saudi Arabia, the lex situs of the shares, does not recognise purely equitable proprietary interests.

9 Following the oral hearing before it, the Supreme Court invited and received two sets of supplementary written submissions focusing more precisely on the questions (a) whether there was any "disposition" within section 127, even if SICL had equitable proprietary interests in the shares, and (b) why, if there was, it could not also be said that there was such a disposition, even if SICL only enjoyed personal rights in respect of the shares.

10 At all instances of this case, detailed submissions have been addressed on the Convention on the Law Applicable to Trusts and on Their Recognition, scheduled to the Recognition of Trusts Act 1987. These submissions focused, before the Chancellor, on article 15 and, before the Court of Appeal and Supreme Court, on both articles 4 and 15 of that Convention. The 1987 Act states in section 1(1) that "The provisions of the Convention set out in the Schedule . . . shall have the force of law in the United Kingdom". The Convention as scheduled contains the following provisions:

"*Chapter I—Scope*

"*Article 1*

"This Convention specifies the law applicable to trusts and governs their recognition.

"*Article 2*

"For the purposes of this Convention, the term 'trust' refers to the legal relationship created—inter vivos or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics— (a) the assets constitute a separate fund and are not a part of the trustee's own estate; (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

"*Article 3*

"The Convention applies only to trusts created voluntarily and evidenced in writing.

"*Article 4*

"The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

"*Article 5*

"The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved.

"*Chapter II—Applicable law*

". . .

"*Chapter III—Recognition*

"*Article 11*

"A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust. Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity. In so far as the law applicable to the trust requires or provides, such recognition shall imply in particular— (a) that personal creditors of the trustee shall have no recourse against the trust assets; (b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy; (c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death; (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. 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.

"*Article 12*

"Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the state where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.

"*Article 14*

"The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts.

"*Chapter IV—General clauses*

"*Article 15*

"The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters— (a) the protection of minors and incapable parties; (b) the personal and proprietary effects of marriage; (c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives; (d) the transfer of title to property and security interests in property; (e) the protection of creditors in matters of insolvency; (f) the protection, in other respects, of third parties acting in good faith. If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

A "*Article 16*

"The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws.

"*Article 17*

"In the Convention the word 'law' means the rules of law in force in a
B state other than its rules of conflict of laws.

"*Article 18*

"The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy."

11 In the Court of Appeal, the first issue under article 4 was whether this article excludes the application of the Convention to the trusts created or
C declared by Mr Al-Sanea, bearing in mind that Saudi Arabian law does not recognise any division of legal and beneficial interests. Secondly, assuming the Convention to apply, SICL relied on its provisions regarding applicable law in Chapter II in submitting that the trusts were governed by Cayman Islands law. That is an issue that has, for present purposes, disappeared, since the present appeal proceeds on the basis that the transactions creating
D or declaring the trusts were subject to Cayman Islands law. Thirdly, assuming the Convention otherwise to apply, Samba argued in the courts below that the effect of article 15(d) was to remit the question whether, under the trusts, SICL acquired any equitable proprietary interest in the shares to Saudi Arabian law, being, it submits, the lex situs designated by English common law as the law governing questions of title. Samba succeeded on this point before the Chancellor (2014) 16 ITELR 808,
E para 63, but lost before the Court of Appeal on the basis that there were triable issues whether under Saudi Arabian law the arrangements constituted by the six transactions were valid and whether any rule precluding the separation of legal and equitable title or precluding foreigners from owning Saudi Arabian property was mandatory, in the sense that it could not be derogated from within the meaning of that term in article 15.

F **12** The first issue, whether or not the Convention applies to the trusts, focuses on the exclusion introduced by article 4. SICL submits that the concept of "preliminary issues relating to the validity . . . of other acts by virtue of which assets are transferred to the trustee" goes no further than to exclude issues about the alienability, or transferability, of the assets to the trustee. It submits that article 4 leaves all further issues concerning the capacity of the trustee to declare a trust in respect of the shares or to create a
G beneficial interest in the shares under such a declaration to be governed under the Convention by the governing law of the trust, i e for present purposes, Cayman Islands law. Samba on the other hand submits, drawing on passages in the travaux préparatoires, that all these issues are excluded from the Convention by article 4, and remitted accordingly to the common law, under which it submits Saudi Arabian law, as the lex situs of the shares,
H governs them.

13 On this issue, the Court of Appeal accepted SICL's case. It held [2015] Ch 451, para 55, that:

"Provided that the property that is made the subject of a trust can be alienated at all under the lex situs, questions as to the validity and effect of

placing such assets in trust, even though the assets are shares in a civil law jurisdiction, can be determined by the governing law of the trust. To put the matter in the context of this case, the declarations of trust will not be dividing the equitable and legal interests in the shares under Saudi Arabian law. That is not possible. But the declarations of trust may give SICL rights under the trust in respect of those shares that will have to be determined by the governing law of the trust, taking into account that under Saudi Arabian law a division of equitable and legal interests is not possible. All these matters will have to be worked out at the next stage of this litigation when the court comes to consider the effect on the rights granted by the declarations of trust of the transfer to Samba which took effect under Saudi Arabian law."

On the present appeal, Samba criticises this passage as obscure, and submits that, in so far as it suggests that an equitable proprietary interest can exist in an asset sited in a jurisdiction which knows no such concept, it is wrong.

14 In the light of the further and more broadly ranging submissions which the Supreme Court has now received, I doubt if it matters for present purposes either whether the Convention applies or even whether SICL's interests in relation to the shares can properly be described as proprietary. The limited focus in the courts below, on the issue whether the trusts gave SICL equitable proprietary interests in the shares, is largely subsumed in a more general question whether, whatever the nature of SICL's interests under the trusts, there was any disposition of property within the meaning of section 127.

15 As to what constitutes "property", this is always "heavily dependent on context . . . something can be 'proprietary' in one sense while also being non-proprietary in another sense": M Conaglen, "Thinking about proprietary remedies for breach of confidence" [2008] Intellectual Property Quarterly 82, 89, referring to R Nolan, "Equitable Property" (2006) 122 LQR 232, 256–257. As the Chancellor noted 16 ITELR 808, para 62, there is a school of thought (which can be dated to *F W Maitland, Equity—a Course of Lectures* (1936)) which analyses the equitable interests created by a common law trust not as proprietary, but as personal or "obligational", even as against third parties. The issue "whether trusts are properly seen as part of the law of property or as an aspect of the law of obligations" is described in *Burrows, English Private Law*, 3rd ed (2013), para 4.140 as a "difficult question"; see also *Burrows, The Law of Restitution*, 3rd ed (2011), pp 191–193, Nolan, "Equitable Property" 122 LQR 232. Supporters of a personal analysis include *B McFarlane, The Structure of Property Law* (2008); see also G Watt, "The Proprietary Effect of a Chattel Lease" [2003] Conveyancer and Property Lawyer 61. A recent discussion of the pros and cons of each analysis appears by P Jaffey in "Explaining the Trust" (2015) 131 LQR 377. Jaffey concludes that, although a trust involves personal rights against the trustee, only a proprietary analysis explains satisfactorily those aspects which concern the beneficiary's position vis-à-vis third parties, such as the trustee's creditors and recipients of unauthorised transfers of trust property.

16 As before the Chancellor, so before the Supreme Court, the parties were content to proceed on the basis of the "conventional" analysis that a trust creates a proprietary interest, at least to the extent that such an interest

A is capable of existing and being recognised in the relevant asset. In this judgment, I am also content, without expressing any view about the appropriate analysis, to proceed on the same basis.

17 At common law, the nature of the interest intended to be created by a trust depends on the law governing the trust. This law therefore determines whether the intention is to give a beneficiary an equitable proprietary interest in an asset held on trust or a mere right against the trustee to perform B whatever functions the trust imposes upon him with regard to the use and disposal of foreign shares and income derived from them: see *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), vol 2, para 22-048, citing *Archer-Shee v Garland* [1931] AC 212.

18 Where the intention is to create an equitable proprietary interest, then the common law position is as stated in *Westdeutsche Landesbank* C *Girozentrale v Islington London Borough Council* [1996] AC 669, 705F, per Lord Browne-Wilkinson:

> "Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or D substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice."

The initial inquiry is therefore whether an equity subsists, which it will prima facie do at common law, so long as the relevant property (original or substitute) does not pass into the hands of a transferee for value of the legal interest without notice of the equity. But a further issue may arise under the E law of the situs of the relevant property.

19 The situs or location of shares and of any equitable interest in them is in the jurisdiction where the company is incorporated or the shares are registered (which is presently unimportant, since in this case they coincide in Saudi Arabia): *Dicey*, 15th ed, vol 2, paras 22-044 and 22-048, *Underhill & Hayton, Law of Trusts and Trustees*, 19th ed (2016), para 100.128, both F citing *In re Berchtold* [1923] 1 Ch 192, *Philipson-Stow v Inland Revenue Comrs* [1961] AC 727, 762, per Lord Denning.

20 It is established by Court of Appeal authority (and was not challenged on this appeal) that, where under the lex situs of the relevant trust property the effect of a transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise subsist, that effect should be recognised as giving the transferee a defence to any claim by G the beneficiary, whether proprietary or simply restitutionary: *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. In that case, bona fide chargees for value of shares situated in New York and held on trust for Macmillan were thus able, by application of New York law, to take the shares free of Macmillan's prior equitable interest of which the chargees had had no notice. As will appear, I do not consider that any different position H would result under the Convention.

21 That does not mean that a common law trust cannot or will not exist in respect of shares, simply because the lex situs may treat a disposition of the shares to a third party as overriding any interest of the beneficiary in the shares. A trust existed in respect of the shares in issue in *Macmillan v Bishopsgate* until they were disposed of under the lex situs by transfer to

bona fide purchasers for value without notice. But a common law trust can also exist in respect of shares, such as the Saudi Arabian shares presently in issue, even though Saudi Arabian law does not recognise equitable proprietary interests at all and may not (though this has not been investigated) give any effect at all to a common law trust.

22 A common law court concerned with Cayman Islands trusts in respect of Saudi Arabian shares will give them their intended effect to the greatest extent possible, having regard to the overriding effect of any disposition under their lex situs. This is so both at common law and under the Convention. Thus, as between the immediate parties to the present trusts, Mr Al-Sanea and SICL, Mr Al-Sanea cannot deny the validity or effect of the trusts, or assert a right to deal with assets subject to a trust or their proceeds as his own, simply because Saudi Arabian law does not recognise the trusts as giving rise to the separate equitable proprietary interest that would exist if the shares were situated in, say, the United Kingdom or Cayman Islands. If Mr Al-Sanea were to be the subject of bankruptcy proceedings or a receivership in the United Kingdom or Cayman Islands, it is equally clear that his creditors could not claim that the Saudi Arabian shares formed part of his estate in bankruptcy.

23 The Supreme Court was referred to *Attorney General v Jewish Colonisation Association* [1901] 1 QB 123 and *Duke of Marlborough v Attorney General (No 1)* [1945] Ch 78. In these cases the issue was whether foreign shares held on trust were taxable as on a succession, in the first case on the death of the settlor and the termination of his life interest, and in the second case on the death of the beneficiary of the trust. This issue turned on the application of general words in section 2 of the Succession Duty Act 1853 (16 & 17 Vict c 51): "every past, or future disposition of property . . . shall be deemed . . . to confer . . . 'a succession' ". The courts held these general words to be limited to property held on trust under an English law trust, but applied them even though the property consisted of foreign shares. In the former case, a contrary argument raised by the taxpayer was that, under the Austrian law of the domicile of settlor (which may also have been the situs of some or all of the shares),

> "an Austrian father cannot divest himself of property so as to impair the rights of his children to 'legitim', and any alienation at any time having that effect may on the death of the father be set aside": p 133.

It was argued that Austrian law must govern accordingly. Both A L Smith MR and Collins LJ (pp 133 and 137) noted that, if such an event had occurred, then to that extent the settlement might have been ineffective. But, in circumstances where it had not occurred, they held the trust to be an effective English law trust giving rise to a taxable succession on the settlor's death, while recognising that the actual implementation of the trust in respect of foreign assets might in some circumstances be affected by foreign law. While these are cases from a different area of the law, their recognition of English law trusts in respect of foreign shares, subject only to any possible qualifications on their implementation arising under foreign law, is generally consistent with the analysis which I have indicated in the preceding paragraphs.

24 The validity and enforceability of English law trusts in respect of foreign assets has also been considered in an instructive series of English

authorities. First, the English courts have regularly stated their willingness to enforce in personam trusts in respect of property abroad. As the Earl of Selborne LC said in *Ewing v Orr Ewing* (1883) 9 App Cas 34, 40:

> "The courts of equity in England are, and have always been, courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries: *Penn v Baltimore* (1750) 1 Ves Sen 444."

25 Second, they have exercised such jurisdiction, applying the principles of English law to enforce contracts and trusts relating to foreign property, even though the lex situs did not recognise such principles. Thus, in *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502 the Court of Appeal held that the equitable rule against clogging the equity of redemption of a mortgage applied to a contract governed by English law and would be enforced against a contracting party as regards land abroad in a state where the equity of redemption may not be recognised. Cozens-Hardy MR stated, at pp 513–514:

> "For centuries the Court of Chancery has, by virtue of its jurisdiction in personam, applied against parties to a contract or trust relating to foreign land the principles of English law, although the lex situs did not recognise such principles . . . 'If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.'
>
> "To take a simple case, if A by an English contract agreed to give a mortgage to secure an English debt upon land in a foreign country, the law of which country does not recognise the existence of what we call an equity of redemption, which was the case of our common law, and if a mortgage was given and duly perfected according to the lex situs, I feel no doubt that our courts would restrain the mortgagee from exercising the rights given by the foreign law and would treat the transaction as a mortgage in the sense in which that word is used by us. In doing this our courts would not in any way interfere with the lex situs, but would by injunction, and if necessary by process of contempt, restrain the mortgagee from asserting those rights. Similar observations would apply to a trustee, if the lex situs does not recognise trusts."

26 Thirdly, the situation envisaged by the last sentence of this last quotation is directly covered by Court of Appeal authority in *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 TLI 35. It concerned a claim by Mr Lightning to be the beneficiary under a resulting trust in respect of land in Scotland, bought by an English company to which he had advanced the

purchase price. Scots law, the lex situs of the land, did not recognise any equitable interest. The company having gone into receivership, Mr Lightning obtained a declaration in English proceedings that the property or its proceeds of sale were held on trust for him.

27 Peter Gibson LJ, giving the lead judgment, applied the Earl of Selborne LC's words in *Ewing* 9 App Cas 34 and endorsed the statement by Parker J in *Deschamps v Miller* [1908] 1 Ch 856, 863, that the court would act where there was "some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in a view of a court of equity in this country, would be unconscionable" and that whether it would do so did not depend "on the law of the locus of the immovable property".

28 Peter Gibson LJ also recognised that the lex situs can, under the principle recognised in *Macmillan v Bishopsgate* [1996] 1 WLR 387, have a significance in the case of a third party transfer. He said 23 TLI 35, 38, that the English court had

> "not unnaturally regarded English law as applicable to the relationship between the parties before it in the absence of any event governed by the lex situs destructive of the equitable interest being asserted."

The English court would thus: "accept jurisdiction and apply English law as the applicable law, even though the suit relates to foreign land", but:

> "In contrast if the equity which is asserted does not exist between the parties to the English litigation, for example where there has been a transfer of the property to a third party with notice of an equity but by the lex situs governing the transfer, the transfer extinguished the plaintiff's equity, the English court could not then give relief against the third party even though he is within the jurisdiction."

In *Lightning* itself, as Peter Gibson LJ pointed out: "No event governed by Scottish law [had] occurred whereby any equity arising under English law was destroyed."

29 Henry and Millett LJJ agreed, the latter putting the position forcefully as follows, at p 40:

> "If A provides money to B, both being resident in England, to purchase landed property in his own name but for and on A's behalf, and B does so, the consequences of that transaction are governed by English law. It would be absurd if they were governed by the law of the place where the property in question happened to be located.
>
> "Such a rule would lead to bizarre results if, for example, A's instructions were to buy properties in more than one jurisdiction, for the consequences of the same arrangement might then be different in relation to the different properties acquired. It would also lead to bizarre results if A left it to B's discretion to choose the property to be acquired, since that would give B the unilateral power to decide on the legal consequences of the transaction which he had entered into with A."

30 Fourthly, all these authorities were recently and instructively examined by Roth J in *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch). The case concerned an agreement by Midland to sell to Luxe shares in 20 companies, 17 of which were incorporated in Russia

A or the Ukraine, with the lex situs of the shares in them being also there. Midland defaulted, sold the shares in the Russian and Ukrainian companies elsewhere and, when sued by Luxe, argued that, since Russian and Ukrainian law did not recognise the concept of a beneficial interest at all, and since "questions of ownership and therefore proprietary interests in shares are governed by the lex situs of the companies", it followed that
B "whatever might have been the position if these had been shares in English companies, there were no beneficial interests in the shares which could pass to Luxe" under the share sale agreement: para 30.

31 Addressing this argument, Roth J noted that the "sort of trust, and thus beneficial interest" which arises on the sale of land or of shares in private companies, "arises only because the agreement is specifically enforceable" and is "In a sense, therefore . . . the corollary of the remedy of
C specific performance" and "is not a full trust in the classic sense": para 31. He continued, at para 32, citing *Lake v Bayliss* [1974] 1 WLR 1073:

> "It is by reason of this trusteeship that the vendor who breaks his contract of sale by reselling to someone else has been held to be accountable to the first intended purchaser for the proceeds of sale."

D **32** Roth J then engaged in the following analysis, which is worthwhile quoting in extenso, at paras 35–36:

> "35. Is the application of these principles precluded by the fact that the property is held through subsidiaries in a country the law of which does not recognise the concept of a lesser proprietary interest or that it does not recognise a beneficial interest at all? The fact that Midland held the
E shares through subsidiaries does not in itself preclude the [sale and purchase agreement] from being specifically enforceable, as Midland for present purposes accepts. The obligation to be enforced would be that Midland must procure that the shares are transferred. I do not see that this in itself would prevent the qualified trust relationship from arising.
>
> "36. Does the applicability of the lex situs to questions of ownership alter the position *as between the contracting parties*? It is trite but none
F the less important to recall that equity acts in personam. The parties here have chosen to govern the relationship as between themselves according to English law. Unless precluded by authority, it seems to me that as a matter of principle where the parties have expressly chosen English law and the exclusive jurisdiction of the English court, they have voluntarily subjected themselves to the English system of remedies. In my judgment,
G it is at the very least well arguable, and if necessary I would hold, that this includes the 'qualified trusteeship' that applies as the corollary in such a case to the availability of specific performance, unless that gave rise to a situation that was directly contrary to the lex situs in the sense of interfering with the operation of the local law."

33 After considering *British South Africa Co v De Beers Consolidated*
H *Mines Ltd* [1910] 2 Ch 502 and *Lightning v Lightning Electrical Contractors Ltd* 23 TLI 35, Roth J continued, at paras 41–42:

> "41. I do not consider that the reasoning in *Lightning* is confined to the particular case of a resulting trust. On the contrary, it seems to me of general application. And the observation made by Millett LJ resonates in

the present case, since three of the 20 companies of which Midland sold its shareholding were Guernsey or Irish companies, for which as I apprehend the lex situs recognises a beneficial interest. As it happens, those companies are of negligible value, but that obviously cannot affect the principle. If Midland's analysis were correct, the English court would find that Luxe had acquired as against Midland a beneficial interest in those shares but not in the shares of the other companies incorporated under a different system of law, and that it would thus have a very limited proprietary claim.

"42. Moreover, it is accepted by Luxe that any beneficial interest in the shares sold to Troika was destroyed or terminated by that sale. Its claim is to the proceeds in Midland's hands. Thus no interference with property transfers under Ukrainian (or Russian) law is involved. There is no reason why equity, acting on the conscience of Midland as a proper defendant to English proceedings, cannot require that Midland holds those moneys for the benefit of Luxe."

34 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.

35 In non-common law jurisdictions, a similar approach may also be expected. In Scotland, the civil law concept of patrimony has been developed to explain the protection of trust property held by a trustee against claims by the trustee's personal creditors: *Glasgow City Council v Board of Managers of Springboig St John's School* [2014] CSOH 76 at [17], per Lord Malcolm. Following Italy's ratification of the Convention, Italian courts have also recognised common law trusts as creating a separate patrimony, rather than a new kind of property right: see "Italy: The Trust Interno" by Alexandra Braun in *Hayton, The International Trust*, 3rd ed (2011). Whether Saudi Arabian law would, in any proceedings before a Saudi Arabian court, adopt a similar approach, by treating the relevant transactions as amounting to amaana, even though Saudi Arabia is not a party to the Convention and its law does not recognise distinct equitable proprietary interests, is, as the Court of Appeal noted [2015] Ch 451, para 75, presently unknown: see also para 5 above.

36 The decision by Lord Hodge sitting in the Outer House in the Scottish case *Joint Administrators of Rangers Football Club plc, Noters* 2012 SLT 599 concerned contracts, made in 2011 and subject to English law, between Rangers and two English limited liability partnerships (collectively "Ticketus"). Under the contracts, Ticketus had paid Rangers large sums for future tranches of season tickets in respect of a defined number of seats of different types at specified future matches in each of the seasons from 2011–2012 to 2014–2015. Rangers having gone into administration, its administrators applied for directions as to whether they could be prevented from terminating the contracts. Ticketus argued that they had acquired rights which were more than mere personal rights, and which could be enforced by specific performance. Lord Hodge held, first, relying on the travaux préparatoires (in particular paras 55–57 of the Explanatory Report prepared by Professor Alfred E von Overbeck), that the concept in article 4 of the Convention of a preliminary issue relating to the validity of an act by which assets were transferred to a trustee included

an issue relating to the validity of a declaration of trust. He held, second, that whether the agreements between Rangers and Ticketus in respect of season tickets gave Ticketus more than purely personal rights was such an issue, and, third, that this issue fell accordingly outside the Convention and was to be determined under Scots private international law rules by reference to Scots law, as the lex situs of the future tickets to be issued and the stadium seats to which they related. He went on, at para 33:

> "If I am correct in my conclusion that Scots law applies, the difficulty which Ticketus faces in asserting a trust over the proceeds of sale of the [season tickets agreement] tickets is that the proceeds do not yet exist. On the assumption that the Ticketus agreements are sufficient to amount to a declaration by Rangers of a trust over the STA tickets and the proceeds of their sale, the non-existence of both is fatal to the creation of a trust. Where the truster and trustee are the same person it is our law that there must be constructive delivery of the trust subjects to himself as trustee of an irrevocable trust: see *Allan's Trustees v Lord Advocate* 1971 SC (HL) 45, 54 in which Lord Reid spoke of the doing of 'something equivalent to delivery or transfer of the trust fund'."

37 The essence of the decision was, therefore, that there was nothing which, at least in Scots law, was capable of giving rise to any form of proprietary interest or as being the subject of any trust, which was what Ticketus were claiming. The decision, under Scots law, to apply Scots law to this question, does not determine the common law position or detract from Roth J's analysis in the *Luxe* case [2010] EWHC 1908. The approach taken in the second and third steps of Lord Hodge's reasoning set out above is open to question, at least through English legal eyes (see also the query raised about its correctness by George L Gretton, Lord President Reid Professor at Edinburgh University, in "The Laws of the Game" (2012) 16 Edinburgh Law Review 414, 418). But it is unnecessary to consider this further on this appeal. On an English appeal relating to common law trusts, it is the approach indicated by Roth J in the *Luxe* case and by the Court of Appeal in the *Lightning* case that is correct and applicable.

38 In the light of the above, to regard a trust as falling outside the Convention under article 4, simply because its assets consist of assets in a jurisdiction which does not recognise a division between legal and equitable proprietary interests, is wrong. Even if the Court of Appeal was wrong to limit article 4 to the question whether the assets were alienable, in the sense of being capable of transferable to the trustee or anyone else (see paras 12–13 above), an issue on which it is unnecessary to reach any final conclusion, there was nothing invalid about the declarations of trust.

39 There is nothing in the Convention to suggest that it was intended to be inapplicable to a trust simply because the trust was in respect of assets in a jurisdiction which does not recognise some form of separation of legal and equitable interests. Rather, the contrary—since one object of the Convention was to provide for the recognition of trusts in jurisdictions which did not themselves know the institution. There must be many common law trusts which have or acquire assets in civil law or other jurisdictions which do not recognise the concept of an equitable proprietary interest in the English common law sense. All that the provisions for recognition of a trust in article 11 of the Convention contemplate, "as a minimum" is "that the trust

property constitutes a separate fund". But that does not mean that there must exist a concept of equitable proprietary interest or any separation of legal and equitable proprietary interests under the lex situs of the relevant assets. The further provisions of article 11 remit to the law governing the trust the further consequences of recognition of a trust. But article 11(d) also recognises that third parties may have acquired rights in respect of trust assets under, in particular, the lex situs of the assets, which may prevent the recovery for the benefit of the trust of trust assets which the trustee has, in breach of trust, alienated. The provision in article 15 that, if "recognition of a trust is prevented" by the application of a provision of the law designated by the conflicts law of the forum which cannot be derogated from by voluntary act, "the court shall try to give effect to the objects of the trust by other means" is a further pointer towards the Convention's general aim of accommodating the institution of trust, so far as possible, with other systems.

40 Article 15 itself appears as designed to address the impact of relationships or transactions separate from the trust itself. The Explanatory Report by Professor von Overbeck, which is part of the travaux préparatoires, notes (para 136) that the first paragraph of article 15 "preserves the mandatory rules of the law designated by the conflicts rules of the forum for matters other than trusts". Paragraph 138 of the report proceeds to draw a parallel with the last sentence of article 11(d), noting that this is general, whereas article 15 is limited in application to mandatory rules. In the present context, it is in my opinion the last sentence of article 11(d), not article 15(e) or (f), which is primarily applicable when determining what, if any, rights and obligations Samba may have in relation to the shares as a result of their transfer to Samba by Mr Al-Sanea.

41 On the face of it, this last sentence of article 11(d) would remit to Saudi Arabian law the question whether Samba acquired free of SICL's interests under the trusts, whether or not those interests can be categorised as proprietary. The existence under Saudi Arabian law of the institution of amaana might in this context prove relevant. That is not however an issue presently before the Supreme Court.

42 The issue before the court in the light of the expanded submissions which it has received is whether SICL has any basis for alleging that there was a disposition of property within the meaning of section 127. Viewing the matter in the light of the common law principles set out in paras 21–34 above, I would regard the present trusts not only as intended to create, but also as creating equitable proprietary interests in the Saudi Arabian shares, enforceable at common law at least as between SICL and Mr Al-Sanea and anyone else other than a transferee from Mr Al-Sanea in circumstances giving the transferee a good title under Saudi Arabian law. But, in the context of the present issues under section 127, there is to my mind a considerable case to be made for saying that it cannot matter. The definition of "property" in section 436 is wide enough to embrace both equitable proprietary and purely personal interests.

43 Sir Nicholas Browne-Wilkinson V-C said of section 436 in *Bristol Airport plc v Powdrill* [1990] Ch 744, 759D, that "It is hard to think of a wider definition of property." The case concerned a chattel lease, which it was argued gave rise only to contractual rights. The Vice-Chancellor said, at p 759:

A "Although a chattel lease is a contract, it does not follow that no property lease is created in the chattel. The basic equitable principle is that if, under a contract, A has certain rights over property as against the legal owner, which rights are specifically enforceable in equity, A has an equitable interest in such property. I have no doubt that a court would order specific performance of a contract to lease an aircraft, since each B aircraft has unique features peculiar to itself. Accordingly in my judgment the 'lessee' has at least an equitable right of some kind in that aircraft which falls within the statutory definition as being some 'description of interest . . . arising out of, or incidental to' that aircraft."

44 Any equitable proprietary interest arises out of, or is incidental, to the shares. In my view, a purely personal interest in having the shares dealt C with by the trustee and holding the trustee to account in accordance with the trust might equally well be said to be an "interest . . . arising out of, or incidental to, property". If so, the appeal could be approached on the basis that SICL's rights under the trust constituted relevant property within section 436, whether they were equitable proprietary or purely personal rights. In either case, the question would arise whether the transfer by Mr Al-Sanea of the shares to Samba constituted a "disposition" within the D meaning of section 127, bearing in mind that the disposition would not affect the interests involved, unless they were overridden under Saudi Arabian law by Samba's acquisition of the shares. However, even if it is only equitable proprietary interests that are capable of being regarded as relevant property for present purposes, the key question remains whether there was any disposition of them within the meaning of section 127.

E **45** I have found this a difficult issue. On the one hand, it can be said that "trust assets" have been "misappropriated", "misapplied", "dissipated" or, in terms of article 11(d) of the Convention, "alienated". Such phrases can be found in academic textbooks. Thus, *Snell's Equity*, 33rd ed (2015), para 30-013 reads, under the head "Misapplication":

F "Where the breach consists in a misapplication of trust assets, the first question is whether the trustee should specifically restore the assets to the trust or restore their value by making a money payment. If the trustee still has the original assets, he may effect restoration in specie by transferring them back to the trust fund. If the original assets are no longer available, then the beneficiary may elect to assert a proprietary remedy over any traceable proceeds in the hands of the trustee or a third party."

G Likewise, *Burrows, English Private Law*, 3rd ed, para 4.151 reads:

"The recipient of rights dissipated in breach of trust does not automatically step into the trustee's shoes, inheriting the powers and duties of his transferee [sic, this should presumably be 'transferor']. He is only liable to restore the rights dissipated in breach of trust, either to the former trustee, or, more likely, to other persons nominated by the H beneficiaries. This right of the beneficiaries to recover the trust rights is good against all transferees of rights dissipated in breach of trust bar one, the transferee of a common law right who takes in good faith, for value, and without notice, actual, implied, or constructive, of the fact of the dissipation being in breach of trust. If the transferee is such a person,

compendiously known as 'equity's darling', then the effect of the transfer will be to destroy the beneficiary's right to reconveyance."

46 SICL submits that it is misleading to regard a beneficiary as owning only the equitable interest, and that he or it is entitled to "the entirety of the interest in the relevant property". They point out that, in other contexts, such as tax, the courts have held trust beneficiaries to be assessable to income tax on trust income on the basis that they owned the trust income: see e g *Baker v Archer-Shee* [1927] AC 844 and *Corbett v Inland Revenue Comrs* [1937] 1 KB 567. Further, although the trustee remains accountable as such, a wrongful disposition by a trustee of trust assets does not give to the beneficiary as against the recipient of trust property the same rights as the beneficiary had under the trust as against the trustee. As explained by Nolan, "Equitable Property" 122 LQR 232, 243, 247 and 250 and by Jaffey, *Explaining the Trust* 131 LQR 377, 383, the beneficiary has only the right to have the trust assets restored to the original trustee, or, if the trust was a bare trust to which the rule in *Saunders v Vautier* (1841) 4 Beav 115 applies, to himself; see also the citation from *Burrows, English Private Law*, in the previous paragraph of this judgment.

47 More generally, it can be said that section 127 introduces a prima facie right to recover any property disposed of in which SICL had the legal title, subject only to a power in the court to validate the disposition by order; and that it is well established, in the light of the pari passu principle operating in insolvency, that validation will, save in exceptional circumstances, only be ordered in relation to a disposition occurring after the inception of the winding up

> "if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors": *Express Electrical Distributors Ltd v Beavis* [2016] 1 WLR 4783, para 56, per Sales LJ.

48 On the other hand, SICL's case can be said to overlook the considerable difference which exists between an unrestricted legal title to an asset, which can normally be disposed of to a third party, and a legal title in relation to which a beneficiary has trust rights, which continue to exist and be enforceable unless and until overridden by a transfer under the lex situs as recognised in *Macmillan v Bishopsgate* [1996] 1 WLR 387.

49 In *Ayerst v C & K (Construction) Ltd* [1976] AC 167, 177G–H Lord Diplock referred to the legal ownership of property subject to a trust as held by the trustee "not for his own benefit but for the benefit of the cestui que trust or beneficiaries", but went on to say that:

> "Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements . . . the 'legal ownership' in the trustee, what came to be called the 'beneficial ownership' in the cestui que trust."

50 The metaphor of a "division" or "split" of title needs to be approached with some caution. *Burrows, English Private Law*, 3rd ed, para 4.149, speaks of:

A "the falsity of statements which talk in terms of a 'division' or 'separation' of rights when rights are held on trust, or even worse, of legal and equitable 'titles' existing before the creation of the trust."

Burrows, citing Australian authority, suggests an analysis according to which an equitable interest is "not carved out of a legal estate but impressed" or "engrafted" onto it: para 4.150. Likewise, in "Fiduciary Ownership and
B Trusts in a Comparative Context" [2014] ICLQ 901, Daniel Clarry refers to the concept of "fiduciary ownership . . . whenever title is held by a person in respect of property that is designated for a purpose protected by law" (p 930), and suggests "a concerted effort to move away from the use of 'dual' or 'split' ownership metaphors in trusts discourse towards the fiduciary ownership of trust property in both the common and civil law traditions":
C p 933. Jaffey 131 LQR 377, 386, also notes that one of the difficulties about the proprietary approach (which he advocates) is that:

"it has sometimes been understood in a way that makes it seem paradoxical. That is the 'dual ownership' or 'split ownership' approach. On this approach, it is said that both the trustee and the beneficiary are owners of the trust property, the trustee at law and the beneficiary in
D equity . . . Considering the position overall, clearly one cannot say that the trustee and the beneficiary are both separately the owners of the trust property, at least in the ordinary sense of ownership."

Rejecting any idea of "simultaneous allocation" of all the elements of ownership to both the trustee and the beneficiary, he however opts (p 387)
E for an analysis of:

"distribution according to which the trustee has the right of control over the property, carrying with it the power to manage the property and to deal with it as owner vis-à-vis other parties, signified by legal title, and the beneficiary, where there is a single beneficiary, has the right to all the benefit and enjoyment of the property, which is beneficial ownership."

F

51 It is unnecessary on this appeal to examine these slightly differing analyses further. What is clear, on any analysis, is that, where a trust exists, the legal and beneficial interests are distinct, and what affects the former does not necessarily affect the latter. Where an asset is held on trust, the legal title remains capable of transfer to a third party, although this undoubted disposition may be in breach of trust. But the trust rights,
G including the right to have the legal title held and applied in accordance with the terms of the trust, remain. They are not disposed of. They continue to be capable of enforcement unless and until the disposition of the legal title has the effect under the lex situs of the trust asset of overriding the protected trust rights. If the trust rights are overridden, it is not because they have been disposed of by virtue of the transfer of the legal title. It is because they were
H protected rights that were always limited and in certain circumstances capable of being overridden by virtue of a rule of law governing equitable rights, protecting in particular (under common law) bona fide third party purchasers for value (equity's "darling" in the terms of para 4.151 in *Burrows, English Private Law*, cited in para 45 above).

52 The position was neatly summarised by Lloyd LJ in *Independent Trustee Services Ltd v GP Noble Trustees Ltd (Morris intervening)* [2013] Ch 91, para 106:

> "a transferee of the legal title to property under a disposition made in breach of trust, or a successor in title to such a person, does not have the beneficial title to the property, which remains held on the original trusts, unless either the transferee, or a successor in title, was a bona fide purchaser for value without notice. The trustee acting in breach of trust can transfer the legal title, but cannot vest the beneficial interest in the property in a bona fide purchaser for value without notice, since he does not own that title and is not acting in a way which enables him, under the trust, to overreach the beneficiaries' equitable interest. Despite that inability, the availability of the bona fide purchaser defence means that a transaction in favour of a bona fide purchaser for value without notice is as effective as it would be if he could vest the beneficial title in the purchaser. Thereafter the purchaser can deal with the asset free from any prior claim of the beneficiaries."

53 In these circumstances, I conclude that section 127 is neither aimed at, nor apt to cover, the present situation. Section 127 addresses cases where assets legally owned by a company in winding up are disposed of. The section is necessary to enable the company to recover them, by treating the disposition as void. The court's power to validate the disposition is a necessary safety valve, to cater for situations in which validation would be appropriate, bearing in mind the position of creditors as well as that of the other party to the transaction. Any such disposition will involve issues which arise directly between the company (embracing in that concept its creditors in liquidation) whose property is disposed of and the other party to the transaction, although the section embraces situations where the company's property is held by, for example, a director or agent and is disposed of by him to a third party: *In re J Leslie Engineers Co Ltd* [1976] 1 WLR 292.

54 The holder of interests such as SICL's does not need protection on the lines of section 127, in order to protect its property or to protect or enforce its interests. Mr Al-Sanea disposed of his legal interest in the shares. That involved him in a breach of trust. But it did not involve any disposition of SICL's property. SICL's property, whether it consisted of an equitable proprietary interest or personal rights to have the shares held for its benefit, continued, despite the disposal of the legal title, unless and until that disposal overrode it. If the disposal overrode SICL's interest as regards a third party transferee of the legal title such as Samba, that was not because of any disposal of SICL's interest. It was because SICL's interest was always limited in this respect.

55 In some circumstances, the term "disposition" may, as Lord Neuberger of Abbotsbury PSC demonstrates, embrace destruction or extinction of an interest. In the present context, one might also pray in aid academic descriptions of the wrongful alienation of trust property (even if it did not override any beneficial interest in such property) as a "misapplication of trust assets" (see *Snell's Equity*, paras 30-013, 30-050 and 30-067) and a "dissipation . . . in breach of trust": see *Burrows, English Private Law*, para 4.151. But the natural meaning of "disposition" in the

A context of section 127 is in my view that it refers to a transfer by a disponor to a disponee of the relevant property (here the beneficial interest), not least when the section goes on to render any disposition "void" unless the court otherwise orders. I agree with Lord Neuberger PSC's and Lord Sumption JSC's further reasoning on this point.

56 I do not, in these circumstances, see any basis for extending, or any need to extend, section 127 to cover three-party situations where legal title is B held and disposed of to a third party by a trustee, and the beneficiary's beneficial interest either survives or is overridden by virtue of the disposition of the legal title to the third party. The law regulates, protects and circumscribes beneficial interests under a trust in a manner which is separate from and outside the scope of section 127.

57 It follows that I would allow the appeal, set aside the order made by C the Court of Appeal, and declare that for the purposes of section 127 of the Insolvency Act 1986 there was no disposition of any rights of SICL in relation to the shares by virtue of their transfer to Samba. On the way the case has been put to date, it would appear to follow that there should be an order either to restore the judge's order of a stay of the proceedings brought by SICL and the liquidators, or to strike out the proceedings. But I would allow the parties 21 days in which to make written submissions inviting any D other order, including an order for remission of the matter to the High Court to enable an application to save the proceedings by amendment of the pleadings.

LORD NEUBERGER OF ABBOTSBURY PSC

58 The assumed facts and the issue can be very shortly summarised. E Mr Al-Sanea held certain shares on trust for the benefit of Saad Investments Co Ltd ("SICL"), and, six weeks after the compulsory winding up of SICL commenced, he transferred those shares to Samba Financial Group ("Samba") in discharge of some of his liabilities to Samba. The question which arises is whether, if Samba was a bona fide purchaser for value of the shares without notice of SICL's beneficial interest, the transfer, at least in so far as it relates to SICL's beneficial interest, is to be treated as "void" for F the purposes of section 127 of the Insolvency Act 1986. Section 127(1) provides that a "disposition of the company's property . . . made after the commencement of the winding up is, unless the court otherwise orders, void".

59 In the case of a compulsory liquidation, the "commencement of the winding up" is, at least in a domestic case, the date of the presentation of the G petition to wind up: see section 129 of the 1986 Act. In this case, however, SICL is a Cayman Islands company and the winding up petition was made to, and the winding up order was made by, the Grand Court of the Cayman Islands. The case has accordingly proceeded on the basis that the commencement of the winding up was "at the latest, the date of recognition of [those] foreign proceedings" by the High Court of England and Wales: per Sir Terence Etherton C at first instance (2014) 16 ITELR 808, para 11.

H **60** There is no doubt but that SICL's equitable interest in the shares constituted "property" in the light of the very wide definition of that expression in section 436 of the 1986 Act, which is set out in para 7 of Lord Mance JSC's judgment. As Sir Nicolas Browne-Wilkinson V-C said in *Bristol Airport plc v Powdrill* [1990] Ch 744, 759, "It is hard to think of a

wider definition of property." Having said that, I do not think one actually needs to rely on the width of the statutory definition in section 436: one only has to consider whether section 127 would apply if SICL had purported to transfer its equitable interest in the shares after its winding up had commenced, to realise how inappropriate it would be if the definition in section 436 did not extend to equitable interests.

61 The more difficult question is whether there is in circumstances such as the present a "disposition" of the equitable interest in the shares, assuming that Samba was a bona fide purchaser for value of the shares without notice of that interest.

62 As Lord Mance JSC says, where a legal estate is sold to a bona fide purchaser for value without notice, any equitable interest is not transferred to the purchaser: it is overridden, or to put it more colloquially, it is lost or disappears. Lloyd LJ accurately summarised the position in *Independent Trustee Services Ltd v GP Noble Trustees Ltd (Morris intervening)* [2013] Ch 91, para 106, when he said that a

> "trustee acting in breach of trust . . . cannot vest the beneficial interest in the property in a bona fide purchaser for value without notice, since he does not own that title and is not acting in a way which enables him, under the trust, to overreach the beneficiaries' equitable interest";

but, none the less,

> "the availability of the bona fide purchaser defence means that a transaction in favour of a bona fide purchaser for value without notice is as effective as it would be if he could vest the beneficial title in the purchaser."

63 As Lord Mance JSC also points out, where the legal owner transfers the legal estate to a bona fide purchaser for value with no notice of the beneficial interest in breach of trust, the person who owned the beneficial interest does not by any means lose all its other rights. In particular, it retains all its personal rights against the trustee, i e the party who sold the legal estate. In other words, following the transfer of the shares in this case, SICL retained its personal rights against Mr Al-Sanea, but (assuming Samba was a bona fide purchaser for value without notice and subject to section 127), SICL lost any proprietary rights or interest it had in the shares.

64 The fact that SICL retains its personal rights against Mr Al-Sanea notwithstanding the loss of its beneficial interest in the shares appears to me to be irrelevant to the issue whether section 127 applies. If a transaction would otherwise be a disposition within the section, there is no reason for disapplying the section merely because the company in question would not be deprived of its personal rights by the disposition. Similarly, the fact that an equitable interest is more precarious than a legal interest appears to me to be nothing to the point. The very purpose of section 127 is to impeach transactions which would otherwise be effective, and it seems to me to be inconsistent with that purpose to exclude from its ambit a transaction which would otherwise be lawful, and to which a particular right or interest is otherwise susceptible of being defeated.

65 There is undoubtedly a powerful argument for saying that a transfer by the legal owner of the legal estate for value in an asset to a bona fide purchaser who has no notice of the existence of an equitable interest in that

asset cannot amount to a disposition of that equitable interest. As already mentioned, and as Lord Mance JSC demonstrates, there is no question of Mr Al-Sanea having transferred SICL's equitable interest in the shares to Samba: he simply transferred his legal ownership of the shares to Samba, and, on the assumption that Samba was a bona fide purchaser for value without notice, the equitable interest effectively disappeared. In those circumstances, at least on the basis of the meaning which it naturally conveys, section 127 simply does not apply: a "disposition" normally involves a disponor and a disponee, and so there has simply been no disposition. Indeed, in an Australian first instance decision, *In re Mal Bower's Macquarie Electrical Centre Pty Ltd* [1974] 1 NSWLR 254, 258, Street CJ in Eq expressly so stated, albeit in a very different context from the present.

66 However, it is fair to say that the word "disposition" is linguistically capable of applying to a transaction which involves the destruction or termination of an interest. Etymological analyses can fairly be said to be suspect in this sort of context, but it seems to me to involve a perfectly natural use of language to describe SICL's interest in the shares as having been "disposed of" by the transfer of those shares to a bona fide purchaser.

67 And it is possible to claim support for such a view in relation to section 127 from respected authors. Thus, Professor Sir Roy Goode in *Principles of Corporate Insolvency Law,* 4th ed (2011), para 13-127 states that "Section 127 bites on beneficial ownership, not necessarily on the legal title". And at para 13-128, he says that:

> "The word 'disposition' . . . must be given a wide meaning if the purpose of the section is to be achieved, particularly in view of the fact that there is no exception in favour of transfers for full value";

particularly relevantly for present purposes, this passage continues:

> " 'Disposition' should therefore be considered to include not only any dealing in the company's . . . assets by sale, exchange, lease, charge, gift or loan but also . . . any other act which, in reducing or extinguishing the company's rights in an asset, transfers value to another person."

Sir Roy then explains that on this basis " 'disposition' includes an agreement by which the company surrenders a lease or gives up its contractual rights". And *McPherson's Law of Company Liquidation,* 3rd ed (2013), para 7-015, states that section 127 "only [applies to] property which belongs in equity to the company" and "is confined to the company's beneficial interest in property".

68 There is also some judicial support for the notion that "disposition" can extend to extinguishment. Thus, Wynn-Parry J said in *In re Earl Leven and Melville, decd; Inland Revenue Comrs v Williams Deacon's Bank Ltd* [1954] 1 WLR 1228, 1233, that "The word 'disposition', taken by itself, and used in its most extended meaning, is no doubt wide enough to include the act of extinguishment." However, he rejected such a wide interpretation of that word in the Finance Act 1940, partly because it produced "a quite unexpected result" and partly because in other sections of that Act "it is clear that where the legislature intended that . . . 'disposition' should include 'extinguishment', it was at pains to make express provision". Accordingly,

the extinguishment of a liability to pay insurance premiums did not amount to a "disposition" for the purposes of section 44(1) of the 1940 Act.

69 In another revenue case, *Inland Revenue Comrs v Buchanan* [1958] Ch 289 the Court of Appeal held that the surrender of a life interest under a will trust in favour of those people entitled in remainder operated as a "disposition" of that life interest for the purposes of sections 20 and 21 of the Finance Act 1943. At p 298, Jenkins LJ specifically rejected the argument that there was no disposition because "a surrender of a life interest destroys the interest and there is nothing left". This again provides support for the notion that the fact that property ceases to exist as a result of a transaction does not prevent the transaction involving a "disposition" of that property. But, of course, all depends on the statutory context and how they apply to the facts of the particular case.

70 There is also a policy argument for concluding that in a case such as the present, the equitable interest is the subject of a "disposition" for the purposes of section 127, particularly bearing in mind the fact that the court has a dispensing power. The purpose of section 127 is to ensure that, at least once the winding up procedure has been started, a company's property is retained, in particular for the purpose of being available in order to be distributed pro rata, i e fairly, among its creditors. On the face of it, at any rate, that should apply as much to property which is held for it by a third party as to property which it holds in its own name.

71 It would appear that Mr Al-Sanea was a bare trustee of the shares—i e the whole of the beneficial interest in the shares was vested in SICL. A transfer of the bare legal estate by the trustee to a purchaser with notice of the trust would not be caught, because he would only acquire the bare legal interest, which would normally be worth nothing, and no disposition of the company's property would have occurred. And a transfer by the company of its equitable interest would undoubtedly be caught by section 127 as it would involve a disposition by the company of that interest. It can therefore be said to be surprising if a transfer by the trustee which involved the transferee effectively obtaining the whole of the equitable interest previously owned by the company was not caught by the section.

72 None the less, I have reached the conclusion, in agreement with Lord Mance JSC, that there is no "disposition" of an equitable interest within section 127, when there is a transfer by the legal owner of the legal estate, which is subject to that equitable interest, to a bona fide purchaser for value without notice of that equitable interest.

73 As already mentioned, the natural meaning of section 127 appears to me to carry with it the notion of a disponor transferring property to a disponee, and on that basis there was no disposition of SICL's equitable interest in the shares in this case. Although, as explained above, there are arguments for departing from the natural meaning of section 127, I consider that they are outweighed by the arguments the other way.

74 In my view, Sir Roy Goode is right when he says that the surrender of a lease or the giving up of contractual rights by a company would be a "disposition" within section 127, as would a surrender of a life interest (and a company can no doubt have such an interest, at least if it is contingent on an individual's life) as discussed in *Buchanan*. However, there are differences between a surrender (whether of a lease, contractual rights, or a life interest) and the loss of a beneficial interest on a transfer of the legal

A estate to a bona fide purchaser for value without notice of that interest. In the former case, the person who is the disponor is the same as the person who loses the property; whereas in the latter case the disponor is, ex hypothesi, not the person who loses the property. And, in the former case the disponee is well aware of the property which is ceasing to exist: as far as he is concerned, its extinction is the purpose of the transaction; in the latter B case, the disponee is, by definition, unaware of the property which is being disposed of.

75 Section 127 can operate harshly so far as people dealing in good faith with a company are concerned. In many cases, a person dealing with a company will be unaware that a petition has been presented (particularly if the presentation occurred very recently), and the section contains no exception for transactions in the ordinary course of business or for C transactions for which the company receives full value. The fact that the court will often sanction transactions in the ordinary course of business under its statutory dispensing power is by no means a wholly satisfactory answer to this. As Fox LJ explained in *In re SA & D Wright Ltd* [1992] BCC 503, 505, when deciding whether to validate a disposition under section 127, the court "must always do its best to ensure that the interests of D the unsecured creditors will not be prejudiced", and, where there is said to have been a benefit in validating, "the court must carry out a balancing exercise". And, as Sales LJ put it more recently in *Express Electrical Distributors Ltd v Beavis* [2016] 1 WLR 4783, para 56, validation will ordinarily only be granted "if there is some special circumstance which shows that the disposition in question . . . has been . . . for the benefit of the general body of unsecured creditors".

E 76 But it would not merely be harsh, but positively unfair for a bona fide purchaser of a legal estate from a third party to find that, because of section 127, the transaction in question was liable to be held void owing to the existence of an equitable interest held by a company of which he had no notice. As explained in para 74 above, the position is very different from the surrender of a lease or of contractual rights. A person taking a surrender of a F lease or contractual rights from a company knows both that he is dealing with the company and that he is dealing in the lease or the rights. A bona fide purchaser for value of an asset without notice of a company's equitable interest in the asset would be unaware both of the company (or at least that it had an equitable interest) and of the equitable interest (as if he knew about it he would be bound by it, as he would not be a bona fide purchaser).

G 77 So far as the passages in the books quoted in para 67 above are concerned, it seems to me that, read in context, they do not support the view that section 127 applies in a case such as this. The authors were not directing their minds to a case where the disponor was someone other than the company concerned or its agent. As already mentioned, Sir Roy's examples all involved the company as disponor, and the passage quoted from *McPherson* was directed to explaining why completion by a company H of a prior contract to sell its property does not fall within section 127. The dicta and decisions in the two cases referred to in paras 68–69 above must, of course, also be assessed by reference to their respective legal and factual contexts. In both *Earl Leven and Melville* [1954] 1 WLR 1228 and *Buchanan* [1958] Ch 289, the courts were construing a revenue statute, and,

more importantly, the transaction involved disponors transferring property which they owned beneficially.

78 As to the other issues discussed in the judgments of Lord Mance, Lord Sumption JJSC and Lord Collins of Mapesbury, I agree with what they say and there is nothing I can usefully add.

LORD SUMPTION JSC

79 The facts to be assumed for the purposes of this appeal are that Mr Al-Sanea held shares in various Saudi Arabian banks on trusts governed by Cayman Islands law for the claimant Saad Investments Co Ltd ("SICL"); and that on 16 September 2009, six weeks after SICL went into liquidation, he transferred them to the defendant Samba Financial Group in discharge of personal liabilities which he owed to them. The transfer is said to be void under section 127 of the Insolvency Act 1986 as a "disposition of the company's property . . . made after the commencement of the winding up".

80 The appeal arises out of what is, in point of form, an application by Samba to stay the proceedings on the ground of forum non conveniens. But the real ground of the application is that the proceedings are bound to fail. There are four critical steps in Samba's argument:

(1) The transmission of property is governed by the lex situs, which in the case of registered shares is the law of the company's incorporation, in this case Saudi Arabia. This proposition is well established and was not seriously disputed: see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. It applies as much to the transmission of an equitable as to a legal interest in shares: *Underhill & Hayton, The Law Relating to Trusts and Trustees*, 18th ed (2010), para 100.128.

(2) The law of Saudi Arabia does not recognise trusts or any other distinction between the legal and beneficial interests in property. It treats the registered owner of shares in a Saudi Arabian company as their sole and entire owner. This was found as a fact by the Chancellor of the High Court, and is no longer disputed.

(3) It follows that an instrument purporting to create a trust over shares in a Saudi Arabian company was ineffective to do so, even though governed by a law (that of the Cayman Islands) which recognised trusts.

(4) Accordingly SICL can have had no equitable interest in the shares capable of being "disposed of" within the meaning of section 127 of the Act.

81 The real issues raised by this argument have been obscured by the narrow basis on which it was presented in the courts below. The focus of the argument was on point (3). Although point (4) was perhaps the most critical step of all, it was left to one side, and this court was initially told that it was agreed not to be in issue "at this stage". This was unfortunate, for it meant that the oral argument proceeded on an artificial basis. There could be no proper analysis of the nature of the proprietary interest said to have been disposed of within the meaning of section 127, or of the way in which that provision operates in relation to such an interest. The omission was ultimately made good after the conclusion of argument by the service of written submissions at the request of the court. This means that it is possible for us to address the issue on a rather broader basis of principle than the courts below. It also means that a number of the issues which featured in argument below can be seen not to arise.

A **82** As the beneficiary of a trust, SICL had two main legal rights. First, it had a right to have the trust administered according to its terms. This was a personal right against the trustee. The only relevant condition for its enforceability is that Samba should be before the court. Since it has been properly served with the proceedings, that condition is satisfied. Secondly, SICL had a true proprietary right. The proprietary character of an equitable interest in property has sometimes been doubted, but in English law (which B is in this respect the same as Cayman Islands law), the position must be regarded as settled. An equitable interest possesses the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice: see *Westdeutsche Landesbank Girozentrale v Islington London* C *Borough Council* [1996] AC 669, 705 (Lord Browne-Wilkinson).

83 There are a number of reasons why the proprietary interest of the beneficiary may not be effective or enforceable. Obvious examples include cases where the property or its traceable proceeds have been transferred to a bona fide purchaser for value without notice; and cases where the property has been consumed or destroyed, or has ceased to be traceable. But that will not affect the beneficiary's personal rights, if any, against the trustee or his D amenability to personal remedies. Those rights will remain enforceable, for example by an action for the restoration of the trust assets or for equitable compensation for their loss. The personal and proprietary rights of the beneficiary exist independently, and neither is dependent on the continued existence of the other. For this reason, the beneficiary's proprietary interest in property is of limited practical importance. It is relevant only as between E the beneficiary and a third party, or for the purpose of asserting a prior claim to specific assets in an insolvency. Even then, equity acts in personam by requiring the trustee to perform his trust or a relevant third party to account.

84 The question whether some species of proprietary interest is capable of existing is necessarily a question for the general law. Unless the general law recognises the possibility of such an interest, it is self-evident that the parties cannot create or transfer it. That necessarily provokes the question: F the general law of which jurisdiction? Normally, it will be the lex situs. This would be obvious in the case of land, but is equally true of shares. Shares in a company are legal rights against that company, dependent on the law of its incorporation. The principle is the same as that which applies where a person assumes a contractual obligation to transfer an interest which is incapable of existing under the lex situs. It is stated in *Anton's Private* G *International Law*, 3rd ed (2011), para 21.61, in a passage adopted by Lord Hodge in *Joint Administrators of Rangers Football Club plc, Noters* 2012 SLT 599, para 19:

> "while the contractual aspects of a contract to assign corporeal moveables are governed by the law applicable to the contractual obligation, the final question of proprietary right must be determined by H the lex situs."

85 None of this, however, means that where a person assumes the liabilities of a trustee under an instrument governed by another law which recognises the concept, that instrument is void or cannot be enforced according to its terms. It remains effective to create personal rights against

the trustee, who may be ordered to give effect to the trust, either by specifically performing it where that can be done, or making good his breach of duty financially. The law of Saudi Arabia will treat the trustee as the owner of the entire interest in the shares with all the rights that that entails, but equity will exercise its personal jurisdiction to compel him to deal with the shares in accordance with his trust. The same is true of equitable obligations in respect of property which are imposed by law, where the amenability of the defendant to the personal jurisdiction of the court has always been enough to justify the enforcement of his obligations.

86 In *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 736–737, the question was whether the recipient of trust money was accountable as a constructive trustee on the footing of knowing receipt when before reaching him the property had passed through the hands of persons in a number of civil law jurisdictions where equitable interests were not recognised and the legal owner was treated as having the entire interest in the property. The reason was that, as between the alleged constructive trustee and the beneficiary, the former's amenability to personal remedies was unaffected by any issue as to existence of rights in rem:

> "Although equitable rights may found proprietary as well as personal claims, it has long been settled that they are classified as personal rights for the purpose of private international law. The doctrine was stated by Lord Selborne LC in *Ewing v Orr Ewing* (1883) 9 App Cas 34, 40 as follows: 'The courts of equity in England are, and always have been, courts of conscience, operating in personam and not in rem: and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries . . .'
>
> "In *Cook Industries Inc v Galliher* [1979] Ch 439, Templeman J entertained an action in which the plaintiff claimed a declaration that the defendants held a flat in Paris together with its contents in trust for the plaintiff, and made an order compelling the defendants to allow the plaintiff to inspect the flat. The fact that the subject matter of the alleged trust was situate in France, a civil law country, was no bar to the jurisdiction. DLH is, therefore, answerable to the court's equitable jurisdiction as regards assets situate abroad, even in a civil law country . . .
>
> "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. In the present case, any obligation on the part of DLH to restore to their rightful owner assets which it received in England is governed exclusively by English law, and the equitable tracing rules and the trust concept which underlies them are

A applicable as part of that law. There is no need to consider any other system of law."

A similar analysis was applied by the Court of Appeal in *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 TLI 35 and more recently by Roth J in *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch).

B 87 Section 436 of the Insolvency Act 1986 defines "property" as including

> "money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property . . ."

C These are exceptionally wide words. It is plain that an equitable proprietary interest in property under a trust and a personal right to have the trusts of that property administered according to their terms are both "property" for the purposes of the Act, including section 127.

88 SICL's problem is not that it lacked a beneficial interest in the shares but that Mr Al-Sanea did not dispose of that interest by transferring the D shares to Samba. Mr Al-Sanea purported to transfer the legal interest to Samba. That was the only interest that he had. He did not purport to dispose of SICL's interest. Only SICL could do that, and it did not do so. The disposition of the legal interest did not itself extinguish any equitable interest of SICL in the shares. It only meant that that interest fell to be asserted against Samba, subject to the usual equitable defences. Samba's position in E law was that it took the shares on a bare trust to restore them to the beneficial owner, unless it was a bona fide purchaser for value without notice. Since Samba gave value in the form of the discharge of Mr Al-Sanea's debt, its liability to restore the shares must depend on whether they are accountable on the basis of notice. Section 127 is irrelevant to the disposition of the only interest which matters for present purposes, namely SICL's equitable interest in the shares.

F 89 It is arguable, as Lord Neuberger of Abbotsbury PSC observes, that the transfer of the legal interest in movables may constitute a "disposition" of an equitable interest if its effect is that the equitable interest is extinguished. But the difficulty about the argument, and the reason why I would reject it, is that equitable interests arise from equity's recognition that in some circumstances the conscience of the holder of the legal interest G may be affected. When the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected. On the facts pleaded in the present case, the equitable interest of SICL was defeated not by the act of the transferor (Mr Al-Sanea) but by absence of anything affecting the conscience of the transferee (Samba). The rules of equity which protect transferees acquiring in good faith and without notice are among the H fundamental conditions on which equitable interests can exist without injustice.

90 The reality is that the transaction of 16 September 2009 was simply a transfer of the shares in breach of trust, and any rights of SICL against Samba depend on the law relating to constructive trusts and not on section 127 of the Insolvency Act 1986. The law relating to constructive

trusts has achieved a high level of development, reflecting a careful balance between the competing interests engaged in such cases. Wide as the term "disposition" is, the coherence of the law in this area would not be assisted by giving it a meaning inconsistent with the basic principles governing the creation and recognition of equitable interests and founded on a very different balance of the relevant interests. There is no claim in this case to make Samba accountable as a constructive trustee, and no allegation of notice. For that reason, the proceedings as presently framed must fail.

91 I arrive at this conclusion without reference to the Convention on the Law Applicable to Trusts and on Their Recognition. The purpose of the Convention is to procure the recognition of the main incidents of a trust by contracting parties whose law would not otherwise recognise them. It is therefore of limited significance in jurisdictions such as England and the Cayman Islands which do recognise trusts. It might have modified the law of Saudi Arabia if Saudi Arabia had been party to the Convention, but it is not. The argument before us turned mainly on articles 4 and 15, both of which are set out in the judgment of Lord Mance JSC. But neither of them is in point. Article 4 provides that the Convention does not apply to issues as to the validity of instruments creating a trust. But there is no question as to the validity of the trusts in issue here, since they are certainly valid under the law of the Cayman Islands which governs them. Samba's argument relates not to the validity of the trusts themselves but to the existence of a proprietary interest in the trust assets having regard to the legal characteristics of those assets in Saudi Arabian law. But that is irrelevant given the undoubted validity and legal sufficiency of the trustee's personal obligations under Cayman Islands law. As to article 15, that provision is concerned only to preserve the effect of mandatory rules of a relevant law which may be inconsistent with the recognition of some incidents of a trust. It follows that the only potentially relevant provision of the Convention is article 11, which determines the extent to which obligations under a trust are to be effective in England. But as between SICL and Samba it does no more than refer the latter's liabilities to the law selected in accordance with the choice of law rules of the forum, in this case the law of the Cayman Islands: see article 11(d).

92 I would accordingly allow the appeal. Subject to argument about the precise form of order, I would declare that for the purpose of section 127 of the Insolvency Act 1986 there was no disposition of any rights of SICL in relation to the shares by virtue of their transfer to Samba. Logically, it follows that the proceedings should be struck out. But I would remit the matter to the High Court to deal with any consequential matters, in case it be contended that they can be saved by an appropriate amendment to the pleadings.

LORD COLLINS OF MAPESBURY

93 I agree with Lord Mance JSC that this case does not raise the interesting and difficult questions on the Hague Convention which were argued, first before Sir Terence Etherton C (2014) 16 ITELR 808 and the Court of Appeal, and then in the oral argument in this court before the parties were asked to provide written submissions on the combined effect of sections 127 and 436 of the Insolvency Act 1986.

A **94** This appeal came to this court as a preliminary issue on a wholly artificial basis, namely that the liability of Samba (which was in fact the whole point of the proceedings) was agreed not to be in issue "at this stage" (as it was put several times in the oral argument) and that the sole question was whether as between SICL and Mr Al-Sanea the declarations of trust by SICL had a proprietary effect. Because the liability of Samba had been B expressly and artificially excluded, there was no full analysis in the full context of the question of what is meant by the expression "proprietary interest", since both parties proceeded on the basis that there was a prior question as to whether SICL itself ever acquired a proprietary interest from Mr Al-Sanea in the light of the assumption that Saudi Arabian law had no trust concept.

C **95** It is understandable why the original application before Sir Terence Etherton C was for a stay of the proceedings with the ultimate object of ensuring that, if the proceedings were in Saudi Arabia, they would be bound to fail. It is also understandable why a discretionary jurisdictional route was taken, since the defendant approached it as if it were a case of personal jurisdiction based solely on the presence in London of a branch of Samba, which had nothing to do with the transfer of the shares in Saudi Arabia. As D Sir Terence Etherton C pointed out 16 ITELR 808, para 54, the claim could have been put on the basis of constructive trust if there were a sufficient factual basis, and the failure to do so emphasises the artificially narrow basis of the claim.

96 But in the light of the way the claim was formulated, the real question was not one of the proper exercise of judicial jurisdiction, but rather a question of legislative jurisdiction, namely the extra-territorial E scope of section 127 of the Insolvency Act 1986 and its application to the shares. The combined effect of sections 127 and 436 of the Insolvency Act 1986 is that the avoidance provisions of section 127 apply to property "wherever situated".

97 If this were a purely domestic case there would be no possible doubt of the effect of the declarations of trust: they give the beneficiary "the F paradigm of an equitable interest in property": *Snell's Equity*, para 2-002.

> "Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property . . .)": *Westdeutsche Landesbank Girozentrale v* G *Islington London Borough Council* [1996] AC 669, 705.

98 It was only after further submissions were requested after the hearing of the appeal that there was any exploration of the issues under section 127 of the Insolvency Act 1986. For the reasons given by Lord Mance JSC, I do not consider that there was any "disposition" of SICL's property.

H **99** It follows that the scope and effect of the Hague Convention do not fall to be decided. The Hague Convention was promoted by the United Kingdom. It was "particularly intended to build bridges between countries of common law and countries of civil law" and for common law states "the principal interest [was] obviously to have the trusts created under their laws

recognised in the countries which do not have this institution": von Overbeck Explanatory Report, January 1985, paras 12, 14.

100 There was exceptional interest in the Convention from states, and its conclusion owed much to the work of the fine scholar Professor Alfred von Overbeck, who died in April 2016, Mr Adair Dyer and Mr Hans van Loon (respectively later Deputy Secretary-General and Secretary-General of the Hague Conference on Private International Law) and Professor A E Anton and (particularly) Professor David Hayton of the UK delegation. But in the event although 32 member states of the Hague Conference adopted the draft Convention, only 12 states are now parties to the Convention, and it says much about the likely principal uses of the Convention that they include Liechtenstein, Luxembourg, Monaco, San Marino and Switzerland.

101 There was considerable discussion in the travaux of the Hague Conference about whether the Convention was to apply to declarations of trust (because article 2 refers to assets being "placed" under the control of the trustee). But there can be no doubt that it applies to declarations of trust, not only because the travaux make it clear that it was so intended, but more importantly, that is the clear effect of the Recognition of Trusts Act 1987, section 1(2), which provides that the scheduled provisions of the Hague Convention apply not only to the trusts described in articles 2 and 3, but also to all other trusts under United Kingdom law.

102 There has never been any suggestion in the authorities that an effective declaration of trust could not be made over shares in a company incorporated, or shares registered, in a country which does not recognise the trust concept. *Attorney General v Jewish Colonisation Association* [1901] 1 QB 123 and *Duke of Marlborough v Attorney General (No 1)* [1945] Ch 78 are only indirect authority, but they have been, correctly, regarded as recognising English trusts over foreign shares irrespective of whether the place of incorporation or place of registration recognises the trust concept: cf *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch) (Roth J). But for the reasons given by Lord Mance JSC, this is not the occasion for considering the effect on third parties.

103 I would therefore allow the appeal, and I agree with the order which Lord Mance JSC proposes.

Appeal allowed.

JILL SUTHERLAND, Barrister

A

Court of Appeal

*Asturion Fondation *v* Alibrahim

Practice Note

[2020] EWCA Civ 32

B

2020 Jan 15; 24 Ryder, Leggatt, Arnold LJJ

Practice — Pleadings — Striking out — Abuse of process — Claimant deciding not to pursue claim for substantial period of time while intending to pursue it at later juncture — Whether abuse of process of court — CPR r 3.4(2)(b)

C A unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant has decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court; but it is not the D law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason might be or the length of the delay (post, paras 49–50, 55, 61, 81, 82).

Grovit v Doctor [1997] 1 WLR 640, HL(E) and dicta of Lord Woolf MR in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, 1436F–H, 1437B–E, CA, considered.

E An application to strike out a claim on the ground of abuse of process falls to be analysed in two stages. First, the court should determine whether the claimant's conduct was an abuse of process. Secondly, if an abuse of process is found, the court should exercise its discretion as to whether to strike out the claim. This two-stage analysis is supported by the structure of CPR r 3.4(2)(b)[1], which provides that the court "may" strike out a statement of case if it is an abuse of the court's process (post, F paras 64, 81, 82).

Decision of Judge Cooke sitting as a judge of the Chancery Division [2019] EWHC 274 (Ch) affirmed.

The following cases are referred to in the judgment of Arnold LJ:

Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426; [1998] 2 All ER 181, CA

G *Braunstein v Mostazafan & Janbazan Foundation* (unreported) 12 April 2000, CA

Grovit v Doctor [1997] 1 WLR 640; [1997] 2 All ER 417, HL(E)

Icebird Ltd v Winegardner [2009] UKPC 24; 23 EG 93 (CS), PC

Realkredit Danmark A/S v York Montague Ltd The Times, 1 February 1999, CA

Sarpd Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120; [2016] CP Rep 24, CA

Société Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS [2017] EWHC 667 H (Comm); [2018] EWCA Civ 1093; [2019] 1 WLR 346, CA

Solland International Ltd v Clifford Harris & Co [2015] EWHC 3295 (Ch)

[1] CPR r 3.4(2): "The court may strike out a statement of case if it appears to the court— . . . (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."

The following additional cases were cited in argument:

Bostani v Pieper [2019] EWHC 547 (Comm); [2019] 4 WLR 44; [2019] 2 All ER (Comm) 276
Datec Electronic Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; [2007] 1 WLR 1325; [2007] Bus LR 1291; [2007] 4 All ER 765, HL(E)
Grenda Investments Ltd v Barton [2017] EWHC 2371 (Comm)
Hunter v Chief Constable of the West Midlands Police [1982] AC 529; [1981] 3 WLR 906; [1981] 3 All ER 727, HL(E)
Kaplan v Super PCS llp (formerly Chancery (UK) plc) [2017] EWHC 1165 (Ch)
Solland International Ltd v Clifford Harris & Co [2015] EWHC 2018 (Ch)
Wearn (trading as Jonathan Wearn Productions) v HNH International Holdings Ltd [2014] EWHC 3542 (Ch)

The following additional cases, although not cited, were referred to in the skeleton arguments:

Aldi Stores Ltd v WSP Group plc [2007] EWCA Civ 1260; [2008] 1 WLR 748, CA
Assicurazioni Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642; [2003] 1 WLR 577; [2003] 1 All ER (Comm) 140, CA
Birkett v James [1978] AC 297; [1977] 3 WLR 38, CA; [1978] AC 297; [1977] 3 WLR 38; [1977] 2 All ER 801, HL(E)
Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) [2014] EWCA Civ 906; [2014] 1 WLR 3926; [2015] 1 All ER 880, CA
Dinglis Management Ltd v Dinglis Properties Ltd [2019] EWCA Civ 127, CA
Harbour Castle Ltd v David Wilson Homes Ltd [2019] EWCA Civ 505; [2019] BLR 304, CA
Higinbotham v Teekhungam [2018] EWHC 1880 (QB)
Kamoka v The Security Service [2017] EWCA Civ 1665, CA
Link Up Mitaka Ltd (trading as thebigword) v Language Empire Ltd [2018] EWHC 2728 (IPEC); [2018] 6 Costs LR 1279
Nugent v Nugent [2013] EWHC 4095 (Ch); [2015] Ch 121; [2014] 3 WLR 59; [2014] 2 All ER 313
R (O'Connell) v Westminster Magistrates' Court [2017] EWHC 3120 (Admin); [2018] Lloyd's Rep FC 130, DC
Sarpd Oil International Ltd v Addax Energy SA [2015] EWHC 2426 (Comm); [2015] 4 Costs LR 751
Stuart v Goldberg Linde [2008] EWCA Civ 2; [2008] 1 WLR 823, CA

APPEAL from Judge Cooke sitting as a judge of the Chancery Division

By a claim form issued on 10 April 2015, the claimant, Asturion Fondation, sought to recover a property worth approximately £28m on the basis that it had been gratuitously transferred to the defendant, Aljawharah Bint Ibrahim Abdulaziz Alibrahim, by a member of the claimant's board, allegedly without authority. On 2 February 2016, an agreed set of directions in the English proceedings was lodged at court, but since the court made no order embodying those directions or listing a case management conference, neither party was subject to any court-ordered deadline for taking subsequent steps in the proceedings and there was no active case management in respect of the claim. On 9 November 2016 the defendant's solicitors asked the claimant for confirmation by 25 November 2016 as to whether it intended to amend its particulars of claim and consent to the proposed amendments to the defence, failing which the defendant would make an application for permission to amend her defence and list a case management conference at court. On 24 November 2016 the claimant's solicitors replied that the claimant did intend to amend its particulars of

claim and would respond to the question of consent to proposed amendments to the defence at the beginning of December 2016. Between 24 November 2016 and 15 August 2017 there was no activity by or communication between either party to the claim. On 15 August 2017 the defendant's solicitors wrote to the claimant asserting that in the circumstances it was clear that the claimant had abandoned the claim and invited it to discontinue. On 23 August 2017 the claimant responded that it had not abandoned the claim, stating that it considered that there was no immediate need to push ahead with directions to trial, given that the parties were involved in separate court proceedings in Liechtenstein regarding the composition of the claimant's board.

On 11 December 2017 the defendant issued an application to strike out the claim on the ground of abuse of process, alleging that the claimant had effectively given an admission of "warehousing" its claim, unilaterally placing the proceedings on hold for a substantial period of time without either the agreement of the defendant or an order of the court. By a decision dated 11 September 2018, Deputy Master Cousins ordered the claim to be struck out, on the basis that any decision by a claimant unilaterally to put proceedings on hold for a significant period of time was ipso facto an abuse of process. By a decision dated 15 February 2019 [2019] EWHC 274 (Ch), Judge Cooke sitting as a judge of the Chancery Division allowed the claimant's appeal, holding that such delay was not automatically an abuse of process and that the court had to examine all the circumstances in which the delay occurred, including the length of the delay, the degree of the claimant's responsibility for that delay and the reasons given for it, and assess whether they amounted to abuse of process, as distinct from "mere" delay.

By an appellant's notice dated 15 March 2019 and pursuant to permission granted by the Court of Appeal (Asplin LJ) on 15 April 2019 the defendant appealed on the ground that the judge had applied the wrong substantive legal test as to what constituted "warehousing" and, in fashioning his own test, had departed from clear authority.

The facts are stated in the judgment of Arnold LJ, post, paras 7–38.

Rupert Reed QC and *Simon Atkinson* (instructed by *Simmons & Simmons llp*) for the defendant.

David Mumford QC and *James Kinman* (instructed by *Bryan Cave Leighton Paisner llp*) for the claimant.

The court took time for consideration.

24 January 2020. The following judgments were handed down.

ARNOLD LJ

Introduction

1 In these proceedings the claimant ("Asturion") seeks to recover a property worth around £28m which was gratuitously transferred to the defendant ("Ms Alibrahim") by a member of Asturion's board, it is said without authority. Asturion's claim was struck out by Deputy Master Cousins ("the Master") on the ground that Asturion had abused the process of the court by "warehousing" its claim, that is to say, unilaterally placing the proceedings on hold for a substantial period of time without either the agreement of Ms Alibrahim or an order of the court. Judge David Cooke sitting as a judge of the Chancery Division ("the Judge") allowed an appeal against that decision by Asturion. Ms Alibrahim now appeals to this court with permission granted by Asplin LJ. The appeal raises an issue of principle as to what amounts to an abuse of process in this context.

Background

The parties

2 Asturion is a Liechtenstein foundation which was founded in 1974 to hold and manage certain properties on behalf of Prince Fahd Bin Abdulaziz Al Saud of Saudi Arabia, who became King Fahd in 1982 and died on 1 August 2005. Ms Alibrahim is one of the widows of King Fahd.

The dispute in outline

3 In 2011 Maître Faisal Assaly ("Mr Assaly"), who was one of the members of the board of Asturion at that time, executed transfers of four high value assets to Ms Alibrahim. No consideration was paid by her. Mr Assaly claimed to have acted on the basis of oral and written instructions given by the late King in 2001. Mr Assaly died in 2015.

4 These proceedings concern one of the four assets, namely a property known as Kenstead Hall, 52 Bishops Avenue, London N2 0BE ("the Property"). This was transferred by a TR1 executed by Mr Assaly on 14 October 2011 ("the Transfer"). Asturion alleges that Mr Assaly executed the Transfer without Asturion's authority, in excess of his internally specified competencies as a matter of Liechtenstein law and/or contrary to the purposes of Asturion and/or under some fundamental mistake. It is said by Asturion that Ms Alibrahim knew or ought to have known of these alleged irregularities by reason of her alleged knowledge of Shari'a law. Accordingly, Asturion claims that the Transfer was void both under English law and under Liechtenstein law, or was voidable.

5 Ms Alibrahim contends that the Transfer is neither void nor voidable for want of actual or apparent authority of Mr Assaly, nor for any lack of good faith on the part of Ms Alibrahim. As a matter of Liechtenstein law, alternatively English law, Mr Assaly had authority to effect the Transfer. Even if, however, he did not, then Ms Alibrahim relied in good faith on the publicly-registered power of Mr Assaly solely to represent Asturion in its dealings with third parties. As a further alternative, if the validity of the Transfer is to be determined according to principles of Shari'a law, then the Transfer would be neither void nor voidable since the instructions of King Fahd amounted to an inter vivos gift to Ms Alibrahim, and those instructions were binding on Mr Assaly and Asturion both before and after King Fahd's death.

6 The other assets transferred by Mr Assaly to Ms Alibrahim were properties in Germany, France and Spain (in the last case through a Spanish company, Fasfunda SA, in which Asturion has an interest). Similar proceedings, also strongly contested, have been brought by Asturion and Fasfunda in France and Spain. There is no claim in respect of the German property because, Asturion says, Ms Alibrahim had disposed of it before proceedings could be begun.

Procedural history of this claim

7 The claim form in these proceedings was issued on 10 April 2015. Asturion immediately applied to register notice of a pending land action against the Property at the Land Registry ("the Notice"), thereby preventing Ms Alibrahim from disposing of the Property to a third party until resolution of the claim.

8 Ms Alibrahim was served with the claim form in late June 2015. She filed an acknowledgment of service on 2 July 2015. Her defence was filed and served on 18 September 2015, after two agreed extensions of time which were approved by the court by way of a consent order.

9 On 6 October 2015 Ms Alibrahim's solicitors wrote to Asturion's solicitors, asking Asturion to confirm that it would in principle be willing to give security for costs. The letter pointed to the absence of any publicly-available information regarding the assets and liabilities of Asturion. On 16 October 2015 Asturion's solicitors replied declining to provide any security, offering an undertaking by

A Asturion that it would not object to any claim by Ms Alibrahim in Liechtenstein to enforce any judgment or costs order and asserting that Asturion had sufficient assets with which to satisfy any costs order or judgment.

10 Asturion filed and served a reply on 18 December 2015, again after two agreed extensions of time which were approved by the court by way of a consent order.

11 In late January and early February 2016 the parties' solicitors discussed
B directions. An agreed set of directions was lodged at court on 2 February 2016. Through an oversight on the part of the court, however, the court did not either make an order embodying those directions or list a case management conference ("CMC"). This oversight was fatal to the court's ability to exercise active case management in respect of this claim, as is required by the Civil Procedure Rules ("CPR"). Moreover, it meant that neither party was subject to any deadline embodied in a court order for taking the subsequent steps in the proceedings. It is clear that this was a significant
C factor in what happened (or did not happen) subsequently.

12 During the course of this correspondence, Ms Alibrahim's solicitors referred to the fact that proceedings were underway in Liechtenstein regarding the constitution of the board of Asturion, and said that in those circumstances Ms Alibrahim did not think that alternative dispute resolution would be productive at that time.

13 On 28 January 2016 Asturion's solicitors indicated that Asturion was
D considering making an amendment to its particulars of claim. After a couple of chasing letters from Ms Alibrahim's solicitors, Asturion's solicitors sent Ms Alibrahim's solicitors a draft amended particulars of claim on 8 March 2016 requesting Ms Alibrahim's consent to the amendments.

14 On 22 April 2016 Ms Alibrahim's solicitors wrote again to Asturion's solicitors regarding security for costs, commenting on the proposed undertaking and inviting Asturion to provide sufficient information as to the nature and location of its
E assets to show that it could meet any costs order. The letter did not respond to the request to consent to the amendments to the particulars of claim.

15 After a chasing letter from Ms Alibrahim's solicitors threatening an application to the court for security for costs, Asturion's solicitors sent a holding response on 13 May 2016, promising that a substantive response to the letter dated 22 April 2016 would be provided as soon as possible.

F 16 On 20 July 2016 Ms Alibrahim's solicitors sent Asturion's solicitors a draft amended defence and indicated she would consent to Asturion's amendments of the particulars of claim if it consented to her amendments and paid her costs.

17 On 2 August 2016 Ms Alibrahim's solicitors requested a response regarding the amendments and also warned that, if Asturion did not provide a substantive response on the question of security soon, then Ms Alibrahim would make an application.

G 18 Asturion's solicitors replied on 12 August 2016 objecting that not all of the amendments to the defence flowed from the amendments to the particulars of claim, and discussing possible amendments to the reply and when it would be appropriate to consider a rejoinder. The letter also reiterated Asturion's position concerning security which had been set out in the letter dated 16 October 2015.

19 On 9 November 2016 Ms Alibrahim's solicitors pressed for confirmation by 25 November 2016 as to whether Asturion intended to proceed with its amendments
H and consent to those of Ms Alibrahim, failing which she would make an application for permission to amend her defence and list a CMC. The letter also demanded further information and undertakings in relation to security for costs by the same date, failing which Ms Alibrahim would apply to the court.

20 On 24 November 2016 Asturion's solicitors replied that Asturion did intend to amend its particulars of claim, and would respond on the question of consent to

Ms Alibrahim's amendments to her defence and on the question of security for costs at the beginning of December.

21 Between 24 November 2016 and 15 August 2017 there was no activity by either side. Asturion did not respond as it had said it would and Ms Alibrahim did not make the applications for permission to amend her defence or for security for costs that she had threatened.

22 On 15 August 2017 Ms Alibrahim's solicitors wrote asserting that in the circumstances it was clear that Asturion had abandoned the claim and inviting it to discontinue.

23 On 23 August 2017 Asturion's solicitors replied as follows:

> "Our client has not abandoned its claim. As you are no doubt aware, the court has not listed a case management conference or approved directions to trial. Given that the parties have been involved in separate court proceedings in Liechtenstein regarding the composition of our client's board, we were of the opinion that unless your client requested, there was no immediate need to push ahead with directions to trial.
>
> "It appears your client now wishes the formal court proceedings to be progressed. We will accordingly write to the court and request that directions to trial be approved or, if necessary, a case management conference be listed. We will also provide a substantive response in relation to your client's amended defence and security for costs."

24 On 8 September 2017 Ms Alibrahim's solicitors responded alleging that this was an admission of "warehousing" which constituted an abuse of process and threatening an application to strike out unless the claim was discontinued by 15 September 2017.

25 On 12 September 2017 Asturion's solicitors replied disputing that the claim was liable to be struck out. Among other things, this letter stated:

> "the further delay by our client has been caused by your client actively seeking to disrupt our client's ability to continue these proceedings by commencing proceedings in Liechtenstein to replace the board of our client. It was entirely reasonable not to seek directions in circumstances in which your client was contesting our client's board's authority to do so. As soon as your client intimated that it wished the claim to proceed, our client agreed to do so."

The letter went on to state that Asturion consented to the amendments to the defence, asked Ms Alibrahim to confirm that she consented to the amendments to the particulars of claim and proposed revised directions.

26 On 21 September 2017 Asturion issued an application for permission to amend its claim form and particulars of claim.

27 On 29 September 2017 the parties agreed a standstill in relation to Asturion's proposed amendments to its claim form and particulars of claim.

28 On 11 December 2017 Ms Alibrahim issued an application to strike out the claim on the ground of abuse of process, alternatively seeking an order that Asturion provide a cross-undertaking in damages in respect of the Notice and security for costs in a sum exceeding £1m.

29 In a witness statement made in opposition to the application Graham Shear of Asturion's solicitors stated:

> "21. . . . there followed a hiatus where no steps were taken in relation to the English proceedings. This was not in any sense a cessation of hostilities in the English proceedings, nor was there a conscious decision on the part of the board not to progress matters in England. Rather, the hiatus was a consequence of (a) there being no court-approved directions order requiring immediate steps be taken; and (b) the fact of the Liechtenstein proceedings, in which the defendant

was arguing that the English proceedings were a gross breach of duty and abusive, and that they were generating vast costs to no proper end for which the defendant should be compensated.

"22. I assumed that as a result of these circumstances the defendant was content that neither party should incur further costs in relation to the English proceedings save to the extent that they were necessary. Not only would this avoid the risk of the board further committing [Asturion] to courses of action in circumstances where their authority to act was in doubt, but it also saved costs which may be wasted depending on the outcome of the Liechtenstein proceedings.

"23. It is right that we did not write in terms confirming this, but given the substantial delays which there had been in correspondence from the defendant, and given that she took no steps to list a CMC as she had said that she would, that assumption appeared to me to be a valid one until the correspondence below . . ."

30 The application was heard by the Master on 16 May 2018. Shortly before the hearing, it was agreed between the parties that Asturion would provide security for costs in the sum of £800,000 and a prospective cross-undertaking in damages in respect of the Notice capped at £1m.

Proceedings in Liechtenstein

31 On 11 December 2015 Ms Alibrahim and her son issued proceedings in Liechtenstein to remove Asturion's board. The alleged basis for her doing so was that the board's attempt to recover the properties transferred to her was a "gross breach of duty and abusive". Ms Alibrahim also complained of the costs which were being incurred in the proceedings against her: "In the proceedings in London alone, [Asturion] is incurring yearly costs of over £1m."

32 On 15 December 2016 the Liechtenstein court delivered its judgment, dismissing the application.

33 On 18 January 2017 Ms Alibrahim and her son appealed to the Liechtenstein Court of Appeal.

34 On 6 April 2017 the Liechtenstein Court of Appeal allowed the appeal and ordered that the entire board of Asturion be removed. In the case of one board member (Prince Mohammed bin Fahd, who is a son of another widow of King Fahd) this was on the ground of conflict of interest, while in the case of the other two members (Dr Beck and Dr Kolzoff) it was on the ground that they had not been validly appointed. While this order was stayed pending further appeal, it had obvious ramifications for the proceedings in England: as matters then stood, the board was not entitled to prosecute the proceedings at all.

35 On 5 May 2017 the members of the board of Asturion appealed to the Liechtenstein Supreme Court.

36 On 7 September 2017 the Liechtenstein Supreme Court allowed the appeal in respect of two members of the board of Asturion (Dr Beck and Dr Kolzoff) but dismissed it in respect of the third (Prince Mohammed).

37 On 11 October 2017 both sides challenged the decision of the Liechtenstein Supreme Court before the Liechtenstein Constitutional Court. We were informed that the Liechtenstein Constitutional Court has dismissed these challenges. As I understand it, there may yet be a dispute as to whether, in the light of the decision of Liechtenstein Supreme Court, the commencement and/or pursuit of these proceedings was and/or is properly authorised.

Proceedings in France and Spain

38 As noted above, proceedings have been brought and are being pursued by Asturion and Fasfunda in France and Spain respectively. For the most part, the history of these proceedings does not matter for present purposes. The one point which is of some relevance is that on 5 September 2016 Ms Alibrahim applied for a

statement of nullity in respect of Asturion's claim in France on the basis that its representative had not been properly authorised by Asturion's board to file the claim and, in the alternative, claimed that the board's lack of authority meant that the proceedings should be stayed pending the outcome of her Liechtenstein proceedings. In its written submissions, Asturion opposed both these applications on the basis that its representative did not lack authority and the stay proposed was moot, as the Liechtenstein proceedings would not affect the position in France. Nevertheless, Asturion indicated to the judge in charge of the French proceedings that it would be happy to postpone the French proceedings for a couple of months pending the Liechtenstein proceedings, as this would make the situation more straightforward, and asked for a longer period of time for written submissions so as to give the Liechtenstein Supreme Court time to make its judgment before the French court had to rule on Ms Alibrahim's application for a statement of nullity.

The Master's judgment

39 The Master handed down a reserved judgment on 11 September 2018. In it he concluded that the claim should be struck out for reasons he expressed in para 36 as follows:

> "(1) In my judgment, although Berwin Leighton Paisner writing on behalf of the Asturion Fondation in their letter dated 23 August 2017 did not actually use the word to 'warehouse' its claim, I find that the words 'there was no immediate need to push ahead with directions to trial' carries the same meaning. I therefore agree with leading counsel for the defendant that this was, in effect, a unilateral decision on the part of the Asturion Fondation, and that such action amounted to an abuse of process entitling the court to strike out the claim.
>
> "(2) There was a long period of inactivity on the part of the Asturion Fondation as to the conduct of the litigation. The claim form and the original particulars of claim were issued as long ago as 10 April 2015, and almost $2\frac{1}{2}$ years later there had been virtually no progress in the conduct of the litigation by the Asturion Fondation.
>
> "(3) It is also to be noted that it took more than 12 months for the Asturion Fondation to provide the information as to whether or not it consented to the defendant's filing and serving the amended defence.
>
> "(4) As to the question of providing information as to the nature and location of the Asturion Fondation's assets, again as long ago as 16 October 2015 Berwin Leighton Paisner on behalf of the Asturion Fondation declined to provide any meaningful information as to request made for security for costs. It failed to deal constructively with the requests made. There was no meaningful engagement. It merely stated that the Fondation had sufficient assets with which to satisfy any costs order or judgment.
>
> "(5) No particulars of the Asturion Fondation's assets and liabilities have ever been provided. The defendant was in effect left to infer the standing or otherwise of the Asturion Fondation's assets. This approach is to be contrasted with that adopted in the other European litigation.
>
> "(6) In the evidence filed in response to the application in March 2018 the defendant was little the wiser with regard to the issue of security for costs, as demonstrated in the witness statement of Mr Shear.
>
> "(7) The point should also be made that the notice has effectively prevented any dealings with the property in the meantime.
>
> "(8) The decision to place the English proceedings on hold for a substantial period of time is, in my judgment, amply demonstrated when regard is had to the factual circumstances. I do not accept the reason put forward that the defendant was somehow at fault in issuing her proceedings in Liechtenstein. The reason given somewhat belatedly that the Asturion Fondation's authority to conduct the

A current proceedings was coming under sustained attack in that jurisdiction cannot, in my judgment, be justified as a reason why there was no progress in the current litigation.

"(9) To echo the words of Lord Woolf in *Grovit v Doctor* [1997] 1 WLR 640, 'to commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings are brought is entitled to apply to have the
B action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action.'

"(10) In my judgment these words are entirely apposite to the current circumstances.

"(11) Finally, I should state that in the circumstances I do not consider that it is unjust and disproportionate for the court to strike out the claim in its entirety at this stage. I do not accept the reasons put forward by leading counsel that in the
C alternative the court could adopt another approach so as to enable the Asturion Fondation to proceed with the litigation."

40 The Master went on to state at para 37 that he therefore did not need to consider the question of security for costs.

41 After the judgment had been handed down, Asturion sought permission to appeal. The Master refused permission to appeal. One of the grounds of appeal
D which had been advanced by Asturion was that, in exercising his discretion, the Master had taken into account factors which were irrelevant, one of which was Asturion's failure to provide information about its assets. The Master rejected this contention, stating at para 11 of his extempore judgment on consequential matters:

> "I also make reference to the fact that in the judgment (and again I cite this in support of the reasons why there should be no permission to appeal granted by this court) that, on a number of occasions, Asturion was asked to provide evidence
E of means and that was never forthcoming. I appreciate that, as was said by Mr Mumford QC, in effect, there was no duty on the part of Asturion Fondation to give such information. However, in my judgment, it weighs strongly in the exercise of discretion, as it places the defendant in a difficult position and she was justified, in my judgment, in seeking to strike out the claim. So, in the exercise of my discretion, I came to the conclusion that the matter should be struck out."

F

The Judge's judgment

42 Asturion appealed to the Judge on four grounds with permission granted, as it happens, by myself. Ground 1 was that the Master had erred in law in characterising Asturion's conduct as an abuse of process. Ground 2 was that the Master's finding that Asturion had decided to "warehouse" the claim was not open to him on the evidence. Ground 3 was that in exercising his discretion the Master
G took into account matters which he should not have done. Ground 4 was that in exercising his discretion the Master failed to take into account matters which he should have done.

43 The Judge rejected ground 2, but upheld the other grounds and allowed the appeal for the reasons he gave in a reserved judgment handed down on 15 February 2019 [2019] EWHC 274 (Ch).

H

Abuse of process: the law

44 Abuse of process can take many forms. This case concerns the form which has become known as "warehousing". While that is no doubt a convenient label, as counsel for Asturion submitted, it is necessary to be more precise in specifying what conduct amounts, or may amount, to abuse of process.

45 The parties are sharply divided on this issue. Counsel for Ms Alibrahim submitted that it is always an abuse of process for a claimant unilaterally—that is to say, without either the consent of the defendant or the approval of the court—to decide not to pursue its claim for any period which is more than insignificant. He contended that this principle applied if the claimant decided not to pursue the claim for as little as a month, since a month was a not insignificant period, although he accepted that a day would be insignificant. He accepted, however, that a finding of abuse of process would not automatically lead to the conclusion that the claim should be struck out. I shall return to that point later.

46 Counsel for Asturion disputed that a mere unilateral decision by a claimant not to pursue its claim for a period of time constituted, or was even capable of constituting, an abuse of process. He submitted that it was necessary to distinguish between four classes of case. The first was where the claimant had no intention ever to pursue the claim to trial (or other proper resolution, such as a settlement). The second class was where the claimant had no current intention to pursue the claim, but might pursue it in the future depending on contingencies which were extraneous to the claim (such as the claimant's pursuit of other claims against other defendants). The third class was where the claimant always intended to pursue the claim, but decided temporarily to pause its progress for reasons legitimately connected with the claim. The fourth class was where the claimant always intended to pursue the claim, but failed to do so through incompetence (whether the claimant's or its lawyers'). He submitted that the first and second classes of case would generally constitute abuse of process, but not the third and fourth. He further submitted that the present case fell into the third class.

47 In considering these submissions, the starting point is that it is well established that mere delay in pursuing a claim, however inordinate and inexcusable, does not without more constitute an abuse of process: see *Icebird Ltd v Winegardner* [2009] UKPC 24 at [7] (Lord Scott of Foscote delivering the judgment of the Privy Council).

48 In *Grovit v Doctor* [1997] 1 WLR 640 the claimant had commenced wide-ranging proceedings against the defendants in August 1989, but by March 1990 all that remained was an allegation of libel. The last activity of the claimant prior to the application to strike out had been on 20 September 1990. On 21 March 1991 and 23 September 1991 the defendants' solicitors wrote to the claimant's solicitors inviting the claimant to proceed with or abandon the claim. By the time of the application, the claimant had done nothing for over two years. In those circumstances the Judge found that the claimant had no interest in actively pursuing the litigation: so far as he was concerned, it was dead in the water. The claimant did not challenge that finding before the Court of Appeal. The House of Lords held that this conduct constituted an abuse of process for reasons which Lord Woolf expressed at p 647G–H as follows (emphasis added):

> "The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to a conclusion *can* amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will *frequently* be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity."

49 Two points should be noted about this reasoning. The first is that, as Leggatt LJ pointed out during the course of argument, the words "which you have no intention to bring to a conclusion" could embrace both (i) cases in which the claimant has no intention of ever bringing the claim to a conclusion and (ii) cases in which the claimant has no intention of bringing to a conclusion at present, but intends to do so

in future, perhaps depending upon some contingency. On the facts, however, the case in question was of the first kind.

50 The second point is that Lord Woolf was clear that such conduct "can" constitute abuse of process, not that it will automatically do so, and that it will "frequently" be the case that the court will strike out the claim, not that it will always do so. If that is the position with respect to cases of the first kind identified in the preceding paragraph, then it is difficult to see why cases of the second kind should be treated more stringently.

51 In *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 the Court of Appeal considered two appeals concerned with striking out on the ground of want of prosecution. The facts of the cases and the individual decisions do not matter for present purposes. What do matter are the statements of Lord Woolf MR delivering the judgment of the Court of Appeal in two passages.

52 The first passage is at p 1436F–H (emphasis added):

> "It is already recognised by *Grovit v Doctor* [1997] 1 WLR 640 that to continue litigation with no intention to bring it to a conclusion *can* amount to an abuse of process. We think that the change in culture which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of the process as suggested by Parker LJ in *Culbert v Stephen G Westwell & Co Ltd* [1993] PIQR P54.
>
> "While an abuse of process can be within the first category identified in *Birkett v James* [1978] AC 297 it is also a separate ground for striking out or staying an action (see *Grovit v Doctor* at pp 642–643) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation [of] questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired."

53 It can be seen from this that Lord Woolf again said that continuing litigation with no intention to bring it to a conclusion "can" amount to an abuse of process, not that it necessarily does so.

54 The second passage is at p 1437B–E (emphases added):

> "It has been the unofficial practice of banks and others who are faced with a multitude of debtors from whom they are seeking to recover moneys to initiate a great many actions and then select which of those proceedings to pursue at any particular time. This practice should cease in so far as it is taking place without the consent of the court or other parties. If there is good reason for doing so the court can make the appropriate directions. *Whereas hitherto it may have been arguable that for a party on its own initiative to, in effect, 'warehouse' proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice.* It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. *If the claimant has for the time being no intention to pursue the action this will be a wasted effort.* Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. *If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being* adjourned generally. The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes. This new approach will not be

applied retrospectively to delays which have already occurred but it will apply to future delay." A

55 Although this passage was strictly obiter, it was plainly intended to lay down the approach that the courts would adopt in future. It is clear from what Lord Woolf MR said that it is likely to be an abuse of process for the claimant unilaterally to decide not to pursue a claim for a substantial period of time, even if the claimant remains intent on pursuing the claim at some future point. In my view Lord Woolf MR cannot have meant that this will always constitute an abuse of process given what he had reiterated about the *Grovit* case. Nor is there any indication that Lord Woolf MR was differentiating between counsel for Asturion's second and third classes of case. B

56 In *Realkredit Danmark A/S v York Montague Ltd* The Times, 1 February 1999 the claimant lenders had brought a claim against the defendant valuers for alleged negligent valuation of seven hotels. The claim was struck out for alleged non-compliance by the lenders with an unless order for discovery even though the lenders had served in time a list of documents listing over 2,500 documents. Unsurprisingly, the Court of Appeal allowed the lenders' appeal. The valuers had also applied to strike out the claim as an abuse of process, but the Judge had dismissed that application and this was the subject of a cross-appeal. The valuers argued that there was an abuse of process because the lenders had taken a deliberate decision not to pursue the litigation, and to ignore the timetable laid down by the court in an order dated 24 July 1996 which was designed to lead to a trial which was later fixed for 2 June 1998. The lenders had taken no step after that order until they served a notice of intention to proceed on 21 November 1997. The lenders' evidence was to the effect that the reasons for the delay were, first, a concern as to the valuers' professional indemnity insurance, secondly, the fact that the valuers were placed into administrative receivership on 28 January 1997, and thirdly, the failure of the administrative receivers to respond to a query about the insurance position at a creditors' meeting on 14 May 1997. C D E

57 The judge accepted that the lenders had warehoused the proceedings and that this was not permissible, but nevertheless concluded that it would not be right to strike out the claim on the ground of abuse of process. It is not clear whether he held that there was no abuse or whether he held that there was an abuse but nevertheless decided not to strike the claim out. Tuckey LJ, with whom Morritt LJ agreed, held that there was no reason to think that the Judge had exercised his discretion in a wrong way, still less that he was plainly wrong. He added: F

> "What happened could be characterised as warehousing but one can well understand the lenders' concern about the valuers' insolvency. Had the administrative receivers responded to the request for information about the insurance position the delay would probably not have been such as to jeopardise the trial date. But the message in *Arbuthnot* that in such a circumstance, the authority of the court should be obtained for delay, particularly where this involves ignoring directions for trial which the court has already given, needs to be emphasised. Had the court been asked to sanction the delay in this case at an early stage it would, I think, certainly have done so. But more probably the application would have resulted in the lenders discovering, as is the case, that the valuers are insured against this claim." G

58 In *Braunstein v Mostazafan & Janbazan Foundation* (unreported) 12 April 2000 the plaintiff was a solicitor who claimed for fees for work done for the defendant. The defendant denied that the plaintiff had acted as its solicitor. The writ was issued on 8 October 1992. After service of further and better particulars of the defence in November 1995, the plaintiff took no steps until service of notice of intention to proceed on 8 April 1997. The plaintiff's evidence was that, during this H

A period, he was negotiating a settlement with a Mr Jafari who he believed was acting on behalf of the defendant, although it subsequently transpired that Mr Jafari was not, and Mr Jafari had told him on several occasions that the defendant had requested that the action should not be progressed whilst negotiations were continuing.

59 Although the defendant's principal ground for applying to strike out the claim before the Master, and its only ground before the Judge, was inordinate and
B excusable delay causing serious prejudice to the defendant, on appeal to the Court of Appeal the defendant also contended that the claim should be struck out as an abuse of process. This contention was based on what Harrison J described at para 26 as "the deliberate decision of the plaintiff to put his action on ice, or to 'warehouse' the proceedings, from mid-1995 to April 1997" while negotiating with Mr Jafari.

60 The Court of Appeal rejected this contention for reasons which Harrison J,
C with whom Mance LJ agreed, expressed at para 32 as follows:

> "I am not persuaded that the conduct of the plaintiff was sufficiently serious as to amount to an abuse of process. The length of time for which the negotiations were carried on by the plaintiff without progressing the action from mid-1995 to April 1997 was less than half the time involved in the case of *Co-operative Retail Services Ltd v Guardian Assurance plc* (unreported) 28 July 1999, and the overall period of inordinate and inexcusable delay in that case was five years and five
> D months compared to the period of $3\frac{1}{2}$ years in this case. Furthermore, it is implicit in the findings of the Judge that the plaintiff believed that Mr Jafari was acting on behalf of the defendant, albeit that he can quite properly be criticised for failing to check the authenticity of Mr Jafari's authority to negotiate, either with the defendant or with the defendant's solicitor. Looking at the matter in the round, however, I do not consider that, as a matter of fact and degree, this is a case where it can be said that the plaintiff's conduct was such as to amount to an abuse of
> E process so that it should be struck out without prejudice having to be shown."

61 In my judgment the decisions in *Grovit*, *Arbuthnot*, *Realkredit* and *Braunstein* show that a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and
F on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason may be or the length of the delay.

G **62** Although we were referred to a number of decisions of High Court judges, both sitting at first instance and on appeal from masters, it is only necessary briefly to mention two of these. The authority which comes closest to supporting the contention advanced by counsel for Ms Alibrahim is *Société Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* [2017] EWHC 667 (Comm), in which Popplewell J (as he then was) held that the claimant's conduct was an abuse of
H process for three reasons, one of which was that it had decided to recover the sums it claimed were due from the defendants not in the English proceedings, but in proceedings in Turkey, leading to a delay of some eight years which was only brought to an end by the defendants' strike out applications. In that context (which is unaffected by the subsequent decision of the Court of Appeal [2019] 1 WLR 346) Popplewell J stated [2017] EWHC 667 (Comm) at [63]:

"For a claimant unilaterally to warehouse proceedings is therefore an abuse of process, and may be a sufficiently serious abuse to warrant striking out the claim in appropriate cases under the line of authority from *Grovit v Doctor* [1997] 1 WLR 640; see *Solland International Ltd v Clifford Harris & Co* [2015] EWHC 3295 (Ch) at [54]. It is not necessary to decide in this case whether if Goldas had been validly served, the warehousing of the proceedings was an abuse of sufficient gravity to warrant striking out the claim. What is clear is that the decision to put the proceedings on hold for such a long period was an abuse, and a serious abuse, which militates against there being a good reason for granting the relief sought on this application."

63 Notwithstanding the phrasing of the first sentence, I do not think that Popplewell J can have meant to say that unilaterally putting proceedings on hold is always an abuse. Such a statement of the law would not be supported by his citation from *Solland International Ltd v Clifford Harris & Co* [2015] EWHC 3295 (Ch) at [54], where I said that "it *may* be an abuse of process for the claimant unilaterally to 'warehouse' the claim for a substantial period of time, even if the claimant subsequently decides to pursue it [emphasis added]" (and see also para 69). Furthermore, Popplewell J evidently regarded the length of the delay as germane to this question.

64 Finally on the law, I should address a more minor dispute between the parties. Counsel for Ms Alibrahim suggested that an application to strike out on the ground of abuse of process by "warehousing" fell to be analysed in three stages. The first stage was to consider whether the claimant's conduct was an abuse of process. The second stage, if an abuse of process was found, was to consider whether the abuse was sufficiently serious to entitle the court to strike out the claim. The third stage, if the abuse was sufficiently serious, was for the court to exercise its discretion as to whether in all the circumstances striking out was the appropriate remedy. In the course of argument, however, he accepted that an alternative view was that there were only two stages to the analysis: first, the court should determine whether the claimant's conduct was an abuse of process; and if so, secondly, the court should exercise its discretion as to whether to strike out the claim. Counsel for Asturion supported a two-stage analysis. In my judgment the better reading of the authorities is that the analysis falls into two stages, and not three. Furthermore, this is supported by the structure of CPR r 3.4(2)(b), which provides that the court "may" strike out a statement of case if it "is an abuse of the court's process" (it is perhaps worth noting that the authorities have added the gloss "in all the circumstances of the case", particularly the claimant's conduct).

Was the Judge entitled to interfere with the Master's decision?

65 Ms Alibrahim contends that the Master directed himself correctly as to the law and exercised his discretion to strike out the claim in a manner which is not impeachable by an appellate court. Accordingly, she contends that the Judge was not entitled to interfere with that decision.

66 The principal basis upon which the Judge held that he was entitled to intervene was Asturion's ground 1, namely that the Master had erred in law in concluding that Asturion had abused the process of the court. Accordingly, the principal question for this court is whether the Judge was right to reach that conclusion.

67 In my judgment it is clear from the Master's reasons that he did misdirect himself as to the law in three linked respects. The first is that in para 36(1) he held that Asturion's unilateral decision not to pursue the claim during the period between 24 November 2016 and 15 August 2017 amounted to an abuse of process without at that stage considering the reason for that decision or the strength of that reason objectively considered. Nor indeed did he consider the length of the delay at that

A stage. Thus he proceeded on the basis that any decision by a claimant unilaterally to put proceedings on hold for a significant period of time is ipso facto an abuse of process. For the reasons explained above, that is not the law.

68 The second respect is that, when he did come to consider the reason at para 36(8), he appears only to have done so for the purposes of exercising his discretion as to whether to strike the claim out. Although this is a factual rather than a legal matter, it is convenient to add at this point that he also mischaracterised the reason.
B Asturion did not suggest that "the defendant was somehow at fault in issuing the proceedings in Liechtenstein". Asturion's explanation for its conduct was that (a) if Ms Alibrahim's case in Liechtenstein was well founded, then it necessarily followed that Asturion had no authority to pursue this claim, (b) it was Ms Alibrahim's own position in the Liechtenstein proceedings that Asturion should not be wasting large sums of money in the pursuit of this claim and (c) in those circumstances Asturion had assumed that she would be content for it not to pursue the claim for the moment.
C Moreover, the reason was not given "somewhat belatedly", but immediately Asturion's conduct was challenged.

69 The third respect is that in para 36(9) and (10) the Master held that Lord Woolf's words in *Grovit* [1997] 1 WLR 640 were "entirely apposite" to the present case, but failed to recognise that *Grovit* was a case in which the claimant had no intention ever to bring the claim to trial, something that was not even alleged against Asturion. Asturion also attacks this as a finding by the Master that Asturion had no
D intention ever to bring its claim to trial which was not open to him on the evidence, but, like the Judge, I do not consider that the Master made any such finding. Rather, the Master treated the two types of case as being the same, which is legally erroneous. As I understand it, this is the point which the Judge made at para 67.

70 The secondary basis upon which the Judge held that he was entitled to intervene was on Asturion's grounds 3 and 4. The Judge held that the Master's exercise of his discretion was flawed for two reasons, one of which I have addressed
E in the preceding paragraph. The other point which the Judge relied upon was that in para 36(4), (5) and (6) the Master had taken into account, when exercising his discretion, Asturion's failure to provide information about its assets. Indeed, it can be seen from the passage I have quoted from the Master's judgment on consequentials that he considered that this weighed "strongly" in the balance. The Judge held that this was irrelevant to the question of whether, even if it was an abuse of process, Asturion's conduct in putting the proceedings on hold for ten months
F warranted striking out the claim. I agree with the Judge on this point. Asturion was not obliged to disclose any information about its assets, although its failure to do so might well have assisted Ms Alibrahim to obtain an order for security for costs: see *Sarpd Oil International Ltd v Addax Energy SA* [2016] CP Rep 24, para 19. Moreover, Asturion's failure to provide such information has nothing to do with the alleged abuse of process. Furthermore, the Master failed to recognise that it took Ms Alibrahim a long time to make her threatened application for security or that,
G when she did so, Asturion agreed to provide security.

71 It is convenient next to deal with three additional matters relied upon by Asturion in this court by way of respondent's notice. First, Asturion contends that the Master was wrong to find that Asturion unilaterally decided not to pursue this claim pending the outcome of the Liechtenstein proceedings unless Ms Alibrahim pressed it to do so and that the Judge was wrong to hold that the Master was entitled to make that finding. Counsel for Asturion did not press this point. In any event, in
H my judgment the Master was fully entitled to draw that inference from what Asturion's solicitors said in their letter dated 23 August 2017 and from Mr Shear's evidence.

72 Secondly, Asturion contends that the Master was wrong, when exercising his discretion as to whether to strike out the claim, to take into account Asturion's service of the Notice and its effect. Asturion argues that he should not have done so,

because it merely prevented transfers of the Property and there was no evidence from Ms Alibrahim that it had inhibited any dealings in the Property by her. I do not accept this argument. In my judgment the Master was entitled to take the Notice into account. It was a relevant consideration because it inhibited Ms Alibrahim's freedom to deal with the Property while the claim was pending. Given that the pendency of the claim was increased by Asturion's unilateral decision not to pursue it for a period, her freedom was inhibited for a longer period. The weight to give this factor was a matter for the Master, but in any event there is nothing to suggest that the Master gave this factor undue weight.

73 Thirdly, Asturion contends that in para 36(2) the Master wrongly treated Asturion as having been solely responsible for the claim having made "virtually no progress" for "almost $2\frac{1}{2}$ years". I accept this point. In my view the procedural history demonstrates that both parties were slow to progress the claim down to 24 November 2016. Moreover, the Master failed to take into account the court's oversight in failing either to make an order for directions or to list the CMC. He also ignored the fact that it took Ms Alibrahim $3\frac{1}{2}$ months from 23 August 2017 to issue her strike-out application.

74 For the reasons given above, I conclude that the Judge was entitled to set aside the Master's order and to consider the matter afresh.

Is this court entitled to interfere with the Judge's decision?

75 Ms Alibrahim contends that, even if the Judge was entitled to set aside the Master's order and consider the matter afresh, the Judge's decision is also flawed.

76 The first question under this heading is whether the Judge applied the correct legal test. The Judge expressed the test at para 41 as follows:

> "What these cases show, in my judgment, is that it is now established that delay may amount to abuse of process in circumstances short of a finding that the claimant has permanently abandoned any intention to pursue them, but that the court will examine all the circumstances in which the delay occurred, including the length of the delay, the degree of the claimant's responsibility for that delay and the reasons given for it, and assess whether they amount to abuse of process, as distinct from 'mere' delay. 'Warehousing' may be descriptive of some circumstances that show abuse, primarily where for an extended period the claimant has no present intention of pursuing the claim but keeps it going in case it decides to do so in the future, but application of that term is not determinative one way or the other. If abuse is found, the question then arises whether striking out is an appropriate sanction."

77 In my view this statement of the law is substantially correct, although I would prefer to express the test in the manner in which I have done in para 61 above.

78 The next question is whether, applying that test, the Judge was entitled to conclude that Asturion's conduct was not an abuse of process. The Judge's assessment, in brief summary, was that Asturion's reason for not pursuing the claim for ten months was an objectively reasonable one, namely that the authority of the board of Asturion to bring the proceedings was under attack by Ms Alibrahim in Liechtenstein and in that context she had complained about the costs being incurred by Asturion in these proceedings. In my view that was an evaluative assessment which the Judge was fully entitled to make. As has been emphasised in a number of decisions now, Asturion should not have proceeded unilaterally. It should have sought Ms Alibrahim's consent to a stay and, in the absence of consent, applied to the court. (If it had done so, it would have been very likely to succeed in obtaining a stay.) Nevertheless, the fact that Asturion did not take the proper course does not, in the circumstances of this case, necessarily lead to the conclusion that its conduct was an abuse of process.

A 79 Even if the Judge was wrong to conclude that Asturion's conduct was not an abuse of process, the question would remain as to whether he was entitled to exercise his discretion not to strike out the claim. The Judge held that, even if there was an abuse, it was of a relatively minor nature and did not justify the sanction of striking out. In my judgment the Judge was fully entitled to take that view. Although neither the Master nor the Judge gave any detailed consideration to alternatives to striking out, there were lesser sanctions available to the court which were more proportionate
B to the abuse, if abuse there had been. For example, the court could have imposed tight directions to trial, including unless orders against Asturion, and it could have imposed a costs sanction. Striking out was a disproportionate response.

Conclusion

80 For the reasons given above, I would dismiss this appeal.

C **LEGGATT LJ**

81 I agree.

RYDER LJ

82 I also agree.

Appeal dismissed.

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ISABELLA CHEEVERS, Barrister

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CHITTY, J.

1894

June 6, 7.

In re EARNSHAW-WALL.

Practice—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44) —*General Order under the Act, Sched. I., Part I.—Advowson in gross—Freehold Property.*

An advowson in gross though an incorporeal hereditament is freehold property within the meaning of Sched. I., Part I., to the order made in pursuance of the *Solicitors' Remuneration Act*, 1881, and on a purchase and sale the scale charge applies.

In re Stewart (1) discussed and distinguished.

ADJOURNED SUMMONS to review taxation.

The Applicant was employed to carry out the purchase by private contract of an advowson in gross, the purchase-money being £1400, and on the completion delivered to the client his bill of costs in respect of the business done made out on the old system as altered by Sched. II. to the Order made in pursuance of the *Solicitors' Remuneration Act*, 1881.

An order to tax the bill having been obtained, the Taxing Master taxed the bill on the footing of the purchase being one to which rule 2, sub-rule (*a*), and the scale in Sched. I., Part I. of the General Order was applicable.

This was a summons by the solicitor asking that it might be referred back to the Taxing Master to tax the bill according to the old system as altered by Sched. II.

Chaster, for the Applicant:—

An advowson in gross is an incorporeal hereditament, and is not "freehold property" within the meaning of Sched. I. The schedule contemplates the sale and purchase of land held as freehold, copyhold, or leasehold property. The decision in *In re Stewart* is applicable to this case. An advowson is not land and the scale charge does not apply.

Ryland, for the client:—

An advowson is clearly freehold property: *Cleer* v. *Peacock* (2), *Hughes'* Parsons' Law (3), and therefore comes within the

(1) 41 Ch. D. 494.

(2) Cro. Eliz. 359.

(3) Ed. 1673, pp. 48, 49.

schedule. The decision in *In re Stewart* (1) turned on the particular circumstances of that case. Mr. Justice *Kay* was not dealing with the general question, he did not express an opinion that the term "property" did not include incorporeal hereditaments. I submit that in this case the scale charge applies.

Chaster, in reply.

CHITTY, J.:—

On the purchase of an advowson in gross for the sum of £1400 the Taxing Master has taxed the bill of costs of the purchaser's solicitor according to the scale prescribed by Sched. I., Part I., of the General Order. The solicitor is not content with that taxation, and says that the purchase of an advowson does not fall within the scope of the scale charges, and that he ought to be remunerated according to the old system as altered by Sched. II.

The material words in the order are "freehold, copyhold, or leasehold property." The expression "property" is not a term of ancient art. The word is discussed in *Williams* on Real Property, and incorporeal hereditaments are found under the title of real property. In that work there is a well-reasoned explanation of the term "property" (2) which shews that it is used in three senses, two of which I should call the leading senses. "Property" may denote the thing to which a person stands in a certain relation, and also the relation in which the person stands to the thing. The term as used in the schedule may be used in both or either of these senses.

The argument used against the Taxing Master's certificate is that the term "property" in the schedule means land—that is to say, corporeal hereditaments—and that an advowson, being an incorporeal hereditament and not land, does not fall within the term "property" as used in the schedule, and therefore that the scale charges do not apply. I do not, however, find the word "land" used in the schedule, and I can find nothing to enable me to cut down the term "property" to land.

Looking at the schedule, the "property" referred to therein is

(1) 41 Ch. D. 494. (2) 17th Ed. pp. 3, 4.

CHITTY, J. 1894 *In re* EARNSHAW-WALL.

property in respect of which title is deduced, and in respect of which there is a conveyance. The words are, "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance." There are some sales on which there is no deduction of title as the sale of chattels and such-like; but there is equally a deduction of title on the sale of corporeal and incorporeal hereditaments, and the title to an advowson must be deduced, whether it is an advowson appendent or an advowson in gross. Moreover, an advowson in gross is a freehold. It is the subject of tenure, and may be held by homage, fealty, and escuage; it was also devisable under the statute of *Henry* VIII. If the term "property," as used in the schedule, is to be taken in the sense of the interest which a man has in a thing, a man can have a freehold interest in an advowson, whether for life or in tail or in fee simple. A man may also have a lease for a term in an advowson.

I cannot see on what ground I should be justified in making, or that I ought to make, any distinction for the purposes of the rule between corporeal and incorporeal hereditaments. The deduction of title is a common feature in both cases. That being so, and for the reasons which I have already given, I think I ought to affirm the certificate.

But it is said that the case of *In re Stewart* (1) is opposed to what I have decided. The question there related to the costs of the purchase and grant of the right or easement of laying and maintaining pipes through the lands of other persons which the corporation obtained under the powers of their special Act, and no land whatever was conveyed, and Mr. Justice *Kay* held that the scale charges did not apply, saying in the course of his judgment (2): "Can the grant of an easement like this be considered a conveyance of freehold, copyhold, or leasehold property within the meaning of that schedule? I confess it seems to me difficult so to hold. Obviously the schedule contemplates *primâ facie* conveyances of land held as freehold, copyhold, or leasehold property, and the scale is fixed upon the purchase-money which is paid when such property changes hands. When a mere easement is granted there is no change of

(1) 41 Ch. D. 494. (2) 41 Ch. D. 506.

property in that sense, and the purchase-money is comparatively trifling in amount." His words had reference to the particular circumstances of the case before him; he was not dealing with the general question, nor with the question of property passing by conveyance; he did not express any decided opinion on the point before me. I should feel bound to follow him if I thought he intended to lay down the proposition that the term "property" did not include incorporeal hereditaments; but, as I consider he did not so intend, I am free to decide as I do. I hold, therefore, that the Taxing Master is right, and I dismiss the summons with costs.

Solicitors: *Earnshaw-Wall; Belfrage & Co.*, agents for *Byrch & Cox, Evesham.*

G. M.

NATIONAL DWELLINGS SOCIETY *v.* SYKES.

[1894 N. 828.]

Company—General Meeting—Conduct and Power of Chairman.

It is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but he has no power to stop or adjourn a meeting at his own will; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that object.

MOTION.

The National Dwellings Society, Limited, was incorporated under the *Companies Acts* in 1875. By its articles of association the business of the society was to be managed by a council, who were invested with all the usual powers of directors. One-fifth of the members of the council were to retire at the annual general meeting in every year, when new or retiring members were to be elected or re-elected. The statement of accounts for each year was also to be submitted to the members at the annual general meeting, and a printed copy of the certified balance-sheet was to be sent to every shareholder previous to the holding of the annual general meeting. The articles also provided that a member of the council should preside at every general meeting of the society; but if no such member should be present within fifteen minutes

Ch.

A

In re FLINT (A BANKRUPT)

1992 June 26, 29; July 3

Nicholas Stewart Q.C. sitting as a deputy High Court judge

Bankruptcy—Property passing to trustee—Joint tenants—Husband and wife holding matrimonial home on trust for sale—Divorce proceedings—Court ordering transfer of bankrupt's interest to wife between presentation of bankruptcy petition and adjudication—Whether "disposition of property" by bankrupt—Insolvency Act 1986 (c. 45), s. 284(1)

B

Three weeks after a bankruptcy petition was presented against the husband, an order was made by consent in the county court in divorce proceedings, pursuant to section 24 of the Matrimonial Causes Act 1973, ordering him to transfer his interest in the matrimonial home to the wife. A week later the husband was adjudicated bankrupt. The husband's trustee in bankruptcy issued a notice of motion seeking a declaration that the order transfering the husband's interest in the house was void since it had been a "disposition of property" made between the presentation of the bankruptcy petition and the adjudication order without the consent of the bankruptcy court, within section 284(1) of the Insolvency Act 1986.[1] The judge in the county court, sitting in bankruptcy, made a declaration that the order in the divorce proceedings was void against the trustee and that the house was held on trust for the wife and the trustee in equal shares, and refused to ratify the disposition under section 284(1).

C

D

On the wife's appeal:—

Held, dismissing the appeal, that a transfer of property order made by a court under section 24 of the Matrimonial Causes Act 1973 in respect of property held by a person against whom a bankruptcy petition had been presented was a "disposition of property" by that person within section 284(1) of the Insolvency Act 1986 and was void unless subsequently ratified by the court dealing with the bankruptcy; that there were no grounds for interfering with the judge's exercise of discretion in refusing to ratify the disposition under section 284(1); and that, accordingly, the declaration that the house was held on trust for the trustee and the wife in equal shares would stand (post, pp. 326F–H, 329F–H).

E

F

In re Abbott (A Bankrupt), Ex parte Trustee of the Property of the Bankrupt v. Abbot (P.M.) [1983] Ch. 45, D.C. considered.

G

The following cases are referred to in the judgment:

Abbott (A Bankrupt), In re, Ex parte Trustee of the Property of the Bankrupt v. Abbott (P.M.) [1983] Ch. 45; [1982] 3 W.L.R. 86; [1982] 3 All E.R. 181, D.C.

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Clifton Place Garage Ltd., In re [1970] Ch. 477; [1970] 2 W.L.R. 243; [1969] 3 All E.R. 892; [1970] 1 All E.R. 353, Megarry J. and C.A.

H

de Lasala v. de Lasala [1980] A.C. 546; [1979] 3 W.L.R. 390; [1979] 2 All E.R. 1146, P.C.

[1] Insolvency Act 1986, s. 284(1): see post, p. 323B–C.

Eagil Trust Co. Ltd. v. Pigott-Brown [1985] 3 All E.R. 119, C.A.
Egerton v. Jones [1939] 3 All E.R. 889, C.A.
Hudhud Shand Ltd. v. Johnston Pipes Ltd. (1989) 5 Const.L.J. 209, C.A.
James, Ex parte; In re Condon (1874) L.R. 9 Ch.App. 609
Levy (A.I.) (Holdings) Ltd., In re [1964] Ch. 19; [1963] 2 W.L.R. 1464; [1963] 2 All E.R. 556
Steane's (Bournemouth) Ltd., In re [1950] 1 All E.R. 21
Thwaite v. Thwaite [1982] Fam. 1; [1981] 3 W.L.R. 96; [1981] 2 All E.R. 789, C.A.

No additional cases were cited in argument.

APPEAL from Judge Roberts sitting at Shrewsbury County Court.

On 18 July 1990 Mr. Registrar Shaw, sitting at Crewe County Court, made an ancillary relief order in divorce proceedings requiring the husband, Ronald Flint, to transfer to the wife, Brenda Flint, within 28 days all his estate and interest in 7, Galway Grove, Shavington, near Crewe, the former matrimonial home. On 24 July 1990 the husband was adjudicated bankrupt in the Shrewsbury County Court. On 16 December 1991 Judge Roberts, sitting at Shrewsbury County Court, made a declaration that the order of 18 July was void under section 284(1) of the Insolvency Act 1986, as having been a disposition of property by a person against whom a bankruptcy petition had been presented, and refused to ratify the disposition.

By a notice of appeal dated 13 January 1992 the wife appealed against the order of 16 December and sought an order that the disposition of 18 July was valid on the grounds (1) that the judge erred in law in holding that the order of 18 July was a disposition by a person adjudged bankrupt and void under section 284 of the Act of 1986; (2) that the judge ought to have held that the order was a disposition of the property by the court and not by the husband, so that section 284 did not apply; and, in the alternative, (3) that if section 284 did apply, the judge failed to exercise his discretion whether or not to ratify the disposition properly or at all.

The facts are stated in the judgment.

David Parry for the wife. The effect of the order of the county court made under section 24 of the Matrimonial Causes Act 1973 was to transfer the beneficial interest of the husband to the wife. The transfer took effect in equity as an immediate consequence of the making of the order, and the terms of the order when complied with by the husband did no more than confirm that which had already happened in equity. Accordingly, the transfer to the wife was not a disposition by the husband but a disposition by the court and by operation of equity so that section 284 of the Insolvency Act 1986 did not apply to it. [Reference was made to *Thwaite v. Thwaite* [1982] Fam. 1 and *de Lasala v. de Lasala* [1980] A.C. 546.]

In the alternative, if section 284 applied, the judge had a discretion under the section whether or not he should ratify the transfer but failed to exercise that discretion properly or at all, in that (i) he stated that he had no guidelines as to what factors should influence him in coming to

his decision, whereas such guidelines exist and are to be applied to the exercise of every kind of judicial discretion (see *In re Clifton Place Garage Ltd.* (1970) 1 Ch. 477); (ii) he failed to take account of those guidelines; (iii) he took no account of available evidence upon the basis of which he could have exercised his discretion; and/or (iv) he took account or appears to have taken account of irrelevant and/or erroneous matters, in that he wrongly described the transfer as being voluntary and/or did not distinguish between "voluntary" and "by consent" and appears to have treated an order by consent as being different in its effects from a non-consensual order, contrary to *Thwaite v. Thwaite* [1982] Fam. 1. [Reference was also made to *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; *Egerton v. Jones* [1939] 3 All E.R. 889; *Eagil Trust Co. Ltd. v. Piggott-Brown* [1985] 3 All E.R. 119; *In re Steane's (Bournemouth) Ltd.* [1950] 1 All E.R. 21; *In re A. I. Levy (Holdings) Ltd.* [1964] Ch. 19 and *Ex parte James; In re Condon* (1874) L.R. 9 Ch.App. 609.]

David Stockill for the trustee in bankruptcy. It would be anomalous if the effect of the order of the county court was held not to be a disposition. The old law had two stages: (1) where the "settlement" or disposition occurred before the act of bankruptcy (when the court could upset it in certain circumstances); and (2) after the act of bankruptcy (thereafter by the doctrine of relation back the title to property was vested in the trustee). By contrast the new law has three stages: (1) up to presentation of petition (any disposition during this period can be upset under section 339 of the Insolvency Act 1986); (2) between presentation of the petition and the bankruptcy order; and (3) after the bankruptcy order (when the property is vested in the trustee). If the appellant's arguments are correct, during stage (2) under the new legislation there would be an unimpeachable transfer of property, but not during stages (1) and (3). This cannot be right.

By analogy with *In re Abbott (A Bankrupt), Ex parte Trustee of the Property of the Bankrupt v. Abbott (P.M.)* [1983] Ch. 45, "a disposition" in the modern bankruptcy legislation can include a court order by consent. The husband had sufficient control over the act of disposition for it to be his own.

In the exercise of its discretion the court should not ratify any voluntary disposition of a major asset of the bankrupt. The proviso to section 284 empowers the court to ratify normal expenditure out of income, such as the payment of usual household bills or the payment of wages of employees if the bankrupt was a sole trader. Alternatively, if the court has a discretion to ratify the disposition of a major asset in the bankruptcy, it should do so only in exceptional circumstances, the burden of proving which falls on the person seeking ratification. No such exceptional circumstances have been proved. [Reference was also made to *Hudhud Shand Ltd. v. Johnston Pipes Ltd.* (1989) 5 Const.L.J. 209.]

Parry replied.

The husband did not appear and was not represented.

Cur. adv. vult.

3 July. NICHOLAS STEWART Q.C. read the following judgment. This is an appeal in bankruptcy from a decision of Judge David Roberts sitting in the Shrewsbury County Court. The appeal lies to this court under section 375 of the Insolvency Act 1986. The appellant is Mrs. Brenda Flint, who was represented by Mr. Parry of counsel. The first respondent, represented by Mr. Stockill, is the trustee in bankruptcy of Mrs. Flint's former husband Mr. Ronald Flint. Mr. Flint is the second respondent but took no part in the appeal or in the hearing in the Shrewsbury County Court. The particular point at issue is whether a transfer of property order made in favour of Mrs. Flint under section 24 of the Matrimonial Causes Act 1973 is an order which was void under section 284 of the Insolvency Act 1986 unless ratified by the court dealing with Mr. Flint's bankruptcy.

Both counsel have given me considerable help on all aspects of a case which is far from straightforward. A brief history is as follows. Mr. and Mrs. Flint were married in 1969 and in the same year they bought a house at 7, Galway Grove, Shavington, near Crewe as legal and beneficial joint tenants. Two children were born in 1970 and 1972. In January 1986 Mr. Flint left the family home and never returned. On 27 October 1988 Mrs. Flint presented a petition for divorce in the Crewe County Court, based on two years separation and the consent of both parties. In 1989 Mr. Flint started a business which failed and eventually led to his bankruptcy. On 17 February 1989 Mrs. Flint gave notice of intention to proceed with an application for ancillary relief under the Matrimonial Causes Act 1973. In March 1990 a decree absolute was obtained by Mrs. Flint. On 22 May 1990 a bankruptcy petition was presented against Mr. Flint by one of his creditors. On 11 July 1990 there was a hearing of Mrs. Flint's application for ancillary relief, but for one reason or another it was not a fully effective hearing. On 18 July a transfer of property order, which I shall call "the Crewe order," was made by consent by Mr. Registrar Shaw in the Crewe County Court which among other matters ordered Mr. Flint within 28 days to transfer all his estate and interest in the house to Mrs. Flint. On 24 July 1990, only six days after the Crewe order, a bankruptcy order was made against Mr. Flint in the Shrewsbury County Court. On 6 September 1990 Mr. Edwin Hunt of Messrs. Pannell Kerr Forster was appointed Mr. Flint's trustee in bankruptcy.

It is this sequence of events, and particularly the fact that the Crewe order took place between presentation of the bankruptcy petition and the bankruptcy order itself, which has given rise to the issues on this appeal. The bankruptcy order was made before there had been any transfer or other document to implement the Crewe order and in correspondence in late 1990 and early 1991 the trustee indicated a proposed challenge to the validity of the Crewe order under section 339 of the Insolvency Act 1986. Accordingly on 28 February 1991 the trustee issued a notice of motion in the Shrewsbury County Court for an order under section 339 for a declaration that the Crewe order and/or the terms of that order were void by virtue of section 339. It was subsequently appreciated by the trustee and his advisers that this section, which relates specifically to transfers at an undervalue, had no application to a transaction which occurred after presentation of the bankruptcy petition:

see the definition of "relevant time" in section 341(1)(*a*) of the Insolvency Act 1986.

On 1 March 1991 the trustee swore an affidavit which showed notified creditors' claims of more than £120,000. On 10 May 1991 Mrs. Flint swore an affidavit dealing with the alleged undervalue for the purposes of section 339. Also on 10 May 1991 there was a first hearing of the trustee's application, at which the trustee's notice of motion was amended to drop reliance on section 339 and rely instead on section 284 of the Insolvency Act 1986, subsection (1) of which states:

> "Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this section applies"—which by subsection (3) is the period between presentation of the petition and the vesting of the bankrupt's estate in his trustee in bankruptcy—"is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court."

On 25 July 1991 there was the first contested hearing of the trustee's application, at which oral evidence was given by one witness only, Mrs. Flint. Mr. Stockill represented the trustee at that hearing; Mrs. Flint was also represented by counsel (not Mr. Parry) and Mr. Flint took no part at all. I have an agreed note of that hearing. There is also a single typed sheet which apparently sets out the judge's note of Mrs. Flint's evidence, but neither side referred me to anything on that sheet. That hearing lasted the day, at the end of which Judge Roberts reserved his judgment. His written judgment was delivered some five months later, the order now under appeal having been made on 16 December 1991. The crucial part of that order, which I shall call "the Shrewsbury order," is a declaration that the Crewe order and the terms thereof were void against the trustee and that the house was held on trust for the trustee in bankruptcy and Mrs. Flint in equal shares.

Notice of appeal by Mrs. Flint against that order was issued on 13 January 1992. She naturally seeks an order that the disposition by the transfer of property order on 18 July 1990 was valid and effective. The three grounds of appeal may be summarised: (1) the judge was wrong to hold that the Crewe order was a disposition by Mr. Flint to which section 284 of the Insolvency Act 1986 applied at all; (2) he ought to have held that it was a disposition by the court (which is really just another way of putting the first ground of appeal); and (3) if section 284 was applicable, the judge failed properly to exercise his discretion whether to ratify the transaction and the matter should be remitted to the Shrewsbury County Court for further consideration.

The request for remission to the Shrewsbury County Court was based on the supposition that even if I set aside the exercise of Judge Roberts's discretion I had no power to substitute my own. However, during the course of the hearing it became clear that by virtue of rule 7.49 of the Insolvency Rules 1986 (S.I. 1986 No. 1925) I did have that power and both parties invited me, if I was against Mrs. Flint on the first two grounds but with her on the third, to exercise my own discretion rather

than send the matter back to the County Court and involve the parties in a further avoidable hearing.

It was common ground that (1) section 284 was the only relevant provision to be considered and (2) if the order by the Crewe County Court was a disposition by Mr. Flint, it was made at a time when caught by section 284. Mr. Stockill also accepted, entirely correctly, that although in the court below it had been accepted by counsel then acting for Mrs. Flint that as a matter of law the order was caught by section 284, he could not hold Mrs. Flint to that concession. I therefore consider the first ground of appeal. If I decide in Mrs. Flint's favour that section 284 has no application to the Crewe order, the transfer of property order is fully effective against the trustee and the appeal will be allowed. There will strictly be no need to consider the third ground of appeal, as no question of exercise of discretion would arise.

Mr. Parry's submission on this first ground is essentially quite simple. He says that section 284 had no application because the Crewe order was not for the purposes of that section a "disposition by the person adjudged bankrupt," i.e. Mr. Flint. In support he referred me to *Thwaite v. Thwaite* [1982] Fam. 1 and in particular the acceptance by the Court of Appeal, as binding upon them, of the statement of principle by Lord Diplock in the opinion of the Judicial Committee of the Privy Council in *de Lasala v. de Lasala* [1980] A.C. 546, 560:

> "Financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order . . ."

Mr. Parry said that accordingly it did not matter precisely what happened before the order, for example, whether before the order was made there was any contract which might have amounted to a disposition in equity. Any agreement between the parties, as shown by *Thwaite v. Thwaite*, was superseded by the order of the Crewe County Court. It followed, he argued, that as the disposition of Mr. Flint's interest derived from the order and not from agreement between the parties, it was not made by Mr. Flint for the purposes of section 284.

Mr. Stockill sought to persuade me that what the Court of Appeal said in *Thwaite v. Thwaite* about the effect of consent orders was strictly obiter, because the husband in that case had not been making any attack on the order on contractual grounds. However, I do not think that is right. The Court of Appeal's view of the effect of consent orders under the Matrimonial Causes Act 1973 was the foundation of its upholding the judge's dismissal of the husband's appeal against the registrar's refusal to vary the consent order.

That does not, however, necessarily undermine Mr. Stockill's overall argument in relation to section 284. Mr. Stockill did not base his submissions on this point on the fact that the Crewe order was a consent order. That did not, he said, make any difference. He was not looking back before the court order, which in his submission was a disposition

A and was made by Mr. Flint. In the first place, he pointed to the anomalous position which would otherwise arise. He submitted that the previous bankruptcy law, governed by the Bankruptcy Act 1914, involved two stages: the first stage was that prior to the act of bankruptcy and the second stage from that point onwards. Settlements or other dispositions by the bankrupt during the first stage could in certain circumstances be avoided. However, there was no need to avoid dispositions made during B the second stage, because upon the adjudication of bankruptcy the title of the trustee in bankruptcy related back to the act of bankruptcy and so the settlement or disposition by the bankrupt could not have any effect because he had not been the owner of the property able to make it.

The new law in relation to personal insolvency, governed mainly by the Insolvency Act 1986, involved three phases: (1) up to presentation of C a petition; (2) from presentation up to the making of a bankruptcy order; and (3) after the bankruptcy order, when the trustee acquires title to the bankrupt's estate, but not so as to relate back to the period before the order.

In certain circumstances, dispositions at an undervalue during phase 1 might be challenged under section 339; during phase 3 it was no longer possible to make effective transfer of property orders because the D bankrupt's estate was no longer vested in him but in the trustee. If Mr. Parry were right, it would only be during phase 2, which includes the present case, that an effective transfer of property order could be made which was then invulnerable to attack under the insolvency legislation. The thrust of these submissions by Mr. Stockill was that there was no sensible rationale to support such a distinction between phases 1 and 3 E on the one hand and phase 2 on the other.

I agree that such an anomaly, though it might always have to yield to the plain meaning of a statutory provision, is some support for Mr. Stockill's position. It certainly leads to serious questioning whether, consistently with the aims and policy of the personal insolvency legislation, a transfer of property order under section 24 of the Matrimonial Cause Act 1973 can sensibly be regarded for the purposes F of section 284 as a disposition not made by the bankrupt.

Mr. Stockill also cited, though principally in support of his submissions on the exercise of discretion under section 284, *In re Abbott (A Bankrupt), Ex parte Trustee of the Property of the Bankrupt v. Abbott (P.M.)* [1983] Ch. 45, in the Divisional Court of the Chancery Division, which prior to the Insolvency Act 1986 exercised appellate jurisdiction in G bankruptcy matters. That court, consisting of Sir Robert Megarry V.-C. and Peter Gibson J., had to decide whether a wife in whose favour a property adjustment order had been made by consent under section 24 of the Matrimonial Causes Act 1973 was a "purchaser for valuable consideration" for the purposes of section 42 of the Bankruptcy Act 1914. If she was, that was an effective answer to what would otherwise have followed under section 42, that the relevant part of the consent H order would have been void against the trustee in bankruptcy because it had been made within two years of the husband's bankruptcy.

Section 42 of the Act of 1914 was affected by a special provision in section 39 of the Act of 1973 which expressly provided that the fact that

a settlement or transfer of property had to be made in order to comply with a property adjustment order should not prevent that settlement or transfer from being a settlement of property to which section 42 applied. Section 39 is now applied, by amendment, to sections 339 and 340 of the Act of 1986 but has no equivalent so far as section 284 is concerned.

Nevertheless, even allowing for that difference, it is worth noting that in *In re Abbott* the judge had held that the consent order *itself* was a settlement for the purposes of section 42. That conclusion was not challenged in the Divisional Court, where the appeal on the critical point, whether the wife was a purchaser for valuable consideration, simply proceeded on the assumption that it was correct. It is not binding on me. But it does at least show that Peter Gibson J. and Sir Robert Megarry V.-C. accepted, though without the benefit of any argument, as a reasonable proposition a conclusion which is essentially on all fours with the one that Mr. Stockill is inviting me to reach in relation to section 284. For a settlement to be void under section 42 it was necessary for "the settlor" to have become bankrupt within two years. Accordingly, for the court order to have been a settlement of the purposes of section 42 it must have been a settlement by the bankrupt, since otherwise he could not have been the settlor and the section could have had no application.

If the relevant part of the court order in *In re Abbott* was a settlement for the purposes of section 42, the relevant part of the Crewe order, i.e. the part ordering transfer of his interest in the House, would likewise be a disposition by Mr. Flint. In my view that is the position. The first paragraph of the Crewe order stated: "Within 28 days of the date of this order [Mr. Flint] do transfer unto [Mrs. Flint] all his estate and interest in the [house]." Leaving aside section 284, such an order would have the effect that Mr. Flint's equitable interest would pass immediately. That is a relatively straightforward example of equity treating as done that which ought to be done, the same principle by which a purchaser under a specifically enforceable contract acquires an equitable interest upon contract and before completion. What was treated as done in the present case was a transfer by Mr. Flint of all his interest in 7, Galway Grove.

This conclusion does not, I emphasise, depend upon the Crewe order being a consent order. If the relevant parts of the order had been the result of a contested application my conclusion on this further point would have been exactly the same. As soon as the court makes its order, whether or not by consent, the transfer of property in accordance with the order becomes compulsory in a way that it was not immediately before the making of the order. But the fact that it is then compulsory, and that in the case of a consent order any previous agreement between the parties is superseded, does not in any way prevent its being a disposition by the owner of the property in question, in this case, Mr. Flint. It follows, therefore, that once Mr. Flint was adjudged bankrupt, the disposition of Mr. Flint's interest in the house became void under section 284 unless subsequently ratified by the court, both counsel agreeing that "the court" mentioned in section 284(1) did not include the Crewe County Court.

A That brings me on to the second ground of appeal, which is a challenge to Judge Roberts's refusal to ratify the disposition of Mr. Flint's share of the house. A decision whether or not to ratify a disposition under section 284 is of course a matter of discretion, though like all judicial discretions, it must be exercised reasonably in accordance with principle and in particular must take proper account of all relevant considerations and exclude the irrelevant. I was referred to *Associated* B *Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, a well known case setting out now well known principles; and to a passage in the judgment of Sir Wilfrid Greene M.R. in *Egerton v. Jones* [1939] 3 All E.R. 889, 891–892, dealing with the circumstances in which it is the duty of an appellate court to interfere with the discretion exercised by the court below. Of course, I accept the guidance of both C cases unhesitatingly.

On this part of the case, Mr. Parry referred me first to the notes in *The Supreme Court Practice 1991*, vol. 1, p. 899, para. 59/1/33 and then to *Eagil Trust Co. Ltd. v. Pigott-Brown* [1985] 3 All E.R. 119, and particularly a passage in the judgment of Griffiths L.J., at p. 122, dealing with a judge's duty to give reasons. There can be no arguing with what is said there, but criticism of a judgment for failure to give full reasons D to support the exercise of a discretion does not necessarily mean that the discretion has not been properly exercised.

Mr. Stockill cited a decision of the Court of Appeal in *Hudhud Shand Ltd. v. Johnston Pipes Ltd.* (1989) 5 Const.L.J. 209, in which an official referee had vacated a date for trial of a preliminary issue without delivering judgment or giving any reason for his decision. The Court of E Appeal held that it could not be said that the official referee had so erred in the exercise of his discretion that any other order should have been made. Mr. Stockill drew attention to two passages in the judgment of the court delivered by Slade L.J., first, at p. 212:

> "in the light of the decision of this court in *Eagil Trust Co. Ltd. v. Pigott-Brown* [1985] 3 All E.R. 119, it is common ground that this F court must accept that the learned judge took into account all relevant considerations unless the opposite can be demonstrated. It is also common ground that this court can interfere with the exercise of his discretion, if at all, only within the narrow limits established by decisions of the House of Lords, which are too well known to need recapitulation in this judgment."

G And then, at p. 214:

> "The question for us is not whether we would necessarily have made the same order as did the learned judge. The question is whether there are sufficient grounds for us to interfere with the exercise of his discretion. In due course, after the limited discovery contemplated by his order has taken effect, it may well be appropriate for the H judge to decide the defendants' striking out application or an appropriately formulated preliminary issue or both. Meanwhile I can for my part see no sufficient grounds for interfering with the exercise of his discretion on 29 July 1988. In my judgment he cannot be said

to have erred in principle. His decision cannot be said to have been perverse. Neither can it be said to have been plainly wrong." A

It would certainly be fair to say that in the present case the judgment in the court below was not a very full judgment. But that is not in itself a reason for interference by this court on appeal. It is necessary to consider what, if any, are the objections of substance.

One specific objection was put forward by Mr. Parry on the basis of B a short passage in the judgment which included the statement: "such an order"—i.e. the Crewe order—"is a disposition of property when it records a voluntary transfer by the husband . . ." and in particular on the basis of the judge's use of the word "voluntary." Mr. Parry said that the transfer was voluntary neither in the sense that it was of Mr. Flint's own volition nor in the sense that it was for no consideration. I think C that in using the word "voluntary" the judge was just drawing a distinction between the prior agreement of the parties and the actual court order. Whether or not that is right, I cannot see the slightest indication in that passage of any misunderstanding by the judge about what had actually happened and the practical result of the order.

Mr. Parry also drew attention to the fact that the judge was not referred to any authorities and expressly stated in his judgment that he D had no guidelines as to what factors should influence him in coming to his decision. Though perhaps it is not a major point, it is clear that the judge was at least shown the note to section 284 at paragraph 3–154 of *Muir Hunter on Personal Insolvency* (1988). It is also relevant to observe that section 284 is a new provision in personal insolvency and there do not yet appear to be reported cases offering guidelines for the exercise E of the discretionary jurisdiction under that section. It is also clear, however, that the section is closely modelled on what used to be section 227 of the Companies Act 1948 and is now section 127 of the Insolvency Act 1986. Though the particular facts of the present case could never arise in the context of a corporate insolvency, in broad terms the similarities between corporate and personal insolvency in the context of dispositions of property after presentation of the winding up or F bankruptcy petition, as the case may be, are far greater than any differences. It would therefore be legitimate to look for guidelines in cases concerning sections 227 of the Act of 1948 and 127 of the Act of 1986.

Mr. Parry referred me to a number of cases on section 227: *In re Steane's (Bournemouth) Ltd.* [1950] 1 All E.R. 21; *In re A. I. Levy* G *(Holdings) Ltd.* [1964] Ch. 19 and *In re Clifton Place Garage Ltd.* [1970] Ch. 477. In particular those cases showed that in exercising its discretion under section 227, and by analogy under section 284, the court should consider what is just and fair in all the circumstances, having particular regard to good faith and honest intention. There can be no doubt about the correctness of that approach. But I do not see how it is demonstrated on the material before me that Judge Roberts failed to take proper H account of those considerations. It seems to me that unless there is material to indicate otherwise, it is reasonable to assume that a judge has taken account of such obvious factors as the good faith and honest

A intention of the parties. At the most fundamental level, it is hardly realistic to suggest that a judge did not approach the matter with the aim of achieving what was just and fair in all the circumstances. Mr. Parry also referred to the rule in *Ex parte James*; *In re Condon* (1874) L.R. 9 Ch.App. 609, to the effect that the trustee as an officer of the court must do what is just and right and not take any unfair advantage. But he did not seriously resist the suggestion that his submissions on the rule did not B in the end add to what he had to say more generally about what was just and equitable in the circumstances of the case.

The decision in *In re A. I. Levy (Holdings) Ltd.* [1964] Ch. 19, was relied upon by Mr. Parry to support a submission that the judge had failed to take account of the fact that Mrs. Flint took on liabilities of Mr. Flint's estate and that it was for the benefit of the estate that the position C was crystallised, particularly with regard to possible future maintenance payments. I do not see how it is shown that the judge failed to take account of those considerations. He had the Crewe order before him, after all, and it is clear on the face of the order that liabilities were being taken over by Mrs. Flint. The material before the judge included an affidavit of Mrs. Flint, sworn on 10 May 1991, containing information about the financial background which, together with the Crewe order, D meant that the judge could see the financial implications of the Crewe order in sufficient detail for the purposes of the exercise of his discretion under section 284. Mrs. Flint also gave oral evidence which confirmed and expanded what was in her affidavit. There is nothing to demonstrate that the judge left those matters out of the balance.

Mr. Parry even went so far as to submit that as a result of the Crewe E order Mr. Flint's creditors were better off than they otherwise would have been. That slightly surprising proposition does not bear close examination. As Mr. Stockill pointed out, for example, even if it is assumed in Mrs. Flint's favour that the £17,000 mentioned in the recital to the Crewe order was a sum in which Mrs. Flint had a half beneficial share, she did not give up any claim in respect of that item. That item on its own puts a fatal dent in the notional balance sheet which Mr. F Parry argued made the order favourable to the creditors.

I can see no indication that the judge failed to consider the overall effect of the Crewe order and give it proper weight. Nor do I think it can be said that his decision was perverse or obviously wrong, which would be a rather startling proposition in circumstances where, as Mr. Stockill observed, a man owing over £120,000 makes a disposition of G about £20,000—in very broad terms—six days before being made bankrupt. Moreover, though it has not been suggested that the consent order involved any scheme on the part of Mr. or Mrs. Flint, in the sense of anything underhand, it is a fact that the impending risk of bankruptcy was known to Mrs. Flint, and of course to Mr. Flint, at the time the Crewe order was made.

There is accordingly no basis on which I can properly interfere with H the judge's decision. If there had been grounds for doing so, I should certainly have exercised my own discretion rather than involve the parties in a further and unnecessary hearing in the Shrewsbury County Court. But on the conclusions I have reached the question of substituting my

own discretion does not arise and I do not think it would be helpful to the parties for me to examine the additional submissions made to me on that aspect of the case. I therefore dismiss this appeal.

My decision will obviously be a hard blow to Mrs. Flint, who no doubt will also feel that her difficulties now are the result of the fairly long delay, for which I do not know the reasons, before her application for ancillary relief was brought to a proper hearing. Like the judge, I have great sympathy for her position but I should certainly not wish her to assume that if the discretion had in the end been mine I should have reached a different conclusion from Judge Roberts.

Appeal dismissed.

Solicitors: Vizards for Robert De Coninck & Co., Crewe; George Green & Co., Cradley Heath.

S. W.

[COURT OF APPEAL]

PALK AND ANOTHER v. MORTGAGE SERVICES FUNDING PLC.

1992 July 3; 31

Sir Donald Nicholls V.-C., Butler-Sloss L.J. and Sir Michael Kerr

Mortgage—Sale by mortgagor—Order of court—Mortgagors unable to pay mortgage instalments—Value of mortgaged property insufficient to redeem mortgage—Mortgagee opposing sale by mortgagors seeking to reduce interest payments—Whether court having discretion to order sale—Law of Property Act 1925 (15 Geo. 5, c. 20), s. 91(2)

The plaintiffs, a husband and wife, who were unable to pay the instalments under a mortgage of their house to a finance company, negotiated a sale of the house for £283,000. The amount needed to redeem the mortgage was £358,587. The company refused consent to the sale and obtained an order for possession with a view to letting the house and postponing sale to achieve a better price. That order was suspended pending the plaintiffs' application for an order for sale under section 91(2) of the Law of Property Act 1925[1]. The expected annual rental value was significantly less than the interest that would be saved by selling the house. The judge refused the application for sale.

[1] Law of Property Act 1925, s. 91(2): see post, pp. 334H–335B.

[HOUSE OF LORDS.]

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June 4, 5, 6; Aug. 1.

NOKES . . . . . APPELLANT;

AND

DONCASTER AMALGAMATED COLLIERIES, LIMITED . . . . RESPONDENTS.

Master and servant—Contract of service—Company—Reconstruction or amalgamation—Order by Court for transfer of property rights, powers and liabilities of transferor company to transferee company—Whether employee bound by transfer—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 154.

Where an order is made by the Court under s. 154 of the Companies Act, 1929, for the amalgamation of two companies, a contract of service existing at the date of the amalgamation between a workman and the transferor company does not automatically become a contract of service between the workman and the transferee company. So *held*, Lord Romer dissenting.

Decision of Court of Appeal [1939] 2 K. B. 578 reversed.

APPEAL from the decision of the Court of Appeal. (1)

The appellant had been for some time in the employment of the Hickleton Main Company, Ld. On June 4, 1937, an order was made by the Chancery Division under s. 154, sub-s. 1, of the Companies Act, 1929 (2), transferring to the respondent

(1) [1939] 2 K. B. 578.

(2) Companies Act, 1929, s. 154, sub-s. 1: "Where an application "is made to the court . . . . for "the sanctioning of a compromise "or arrangement . . . . and it "is shown to the court that the "compromise or arrangement has "been proposed for the purposes "of or in connection with a scheme "for the reconstruction of any "company or companies or the "amalgamation of any two or "more companies, and that under "the scheme the whole or any part "of the undertaking or the property of any company concerned "in the scheme (in this section "referred to as 'a transferor "'company') is to be transferred "to another company (in this "section referred to as 'the "'transferee company'), the "court may . . . ." by order ". . . . make provision for all or "any of the following matters:— "(*a*) the transfer to the transferee company of the whole or "any part of the undertaking "and of the property or liabilities of any transferor "company. . . . . "

Sub-s. 4 provides: "In this "section the expression 'property' "includes property, rights and "powers of every description, and "the expression 'liabilities' includes duties."

* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD ROMER, and LORD PORTER.

company all the property, rights, powers, liabilities and duties of the Hickleton company. On October 7, 1937, the appellant absented himself from work in circumstances which would have made him liable under s. 4 of the Employers and Workmen Act, 1875, if he could be regarded as under a contract of service with the respondent company. This however, he denied, but on a summons preferred against him under the Act of 1875, for unlawfully absenting himself from work, the justices adjudged that he should pay the sum of 15*s.* and 10*s.* costs. From that order he appealed, but the Divisional Court and the Court of Appeal dismissed the appeal. He appealed to this House.

John Morris K.C. and *G. Granville Sharp* for the appellant. The question is whether upon the amalgamation of two companies under s. 154 of the Companies Act, 1929, a contract of personal service entered into by an employee with one of these companies is ipso facto transformed into a contract of personal service between the employee and the transferee company irrespective of the consent of the employee. We submit that a contract of personal service is not assignable, being by its nature unlike other contracts, and is not transferable without the consent of the employee. That consent was not given in the present case. The transfer effected by s. 154 of the Companies Act, 1929, is only of things which by their nature are assignable. There is a fundamental difference between a contract for personal service, such as there is in this case, and other contracts. It has been said on behalf of the respondents that s. 154 of the Companies Act is very wide in its terms and is intended to facilitate transfers, but contracts of personal service cannot be included seeing that they would involve new liabilities on the employee without his consent. In his contract with the Hickleton company there was no doubt implied an agreement by the appellant to obey the lawful orders of that company; there was no such agreement by him to obey the orders of any other company. *Brace* v. *Calder* (1), we submit, shows that

(1) [1895] 2 Q. B. 253.

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a contract of personal service may not be assigned without consent; see also *Tolhurst* v. *Associated Portland Cement Manufacturers* (1), where Collins M.R. said (2): "It is, I think, "quite clear that neither at law nor in equity could the burden "of a contract be shifted off the shoulders of a contractor on "to those of another without the consent of the contractee."

[LORD THANKERTON referred to *Cole* v. *Handasyde & Co.* (3)]

Wynn Parry K.C., *Hylton-Foster* and *Denis Robson* for the respondents. We challenge the contention made on behalf of the appellant that s. 154 of the Companies Act, 1929, is procedural only. Its purpose is correctly stated in the marginal note, which reads thus: "Provisions for facilitating "reconstruction and amalgamation of companies," and it follows on, and is complementary to s. 153, being designed to carry out the arrangements made under that section. That is the key to the section—to carry out any compromise or arrangement under s. 153. Every transaction contemplated by the two sections is essentially commercial and intended to give full effect to it. So far from being procedural only, s. 154 is in one aspect quite revolutionary, as making a substantial alteration in company law. Why has this been done? It is to accomplish by one document everything which previously would have necessitated a number of documents with consequent stamp duties on each. Thus the whole previous procedure is short-circuited by s. 154, than which no more apt language could have been devised to achieve the result aimed at. By the amalgamation all rights and liabilities are transferred, the language used being clearly wide enough to deal with everything which the transferor company had, the transferee company taking the place of the former. The highly artificial objection which has been taken to this scheme should be given no weight.

[LORD THANKERTON. I do not think it can be called highly artificial. Take the case of a managing director at a large salary. Can his position be prejudiced?]

It must be borne in mind that before a scheme is brought

(1) [1902] 2 K. B. 660.
(2) Ibid. 668.
(3) 1910 S. C. 68, 72.

before the Court great care is taken to see that some arrangement is made whereby no one should be prejudiced. It must always be a matter of degree. Testing the matter from the point of view of liabilities: we find that every liability is transferred. The word "liabilities" is given a meaning more extensive than is to be expressed in terms of money, and is wide enough to include all former obligations. We rely on the words in sub-s. 2, "vest in." The Act has dispensed with one element, namely, the consent of one of the parties. There is thus a substitution and the creation of a new legal relationship. The view submitted on behalf of the appellant would involve a curious result, namely, a transfer of all the liabilities of the transferred company, but only a partial transfer of the rights, or only a partial transfer of property and a partial transfer of liabilities. There would thus be something omitted in carrying out a scheme under s. 154. If the contention on behalf of the appellant is right, so far from facilitating amalgamation s. 154 would be made in effect a dead letter. We say that the whole subject-matter—rights and liabilities—pass from the old company to the new.

John Morris K.C. in reply. In the case of a right which is clearly non-assignable—and that is this case—there are no words in the Act which apply to it. The new contract would create a wholly new relationship. The contract now in question by its very nature does not pass from the one company to the other, and the person entitled to say so is the present appellant who contracted only with the old company.

The House took time for consideration.

1940. Aug. 1. VISCOUNT SIMON L.C. My Lords, the question to be decided in this appeal can be thus stated. When the Court makes an order under s. 154 of the Companies Act, 1929, transferring all the property and liabilities of the transferor company to the transferee company, is the result that a contract of service previously existing between an individual and the transferor company automatically becomes a contract between the individual and the transferee company?

The appellant is a coalminer, and between January, 1937,

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and June 4, 1937, there existed between him and the Hickleton Main Colliery Company, Ld., a contract under which he worked at the colliery and received wages from that company. On June 4, 1937, an order was made by the Chancery Division of His Majesty's High Court of Justice under s. 154, which transferred to the respondent company all the property, rights, powers, liabilities and duties of a number of colliery companies, including the Hickleton Main Colliery Company, and which provided that these transferor companies should be dissolved without winding up. The appellant continued to work at the Hickleton Main Colliery until October 7, 1937, and received wages from the respondents for his labour, but he throughout believed himself to be working under his contract with the Hickleton Main Colliery Company, Ld., which contract had never been terminated by notice. The company, however, as the result of the order made by the Chancery Division, had ceased to exist. On October 7, 1937, the appellant absented himself from work, in circumstances which would have made him liable under s. 4 of the Employers and Workmen Act, 1875, if he could be regarded as under a contract of service with the respondents. This he denied, and hence, on a case stated by the justices of Doncaster, the general question arises which I have defined above and which the House has now to determine.

Counsel for the appellant argued that a contractual right to personal service was a personal right of the employer and was incapable of being transferred by him to anyone else, and that a duty to serve a specific master could not be part of the property or rights of that master capable of becoming, by transfer, a duty to serve someone else. It is, of course, indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent, which is the same thing as saying that, in order to produce the desired result, the old contract between A and X would have to be terminated by notice or by mutual consent and a new contract of service entered into by agreement between A and Y. The rule is so strict that if the contract

is between individuals on both sides and X dies, the contract of service is immediately dissolved—*Farrow* v. *Wilson* (1)—for A never promised to serve X's personal representative and X could only act as employer when alive. Where a firm consisting of four partners engaged the plaintiff as manager for a term of two years, the retirement of two partners from the firm within that period operated as a wrongful dismissal of the plaintiff: *Brace* v. *Calder* (2). If A's contract is to serve a limited company, X & Co., and X & Co. goes into liquidation, the winding-up order operates as a notice of discharge to the servants of the company: *Chapman's case.* (3)

The rules of law restricting the assignability of contracts are, however, by no means limited to contracts of personal service. In the case of contracts for the sale of goods, for example (unless the contract expressly or by implication covers the purchaser and his assigns), the seller is entitled to rely on the credit of the purchaser and to refuse to recognize any substitute. Similarly, the purchaser is entitled to rely upon the seller and to hold him responsible for due performance. I may add that a possible confusion may arise from the use of the word "assignability" in discussing some of the cases usually cited on this subject. Thus, in *British Waggon Co. and Parkgate Waggon Co.* v. *Lea* (4) the real point of the decision was that the contract which the Parkgate company had made with Lea for the repair of certain wagons did not call for the repairs being necessarily effected by the Parkgate company itself, but could be adequately performed by the Parkgate Company arranging with the British Waggon company that the latter should execute the repairs. Such a result does not depend on assignment of contract at all. It depends on the view that the contract of repair was duly discharged by the Parkgate company by getting the repairs satisfactorily effected by a third party. In other words, the contract bound the Parkgate company to produce a result, not necessarily by its own efforts, but, if it preferred, by vicarious performance through a sub-contractor or otherwise.

(1) (1869) L. R. 4 C. P. 744, 746.
(2) [1895] 2 Q. B. 253.
(3) (1866) L. R. 1 Eq. 346.
(4) (1880) 5 Q. B. D. 149.

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A quite different situation, as it seems to me, is illustrated by the well known case of *Tolhurst* v. *Associated Portland Cement Manufacturers* (1) and, with all respect to an observation made by Lord Lindley at the end of his judgment in *Tolhurst's* case (1), I doubt whether the *British Waggon Company's* case (2) was really an authority very much in point. In *Tolhurst's* case (1) the majority of this House took the view that the contract then under discussion was "assignable," because the contract ought to be read and construed as one between the named parties and their respective assigns, although assigns were not in fact mentioned in the document. By so construing the agreement the validity of the transfer of the benefit of the contract from the original company to the new company to which it assigned it became unchallengeable, and Lord Macnaghten insists, at the beginning of his judgment, that once the true interpretation of the contract was settled there was no further legal point in the case at all. *Tolhurst's* case (1), therefore, was a case in which the terms of the contract provided for its assignment; the *British Waggon Company's* case (2) does not turn on assignment, but illustrates the circumstances in which the original contracting party may perform the contract by getting somebody else to do the work in satisfactory fashion.

It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law—the principle, namely, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent. The whole question, however, is whether s. 154 of the Companies Act, 1929, provides a statutory exception to that principle.

In favour of the view that it does, it is pointed out that the only transfers which the section can authorize are transfers of the undertaking of one company to another, and that if the employer is a company, the servant can have no direct contact with the artificial entity but of necessity deals with and acts

(1) [1903] A. C. 414. (2) 5 Q. B. D. 149.

under the orders of the company's agents. Moreover, the change involved in a wage earner serving the new company in place of the old is, in normal cases, no greater than the change he would experience when the company which he is serving throughout changes its directors, its shareholders, its managers, its scope of operations, and its name, all of which it may do without losing its identity. No doubt this is true in many cases, though I am far from saying that the transformation of a small private or family company, in which the wage-earner maintains a personal relation with the principal shareholders who act as managers and directors, into a much larger concern where personal contacts disappear, is in all cases a matter of indifference to the employees. But the point made is that such a transformation can take place without necessarily changing the identity of the company.

It is further argued on behalf of the respondents that s. 154 constitutes a new and simpler machinery for the transfer of the undertaking of an old company to a new company, which thus acquires the undertaking without the necessity of the transferor company going into liquidation. As the Master of the Rolls observed in his judgment, the word "transfer" is not a word of art and the language of s. 154 is in very wide terms. Moreover, s. 154 contemplates, or at any rate provides for, the dissolution of the transferor company when the transfer of its undertaking has been made, and there appears to be no means of calling back to life the company so dissolved, for s. 294 occurs in Part V. of the Companies Act dealing with winding up, whereas s. 154 is found in Part IV.

In these circumstances, and with powerful arguments presented on either side, the House is left with the difficult task of putting the proper construction on s. 154, so far as its application to current contracts of service is concerned. I give full weight to the unanimity of view expressed in the Courts below by judges some of whom speak with special authority on this sort of subject-matter, but after much reflection, and after weighing the reasoning in those judgments and the arguments presented at the Bar of this House, I have to come to the conclusion that contracts of personal

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service are not automatically transferred by an order made under s. 154.

The principles of construction which apply in interpreting such a section are well established; the difficulty is to adapt well established principles to a particular case of difficulty. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

Here, the wider interpretation of s. 154 which has found favour in the Courts below practically amounts to saying, in reference to current contracts of the transferor company, that an order made under s. 154 strikes out the name of the transferor company and substitutes that of the transferee company as a party to the contract. Consequently, all current contracts of service are transformed, without consulting the servant, by substituting the new employer for the old. But it is fallacious to suppose that this wide construction of s. 154 would remove all difficulty in transferring contracts for personal service. If, for example, one of the companies to be amalgamated under the procedure of that section has a long-term contract with an individual to be sole manager of its

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undertaking, what would happen when the transfer takes place to a new and enlarged company? The remuneration may be quite inadequate, or the individual may be quite unsuited, for so extended a responsibility. Again, if each of half a dozen amalgamating companies has such a contract with its manager, the suggested interpretation of s. 154 appears to lead to absurdity. The truth is that many contracts are not capable of being dealt with by the method said to be involved in the language of s. 154. For example, what would become of a contract which remunerates a manager with a share of the profits of a constituent undertaking, or a contract with a medical man to attend the servants of a company at a fixed total fee? Such contracts cannot be dealt with by simply substituting a new employer for the old, for the nature of the contract necessarily depends upon the old employer continuing to be a contracting party, and any change of employer gives the contract an entirely new meaning.

It seems to me therefore than any difficulties arising in connection with such contracts as I have described above must be disposed of at the time of transfer by negotiation leading either to a new engagement or to compensation. If this is so, it is no longer possible to give an interpretation to s. 154 which would automatically transfer every kind of current contract by merely substituting the name of the new company for the name of the old. The argument that an order made under the section transfers wage-earners from one employer to another without their consent thus loses much of its force. I do not see why there should be any great practical difficulty in the old company announcing to its work-people that the undertaking is about to be transferred to a new company, giving the necessary notice to terminate existing engagements and informing the wage-earners that the new company is prepared to re-engage them on the same terms, and that continuing service after such a date will be taken as acceptance of the new offer. At any rate, after examining s. 154 with close attention and considering the consequences of its application in different cases, I can come to no other conclusion than

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that an order made under it does not automatically transfer contracts of personal service. The word "contract" does not appear in the section at all, and I do not agree with the view expressed in the Court of Appeal that a right to the service of an employee is the property of the transferor company. Such a right cannot be the subject of gift or bequest; it cannot be bought or sold; it forms no part of the assets of the employer for the purpose of administering his estate. In short, s. 154 when it provides for "transfer" is providing in my opinion for the transfer of those rights which are not incapable of transfer and is not contemplating the transfer of rights which are in their nature incapable of being transferred. I must make it plain that my judgment is limited to contracts of personal service with which the present appeal is concerned. It may well be that current contracts for the supply and purchase of goods are subject to what I may call a statutory novation, except contracts for the supply of "your requirements" or the like which, like contracts to obey "your orders," do not seem to me capable of automatic transfer.

The conclusion at which I have arrived may be regarded as limiting the usefulness of the section, but to that consideration there are two answers. In the first place I am not justified on that account in giving to the section a wider effect than its true interpretation should provide, and there must be great advantages in avoiding the necessity of liquidation and in effecting transfers without any further act or deed in cases contemplated by the section. In the second place, if the Legislature really desires that workmen should be transferred to a new employer without their consent being obtained, plainer words can be devised to express this intention. I cannot regard s. 154 as plainly authorizing this result and, in my view, the appeal should be allowed with costs here and below, and the question of law raised in the case stated should be answered by saying that a contract of service did not exist between the appellant and the respondents and that the magistrates should dismiss the summons with such order as to costs as they think fit.

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LORD ATKIN (read by LORD WRIGHT). My Lords, this is an appeal from an order of the Court of Appeal dismissing an appeal from a Divisional Court, which dismissed an appeal from an order of the justices at the petty sessions held at Doncaster in and for the Division of Lower Strafforth and Tickhill. The case came before the justices on a summons preferred by the Doncaster Amalgamated Collieries, Ld., against the appellant under s. 4 of the Employers and Workmen Act, 1875. The summons, which was dated October 16, 1937, claimed fifteen shillings for damages for breach of contract alleging that the defendant wrongfully absented himself from or neglected the service of the plaintiffs at their Hickleton colliery on October 7, 1937. The justices adjudged that the defendant pay the sum of 15*s.* damages and 10*s.* costs The Act gives the justices jurisdiction in disputes between an employer and a workman when the claim does not exceed 10*l.*: and by s. 10, "'workman' . . . . . means any person "who being a . . . . miner . . . . has entered into or works under "a contract with an employer whether the contract . . . . "be express or implied, oral or in writing, and be a contract "of service or a contract personally to execute any work or "labour." The defence of Mr. Nokes was that he had no contract with the respondents: he had been an employee of the Hickleton Main Colliery Company, Ld., and on October 7 he had never heard of the Doncaster Amalgamated Collieries, Ld. To which the answer was that that might be, but by an order made in the Chancery Division on June 4, 1937, under s. 154 of the Companies Act, 1929, all the property rights and liabilities of the Hickleton Main Company had been transferred to the respondent company, and included in them was the contract of service with Nokes, so that from that date he had become without his knowledge the servant of the respondent company. I do not refer to the facts found by the justices in the case stated: but it is clear from the case that Nokes had on October 7 no knowledge of any proposed change in his employers: and that the question of law for determination is whether the order of Crossman J. on June 4 had the effect

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ipso facto of creating a contract of service between Nokes and the respondent company.

My Lords, I confess it appears to me astonishing that apart from overriding questions of public welfare power should be given to a court or anyone else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf. But if Parliament has so enacted the result must be accepted. I venture to think, however, that the effect of the legislation is far different from what it is supposed to be by the six judges who have dealt with the matter in the courts below. The problem arises under two sections in the Companies Act, 1929, ss. 153 and 154, which with section 155 form a small division of the Act entitled "Arrangements and Reconstructions" which, modifying and replacing ss. 45 and 120 of the Act of 1908 provide for compromises between a company and its members or creditors, and also provide for arrangements in the nature of reconstruction or amalgamation. Sect. 154 was introduced for the first time into the Companies Act, 1928, by s. 54, and so found its way into the consolidating Act of 1929. The sections come into play in the following way. The Hickleton Main Colliery Company, Ld., was a company working its pits in Yorkshire. Nokes in January, 1937, entered into a written contract of service with the company to serve it as a miner on the terms and conditions appearing in the bylaws in force at the company's collieries, and the company by this agreement agreed to engage Nokes on the same terms and conditions. The contract was in writing constituted by Nokes's signature to the contract book. At some time before June, 1937, the company together with six other colliery companies proposed an arrangement for amalgamating all the companies with a new company to be formed or then formed, namely, the Doncaster Amalgamated Collieries Ld.; and as part of the scheme agreed with each other and with the said company to transfer

their property rights and liabilities to the new company. I have to rely upon my recollection of the agreement which was produced at the hearing by counsel for the respondents: but I think that the new company were parties to the formal agreement. Application was made to the Court under s. 153 for the approval of this scheme, and the scheme was duly sanctioned by Crossman J. on March 22, 1937. By an order dated June 4, 1937, made by Crossman J. on an originating summons dated April 23, 1937, issued by the Doncaster Amalgamated Collieries, Ld., it was ordered that all the property rights and powers of four of the amalgamating companies including Hickleton Main Company, Ld., as specified in the schedule and all other the property rights and powers of the transferor companies, be transferred without further act or deed, to the transferee company and that the same should vest in the transferee company for all the estate and interest of the transferor companies therein. It was further ordered that all the liabilities and duties of the transferor companies should be transferred to the transferee company without further act or deed, and accordingly the same should, pursuant to s. 154, sub-s. 2, of the Companies Act, 1929, be transferred to and become the liabilities and duties of the transferee company. It was further ordered "that all pro-"ceedings now pending by or against the transferor companies "be continued by or against the transferee company", and that the transferor companies should deliver an office copy of the order to the Registrar of Companies and that on such delivery the transferor companies should be dissolved. This order follows very closely the terms of s. 154. The contention is that the effect of the section is to transfer all rights which a transferor company had against anyone at the date of the order whether on personal contracts or on contracts expressed to be non-assignable, or on property the rights in which ceased on assignment.

In other words rights not transferable in law or equity were in fact transferred if necessary against the will of the parties against whom the rights existed, and in confiscation of the rights which those parties had reserved to have dealings only

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with the person, i.e., the transferor company, with whom they had elected to be associated. It means that contracts of service are compulsorily altered; and new contracts of service with a new employer created without the consent of one of the contracting parties. It is not, of course, confined to weekly or fortnightly contracts: it extends in the case of collieries to the longer term contracts of accountants, managers, salesmen, solicitors, doctors, and, apparently, though how this would be applied where the company is dissolved is not explained, to managing directors engaged for a term of years. It applies to other personal contracts such as those to write a book or a play, or produce a film, or paint a picture. It covers property held without the right of assignment: in England in the case of leases it would forfeit the right reasonably to withhold consent: in Scotland, as I understand it, it would invalidate any condition based on law or contract of non-assignability. It would convey personal rights of action, as for instance a right to sue for defamation. It would transfer shares in companies which by their constitution allowed the directors a discretion as to the shareholders they admitted to their register. As I understood the argument, the transferee company was entitled by the order to be registered in respect of such shares.

When one regards the remarkable legal consequences of the construction adopted by the courts below one is driven to ask what the reasons may be supposed to be that brought about this revolution in the law, and that led to one class of person, companies under the Companies Act, being able to shake off the restrictions which bind ordinary persons, though only when they are minded to transfer their business to another and probably a larger company. Before 1928 no such privilege existed. Amalgamations, a vague term, were possible: companies could dispose of their undertaking to other companies. But it was necessary to invoke the machinery of a winding up: assets would be transferred by conveyances to which the liquidator was party: assignments had to be negotiated: and dissolution of the company could not take place until after the winding up had been completed. But

all such sales of undertaking were subject to the ordinary law, and had of course to respect the rights of third parties. Nothing was transferable by a company that was not transferable by an individual: and in particular no one suggested that contracts of service could be transferred. On the contrary, a winding-up order or resolution operated as a discharge of existing servants, resulting in the right to claim damages for wrongful dismissal. It is true that the transferee company would ordinarily offer to employ the former servants of the transferor company: and an unreasonable refusal to accept such offer would mitigate or perhaps get rid of any damages. But the servant was left with his inalienable right to choose whether he would serve a new master or not.

Now the new procedure operates to remove much of the complexity of the former system. An arrangement can be made for transfer of an undertaking by way of amalgamation without incurring the necessity of a winding up. Once a winding up is avoided there is no longer a liquidator to control the transfer: and by the old device of a vesting order, property that previously had to be conveyed can be transferred, as the order in the present case says, without further act or deed. A further change is made. Under the former law a company could only be dissolved after the winding up had been completed, which involved delay until its liabilities had been met or compromised, either by arrangement with the new company, i.e., a novation, or by taking an indemnity from the new company, realizing or reserving assets sufficient to meet the liabilities. But as there is to be no winding up under the new system there has to be a special power of dissolution. This is given by s. 154, sub-s. 1 (*d*): but no time is fixed for dissolution; it need not be ordered at all; or if ordered can be postponed for any period that the judge may deem necessary. One other change is necessary; as the assets are to be vested in the new company, and an early dissolution is in most cases anticipated it is plain that the liabilities of this transferor company have to be provided for. Otherwise the transfer of the assets would very much resemble a fraudulent conveyance. This is dealt with by making the new company take over

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and so be responsible for the liabilities of the old. There has thus been provided a much more rapid mode of carrying out a reconstruction or amalgamation which avoids a winding up, an improved procedure akin to the various modern conveyancing provisions made in other statutes. But why this beneficent procedure should be tainted with the oppression and confiscation which in some cases would certainly be caused, or why in the interests of companies big or small for the mere purposes of an amalgamation it should violate all the rules as to transferability depending on some occasions on principles of our law and on other occasions on contract I cannot imagine. It is said that one company does not differ from another: and why should not a benevolent judge of the Chancery Division transfer the services of a workman to another admirable employer just as good and perhaps better. The answer is two-fold. The first is that however excellent the new master may be it is hitherto the servant who has the choosing of him, and not a judge. The second is that it is a complete mistake in my experience to suppose that people, whether they are servants or landlords or authors do not attach importance to the identity of the particular company with which they deal. It would possibly hurt the feelings of financial gentlemen with large organizing powers and ambitions to know how strongly some people feel about big combinations, and especially amalgamations of small trading concerns. But it is said how unreasonable this is: for the big company can buy the majority of the shares in the old company: replace the directors and managers: change the policy and produce the same result. Be it so: but the result is not the same: the identity of the company is preserved: and in any case the individual concerned, while he must be prepared to run the one risk, is entitled to say that he is not obliged to run the other. The truth is that this argument was tried out and repelled over forty years ago by Stirling J. in *Griffith* v. *Tower Publishing Co.* (1), where an author was held justified in refusing to allow his contract to be transferred to another company. The judgment is very apposite to the present

(1) [1897] 1 Ch. 21.

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case. After deciding that there is no difference between publishing contracts with an individual and contracts with a company so far as assignability is concerned the judge said: "No doubt part of the inducement was also that the company "had a very efficient manager. It was said that the company "might have discharged him the next day without giving the "plaintiff cause to complain. That observation is well "founded. The company might have discharged its manager "the next day, and appointed new officers at any time; but "still the plaintiff might well act on the assumption that the "Tower Company and those who directed its affairs would "select a manager who would maintain the reputation of the "company. It seems to me that it would be wrong to draw "any such distinction as is suggested between an agreement "entered into by an author with an individual publisher and "a similar agreement between an author and a limited "company; and agreements of the former kind being non-"assignable, I hold that agreements of the latter description "are also incapable of being assigned."

Much stress has been laid on the general words in the definition clause, s. 154, sub-s. 4: "In this section the expression "'property' includes property rights and powers of every "description and the expression liabilities' includes duties." But it has been the duty of the Court on countless occasions to construe general words cutting down the generality to the obvious intention of the Legislature. The words of the learned author of Maxwell on Statutes, 8th ed., p. 73, appear to me to afford a true canon of construction. After saying that there are certain objects which the Legislature is presumed not to intend, and that a construction which would lead to any of them is therefore to be avoided, he continues: "One of these "presumptions is that the Legislature does not intend to "make any substantial alteration in the law beyond what it "explicitly declares, either in express terms or by clear "implication, or, in other words, beyond the immediate "scope and object of the statute. In all general matters "outside those limits the law remains undisturbed. It is "in the last degree improbable that the Legislature would

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"overthrow fundamental principles, infringe rights, or depart "from the general system of law, without expressing its "intention with irresistible clearness, and to give any such "effect to general words, simply because they have a meaning "that would lead thereto when used in either their widest, "their usual or their natural sense, would be to give them a "meaning other than that which was actually intended. "General words and phrases, therefore, however wide and "comprehensive they may be in their literal sense, must, "usually, be construed as being limited to the actual objects "of the Act. The general words of the Act are not to be so "construed as to alter the previous policy of the law." The learned author proceeds to illustrate this principle by instances which occupy several of the succeeding pages. I will only cite one application, *Leach* v. *Rex*. (1) The Criminal Evidence Act, 1898, had made the wife of an accused person a competent witness for or against him on charges of certain scheduled offences. The question arose on appeal to this House whether she was thereby made a compellable witness. The House, reversing the Court of Criminal Appeal, said no. Lord Halsbury said (2): "You must consider, when you are dealing "with Acts of Parliament, and examining what the effect of "your proposed construction is, whether or not you are dealing "with something that it is possible the Legislature might either "have passed by definite and specific enactment or have "allowed to pass by some ambiguous inference . . . . If "you want to alter the law which has lasted for centuries and "which is almost ingrained in the English Constitution, in "the sense that everybody would say 'To call a wife against "'her husband is a thing that cannot be heard of'—to suggest "that that is to be dealt with by inference, and that you "should introduce a new system of law without any specific "enactment of it, seems to me to be perfectly monstrous." In the same case Lord Atkinson said (3): "The principle that "a wife is not to be compelled to give evidence against her "husband is deep-seated in the common law of this country,

(1) [1912] A. C. 305.
(2) Ibid. 310, 311.
(3) Ibid. 311.

"and I think if it is to be overturned it must be overturned "by a clear, definite, and positive enactment, not by an "ambiguous one such as the section relied upon in this case." My Lords, I should have thought that the principle that a man is not to be compelled to serve a master against his will is just as deep-seated in the common law of this country, as that which was under discussion in the case cited: and that here there is no clear, definite, or positive enactment overturning it. But in truth the general words in this section describing "property" seem to me to add nothing to the word "property" standing by itself which would be taken by any lawyer to include property, rights and powers of any description. Now it is to be noticed that in the Companies Act, 1908, s. 151, sub-s. 2 (*a*), the liquidator in a winding up was given power "To sell the real and personal property, "and things in action of the company by public auction or "private contract, with power to transfer the whole thereof "to any person or company, or to sell the same in parcels." This power is given in the same words in the Act of 1929, s. 191, sub-s. 2 (*a*). Now it is beyond controversy that the Act of 1908, s. 151, sub-s. 2 (*a*), in giving power to the liquidator to sell or transfer property did not give power to sell or transfer non-assignable property: and the same construction must be given to the powers given by the Act of 1929, s. 191, sub-s. 2. We should then have what appears to me to be the anomaly that while the liquidator's power to transfer property in a winding up is limited to assignable property, the Court's power in an amalgamation to transfer property extends to non-assignable property. I cannot think that this departure from observing the ordinary rights of property of third persons is even suggested, much less expressed in clear and unambiguous language. Indeed when I consider that the Court gets no power until it sanctions an arrangement made under s. 153, which must rest on agreement: and that there is plainly no right in the parties to agree to transfer what they have no right to transfer, and that such agreement can give no legal or equitable rights to anyone I am still further confirmed in my view. It was said how short and simple the procedure

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suggested was, and with what consternation practitioners in company work would view a reversal of the present decision. I am not satisfied that all company lawyers have taken the view which found favour below; and I am satisfied that the result which I favour will still allow very considerable advantages, and still be an improvement upon that system with which the company world did very well up to 1928. But a speedy transfer of property from A to B and a short, sharp dissolution of A though certainly simple does not necessarily do justice to A and still less to third parties who had dealings with A. I am satisfied that this in the main procedural section should not be construed so as to transfer rights which in their nature are by law not transferable. I am of opinion therefore that the appeal should be allowed with costs here and in the Court of Appeal and in the Divisional Court, and that in answer to the case the justices should be directed to dismiss the summons with such order as to costs as they think fit.

LORD THANKERTON. My Lords, I have had the privilege of considering the written opinions of my noble and learned friends Lord Atkin and Lord Romer; I find myself in agreement with the opinion of Lord Atkin, and regret that I feel bound to differ from Lord Romer's opinion, as also from the decision of both courts below.

The decision of the appeal turns on the proper construction of head (*a*) of the matters referred to in s. 154, sub-s. 1, of the Companies Act, 1929, namely, "the transfer to the transferee "company of the whole or any part of the undertaking and of "the property or liabilities of any transferor company," and of s. 154, sub-s. 2, which provides, "Where an order under "this section provides for the transfer of property or liabilities, "that property shall, by virtue of the order, be transferred "to and vest in, and those liabilities shall, by virtue of the "Order, be transferred to and become the liabilities of, the "transferee company, and, in the case of any property, if the "order so directs, freed from any charge which is by virtue "of the compromise or arrangement to cease to have effect."

In sub-s. 4 property and liabilities are defined in wide terms.

The construction which has prevailed in the courts below clearly involves that the right which a third party would otherwise have to prohibit a transfer by the transferor company, is at the mercy of the Court under this section. That necessarily involves an extension of the rights of the transferor company, and the corresponding extinction of a third party's rights. Lord Halsbury's remarks in *Leach* v. *Rex* (1), quoted by my noble and learned friend, appear to me to be directly in point. The point that raises the difficulty is the word "transferred." If it had been intended to effect a substitution of the transferee company in room and stead of the transferor company it would have been easy so to express it, but Parliament has not done so. This particular difficulty has not been mentioned or dealt with in the courts below, which appear to have been most impressed with the width of the definition of property and liabilities. I confess that the width of the definition does not impress me as favouring either construction, for, even if the word "transferred" had been qualified by such a phrase as "so far as transferable by the transferor company," the wide definition would have been equally necessary and appropriate. We are then left to a series of ingenious implications from other provisions in the section in order to give to the word "transferred" a meaning which I do not consider to be its natural meaning. If it had been intended to extinguish the rights of third parties, that should have been done "by a clear definite and positive enactment, not by an "ambiguous one such as the section relied upon in this case"; per Lord Atkinson in *Leach's* case. (2) I cannot believe that this matter was considered by Parliament; clearly the main object of these provisions which were first introduced in s. 54 of the Companies Act of 1928, was to facilitate the amalgamation of companies and to avoid the payment of duties on a whole series of deeds of transfer, etc.

It cannot be gainsaid that the rights of third parties which would be overridden or extinguished by the respondents' construction are, in many cases, of material importance and

(1) [1912] A. C. 305. (2) Ibid. 311.

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value. I will only add one illustration to those instanced by my noble and learned friend Lord Atkin. In the case of mineral leases it has long been settled in Scotland that a lease excluding assignees unless approved of by the landlord, has the same force with an unqualified exclusion; the tenant has no right under such a clause to require the landlord to justify his refusal, neither, if he does assign a reason, is that subject to the review of the Court: *Duke of Portland* v. *Baird & Co.* (1); Bell's Princ. s. 1218. In the *Duke of Portland's* case Lord Justice Clerk Inglis, after referring to the delectus personæ involved in certain leases, says (2): "But I think that both "the clause and the subject with which we are dealing suggest "a great many other considerations on the part of the landlord "than the mere consideration whether a particular assignee "or subtenant is an eligible man. It may in a mining district "like this be at one time a very beneficial proceeding for the "landlord under such a lease to take an assignee, and to take "an assignee of a particular character—an assignee or a "subtenant who will work out the minerals very rapidly. "It may at another time be his interest to receive no assignee "at all, or only an assignee or subtenant whose command "of capital, or whose enterprise, is not such as to be likely "to produce a very rapid working-out of the minerals. There "is a great competition and a great complication of interests "in such districts. There are a great many things to be "considered in the interest of a mineral proprietor besides "the mere solvency or sufficiency of the tenants in his mineral "leases; and I should say it is difficult to understand that a "landlord in making a lease of this kind should not have these "interests in his eye when he arranges with his tenant under "what conditions assignation or subtack is to be allowed. "Can anything be more natural—or, I should say, more "expedient—for the landlord, than that he should hold in his "hand the power, not of rejecting this or that assignee or "subtenant, but of determining absolutely, and with a view "to his own wishes and interests only, whether at any "particular time there shall be an assignation or subtack

(1) (1865) 4 Macp. 10. (2) Ibid. 18.

"at all?" In the absence of explicit provision to that effect, I am unable to find in the terms of s. 154 anything to deprive the mineral landlord of such a right.

Since writing this opinion I have had the privilege of considering the opinion just delivered by my noble and learned friend on the Woolsack, and the opinion of my noble and learned friend Lord Porter, with both of which I agree, as also in the motion proposed by the Lord Chancellor.

LORD ROMER. My Lords, this appeal raises a general question of difficulty and importance as to the construction of s. 154 of the Companies Act, 1929. It is the question whether the Court has power under this section to transfer to or vest in the transferee company, therein mentioned, property and rights of a transferor company which the latter company is itself incapable of assigning, or which it can only assign with the consent of some third party whose consent to the transfer has not been obtained. The question more particularly involved is whether the order made by Mr. Registrar Stiebel on June 4, 1937, was effectual to transfer to the respondent company all the rights and liabilities of the Hickleton Main Colliery Company, Ld., as they subsisted on that date, under and by virtue of the contract of employment entered into by the last mentioned company with the appellant. In other words, was the appellant, as from June 4, 1937, in the employment of the respondent company upon the terms of such contract?

It is plain that the proper answer to be given to these questions can only be discovered after a careful and critical examination of the language employed in s. 154. It is true that the section merely gives effect to an amendment of the law made by s. 54 of the Companies Act of 1928, but that Act was passed for the purpose of amending the law relating to companies with a view to the consolidation of such law effected in the following year, and never itself came into force. In order, therefore, to appreciate the objects that the Legislature had in view when making the amendment embodied in the section, it is necessary to consider how matters stood before

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1929. For this purpose it will suffice to consider an amalgamation of a company with another carried into effect by means of an arrangement made between each company and its shareholders under the provisions of s. 120 of the Companies Act, 1908, now represented by s. 153 of the Act of 1929. The arrangement would provide for each company going into voluntary liquidation and for the sale of the whole undertaking and assets of each company by its liquidator to a third company to be formed for the purpose of acquiring them. It would also provide that the purchasing company should undertake and indemnify the liquidators against the liabilities of the two amalgamating companies. The arrangements having been sanctioned by the Court, and each company having gone into voluntary liquidation, the undertaking and assets of each company would be assigned to the new company by appropriate methods. Where any particular asset could only be transferred with the consent of some third party, it would be the duty of the liquidator of the transferring company to obtain that consent. Such an asset might consist of leasehold premises held subject to a covenant against assignment without the lessor's consent. I have never heard of a lessor's consent being refused in such a case, and it seems most unlikely that such a thing would occur in practice. But if it did, then, unless the covenant extended to parting with the possession of the demised premises, the difficulty might be got over by the transferor company executing a declaration of trust in favour of the new company, a step that would, upon the final dissolution of the transferor company, involve the appointment of a new trustee and a vesting order being made by the Court under the provisions of ss. 41 and 44 of the Trustee Act, 1925. Any difficulty encountered in dealing with shares in another company which were subject to restrictions on transfer could be overcome in like manner, the vesting order in the new trustee being effected under s. 51 of the last mentioned Act.

Another asset of the transferor company might be a trading contract for the purchase of the raw materials of its business. Unless it appears from the express terms of the contract or by

necessary implication that it is to enure for the benefit of the assigns of the contracting parties, such a contract is not assignable at law: see *Tolhurst* v. *Associated Portland Cement Manufacturers*. (1) If, therefore, the new company were desirous of obtaining the benefit of the contract the liquidator of the transferor company would do his best to obtain a novation of the contract by arrangement between himself as representing the transferor company, the other party to the contract in question, and the new company. Failing this the other party to the contract would be entitled to treat the sale of the transferor company's undertaking as a repudiation of the contract by that company, and prove in the liquidation for such damages as he might have suffered by reason of the repudiation. The contract, however, might be one that was essential to the success of the undertaking. In such a case the parties to the scheme of amalgamation would, if there were any risk of failure to obtain a novation of the contract have adopted an alternative scheme of arrangement that is not an amalgamation in its strict sense but is one for all practical purposes. The new company would not purchase the undertakings of the two companies in question, but would purchase the shares in those companies in consideration of the allotment to the shareholders of fully paid shares in the new company. The two companies would not go into liquidation but would continue in existence as going concerns, each carrying on business in its own name; but the management of its affairs and the control of its assets would be in the hands of the new company. Under such a scheme there would of course be no transfer to the new company of any assets of the two amalgamating companies, but for every practical purpose the result would be the same as if every asset of those companies had been transferred whether by deed, declaration of trust, novation of contract or otherwise. For the scheme of arrangement with which I am contrasting a sale of the shares in the companies, would have been dependent upon the sanction of the court being obtained, and such sanction would never be given to an amalgamation of a solvent company with one

(1) [1903] A. C. 414.

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which was commercially insolvent or concerning whose commercial solvency there was any reasonable doubt.

It remains to consider another class of contracts into which an amalgamating company may have entered, namely, contracts of service. So far as concerns its contracts with the more highly placed officials there will not in practice be found any difficulty. Whether the amalgamation being negotiated is one to be effected by a transfer to the new company of the undertaking and assets of the amalgamating companies or the purchase by the new company of the shares in those companies, one of the first things to be settled is who are to be the directors, managing directors, solicitors, auditors and so forth of the new company, or who are the persons who are to continue to occupy those positions in the amalgamating companies as the case may be. Compensation for those who are displaced, sometimes on what may appear to be a generous scale, will be provided by the scheme of arrangement. All of this is an essential commonplace of such schemes. But the contracts of service of those in a more humble situation, as for example, those serving behind the counter in a shop or those working underground in a colliery and whose services can be usually terminated by a comparatively short notice, will be left to the liquidator to deal with in the case of amalgamation proper, and will not need to be dealt with at all where the new company merely purchases the shares in the amalgamating companies. The making of an order for winding up by the Court operates no doubt as a notice of dismissal of a company's employees. But this is not the result, or at any rate is not necessarily the result, of the passing of a resolution for voluntary winding up: see *Midland Counties District Bank, Ld.* v. *Attwood* (1), and *Reigate* v. *Union Manufacturing Co.* (2) It would certainly not be the result of a voluntary liquidation of a company entered upon merely for the purpose of carrying through an amalgamation with another company by means of a sale of the company's undertaking and assets. In such a case the liquidator would carry on the business as before, making use of the employees' services and paying their wages, until the

(1) [1905] 1 Ch. 357. (2) [1918] 1 K. B. 592.

time came for a transfer of the undertaking to the new company. The transfer would unquestionably operate as a notice of dismissal of the employees and the liquidator before making it should in strictness take timely steps to determine the existing contracts of service and give the employees the opportunity of entering into fresh contracts with the new company. In practice, I suspect, he does no such thing, relying on the willingness of the employees to serve the new company in spite of the fact that it might be governed by an entirely different lot of directors and managers and might be carrying on business under an entirely different name from those of the company whom he had contracted to serve. But such changes as these might well occur in the case of his original employers. Directors and managers may come and go. The whole policy and methods of trading of his employers may be changed in the space of a very short time by a new body of shareholders obtaining control of the company. Its very name may be changed: see s. 19 of the Act of 1929. Such changes as these must be expected by those who serve limited companies. The liquidator might well think, therefore, that an employee would not pay any regard to the fact that after the transfer he was serving a different legal entity, even assuming that the fact was one that he was capable of appreciating. The employee would serve and be paid by the new company in the same way as he had served and been paid by the old one. In such circumstances a novation of his contract of employment would be readily implied.

With the general creditors of the company the liquidator could take no risks. Except in so far as they might have become bound by the scheme of arrangement to accept other provisions they would be entitled to be paid by the liquidator, and, until they had been paid, the liquidator could not hand over the assets to the new company nor could the company be deemed to be dissolved under what is now s. 236 of the Act.

It will be manifest from the foregoing observations that many months might elapse after the Court had sanctioned an arrangement which provided for the amalgamation of two companies before the amalgamation would be "fully and effectively

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"carried out." It was in these circumstances that the amendment of the law embodied in s. 154 of the Act of 1929 was made.

Turning now to the section, the first thing to be noticed is that the Court may by order provide for the dissolution of the transferor company without winding up, and that this order may be made at the same time as the order sanctioning the compromise. In the present case the order providing for the dissolution of the Hickleton Main Colliery Company, Ld., was not in fact made until nearly two and a half months after the order sanctioning the arrangement. This, however, is immaterial. The important thing is that the Legislature contemplated that the two orders might be made at the same time. Now it is plain that until the arrangement is sanctioned by the Court, there can be no transfer to the transferee company of the undertaking or property of the transferor company. It is equally plain that if the dissolution of the transferor company takes place the moment that the arrangement is sanctioned, there can be no transfer thereafter of such undertaking or property whether by way of deed of assignment or declaration of trust or novation of contract or otherwise. The transferor company will have ceased to exist. The Court, has, no doubt, power under s. 294 of the Act to declare the dissolution of a company "to have been void." But the section would seem to be applicable only to cases where the company has been in compulsory or voluntary liquidation and the dissolution has been effected under the provisions of ss. 221, 236 or 245. Under those sections it is a condition precedent of dissolution that the affairs of the company have been completely or fully wound up; and where, owing to some liability or some asset of the company having been overlooked the condition precedent has not been fulfilled the Court can properly declare the dissolution "to have been void." But where the Court has under s. 154 brought about the dissolution of the company without a winding up I can see no grounds upon which the Court could possibly thereafter declare such dissolution "to have been void." It is moreover to be observed that the order under s. 294 is to be made upon an

application by "the liquidator of the company or by any other "person who appears to the Court to be interested"; words that seem quite inapplicable to the case of a dissolution without a winding up. In these circumstances I should expect to find in the section some provision for vesting in the transferee company the whole of the undertaking and assets of the transferor company, lock, stock and barrel, and I shall not have expected in vain. For under sub-s. 1 (*a*) the Court is given power to make provision for the transfer to the transferee company of the undertaking property and liabilities of the transferor company and by sub-s. 2 the effect of making such provision is that the property thereupon becomes transferred to and vested in and the liabilities are transferred to and become the liabilities of the transferee company.

Now it is to be noticed that by virtue of sub-s. 4 the expression "property" includes property, rights and powers of every description. It includes therefore the rights of the transferor company under trading or service contracts, for the transferor company undoubtedly possesses rights under such contracts as well as liabilities, and such rights and liabilities become by virtue of the order transferred to and vested in the transferee company. Property passing by the order will also include assets that were only transferable by the transferor company with the assent of a third party, for such assets are property notwithstanding any restrictions upon their assignability. I cannot for myself think of any item of a company's undertaking and assets that would not be covered by the expression "property, rights and powers of every "description." If there were any, the Court could vest them in the transferee company under the power conferred upon it by sub-s. 1 (*f*) of making provision for such incidental consequential and supplemental matters as are necessary to secure "that the reconstruction or amalgamation shall be "fully and effectively carried out." These words are of great importance. Of equal importance is the very remarkable provision contained in sub-s. 1 (*c*). The Court apparently under that provision can by the order that puts an end to the transferor company enable the transferee company to continue

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any legal proceedings that have been instituted by or against the transferor company

My Lords, the more closely I examine the section the more I am convinced that the object of the Legislature was to enable the Court by an order to make a complete substitution of the transferee company for the transferor company as regards the whole of the rights and liabilities of the latter without exception, and thus to secure, without delay and without the tedious formalities attendant upon a voluntary liquidation of transferor companies, that full and effective carrying out of the amalgamation that previously occupied so much time and involved the execution of so many documents and the making by the liquidators of so many arrangements with creditors, employees and others. Such, in my opinion, was the effect of the order made on June 4, 1937, by Mr. Registrar Stiebel in the present case. It follows that in my judgment the respondents were, as from that date, substituted for the Hickleton Main Colliery Company, Ld., in the contract of service made between the appellant and that company, as was held both by the Divisional Court and the Court of Appeal, and that the judgment of the Court of summary jurisdiction of November 19, 1937, was rightly made.

My Lords, I am by no means unconscious of the fact that the construction that I have placed upon s. 154 means that third parties who are in no way bound by the arrangement made by a company with its shareholders or creditors can be deprived by the Court of their rights without their consent. A landlord who has stipulated with his lessee that the demised premises shall not be assigned without his consent may find that the lease has become vested in a different lessee without his consent having been asked or obtained. A person who has contracted to supply goods or materials to one company, may find that without his consent he has become bound to supply the goods or materials to a different company. A servant may suddenly find himself obliged to render his services to a new master without his wishes having been consulted. It is said that in these and similar cases an injustice will be done by the section if it be construed as I have construed it. I must, of

course, concede that, if there are two possible constructions of a statute of which the one will cause what seems to be an injustice and the other will not, the latter is to be preferred. "But," as was said by Lord Herschell in *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (1) "a sense of the "possible injustice of legislation ought not to induce your "Lordships to do violence to well-settled rules of construction, "though it may properly lead to the selection of one rather "than the other of two possible interpretations of the "enactment." With all respect to those who think differently I cannot, consistently with well settled rules of construction, so read the section as to avoid causing the alleged injustices to which I have referred. Take the case of the landlord. The lease is without question part of the property of the transferor company. How is it possible consistently with well settled rules of construction to exclude that property from the operation of the section? Property, moreover, for the purposes of the section includes rights of *every* description. Under its trading contracts and its service contracts the transferor company, as I have already said, undoubtedly possesses rights. What rule of construction will permit such rights to be excluded?

It is contended that an answer to these questions favourable to the appellant is to be found in sub-s. 1 (*a*), under which the Court may by the order make provisions for the transfer to the transferee company of the property and liabilities of the transferor company. The use of the word "transfer," so runs the argument, shows that the only property that can be affected by the order is property that the transferor company can by itself transfer. But there seem to me to be several objections to this argument. In the first place the transfer for which provision may be made is not a transfer by the transferor company at all. It is not, indeed, a transfer that is to be made by anybody. The making of the provision for a transfer is merely the machinery for bringing into operation the vesting of the property in the transferee company under sub-s. 2. In the next place, the provision for transfer extends

(1) [1894] A. C. 508, 516.

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not only to property but to liabilities; and the transferor company could not by itself transfer its liabilities to the transferee company so that, to use the words of sub-s. 2, they become the liabilities of the transferee company. The word transfer cannot have one meaning when applied to liabilities and a more restricted meaning when applied to property. Finally the section contemplates that the order that provides for the transfer may also provide for the contemporaneous dissolution of the transferor company, in which case any property of that company of which the transfer is not provided for by the order can never be transferred to and vested in the transferee company at all. The words of the section seem to me to be quite unambiguous, and I am not prepared to depart from what appears to me to be the plain meaning of the section by reason of the possible injustices that it may cause.

Nor can I see any good reason for supposing that the injustices to which I have referred, if they can properly be so called, were not within the contemplation of the Legislature. No one can doubt that by an order under s. 154 the Court can vest the liability of the transferor company for a simple contract debt in the transferee company by the same order that causes the extinction of the former company. The result is that a man who has given credit to a company that he knows suddenly finds that he has to rely upon the credit of a company of which he knows nothing and without any remedy against his former debtor. The injustice, such as it is, inflicted upon him differs in no material respect that I can see from that inflicted upon the landlord, the contractor, and the servants of the company. If the injustice in the former case was within the contemplation of the Legislature, as it must, in my opinion, be assumed to have been, I can see no reason for thinking that the injustice in the latter cases was not equally within its contemplation.

But in truth it is an exaggeration to use the word injustice in such a connection as the present. If all or the large majority of the shares in one company are acquired by another, the first company will almost certainly come under the control

of new directors and managers carrying out a policy that may differ widely from that of their predecessors. Yet no one could possibly say without gross exaggeration that the landlord, the contractors, or the servants of the first company had suffered an injustice. Their position nevertheless would differ little for any practical purpose from the position they would be in had the first company become amalgamated with the second company by means of an exercise of the powers conferred on the Court by s. 154 of the Act, construing those powers as I think they should be construed.

My Lords, for these reasons I would dismiss this appeal.

LORD PORTER (read by LORD THANKERTON). My Lords, The facts in this case have been fully stated by my noble and learned friend Lord Atkin and it is unnecessary for me to repeat them. It is clear from that statement that the solution of the question at issue depends upon the true construction of ss. 153 and 154 of the Companies Act, 1929, and primarily of the latter of those two sections. The vital words are :—

"154.—(1.) . . . . 'the court may, either by the order "sanctioning the compromise or arrangement or by any "subsequent order, make provision for all or any of the "following matters :—(*a*) the transfer to the transferee "company of the whole or any part of the undertaking and "of the property or liabilities of any transferor company, "(*c*) the continuation by or against the transferee company "of any legal proceedings pending by or against any transferor "company; (*d*) the dissolution, without winding up, of "any transferor company; (*f*) such incidental, consequential "and supplemental matters as are necessary to secure that the "reconstruction or amalgamation shall be fully and effectively "carried out.

"(2.) Where an order under this section provides for the "transfer of property or liabilities, that property shall, by "virtue of the order, be transferred to and vest in, and those "liabilities shall, by virtue of the order be transferred to and "become the liabilities of the transferee company, and in the "case of any property, if the order so directs, freed from any

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"charge which is by virtue of the compromise or arrangement "to cease to have effect.

"(4.) In this section the expression 'property' includes "property rights and powers of every description, and the "expression 'liabilities' includes duties."

It will be seen from the wording quoted that the matter to be determined is what is included under the word "property" in sub-s. 1 (*a*) as defined in sub-s. 4. The sections give a new power to the Court to reconstruct or amalgamate companies, a power which was first given by the Companies Act of 1928. That Act, however, was passed by way of preparation for the inclusion of its provisions in the Consolidating Act of 1929 and never came into force. The provisions now to be considered therefore may be regarded as coming into effect as a result of s. 154 in the Act of 1929. Before that date no such power of reconstruction or amalgamation existed. If an amalgamation had previously to be effected it could have been accomplished by winding up one or both of the original companies. Alternatively, a somewhat similar result could have been obtained by transferring the shares of both to a holding company. The actual amalgamation of the two companies could not have been carried out directly by an order of the Court. Sect. 154 now gives power to a judge of the Chancery Division to take a short cut and avoid the delay and expense of following the course previously imperative.

The question at issue is, does it do more than this? Does it by an executive act transfer to the new body all the contractual rights of the original companies in spite of any safeguards against transfer whether express or implied contained in their contracts with third parties? Does it transfer contracts by their terms non-transferable and those, such as contracts of service, which at common law could not have been transferred without the consent of both parties? Undoubtedly to effect such a result would be to make a momentous change in the law as it previously stood, a change which from one point of view affects companies only, but from the other, affects many individuals who have entered into contracts with them. The

same considerations might perhaps be raised by asking the question, is s. 154 procedural only, enabling what previously could have been accomplished by one method to be carried out by another, or does it change the rights of third parties vis-a-vis the company?

I do not find myself assisted at this stage by a consideration of the probability or improbability that the Act intended to produce the one result or the other. Primarily I think the question is one of construction. The argument on behalf of the respondents which was accepted in the Court of Appeal was that the transfer of "property" spoken of in sub-s. 1 (*a*) which is said by sub-s. 4 to include property rights and powers of every description must include every contract of the original companies and that words so wide must be held to substitute the amalgamated company for the original constituent companies so that the amalgamated company must be held to be as it were the same entity as each of the old companies and to succeed to all their contracts without requiring the consent of other interested parties to the change.

I will consider the meaning of the word "property" itself later on; for the moment I desire to consider the words with which it is associated. In the first place, I do not think its meaning is elucidated by the fact that it is found in collocation with the word "undertaking." "Undertaking" is, I think, inserted in order to make it plain that the business will be transferred as a going concern. Nor, in my view, does the definition in sub-s. 4 settle the question in favour of the respondents. "Property rights and powers of every description" is not to me a familiar phrase. I should have thought that the additional words added after "property" are merely inserted in order to make sure that all the assets of which the original company could dispose were transferred to the amalgamation. Indeed without them I think it might have been contended that the right, which the original company possessed to call up uncalled capital was not transferred, or, at any rate, there might be some doubt in the matter: see *Bank of South Australia* v. *Abrahams* (1)

(1) (1875) L. R. 6 P. C. 265.

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and *Howard* v. *Patent Ivory Manufacturing Co.* (1) An examination of the decisions in those two cases at least suggests the desirability of adding the words "rights" or "powers" or both in defining the property to be transferred. Nor do I find myself assisted by a consideration of the word "liabilities," or the definition which includes duties within it. A company to which the undertaking of another company is transferred at the instance of the latter and by its own consent, must necessarily, if justice is to be done, undertake the liabilities towards third parties under any contracts entered into by the original company. If it did not both the original and the amalgamated company would escape all liabilities to servants and contractors: the original company upon its dissolution as contemplated by s. 154, sub-s. 1 (*d*), of the Act, and the amalgamated company because no liabilities would have been transferred to it.

The shareholders and creditors of the companies to be amalgamated are the initiators of the steps taken and need not enter into the compromise or agreement unless they wish. They alone are entitled to be represented when the arrangements for the amalgamation are being made, and before the Court when application is made to it under s. 154. Moreover, under s. 155 provision is made as to dissenting shareholders. On the other hand contractors, unless creditors, and employees have no say in the matter and are not entitled to be represented at any time.

In these circumstances I do not see why the amalgamated companies as a recompense for undertaking the liabilities of the original company should obtain under s. 154, sub-s. 1 (*a*), the benefit of the contracts which by their nature are not transferable. Nor do I think any such result follows, though s. 154, sub-s. 1 (*c*), provides that liabilities or alleged liabilities which have resulted in the taking of proceedings against the original company are to be treated in the same way as liabilities which have not so resulted, and provides that they are to be transferred to the amalgamated company. In the former case the Court which is asked to

(1) (1883) 38 Ch. D. 156.

sanction the arrangement can assure itself that the assets of the amalgamated company are sufficient to answer liabilities already incurred: to discover whether that company can meet its future liabilities is a different and more difficult matter. In the latter it merely makes a similar provision where the liability has already given rise to the issue of a writ.

Sect. 154, sub-s. 1 (*c*), also enacts that the Court may order legal proceedings by the original company to be transferred to the amalgamated company. Such claims seem to me to have nothing in common with contractual obligations where no cause of action has arisen. There is no question of transferring a contract against the will of the defendant. All that is provided for is that an accrued right should be enforceable after substituting one plaintiff for another in an action which in the case of a winding up a liquidator would have been entitled to continue under the Act of 1908 and, where no amalgamation had taken place, would have been entitled to continue to-day.

Having regard to these considerations I find myself thrown back upon a consideration of the meaning to be placed on the word "property" in sub-s. 1 (*a*). Prima facie I should not expect it to include non-transferable contracts. In truth the word "property" is not a term of art but takes its meaning from its context and from its collocation in the document or Act of Parliament in which it is found and from the mischief with which that Act or document is intended to deal. The word is used in many Acts of Parliament but I propose to confine myself to the Companies Acts themselves. The Companies (Consolidation) Act, 1908, s. 122 and following sections, and the Companies Act, 1929, s. 156 and following sections, deal with winding-up. Sect. 151, sub-s. 2, of the former Act enacts that,—

"(2.) The liquidator in a winding up by the Court shall "have power, but (subject to the provisions of this section) "in the case of a winding up in Scotland or Ireland only with "the sanction of the court,—(*a*) to sell the real and personal "property, and things in action of the company by public "auction or private contract, with power to transfer the

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"whole thereof to any person or company, or to sell the same "in parcels: . . . . (*g*) to do all such other things as may "be necessary for winding up the affairs of the company and "distributing its assets."

Sect. 189 of the latter Act contains similar provisions. In neither case has it ever, so far as I know, been suggested that "property" included anything other than property of which the company then in course of being wound up could dispose. Certainly the word "property" in those sections does not include personal contracts. Indeed winding up by the Court constitutes a dismissal of the company's employees for which they are entitled to compensation as for wrongful dismissal.

No doubt it would simplify the administration of the sections now under consideration if the amalgamated company were held to be substituted for the original company and to succeed to all its liabilities and contracts whether transferable or not. But ease of administration is not everything, and, if so great an alteration in the law as it previously existed is to be made, a clear expression of its intention must be given by the Legislature. I find no such clarity in s. 154. Indeed one can point to a number of difficulties which would arise if the construction put forward by the respondents were to be adopted. One example may suffice. A company may have contracted to take all its requirements from a third party or may have appointed a general manager or managing director for all its undertakings: how could the quantum of those requirements be ascertained or the area of the undertaking which had to be supervised be known after the amalgamation was effected? No doubt the amalgamated company would be liable in damages if they failed to take the necessary material or employ the manager, but that is merely to adopt the construction suggested by the appellant and not to solve the difficulty posed by the respondents' construction of the Acts.

Apart from these considerations I do not myself feel that in this particular case any great hardship would be imposed upon the appellant if the respondents' construction were accepted. Workmen are entitled to, and must receive, the

same consideration as any other employees of the company, but their contracts are for a short term and no serious disadvantage is likely to be caused by their being transferred without their consent to a new company for a period of a week or a fortnight. I can imagine the Legislature entrusting to a judge of the Chancery Division the task of seeing that their interests were properly protected. But the argument cuts both ways; just as no great hardship would be caused, so no great difficulty would arise if the original company were compelled to give a week or a fortnight's notice to their employees with an intimation that the amalgamated company would be prepared to accept their services as soon as it was formed.

On the other hand the appellant's interpretation of the section would safeguard alike the interests of the workman and of those with long-term contracts and of any other persons who either by express words or implied terms were under no obligation to accept a substituted party to their contracts in the place of the party with whom they had originally come to terms. I am prepared to accept the view that to place in the hands of the Court the right to make a change of the kind suggested would be of some advantage in preventing those who had contracted with the original company from endeavouring to obtain some undue advantage as a condition of their consenting to supply or serve the amalgamated company. There are, it is true, advantages and disadvantages in either construction; but the change contended for is a grave one and in my opinion the wording of the section is far from being sufficiently precise to have the suggested effect.

I may sum up my view by saying that the word "property" in s. 154, whether considered alone or in conjunction with the words "rights and powers of every description" means property with which the original company has the right to deal without having to obtain the consent of some third party, and I cannot think that the addition of s. 154, sub-s. 1 (*f*), empowering the Court to make provision for incidental consequential and supplementary matters is sufficient

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to widen the content of the section so as to include non-transferable contracts. I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Hosking & Berkeley, for J. W. Fenoughty, Dunn & Co., Rotherham.*

Solicitors for respondents: *Bird & Bird, for Gichard & Co., Rotherham.*

RE AHMED (A DEBTOR); (1) AHMED (2) AHMED (3) AHMED (4) HUSSAIN v (1) INGRAM (2) HALL [2018] EWCA Civ 519

Court of Appeal

Gloster, Patten and David Richards LJJ

19 March 2018

Bankruptcy – Void disposition of shares after petition but prior to bankruptcy order – Breach of duty to return shares by transferees – Duty to restore value – Loss to estate – Date of valuation – Method of valuation – Insolvency Act, s 284

M presented a bankruptcy petition against A in January 2007. In March 2007 a proposal for an individual voluntary arrangement ('IVA') by A was approved by A's creditors by what was subsequently determined to have been 'vote rigging' by the first appellant and other members of A's family. By letter the first appellant had agreed to contribute money to the IVA in return for the transfer to him of shares owned by A. The shares were transferred to the first appellant on 6 June 2007 ('the transfer date'). Sometime in 2008 or 2009, he then transferred certain of these shares to the second, third and fourth appellants ('the sisters') who subsequently re-transferred them to the first appellant no later than 30 June 2010. M successfully challenged the validity of the IVA which was revoked on 15 December 2008. A was made bankrupt on 21 April 2009. The respondents were appointed as trustees in bankruptcy in succession to the original trustee in bankruptcy who resigned on 14 April 2010. The respondents applied on 28 May 2013 pursuant to s 284 of the Insolvency Act 1986 ('the Act') for an order that the transfers of shares were void, as they took place after the presentation of the relevant bankruptcy petition and before the bankruptcy order. Although that application was originally opposed, such relief was admitted at trial and the shares were delivered up to the respondents on 27 February 2015, shortly before trial. The remaining issue related to the respondents' monetary claims, by which they sought to restore the bankruptcy estate with the fair value of the shares at the transfer date which they alleged was the relevant date for valuation purposes. The trial court held that the appropriate basis for valuation was a fair value (as opposed to a market value) at the transfer date. Each of the appellants was jointly liable to pay the value of the shares at that date less the fair value of the shares at the date of their return to the respondents. The appellants appealed. The following issues arose for determination: (i) whether s 284 of the Act provided a free-standing right to recover the value of the shares as awarded by the judge, namely the value of the shares as at the transfer date, less their value as at the date of their redelivery to the trustees; (ii) if there was no such free-standing remedy, whether the respondents were automatically entitled to be compensated in respect of the difference in value between the value of the shares as at the transfer date, less their value as at the date of their redelivery to the respondents, or whether they were only entitled to be compensated for any diminution in the value of the shares which they could prove that the estate had actually suffered as a result of breach of trust on the part of the appellants; (iii) if issue (ii) was decided on the basis ('the loss basis') that the respondents were obliged to prove the loss which the estate had actually suffered whether they had adequately pleaded and proved breach of trust; (iv) if issue (ii) was decided on the loss basis, what was the date from which such loss should be calculated; (v) if liability was established, whether the judge was correct that the shares should be valued at fair, as opposed to market, value; and (vi) whether the judge was correct to find the sisters jointly liable with the first appellant.

Held – allowing the appeal in part –

(1) Section 284 of the Act did not provide a free-standing right to recover compensation but only operated to avoid relevant dispositions. The section was silent as to remedy and the appropriate remedy was governed by general law. *Hollicourt (Contracts) Ltd v Bank of Ireland* [2000] EWCA Civ 263 followed.

(2) The right to recover was restitutionary. The respondents had a right to the return of the shares and were entitled to claim equitable compensation in respect of any loss suffered as a result of the wrongful retention. That liability was fault based. The appellants had to make good the loss in fact suffered and caused by the breach of trust. *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58 and *Target Holdings v Redferns* followed.

(3) The relevant evidence addressed the various contentions of the parties as to the various possible dates for valuation. The judge's conclusion that the appellants were fixed with liability at the date of the transfer without requiring the respondents to show actual loss was wrong in law.

(4) At the transfer date, the first appellant held the legal title to the shares: (i) contingently for the bankrupt in the event a bankruptcy order was made; and (ii) subject thereto, for himself as absolute owner of both the legal and beneficial title. As from the date of the bankruptcy order, the appellant and/or the sisters held the legal title on trust for the bankrupt and on appointment for the trustee in bankruptcy. *Re Gray's Inn Construction*, *Re Dennis (A Bankrupt)* and *Re Palmer (Deceased) (A Debtor)* considered.

(5) The duties of a constructive trustee depended on the context. On the facts, the first appellant had an immediate obligation to restore the shares to the estate as soon as the trustee in bankruptcy was appointed. He was in breach of trust when the shares were not restored following the appointment of the trustee in bankruptcy. *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58 and *Target Holdings v Redferns* applied.

(6) The loss to the estate did not flow from the transfer date of the shares to the first appellant but occurred from the date at which the trustee in bankruptcy would have actually sold the shares. The most appropriate valuation date was 30 June 2010 (within 3 to 6 months of the appointment of the respondents).

(7) The judge was entitled to conclude that the shares should be valued on the basis of a transaction between identified knowledgeable and willing parties, the fair value, as opposed to a market value.

(8) Following the appointment of the trustee in bankruptcy, the sisters were in breach of trust whether or not they had received the shares as nominees or for themselves. They had an obligation to hand back the shares to the trustee and were in breach of trust by failing to do so. They were jointly liable with the first defendant to the extent of their respective shareholdings but again only in respect of the diminution in value between 30 June 2010 and the date of the shares' return.

Statutory provisions considered

Bankruptcy Act 1869
Bankruptcy Act 1883
Bankruptcy Act 1914, ss 37, 38, 45
Companies Act 1948, s 227
Insolvency Act 1986, ss 262, 278, 283, 284(1), (3)–(5), 305, 306, Ch IV, Part IX

Cases referred to in judgment

AIB Group (UK) plc v Mark Redler and Co Solicitors [2014] UKSC 58, [2014] 3 WLR 1367
Ashwell, Re, ex parte Salaman [1912] 1 KB 390
Bartlett v Barclays Bank Trust Co Ltd (No 1) [1980] Ch 515, [1980] 2 WLR 430, [1980] 1 All ER 139, ChD
Brandeis Goldschmidt and Co Limited v Western Transport Limited [1981] QB 864

Caffrey v Darby (1801) 6 Ves 488
Clough v Bond (1838) 3 M & C 490
Cooper v Chitty (1756) 1 Burr 20, 97 ER 166
Dennis (a bankrupt), Re [1996] Ch 80, [1995] 3 All ER 171
Doe d Lloyd v Powell (1826) 5 B & C 308, 108 ER 115
Chapman, Re, ex parte Edwards (1884) 13 QBD 747, CA
Fox v Hanbury (1776) 2 Cowp 445, 98 ER 1179
Fraser v Kershaw 2 K & J 496
French's Wine Bar Limited, Re [1987] 3 BCC 173
Gunsbourg, Re [1920] 2 KB 426
Gray's Inn Construction Co Ltd, Re [1980] 1 WLR 711, [1980] 1 All ER 814, CA
Hollicourt (Contracts) Ltd v Bank of Ireland [2000] EWCA Civ 263, [2001] Ch 555
Hirth (Carl), Re, ex parte the Trustee [1899] 1 QB 612, CA
Kuwait Airways Corporation v Iraqi Airways (Nos 4 and 5) [2002] AC 883
Livingston v Rawyards Coal Co (1880) 5 App Cas 25
Leslie Engineers Co Ltd, Re [1976] 1 WLR 292, [1976] 2 All ER 85, ChD
McGuinness Bros (UK) Ltd, Re [1987] 3 BCC 571
Miller's Deed Trusts, Re (1978) 75 LSG 454
Montefiore v Guedalla [1901] 1 Ch 435
Morgan v Marquis (1853) 9 Exch 145, 156 ER 62
Nestle v National Westminster Bank plc [1993] 1 WLR 1260
Nocton v Lord Ashburton [1914] AC 932, HL
Palmer, Re (deceased) (a Debtor) [1994] Ch 316, [1994] 3 WLR 420, [1994] 3 All ER 835, CA
Pettit v Novakovic [2007] BPIR 1643, [2007] All ER (D) 310 (Jan)
Pollitt, Re; ex parte Minor [1893] 1 QB 455, CA
Rose v AIB Group (UK) plc [2003] EWHC 1737 (Ch), [2003] 1 WLR 2791, [2003] BPIR 1188, [2003] 2 BCLC 374, ChD
Smith v Stokes 1 East 363
Target Holdings v Redferns [1996] AC 421
Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd [1966] 2 NSWR 211

Giles Maynard-Connor for the appellants
Francis Collaço Moraes for the respondents

Cur adv vult

GLOSTER LJ:

Introduction

[1] This is an appeal by Mr Kashif Ahmed ('the first appellant'), Ms Bushra Ahmed, Ms Tesneem Ahmed and Ms Tabusam Hussain (collectively 'the appellants') against an order and corresponding judgment of Proudman J ('the judge') dated 29 June 2016.

[2] This action relates to an application issued on 28 May 2013 by the respondents, Mr David Ingram and Ms Michaela Hall ('the trustees in bankruptcy' or 'the respondents') as the joint trustees in bankruptcy of Eaitisham Ahmed ('the bankrupt'), pursuant to s 284 of the Insolvency Act 1986 in relation to transfers of minority shareholdings ('the shares') in three companies made by the bankrupt to the first appellant on 6 June 2007 ('the transfer date'), and later transfers by the first appellant of some of the shares to the second to fourth appellants (collectively 'the sisters').

[3] The transfers to the first appellant took place after presentation of the relevant bankruptcy petition and before the bankruptcy order was made against the bankrupt. The exact timing of the subsequent transfers to the sisters is unclear, although it was agreed that these would have taken place sometime during the period 2008 to 30 June 2009 when the public records showed that they had been transferred. Amongst other things, the trustees in bankruptcy claimed a declaration that the transfers of the shares ('the share transfers') were void. Although that was originally opposed, at trial such relief was admitted and the remaining issue in dispute related to the trustees in bankruptcy's monetary claims, by which they sought to restore the bankruptcy estate with the fair value of the shares as at the transfer date which they alleged was the relevant date for valuation purposes. Although the appellants had issued a cross-application seeking a validation order in respect of the share transfers, they had in fact delivered the shares up to the trustees on 27 February 2015, shortly before the trial began and accordingly had withdrawn their cross-application,

[4] The trial took place before Proudman J on 9 – 13 March 2015, 14 January 2016 and 18 March 2016. A proposed preliminary issue was dealt with on 9 March 2015 to 11 March 2015 but not determined. The evidence, factual from one of the trustees in bankruptcy ('Mr Ingram') and from the first appellant, and expert evidence from the parties' respective valuers, was then heard on 12 and 13 March 2015 and 14 January 2016. Closing submissions were made orally on 18 March 2016.

[5] Proudman J handed down her judgment on 29 June 2016 and, by her order of the same date, upheld the trustees' application. She held that the appropriate basis of valuation was a fair value (as opposed to a market value) and declared that the fair value of the shares as at the transfer date[1] was £2,216,000. She ordered that each of the appellants were jointly liable to pay the value of the shares as at that date (to the extent that they had held relevant shares), less the fair value of the shares as at their date of return to the trustees on 27 February 2015. Directions were then given for the determination of the value of the shares as at 27 February 2015. The appellants were also ordered to pay interest on the principal sums payable by them as from 25 February 2010 and to pay the trustees in bankruptcy's costs of the application and the withdrawn cross-application on an indemnity basis after 27 August 2013.

[6] Notwithstanding her judgment, Proudman J gave permission to appeal and, with the agreement of the trustees in bankruptcy, extended the time for filing the appellant's notice to 4 pm on 3 August 2016. Further, the judge stayed payment of the sums ascertained to be due upon valuation of the shares as at 27 February 2015, until determination of the appeal or further order.

[7] Mr Giles Maynard-Connor appeared on behalf of the appellants and Mr Francis Collaço Moraes appeared on behalf of the respondents on the appeal. Both appeared below, although Mr Maynard-Connor only appeared at a later stage of the trial.

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1 In fact the judge assumed that the transfer date was 5 June 2007, which was the date on which the bankrupt had agreed to transfer the shares to the first appellant under the terms of the guarantee referred to in para 18 below. The actual transfer took place, as I have said, on 6 June 2007. There is no difference for valuation purposes between the two dates although I have defined the transfer date as 6 June 2007.

Factual background

[8] A detailed narrative of events is set out in the judgment of Proudman J. It is not necessary to repeat that full account in this judgment. I merely summarise the key events relevant for the purposes of the appeal. I shall make more detailed reference to the judge's findings when I consider the various issues which arise on the appeal.

[9] The bankrupt and the appellants are siblings. The subject companies, Continental Shelf 128 Ltd ('Continental'), Hornby Street Ltd ('Hornby') and Wembley Menswear Company Ltd ('Wembley') (collectively 'the companies'), are private family owned companies, trading in Manchester and London in the design, sourcing and distribution of branded and non-branded fashion clothing. The first appellant has been a director of Continental since 2 June 1997 and a director of Wembley and managing director of Hornby since 27 October 1999.

[10] On 14 July 2006 Monecor (London) Limited (trading as 'Tradeindex') ('Monecor') served a statutory demand in the sum of £4,443,457.73 on the bankrupt. An application to set aside the statutory demand failed.

[11] In mid-September 2006 several members of the family of EA (including the first appellant and the sisters) retained Mr Andrew Andronikou of UHY Hacker Young to advise in respect of the insolvency of the bankrupt.

[12] Monecor presented a bankruptcy petition against the bankrupt on 23 January 2007 ('the petition').

[13] An initial proposal for an IVA for the bankrupt was prepared by Mr Andronikou as nominee on 13 February 2007 and was accompanied by the 1 Nominee's report. An amended IVA Proposal was prepared on 8 March 2007 which was accompanied by a second nominee's report of the same date.

[14] By letter dated 28 March 2007 the first appellant agreed to contribute £1.45million to the IVA in return for the transfer to him of the bankrupt's 24% shareholding in Hornby.

[15] On 29 March 2007 the IVA proposal was approved and Mr Andronikou and a Mr Andrew Hosking were appointed as joint supervisors as a result of what was subsequently determined to have been 'vote-rigging' by the first appellant and other family members of the bankrupt.

[16] On 22 May 2007, the first appellant paid £200,000 to the IVA in accordance with his letter.

[17] On 26 April 2007, Monecor challenged the IVA under s 262 of the Insolvency Act 1986 ('the IVA challenge'). The IVA challenge was ultimately successful.

[18] On 5 June 2007:

(i) the first appellant entered into a written guarantee in respect of certain payments that the bankrupt agreed were going to be made in the IVA ('the guarantee'); the guarantee acknowledged that the bankrupt had an interest in each of the companies;

(ii) under the terms of the guarantee the bankrupt agreed to transfer the relevant shares in the companies to the first appellant absolutely (as well as other assets) in consideration of the provision by the first appellant of the guarantee.

[19] On 6 June 2007 the bankrupt transferred 1,200 shares in each of the companies to the first appellant pursuant to the terms of the guarantee; this represented 24% of each company.

[20] At some date in 2008-2009, many months after the date of the original transfer on 6 June 2007, the first appellant transferred certain of the shares in the companies (excluding Continental) to the second to fourth appellants. They subsequently re-transferred the shares to the first appellant by no later than 30 June 2010.

[21] Following a trial before Deputy Judge Andrew Simmonds QC on 15 December 2008, the IVA was revoked. He held that members of the family of the bankrupt (excluding the second to fourth appellants) and his associates had wrongly claimed they were owed debts of £6,980,876. Those claimed debts were used to approve the IVA. The deputy judge held, however that the claims were false and amounted to vote-rigging as, in reality, the claimed debts only amounted to £3,260,425. The first appellant gave evidence at the IVA challenge trial which was rejected. For the purposes of voting at the IVA, he claimed a debt of £3,882,424 whereas the debt he was owed in fact amounted to only £1,851,500.

[22] A bankruptcy order was subsequently made against the bankrupt on 21 April 2009. On 22 July 2009 the bankrupt's assets vested in Mr Hosking on his appointment as trustee in bankruptcy. Mr Hosking subsequently resigned on 14 April 2010 and was replaced by Mr David Ingram, the first respondent, and Mr Nicholas Miller. Mr Miller was replaced by Mr Ian Defty on 1 May 2013. Mr Defty was later replaced by Ms Michaela Hall, the second respondent.

[23] The application by the trustees in bankruptcy was subsequently issued on 28 May 2013 and the appellants' cross-application for validation of the transfers was issued on 27 August 2013.

[24] On 14 January 2014 Mrs Registrar Derrett made an order that the parties should agree the number of the shares and the potentially relevant dates for valuation purposes, failing which she would determine them herself. In the event the parties agreed that the potentially relevant dates were 5 June 2007, 30 June 2009, 30 June 2010, 30 June 2011 and 30 June 2012.

[25] Shortly before the trial was due to begin, and following the instruction of new solicitors by the appellants (Pannone Corporate replacing Jeffrey Green Russell) and new counsel, Glen Davis QC, on 26 February 2015 the appellants confirmed that their cross-application was withdrawn. They further accepted that the share transfers were void and share transfer forms executed by the first appellant were delivered up on 27 February 2015. The first appellant also offered to purchase the shares for £120,000 on that date.

The issues on the appeal

[26] In my judgment, in light of the arguments presented by counsel, the following issues arise for determination on this appeal:

(i) *Section 284*: Does s 284 of the Insolvency Act 1986 provide a free-standing right to recover the value of the shares as awarded by the judge, namely the value of the shares as at the transfer date, less their value as at the date of their redelivery to the trustees? (This issue was raised by the respondents' notice.)

(ii) *Approach to determination of liability*: If issue (i) is decided in the negative, were the trustees in bankruptcy *automatically* entitled to be compensated in respect of the difference in value between the value of the shares as at the transfer date, less their value as at the date of their redelivery to the trustees, or were the latter only entitled to be compensated for any diminution in the value of the shares which the trustees in bankruptcy could *prove* that the estate had *actually suffered as a result of breach of trust* on the part of the appellants?

(iii) *Pleading and evidence point*: If issue (ii) is decided on the basis ('the loss basis') that the trustees in bankruptcy were obliged to prove the loss which the estate had actually suffered as a result of a breach of trust on the part of the appellants, had the trustees in bankruptcy adequately pleaded and proved such breach of trust? Had they failed to do so, and, if so, should their claim be dismissed?

(iv) *Date of calculation of loss*: If issue ii) is decided on the loss basis, as at what date should the loss be calculated?

(v) *Method of valuation*: If liability was established, was the judge correct that the shares should be valued at fair, as opposed to market, value?

(vi) *Liability of sisters*: Was the judge correct to find the sisters jointly liable with the first appellant?

The appellants' submissions before this court

[27] The arguments advanced in the written and oral submissions by Mr Maynard-Connor on behalf of the appellants may be summarised as follows.

(i) *Section 284*: s 284 was silent as to the remedy available to a bankruptcy estate when a disposition had been avoided. The appropriate remedy was governed by the general law: *Re J Leslie Engineers Co Ltd* [1976] 1 WLR 292 at 298B-D, *Hollicourt (Contracts) Ltd v Bank of Ireland* [2000] EWCA Civ 263 at [22] and *Rose v AIB Group (UK) plc* [2003] EWHC 1737 (Ch) at [30].

(ii) *Approach to determination of liability*: The trustees were only entitled to be compensated for any diminution in the value of the shares which the trustees in bankruptcy could prove that the estate had actually suffered as a result of a breach of trust on the part of the appellants. In particular:

(a) The authorities established that the remedy is a restitutionary one, the purpose of which is to replace a loss to the trust fund which the trustee has brought about: *AIB Group (UK) plc v Mark Redler and Co Solicitors* [2014] UKSC 58 at [65]. *AIB* and *Target Holdings v Redferns* [1996] AC 421 supported the proposition that, in order to be able to recover equitable compensation, actual loss had to be proved. The appellants accepted that this remedy was available even where there had been a return of the asset.

(b) Further, the judge had erred as a matter of law and or fact in finding that the respondents had established actual loss to the bankruptcy estate.

(c) The respondents' use of a value as at the transfer date of the shares (5/6 June 2007) represented a hypothetical value. It was some 22 months before the bankruptcy and 24 months before Mr Hosking as the trustee in bankruptcy was appointed. On any analysis, the shares would not have been realised on that date. In determining equitable compensation, the court cannot ignore the reality of what would have actually happened: see Lord Toulson at [64] – [67] and Lord Reed at [107] in *AIB* and Lord Browne-Wilkinson at 436 in *Target Holdings*.

(d) The effect of the judge's order was actually to grant an unfair and erroneous windfall to the bankruptcy estate which bore no correlation to reality and was contrary to both the trustees in bankruptcy's own case and evidence and the principles confirmed in *AIB* and *Target Holdings*.

(e) The judge was wrong to have found that the case did not involve the temporary deprivation of an asset and in distinguishing this case from the principle confirmed in *Brandeis Goldschmidt and Co Ltd v Western Transport Ltd* [1981] QB 864. Equity should follow the law on conversion cases.

(iii) *Pleading and evidence point*: The judge erred in finding that the trustees in bankruptcy were not obliged to plead and prove actual loss to the bankruptcy estate in terms of when the shares would have been sold by the trustees, to whom and at what price. The respondents' case was insufficient in a number of ways. They were required to show when the shares would have been sold by the trustees in bankruptcy, to whom and at what price. Their failure to do so meant that their action failed from the outset.

(iv) *Date of calculation of loss*: The respondents argued that liability for breach should be determined as at the transfer date and that liability to account flowed from that date.

(a) However, as at the transfer date, the shares had been transferred but the first appellant was not a trustee and could not have committed any breach of trust.

(b) Once the bankruptcy order was made, the effect of s 284 was retrospectively to create a restitutionary trust that had not previously existed prior to the date on which the order was made. There could be no breach as at this point.

(c) If the first appellant were to be liable, the breach could only have occurred as from the date the trustees in bankruptcy demanded the shares. However, there was no demand.

(d) The date at which the value of the shares had to be determined was necessarily the date at which the shares

would have been sold by the trustees. As such, if the first appellant was liable, the only correct valuation date was 30 June 2010, because that was the only date that fell within the window of possible dates on the trustees in bankruptcy's own case.

(v) *Method of valuation*: If the appellants were unsuccessful on issue (i), then nonetheless the judge erred as a matter of law in finding the shares were to be valued at a fair value, not at market value.

(vi) *Liability of sisters*: The finding that the second to fourth appellants were jointly liable was wrong as a matter of law and/or fact. There was insufficient evidence to support such a finding.

The respondents' submissions before this court

[28] The arguments developed by the respondents, in written submissions and by Mr Moraes in oral submissions, in relation to the above issues may be summarised as follows:

(i) *Section 284*: The judge ought to have concluded that the Insolvency Act 1986 provided a free-standing right pursuant to s 284 to recover compensation for loss arising out of the illegitimate transfer. That right required the restoration of the bankruptcy estate as at the date of the impugned disposition: see Harman J in *Re McGuinness Bros UK* (1987) 3 BCC at 571.

(ii) *Approach to determination of liability*: Contrary to the appellant's assertion, the judge *did* find that actual loss had been suffered. There could not have been any evidence of an actual sale as the appellants deliberately and wrongly detained the shares. Further, the judge was correct in holding that the bankruptcy estate suffered actual loss:

(a) The statutory matrix meant that the estate was the estate of the bankrupt at the date of commencement of the bankruptcy, via a bankruptcy petition, including avoided dispositions. The appellants had actual notice of the petition for bankruptcy making the share transfers void without a validation order. The trust was a real trust imposed by statute to preserve assets of the bankrupt's estate, which arose at the date of the disposition: *In Re Gray's Inn Construction* [1980] 1 WLR 711 at 716E.

(b) The shares were taken out of the estate on 5 June 2007. On that date, the first appellant became a bare trustee of the shares. Given the context, namely that he was aware of the bankruptcy petition at the time of the disposition, he had an immediate obligation to restore the estate. Failure to do so constituted a breach.

(c) The estate was depleted by its value on this date and this is

the date from which loss must be assessed: *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] AC 883.

d) The remedy was one of restoration of the position as at the date of the void disposition: see *In Re Gray's Inn*, *In Re Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, *Rose v AIB Group (UK) plc and another* [2003] EWHC 1737 and *Pettit v Novakovic* [2007] BPIR 1643.

(e) The trustees in bankruptcy were under an obligation to sell the shares. The judge was correct to conclude that, given the wrongful detention of the shares and their fall in value, specific restitution was not possible and a compensatory remedy was not limited to merely returning the asset: *Re French's Wine Bar Limited* (1987) 3 BCC 173 J at 178 (2 column).

(f) Relevant trust authorities on wrongful payments of money established that returning the original asset was often not enough and more can be recovered to compensate for loss which would not have been suffered, but for the breach. The only limitation was that a claimant could not recover more than what had in fact been lost: *Target Holdings* at 436C-E, 437H and 439B.

(g) As confirmed in *AIB*, if the value of the trust could not be restored in specie, then value would have to be put back in to put the beneficiary back in the position he would have been in but for the breach:

(h) The judge correctly distinguished the decision in *Brandeis Goldschmidt and Co Ltd v Western Transport Ltd* [1981] QB 864 and was right to find this case involved permanent deprivation of an asset.

(iii) *Pleading and evidence point*: The judge was correct to find that the trustees in bankruptcy did not have to plead the amount of the actual loss suffered.

(iv) *Date of calculation of loss*: The judge correctly concluded that the correct date for valuation was the transfer date – ie 5 June 2007. That was when the estate had been depleted and, accordingly, the first appellant, as trustee, came under an immediate obligation to restore the shares, which the trustee had taken for the trustee's own benefit. The misapplication of the trust fund was the wrongful disposition. However, if there were a requirement of a triggering event, the following were alternative dates as at which the loss should be calculated:

(a) the date of the bankruptcy order on 21 April 2009 which crystallised the position; the appellants came under an obligation to restore the estate at this point and their failure to do so constituted a breach;

(b) in the further alternative, the relevant date was the date on which the trustees in bankruptcy would have sold the

shares; the appellants came under an obligation to restore the estate as at this date and their failure to do so constituted a breach;

(c) in the further alternative, the relevant date was when the transferees had notice of the trustees in bankruptcy's claim; the appellants came under an obligation to restore the estate at this point and the failure to do so constituted a breach.

(v) *Method of valuation*: The judge correctly concluded the shares should be valued on the basis of a fair valuation in the circumstances of the case.

(vi) *Liability of sisters*: The judge correctly concluded the second to fourth appellants were jointly liable with the first appellant and there was sufficient evidence to support such a finding. In particular:

(a) The sisters were aware of the bankruptcy petition and the fact that the shares had been transferred to the first appellant; nonetheless, they accepted the shares subsequently transferred to them by the first appellant without question and, until shortly before the trial, positively sought to validate those wrongful transfers.

(b) They would only suffer unfairness if the first appellant were to fail to honour the indemnity which they were entitled to from him. In this connection it was relevant to note that not only have the second to fourth appellants still not indicated when they received the relevant shares (or for that matter when they claimed to have transferred them back to the first appellant), but they took no steps in the proceedings to assert the indemnity they have from the first appellant.

Discussion and determination

Issue (i) – A free-standing remedy under section 284?

[29] In the respondent's notice, the respondents submitted that the judge ought to have concluded that s 284 of the Insolvency Act 1986 provides a free-standing right to recover the compensation ordered by the judge. I disagree. In my judgment s 284[2] only operates to *avoid* relevant dispositions. The section is silent as to the remedy available to the bankruptcy estate when a disposition has been avoided, and the appropriate remedy is, accordingly,

2 Section 284 provides: '(1) Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is or was made with the consent of the court, or is was subsequently ratified by the court. … (3) This section applies to the period beginning with the day of the presentation of the petition for the bankruptcy order and ending with the vesting, under Chapter IV of this Part, of the bankrupt's estate in the trustee.'

governed by the general law. This is a point which was decided by this court in *Hollicourt (Contracts) Ltd* above where Mummery LJ, giving the judgment of the court,[3] said at [22]:

> 'As Oliver J pointed out in *Re J Leslie Engineers Co Ltd* [1976] 1 WLR 292 at 298 the invalidating provisions (then to be found in section 227 of the Companies Act 1948) do not spell out the appropriate remedy of the company when the disposition is avoided. The right of recovery of the company's property which has been disposed of is determined by the general law. It is common ground in these proceedings that the right of recovery, whether invoked against the payees or against the Bank, is restitutionary.'

[30] In [31] of her judgment, the judge appears not to have accepted the respondents' submission on this issue and her reasoning, although somewhat opaque, appears to rely on her application of the general law. That, in my judgment, is the correct approach in cases involving dispositions which have been avoided under s 284.

Issue (ii) – Approach to the determination of liability

[31] In my judgment the main scope of the appellants' argument in relation to this issue are to be preferred and the judge was wrong to decide otherwise.

[32] The judge's reasoning is hard to follow. She seems to have taken the view that: the trustees did indeed have to establish loss caused by the breach in accordance with *Target Holdings* and *AIB*; that loss had indeed been caused by the breach (para 75); that (apparently) the breach occurred on the transfer date, when the first appellant became a trustee; and that the loss was the diminution in the value of the shares from that date until the shares were returned. However, there is no explanation as to why she thought that a breach had occurred, or loss had been suffered, on that date, other than her view that the first appellant held as a trustee from that date and 'owed a fiduciary duty to preserve the value of the asset'. Thus, she stated in para 72:

> '72 The second respondent held as trustee from 5 or 6 June 2007 and owed fiduciary duties including the duty to preserve the value of the asset. The trustees would have realised the Shares soon after their appointment for the benefit of the creditors and the second respondent cannot get round this by appropriating the assets to his own use. The court therefore has to restore the fund, preserving the value of the estate for the benefit of the creditors. It is not enough to say, by analogy with *In Re French's Wine Bar Limited* [1987] 3 BCC 173 at 178, that the beneficial owner can require the property to be transferred to him and to account for any profits. A loss has "in fact [been] suffered by the beneficiaries" and "using hindsight and common sense, can be seen to have been caused by the breach".'

[33] *Hollicourt* clearly shows that the right to recovery is 'restitutionary'. Here the appellants (correctly) accepted that, as well as having a right to the

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3 Peter Gibson, Mummery and Latham LJJ.

return of the shares, the trustees in bankruptcy were, in addition, entitled to claim equitable compensation in respect of any loss that the estate had suffered as a result of the wrongful retention. At trial there was some argument as to the meaning of that term in the context of s 284. Again, it is somewhat unclear what the judge precisely decided on this point, but it appears that Proudman J accepted Mr Moraes' submission that 'restitutionary' simply meant that:

> 'the bankrupt's estate is entitled to be restored to the position it would have been in had the [first appellant] not retained the Shares, as if the trustees in bankruptcy had only had them they would have realised them in accordance with their duties.'

[34] But I cannot agree that that is the right approach. The word 'restitutionary' as used in the authorities is used in the sense of restoring trust property *actually lost as a result of a breach of trust*. The trustees in bankruptcy have chosen to make a case for compensation based on breach of trust. The cases clearly establish that compensatory relief, in addition to the restoration of trust property, is available where the claimant beneficiary can establish a loss to the estate caused by the trustee's breach of trust. Such relief may be awarded in appropriate cases in addition to the restoration of property and is compensatory in nature. That was made clear by Lord Toulson in his judgment in *AIB* at [64]–[66]:

> '64 All agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach (and which ought therefore properly to be held on behalf of the beneficiary). Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach. But a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal.[4]
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> 65 The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about. To say that there has been a loss to the trust fund in the present case of £2.5m by reason of the solicitors' conduct, when most of that sum would have been lost if the solicitors had applied the trust fund in the way that the bank had instructed them to do, is to adopt an artificial and unrealistic view of the facts.
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> 66 I would reiterate Lord Browne-Wilkinson's statement, echoing McLachlin J's judgment in *Canson*, about the object of an equitable monetary remedy for breach of trust, whether it be sub-classified as substitutive or reparative. As the beneficiary is entitled to have the trust properly administered, so he is entitled to have made good any loss

4 All bolded text in this judgment is my emphasis.

> suffered by reason of a breach of the duty. The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about.'

This 'causation loss' point was further emphasised by Lord Reed at [107]:

> '… to impose an obligation to reconstitute the trust fund, in order to enable the client to recover more than he has in fact lost, "flies in the face and is in direct conflict with the basic principles of equitable compensation". That is clearly correct. As Lord Browne-Wilkinson went on to explain, an obligation to reconstitute the trust fund does not inexorably require a payment into the fund of the value of misapplied property, for example where the consequences of the breach of trust have been mitigated by subsequent events.'

[35] Thus, as *AIB* and *Target Holdings* demonstrate, liability in equity is fault based, and the relevant loss for which compensation is payable must be *caused by the actions or omissions of the relevant trustee*. As the appellants have now returned the shares to the respondents, the only case remaining is one for equitable compensation. The decision of the House of Lords in *Target Holdings* (considered and upheld by the Supreme Court in *AIB*) represents the highest authority for the proposition that, in order to recover equitable compensation, the trustee must show actual loss caused by the breach, thus equating the equitable principle for calculating compensation, with the common law principle of assessing loss. In that case, Lord Browne-Wilkinson held at 432–6:

> 'At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation": *Livingstone v Rawyards Coal Co*. (1880) 5 App. Cas. 25, F 39, per Lord Blackburn. Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same
> …
> … a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate: see *Nocton v Lord Ashburton* [1914] AC 932,

> 952, 958, per Viscount Haldane L.C. If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed: *Caffrey v Darby* (1801) 6 Ves. 488; *Clough v Bond* (1838) 3 M. & C. 490. Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred: see Underbill and Hayton, *Law of Trusts & trustees* 14 ed. (1987), pp. 734–736; *In Re Dawson*, *deed.*; *Union Fidelity Trustee Co. Ltd. v Perpetual Trustee Co. Ltd.* [1966] 2 N.S.W.R. 211; *Bartlett v Barclays Bank Trust Co. Ltd. (Nos. I and 2)* [1980] Ch. 515. Thus the common law rules of remoteness of damage and causation do not apply. However there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred but for the breach: see also *In Re Miller's Deed Trusts* (1978) 75 L.S.G. 454; *Nestle v National Westminster Bank Pic.* [1993] 1 WLR 1260 …
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> … But the basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach …'

Lord Browne-Wilkinson further held at 439A-B:

> 'Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.'

[36] Although Proudman J seemed to have both of these cases at the forefront of her mind, it is difficult to follow how she reached her conclusion. As Mr Moraes submitted, it would appear[5] that she accepted the respondents' case that the bankrupt's estate suffered *an actual loss* at the transfer date on the grounds that: there was an obligation on that date to restore the shares (the disposition/transfer being void); there was a failure on that date to restore; and actual loss was suffered on the transfer date because the estate has been depleted by the value of the shares on that date. The judge placed the value of the shares at £2.26 million, which was the fair value as at 5/6 June 2007 (the transfer date). However, she did not make a finding, and the respondents did not allege, that the shares would have been sold as at the transfer date. That was obvious, since, as at that date, the bankruptcy order had yet to be made, and the trustee in bankruptcy had yet to be appointed. In her judgment, she fixed the loss as at the date of transfer, assuming a sale at arms length between a willing purchaser and a willing buyer on that date. That had the result that the appellants were effectively on risk in relation to any fall in the value of the shares thereafter.

[37] I accept Mr Maynard-Connor's submission that the judge was wrong in her approach in simply imposing this as a measure of liability on the

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5 See paras 72 and 75 of the judgment.

appellants, apparently as a consequence of her view as to the effect of s 284. In accordance with *Target Holdings* and *AIB* she was, in my judgment, required to identify at least: (i) what constituted the breach of trust; (ii) when it occurred; (iii) what was the loss actually caused to the estate as a result of the breach of trust on the part of the first, or all four, appellants. This necessitates a complete reconsideration of the judge's approach to actual loss in line with the principles established in *Target Holdings* and *AIB*.

[38] However, although counsel spent some time addressing the judge's decision to distinguish the present case from the principle articulated in *Brandeis Goldschmidt*, I do not consider that reference to this case or the other conversion cases is useful. As I am persuaded by Mr Maynard Connor's submission that the present case falls neatly within the principles established in *AIB* and *Target Holdings*, whether or not an analogy can be drawn with *Brandeis Goldschmidt* takes the matter no further. I am already of the view that, in order to recover equitable compensation, the respondents have to prove that the estate actually suffered loss as a result of the appellants' breach of trust.

[39] I address below the method by which I consider the judge should have conducted that valuation assessment.

(iii) Pleading and evidence point

[40] The appellants submitted that the respondents' failure to prove or plead actual loss meant their action failed from the outset. I disagree. The appellants' focus on evidence and pleading here misses the point. Although it might have been preferable if the points of claim had clearly pleaded the alleged loss and the basis upon which the claim was made, by the time of the hearing the relevant issues had been sufficiently articulated in a 'non-binding' agreement on the outstanding issues. Moreover, the relevant evidence, both expert and factual, addressed the various contentions of the parties as to the various possible dates for valuation. The real point was that the judge's conclusion that the appellants were simply fixed with liability as of the date of transfer because of s 284, without requiring them to show actual loss, was wrong in law.

(iv) Date of calculation of loss

[41] This issue in turn raises the questions: (a) when did the first appellant and/or the sisters become a trustee or trustees; (b) when did he or they commit a breach of trust; (c) when did the loss occur; and (d) in the circumstances, from what date should the first appellant and/or the sisters be responsible for the fall in the value of the shares.

When did the first appellant and/or the sisters become a trustee or trustees?

[42] In *In Re Gray's Inn Construction* [1980] 1 WLR 711 Buckley LJ, in relation to the then comparable provision of the Companies Act 1948, s 227[6] in relation to corporate insolvency, stated at 716E:

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6 This provided: 'In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void'. The comparable provision in the Insolvency Act 1986 is s 127. It is in similar terms to s 227.

> 'The section must, in my judgment, invalidate every transaction to which it applies at the instant at which that transaction purports to have taken place.'

But Buckley LJ was not, of course, considering the position of a transferee in the historic interim when it was uncertain whether a bankruptcy order would be made. He was looking at a case where a winding up order had already been made as at the date that the judge had to determine the application to validate. In my view, the position is somewhat more nuanced in the interim period.

[43] However, it is not in my view necessary for the purposes of this case to decide the precise question whether, prior to making of the bankruptcy order (and at a time when it may be uncertain whether one will be made), a transferee holds no title at all (as the quotation from Buckley LJ might seem to suggest), or merely a voidable or defeasible title. It seems to me that, logically, since s 284 only takes effect *in the event that* a bankruptcy order is actually made (when the bankruptcy commences (see s 278) and when the bankrupt's estate is defined for the purposes of the trustee in bankruptcy's title as including (a) all property belonging to the bankrupt as at that date *and* (b) that which is treated as belonging to the bankrupt under Part IX of the Act (see ss 283 and 284)), there is necessarily a period of time between the transfer and the making of the bankruptcy order, when it is not certain whether the transfer will indeed turn out to be void. This strange state of affairs was considered by Millett LJ in *In Re Dennis (A Bankrupt)* [1996] Ch 80 at 104 (albeit in relation to the previous effect of ss 37 and 38 of the Bankruptcy Act 1914, where the doctrine of relation back was somewhat different, in that title related back to the relevant act of bankruptcy, as opposed to the petition date as in the case of void transactions under ss 284 or 127 and the bankrupt was divested of his title as from that date). Millett LJ said:

> 'Conclusion
> For more than four centuries the act of bankruptcy formed the cornerstone of the English law of bankruptcy. It represented a form of cessio bonorum which marked the moment at which the debtor became insolvent and from which he was to be 'reputed, deemed and taken for a bankrupt.' Bankruptcy proceedings could be taken against him by any of his creditors whose debt was in existence at the date of the act of bankruptcy. If the debtor was afterwards adjudicated bankrupt, his assets were divisible among his creditors as from the time when he became bankrupt, not from the time when he was adjudged to be so. From this the judges deduced the doctrine of relation back. If the debtor was adjudicated bankrupt, then the title of the trustee in bankruptcy related back to the time of the first available act of bankruptcy. The doctrine was given statutory form in the Act of 1869, the relevant provisions of which were re-enacted without material alteration in the Acts of 1883 and 1914. Together with the act of bankruptcy itself it was finally swept away by the Insolvency Act 1986, following the recommendations of the Cork Committee which expressed its opposition to the whole concept of a notional cessation of payments

earlier than the commencement of bankruptcy proceedings: see Report of the Review Committee on Insolvency Law and Practice (1982) (Cmnd. 8558).

It is clear from the authorities that the relation back of the trustee's title did not merely make the title of the debtor himself or any person claiming through the debtor defeasible in the event of adjudication. If the debtor was adjudicated bankrupt, then as from the date of the act of bankruptcy neither the debtor nor any such person claiming under him who could not bring himself within the protective provisions of the Bankruptcy Acts had any title at all; as from that date title was vested in the trustee. The position of the debtor and persons who claimed under him during the intermediate period was extremely curious. They did not possess a defeasible title, but either an indefeasible title if the act of bankruptcy was not followed by adjudication or no title at all if it was. Outside the law of bankruptcy no similar ambulatory title was known to the law.

This was expressly decided by this court in *In Re Gunsbourg* [1920] 2 K.B. 426, but it is also the basis of the reasoning in many of the earlier cases which I have cited (especially *Doe d. Lloyd v Powell*, 5 B. & C. 308; *Ex parte Edwards*, *In Re Chapman*, 13 QBD 747; *In Re Pollitt*; *Ex parte Minor* [1893] 1 Q.B. 455; *In Re Carl Hirth*; *Ex parte The Trustee* [1899] 1 Q.B. 612). In many of the cases the result would have been the same whether the title of the debtor vested in the trustee at the date of the act of bankruptcy or not; but in others the result would have been different if it had not (for example *Doe d. Lloyd v Powell*, 5 B. & C. 308; *Montefiore v Guedalla* [1901] 1 Ch. 435; *In Re Ashwell*; *Exparte Salaman* [1912] 1 K.B. 390; *In Re Gunsbourg* [1920] 2 K.B. 426). Since the property of the debtor vested in the trustee from the act of bankruptcy, it followed that it was divested from the debtor from the same date. If the debtor was a joint tenant, then if adjudication followed his act of bankruptcy operated to sever the joint tenancy with immediate effect. This was so where both the joint tenants were still alive (*Cooper v Chitty*, 1 Burr. 20; *Fox v Hanbury*, 2 Cowp. 445; *Fraser v Kershaw*, 2 K. & J. 496; *Morgan v Marquis*, 9 Exch. 145); where the solvent joint tenant had died in the interim (*Smith v Stokes*, 1 East 363); and where it was the debtor who had died (*In Re Palmer*, *decd. (A Debtor)* [1994] Ch. 316).

It is true, as counsel for the trustee submitted, that the *purpose* of the statutory provisions was to defeat dealings with the debtor's property after the act of bankruptcy, and that the acquisition by the trustee of property by survivorship would not conflict with that statutory purpose. But the *method* by which that purpose was given effect was not (as in the Companies Acts) to avoid all dispositions of the debtor's property after the relevant date, but to divest the debtor of his property at that date. In my judgment the decision of Sir Donald Nicholls V-C that the property of the debtor was not divested until he was adjudicated bankrupt cannot be supported.

There remains the question whether the decision of the Vice-Chancellor can be supported on the narrow ground that whereas the trustee can rely on the doctrine of relation back to found a claim to

> property formerly belonging to the debtor, and to claim that a joint tenancy has been severed where it is the debtor who has died in the interim, the personal representatives of a deceased joint tenant cannot rely on the doctrine in order to deprive the trustee of his claim to an interest which has accrued to the debtor by survivorship.
>
> In my judgment such a contention cannot be accepted. It is contrary to the decision in *Smith v Stokes* which is direct authority on the point, and to other cases in which the doctrine of relation back operated to the disadvantage of the trustee (as in *Montefiore v Guedalla*). A similar contention has occasionally surfaced in argument, but it has received no support in any of the cases when properly understood. Moreover, it cannot be correct in principle. The vesting of the debtor's property in the trustee which occurred on adjudication was automatic; the trustee had no choice in the matter. In some circumstance (as in *In Re Gunsbourg*) he might have a right to elect whether to treat a transaction as constituting an act of bankruptcy. If he elected to do so, he could not avoid the consequences. The relation back of his title to the act of bankruptcy was an automatic statutory consequence. The trustee could not lay claim to the property and deny that it had vested in him at the anterior date.'

[44] In *Re Palmer (Deceased) (A Debtor)* [1994] Ch 316 (reversed on appeal, but not on this point) Vinelott J concluded that s 284 had a similar effect to the application of the old doctrine of relation back:

> 'section 284 has a dual effect. First, it supplements the relation back of the trustee's title by avoiding dispositions after the date of presentation of the petition. Secondly, it protects dispositions after the presentation of the petition and before the appointment of the trustee which fall within subsections (4) and (5); to that extent it reflects (though it is not coterminous with) section 45 of the Bankruptcy Act 1914'(at 334C-D).

[45] In my judgment, the effect of ss 278, 283, 284 and 306 of the Insolvency Act 1986 was that, in the present case, as from the transfer date, the first appellant held the legal title[7] to the shares on the following trusts:

(i) contingently for the bankrupt, in the event that a bankruptcy order was indeed made against him; and
(ii) subject thereto (ie in the event that no such order was made), for himself as absolute owner of both the legal and beneficial title.

As from the date when the bankruptcy order was made on 21 April 2009, the first appellant and/or the sisters (if they had had some of the shares transferred to them by this date, as to which see below) held the legal title on trust for the bankrupt and title to them was vested in Mr Hosking, on the latter's appointment as trustee in bankruptcy on 22 July 2009. An alternative analysis

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7 It was not in dispute between the parties that the legal title to the shares had been transferred. As I explain below, an alternative analysis is that there was no trust, but merely a defeasible title held by the first appellant.

would be that the first appellant and/or the sisters held a defeasible or voidable title from the transfer date until the bankruptcy order and thereafter no title to the shares at all, since the transfer was, retrospectively, void. However, the claim for equitable compensation was premised on the trust analysis and I see no reason to depart from it as it makes little difference to the ultimate outcome.

[46] It follows that I reject Mr Moraes' submission (accepted by the judge at para [52] of her judgment) that, because the first transfer was after presentation of the bankruptcy petition, the first appellant became a *bare* trustee of the shares for the bankrupt, immediately upon the disposition. I do not consider that the retrospective effect of s 284 or the cited passage from Buckley LJ *In Re Gray's Inn Construction* at 716E lead to, or support, that conclusion. It was only on the making of the bankruptcy order that the first appellant became a *bare* trustee of the shares for the bankrupt and, on the latter's appointment, for the trustee in bankruptcy.

When did the first appellant and/or the sisters commit a breach of trust?

[47] In order to ascertain when the first appellant and/or the sisters committed a breach of trust, one has to determine the scope of his/their duty as trustee. I do not accept Mr Maynard-Connor's submission that the only obligation on the first appellant as bare trustee was to deliver the shares following a demand. As Mr Moraes submitted, it was not suggested in *Target Holdings*, which was a bare trust case, that a beneficiary under such a trust was only entitled to call for the asset (in that case a legal charge). The right to call for the asset is an additional right which all sui juris beneficiaries have, together with the other rights they enjoy as beneficiaries. In my judgment, the duties of a constructive trustee (the type of trust here) depend on the context.

[48] There are a number of factual findings of the judge that provide the relevant context for determining the scope of the first appellant's duty. These are as follows:

(i) Her finding that all of the appellants had actual notice of the bankruptcy petition of 23 January 2007 prior to the share transfers at [70].
(ii) Her finding that there was a deliberate attempt to rig the votes in the IVA so that the family could retain the shares at [67], albeit one to which the sisters were not party.
(iii) Her finding that the first appellant inflated the alleged debt which he said was owed to him and created a debt in Hornby in an attempt to award himself the shares at [80].

[49] Further, it is relevant that the first appellant is an astute businessman who signed a guarantee dated 5 June 2007, over five months after the bankruptcy petition and some 22 months before the bankruptcy order. The guarantee acknowledged that the bankrupt had an interest in the companies. Further it made clear:

> '4 Should the IVA fail as a result of the legal challenged mounted by Monecor (London) Limited under No. 19–10–2007 (No. 973 of 2007) in the High Court of Justice in London, this guarantee will be void and

of no further effect and any money paid thereunder by the Guarantor to the Supervisors (less proper professional fees) will be refunded forthwith.'

[50] All of the share transfers took place in the context of the bankrupt's IVA proposal, which had been approved on 29 March 2007. I am persuaded by Mr Moraes' submission that that it was the wrongful vote-rigging by the family (but not the sisters who are respondents[8]) that delayed the making of the bankruptcy order. Once the IVA failed on 15 December 2008, the first appellant was aware of a potential issue with his title to the shares. Nonetheless, he continued to assert title over Hornby and Continental using the s 284(4) defence as late as 19 May 2010. I regard it as irrelevant that he made a payment into the IVA of £200,000 on 22 May 2007, as the guarantee made it clear that the Guarantee was void in the event of bankruptcy and the money was to be refunded.

[51] In my judgment, as the judge found, this case involved serious dishonesty in relation to which the first appellant played a central role. In those circumstances, I conclude that, once he had knowledge of the facts that made him a bare trustee – namely that a petition had been presented against the bankrupt and a bankruptcy order had been made – and once the trustee in bankruptcy had been appointed, he had an immediate obligation to restore the estate. This was because, once appointed, the trustee in bankruptcy had an immediate obligation to realise the shares for the benefit of the creditors under s 305 of the Insolvency Act 1986. From this point, the first appellant was under a duty to notify the trustee in bankruptcy that he held the shares and to tender them immediately. If the first appellant was unsure as to his legal position, the level of dishonesty in this case meant he had a duty to inquire.

[52] *AIB* and *Target Holdings* make it clear that the starting point for any analysis of loss has to be the date when the breach of trust occurred. Of the four possible dates canvassed as the date of the breach of trust in this case (transfer date, date of making of the bankruptcy order, date on which the trustee in bankruptcy was appointed and date on which the trustee in bankruptcy made a demand for the return of the asset), I can reject the transfer date, given my conclusions at paras 45 and 46 above as to the basis on which the first appellant held the shares as at that date. As at the transfer date the first appellant, as transferee, had no obligation to hand the shares over to anybody and further, there was nobody to whom the shares could be handed. I reject Mr Moraes' submission that the first appellant should have immediately returned the shares to the bankrupt. Such an obligation would not have made sense in the alternative counter-factual scenario where the IVA continued and a bankruptcy order was never made.

[53] There is some force to Mr Moraes' alternative submission that the first appellant's and/or the sisters'[9] obligation to restore the shares arose on the making of the bankruptcy order and his/their failure immediately to do this constituted a breach. The problem with this analysis, however, is that at this point the trustee in bankruptcy had not yet been appointed. Consequently, the

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8 It was common ground on the appeal that the judge was wrong in her conclusion in this respect.

9 See below as to the date from which it is to be inferred that the sisters first held the shares.

first appellant and the sisters were not withholding the shares from a trustee in bankruptcy with a legal obligation to realise their value and nor did he prevent the trustee from doing so. Accordingly, I consider neither he nor the sisters were in breach on that date.

[54] However, given my conclusion as to the scope of the first appellant's duty, the first appellant was, in my view, in breach of trust when he and/or the sisters failed immediately to restore the asset following the appointment of the first trustee in bankruptcy, Mr Hosking. Given the trustee in bankruptcy's obligation to realise the shares for the benefit of the creditors under s 305 (and it must be assumed for the purposes of ascertaining whether the first appellant and the sisters were in breach, that the trustee in bankruptcy would act in accordance with his duty) the first appellant and/or the sisters, by holding on to the shares prevented the trustee in bankruptcy from doing what he was required to do in law. As such, the relevant breach of trust, in my judgment, occurred on or around 22 July 2009, which is when Mr Hosking was appointed trustee in bankruptcy.[10]

[55] For completeness, I should say that I do not accept Mr Maynard-Connor's submission that, if the first appellant was liable, the breach only occurred on the subsequent date when the trustee in bankruptcy actually *demanded* the shares because there could be no breach without a demand. That might be the case in other circumstances, but, given the context of this bankruptcy and the dishonesty involved in this case, the first appellant's duty to inquire as to the position in relation to the shares, and to tender them to the trustee in bankruptcy, arose on the appointment of the trustee in bankruptcy. The failure to do both of these things on that date in my view constituted a breach of trust.

When did the loss occur?

[56] However, the fact that *the breach* occurred on that date does not predicate that the loss occurred on, or will be calculated as at, or as from, that date. In *Target Holdings*, Lord Browne-Wilkinson made it clear that, in cases of breach of trust, the remedy is restoration of the trust estate and the relevant loss for which compensation is payable must be *the actual loss* caused by the actions or omissions of the subject trustee; in other words, when determining loss, the court is required to look at the actual loss suffered by the trust estate. On the date of the bankruptcy order, the trustee in bankruptcy had still not been appointed. As such, he could not realise the value in the shares and loss could not have flown from this point. Lord Browne-Wilkinson said at 437D-E:

> … the fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been

10 There was no suggestion that there was any involvement of the Official Receiver or any realistic possibility of handing the shares back to him.

> no breach. I can see no justification for "stopping the clock" immediately in some cases but not in others: to do so may, as in this case, lead to compensating the trust estate or the beneficiary for a loss which, on the facts known at trial, it has never suffered.'

[57] I accept Mr Maynard-Connor's submission that, in this case, the loss occurred, or flowed from, the date at which the trustee in bankruptcy would have *actually* sold the shares.

[58] The evidence provided in the trial was that shares in a private company of the type under consideration could be sold in 3–6 months from the date of a decision to sell. If the first trustee in bankruptcy, Mr Hosking, had put his mind to the task immediately, he could have sold these shares prior to the end of 2009. However, given *Target Holdings*, the court cannot ignore the reality of what would have actually happened in the particular circumstances of this case. On the evidence, Mr Hosking did not actually attempt a sale of the shares either upon his appointment or thereafter. The reasons why are unclear. He wrote two relevant letters. The first was a letter to Hornby on 4 November 2009 requesting confirmation that the bankrupt held shares in the company. The second was to the first appellant on 25 February 2010 asserting title to the shares in Hornby and Continental. In neither of these letters, does he appear actually to make a demand for the shares or to evince any intention to realise them.

[59] In my judgment, the evidence does not support a finding that he was in the process of taking any steps to sell the shares. Even though he was under an obligation to sell them, the evidence effectively shows that he would not have got round to selling the shares during his time as trustee in bankruptcy, even if he had received them from the first appellant and/or the sisters. Accordingly, the loss cannot be said to have occurred during that time. Any depreciation in the value during that period would have been at the risk of the estate.

[60] On the evidence before the judge, it is clear that the loss caused by the first appellant's and/or the sisters' breach of trust in not returning the shares actually occurred within a three to six month window from the date of the appointment of Mr Ingram and Mr Miller as joint trustees in bankruptcy on 14 April 2010. That was because the evidence showed that a sale of the shares (if they had been returned either to Mr Hosking or to the trustees in bankruptcy) would have taken place within that three to six month window. Given the available valuation dates as decided by the Registrar in advance of trial, it follows the most appropriate valuation date is 30 June 2010. That is the only date that falls within the window on the trustees in bankruptcy's own case.

[61] In my judgment, the judge was wrong to find that the appellants' liability for loss flowed from the transfer date. Accordingly, I would allow the appeal on this issue and substitute the 30 June 2010 as the date at which the shares should be valued for the purposes of ascertaining the loss which the estate has suffered as a result of having been deprived of the shares until their return shortly before trial; ie the diminution in their value between the two dates.

Issue (v): *Method of valuation*

[62] The issue under this head was whether the judge was right to find that the shares should be valued at a fair value, as opposed to at market value. Mr Maynard-Connor submitted that the judge's finding that fair value was the correct basis was based on a flawed premise, namely a sale by the bankrupt to the first appellant. In this context I do not find the appellants' submission that Mr Cowan, the expert valuer, had not been asked specifically to value a sale by the trustee in bankruptcy to the first appellant as persuasive. Under cross-examination by counsel for the appellants, Mr Cowan made it clear that his valuation (based on a fair value as between insiders) would not have been any different.

[63] Mr Maynard-Connor further submitted the judge should not have relied on the evidence of Mr Cowan to value the shares, but rather should have relied on that of Mr Hosking in the IVA challenge proceedings. But the question as to the admissibility and weight to be given to Mr Hosking's evidence was a matter for the judge. Since Mr Hosking's evidence was not tested before her, she was perfectly entitled to give it little or no weight. The judge relied on evidence in addition to the expert evidence (at [80]) and was clearly entitled to reject Mr Hosking's conclusion that there was 'no worth' in the shares and accept that of Mr Cowan.

[64] In my judgment, the judge was entitled to conclude that the shares should be valued on the basis of a transaction between identified knowledgeable and willing parties. Her decision at [110] of her judgment in which she preferred the evidence of Mr Cowan over Ms Longworth, the other expert valuer, is not susceptible to challenge. I am also persuaded that, in the circumstances of this case, the reasons which would apply in a sale between family members similarly apply in the context of a sale from a trustee in bankruptcy to a family member: first that the family would not want a third party holding 24% of the shares in the companies; and second, that the first appellant, as the most likely buyer, would consider the trustee in bankruptcy's next best option of selling to somebody outside the family. I consider the second reason would likely lead to a higher valuation.

[65] Accordingly, there is no reason to interfere with the judge's conclusion that the fair value was the appropriate valuation. I would dismiss the appeal on this ground.

Issue (vi) – Liability of the sisters

[66] The respondents accepted that one of the bases on which the judge found the sisters to be liable was wrong; namely that they had been involved in the 'IVA vote-rigging scheme'. They had not in fact been involved.

[67] At [117] of her judgment, the judge found the sisters jointly liable with the first appellant. However, since, for the reasons which I have already stated, her approach to the question of loss was erroneous, her analysis needs to be reconsidered.

[68] Mr Maynard-Connor submitted the sisters were always nominees although Proudman J did not appear to make a finding on this point. I conclude that, even if they did at all times purportedly hold title to the shares as nominees for the first appellant, as opposed to purporting to hold beneficially for themselves, that, in the circumstances, makes no difference to the question as to whether they were in breach of trust. If they held legal title

and there was an obligation to return the shares to the trustee in bankruptcy, it applied to them, whether they were nominees or not.

[69] Moreover, the evidence of the first appellant (on which he was cross-examined) strongly suggested that he intended to transfer full beneficial ownership to his sisters and not merely legal title. In addition, their participation in the application for cross-validation, is consistent with an assertion of beneficial title by them. If they had been acting purely in a nominee capacity their correct course would by that stage have been to have played no active part but rather to have indicated that, as trustees, they would abide by the court's decision as to whether the beneficial ownership of the shares should remain with the estate or whether the transfers should be validated.

[70] In my judgment, the failure of the sisters to give evidence or to provide the relevant stock transfer forms to clarify when the shares were transferred to them, justifies this court drawing the inference against them that the transfer occurred at the earliest of the suggested dates, viz as from 1 January 2008. In line with my previous analysis, as from that date they held the shares on the trusts referred to in para 45 above, ie contingently for the bankrupt, in the event that a bankruptcy order was indeed made against him; and, subject thereto (ie in the event that no such order was made), for either themselves or the first appellant as absolute owner of both the legal and beneficial title.

[71] It follows that they were likewise in breach of trust for failing to hand the shares back following the appointment of the first trustee in bankruptcy on 22 July 2009, in retaining them in the period to 30 June 2010 and in transferring them to the first appellant (as opposed to handing them to the trustees in bankruptcy) at the relevant date before 30 June 2010. I have no difficulty in concluding that, on the facts as found by the judge, the circumstances in which they came to hold the shares meant that they, like the first appellant, had an obligation to hand the shares back and were in breach of trust for failing to do so. Those circumstances included:

(i) the finding that all of the appellants had actual notice of the bankruptcy petition of 23 January 2007 prior to the share transfers at [70];

(ii) the finding that all of the family members were aware that the bankrupt was insolvent and that obtaining the shares in return for payment would result in the creditors being disadvantaged, if as eventually happened, the IVA failed at [71];

(iii) the finding at [68] that:

> 'it is inconceivable that, bearing in mind the closeness of the family and the fact that Mr Andronikou acted for all the [appellants], the bankrupt (who knew about the petition at latest on 5 February 2007) would not have told the other [appellants] of the existence of the petition, and why it was so urgent for him to enter into an IVA';

(iv) the rejection of the first appellant's attempt to withdraw evidence in para 42 of his witness statement as an opportunistic attempt to exclude his sisters from liability at [66]; and

(v) the fact that the sisters did not give any evidence at [113].

[72] I also find it relevant that the sisters all 'worked in the business,' according to the witness statement of the first appellant at [42]. They took the shares transferred to them without any consideration being given to the estate in the context of an insolvent estate and positively, until shortly before the trial, sought to validate those wrongful transfers. I also consider that the judge was entitled to find they were involved – even if to a lesser extent – in the same serious dishonesty as him. Again, once they had knowledge of the facts that made them a bare trustee for the estate, namely that a petition had been presented against the bankrupt, a bankruptcy order had been made and a trustee in bankruptcy had been appointed, they had an immediate obligation to notify the trustee in bankruptcy that they held the shares and to tender them immediately. If they were unsure as to their legal position, their engagement in the dishonesty meant they had a duty to inquire.

[73] For the same reasons I have given for the first appellant, I find that, in relation to the shares held by them, they are theoretically liable for the loss suffered by the estate (ie the diminution in value) during the period from 14 April 2010 (the date on which Mr Ingram and Mr Miller were appointed) to the date of their return shortly before trial; ie the diminution in their value between the two dates. Their liability for loss in the diminution in value did not cease on 30 June 2010 (when they re-transferred the shares to the first appellant) because, as I have said, their obligation was to retransfer the shares to the trustees in bankruptcy – not to do the first appellant. Their failure to so was also causative of the estate's loss.

[74] Accordingly, I agree with the judge's finding that the sisters are jointly liable with the first appellant to the extent of their respective shareholdings, but, like the first appellant, only in respect of the diminution in value during the period from 30 June 2010 until the date of the shares' return shortly before trial.

Disposition

[75] Accordingly, to the extent stated in this judgment, I would allow the appeal.

PATTEN LJ:

[76] I agree.

DAVID RICHARDS LJ:

[77] I also agree.

Solicitors: *Pannone Corporate LLP* for the appellants
Max Legal Ltd for the respondents

TIANRUI (INTERNATIONAL) HOLDING COMPANY LIMITED v. CHINA SHANSHUI CEMENT GROUP LIMITED

C.A. (Rix, Field and Moses, JJ.A.) February 18th, 2020

Companies — compulsory winding up — dispositions and transfers during winding up — validation by court — Companies Law (2018 Revision), s.99 preserves status quo pending resolution of petition — validation order must not impede, undermine or preclude preservation of status quo

The appellant sought the winding up of the respondent.

China Shanshui Cement Group Ltd. ("the company") was a Cayman Islands company listed on the Hong Kong Stock Exchange ("SEHK"). The company's major shareholders were the appellant, Tianrui (International) Holding Co. Ltd. ("Tianrui"); Asia Cement Corporation ("ACC"); and China National Building Material Holding Co. ("CNBM"). They were involved in what Tianrui described as a bitter take-over battle for the company. Tianrui presented a petition to wind up the company on the just and equitable ground, alleging that ACC had been acting improperly in concert with CNBM to dilute Tianrui's shareholding and squeeze it out of the company. It was alleged that the dilution had been achieved by an improper exercise by the directors of their powers to issue securities, through successive issues of bonds to bondholders with whom ACC and CNBM were associated or connected, which bonds were subsequently converted into shares. The company sought validation of proposed transfers of shares to the Hong Kong Securities Clearing Co. Nominees Ltd. ("HKSCC") to facilitate the trading of those shares through the CCASS. A validation order would have the effect that those transactions could not be unwound under s.99 of the Companies Law in the event of the petition being successful.

Section 99 provided:

"When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void."

The Grand Court (Mangatal, J.) made a validation order that any transfers of the shares in the company to HKSCC should not be avoided by the provisions of s.99 in the event of an order being made on Tianrui's petition for the winding up of the company (that decision is reported, *sub*

nom. In re China Shanshui Cement Group Ltd., at 2019 (2) CILR 734). The judge accepted the company's case for validation, that it was a response to CCASS's request and that it wished to reduce the illiquidity of its shares, which reasons an intelligent and honest director could reasonably hold in good faith and had a clear commercial basis. She accepted the company's argument that the share transfer did not "run afoul of the rationale of s.99" to prevent the shareholders of partly paid up shares to evade liability by transferring their shares to men of straw after the commencement of the winding up.

The appellant appealed, submitting that the judge misunderstood the purpose of s.99 and failed to identify the correct approach to validation.

Held, allowing the appeal:

(1) The purpose of s.99 of the Companies Law was to preserve the status quo. Its retrospective effect derived from the legislative scheme for insolvency which treated the commencement of a winding up as the date when the winding up was initiated, normally the date of the presentation of the petition, rather than the date when a winding-up order was made and the winding up began. During the period between the presentation of a petition and its resolution, any transaction such as the proposed transfer of shares to HKSCC or alteration in the status of the company's members would be avoided if the winding-up order was made, unless the court exercised its discretionary power under s.99 to validate the transaction. The avoidance effect of s.99 enabled the liquidator to unwind any transactions which might have taken place during this period and return the assets and circumstances of the company and its contributors to those which were in place at the time the winding up commenced. The ability to validate transactions during the period between presentation and the hearing of the petition enabled companies to continue to operate in the ordinary course of their business prior to the hearing. The purpose and importance of validation could most clearly be seen in relation to trading companies. They were not prevented from continuing to trade once a winding-up petition was presented: a validation order provided commercial certainty for those trading with the company, and for the company, that their transactions would not be avoided. The power to make a validation order must not be exercised in a way that undermined the essential purpose of s.99, namely to preserve the status quo pending resolution of the petition. Any assessment of an application for a validation order must have, at the forefront of consideration, the need not to impede, undermine or preclude fulfilment of that purpose (paras. 13–20).

(2) The judge had been led into a fundamental error in relation to the purpose of s.99. She had been led by the company to take a limited view of s.99, namely that it was to prevent shareholders from evading liability by transferring their shares to a straw man after winding up had commenced. The transfer of legal title from a shareholder to HKSCC fell squarely within s.99. A validation order in respect of such a transaction

ought only to be made in circumstances which assisted in preserving the status quo and which did not frustrate the purpose of s.99 (paras. 21–23).

(3) When considering whether to exercise the power to make a validation order under s.99, as a matter of principle a court must satisfy itself that any order it might make would not undermine or frustrate the maintenance of the status quo pending resolution of the winding-up petition; the order should be made in furtherance of that objective. This underlying principle should not alter according to the particular circumstances of a case, although its application would of course vary from case to case. The court's assessment as to whether a proposal would advance or undermine the purpose for which the power was conferred would vary according to whether or not it was sought in relation to the ordinary course of business. It would be dangerous to assume that a court might be relieved of the responsibility of careful scrutiny and caution merely because a company was solvent. In every case, those seeking a validation order must be able to satisfy the court that what was proposed would not undermine the avoidance function of s.99, that it would not impede or frustrate the unwinding of transactions after the presentation of the petition but would maintain the status quo. That was so whether the company was solvent or insolvent, and whether or not the proposal was made in the ordinary course of business. Where a proposal was made for the purposes of the ordinary course of business, the court would more readily take the view that there was no unacceptable risk to the maintenance of the status quo. In such a case the views of the directors as to whether the proposals were for the benefit of the company would plainly be relevant even though not dispositive. The court adopted the appellant's submission that just as in the case of a creditors' petition validation would not be allowed to undermine the purpose of a winding up, in a just and equitable petition a validation order should not undermine the objective of stopping or reversing oppressive conduct. Careful scrutiny was needed not just to protect creditors in an insolvency petition but also contributories at a stage when no one could say whether the petition in respect of a solvent company would succeed. Validation orders should only be made if they were consistent with the purposes of s.99 and of the power to make such orders (paras. 40–47).

(4) As the judge had not scrutinized the company's proposal, the court would do so. The deposit of shares to CCASS was alleged by the appellant to be an important further stage in the process of diluting its shareholding and the conspiracy to cause it damage. It should not have been forgotten that the proposed transactions in respect of which validation was sought were themselves the subject matter of the petition. Validation would make it impossible to reverse the issue of the shares and risk stymying what a court, liquidator or the appellant might legitimately do. There appeared to be no reasonable explanation other than that proffered by the appellant, namely that the deposit was intended to prevent the unwinding of the transactions should the petition be successful. The transactions were not

made in the ordinary course of business; the company's business was in holding interests in subsidiaries, not trading in its own shares. The judge made material errors of law leading her to a failure to consider relevant evidence and to make the necessary assessments of it. Her exercise of evaluative judgment could not stand. The court would reverse the order and refuse to make a validation order in respect of the proposed CCASS deposit (paras. 60–61; paras. 66–72).

Cases cited:

(1) *A.I. Levy (Holdings) Ltd., In re*, [1964] Ch. 19, considered.
(2) *Burton & Deakin Ltd., In re*, [1977] 1 W.L.R. 390; [1977] 1 All E.R. 631, considered.
(3) *Charterbridge Corp. Ltd.* v. *Lloyds Bank*, [1970] 1 Ch. 62, considered.
(4) *Company (007130 of 1988), In re a*, [2000] 1 BCLC 582, considered.
(5) *Cybervest Fund, In re*, 2006 CILR 80, considered.
(6) *Fortuna Dev. Corp., In re*, 2004–05 CILR 533, considered.
(7) *Henderson* v. *Foxworth Invs. Ltd.*, [2014] UKSC 41; [2014] 1 W.L.R. 2600; 2014 SCLR 692; 2014 SLT 775, referred to.
(8) *Howard Smith Ltd.* v. *Ampol Petroleum Ltd.*, [1974] A.C. 821; [1974] 2 W.L.R. 689; [1974] 1 All E.R. 1126, considered.
(9) *Park Ward & Co. Ltd., Re*, [1926] Ch. 828, referred to.
(10) *Rudge* v. *Bowman* (1868), L.R. 3 Q.B. 689, referred to.
(11) *Torchlight Fund LP, In re*, 2018 (1) CILR 290, referred to.
(12) *Wiltshire Iron Co., Re* (1868), L.R. 3 Ch. App. 443, considered.

Legislation construed:

Companies Law (2018 Revision), s.99: The relevant terms of this section are set out at para. 13.
s.100(2): The relevant terms of this sub-section are set out at para. 14.

T. Lowe, *Q.C.* and *G. Lardner* for the appellant;
V. Flynn, *Q.C.*, *J. Eldridge* and *A. Davey* for the respondent.

1 **MOSES, J.A.:**

Background

This is an appeal against a validation order made by Mangatal, J. dated September 12th, 2019 (reported at 2019 (2) CILR 734) in which she ordered, *inter alia*, that any transfers of the shares in China Shanshui Cement Group Ltd. ("the company/respondent") to HKSCC Nominees Ltd. ("HKSCC") should not be avoided by the provisions of s.99 of the Companies Law (2018 Revision) in the event of an order being made on a petition by Tianrui International Holding Co. Ltd. ("Tianrui") for the winding up of the company.

2 The company is a holding company whose subsidiary is amongst the largest of the cement producers in the People's Republic of China. Its major shareholders, Tianrui, Asia Cement Corporation ("ACC") and China National Building Material Holding Co. ("CNBM"), have been involved in what Tianrui describes as a bitter take-over battle for the company. Tianrui alleges in its petition, brought on the just and equitable ground, that ACC has been acting improperly in concert with CNBM to dilute Tianrui's shareholding and squeeze it out of the company.

3 The petition has already been fully analysed and explained in the decision ("the CICA decision") of this court (CICA (Civil) 26 of 2018 (Martin, Newman and Moses JJ.A.), January 16th 2019, reasons given April 5th, 2019 (reported at 2019 (1) CILR 481)) in which it overturned a decision of the Grand Court to strike out the petition.

4 The relevant part of the validation order concerns share issues which the appellant Tianrui seeks to impugn as part of the conspiracy to dilute Tianrui's own shareholding.

5 It is alleged that this dilution was achieved by an improper exercise by the directors of their powers to issue securities, through successive issues of bonds in August and September 2018 to bondholders with whom ACC and CNBM were associated or connected. The convertible bonds were subsequently converted into shares. This is described more fully in the CICA decision (2019 (1) CILR 481, at paras. 5–7):

> "5 . . . In August and September 2018 . . . when nominees of CNBM and ACC were on the board, the company made two issues of convertible bonds. The first issue, made on August 8th, 2018, was in consideration of a payment of US$210.9m. at an interest rate of 20%; and on conversion the bondholders would receive shares in the company, resulting in the dilution of the shareholdings of all the then current shareholders. In Tianrui's case, the effect of conversion would be that its percentage of shares would drop from 28.16% to 26.13%. The second issue of convertible bonds was made on September 3rd, 2018, in consideration of payments totalling US$320.7m., again at an interest rate of 20%; and the effect of conversion into shares in the company would be that the percentage of shares held by Tianrui would fall from 26.13% to 23.56%.
>
> 6 On October 7th, 2018, after service of the petition on September 4th, 2018, the company announced that it had agreed with some of the bondholders to vary the terms so that conversion would occur immediately at a lower price in return for more shares. The effect of conversion into shares would be that Tianrui's shareholding would fall to 21.40%.

> 7 On October 30th, 2018, an EGM of the company was held at which the shareholders voted by a majority to authorize the issue of new shares to the bondholders on conversion . . . The shares were issued on the same day. The issue of the shares allowed the company to represent to the Hong Kong stock exchange that there were enough public investors to satisfy the listing requirements, with the result that the suspension of the company's listing was revoked and trading in its shares resumed on October 31st, 2018."

6 These successive steps taken, as Tianrui asserts, to dilute its shareholding were the latest stage in an alleged conspiracy to cause it damage (CICA decision, 2019 (1) CILR 481, at para. 33). Both by means of its petition and by a separate action to reverse the convertible bond and share issues, Tianrui is seeking to unwind the allegedly improper steps taken to achieve this dilution of its shareholding. The shares into which the bonds were converted were the subject-matter of the validation order. Tianrui contends that the application for the validation order was part of the means by which ACC and CNBM, through the company, sought to safeguard the impugned share issues and baulk any future restoration of the status quo, should the petition be successful.

7 The company sought validation of a proposed transfer of shares in the company, held by eighteen shareholders known as the "definitive shareholders" (defined by the company as those who held their shares by direct entry on the register of members). It was proposed that the shares should be transferred to the Hong Kong Securities Clearing Co. Nominees Ltd. ("HKSCC") to facilitate the trading of those shares through the central clearing and settlement system ("CCASS"). CCASS is an electronic book-entry clearing and settlement system for the public stock market in Hong Kong. In order to trade using CCASS, shareholders must transfer their legal title to HKSCC, acting as common nominee for shares held in CCASS, prior to depositing their shares into CCASS. The transfer of legal title would involve the company issuing the necessary share certificates for deposit with CCASS, delivering the certificates to CCASS on behalf of the shareholders and confirming that henceforth legal title in the shares was held by HKSCC rather than the individual shareholders to whom the share certificates had been issued.

8 CCASS had indicated that, before it would accept the deposit of shares, it required that the Cayman court should validate the transfer of legal title to HKSCC (see the exchange of emails referred to by Mangatal, J. in her judgment, 2019 (2) CILR 734, at para. 47). The eighteen definitive shareholders had informed the company that they wished to have their physical shares, representing 43.96% of the company's issued share capital, deposited into CCASS.

9 A validation order made in respect of the transfer of legal title in the shares to HKSCC and their subsequent deposit into CCASS would have the effect that those transactions could not be unwound under s.99 in the event of the petition being successful.

10 The judge accepted the company's case for validation, that it was a response to CCASS's request and that it wished to reduce the illiquidity of its shares. She was sedulous in her application of what she concluded, at the invitation of the company, to be the applicable test to be found in *Burton* v. *Deakin Ltd.* (2): the postulated reasons were those which an intelligent and honest director could reasonably hold in good faith and had a clear commercial basis.

11 Further, she accepted the company's argument that the transfer of legal title in the shares did "not run afoul of the rationale of s.99" (2019 (2) CILR 734, at para. 129). That rationale was said by the company to be to prevent the shareholders of partly paid shares to evade liability by transferring their shares to men of straw after the commencement of the winding up. The company's entire share capital was fully paid up.

12 This appeal is focused on Tianrui's contention that the judge misunderstood the purpose of s.99 and failed to identify the correct approach to validation under that section. Had she considered the application in a manner consistent with the purpose of s.99 she would have appreciated that the consequence of validation of the proposed transactions was, by virtue of ss. 45 and 54 of the Hong Kong Securities and Futures Ordinance, to make it impossible to unwind those transactions should the petition be successful.

Section 99

13 Section 99 of the Companies Law (2018 Revision), which, for relevant purposes, replicates s.127 of the UK Insolvency Act 1986, provides:

> "When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void."

14 It is fundamental to this appeal to identify the purpose of this section. Its purpose is to preserve the status quo; it has what *Palmer's Company Law*, vol. 4, at 15.526 describes as a "conservational" function. The retrospective effect of s.99 derives from the legislative scheme for insolvency which treats the commencement of a winding up as the date when the winding up was initiated, normally the date when the petition was presented, rather than the date when a winding-up order is made and the real winding up begins (see s.100(2) Companies Law (2018 Revision)

which provides that the winding up "is deemed to commence at the time of the presentation of the petition for winding up").

15 Accordingly, once a petition has been presented, during the "twilight period" between presentation of the petition and its resolution, any transaction such as the proposed transfer of shares to HKSCC or alteration in the status of the company's members will be avoided if the winding-up order is made, unless the court exercises its discretionary power under s.99 to validate the transaction. The avoidance effect of s.99 enables the liquidator to unwind any transactions which may have taken place during this twilight period and return the assets and circumstances of the company and its contributors to those which were in place at the time the winding up commenced.

16 However, during this twilight period, it is important that the deleterious effect of the very fact of the presentation of the petition, possibly long before its merits are determined, may be ameliorated by the process of validation. Validation may prevent the risk of paralysis once a petition is presented. All companies are vulnerable to the damaging effect the presentation of a petition may have; the ability to validate transactions during the period between presentation and the hearing of the petition enables companies to continue to operate in the ordinary course of their business prior to the hearing. As the editors of *Palmer* put it (*op. cit.*, at 15.527):

> "A company is not by law required to cease trading merely because a winding-up petition is presented against it. Pending the determination of the petition it is permissible for the company to continue to trade, provided that it does so in a bona fide and regular manner and with necessary regard to the implications for all interested parties (including the potential liability of the directors) if a winding up order is made by the court when the petition is heard."

17 The purpose and importance of validation may most clearly be seen in relation to trading companies. They are not prevented from continuing to trade once a winding-up petition is presented; a validation order provides commercial certainty for those trading with the company, and for the company, that their transactions will not be avoided.

18 The rationale for validation of transactions by a trading company in the ordinary course of business was explained by Lord Cairns in *Re Wiltshire Iron Co.* (12) in relation to a predecessor of s.127, s.153 of the Companies Act 1862 (3 Ch. App. at 446):

> "The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the court otherwise orders, be

> void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of everyone to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, ipso facto, paralyse the trade of the company, and great injury, without any counter-balance of advantage, would be done to those interested in the assets of the company."

See also Romer, J. in *Re Park Ward & Co. Ltd.* (9).

19 Thus validation itself may be seen as preserving the status quo by permitting a company to conduct its business in a manner which enables it to survive notwithstanding the depressing effects which flow from the presentation of a petition. It enables the company to keep "ticking over."

20 It ought hardly to need emphasis that the power of the court to make a validation order must not be exercised in a way which undermines the essential purpose of s.99, namely to preserve the status quo pending resolution of the petition. Any assessment of an application for a validation order must always have, at the forefront of consideration, the need not to impede, undermine or preclude fulfilment of that purpose.

21 The judge was led by the company to take a far more limited view of the purpose of s.99. It had submitted that the purpose of s.99 was to prevent shareholders from evading liability by transferring their shares to a man of straw after winding up has commenced. The judge appeared to accept that submission. The company has persisted in that submission in this appeal. The judge said (2019 (2) CILR 734, at para. 129):

> "I also accept the company's submission that the transfer of legal title from a shareholder to HKSCC is as nominee and does not run afoul of the rationale of s.99, since the shares of the definitive shareholders are fully paid-up."

22 Undoubtedly, there is authority that s.99 did have that purpose in relation to calls on a shareholder in respect of partly paid up shares (see *e.g. Rudge* v. *Bowman* (10)). But the days of partly paid up shares are long gone. The purpose of s.99 cannot be so confined. The statutory analogue in the United Kingdom has been re-enacted many times (in 1908, 1929, 1984 and 1985), into a period long after the days of partly paid up shares. Moreover, the section has application to all kinds of compulsory winding

up whether on the grounds of insolvency or on just and equitable grounds, and, accordingly, whether the company is solvent or not.

23 The judge was led into a fundamental error in relation to the purpose of s.99. The transfer of legal title from a shareholder to HKSCC fell squarely within s.99; a court ought only to have made a validation order in respect of such a transaction in circumstances which assisted in preserving the status quo and which did not frustrate the purpose of s.99. The question then arises as to the principles the judge ought to have applied, consistent with that purpose.

The principles applicable to a validation order

24 The principles which apply were disputed by the parties to the instant appeal. The judge based her decision on what Slade, J. himself called "broad guidelines" in *In re Burton & Deakin Ltd.* (2). In that case, the company was trading in the business of buying and selling new and second hand cars. Faced with the reluctance of its finance company to continue to finance the supply of new cars, the company sought an alternative source of borrowing and to obtain a validation order to protect itself from the operation of s.227 in respect of a proposed deed of assignment in favour of the new finance company and the discharge of the remaining indebtedness to the former finance company. It asserted that the payments were to be made in the ordinary course of business ([1977] 1 W.L.R. at 393–394). To this proposal objection was made on the basis that it was a radical change in the company's course of business which would have a deleterious effect (*ibid.*, at 395). The precise reasons for this challenge need not detain us, but it led to an argument relating to the burden of proof in circumstances where Slade, J. thought the evidence was such that he could not decide the case "firmly" either way (*ibid.*, at 395).

25 Slade, J. accepted that where a company was insolvent, in order to protect the creditors, careful scrutiny of the proposed disposition was needed (*ibid.*, at 396), following the approach of Buckley, J. in *In re A.I. Levy (Holdings) Ltd.* (1) ([1964] Ch. at 24). But he drew a significant distinction between an insolvent and a solvent company. Where the company was solvent, he said there was no onus on the directors to justify the proposed transactions; on the contrary, the onus was on those who opposed validation: a court would normally sanction the disposition unless "compelling evidence" was adduced by the contributory who opposed the proposal. Mangatal, J. relied on the following passage (quoted at 2019 (2) CILR 734, at para. 121):

> "As Mr. Stubbs pointed out, the responsibility of managing the business of the company is entrusted in its articles of association to its directors. At least so long as a winding up petition has not been presented, the court will not generally, save in the case of proven bad

faith or other exceptional circumstances, interfere with the exercise of the discretion conferred on the directors by a company's articles of association at the instance of a shareholder. Thus, if before the presentation of a petition a shareholder were to come to the court in an attempt to restrain a particular disposition of the company's property contemplated by the board of directors and falling within their powers, he would not generally succeed, unless he could prove bad faith or other exceptional circumstances. He would not be able, merely by adducing prima facie grounds for criticizing the wisdom or beneficial nature of a particular transaction, to place upon the company or its board of directors the onus of justifying the proposed disposition by detailed evidence.

I can see no good reason why the rights of interference by a shareholder vis-à-vis the company or its directors should, in this kind of situation, for practical purposes be drastically improved during the interim period, merely because he happens to have presented a winding up petition which is not demurrable and which has not yet been heard. The interim period may be quite a long one. In the present case, from what I have been told, it looks like between three and six months. In a case such as the present, the court, at the time when the application under section 227 comes before it generally has not sufficient evidential material to enable it properly to form even a prima facie view as to whether the petition itself is ultimately likely to succeed or fail. It must therefore necessarily assume that the petition is at least as likely to fail as it is to succeed. Indeed, in the case of many contributories' petitions—of which this is one—the primary relief sought by the petitioners is an order under section 210 that other persons be ordered to purchase their shares at a stated price, a winding up order being sought only as a second alternative—so that, if the primary relief were granted, the petitioner would in any event have had no interest in the intended dispositions at all.

Taking all these considerations into account and in the absence of any authority demonstrating the contrary, I thus reach these conclusions on the question of principle raised by the present application. If on an application under section 227 relating to a solvent company, (a) evidence is placed before the court showing that the directors consider that a particular disposition, falling within their powers under the company's constitution, is necessary or expedient in the interests of the company, and (b) the reasons given for this opinion are reasons which the court considers that an intelligent and honest man could reasonably hold, it will in the exercise of its discretion normally sanction the disposition, notwithstanding the opposition of a contributory, unless the contributory adduces compelling evidence

proving that the disposition is in fact likely to injure the company. A fortiori in my judgment the court will be inclined to exercise its discretion in this manner in a case such as the present, where the primary relief sought by the petition is an order under section 210 that the other shareholders be ordered to purchase the shares at a stated price.

While I have attempted to formulate these statements of principle so as to explain the basis upon which I decide this particular case, I should nevertheless make it clear that they are intended merely as broad guidelines. No limits are placed by the sections on the court's discretion to grant or refuse an application under section 227, and such a discretion will of course be exercised in every instance having regard to the particular circumstances of the case."

26 Mangatal, J. (*ibid.*, at paras. 123–124) then invoked the decision of Henderson, J. in the Grand Court in *In re Fortuna Dev. Corp.* (6), which followed *In re Burton* (2). In that case the company sought a validation order permitting it to engage in a major refinancing to relieve its principal of his obligations under a personal guarantee. Henderson, J., at the first hearing, adopted Slade, J.'s distinction between an insolvent and solvent company (2004–05 CILR 533, at para. 3) and stated that the passage cited above accurately stated the law in the Cayman Islands (*ibid.*, at para. 4). Henderson, J. continued, in passages cited by Mangatal, J. (*ibid.*, at para. 5):

"5 Thus, there are four elements which must be established before an applicant is entitled to a validation order. First, the proposed disposition must appear to be within the powers of the directors. There is no dispute about that here. Secondly, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company. There is no dispute here that the directors do have that belief. Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold."

After considering further evidence at a later hearing, Henderson, J. continued (*ibid.*, at para. 16):

"16 I am not called upon here to answer the question 'Is this in the best interests of the company?' or even 'Is this a reasonable decision?' The question is a narrow one. Might an intelligent and honest director acting reasonably come to such a conclusion? I find for the reasons given in Ms. Tsien's affidavit that he or she might. The

decision has been demonstrated to fall within the realm of reasonableness. The applicant will therefore be granted a validation order."

27 In two further passages, Mangatal, J. emphasized the approach she adopted in reliance on those two cases (2019 (2) CILR 734, at para. 126):

"One of the principles that I derive from the decision in *Fortuna* . . . is that the type of solid evidence that the court needs to see must depend upon the nature and type of transaction in respect of which validation is sought. As *Burton & Deakin* . . . reminds, the articles of association of a company entrust the management of the business of a company to its directors. Thus, upon a winding-up petition being filed in relation to a solvent company—

'it is not only normal but necessary for a company to obtain a validation order and that it would only be if the shareholder has specific concerns which he can support by credible evidence that he should actively contest any part of the application.'

See the statement of Harris, J. in the *Emagist* Hong Kong decision referred to in para. 107 above ([2012] 5 HKLRD 703, at para. 7)."

She continued later (*ibid.*, at paras. 130–131):

"130 As *Burton & Deakin* reminds, in the case of a solvent company, a shareholder should not, merely because he happens to have presented a winding-up petition which is not demurrable and which has not yet been heard, get some greatly improved position from which to attack the decisions taken by the directors of the company which they say are taken in good faith and in the best interests of the company. The consideration discussed in *Cybervest* . . . does not arise here, or at least at this stage since the court is not in a position at this stage to say and has not sufficient evidential material to enable it properly to form even a *prima facie* view as to whether the petition itself is ultimately likely to succeed or fail. I must therefore necessarily assume that the petition is at least as likely to fail as it is to succeed—*Burton & Deakin.* In *Cybervest*, the facts were, in my view, distinguishable—see paras. 32–34 of the judgment. In the instant case, I am not, on the state of the evidence before me, able to say that irregularities in the conduct of the company have been 'shown.'

131 Also as contemplated in *Burton & Deakin*, the interim period may be quite a long one. Between the different interlocutory applications that are pending in the Financial Services Division and the pending application to the Privy Council for special leave, this petition is likely to take a long time to come on for hearing."

28 The judge's reference to *Re Cybervest Fund* (5) was to observations made by Smellie, C.J. in a case where a winding up had been sought on just and equitable grounds because there was alleged to have been convoluted dealings with the assets of the fund about which the manager had failed to consult the shareholders. The Chief Justice refused to validate management fees said to be paid in the ordinary course of business. After citing Henderson, J. in *Fortuna* (6) (2004–05 CILR 533, at para. 5), he continued (2006 CILR 80, at para. 29):

> "There is another consideration to add to this list, in light of the concerns raised in this matter, although arguably it is subsumed within the third and fourth elements. This would be whether irregularities in the conduct of the affairs of the company can be shown, even if the company is clearly solvent, as is alleged here."

29 The Chief Justice then referred to *In re a Company (007130 of 1998*) (4) in support of the proposition that even in the case of a solvent company the conduct of the company's business should not be at the expense of its members (2006 CILR 80, at para. 30). But his approach was strongly influenced by Henderson, J.'s fourth principle. He did not consider that "the directors could properly hold" that the opposed payment of fees was "necessary or expedient in the interests of the company at that time" and rejected the validation order (*ibid.*, at para. 33).

30 *In re a Company (No. 007130 of 1998)* (4) provides, as you would expect, an important explanation of the approach adopted by Slade, J. in *Burton* (2) but also sounds a significant note of caution in cases where the opposed transactions were not in the ordinary course of business. Mervyn Davies, J. drew attention to Buckley, J.'s identification in *Re A.I. Levy (Holdings) Ltd.* (1) ([1964] Ch. at 24) of the purpose of validation orders, founded on Lord Cairns' judgment in *In re Wiltshire* (12) (at 59):

> "[they are] designed to preserve the value of the assets of a company for the people interested in the assets notwithstanding the pendency of winding up proceedings in order that the company might not be unduly hampered in carrying out transactions which might be for the benefit of those interested in the value of its assets."

31 Mervyn Davies, J. pointed out that in the case of solvent companies, when both petitioner and respondent are anxious to preserve the worth of their shares, the application for a validation order is usually unopposed (*ibid.*, at 59). He cited Slade, J. in *Re Burton* and continued (*ibid.*, at 60):

> "As I see it, that case brings out the point that on a s.522 application of that kind, great weight is to be attached to the wishes of the directors of the company since the mere presentation of a petition should not have the effect of allowing a shareholder to interfere with the directors' management of the company's business. But beyond

> that I do not see that the Burton case affords much guidance here. I say that because in Burton (i) there was no objection to an order validating transactions in the ordinary course of business; (ii) the application (as opposed) concerned specific transactions and (iii) the company was plainly solvent . . . None of those three features appears in the case before me."

32 Mervyn Davies, J. then commented (*ibid.*, at 61) that "s.522 consents are in all cases to be given with some caution" and concluded that continued trading would not be for the benefit of the shareholders and might well work to their detriment.

33 *In re a Company* (4) is of importance in the instant appeal in three respects. First, in the distinction drawn between cases where it is plain that the proposed dispositions sought to be validated are in the ordinary course of business. It was beyond question that *Burton* (2) concerned a disposition proposed for the purposes of the ordinary course of business of that motor trader. No other justification had been advanced. That the proposal was to enable the company to continue in business during the twilight period was not disputed by the opposition.

34 The second significant feature of Mervyn Davies, J.'s judgment lies in his reminder that the beliefs and wishes of the directors, even if advanced in good faith and without improper motives, and even if the proposal is made for the purposes of the ordinary course of business, although to be given great weight are not dispositive.

35 Third, all applications need to be approached with some caution, whether in the ordinary course of business or not and whether the company is solvent or not.

36 Slade, J.'s guidelines in *Burton* paraphrase the test adopted, in the alternative, by Pennycuick, J. in *Charterbridge Corp. Ltd.* v. *Lloyds Bank* (3), in which it was alleged that a legal charge had been created for purposes outside the scope of the company's business, and was *ultra vires.* The state of mind of the directors was, so Pennycuick, J. held, irrelevant on the issue of *ultra vires* ([1970] 1 Ch. at 74). But he took an alternative approach in case he was wrong in his view of the law (*ibid.*, at 74):

> "The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company."

37 That Pennycuick, J. was not wrong as to the irrelevance of the directors' state of mind, where a transaction is said to be *ultra vires*, is confirmed by Lord Wilberforce in *Howard Smith Ltd.* v. *Ampol Petroleum* (8). A shareholder company challenged the issue of shares to a rival in a

takeover battle on the basis that the issue was to reduce the proportion of its shareholding. The directors contended they were acting in good faith for the purposes of raising capital in the target company. The Board decided that it was unconstitutional for directors to use their fiduciary powers over the shares in a company purely for the purpose of destroying an existing majority, or creating a new majority which did not exist ([1974] A.C. at 837). Lord Wilberforce continued (*ibid.*, at 838):

> "That this is the position in law was in effect recognised by the majority directors themselves when they attempted to justify the issue as made primarily in order to obtain much needed capital for the company. And once this primary purpose was rejected, as it was by Street, J., there is nothing legitimate left as a basis for their action, except honest behaviour. That is, in itself, not enough."

38 Both *Charterbridge* and *Howard Smith*, in admittedly different contexts, although the latter may subsequently be relevant to issues in the petition, provide an important reminder that there will be cases where the honest belief of the directors is irrelevant to the propriety of a transaction. In an application for a validation order, where the purpose of the proposed transaction is impugned, the motive of the directors is far from determinative. If the proposed transaction undermines the purposes of s.99 and of the power to make validation orders, then the directors' belief or good faith may be irrelevant.

39 Before analysing the principles which may be drawn from these authorities, I should mention one further Cayman Islands authority to which attention was drawn: *In re Torchlight Fund LP* (11). In that case, a validation order was sought in respect of payments in the ordinary course of the business of a partnership. This court (Martin, Newman and Morrison, JJ.A.) adopted *Burton* (2), *Fortuna* (6) and *Cybervest* (5) (2018 (1) CILR 290, at paras. 16–22), but there was no dispute as to the test (at para. 16) either in this court or below and the judge's exercise of his discretion to make the order was not challenged on the basis that he had applied the incorrect legal test (at para. 68). The opposition was not on the basis that the payments were outside the ordinary course of business but that they were inadequately explained or not legally due (at para. 70).

Principles to be drawn from the authorities

40 The starting point for the identification of the principles a court should apply in considering whether to exercise its power to make a validation order must be the legal source of that power, s.99. Two features are fundamental. First, that the power to make such an order is contained within that section itself. It is, therefore, part and parcel of the means by which the purpose of the section is to be achieved. That purpose is, as I have already identified, the maintenance of the status quo between

presentation and resolution of the winding-up petition, so as to render effective the section's retrospective avoidance function. Second, the section applies to all companies, the subject of a compulsory winding up, whether the company is solvent or not, whether it is a trading company or undertakes some other business, and whether the winding up is on the grounds of insolvency or on just and equitable grounds.

41 It follows, in my view, that as a matter of principle, a court, in every case, must satisfy itself that any order it makes does not undermine or frustrate the maintenance of the status quo pending resolution of the petition and that, on the contrary, the order should be made in furtherance of that objective. This principle should not alter according to the particular circumstance of the case. Of course, its application will vary from case to case.

42 I stress what might be called this underlying principle because there was considerable debate as to whether the approach identified in cases such as *Burton* (2) and *Fortuna* (6) was, as submitted by the appellant, to be confined to cases where the proposals were advanced as being to maintain the ordinary course of the company's business. The respondent contended they were not to be so limited. I suggest it is better to regard the underlying principle as applicable to all cases. But, the court's assessment as to whether the proposal will advance or undermine the purpose for which the power is conferred will vary according to whether it is sought in relation to the ordinary course of business or not.

43 Thus, in cases such as *Burton*, *Fortuna* and *Torchlight* (11), where there can have been no doubt that the proposals were to further the ordinary course of business, the court might need little persuasion that they assisted in maintaining the business pending resolution of the winding up, provided the interests of those concerned with the assets of the company were considered. Such proposals were consistent with s.99. But that is not to recognize a distinction in principle between solvent and insolvent companies. It is, rather, that the application of the underlying principle I have sought to identify will vary according to the relevant circumstances of the company and the nature of its proposed transactions, as Slade, J. himself seems to have acknowledged.

44 It is dangerous to assume that a court may be relieved of the responsibility of careful scrutiny and caution merely because the company is solvent. It may be disputed whether what is proposed is in the ordinary course of business or is in the best interests of the company during the period between presentation and resolution of the petition. It may be contended that the directors themselves are making the proposals out of dishonest or improper motives or that the proposals themselves will run the risk of undermining or frustrating the purpose of the section. In such cases, a court can make no assumptions as to the propriety of the

proposals and will need to be satisfied that they are consistent with the purposes of the section and for the benefit of the company and those interested in the value of its assets.

45 The real danger I detect in the approach in *Burton* (2) and *Fortuna* (6) is that it focuses on the burden of proof and creates a presumption in favour of the belief of the directors as to the propriety of their proposals. Cases will rarely turn on the burden of proof; there is no presumption. In every case, those seeking a validation order must be able to satisfy the court that what is proposed will not undermine the avoidance function of s.99, that it will not impede or frustrate the unwinding of transactions after the presentation of the petition but will maintain the status quo. This is so whether the company is solvent or insolvent, and whether the proposal is made in the ordinary course of business or not. Where the proposal is made for the purposes of the ordinary course of business, the court will more readily take the view that there is no unacceptable risk to the maintenance of the status quo. In such a case the views of the directors as to whether the proposals are for the benefit of the company will plainly be relevant even though not dispositive.

46 For these reasons I adopt the submission of Mr. Lowe, Q.C. in his written argument:

> "Just as in the case of a creditors' petition validation will not be allowed to undermine the purpose of a winding up (i.e. *pari passu* distribution), in a just and equitable petition a validation order should not undermine the objective of stopping or reversing oppressive conduct."

47 Careful scrutiny is needed not just to protect creditors in an insolvency petition but also contributories at a stage when no one can say whether the petition in respect of a solvent company will succeed or not. Validation orders should only be made if they are consistent with the purposes of s.99 and of the power to make such orders.

The judge's approach

48 The foundations of the judge's conclusion are (2019 (2) CILR 723, at paras. 127–129):

> "127 In my judgment, it is quite important that it is the SEHK that has sought for the company to make this application. This is one of the reasons that the company advanced for making this application, along with requests from the definitive shareholders regarding the deposit of their physical shares in CCASS. The company just as recently as October 31st, 2018 was able to have trading in its shares resumed on the SEHK, which both the company and Tianrui consider

a positive development. The company also advanced that the illiquidity of the company's shares has had a significant adverse effect on the company. This is because the illiquidity affects the company's share price adversely. In addition, it maintains that the illiquidity will make it difficult for the company to raise significant capital from the equity markets in the future.

128 In my judgment there is an abundance of evidence and reasons (para. 127 above) that the company has provided, which, viewed objectively, indicate that the directors consider that it is necessary and expedient to seek the validation order. In my judgment, the reasons are reasons which an intelligent and honest director could reasonably hold in good faith and obviously have a clear commercial basis. It is rational as well as reasonable that the company would wish to bring down the illiquidity of its shares, and the company being a holding company, would have good reasons in wanting to reduce difficulties, such as illiquidity, lying in the way of its raising required capital in the equity markets in the future. In my view, it is not possible or necessary for the court at this stage to delve deeper into what are complicated questions as to precisely what are the causes of this illiquidity; the fact of the matter is that the directors have approached the court to validate a type of transaction which in my view clears the bar and ought to be validated.

129 The evidence of Tianrui, including Mr. Birkett, is as to the facility with which changes in beneficial ownership of the shares can be effected and the anonymity of the new shareholders and 'the cloak which CCASS validation would give to future collusive dealings in the shares.' However, it is common ground by the experts on both sides that CCASS is a computerized system, which handles the process of matching buyers and sellers, and the definitive shareholders cannot choose who their shares are sold to. It is also common ground that s.99 does not affect the ability of shareholders to deal with the beneficial interest in their shares. The shareholders could therefore deal with the beneficial interest off market. As a matter of law, shareholders who have not deposited their shares in CCASS may still sell the beneficial interest in their shares off market. I also accept the company's submission that the transfer of legal title from a shareholder to HKSCC is as nominee and does not run afoul of the rationale of s.99, since the shares of the definitive shareholders are fully paid-up. The burden is on Tianrui to demonstrate and unless it adduces 'compelling evidence proving that the disposition is in fact likely to injure the *company*' [Emphasis added.] (*Burton & Deakin* . . . ([1977] 1 W.L.R. at 397)), the court will be inclined to exercise its discretion provided the evidence from the company fulfills the

> requirements (the bar not being a high one). Tianrui has not discharged the burden. Its allegations about being unable to trace beneficial ownership relate to its alleged claim which of course, at this point, remains a matter of assertions. In my judgment, Tianrui has not provided any compelling evidence that the transfers to allow for trading on CCASS is detrimental to the company as a whole."

49 In reliance on *Burton* (2) and *Fortuna* (6), the judge was led to regard herself as free from any requirement to subject the application to close scrutiny, whilst imposing the burden on the appellant to adduce compelling evidence. This approach dictated her view of the evidence and arguments advanced by the appellants and led to her adopting, rather than questioning, the case advanced by the respondent. In addition, by virtue of her incorrect identification of the purpose of s.99, she never even considered whether the proposal to deposit shares with the HKSCC would impede or undermine the purposes of the section.

Tianrui's challenge to validation: the effect of s.45 of the Hong Kong Securities and Futures Ordinance

50 As I have previously indicated, the respondent's case for validation was that the share transfers to HKSCC, as nominees, for depositing into CCASS was to remedy the illiquidity of its shares. The eighteen definitive shareholders had informed the company that they wished to do so to counter the adverse effects of illiquidity (see the company's argument recorded at 2019 (2) CILR 734, paras. 48–57, and paras. 127–128 cited above). The argument as to the ill effects on illiquidity was based on the evidence of an expert, Philippe Espinasse. He described the average daily trading volume in proportion to the company's market capitalization as unreasonably illiquid; this had an adverse effect on share price and made it difficult for the company to raise significant capital.

51 The application was supported by an affirmation from Wu Ling-Ling ("Ms. Wu") (the fourth affirmation). She asserts that the definitive shareholders are at a disadvantage to those who have deposited their shares prior to the presentation of the petition because they cannot trade through the Exchange (*ibid.*, at para. 93), and are left with dealing in the beneficial interests in their shares off-market (para. 95). She records that the company announced on the Hong Kong Exchange that they were applying for a validation order to sanction the deposit of share certificates into CCASS and invited applications from shareholders (para. 102). In the six days following, the eighteen definitive shareholders informed the company they wished to do so and, for that purpose, to transfer the legal title to HKSCC Nominees Ltd. Their shares represent 1,870,323,160 shares being 42.69% of the company's share capital (para. 104). She identifies those shareholders and their holdings in Schedule 1.

52 As is apparent from the passages in the judgment I have cited above, the judge thought it was reasonable for the company to wish to reduce the illiquidity of its shares should they wish to raise capital in the future (*ibid.*, at para. 128). She took the view that it was neither possible nor necessary to delve deeper into the causes of illiquidity. In short, she accepted the evidence of Ms. Wu without any critical analysis, in the absence of compelling evidence from Tianrui.

53 By adopting that approach, it seems to me that the judge wrongly overlooked one of the essential features of Tianrui's opposition. The opposition was based on two distinct arguments. One of the arguments was that validation would enable CNBM and ACC and their related parties to play a "shell game" with beneficial ownership of their shares and cloak future collusive dealings, an argument recorded at para. 94. The judge answered that argument by concluding that under the CCASS system the definitive shareholders could not choose to whom the shares were sold and, in any event, they could deal with the beneficial interest in their shares off market (para. 129). Tianrui contends that investigation of the true beneficial ownership of the shares will be impeded, but that is not material to the nub of this appeal. For the purposes of this appeal, it is unnecessary to consider this aspect of the dispute. The argument relating to the shell game was by no means the only argument.

54 This appeal is concerned with the distinct argument relating to s.99. As the judge herself had earlier recorded, Tianrui contended that the transfer of shares to the CCASS system would cause "serious and irreversible consequences" and would prejudice the outcome of the petition because it would be impossible to unwind the "improper and dilutive share issue if the petition is upheld" (*ibid.*, at paras. 85–86). This argument had been based, as the judge recorded, on the evidence of an expert, Mr. Birkett, adduced on behalf of Tianrui and set out in the judgment (at para. 93). Section 45 of the Securities and Futures Ordinance provides (quoted at para. 93):

"45. Proceedings of recognized clearing house take precedence over law of insolvency:

(1) None of the following shall be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to distribution of the assets of a person on insolvency, bankruptcy or winding up, or on the appointment of a receiver over any assets of a person—

(a) a market contract;

(b) the rules of a recognized clearing house relating to the settlement of a market contract;

(c) any proceedings or other action taken under the rules of

a recognized clearing house relating to the settlement of a market contract;

(d) a market change;

(e) the provision of market capital;

(f) the default rules of a recognized clearing house, or

(g) any default proceedings.

(2) The powers of a relevant office-holder in his capacity as such, and the powers of a court acting under the law of insolvency, shall not be exercised in such a way as to prevent or interfere with—

(a) the settlement in accordance with the rules of a recognized clearing house of a market contract; or

(b) any default proceedings.

(3) Subsection (2) shall not operate to prevent a relevant office-holder from recovering an amount under section 51 after the completion of a matter referred to in paragraph (a) or (b) of that subsection."

55 Mr. Birkett took the view that this section, through the operation of s.54 of the SFO, removed the proposed transactions from the scope of s.99 of the Cayman Companies Law and would place the proposed deposits into CCASS outside the power of a liquidator. Mr. Birkett was of the opinion that the effect of s.45 was to override the Hong Kong law of winding up and insolvency in relation to certain transactions on a recognized clearing house such as HKSCC and by virtue of s.54 of the Ordinance this applied to non-Hong Kong winding up and insolvency statutes (see his evidence recorded, *ibid.*, at para. 93). He concluded:

"51. There are strong statutory finality protections in place for settlement of trades in CCASS. This structure has been established to provide certainty and reduce risk for market participants, and is based on the fungibility of an issuer's securities of the same class, and the interposition of a central counterparty in the clearing mechanics. Together, these elements do appear to be effective in preventing a Participant or issuer, or a liquidator or either of them, from reopening or reversing a sale or purchase of the issuer's shares through CCASS once it has been settled."

56 On the basis of this evidence, Tianrui contended that the CCASS share deposits would be irreversible; the transactions would be beyond the reach of the liquidators, in the event of a winding up (arguments recorded, *ibid.*, at paras. 88–89).

57 The company disputes that interpretation of the Hong Kong Ordinance but produced no expert evidence to the contrary. Although the judge, in her "Discussion and analysis," referred to the "shell game" argument and to Mr. Birkett's evidence in relation to changes in beneficial ownership, she made no reference to this second argument at all. The respondent contended that it was a new argument. But it is plain from both written and oral arguments before the judge, and the argument recorded by the judge, that that is not so. It was a crucial argument in relation to the compatibility of the respondent's application for validation with the purposes of s.99. The consequence of her mistaken view of the purposes of s.99 was that this vital argument received no consideration by the judge.

58 Further, led as she was to the view that the bar which the respondent had to clear "was not a high one" (*ibid.*, at paras. 128–129), and that it was for Tianrui to provide compelling evidence, she neither questioned nor scrutinized the respondent's case for validation.

59 Yet that case required careful analysis as to the reason why the respondent was seeking to deposit the definitive shareholders' shares into CCASS and, above all, consideration as to whether validating such a transaction would impede or frustrate the purpose of s.99, as Tianrui contended.

Examination of the company's proposal

60 Since the judge was deflected from the necessity to scrutinize the company's proposal, this court should undertake that task. The judge did not have the good fortune of the Hon. John Martin, J.A.'s appraisal of the petition and the nature of case advanced by Tianrui, to which I have referred above.

61 The deposit of shares to CCASS was alleged by the appellant to be an important further stage in the process of diluting its shareholding and the conspiracy to cause it damage. It should never have been forgotten that the proposed transactions in respect of which validation was sought were themselves the subject matter of the petition. Validation would have the effect of preventing the successive conversion of the bonds into shares, which took place after presentation of the petition, being unwound. It would make it impossible to reverse the issue of shares and, as Tianrui put it, "risk stymying what a Court, the liquidator or the appellant might legitimately do."

62 Faced with that opposition, the obvious question which arises is as to why the company sought, for its benefit, to deposit the definitive shareholders' shares identified by Ms. Wu. Ms. Wu's schedule identifies four shareholders who had been holders of the convertible bonds. The shares had been issued following an EGM on October 30th, 2018 (CICA

decision, 2019 (1) CILR 481, at para. 7). The names of eleven others on the list speak of a relationship with ACC. No explanation has been given as to why any of those shareholders wanted to deposit their shares into CCASS. It seems unlikely they would wish to sell those shares, the acquisition of which was an integral part of the process whereby Tianrui's percentage was diminished and ACC and CNBM sought to gain control, and of the alleged conspiracy.

63 Moreover, Ms. Wu is not only director of the company but executive vice president and chief financial officer of ACC. She would have been in a position to explain the reason why those shareholders on her list which bore names suggesting association with ACC were concerned with illiquidity at that time when, as I have said, it seems so unlikely that they would want to divest themselves of the shares.

64 Nor does the suggestion that illiquidity would cause problems, should the company wish to raise capital, bear examination. There was no evidence as to why the company which is a holding company, the parent of operating subsidiaries, wanted to raise finance. In any event raising finance would itself need validation to avoid the risk of being unwound.

65 Further, the timing of the request appears of significance. Before the suspension of listing most of the company's shares had not been deposited on CCASS. ACC and CNBM, who became shareholders before the listing was suspended, had not, at that time, sought to deposit all their shares. They could have done so during the period after Mangatal, J. struck out the petition on October 19th, 2018 and before the Court of Appeal's decision was given on January 16th, 2019 restoring the petition. Their asserted concerns as to illiquidity did not prompt them to do so.

66 In the absence of any response, I am driven to the conclusion that there was no reasonable explanation other than that proffered by Tianrui, namely that the deposit was intended to have the effect described by Mr. Birkett and to baulk the unwinding of those transactions should the petition be successful.

67 The fact that prior to deposit CCASS required validation of the transfer of legal title to HKSCC was regarded by the judge as "quite important" and a reason for making the application. On the contrary, it does not seem to me to provide any explanation for the shareholders' wish to deposit the shares. If there was a reasonable explanation for such deposits, then it was true that validation was needed, but that has no bearing on examination of the logically prior question as to why the deposit was requested or needed.

68 There was a dispute between the parties as to whether the deposit was in the ordinary course of the company's business. Whether it was or was not did not preclude the need for acceptable answers to the obvious

questions I have posed nor as to why the transactions should be validated, notwithstanding the effect they would have in frustrating the avoidance provision on s.99.

69 I should, however, record my view that, though it does not appear to have been argued to the contrary below, as the judge noted when giving leave to appeal, the transactions proposed were not made in the ordinary course of business: the company's business is in holding interests in subsidiaries, it is not in the business of trading in its own shares.

70 Nor do I accept the company's repeated complaint that Tianrui is seeking to impose an injunction on the deposit without fulfilling the stringent requirements that would be necessary for such an application, particularly a cross-undertaking in damages. Section 99 and the power to make a validation order have the purpose and effect I have identified. Tianrui had the right to oppose the making of the order and s.99 requires the respondent to make its application good. Tianrui had no obligation or need to seek an injunction, when the merits of the application were to be considered under s.99.

71 For those reasons, I conclude that the judge made material errors of law leading her to a failure to consider relevant evidence and to make necessary assessments of that evidence. Accordingly, her exercise of evaluative judgment cannot stand (see *e.g. Henderson* v. *Foxworth Invs. Ltd.* (7) ([2014] 1 W.L.R. 2600, at para. 67)).

72 At the end of yet another stage in this bitterly fought dispute, there remains the fact that no answer has been advanced as to why the court, in response to the application, should make an order which runs the risk of impeding or obstructing the unwinding effect of s.99, in relation to transactions which are the subject-matter of the petition. In those circumstances I would reverse the order made by the judge and refuse to make a validation order in respect of the proposed CCASS deposit.

73 **FIELD, J.A.:** I agree.

74 **RIX, J.A.:** I also agree.

Order accordingly.

Attorneys: *Ogier* for the appellant; *Maples* for the respondent.