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THE CONTINUING INTEREST OF KNOWING RECEIPT

IN *Byers v Saudi National Bank* [2023] UKSC 51, the Supreme Court clarified a basic point about liability for "knowing receipt" of trust property, or of property transferred in breach of fiduciary duty.

The claimant was a Cayman company now in liquidation. The defendant, the Saudi National Bank, was the successor in title of another Saudi Arabian financial institution, the Samba Financial Group ("Samba"), and "defendant" hereafter refers to both. Mr. Maan Al-Sanea held shares (the "Saudi shares") in five Saudi Arabian companies on trust for the claimant, under various trusts governed by Cayman Islands law, which was taken to be materially identical to English law. As the liquidation of the claimant was looming, Al-Sanea, in breach of trust, transferred the Saudi shares to the defendant to discharge debts that Al-Sanea owed to the defendant. For procedural reasons, the defendant was taken to have whatever knowledge is needed to establish liability for knowing receipt of trust property (at [33], [101], [106]). However, the governing law of the transfer of the shares to the defendant was Saudi Arabian law, which does not recognise any distinction between legal and equitable interests. The trial judge held that as a matter of Saudi law, the effect of the transfer was that the defendant became the only one holding rights in or in relation to the Saudi shares. It followed (at least as a matter of Saudi law) that the claimant had no equitable interest in those shares following the transfer.

The issue was whether the defendant was liable for "knowing receipt" of trust property. The "knowing" part was clearly present. The debated question was whether liability could attach even though, at the moment of receipt of the relevant rights (the Saudi shares) with the relevant knowledge, the rights ceased to be held in trust. The claimants' argument that it could was built entirely on the idea that the presence of the required level of knowledge was capable of making the defendant's receipt "unconscionable", within the test set out in *BCCI (Overseas) Ltd. v Akindele* [2001] Ch. 437, 455 (C.A.). This argument failed. The unanimous holding was that knowing receipt cannot make a person accountable as a constructive trustee in relation to their own unencumbered rights. On the contrary: one cannot be personally liable for knowing receipt of rights held in trust *unless* one held the relevant rights as a constructive trustee (although the converse does not follow).

This is not how the conclusion is expressed in the judgments in *Byers*. Judges are often constrained by the way a case is presented. The judgments say that "a claim in knowing receipt cannot succeed once the

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claimant's proprietary equitable interest in the property in question has been extinguished or overridden" (majority, at [1]); nor, if "the claimant's equitable interest has been overreached or overridden, so as to give the transferee a clean title" (Lord Briggs, at [43]); nor, if "if the defendant takes legal title to the asset unencumbered by equitable interests" (Lord Burrows, at [158]). It is easy to critique these formulations: do they imply that no one could take proceedings in knowing receipt in the context of a charitable trust, because no one ever has an equitable proprietary interest in such trust property? The decision should obviously not be read in that way. Such a claim could succeed, if brought by a proper enforcer, even in the absence of any proprietary interest in the enforcer or anyone else, on the basis that the defendant held the relevant rights as a trustee; if the requisite mind state were present, liability would follow.

The interrelation of the three judgments merits attention. Lord Hodge, in a short judgment with which Lords Leggatt and Stephens agreed, set out a series of propositions of law, including the one quoted above, upon which the court was unanimously agreed. He noted (at [8]) that Lord Briggs and Lord Burrows differed as to the nature of knowing receipt, and while he did not say that he agreed with Lord Briggs, he did say that he would prefer not to adopt Lord Burrows' view, while yet saying that the matter should not be considered decided. Thus the points on which Lord Briggs and Lord Burrows disagreed in their lengthy judgments are *obiter*. It was not necessary to decide exactly what kind or degree of knowledge is required for liability, but the unanimous rejection of the claimant's case founded on the pure "unconscionability" standard from *Akindele* suggests that while this word provides a way of expressing a liability conclusion with a word that is connected to the history of the Chancery, it is not useful as a legal test to be applied directly to the facts to determine liability (see also Lord Briggs, at [82]; Lord Burrows, at [101]).

The differences between the judgments of Lords Briggs and Burrows invite reflection on the nature of the trust. Traditionally the core of the trust is the trustee's obligation relating to the benefit of the rights held in trust, and the beneficial interest of a beneficiary is the benefit of that obligation. The law gives that interest a proprietary character inasmuch as the trustee's obligations are in a sense attached to the rights held in trust, so that transferees of those rights may be bound by that obligation. Not a good faith purchaser of a legal interest who lacks notice, of course; but any other transferee becomes a kind of trustee. It is sometimes said that such a trust does not arise unless and until the transferee has the relevant knowledge. But we know this is at least misleading, if not false, because

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if an innocent but donative transferee of trust property were to die or go bankrupt or make a subsequent donative transfer, the trust could be asserted against the estate, the trustee in bankruptcy, the subsequent transferee (see the discussion in M. J. Hafeez-Baig and J. English, *The Law of Tracing* (Alexandria, NSW 2021), 38–43). Rather, knowledge has the potential to make the recipient personally liable if they cannot produce the trust property.

Lord Briggs (at [42]) adopted a view of knowing receipt that has been proposed by several commentators, in different versions. This view makes knowing receipt a liability for breach of (constructive) trust. There could be no liability in the instant case, because the defendant never held the shares on trust. In response to counsel's concern that this would constitute a "money-launderer's charter", Lord Briggs pointed (at [41]) to the law on dishonest assistance, which was not relied upon in the case, but which could have made the defendant liable (see also Lord Burrows, at [173], referring also to the criminal law). This approach goes in two phases: *primary* "restorative and custodial" duties are imposed, not through consent or via wrongdoing, upon the defendant. These primary duties can be directly enforced if the defendant still has the property or its proceeds; that is the proprietary claim. If not, then in Lord Briggs' second phase, and just as (traditionally) in the case of express trustees, the primary duty can be enforced by substitution in money (*Campbell v Hogg* [1930] 3 D.L.R. 673 (P.C.)). Another reading of the second phase is that a breach of these primary duties of (constructive) trusteeship gives rise to a personal liability to make compensation.

Lord Burrows's approach was different in seeing knowing receipt not as mediated through the anterior imposition of duties of trusteeship but rather as a one-stage liability for wrongful interference with the claimant's pre-existing rights: an equitable analogue to the tort of conversion. In this, he relied on the present writer's "W(h)ither knowing receipt?" (1998) 114 L.Q.R. 394, prompting the response that "[t]he matter does not appear to me now as it appears to have appeared to me then". The "rights to rights" understanding of the common law trust does not foreclose the notion that trust beneficiaries have proprietary rights, although it requires us to be careful about what are the objects of those rights. But although my 1998 analysis referred to the "accountability" of a defendant in knowing receipt (quoted at [152]), it skated over the possibility that those who acquire assets that belong in some sense to another may come under new, *primary* legal requirements towards that other. This technique is not unique to equity; it is seen in the common law (*Parker v British Airways Board* [1982] 1 Q.B. 1004 (C.A.)) and in the civil law (Civil Code of Québec, arts. 940–941). Indeed, the common

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law may impose requirements even on one who acquires legal title to a thing, when they ought to know that they are obliged to restore equivalent value (*R. v Milne* [1992] 1 S.C.R. 697). Depending on the context, these legal requirements may not be duties in the strictest sense, but they have juridical effects (such as disentitling a defendant to a defence).

On the facts of *Byers*, the difference in approach between Lords Briggs and Burrows did not affect the result, which is why the majority did not see the need to choose a side. But (to revert to an earlier example) the view that knowing receipt is "equity's conversion" would perhaps struggle to cope with a charitable trust. On the other hand, Lord Burrows' understanding seems to fit better with the label "knowing receipt".

Both judges considered cases in which liability in knowing receipt can attach even though the original transferor of the assets was not a trustee: these include transfers of Crown assets, and transfers of companies' assets, in both cases in breach of fiduciary duty (or of analogous public law duties in the first case). How do these cases square with the holding that a "continuing proprietary equitable interest" is essential? Lord Burrows stated that the resolution of this is that "the relevant assets of the company are subject to a trust, best viewed as a constructive trust, *prior to* receipt by the defendant" (at [188], emphasis added; see also at [183]). This is mysterious, because the very difficulty being addressed is that there was no trust prior to receipt. Surely the only way to make sense of these cases is that a constructive trust arises at the *moment of* receipt. On one reading, Lord Briggs says this (at [60]–[61]); although he somewhat confuses the issue by saying that the transferor "retained the equitable interest", as if it held on trust for itself before the transfer. Why should a constructive trust not arise? If by improper use of their fiduciary powers, a fiduciary manager is able to transfer legal title from their beneficiary to a person who is not a good faith purchaser for value, it would be surprising if a constructive trust did not arise (cf. the *in rem* claim in *Re Diplock* [1948] Ch. 248 (C.A.), which arose when the executors transferred to donees the undivided legal title of which the executors were the fiduciary administrators). Nor does liability on this basis contradict the requirement of a "continuing proprietary equitable interest", if that requirement is understood to mean that the defendant must not have acquired the relevant rights unencumbered by any trust.

The confirmation, yet again, that liability in knowing receipt is not confined to receipt of trust property in the strict sense but can arise where property has been transferred in breach of fiduciary duty has a resonance beyond knowing receipt. *Byers* becomes the latest in a substantial line of cases that make it clear that the expression "fiduciary

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duties" should not be confined to the rules relating to conflicts and to unauthorised profits (*Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108, at [70]–[73]; *Eclairs Group Ltd. v JKX Oil & Gas plc* [2015] UKSC 71, at [39]; *Lehtimäki v Cooper* [2020] UKSC 33, [2022] A.C. 155; *Grand View Private Trust Co. v Wong* [2022] UKPC 47 (P.C.)). In line with long-standing usage, the adjective "fiduciary" speaks to the *source* of duties and other legal relations, not to their content. This is why the legal restrictions on the exercise of fiduciary powers are called fiduciary duties or restrictions. There are many fiduciary duties and restrictions, and they need to be distinguished; but their commonality is just as important, because fiduciary relationships attract principles that do not apply in other settings.

Lord Burrows noted, perhaps wistfully, that a claim in unjust enrichment was not pursued (at [102], [199]–[200]). Whether such a claim can lie alongside knowing receipt is a matter of long debate, as his citations make clear. Whatever may be the case in two-party cases, such as those involving companies seeking to recover payments unlawfully engineered by their fiduciary managers, it seems unlikely that a trust beneficiary can properly be allowed to invoke such a claim. The law of restitution seems to be moving away from a generalised and abstract inquiry that looks only to a gain connected to a claimant's loss, and towards a future in which there are multiple categories of claim (*HMRC v Investment Trust Companies* [2017] UKSC 29, [2018] A.C. 275). It is not clear that one such category could apply in the context of misapplied trust property, certainly not as a general proposition. Beneficiaries enforce trusts in two distinct ways. Sometimes they assert their entitlement, under the terms of the trust, to some of the trust property. Often, by contrast, they are enforcing the proper administration of the trust, on behalf of the class of beneficiaries; success in such a claim does not necessarily put any money into the pocket of the claimant. A claim in knowing receipt is likely to be of this kind. The suggestion (at [199]) that "want of authority" can be an "unjust factor" in the context of a trust comes very close to adopting an approach through "absence of basis"; and of course want of trustee authority is *exactly* what knowing receipt itself aims to regulate. Even more unfortunate is the suggestion (at [160]–[162]) that we should continue to be preoccupied with "common law tracing".

Although the case itself did not raise these issues, the judgments of both Lords Briggs and Burrows refer to "sheltering" behind a good faith purchaser, and its limits (at [24], [84]–[85], [167]–[169]), as showing the limits of liability. These together illustrate how the trust, though built originally on a particular kind of obligation, has a proprietary flavour. Once a good faith purchaser has acquired an unencumbered legal interest in property transferred in breach of trust, their transfer of that interest to

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a subsequent transferee will not generate liability even if that person knew of the breach. This looks proprietary, as indeed does the subjection of beneficial interests to the rules against remoteness of vesting, which have no place in the law of obligations. But if, following further transfer, the relevant legal rights are re-acquired by the original trustee, the trust comes back to life: this reminds us of its obligational foundation. In the end, Maitland was right: neither the obligational nor the proprietary view of the trust gives a complete picture.

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