SELBORNE CHAMBERS

# Lessons from *Byers v Saudi National Bank* [2023] UKSC 51



On 20 December 2023 the Supreme Court delivered an early Christmas present to the Respondent Bank and to those uncertain as to the precise reach of claims for knowing receipt of the proceeds of breach of trust.

And in a welcome approach, whilst Lords Briggs and Burrows delivered their own lengthy judgments (reaching the same conclusion by slightly different routes) Lord Hodge delivered a judgment of 8 paragraphs setting out what was a summary of "what has been agreed as determining the outcome of this appeal" with which Lords Leggatt and Stephens agreed. Thus there is a summary of 6 principles which determined the appeal (and which set out certain issues for the first time at Supreme Court level), and for those wishing to delve further there are a further 190 paragraphs to digest.

The appeal concerned whether a claim in knowing receipt could be brought in respect of any period after the claimant's proprietary equitable interest in the relevant property had been extinguished or overridden. In the case under consideration, although the property had been transferred to the defendant bank in breach of trust and in circumstances in which the bank should have realised that this was occurring. However, the transfer was subject to Saudi Arabian Law which does not recognise a distinction between legal and beneficial ownership and by that Law the transfer was effective to divest the transferee company (now being represented by its liquidator) of any interest in the property transferred. But although the particular reason for the loss of the proprietary equitable interest was the impact of Saudi Arabian law, the resolution of the issue will apply to the more common reasons for that loss.

THE JUDGMENT CAN BE ACCESSED HERE → https://www.bailii.org/uk/cases/UKSC/2023/51.html

The Court decided that:

1. once the claimant's equitable proprietary interest in the property comes to an end, then there is no basis on which to bring a claim for knowing receipt. This is true even if a transferee who acquires title in good faith for value subsequently becomes aware of the original breach of trust – the proprietary interest is not revived;
2. the same is true if there is a subsequent transfer to a person who is aware of the original breach of trust;
3. once the equitable proprietary interest has been defeated (defeating any proprietary claim) there can be no personal claim (ie for damages rather than return of the property). Allowing the latter to survive when the former has perished would be "logically inconsistent" given the close links between the 2 claims, and
4. this outcome reflects the fundamental difference between the purely proprietary remedy of a claim in knowing receipt and the claim for "dishonest assistance", which renders the defendant liable as an accessory to the trustee's liability.

With regard to 2 above the Court pointed out that if even the property was transferred to the defaulting trustee, the liability of that trustee would not be based upon knowing receipt of the trust property, but because the trustee's re-acquisition of the property is to be taken as making good the breach in transferring that property in the first place. Whilst this is an undoubted legal fiction, the justice it achieves is equally undoubted.

What are not the subject of any of the points in Ld Hodge's judgment but are questions that may arise in similar cases are:

1. What are the "boundaries and content of the requirement to show what is now called "knowledge" necessary to trigger" liability?

Ld Briggs was clear that "notice" of what had occurred (or was occurring was not enough – "This much is inherent in the phrase "knowing receipt."" The first uncertainty was as to the role of "constructive knowledge" ; a second was as to whether the standard of knowledge "is a flexible requirement based upon the concept of unconscionability, or whether it is a single fixed knowledge requirement which applies in every case."

The first issue did not arise in the case before the Court because the defendant had been debarred from contesting the issue for failure to provide disclosure and Lds Briggs and Burrows declined to engage with it.

As for the second, Ld Briggs [82] decided that "so flexible a test of the requirement for knowledge" would bring about an "unruly and unpredictable test for liability" and Ld Burrows [101], whilst considering that the point did not require a decision expressed the view that "terminology of "unconscionability" has unhelpfully obfuscated the answer" to the important question of whether knowledge (or constructive knowledge) is proved.

So, whilst the case is not binding authority on the point, the direction of travel in any future case seems clearly away from flexibility.

2. This was a case in which there was (what the Court described as) a traditional trust situation (where the legal and beneficial interests were distinct. Would the outcome be any different if there was no such distinction, such as where the property was held (legally and beneficially) by a company and mis-applied by a director?

Both Ld Briggs and Ld Burrows adopted the submission made by the Appellants (it appears after some interrogation from the Panel) that earlier CA decisions to this effect had been correct on the basis that there was no sufficient difference to merit any other approach [32] Ld Briggs; [188] Ld Burrows.

3. What is the scope for unjust enrichment to be subsumed into or to replace the cause of action in knowing receipt?

Although counsel on each side were united in not wishing the Court to explore this issue (unjust enrichment not having been pleaded) and in submitting that earlier cases in the House of Lords (in 1996) and the Privy Council (in 2017) emphasised the distinct differences between these causes of action. Lr Briggs [30] was entirely non-committal about whether that stance was right, stating merely that "This is not the occasion for that question to be further reviewed."

Ld Burrows [102] stated that "the relevance, if any, of unjust enrichment to knowing receipt is not a matter before us" but did (in what he headed "A footnote on unjust enrichment" [199-200] set out the basis upon which it was suggested that such a claim might be made. The enrichment would be the receipt of the trust property, at the expense of the beneficiary with the unjust factor being the breach of trust. He acknowledged that if this was a sufficient basis, then it would impose strict liability in place of liability based upon knowledge (subject to any change of position defence). He referred to the "powerfully" argued case that such a claim should lie alongside (but separate from) any claim in knowing receipt, whilst acknowledging the contrary view (both in academic works), but gave no hint of which position he would adopt if required to decide the issue.

Byers therefore provides welcome clarity on the issues within Lr Hodge's Judgment, some guidance on the first further issue, what would appear to be as good as binding precedent on the second further issue and a question left entirely open on the third.

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