IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

BL-2020-001343

BETWEEN:

(1) LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION)
(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS OF LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION))
(3) LONDON OIL & GAS LIMITED (IN ADMINISTRATION)
(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH (JOINT ADMINISTRATORS OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION))

Claimants

- and -

(1) MICHAEL ANDREW THOMSON
~~(2) SIMON HUME-KENDALL~~
~~(3) ELTEN BARKER~~
(4) SPENCER GOLDING
(5) PAUL CARELESS
(6) SURGE FINANCIAL LIMITED
(7) JOHN RUSSELL-MURPHY
(8) ROBERT SEDGWICK
(9) GROSVENOR PARK INTELLIGENT INVESTMENTS LIMITED
~~(10) HELEN HUME-KENDALL~~

Defendants

Transcript of proceedings made to the court on

Day 43 - Wednesday, 19 June 2024

The claimants are represented by Mr Stephen Robins KC, Mr Andrew Shaw & Mr Philip Judd

Michael Andrew Thompson (D1) is represented by Miss Anumrita Dwarka-Gungabissoon

Simon Hume-Kendall (D2) & Helen Hume-Kendall (D10) settled and are no longer appearing

Elten Barker (D3) settled and is not appearing

Spencer Golding (D4) is debarred from defending the claim

Paul Careless (D5) and Surge Financial Limited (D6) are represented by Mr Ledgister & Mr Curry

Russell-Murphy (D7) and Grosvenor Park Intelligence Investments Limited (D9) appear in person

Robert Sedgwick (D8) appears in person

Wednesday, 19 June 2024

(10.30 am)

Submissions in reply by

MR ROBINS (continued)

MR ROBINS: My Lord, your Lordship asked me yesterday about Ponzi schemes and I gave your Lordship an answer. I would just like to provide your Lordship with some references to go with that answer.

First, if we could have up, please, <A6/1> at page 421. This is the section of our written closing submissions in which we quote from various authorities in which judges previously described Ponzi schemes. I think it is fair to say that these are descriptions, rather than definitions. But LCF certainly falls within the scope of those descriptions, and I refer in particular to Q4.1 to Q4.4.

Then your Lordship asked me, I think searching for something more than a description, whether the point at which a company operates as a Ponzi scheme might be reached when there is no realistic prospect of servicing the interest and redemptions to an existing lot of bondholders. We don't need to turn it up, but for the transcript reference that was <A5/42> at page 34. I replied by saying that it might be more accurate to say that it's at the time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts, and that's a reference to our written submissions on the law at <A2/2> at page 3, at paragraph 9, where we cite the William C Leitch Brothers case to which I took your Lordship in my closing oral submissions. The cases, starting with that decision, use the language of "no reasonable prospect". It might be said to be dancing on the head of a pin a little, but I make the point because lawyers sometimes see "fanciful" as the opposite of "realistic", whereas "reasonable" might connote a different threshold.

I made the point, also, yesterday, in answer to your Lordship's question, that it was inherent in LCF's business model that it would collapse. The reference for that is Dr Okongwu's report at <D3/2> at page 10, paragraphs 17 to 23. Your Lordship will recall that he explained that it was bound to collapse by virtue of the commission it paid, first to Mr Russell-Murphy and then to Surge, and the high interest rates that it offered. He said that, even if it had invested the remaining money in corporate lending without any misappropriations, it would have been unable to generate sufficient returns to meet its liabilities. But, of course, that is, as I say, even without misappropriations.

My Lord knows that, throughout the story, money was siphoned off by the relevant individuals, with the group of recipients expanding during the Elysian and Prime SPAs to include Mr Ingham, Mr McCarthy and Mr Mitchell. The final point that I wanted to make -- it is not so much a question of giving a reference to something I said yesterday, I think it is actually a follow-on point or a qualification, which is that the present case isn't actually a case of borrowing short and lending long at all because your Lordship knows that LCF offered one-, two- and three-year bonds and, ultimately, some five-year products. We can see that most conveniently in the weighted average table at <A1/16> at page 1. The majority of the funds from investors were in respect of the three-year bonds. Almost 70 per cent of the outstanding indebtedness to bondholders, as at 21 August 2018, was money that had been borrowed on a three-year term and, at the same time, LCF lent to the connected companies under facility agreements which typically had three-year terms.

If we pull up, for example, the Leisure & Tourism Development facility at <J1/1> at page 4, my Lord may recall the final repayment date is the earlier of 14 days after a demand or a date being three years from the date of this agreement. That's, of course, why we see the Leisure & Tourism

Development debt being parked in the Support companies, and so on, and monies from the investors being used to repay the previous investors. The next point --

MR JUSTICE MILES: One way of looking at it is to say there's effectively this rolling series of liabilities, because there is a series of bonds, mostly three years. One way of looking at it is to ask a fairly simple question: was there a reasonable prospect of those amounts being repaid from income coming from the borrowing companies or not?

MR ROBINS: Yes.

MR JUSTICE MILES: What Mr Thomson seemed to be talking about was a fairly long-term view where, you know, he was saying, well -- it wasn't entirely clear, but, for example, supposing that these oil assets were worth an awful lot, then at some point some money could come in. It wasn't entirely clear, because, of course, the amount of the obligations of the borrowing companies was limited actually to the debt rather than the value of the assets that those companies may have had an interest in. But that seemed to be something he was saying, as I understood his evidence. But that's all some undefined time in the future.

MR ROBINS: Yes, and there is a related point that could perhaps be taken by reference to the William Leitch Brothers test. It might be said, well, we do have a reasonable prospect of repaying creditors because we can just issue some more bonds to some new creditors and use their money to repay the old creditors. But, of course, that doesn't work if there's no reasonable prospect of any underlying investment being realised for an amount sufficient to stop that vicious circle. If there is no reasonable prospect of that, then the vicious circle continues, not necessarily ad infinitum, but to the point at which the scheme collapses, leaving all the creditors who haven't been paid out in full being in a position where their debts won't be paid.

MR JUSTICE MILES: I mean, to some extent, these various strands of your case are interrelated, so there is also potentially the argument, it seems to me, that new bondholders are being told that -- they are being told about the business model and given the impression that the way that the business works is that money is coming in from the borrowing companies, and indeed has been coming in, because they say there have been no defaults. Mr Thomson says, well, that's okay, because they can just pay their interest down by increasing the principal amount of their debt. But that's not, on one view, the impression which is given by the information memoranda. The information memoranda could be said to be giving the impression that, as a matter of, as it were, real commercial business, there's money coming in from borrowers. Certainly there is nothing to suggest that the liabilities of the business are being funded by a new series of bondholders.

MR ROBINS: Your Lordship is right.

MR JUSTICE MILES: So, these things are interconnected, it appears.

MR ROBINS: That's right. Whilst we say that there are three elements -- there's the raising money by deceit or misdescription; there's the incurring debts when there's no reasonable prospect of repaying them, which is the Ponzi aspect; and then there is the misappropriation component -- all three exist together as a part of a single fraudulent scheme in this case. We are not asking your Lordship to deal with each point in isolation. They are very much interlinked.

MR JUSTICE MILES: Yes.

MR ROBINS: On Monday, Ms Dwarka made a point about the MOU and the SPA and sought to argue that they were consistent not only with each other, but also with the Golding-SHK agreement. We don't need to bring it up, but for reference it is <A5/40> at page 15, and that's Day 40, page 58.

Ms Dwarka said she would provide your Lordship with a note to rebut each of the 23 points that I had made. I don't know if your Lordship has had a chance to look at it. If we bring it up, it is at <A6/2.1> at page 1.

MR JUSTICE MILES: I have read this.

MR ROBINS: I'm grateful. Responding to that, paragraph 1 misses the point because we know that the Golding-SHK agreement was first circulated in draft on 16 July and signed on 27 July. That's the document that said that Mr Thomson would take the shares in LCF. That's the document Mr Thomson understood entitled him to the shares in LCF and with which he provided Mr Barker to make that very point.

The MOU, which says that he shall continue to own LCF, can't have been signed on 15 July because that's two weeks before the Golding-SHK agreement that provided those shares to Mr Thomson. So, it misses the timing point.

Paragraphs 2 and 3 seek to say that the MOU and the SPA aren't inconsistent with each other. Well, they are because the MOU says he's retaining the shares; the SPA says he's not retaining them, he's selling them. Paragraphs 2 and 3 miss the point that I've made, which is, if you were going to have an agreement on 15 July 2015, why have two separate agreements? It makes no sense.

Paragraphs 4 to 5 don't make sense either. It is suggested that the various anachronisms relating to, for example, the inclusion of LCCL and LOG and LOG's registered office address are merely instances of sloppiness and imprecision. They are clearly not. They are explained by reference to the fact that it was prepared later and, in respect of LOG and LOG's registered office address, as I have pointed out, those items would not have been erroneous if Mr Sedgwick had stuck with his original intention of dating the SPA 10 August 2015. They only became inaccurate when he was told to redate it with a July date and chose 15 July 2015. These aren't instances of sloppiness or imprecision; they are anachronisms which reveal that these documents were created later and backdated.

MR JUSTICE MILES: Well, your case is that they are a different form of sloppiness.

MR ROBINS: Precisely, yes.

MR JUSTICE MILES: But not the sort of sloppiness that the first defendant is referring to.

MR ROBINS: No, that's right.

Paragraph 6 doesn't seem to make sense or meet any of the 23 points that I made.

In paragraph 7, it's said that the gist of the argument put forward by the claimants is mainly based on document metadata relating to certain documents produced by a witness. In Mr Thomson's written closing submissions, he said we were only relying on two points. That was one of them. Now he says we are only relying on one. But I have dealt with that already. There are, in fact, 23 points that we make, mostly unanswered by this note.

In paragraph 8, it's said it's possible that Mr Sedgwick no longer had access to his work email at Buss Murton and did not have a copy of those documents with him. Over the page, it's said it is possible he felt he should create new ones. That is pure speculation. It is not supported by any evidence, and that seems to be accepted by what's said in paragraph 8, where it's said that there's no evidence and it's simply speculation.

MR JUSTICE MILES: I don't quite see how that is said to have happened either, because if he didn't have the document, is he supposed to have done it from memory? If he did have the document, why did he not copy out the full document?

MR ROBINS: Why were the only changes ones that would create an appearance of the parties not acting at arm's-length? It makes no sense.

At paragraph 9, it's the one I dealt with yesterday, where it's said that we are advancing an unpleaded positive case in respect of these documents. I have dealt with that already.

So, the note doesn't go anywhere. It doesn't address the evidence that the MOU and the SPA were backdated. It doesn't deal with the 23 points, even though we were told that it would. And that can only be because there is no answer to them.

The next point taken by Ms Dwarka related to our pleading of breach of duty, so we are back to pleading points again. For reference, that's <A5/40> at page 20, Day 40, page 78. It is not entirely clear what point is being taken here. It can't be said that the duties, the statutory duties, haven't been pleaded. We can see that they have. If we go to <B1/2.1> at page 55, where we plead the sections of the Companies Act on which we rely.

Equally, it can't be said that we are raising new issues at the trial. If we look at the list of issues at <A1/2> at page 36, which was prepared a very long time ago: 144 is what duties Mr Thomson owed to LCF; 145 is whether he breached them; and 146 is whether LCF suffered any loss as a result. So these are issues that have been squarely in play in the proceedings for a very long time.

Equally, this doesn't seem to be a complaint about new factual allegations that have never previously been made. That sort of objection is an impossibility in circumstances where the factual matters on which we rely in respect of breach of duty overlap with the factual matters on which we rely and have pleaded at length in respect of the fraudulent trading claim. Ms Dwarka said that the allegations of breach of duty were not sufficiently particularised, but that's not accurate. We provided particulars. If we go back to <B1/2.1> at page 55, we provide the particulars in paragraph 56 on this page and the next. The pleading can be economical because we are able to rely on the same factual allegations as we rely on in respect of the fraudulent trading claim that have been explained in much greater detail elsewhere in the pleading. So it may be economical, but it is not exiguous. We know that Mr Thomson has understood our case, and he's understood throughout that the same matters are relied on in respect of breach of duty as are relied on in respect of fraudulent trading. He pleaded to the particulars of claim on that basis from the very beginning. We can see that at <B2/1> at page 44, where he said, at paragraph 67:

"It is admitted that [he] owed duties ..." And then at 68:

"It is denied that [he] breached his duties ..." And it is said in 68.1.1:

"... LCF conducted its business for proper purposes ..."

So he's specifically pleaded there to section 171. He positively avers he acted for a proper purpose. Then, for the rest of it, he relies on his response to the fraudulent trading allegation. So, paragraph 56(3) is denied, paragraphs 8 to 17 and 56 above are repeated, et cetera. So he's understood from the outset the overlap.

There is no suggestion that the allegations of duty or breach are so unparticularised that they can't be responded to. One can contrast what's said in paragraphs 67 and 68 with what's said in paragraph 69 in respect of loss where he says, although he's wrong, that we haven't sufficiently pleaded causation and loss. But there is no suggestion in his pleading that we haven't sufficiently pleaded duty or breach.

His conduct in this litigation more generally is inconsistent with any suggestion that he failed to understand the allegations made against him in respect of breach of duty. He's never served any request for further information under Part 18. He's asked for no further information in respect of that part of our case. As my Lord knows, there was no objection taken to any of this at any of the CMCs, of which there were, I think, at least six.

We identified the legal principles in respect of duty and breach in our opening written submissions on the law, which we provided on 15 December last year. No objection was taken to that. Mr Thomson subsequently participated in the trial on the footing that he understands the claimants' case against him. He addressed these points in his opening written submissions and it was explained on his behalf that he understood the same underlying factual matters were relied on, both in respect of fraudulent trading and in respect of breach of duty. We can see that at <A2/3>, page 43, at paragraph 124, where it's said in subparagraph (3):

"Notably, this part of Cs' claim takes matters no further than the claim in fraudulent trading. There are no new allegations raised, and the allegations of breach of duty are simply paraphrased iterations of the allegations that the claimants have made as part of the fraudulent trading claim."

So, clearly, the allegations were understood, not merely by the counsel team, who drafted this document, but by Mr Thomson's solicitors as well. That can be demonstrated by a number of points made by Ms Dwarka in her oral closing submissions. She said that the claims for breach of duty were, in substance, a rerun or a re-rerun of the case on fraudulent trading. No need to turn it up, but that's <A5/40>, page 1; Day 40, page 3.

She said:

"... again, it seems that the pleading is simply a restatement, at a more general level, of the fraudulent trading ..."

That's <A5/40>, page 21; Day 40, page 81. She said:

"... the pleading is like the others: it is a rehash of the fraudulent trading claim ..."

That is <A5/40> at page 21; Day 40, page 83. She said that our "case on breaches of directors' duties was ... based on making out the averment [of fraudulent trading] -- the same averment on which the claimants' fraudulent trading is based." <A5/40> at page 25; Day 40, page 100.

And went on to make this point by reference to our pleading, explaining that the same factual case was being run in both claims. That's <A5/40> at page 25; Day 40, page 100.

In that context, Ms Dwarka also accepted that there are no factual matters that would need to be put to Mr Thomson distinctly on the issue of breach of duty. In other words, there's a factual overlap. That's <A5/40> at page 26, which is Day 40, page 102, where she said:

"The version of events that the claimants need to establish and the version of events to which the claimants' cross-examination was directed is the factual case that the claimants need to make out in order to succeed on fraudulent trading. There is overlap, we say; if not exact, then so close as to make no difference."

Again, it shows that it is well understood and, for this reason, it can't be said that Mr Thomson is in any way prejudiced in respect of the way in which he, or we, approached his evidence at trial. He's always recognised that the same factual allegations are being made against him in respect of both causes of action. That's why the objection based on Practice Direction 16 doesn't go anywhere. All the details have already been pleaded in the particulars of claim. In the breach of duty section, we simply refer back.

That seems to be why Mr Thomson conceded in his written opening submissions that he will be liable in respect of breach of fiduciary duty if the fraudulent trading claim succeeds. The reference for that, if we can have it up, is <A2/3> at page 43, where it is said at paragraph 125:

"... [he] denies that he has breached his duties ... however, it is accepted that if the court finds against D1 on the claim in fraudulent trading ... then it would follow that he has also acted in breach of his duty to LCF."

Your Lordship asked Ms Dwarka to explain Mr Thomson's position in light of this. I'm not sure I fully understood her answer, but she seemed to say that Mr Thomson's position had been set out in his closing submissions and that he wasn't making any form of concession on the pleadings and that this was only a legal point. That's <A5/41> at page 2; Day 41, page 5, I think.

But, my Lord, that's no answer at all because a written admission of certain matters has procedural consequences under the rules. This amounts to a conditional admission of liability in respect of the breach of duty claim. It is conditional because it is conditional on the success of the fraudulent trading claim. But what has been admitted in writing is that, in that event, Mr Thomson concedes liability for breach of duty. That's a consequence of CPR 14.2(1) which provides:

"After the commencement of proceedings, a party may admit by notice in writing the whole or any part of another party's claim or case."

What the authorities make clear is that a notice in writing need take no particular form. It doesn't need to have any particular formality or heading. It doesn't need to be part of a pleading. And, secondly, an admission in writing can be conditional. I will take this point quickly, but there are just two authorities on it. The first is at <S2/156.6> at page 1, a case called Sabbagh v Khoury, a decision of His Honour Judge Pelling. At page 18, paragraph 40, he rejected an argument that the reference to a notice in writing was to be construed narrowly, and said: "The rule is concerned with the very practical and straightforward issue and is expressed in clear and everyday language."

He said:

"The words mean what they say. There is nothing ... that suggests [they should be narrowed]." He made the point as well in paragraph 41 and over the page to paragraph 42, if I could just ask my Lord to read those to save me from having to read them out.

MR JUSTICE MILES: Yes.

MR ROBINS: The second authority deals with the point about conditional admissions. That's <S2/133.2>, at page 1, a decision called Clark v Braintree. At page 2, my Lord can see the point in paragraphs 5 and 7. Procedurally, the position is that Mr Thomson has admitted that if the fraudulent trading claim succeeds, he will be liable for breach of duty. Again, procedurally, to withdraw that admission, he'd need to apply under CPR 14.5, but any such application would be bound to fail. Under that rule -- we saw it previously in connection with the authenticity point -- the court has to consider all the circumstances of the case, including:

(a) the grounds for seeking to withdraw the admission.

There don't seem to be any grounds at all here. (b) whether there is any new evidence which was not available when the admission was made.

Well, not in any relevant sense.

(c) the conduct of the parties.

The only relevant conduct here is the fact that Mr Thomson has allowed the entire trial to take place with the admission as part of the record. It wouldn't be right, in those circumstances, to permit him to withdraw it right at the end of the trial. (d) any prejudice if the admission is withdrawn or permitted not to be withdrawn.

Well, there is no prejudice to Mr Thomson because, and I will come to this in a moment, what he has admitted is plainly right.

(e) what stage the proceedings have reached. Well, this is the end of the trial. It is much too late to go about withdrawing admissions. (f) the prospect of success of the part of the claim to which the admission relates.

Well, the point that Mr Thomson has admitted is one that is obviously right. The contrary contention has no prospect of success at all.

(g) the interests of the administration of justice. We don't see anything in that that would require permission to be granted for the withdrawal of the admission.

The key point in all of that is that what Mr Thomson has conceded is plainly right. It is obvious that a director who causes his company to engage in fraudulent trading by raising money by deceit and misdescription, by conducting a Ponzi scheme involving the incurring of new debts when there's no reasonable prospect of paying them, and by misappropriating money has breached his fiduciary duties to the company. It follows inexorably.

Mr Thomson's counsel team obviously recognised that. Your Lordship asked Ms Dwarka -- we don't need to turn it up, but the reference is <A5/40> at page 22; Day 40, page 87:

"Mr Justice Miles: Do you accept that, in the event, as this says, the court finds against your client on a claim in fraudulent trading, that is to say, 'he knew of and participated in lending for the purpose of defrauding bondholders', then it would follow that he's also acted in breach of his duty to LCF?" Ms Dwarka said:

"Can I get back to you on that? I will probably need to just think about this point".

My Lord, you don't need to think about it. The answer is blindingly obvious: a director who knowingly causes his company to participate in a fraud necessarily acts in breach of duty. It is axiomatic. The concession was made because it is plainly right. It was in that context, debating the consequences of a finding against Mr Thomson on the fraudulent trading claim, that your Lordship asked whether it might be said that it was too late for Mr Thomson's representatives to object to various matters in closing submissions when they hadn't raised their objections at an earlier stage in cross-examination and had allowed the cross-examination to proceed on the basis that these matters were within the scope of the trial. For the interests of completeness, really, I just wanted to take your Lordship to the authority on that. It is at <S2/110.2> at page 1. It is a decision of the Court of Appeal, Hawksworth v Chief Constable of Staffordshire.

At page 13, we can see, in paragraph 39, that it was being said that evidence relating to sound attenuation software fell outside the pleaded case. Then, at paragraph 40, the Court of Appeal dealt with the point by reference to the familiar passage in Rolled Steel which says in summary that that sort of objection should be taken promptly at the time and not held back.

MR JUSTICE MILES: Yes.

MR ROBINS: In paragraph 41, the second line: "If Mr Pratt was concerned that the defendants were adducing evidence and seeking to rely upon it in a manner which departed from their pleaded case, it was plain that it was incumbent upon him to invite the judge to rule upon his objection."

It is a point that has to be taken there and then. I think that's the authority that your Lordship probably had in mind. I don't think I need to say any more about it than that.

Another point that was taken by Ms Dwarka was the suggestion that we hadn't pleaded LCF's inability to pay its debts. That's at, for reference, <A5/40> at page 25; Day 40, page 97. Ms Dwarka said it was a new point that hadn't been pleaded. That's not correct. As part of our pleaded case, we plainly raised an issue about LCF's ability to repay bondholders. I can take your Lordship through it fairly quickly. If we start with <B1/2.1> at page 16, at subparagraph (16) we say:

"None of the companies to which LCF lent monies generated significant revenue from their own commercial activities. Instead, they were almost entirely dependent on LCF for their income and did not have sufficient commercial activities or legitimate investments to enable them to repay their debts to LCF." Then, on page 24, we deal with the point in some detail in paragraphs (3), (4) and (6).

Then, at page 25, at the end of paragraph 21A, we plead that LCF was an inherently unstable and unsustainable model that was inevitably going to collapse at the point at which it could not raise sufficient funds from new bondholders.

Then, at page 44, subparagraph (7) -- sorry, it must be page 45. No, I've got the wrong reference. It must be 43. Back again. I've got a wrong reference. Again. Yes, there we are, page 41, subparagraph (7): "Mr Thomson knew that LCF connected borrowers were incapable of repaying their debts to LCF and that LCF would inevitably become unable to meet its obligations to bondholders."

Finally, 56, subparagraph (6), this is one of the particulars of breach of duty:

"Causing LCF to pay away bondholder monies with the result that there is no prospect of those sums being repaid to LCF and no prospect of LCF being able to repay those sums to the bondholders."

So we clearly raised the issue of LCF's inability to repay bondholder liabilities and have given particulars as to how, why and when we said that came about. Against that background, in our opening submissions on the law -- we don't need to bring it up -- at <A2/2> at page 23, we set out the content of the West Mercia duty, as explained by the Supreme Court in Sequana, and no objection was taken by Mr Thomson to any of that. He subsequently agreed the contents of that document and made no objection to what we said about West Mercia or Sequana.

So, it is squarely within the scope of

the proceedings --

MR JUSTICE MILES: It is not in the list of issues, is it? Was the company insolvent?

MR ROBINS: Mr Shaw is just checking. While he is looking for that, can I --

MR JUSTICE MILES: Sorry, or was insolvency imminent or --

MR ROBINS: While he is checking that, I just wanted to reiterate a point which I made in closing submissions, which is that, although we say it is within the scope of the trial, we don't actually need it because we are not alleging a failure to consider the interests of creditors; we are alleging defrauding creditors. That's always a breach of duty.

MR JUSTICE MILES: Which duty is it a breach of? There is a duty only to use the powers for a proper purpose.

MR ROBINS: And that's in accordance with the constitution. As I said in --

MR JUSTICE MILES: That's the first duty. Then there is a duty to act bona fide in the interests of the company.

MR ROBINS: And it is both --

MR JUSTICE MILES: That's where the West Mercia one comes in. Do you say that if you -- is your position that if the director is causing the company to do the things which you allege here, so essentially to act dishonestly, that is, first of all, not for the proper purposes of the powers that a director has, and, secondly, can't be bona fide in the interests of the company, whether the company's interests are considered to be those of the members or the creditors or anyone else?

MR ROBINS: That's exactly right, my Lord.

MR JUSTICE MILES: What about if he is the 100 per cent shareholder?

MR ROBINS: Well, even if he is a 100 per cent shareholder, it can't be in the interests of the shareholders. It would still be contrary to their interests. Because it would mean that their equity would have no value. There would then have to be a plea of ratification, and the question of whether the interests of creditors had intruded would be a point that could be raised in response to the plea of ratification. That's how you get to it. But, in the absence of a plea of ratification, you don't get that far.

There has never been any plea of ratification in this case. But, on 171, and we say it is axiomatic on both points, but no court would ever say that directors were entitled to exercise their powers for unlawful purposes. It follows that exercising your powers for unlawful purposes is a breach of that duty. Similarly, it is never going to be bona fide in the best interests of the company, including the shareholders, to embroil the company in a fraud.

Mr Shaw has reminded me of a further point that would arise on ratification as to whether you could lawfully ratify fraud. It would be said that that's not a proper use of the shareholders' power of ratification.

MR JUSTICE MILES: It might said it is outside the power of ratification.

MR ROBINS: Yes.

MR JUSTICE MILES: I detected, also, that the way you put it in closing was, as I understood it, essentially to be saying that Mr Thomson actually didn't consider the interests of the company subjectively.

MR ROBINS: Yes, we make that point as well.

MR JUSTICE MILES: Therefore, the court is then bound to ask whether a reasonable and honest -- I can't remember the test exactly.

MR ROBINS: Yes, your Lordship is quite right. We make that point as well.

MR JUSTICE MILES: So, I wonder whether this point about the creditors, what's sometimes called the creditor duty or the duty to creditors, albeit it is still a duty to the company, really arises. I have to say, I'm not entirely persuaded, on the basis of your submissions, that this has been raised clearly on the pleadings, because I would expect there to be a pleading that, at a certain date, the company was insolvent or imminently insolvent.

MR ROBINS: Yes.

MR JUSTICE MILES: I have seen the references that you have referred to.

MR ROBINS: Can I give you one more reference and I'm flying blind because I don't know what Mr Shaw is taking us to, but it is <A1/2> at page 20. He has directed us to issue 81A, and the next page. It is an issue, but, again, it is not put in quite the way your Lordship has said you'd expect to see it.

MR JUSTICE MILES: It is almost, though. It is almost the issue. Because it could be said, well, they would inevitably be unable to pay the bondholders; that means inevitably be unable to pay their liabilities; which is another way of saying inevitably insolvent. So it is pretty close.

MR ROBINS: Yes, well, the obligations of bondholders are debt obligations, so yes.

MR JUSTICE MILES: And it would at least be, on that footing, cash flow insolvent.

MR ROBINS: But, as my Lord has said, this isn't really a West Mercia-type case where directors have continued with loss-making trading in good faith but without considering the interests of creditors.

MR JUSTICE MILES: Yes.

MR ROBINS: It is a fraud.

MR JUSTICE MILES: Right.

MR ROBINS: Then Monday this week, Day 41, at page 10, we don't need to go to it, but for reference it is <A5/41> at page 3, Ms Dwarka relied on the document if we could bring it up --

MR JUSTICE MILES: Sorry, I'm just looking at the transcript, when I say "Right" in answer to the point "It is a fraud", I want to make clear I'm saying I understood your point.

MR ROBINS: I appreciate it might read --

MR JUSTICE MILES: Things can read rather bluntly on a transcript. I meant, "Right, move on, thank you".

MR ROBINS: <MDR00174219> is where Ms Dwarka took us, and we opened it up in native format. What she relied on was row 30. She said that, on 1 June 2018, Mr Thomson had disclosed to the board that client companies that he was connected to previously as a shareholder and/or director and transferred/sold his interest in has started to pay for his interests transferred/sold.

Just to point out the consequences of that, it would obviously mean that there had been no disclosure of any of the payments under the Lakeview SPA, the Elysian SPA or the Prime SPA. And, more broadly, it is consistent with our invitation to your Lordship to find as a fact that the MOU and the SPA didn't exist.

This seems to be the first time we see even a hint of the idea that ultimately became the MOU and the SPA. What was said at this point, though late in the day, on 1 June 2018, was that these client companies had started to pay.

The idea at that point, therefore, seems to have been to say that the payments under the LPE SPA and the LPT SPA were payments under the buyout agreement. That's what's happening, as my Lord knows, in the early part of 2018. From, I think, early February onwards, payments are being made under LOG's facility. Initially, it is said they will have something to do with the LPC preference shares, but later they are justified by reference to the shares in Asset Mapping, and so on, under the LPE SPA.

What seems to have been envisaged when the idea was first formulated was that the payments under the final two of the five transactions would be payments under the buyout agreement, but we know that by December 2018 into early 2019, the idea had evolved after the FCA raid to say that all payments to Mr Thomson were payments under the buyout agreement, as he called it, including those under the Lakeview SPA, Elysian SPA and Prime SPA. So, the document on which Ms Dwarka relied is not consistent with her own client's case on the point.

MR JUSTICE MILES: I think it's all taken to line 17 and the bit about September '16, which says that he's a "shareholder of London Group".

MR ROBINS: Yes. That's obviously inconsistent with the idea that Mr Thomson had sold his interest. His answer to that was, although he had sold it, he remained the beneficial owner of the shares, and our reply to that, of course, was to say that that makes the entire SPA incoherent and unnecessary. It is an agreement, on his case, by which he sold the shares but didn't.

MR JUSTICE MILES: I think his case was that he agreed to sell the shares, but, until completion of the sales, he remained a beneficial owner, and if you look at the meaning of "completion" under that agreement, it refers to the disposal of the shares, and so, until that time, he retained a -- it is a bit like -- something like an unpaid vendor's lien. He retained a beneficial interest in the shares until he was paid.

MR ROBINS: Yes. The point I made in my closing submissions is that that's not an agreement that anyone would enter into in the real world because what it means in this case is it was unnecessary. If he had 5 per cent, he'd have got 5 per cent of the monies on the sale of any of the companies in which he had ownership. He didn't need the SPA to achieve that. It would have just happened, even without the SPA.

MR JUSTICE MILES: I suppose it could be said, well, it is an agreement to do that, so it does have some point because he's agreeing to transfer the property, which means he's committed to do so. But he keeps some sort of interest, whether it is a lien or some sort of beneficial interest, some sort of security-type interest, until he's actually paid, and, what's more, it has the cap.

MR ROBINS: It has the cap. But, again, that's consistent with the fact that, by that point, he'd received £5 million, or just under, under the SPAs. But, again, it is not how people deal with these things in the real world. If you want to have a scenario where a minority shareholder is compelled to go along with the sale, then you have "drag and tag" provisions in the article. In fact, most companies do. But, yes. This says "shareholder" rather than "beneficial owner", so it's inconsistent with Mr Thomson's case in that regard.

MR JUSTICE MILES: Yes.

MR ROBINS: But the first point I made was that the document to which Ms Dwarka referred us is inconsistent with her client's evidence that he disclosed to the directors the payments under the Lakeview SPA, the Elysian SPA and the Prime SPA. So, that deals with what Ms Dwarka had to say.

I will deal briefly with Mr Sedgwick. We don't need to turn it up, but, for the reference, it is <A5/41> at page 17; Day 41, page 65.

He resisted our submission that your Lordship should draw an adverse inference from his decision not to give evidence. He said:

"I'm quite entitled in my closing to put my gloss on documents and for you then to decide how they should be dealt with."

That's not a point that makes any sense. Every party is entitled to make closing submissions. If it were a good point, then Mr Sedgwick wouldn't have filed a witness statement at all.

The obvious difference is that, when you make closing submissions, you can do so without taking an oath and without having what you say tested through the process of cross-examination. So, we do invite your Lordship to draw the obvious adverse inferences. The fact that Mr Sedgwick turned up to make closing submissions makes the case for an adverse inference stronger. There is clearly no impediment to him turning up in court. He could very easily have turned up to take an oath and be cross-examined on what he has to say.

He then said that he was a bona fide purchaser for value without notice in respect of the money that he received. We have dealt with that in our written closing submissions. He hasn't adduced any evidence, so he can't discharge the burden.

He submitted that it was unconscionable for the claimants to say that he hadn't discharged the burden of proving that he was a purchaser for value, but it is not unconscionable to rely on well-established rules of equity. He hasn't adduced any evidence. He can't discharge the burden. But, in any event, he wasn't acting in good faith, and he had notice, and we have said assisting a fraud is not the provision of value because it is not something the court would recognise as lawful consideration.

In terms of the documents, at <A5/41> at page 18 -- we don't need to go to it, that's Day 41, page 70 -- Mr Sedgwick referred to a document <D8-0000522>. It didn't come up then and it is not coming up now because it is not in the trial bundle. Similarly, at page 71, he referred to <D8-0005950>, and, again, it didn't appear on screen because it is not in the trial bundle. Mr Sedgwick then asserted that 30 per cent of the 57-million-euro price in respect of Paradise Beach had already been paid because CV Resorts took over the deposits that had been made by the previous purchaser. That's entirely incorrect. It's not supported by any evidence. In fact, it's contradicted by the evidence that we looked at very closely during my oral opening submissions.

We looked at the contract. For reference, that was <MDR00005376>, which doesn't say any such thing. To the contrary, it shows that the full 57 million -- have I given the wrong reference? It was <MDR00005376>. If I have got the wrong one, I will correct it later. There we are. We looked at this contract. We went through the provisions in some detail, looking at the various instalments that fell to be paid and the dates on which they were payable, and we added them up and they came to 57 million euros.

We looked also at the spreadsheets and tables that were circulated by Mr Sedgwick at the time. For example, we looked at a document that he sent to Michael Peacock, I think it is <D2D10-00012920>. The covering email at the bottom of the page, Mr Sedgwick sent analysis of the CV contract. And the attachment we saw was <D2D10-00012921>. This was Mr Sedgwick's table. We added up, in my opening submissions, the numbers in cells C3, C9, C14, C18 and C25, and they came to £57 million. The only thing deemed to have been paid, as we saw in my opening submissions, was the sum of a little over 184,000 euros in respect of an empty area which was to be units but it was said had been earmarked as the site of a hotel.

We looked also at the varied agreement that was entered into between CV Resorts and Paradise Beach SA, following the lengthy spat in correspondence about CV Resorts failing to perform. That was <MDR00042490>. We went through that in some detail in my oral opening submissions and added up, again, the various instalments and the dates by which they had to be paid to see that the outstanding price was still 57 million euros. We looked also at many documents showing that Mr Sedgwick knew that what they were proposing to buy was worth considerably less than the price that they were going to have to pay in order to buy it. We have seen many examples of such documents and we have set them out fairly extensively in our written closing submissions, but to take, purely for the purpose of illustration, one example, we can look at <D2D10-00024621>, where Mr Sedgwick emailed the Portuguese lawyer, Maria, and said:

"Further to our recent conversations I would be grateful if you could review the position of CV Resorts with regard to Paradise Beach. As you know we are of the view that the price being paid for the site is too high and wish to persuade them to accept significantly less."

We saw many examples. My Lord, that all provides a very good illustration of why Mr Sedgwick didn't want to give evidence. He didn't want to take an oath. He didn't want to be cross-examined. He wanted to be able to say things in closing submissions without being tested on any of it. That merely reinforces what we say about adverse inferences.

Mr Sedgwick also relied on <D8-0037838>, where he had emailed Mr Lee, on 19 July 2018, to say that Simon and Andy had discussed the issue of repayment of the amounts outstanding from CV Resorts and Atlantic Support, and he set out a payment proposal to the effect that some of the money from LCF in respect of the preference shares in LPC would be used to repay the liabilities of CV Resorts and Atlantic Support. The timing on this is the key point, 19 July 2018. If Mr Sedgwick had turned up to be cross-examined, then we would have been able to take him to <MDR00159795> to see that what was happening at that time -- this is 16 July 2018, just three days earlier -- was that Mr Thomson was beginning to think about preparation for the next audit. My Lord can see the subject "LCF audit", and Emma Benjamin of Oliver Clive said: "I spoke with Andy the other day and he is keen for us to have the meeting this Friday before we start sharing documents so we can kick the audit off." So, as soon as Mr Thomson starts thinking about the audit, there are discussions about putting something in place to satisfy the auditors as to the recoverability of the liabilities of CV Resorts and Atlantic Petroleum. If Mr Sedgwick had turned up for cross-examination, I would have put that to him. I would have also put to him the fact that it wasn't a genuine proposal. Nothing ever happened. No documentation was ever put in place. No repayments were made from the sums paid in respect of LPC preference shares. It was clearly window dressing for the benefit of auditors.

Mr Sedgwick also relied on <D8-0061470>. He said, "This is an email from me to Alex Lee to remind him to draw up the agreement". Well, that's not correct. It starts at the bottom of the page with an email from Alex Lee to Mr Sedgwick. He says:

"Something has just occurred to me. I seem to remember that the proposal for dealing with this is to have the monies received from the sale [of] Prime to be paid through to LCAF."

So he's talking about the legacy debt. He says: "That would require the recipient to sign up to the agreement in some form given that it isn't CV. Can you confirm who the party to the SPA is that receives these funds. Not exactly sure how I am going to do this but will give it some thought.

"I seem to remember that you had a deal sheet at the meeting at LCAF last month. Could you possibly email that over as well please?"

What Mr Sedgwick says in reply -- this was the term sheet:

"With regard to the sale to Prime the sellers were Simon, Elten and Andy together with Mark Ingham and Tom McCarthy. London Group LLP was appointed agent to receive monies due to Simon, Elten and Andy. There is not much to come to Simon, Elten and Andy from the basic consideration but there is an additional 5 per cent due to them on the sales of any of the lodges etc at Waterside."

What Mr Lee has said is, "What about that idea that sums paid under that agreement would be used to pay down the legacy debt?", and what Mr Sedgwick says in response is, "Oh, there's not really much to come to them under that agreement". Of course completely glossing over the fact that very large sums have been paid under that agreement and not used to pay down the legacy debt, and instead implying that there's not much payable. Again, it is the sort of point on which I would have been able to cross-examine Mr Sedgwick if he had turned up. The most I can say, for present purposes, is that it plainly doesn't support the proposition for which he put it forward.

My Lord, that deals with Mr Sedgwick. I see the time and wonder if that would be a convenient moment?

MR JUSTICE MILES: Yes, we will take five minutes. Thank you.

(11.45 am)

(A short break)

(11.53 am)

MR ROBINS: My Lord, the next point to address is Mr Curry's proposition that I think was encapsulated in his suggestion, and this is a quote, "the existence of a contract prevents the trust, constructive or otherwise, from arising". We don't need to go to it, but for reference that was <A5/41> at page 25, and it is Day 41, page 100.

The argument was one which hadn't previously been articulated, so this is really my first opportunity to respond to it.

The starting point is, it is important not to get confused between equitable interests and mere equities. That's really the confusion that lies at the heart of my learned friend's submission.

Equitable interests and mere equities are different. They have different proprietary effects. It is necessary to distinguish between them and not to get confused.

The right of a beneficiary in respect of a trust asset is an equitable interest. I say "right of a beneficiary in respect of a trust asset"; you could equally say the claim of a beneficiary to the trust asset. I don't think much turns on the precise formulation. It is an equitable interest. What that means is that it's enforceable against everyone except a bona fide purchaser for value without notice. It is a fairly basic proposition. It was reiterated recently by the Supreme Court in Byers. We can see that at <S2/179> at page 4, paragraph 2. Lord Hodge said: "It is well established that the transfer of trust property by a trustee to a bona fide purchaser for value without notice extinguishes or overrides the proprietary equitable interest of the cestui que trust (the trust beneficiary) ..."

Similarly, at page 7, paragraph 18, Lord Briggs started by setting the metes and bounds of the battlefield by describing some of the relevant equitable principles which bear on the issue and which are either common ground or beyond realistic challenge. He says:

"The first concerns the very nature of an equitable interest in property. By contrast with a legal interest or estate, which is good against all the world, an equitable interest is (statute or foreign law apart) good against all the world except a bona fide purchaser for value without notice of the legal estate without notice of that interest, a person traditionally given the name equity's darling."

So that's all straightforward. The recipient has to show that he's a purchaser for value, he has to show that he was acting in good faith and he has to show that he was acting without notice in order to defeat the equitable interest.

If the property has been transferred under a contract of sale, as will often be the case, the mere fact of the contract isn't alone sufficient to defeat the equitable interest. The contract has to be one that qualifies as a purchase for value. Most contracts would satisfy that test. But the purchaser then has to show that he was acting in good faith and without notice. In the case of an equitable interest of that type, a true equitable interest, like the interest of a beneficiary under a trust, it is not necessary to rescind the contract in order for the equitable interest to arise. It exists independently of rescission. A mere equity is different. In the case of a mere equity, it is necessary to rescind the contract to give rise to a constructive trust. Examples of mere equities are well known: the right of a vendor to rescind a contract for misrepresentation is a mere equity; similarly, the right of a vendor to rescind a contract for undue influence is a mere equity; duress is another well-known example. These are cases where there is no trust, there is no fiduciary relationship, we are not in that territory. We are dealing simply with a right to rescind on recognised grounds such as misrepresentation, undue influence, duress.

In the case of a mere equity, until rescission, there is no constructive trust. There is only a mere equity.

It is clear from numerous authorities -- we can see it, for example, in Twinsectra v Yardley in the Court of Appeal. Nothing that was said in the House of Lords has any bearing on this point. But it is --

MR JUSTICE MILES: We don't need to go to that, I don't think.

MR ROBINS: Could I take my Lord just to one paragraph because it makes the point very clearly. <S2/61.2>. Then it is page 25. It may be that my Lord is familiar with the exact paragraph, but it is paragraph 99 where Lord Justice Potter said:

"I do not accept either argument. It seems to me that, whatever the legal distinctions between 'theft' and 'fraud' in other areas of the law, the distinction of importance here is that between nonconsensual transfers and transfers pursuant to contracts which are voidable for misrepresentation. In the latter case, the transferor may elect whether to avoid or affirm the transaction and, until he elects to avoid it, there is no constructive (resulting) trust; in the former case, the constructive trust arises upon the moment of transfer. The result, so far as third parties are concerned, is that, before rescission, the owner has no proprietary interest in the original property;

all he has is the 'mere equity' of his right to set aside the voidable contract. That equity binds volunteers and those taking with notice of the equity, but not purchasers for value without notice."

Over the page he says:

"Despite dicta of Lord Mustill in Re Goldcorp ... which, if generally applied ... would suggest that equitable title does not ... revest on rescission, the general proposition seems to me that summarised in Underhill and Hayton ... It is there stated that equity imposes a constructive trust on property where a transferor's legal and equitable title to his property has passed to the transferee according to basic principles of property law but in circumstances (eg involving fraud and misrepresentation) where the transferor has an equitable right (ie mere equity) to recover the property by having the transfer set aside, and the court declares that from the outset the transferee has held the property to transferor's order, though nowadays it seems better to regard a restitutionary resulting trust as arising." There has obviously been some debate in the academic literature which has spilled over into the case law as to whether the trust arising on rescission is best described as a constructive trust or a resulting trust. The most recent terminology that's been used is a rescission trust. But my Lord can see Lord Justice Potter talked about a constructive resulting trust. It is a point of terminology. It doesn't affect the point which I'm making, which is --

MR JUSTICE MILES: He calls it a "restitutionary resulting trust".

MR ROBINS: Yes, and on the previous page, I think we saw "constructive (resulting) trust". But that's a point of semantics. The key point is the point of timing, which is that, in the case of a mere equity, there is no trust unless and until the claimant takes the necessary action to enforce the mere equity. The claimant has to perform a further legal act, typically the rescission of the contract, to cause his mere equity to crystallise as an equitable interest. But, of itself, a mere equity does not give a claimant a beneficial interest in property. That only arises once a claimant has successfully rescinded the transfer and the rescission gives rise to the trust.

It is commonly seen in cases where there is a misrepresentation and, as I say, we are not dealing with trust cases or cases involving fiduciary duties. It is simply a case of a contract induced by misrepresentation.

The purchaser who has induced the contract by misrepresentation remains the beneficial owner of the property unless and until the vendor successfully exercises his equity to rescind, and then, and only then, will the purchaser hold the property as a trustee for the vendor.

It was explained in some detail in Shalson v Russo. Again, my Lord might be familiar with it, but I think it would be helpful to bring it up briefly. <S2/79> at page 1. It is a misrepresentation case. My Lord can see, at the foot of the page, in the headnote: "Held, (1) that where a person was fraudulently induced to lend money to another the money advanced did not become subject to an immediately binding, constructive trust in the lender's favour but became the borrower's property both legally and beneficially ..." The authorities are examined starting at page 41. In paragraph 122, Lord Justice Rimer explains: "Rescission is an act of the parties which, when validly effected, entitles the party rescinding to be put in the position he would have been put in if no contract had been entered into in the first place. It involves a giving and taking back on both sides." In the middle of the paragraph, he says there is "a line of authority supporting the proposition that, upon rescission of a contract for fraudulent misrepresentation, the beneficial title which passed to the representor under the contract revests in the representee. The representee then enjoys a sufficient proprietary title to enable him to trace, follow and recover what, by virtue of such revesting, can be regarded as having always been in equity his own property."

Then, after reviewing the authorities,

Mr Justice Rimer concludes, in paragraph 127 -- if we could just go through to that. He says, just below C: "I propose, therefore, to follow the guidance given in the Banque Belge ... line of authorities. I hold, therefore, that upon the implied rescission of the loan contracts effected by the bringing of his Part 20 claim, Mr Mimran had revested in him the property in the money he advanced to Westland entitling him at least to trace it into assets into which it was subsequently applied ." In the case of mere equity where the constructive trust arises on, and only on, rescission, it is necessary to ask whether the contract has been rescinded. If it has not been rescinded and if it can't be rescinded because rescission is barred, then the equity to rescind is lost and the claimant will never be able to assert a proprietary claim to recover the property. That's why I submitted to your Lordship last week that it is necessary to consider the source of the constructive trust. Does it exist by virtue of an equitable interest which has existed for at least as long as the property has been in the hands of the transferee? Is it one which existed at the moment of the property coming into the transferee's hands, in other words? Or is it one which has come into existence on the enforcement of a mere equity by way of rescission which has given rise to a constructive trust of the property in the hands of the transferee. If the trust exists by reason of an equitable interest which has existed since at least the moment of transfer, if not before, then rescission is a red herring. It is entirely irrelevant to the legal analysis. Because, in that case, we aren't dealing with a constructive trust arising upon rescission; instead, we are dealing with a constructive trust which exists by reason of the fact that what came into the hands of the transferee was, from at least the moment of the transfer, property subject to an equitable interest, and in that case, as I say, you don't need to ask whether the contract has been rescinded, you need to ask only whether the transferee is a bona fide purchaser for value without notice.

So, that's the difference between an equitable interest and a mere equity.

It is then necessary to ask, what is the position of a company in respect of company property which is misapplied by a director? Does the company have an equitable interest in the property which is binding on the transferee immediately from the moment of transfer or does the company have a mere equity which will not give rise to an equitable interest unless and until the transfer is rescinded?

Byers answers that question. It is the former. We looked at it before, but it is helpful, I think, to look at it again, <S2/179> at page 18. At paragraph 60, Lord Briggs said the dicta "fall short of providing a completely neat and satisfying explanation". Mr Green's firmed-up analysis, between F and G, is: "... A trust, with a concomitant splitting of legal title from the company's continuing beneficial interest in the misapplied property occurred at the moment of the transfer which constituted the misapplication. Legal title passed to the transferee, but the equitable beneficial interest remained with the company. Therefore, the company retained the equitable interest sufficient to support a proprietary claim to the property or its traceable proceeds, and a knowing receipt personal claim against any recipient ... subject to any overriding of its equitable interest in the meantime."

He is referring there to the doctrine of bona fide purchaser for value without notice.

Then Lord Briggs says, in 61, that Mr Green's submission is correct. He says:

"It best fits with all the dicta ... First, the analysis in In re Lands Allotment ..."

The judge spoke of the trust arising when the misapplication of company property takes place. He says:

"The same analysis is also supported by ... Agip ... Secondly, Ungoed-Thomas J is at pains to emphasise that this is a real trust and not just a breach of fiduciary duty treated like a breach of trust merely by analogy." It is a real trust, it is an equitable interest: "Thirdly and decisively Buckley LJ implicitly recognises a continuing equitable interest remaining in the company after the transfer because of his acknowledgement that the company's knowing receipt claim may be defeated by a recipient with a better equity. That would of course include equity's darling, and that is I think what Buckley LJ had in mind." The way in which Lord Burrows analysed it is, if anything, even stronger. That's at 52, paragraph 188. What he says is that the company's equitable interest arises not on the moment of receipt by the recipient, but at the logically prior time of misapplication by the fiduciary duty. He says:

"My conclusion is that Mr Green's use of analogy is consistent with the willingness of courts in past cases to decide that the relevant assets of the company are subject to a trust, best viewed as a constructive trust, prior to receipt by the defendant."

So, as I said, it is an equitable interest that exists from the very moment at which the property comes into the hands of the transferee, if not before. It is not a mere equity of the type that gives rise to a constructive trust only on rescission. Obviously, Byers is a decision of the Supreme Court, but what's said here is entirely consistent with the earlier authorities examined in detail in cases such as Selangor. There is just one passage in that I'd like to take your Lordship to. <S2/27> at page 22. In a lengthy treatment of prior cases, one of the earlier authorities is Russell v Wakefield Waterworks Company in which the Master of the Rolls, Sir George Jessel, set out the position. Just above H, he said: "That I take to be the general rule of this court. In this court, the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this court say that he is not a constructive trustee."

It is, again, an analysis that recognises the existence of the equitable interest existing at the very moment of receipt.

What that means is that the company's rights in respect of misapplied property are the same as the rights of a beneficiary under a trust. We are talking about an equitable interest which is binding on everyone, save for a bona fide purchaser for value without notice, and not a mere equity which requires some further act, such as rescission, in order to give rise to an equitable interest.

I should add that the position of companies in this analysis is not unique. This rule applies to any case of fiduciaries dealing with the property of a person to whom they owe fiduciary duties.

That's why a legal owner of property which is held subject to a fiduciary relationship can trace inequity. In such a case, the legal owner can trace the property and its proceeds into the hands of third party recipients on the basis of the principles applicable to trust money. The principle applying to fiduciaries more generally, without anything to confine it to the case of companies and company directors, was set out in a well-known passage in Re Hallett's Estate. We find it at <S2/6> at page 14, where the Master of the Rolls, Sir George Jessel, said, about a fifth of the way up the page, in a line beginning with "Equity" with a capital E:

"Has it ever been suggested, until very recently, that there is any distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position?". He says he has never heard, until quite recently, such a distinction suggested, and goes on to reject it. He says it can have no foundation in principle. Over the page, he explains his point and says, about a fifth of the way down, in the line just after a line beginning with "Equity" with a capital E:

"I say on principle it is impossible to imagine that there can be any difference. In practice we know there is no difference, because the moment you get into a Court of Equity, where a principal can sue an agent as well as a cestui que trust can sue a trustee, no such distinction was ever suggested, as far as I am aware. Therefore, the moment you establish the fiduciary relation, the modern rules of equity, as regards following trust money, apply."

We see the same thing in Re Diplock. That's <S2/21> at page 69, where the Master of the Rolls, Lord Greene, affirmed the principle that tracing in equity is available where assets have been held subject to a fiduciary relationship, and he explained that there is no difference between assets held subject to a fiduciary relationship and what might be described as trust money. He said, at page 533 of the report -- sorry, I'm just looking for the passage.

MR JUSTICE MILES: There is a bit in the middle of that quote.

MR ROBINS: Yes, I'm sorry, it is in the quote: "At law, therefore, the lender can recover the money, as long as he can identify it ... Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money."

So, in order to meet the requirements, as I say, it is not a rule particular to companies, it is sufficient that the assets were held subject to a fiduciary duty. We have seen what was said in Hallett's Estate: "The moment you establish the fiduciary relation, the modern rules of equity, as regards following trust money, apply."

There is a similar point in Agip Africa at <S2/41> at page 26, just between A and B where

Mr Justice Millett said:

"The only restriction on the ability of equity to follow assets is the requirement that there must be some fiduciary relationship which permits the assistance of equity to be invoked."

Then, on the same page, just below D, the judge made the point that company directors are just one example of this wider principle. He said:

"The requirement is, however, readily satisfied in most cases of commercial fraud, since the embezzlement of a company's funds almost inevitably involves a breach of fiduciary duty on the part of one of the company's employees or agents."

So the conclusion in Byers regarding company property is consistent with the approach of equity in the cases of fiduciaries generally.

So, to summarise all of that in the form of a --

MR JUSTICE MILES: What about the passage at 189 of Byers, which is the bit which is specifically relied on by Mr Curry?

MR ROBINS: Can I come back to that, my Lord, to take it in order?

MR JUSTICE MILES: Okay.

MR ROBINS: In terms of the propositions, first, where there is a transfer of property in breach of fiduciary duty, the source of the equitable interest is the receipt of property transferred in breach of fiduciary duty and it arises immediately. The contract is irrelevant to the source of the equitable interest.

Secondly, by contrast to that, where the transfer is not made in breach of fiduciary duty, there's no basis for an equitable interest to arise in that way. But an equitable interest can potentially arise separately as a result of rescission of the contract under which property passes. The difference is that, in that case, in the case of a mere equity, no equitable interest arises immediately, it arises only once the mere equity is exercised. That is the only sense in which the validity, or otherwise, of the contract can be relevant to whether an equitable interest arises. If the contract cannot be rescinded, then no equitable interest can arise on the basis of rescission. For that reason, a bar to rescission prevents the equitable interest from coming into existence at all.

Similarly, if there is no question of the contract being voidable, there is no scope for rescission to take place. But that's only relevant in cases where the source of the equitable interest is rescission, and that's why the presence or absence of a contract is ultimately a distraction in the present case. It confuses equitable interests arising from a breach of fiduciary duty, which is the present case, with equitable interests arising from rescission, which is not the present case.

Before I come to the authorities on which Mr Curry relies, I wanted to deal with your Lordship's examples. Your Lordship put a number of hypothetical examples to Mr Curry during his submissions.

What if there is a contract which can't be rescinded, for whatever reason, but the recipient obtains actual knowledge before performance that performance would be a breach of fiduciary duty? We say it is obvious, in those circumstances, that the recipient would take the property subject to an equitable interest in favour of the company from the very moment of receipt.

Similarly, you can imagine a case where there is no relevant knowledge or notice on the part of the defendant at the time of contracting, and it might be, in such a case, that any right to rescind is barred. But then actual knowledge is acquired by the defendant before the moment of receipt. We say it is obvious, in such a case, that the defendant would hold the asset on constructive trust for the company because there is an equitable interest from the moment of receipt, as described in Byers and earlier cases. It would be for the defendant to show that he's a bona fide purchaser for value without notice at the time of receipt, and we know from the authorities that it is knowledge at the time of receipt which is relevant. In the example I have just provided, the recipient would be unable to discharge that burden because he's acquired knowledge prior to receipt. The fact that the contract can't be rescinded is irrelevant.

Those examples, in my submission, show why Mr Curry's proposition is wrong. The simple point is that the source of the equitable interest in such a case is not rescission, so rescission is unnecessary. If rescission were held to be a necessary precondition to a proprietary claim, it would be likely to have all sorts of unfortunate consequences for the coherence of the law more widely. A right to rescind may be lost for a number of reasons, including lapse of time.

A right to rescind may be lost through the occurrence of circumstances which are entirely outside the control of the transferor, and the classic example of that is the commencement of corporate insolvency proceedings in respect of the recipient. There is a decision called Crown Holdings which we find at <S2/133.3> at page 1.

It is not a case involving a trust or any fiduciary relationship. In summary, some customers of companies in liquidation were asserting that they were entitled to rescind contracts by which they'd transferred monies to the companies. They said the contracts had been induced by fraudulent misrepresentations. So, after the companies had gone into liquidation, they wanted to rescind the contracts and recover their monies on a proprietary basis, and the judge held that the right to rescind had been lost upon the recipient companies going into liquidation.

If we start on page 12, my Lord can see the point in paragraph 37:

"... the liquidators next contend that the customers lost the right to rescind and thereby regain title in equity to the sums transferred by them under the contracts, on the companies' going into administration and/or liquidation."

Then at 38, having set out the counter-argument, the judge says:

"... the 'equity' to rescind a fraudulently induced contract does not give the innocent party any proprietary rights in property which is transferred pursuant to that contract."

He goes on to say:

"... that a party with an equity to rescind a contract does not have any proprietary interest ..." As I said, it only arises by and upon rescission. Over the page, there are various statements in the authorities to that effect that are set out. We have looked at Twinsectra v Yardley and Shalson v Russo, but there are similar statements in (a) and (b) at the top of the page.

The judge examined the authorities. If we go to paragraph 42, the next point in the reasoning is: "When a company goes into voluntary liquidation, its property becomes subject to the statutory scheme imposed by the Insolvency Act ..."

After a quote in italics, he said:

"The provisions of the Insolvency Act apply to all property that is beneficially owned by the company at the date of liquidation ..."

That's the relevant date for deciding what is beneficially the company's property. In 43, he said there may be a difference for these purposes between corporate and personal insolvency because a mere equity might be capable of assertion against the estate of a bankrupt against the specific provision of section 283.

But, in 44, he held that in his judgment, at the time of the companies going into liquidation, the sums paid by the customers were sums to which the companies had full legal and beneficial title:

"The customers' equity to rescind as a result of any fraudulent misrepresentation was a personal right ... and did not encumber the sums which had been paid ..." Now, in the case of a corporate recipient, it follows that Mr Curry's argument would give rise to extremely surprising results which just cannot be right. To take another hypothetical example, assume that a director of company A misapplies property belonging to company A by transferring it to another company that he controls, company B. Company B has actual knowledge of the impropriety because it is controlled by the same director, his knowledge is attributed to it. But the very next day, company B goes into liquidation. According to Mr Curry's argument, the fact that the right to rescind is lost in those circumstances and that company B can no longer rescind the contract -- sorry, company A can no longer rescind the contract will mean that company A cannot recover the property on a proprietary basis.

It is that sort of surprising result that we say makes no sense and demonstrates that the proposition for which Mr Curry contends is contrary to basic principle. Why shouldn't company B hold the property on constructive trust from the very moment of receipt in circumstances where it received that property with notice of the fact that it was being misapplied in breach of fiduciary duty?

That's an illustration by way of example of the wider point that if rescission is introduced into the analysis, the law goes wrong and you get some extremely surprising results which just cannot be right. The correct position, as I have said, is that the misapplied company property is held on trust, no rescission is required. In the example I just gave, the equitable proprietary interest would survive the commencement of corporate insolvency proceedings in respect of the recipient. The right to recover the asset on a proprietary basis wouldn't be destroyed by the commencement of liquidation, as it would if, as Mr Curry contends, rescission was a precondition. I don't want to spend too much time on examples, but it might be worth just considering one further example. You may have circumstances in which company A is induced to enter into a contract with company B as a result of fraudulent misrepresentations made by a director of company B. Assume that the directors of company A at that moment have been deceived.

Under that contract, company A is required to make payments to company B by instalments. Company A makes some of those payments to company B. Company B then pays them to a director who made the fraudulent misrepresentation.

Now, in those circumstances, so far in this hypothesis, we are dealing with a mere equity. At this point in the analysis, company A has no knowledge of the fact that it's being deceived. Its directors are not acting in breach of fiduciary duty by complying with what they believe to be its lawful obligations under the contract.

To give rise to a constructive trust, they would need to discover the deceit and exercise the equity of rescission.

But then change the facts slightly. Assume that, before they finish making the payment under the contract, the directors of company A learn of the fraudulent misrepresentations and say to the director of company B, "Look, we have got a right to rescind here, but if you pay us bribes, we won't exercise it. We will carry on making the payments under the contract".

If the director of company B pays the bribe and the directors of company A don't rescind the contract and carry on making the payments, those will be payments in breach of fiduciary duty in the nature of misapplication of company property. And company B, receiving those monies, will hold them on constructive trust from the time of receipt by reason of the misapplication and company B's knowledge of the fact that the sums are being paid in breach of fiduciary duty. In that scenario, rescission of the contract is likely to be impossible because the directors of company A have caused it to affirm the contract by carrying on making payments under it. But those payments are themselves being made in breach of fiduciary duty and so company B holds them on constructive trust.

In those circumstances, if the shareholders of company A found out what had gone on and sacked the board who had taken the bribes and appointed a new board to recover their monies from company B on a proprietary basis, it would be no answer for company B to say, "Well, the right to rescind has been lost. You can't recover the monies". That contention would be irrelevant and the conclusion for which it was made would not be supportable. The fact that they had knowingly taken monies in breach of fiduciary duty would give rise to a constructive trust of the monies in their hands and the new directors of company A would succeed in an action to recover it.

It is with that, my Lord, that I think we can turn to the authorities on which Mr Curry relies. The first is, of course, Criterion, at <S2/82> at page 3, paragraph 4. We have made our submissions on it in writing. My Lord knows the points we make about how this was obiter. Lord Nicholls wasn't actually dealing with the point at issue. The ratio was that the question of whether an executory poison pill agreement is binding should be decided by applying principles of agency and authority. It is not a matter of knowing receipt and, therefore, unconscionability has nothing to do with it.

In the paragraph, Lord Nicholls has been dealing with that point, saying essentially the Court of Appeal got it wrong by applying the unconscionability test when the question was actually whether the executory contract was valid and binding under normal principles of agency and authority.

In dealing with that point, he wrongly elided equitable interests and mere equity. So, that's the source of the entire confusion.

In paragraph 4, he says that the Court of Appeal fell into error on this point. That's the point about the unconscionability test being applicable. He says: "If a company (A) enters into an agreement with B under which B acquires benefits from A ..." I think for "benefits" we have to read "property or assets" because one of the points decided by this very case is that contractual rights are not assets. But leave that aside:

"If a company (A) enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A." Well, yes, in the case of a mere equity, that's right. In the case of a mere equity, you have to rescind to get your proprietary claim because the constructive trust only arises on rescission. That's not a sentence that is accurate in respect of equitable interests. In the case of equitable interests, whether the agreement is or is not binding is irrelevant, as I have explained. Then he goes on to say, in the next sentence:

"If the directors of A were acting for an improper purpose when they entered into the agreement, A's ability to have the agreement set aside depends upon the application of familiar principles of agency and company law."

That's where it starts to get confused because the first clause, "If the directors of [company] A were acting for an improper purpose when they entered into the agreement", is dealing with circumstances of misapplication of company property that we know from Byers is a true trust, it is an equitable interest from the moment of receipt. It doesn't depend on rescission. To make this correct, you would need to say, "In the case of a mere equity, if a company (A) enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A." That's right. That's fine in respect of a mere equity, as I have said. That accurately states the law. You then need to delete the next clause about directors and you need to add a further sentence after, saying, "But in the case of an equitable interest, rescission is irrelevant". Then it would be accurate. But, as it stands, it is not, because what he's done is to confuse equitable interests with mere equities. That really does seem to be the source of the confusion, because it is then followed through in Madoff v Raven, where my Lord saw Mr Justice Popplewell simply applied what Lord Nicholls had said in Criterion and said, well, you can't have a constructive trust without rescission. Well, in the case of a mere equity, that's right; in the case of an equitable interest, it's not.

MR JUSTICE MILES: It is not really easy to understand this passage.

MR ROBINS: No.

MR JUSTICE MILES: But one view of it, which is perhaps a bit more charitable and less inclined to treat it as a complete muddle, is to say that, in a case of directors acting for an improper purpose, so if that is the allegation which is made by the claimant, that the directors have acted for an improper purpose, it could be said that what Lord Nicholls is really saying is that the proprietary-type claims are, in practice, likely to be the kind of flip-side of the claim about whether it was a proper contract at all.

I accept that he uses the language of "setting aside", and "setting aside" is usually considered to be to do with rescission. But it might be thought that what he really means is, "Look, if" -- he's sort of making a really basic point, which is, if the question of whether it was for an improper purpose is in play, and that's decided in favour of the defendant, so it is not for an improper purpose, well, you're not going to then have a proprietary claim.

If, on the other hand, it's decided that it is for an improper purpose, then there will be, and that's probably because there isn't a contract. I mean, that's looking at it, I have to say, at quite a general level. It is not the actual language that Lord Nicholls used, and I accept that he used the language of "setting aside". But it is a very difficult passage to understand.

MR ROBINS: My Lord is right, that's certainly being charitable. My Lord knows that Lord Neuberger, in his comments on it, was perhaps not quite so charitable.

MR JUSTICE MILES: Well, he may be in a better position to speak more frankly about it than I am.

MR ROBINS: Lord Burrows talks about "Homer nodding", which, again, is perhaps not quite so charitable. But it certainly doesn't stand for the proposition that there can be no equitable interest without rescission, which is what it seems to be relied on for. That would be contrary to basic principle and hundreds of authorities going back centuries.

MR JUSTICE MILES: I wonder whether it's been slightly -- whether people have drawn from this too strong a principle, as I say, that it's to do with rescission, whereas it's arguable that what Lord Nicholls was actually talking about was just saying, "Well, look, if the whole basis of the claim is really that the directors have acted in breach of duty", and it will be in company cases, after all, the only way you are ever going to get a claim off the ground in company cases is to say there's a breach of duty because that's the thing that gives rise to the initial constructive trust, as described by Lord Burrows in Byers. If you don't have that, the directors can just dispose of the company's property.

It could be that he is saying, "Well, where that is the foundation of the claim", as it is with where you're claiming the money back, "if you can't establish that, and therefore the contract" -- as he says, if the contract is held to be valid --

MR ROBINS: In other words, no breach of duty.

MR JUSTICE MILES: No breach of duty, well, then, B gets the property. But he's not making a procedural point about whether you have to apply for rescission. He doesn't actually say that. That's how he's been read --

MR ROBINS: Ah, yes.

MR JUSTICE MILES: -- in later cases. But I'm not sure whether that's really what he's saying. He's making a very general point.

MR ROBINS: I think I adopt that as part of my submissions. Either he is muddled or he is making a different point, but he is certainly not making the point for which Mr Curry --

MR JUSTICE MILES: He is not, on the face of it, saying anything about rescission being a precondition of bringing a claim. He is saying, if one treats it as a non-muddled paragraph, that, where that question of the validity of the contract can be seen as somewhere in play in the case -- as I say, the validity of the contract is, in a sense, a flip-side of the claim because, if there is a good contract, party B, in his example, just says, "Well, I have acquired the title under a good contract".

MR ROBINS: Yes. But, either way, as I say, it doesn't support the proposition for which it is advanced by --

MR JUSTICE MILES: Well, I think the proposition is -- and what seems to have been taken from it -- I think Mr Justice Popplewell treated it as establishing the proposition that rescission is required. Is that right?

MR ROBINS: Yes. Let's look at that. It is at <S2/118> at page 103. I think it is paragraph 369:

"The payments were made pursuant to valid contractual obligations ... under a contract which is valid. That is fatal to this cause of action."

MR JUSTICE MILES: Can we just see the previous page? So, he treats it as being that, unless the contract is set aside as being invalid.

MR ROBINS: Yes. One of the problems with that, of course, is that it eliminates the well-known requirements of good faith and knowledge. The existence of the contract doesn't automatically result in a finding of good faith. It doesn't mean there is no knowledge or no notice or no unconscionability, depending upon which test we are applying. The existence of a contract probably doesn't automatically mean that there's a purchase for value. There might be debate about whether the contract is one which satisfies the purchaser for value element of the test. But it doesn't mean that you don't then need to go on to consider good faith and notice and so on.

MR JUSTICE MILES: He goes on, in the next paragraph --

MR ROBINS: 370?

MR JUSTICE MILES: Hang on, I'm just making a note. He actually says -- I haven't read the facts of this case, but he goes on to say that there wasn't actually a breach of duty by the directors in making the payments.

MR ROBINS: Yes.

MR JUSTICE MILES: I'm assuming that he's also saying that there wasn't a breach of fiduciary duty in relation to the contract.

MR ROBINS: That's back to front, because, if there is no breach of duty, then the questions about justification of the receipt are academic. You don't get past the first base.

MR JUSTICE MILES: That's why I'm -- it is closely related to the point I was just making about Criterion, that, to some extent, one can see that there is a flip-side point here, because, if you can't -- because the starting point for the proprietary claims in the case of a company is that the directors have acted in breach of fiduciary duty. That's what the passages in Byers establish.

MR ROBINS: Yes.

MR JUSTICE MILES: Where it is a contract case by a company, and you're asking, has a contract been entered into in breach of fiduciary duty, it is probably going to be the same question as the springboard for the whole claim.

MR ROBINS: Yes. And here, the first and fundamental reason why there can be no claim is because there is no breach of duty.

MR JUSTICE MILES: So, there isn't, as it were, the separation of equity and law.

MR ROBINS: Exactly.

MR JUSTICE MILES: So, I don't know to what extent this is a reinterpretation of these cases, but they seem to be at least consistent with what I have called the more charitable reading of paragraph 4 of Criterion. I don't think the same can be said for the next case, which is Mr Justice Jacobs' case.

MR ROBINS: Tuke.

MR JUSTICE MILES: But that's not a company case. It is slightly different on the facts.

MR ROBINS: Shall we look at that? <S2/155.1> at page 42.

MR JUSTICE MILES: What was this case about?

MR ROBINS: Well, one of the reasons why there seems to have been some elision in this case is because, if we go back to page 6, my Lord can see paragraph 8: "The Group C transaction is a pivotal transaction as far as the present claim is concerned. Mr Tuke claims that he was misled into entering into the transaction, and that it brought significant financial problems in its wake."

Then, at page 33, the first thing that the judge deals with is deceit. He sets out the law relating to deceit in paragraphs 138 to 148. So, when we come to the discussion that we looked at on page 44, in paragraph 181 --

MR JUSTICE MILES: So, Mr Tuke was the legal owner. Is that right?

MR ROBINS: Yes. And it had previously been held in earlier litigation between the same parties that Mr Hood's company owed fiduciary duties to Mr Tuke. So, there arose in the background an issue relating to fiduciary duties. But the principal claim being considered in this judgment is the claim for misrepresentation.

MR JUSTICE MILES: Sorry, I'm just trying to see what the claim in knowing receipt is for. One needs to understand the facts because it is not quite like a company claim because it -- isn't this saying that the defendant -- isn't this really about a sort of self-dealing rule rather than a case like a director who is misapplying the property of the company in breach of his duties to the company?

MR ROBINS: Yes, and I think we see that from the discussion, if I can find it -- it may be on the previous page or the page before -- about what, if anything, the knowing receipt claim adds to the misrepresentation claim. We see that in 176: "... the claims against Mr Hood in knowing receipt were said to arise in relation to four cars which had been transferred to Mr Hood personally. In the course of his original submissions, however, Mr Wright indicated that the only car where a knowing receipt claim added anything to Mr Tuke's other causes of action concerned the Jaguar Broadspeed."

He says that the relevance of the knowing receipt claim was potentially to convert the figure of £430,000 from a purely personal claim into a proprietary claim, which is a bit of a puzzling thing to say, given that a knowing receipt claim is a personal claim for equitable compensation. So there seems to be some confusion about the terminology.

MR JUSTICE MILES: Can I then see the next page? The way that Mr Justice Jacobs puts it in that paragraph is that it says, in the fifth line or so down:

"Albeit that it is alleged in these proceedings that the relevant contracts were procured by fraud, no claim has been made to set those contracts aside ..." So that bit seems to be talking about the right to set aside a contract for fraud.

MR ROBINS: That's right.

MR JUSTICE MILES: Then he says, "Well, that hasn't happened, through lapse of time". So he then says, "Well, the contract is therefore valid", and then he applies what he takes from Madoff. It is rather puzzling.

MR ROBINS: It is, but you can see how it got to that position because a claim is being made for damages for misrepresentation, and it is being said that the relevant contracts were procured by fraudulent misrepresentations. Then there's what's said to be a knowing receipt claim, but it is actually a proprietary claim, that's said to be based on exactly the same facts, and one can see why, instinctively, Mr Justice Jacobs has headed off in the direction of mere equities, because we are talking about a contract procured by fraud. You would be in the territory where you need to rescind the contract to give rise to a constructive trust.

The claim doesn't seem to have been put on the basis that these were dealings by a fiduciary and, therefore, we are --

MR JUSTICE MILES: Well, that's what's unclear from this passage. That's why I feel that I haven't really understood this case.

What I am going to do is rise now. Perhaps you can have a look at it over the short adjournment and see if it explains at an earlier stage just how -- because there was an allegation of some sort of fiduciary relationship.

MR ROBINS: Yes. I think the right way to argue the case would have been to say, "Fiduciary relationship. Hallett's Estate. Tracing rules apply. Rescission is irrelevant". But the argument doesn't seem to have been --

MR JUSTICE MILES: Well, it may have been. It is a bit unclear, isn't it, because Mr Wright seems to have argued that the principles of bona fide purchaser, and so on, applied. But it is very unclear from this part of the judgment whether Mr Justice Jacobs was taken to those principles about trusts, other than this very general statement that he said that it's a knowing receipt constructive trust.

MR ROBINS: We will have a closer look over the short adjournment.

MR JUSTICE MILES: Okay. 2 o'clock.

(1.03 pm)

(The short adjournment)

(2.00 pm)

MR ROBINS: My Lord, we were looking at Tuke. If we could have up <S2/155.1> at page 42. By this point, as my Lord will have seen, the judge has dealt with the misrepresentation claim, and he's dealt with the claim for dishonest assistance and a breach of fiduciary duty. He then turns to what he describes as "Knowing receipt", and he says in paragraph 176 that the claims against Mr Hood in knowing receipt were said to arise in relation to four cars:

"... Mr Wright indicated that the only car where a knowing receipt claim added anything ... concerned the Jaguar Broadspeed. The claim in respect of that car is £430,000, and that figure was accepted by the joint trustees in the event that liability was established. The relevance of the knowing receipt claim was potentially to convert the figure of £430,000 from a purely personal claim into a proprietary claim ..." As I said before the short adjournment, it is rather confused already by this point because the parties and the judge are not talking about personal liability in knowing receipt, which is a personal liability to pay equitable compensation; they are talking about proprietary claims. But even the way in which the proprietary claim is put is not entirely clear. It is said in the final few lines:

"... in relation to the Broadspeed, Mr Tuke sought a declaration as to the existence of a proprietary claim in relation to £430,000."

It seems to be thought that the existence of a proprietary claim is somehow a claim for a monetary amount, in the same way that a personal claim is a claim for a monetary amount.

Of course, the proprietary claim would be a claim for the car or the traceable proceeds of the car. It may be that that's an attempt to say, in a fairly shorthand way, that it's a claim to the traceable proceeds up to the limit of the £430,000 value of the car, or something like that, but it is not entirely clear.

In the next paragraph, 177, it gets even more confused, because the judge records it is common ground between the parties that the basic principles relating to claims for knowing receipt are the principles set out in those authorities, including, as we see in the final line, the requirement for unconscionability. That is, of course, right, insofar as we are dealing with the personal claim for equitable compensation for knowing receipt which arises if and to the extent the assets haven't been retained, but if we are talking about a proprietary claim to the assets themselves, insofar as they have been retained, then unconscionability has got nothing to do with it.

So, that's fairly confused.

Then, in the next paragraph, the passage from Madoff Securities is set out, and within it the quote from Criterion. Then in 179:

"Mr McWilliams submitted that the principle to which Popplewell J referred provided a complete answer to all of the claims for knowing receipt ..."

Again, I think they are talking about the proprietary claim that the judge referred to in 176, not actually a claim for equitable compensation for knowing receipt. He says:

"... knowing receipt, including that in relation to the Broadspeed."

Which is what he's identified as the proprietary claim:

"The essence of the argument, taking the Broadspeed as an example, was that Mr Tuke had sold the car under a valid contract of sale which had never been set aside. Mr Tuke had received consideration for the sale by way of the purchase price paid ... Whilst claims might be made for damages for fraudulent misrepresentation relating to the alleged sale at an undervalue, a claim for knowing receipt could not arise."

Again, they are dealing with the proprietary claim. That's only right if and insofar as the proprietary claim is being put on the basis of misrepresentation because, as I said, that's a mere equity, and it would be necessary to rescind the contract.

That's not how Mr Wright should have put it. As I said before the short adjournment, he should have said fiduciary duties, Hallet's Estate, tracing, the only possible defence is bona fide purchaser for value without notice.

He seems to have missed out the bulk of that argument and jumped straight to the bona fide purchaser for value point in paragraph 180. But by then he's already conceded, in paragraph 177, that the test is actually unconscionability. So, it is all rather confused.

The argument that should have been made wasn't made, and it proceeded instead on the basis of common ground relating to the test for the personal claim for equitable compensation.

It may be that the point wasn't the focus of particular attention because, as recorded in paragraph 176, it related only to a single car in a much larger case, and in a lengthy judgment it was a fairly small point. It doesn't seem to have attracted sufficient attention or thought or analysis. So, when we come to 181, on the next page, the judge says that he considers the principle stated by Mr Justice Popplewell is applicable to the sale of the cars, including specifically the Broadspeed, which are alleged to give rise to the knowing receipt claims. Although, as I said, the claim in respect of the Broadspeed is actually a proprietary claim: "Mr Tuke entered into contracts under which he agreed to transfer cars which he owned for consideration which comprised or included the receipt of other cars by way of part exchange. Albeit that it is alleged in these proceedings that the relevant contracts were procured by fraud ..."

So the judge is focusing on it very much from the misrepresentation perspective:

"... no claim has been made to set those contracts aside, perhaps because it is recognised that such a claim would be problematic in view of the time which has elapsed ..."

So he's thinking about bars to rescission and the fact that, at least in most cases, the cars have long been disposed of. He seems to be thinking about restitutio in integrum as a bar to rescission: "In circumstances where Mr Tuke's cars were told by Mr Tuke under contracts of sale which have not been set aside, I do not consider that there is the starting point for a claim for knowing receipt." If he is talking about the equitable personal claim for knowing receipt, then the starting point is, we know, not actually rescission at all; it is the disposition of property in breach of duty. If he is talking about the proprietary claim, then the point is the same: the starting point is actually the breach of duty, not the rescission.

What he says only makes sense if he's coming at this from the perspective of mere equities, where the starting point is the rescission that converts the mere equity into the equitable interest.

He says:

"Since there is no starting point, the issue discussed ... [as to] a bona fide purchaser ... for value without notice [defence] -- does not arise." In the case of mere equity, if there has been no rescission, that's right, you don't get to that. But rescission isn't the starting point for the proprietary analysis or the knowing receipt analysis. The starting point is the fiduciary duty and the misapplication in breach of fiduciary duty.

So, it may be that Mr Justice Jacobs is just coming at it from the wrong angle, thinking of mere equities. It may be that he's been led into that by the way in which the case has been put, with the focus on misrepresentation, and he's been encouraged along the way by what Mr Justice Popplewell said about Criterion. But he's ended up in the wrong place, thinking that there can be no proprietary claim without rescission, which, as I said, is wrong in the case of any property which has to be dealt with in accordance with fiduciary duties.

MR JUSTICE MILES: I'm still not sure I understand what this case was about, because no-one has told me yet, so I'm struggling a bit.

MR ROBINS: In very broad terms --

MR JUSTICE MILES: There is some sort of fiduciary duty here, but it seems to me it might be a different sort of fiduciary duty.

MR ROBINS: It is one of agency. If we go back to the facts, we can see, in very broad terms, Mr Tuke made a lot of money and, instead of putting aside the amount that would be required to pay his future tax bill, decided to invest very heavily in classic cars, and when the tax bill arose, he contracted to sell some of those classic cars back to his agent, but on terms which required him to buy yet more classic cars with borrowed monies.

So, his commercial dealings weren't particularly wise, but if we look at page 6, we can see, in paragraph 10, the claims that were made against that background:

"... Mr Tuke seeks damages or equitable compensation or an account of profits exceeding £40 million against the Mr Hood. His claims are brought in deceit, dishonest assistance in breach of fiduciary duty, knowing receipt [which we are later told actually includes a proprietary claim] and conversion." Then the judge says in paragraph 11:

"The present trial of 3 consolidated claims has taken place in the context of a further action which was heard by Lavender J ... In that action, Lavender J decided, in relation to the purchase transactions ... that JDC [the company] was authorised by Mr Tuke to act, agreed to act, and either did act, or purported to act, as agent for Mr Tuke in negotiating and concluding the purchase of cars by Mr Tuke in 2010 ... In relation to the Group C transactions and the other sale transactions ..."

That's when Mr Tuke is selling cars back: "... Lavender J held Mr Tuke appointed JDC as his agent to negotiate and conclude the sale of cars and receive payments on his behalf ..."

Over the page, at paragraph 12, we see that that decision established the existence of an agency relationship in relation to all the transactions: "The case led to the production ... of extensive documentary material ...", et cetera, but Mr Justice Lavender hadn't dealt with the consequences of his finding. Then, in 13:

"JDC is now in administration and therefore the claim has proceeded against Mr Hood alone." The judge goes on to explain that it was interrupted by the Covid pandemic.

Then, on page 15, paragraph 49, he summarises the acquisition phase. Part of that is it is alleged that he was misled into overpaying for some cars. Then, on paragraph 50, there's the explanation of what I have described as the transaction by which Mr Tuke was selling some of his cars back to the dealership, but, as the judge says, "could not resist the opportunities presented to him by Mr Hood to purchase further cars". So as well as selling some cars back, he was buying more cars on credit. He borrowed money from Close Brothers. I think, then, at page 16, paragraph 58, the judgment records the email exchange that formed part of the decision or the reasoning of findings of fact of Mr Justice Lavender. The resale deal was essentially that the dealership could take a fee equal to 10 per cent of the uplift from purchase, and a problem which arose is it emerged that the dealership had made profits in its capacity as agent in excess of the amount that had been agreed by the principal.

So an agent would owe fiduciary duties. That was the basis of the claim for dishonest assistance in a breach of fiduciary duty that was made against Mr Hood. He was the dishonest assistant. The fiduciary was the company.

But, as I say, the argument and the common ground between counsel and the reasoning --

MR JUSTICE MILES: But the company bought the car, didn't it?

MR ROBINS: Yes. Mr Shaw confirms.

MR JUSTICE MILES: So, is this right, that the fact pattern is that JDD was -- sorry, JD was acting as agent for Mr Tuke.

MR ROBINS: Yes.

MR JUSTICE MILES: Is this right? Did JD then buy the car? Sorry, JDC is it called? JDC.

MR ROBINS: Can we go back a page to the pages describing the transaction? Here we are, it is 50 onwards. It certainly seems that JD was the agent for selling the cars to third parties for --

MR JUSTICE MILES: I'm still struggling, at the moment, to understand what the claim was.

MR ROBINS: I have to say, it is not entirely clear from the description in the judgment. We can see the causes of action. Over to the next page, please. He mentions the documentation. Over on the next page. That's about abuse of process.

Mr Shaw is pointing out, if Mr Hood has ended up with the cars, he must have bought them from JDC. So, it looks like it's a case where the agent of the fiduciary has bought them from the fiduciary. Let's have a look at paragraph 181, and see if that helps us. That's page 44, I think. Mr Shaw is pointing out it is staring us in the face at the end of this paragraph:

"... whether Mr Hood, as onward recipient from JDC, could successfully argue that he was a bona fide purchaser ..."

So JDC is the agent for the sale of the cars for an agreed share of the profits, and it has, in fact, gone and sold them to its director, Mr Hood.

MR JUSTICE MILES: But it is therefore -- this is a self-dealing case, isn't it, essentially?

MR ROBINS: Yes, but I don't --

MR JUSTICE MILES: But I'm not sure that I quite see, at the moment, quite what the -- I'm just trying to understand the analogy with the current case, because this is a case where you've got A, B and C, where B is a fiduciary agent for A. The title is vested in A. Legal title is vested in A, the innocent party.

MR ROBINS: Yes.

MR JUSTICE MILES: The fiduciary causes A to transfer the title to C.

MR ROBINS: Yes.

MR JUSTICE MILES: And that's alleged to be a breach of fiduciary duty by B.

MR ROBINS: Yes.

MR JUSTICE MILES: So, Mr Curry says, well, that's like a case where you have a company, which is A, B is the director, the fiduciary, and C gets the property. So he says it is an analogy with that.

MR ROBINS: Yes.

MR JUSTICE MILES: Does it matter what sort of -- maybe it doesn't matter that it is a self-dealing rule because it must be in breach of fiduciary duty.

MR ROBINS: I don't think it does. The point is that it was argued and decided on a rather confused basis; possibly, as I say, because in a very large case it was a small issue that didn't receive sufficient attention. It starts with the knowing receipt claim being described as -- sorry, the proprietary claim being described as a knowing receipts claim, and then it is common ground that the judge should apply the unconscionability test in Akindele. But that's wrong because that's the test for the equitable claim in personam to the extent the assets haven't been retained.

The point is then made, well, there's been no rescission. That's a point that only matters in the case of a mere equity. The fact that there are allegations of misrepresentation seems to lead the judge down that path and, as I say, he's encouraged along the way by what Mr Justice Popplewell has said about Criterion.

It means that, when Mr Wright starts, at the end of the argument, with the point about the bona fide purchaser for value without notice, the judge can't see the relevance of what he's saying or how it is that that point is said to arise.

What Mr Wright should have said is, fiduciary duties, Hallett's Estate, tracing --

MR JUSTICE MILES: Just go back a page.

MR ROBINS: Sure.

MR JUSTICE MILES: Mr Wright, in fairness to him, did say that both -- neither Mr Hood nor JDC were bona fide purchasers for value. The judge seems to then go on and say, well, you don't need to bother with Mr Hood because -- although I don't really understand why, because -- did JDC buy the car first and then sell it to Mr Hood, or what? I don't really understand why JDC is being referred to if the sale was to Mr Hood. But, as I say --

MR ROBINS: It does suggest that in 180, "who had subsequently acquired the car from JDC".

MR JUSTICE MILES: So it looks as though -- sorry, I'm just making a note -- JDC bought the car from the claimant, and then sold it on to Mr Hood, and JDC was an agent for the claimant, so the allegation is that JDC was acting in breach of fiduciary duty, presumably in buying the car and then selling it.

MR ROBINS: Yes. So, the allegation must have been that the agent wasn't acting in the principal's best interests.

MR JUSTICE MILES: It was an undervalue, or something like that.

MR ROBINS: Yes. But, as I said, Mr Wright hasn't explained why it is that he says that the only relevant defence is the defence of bona fide purchaser for value without notice. Having conceded that it's something to do with unconscionability, it's all got into --

MR JUSTICE MILES: But the judge didn't decide it on the unconscionability point. He just says that they haven't set aside the contract, in 181.

MR ROBINS: Mr Shaw seems to have found something helpful on page 27, just to shed light on the nature of the transaction. At the bottom:

"... the Group C transaction set the pattern ... Mr Tuke sold many of his vehicles, including those which were most valuable, by way of part exchange. In most cases, he received cash in addition to the vehicle in return."

The particular part exchange transactions are set out on the next page. Transaction 3 in particular is the Jaguar Broadspeed. So it was a straight swap, with no money changing hands.

Then, at 107:

"Mr Tuke claims that these transactions were induced by fraudulent misrepresentations ... concerned, in particular, the existence of third party buyers who wished to part-exchange, and the value of the cars which were received by way of part exchange. He alleges that he was fraudulently persuaded to trade the most valuable cars in his collection for inferior stock always said to be owned by a third party but invariably owned by JDC or Mr Hood personally."

MR JUSTICE MILES: Yes.

MR ROBINS: But, on those facts, as I say, the argument should have been: fiduciary duties; goes to Hallett's Estate; follow your property; it's held on trust; you get it back unless the defence of bona fide purchaser for value without notice is made out. But I've explained to my Lord why the argument and the reasoning seems to have gone wrong.

MR JUSTICE MILES: It is really that Mr Justice Jacobs seems to have thought that there was this very clear principle taken from the Criterion case, and he seems to have thought that's the answer.

MR ROBINS: Applicable to all proprietary claims, yes.

MR JUSTICE MILES: It seems like it.

MR ROBINS: But I have explained why that's not right. The final case to go to is, I think, Byers, at <S2/179> at page 55. Actually, we can start at page 52, just to see where this fits into the judgment. It is paragraph 189, where Lord Burrows introduces it. He makes the point at F that Criterion didn't feature in the submissions at trial of either party and was not mentioned by the courts below, and that the Supreme Court requested, and was assisted by, post-hearing written submissions on the relevance of the case. Lord Burrows says he was also helped by a case note on Criterion and an article. So it doesn't seem to be something that was argued by way of oral advocacy in the Supreme Court. It was something that was considered on the papers afterwards. It may be that it didn't receive the fullest consideration, as a result. That may be why it doesn't feature in any of the other decisions of the Supreme Court Justices in the case.

Back on page 55, paragraph 196, Lord Burrows says: "If Lord Nicholls was going so far, in my respectful view he was going too far. The better view is that in these types of situations, there are various possible claims ... for example ..."

This is clearly just by way of example: "... it may be decided that, applying contractual agency principles, the contract is void and, in respect of benefits conferred on the defendant by the company, there may then be (common law) restitutionary remedies reversing the defendant's unjust enrichment. But alternatively, if the contract is void, the company may choose to bring an equitable proprietary claim if the traceable asset is still retained or a personal claim for knowing receipt based on the defendant having knowingly received the company's assets transferred in breach of fiduciary duty."

So he's not trying to state in any of this exhaustively the circumstances in which claims may arise or the essential ingredients that have to be proved. He's not saying, for example, that you can only bring such claims where the contract is void. He is simply saying that you may have a variety of remedies in particular sets of circumstances and that the existence of restitutionary remedies doesn't rule out the parallel existence of equitable remedies.

MR JUSTICE MILES: But that passage has to be read together with 191 to 192, because that's what it refers to.

MR ROBINS: Yes, but if we --

MR JUSTICE MILES: One of those, I think it is 192, from memory.

MR ROBINS: Let's go back to it.

MR JUSTICE MILES: It was the one where he referred to the purported contract being void.

MR ROBINS: Yes. But it is the same point. He is giving an example and saying, where the purported contract is void --

MR JUSTICE MILES: But he's not generalising it and saying --

MR ROBINS: He is not saying you can only claim an equitable proprietary remedy if the contract is void.

MR JUSTICE MILES: No, but he doesn't say anywhere that you can claim it if it is not void.

MR ROBINS: No, but he is not dealing with it exhaustively. He is just setting out some examples of how various principles can operate and give rise to different remedies. This isn't meant to be an exhaustive restatement of remedies that can arise. He's just identifying a particular factual scenario, a hypothetical scenario.

MR JUSTICE MILES: Well, in 190, he says there are two main possible analyses. It would be a bit odd if he -- he's clearly used the word "void" for some reason. It would be a bit odd if he was meaning by that "void or not void". In other words, it is just a sort of off-the-top-of-the-head example. He seems to be saying that the basis of the liability in this kind of case is that the contract is void because the director was acting in breach of fiduciary duty.

MR ROBINS: Well, he's dealing with an example where the breach of fiduciary duty, the hypothetical breach with which he's concerned, is such as to make the contract wholly void, and we know that that's not the case in respect of all breaches of duty by directors. Often, they result in a contract being voidable rather than --

MR JUSTICE MILES: Well, which ones? I mean, normally, if it were for the wrong -- if he was doing it for -- entering into it not for the purposes of the company, that would render the contract void because it's an implied restriction on the powers of a director that it must be -- the power must be used for a proper purpose.

MR ROBINS: Yes, there may equally be circumstances where it's not void ab initio. For example, if it's entered into within the director's powers, but contrary to the best interests of the company, or in circumstances where the counterparty has no notice. But it's clear from 190, when he says, "Let us assume", part of his assumption is that a purported but invalid contract has been made. So the very terms of the assumption or the hypothetical scenario with which he's dealing include a void contract. That's just part of the --

MR JUSTICE MILES: Yes, but then assume that the contract -- conversely, he seems to be then, by implication, saying that, where the contract is valid, there wouldn't be a claim, although he doesn't quite say that.

MR ROBINS: That's not what he says. I think that's where --

MR JUSTICE MILES: Why is he talking about it, then? There must be a reason why he's making this point. Because, if he was just saying the contract is irrelevant, he would say it was irrelevant. He clearly isn't saying that. He's not saying here that the only principles that apply are those relating to bona fide purchasers for value without notice. Because, otherwise, he would stop his analysis at this point. So, he seems to be making some point about what a contract does in barring certain claims, and I'm trying to work out what it is he's saying.

MR ROBINS: I don't think he is making that point. He's simply making the point that, in a hypothetical scenario involving a void contract, there are a number of different remedies that are possible. He says, "In that scenario", and, as I say, it is a scenario of a void contract, "there are remedies at law", which he sets out, "and remedies in equity", which he also sets out. He says they are not mutually exclusive. We see it again in the paragraph I took my Lord to, 196, where he says that, in these types of situations -- and he's identified the type of situation he's talking about, it is a void contract situation -- there are various possible claims, and that's why he goes on to say, if the contract is void, there may be common law restitutionary remedies. Equally, again, if the contract is void, there may be an equitable proprietary claim.

He is not saying anything about circumstances where the contract is not void, because that's not part of the assumption on which this entire discussion is proceeding, and he's not --

MR JUSTICE MILES: It seems a very odd thing to be discussing, though, because, why bother? It is obvious, if it is void, that there will be remedies. He's not inclined, I suspect, just to say things idly. He must be making a point that, if it is -- he must be making the point, mustn't he, that, if it is an entirely valid contract, then that may have an impact on the availability of the claim?

MR ROBINS: If he was making that point, my Lord, I would turn your Lordship's observation around and say, why on earth doesn't he say it? Why, on your Lordship's hypothesis, is it left to some sort of implication, on the basis that --

MR JUSTICE MILES: It is not really implication. It is just that people don't generally say things pointlessly. He says twice, "If the contract is void, then there will be these remedies". Equally, he says, "If it is voidable and then set aside, there may be these remedies", but he is concentrating on this idea of the contract being void.

MR ROBINS: If we go back to 191, the very start of the discussion, the first thing he deals with is the position as a matter of contract law, and he says that any purported contract will be void where the director as agent has not bound the company to make a contract. And he says:

"It is also conceivable that in some situations, although for ease of exposition I put these alternatives to one side in the analysis that follows, the contract is, for example, voidable (as where the director has made a misrepresentation to the company of which D had notice) or illegality affects the contract ..." So he's saying he puts those examples to one side. He is dealing simply with the case of a contract that is void. He goes on to say:

"... the company may have (common law) restitutionary remedies against D in the law of unjust enrichment (imposing strict liability but subject to a change of position defence) to recover the value of benefits conferred on D under the void contract with the unjust factor being, for example, want of authority or failure of basis."

So, he's dealing expressly only with an example of void contracts, and the point he's making expressly is, you have certain remedies under the law of unjust enrichment which are governed by one set of rules, and, secondly, you can have an equitable proprietary remedy to recover the asset transferred.

But he's just said in the previous paragraph he is not dealing with circumstances involving voidable contracts and he's saying nothing about the position in those circumstances.

Of course, if the contract is valid, then you don't have the restitutionary remedies. He's dealing with a void contract and sort of comparing and contrasting the different remedies to which it gives rise. There is nothing more complex or significant about it than that.

MR JUSTICE MILES: I'm not sure I accept that. I mean, I can't understand why he even bothers, if you are right, with this passage. You can make the point it is all obiter and unnecessary for the decision and it is not necessarily -- therefore, it is not part of a ratio, but it must be at least -- there must be a purpose in this passage. If all he is saying is, well, if you have got a void contract, you can have a claim, anyone can see that.

MR ROBINS: But you do get passages like that.

MR JUSTICE MILES: The question is, why is he even addressing contracts and -- it is only in the context of companies and directors. It is not -- he is not dealing with a situation, the standard situation, where there is an express trust. He is dealing with companies.

MR ROBINS: Yes, but there is no mystery to it. He explains it in black and white. He says that, at the hearing, they said, "Can you give us some submissions on Criterion to see if that has any bearing on the argument?". He's considered that, and he's the only Supreme Court Justice to have done so. It's of no relevance to the decision, so it is entirely obiter. But what he goes on to say is that, in a particular hypothetical scenario, which he gives, it involves a void contract, he says he's expressly not dealing with a voidable contract, and he puts that to one side. He says it may give rise to a number of different remedies. The bit he goes on to deal with is -- as I say, there may be parallel restitutionary and equitable remedies. If we go over the next page, having dealt with what Lord Scott says, he says, at 194:

"All that is relatively straight forward. But, while agreeing with Lord Scott, Lord Nicholls ... went on to launch a more wide-ranging attack on the Court of Appeal's decision in Akindele, which ... is the leading case on the modern test of knowing receipt being whether receipt or retention is 'unconscionable'." He quotes from what Lord Nicholls said and, at paragraph 4, he said the Court of Appeal in Akindele fell into error.

We have focused quite closely on what Lord Nicholls said in paragraph 4, but we have been coming at it from a different perspective. I think what Lord Burrows is emphasising is, first -- in the first line, where Lord Nicholls says he considers the Court of Appeal, in Akindele's case, fell into error, and then just between E and F:

"If, applying these principles, the agreement is found to be valid and is therefore not set aside, questions of 'knowing receipt' by B do not arise." It's the suggestion that equitable rules are to be excluded.

Then:

"So far as B is concerned there can be no question of A's assets having been misapplied. B acquired the assets from A ... under a valid agreement ... If, however, the agreement is set aside, B will be accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the assets in question, A will have a personal claim against B for unjust enrichment ..."

Then he goes on to say that's subject to a defence of change of position:

"B's personal accountability will not be dependent upon proof of fault or 'unconscionable' conduct ... B's accountability ... will be 'strict'.

"Either way ... whether the ... agreement is set aside or not, questions of unconscionability do not arise ..."

Lord Burrows goes on to say:

"On the face of it, Lord Nicholls' speech may be thought to indicate that the leading case of ... Akindele ... and all other cases on directors acting in breach of fiduciary duty to their companies, by entering into contracts with defendants under which the company's assets have been transferred to defendants, have been wrongly reasoned ...

"If Lord Nicholls was going so far, in my respectful view he was going too far."

That is precisely the point he is making, which is to say you can't say, or it is wrong to say, that you can only analyse the situation under the law of unjust enrichment and that restitutionary principles are applicable to the exclusion of equitable principles. The point Lord Burrows is making is to say that the same circumstances may give rise to both restitutionary and equitable remedies and that, insofar as Lord Nicholls might have been saying that unconscionability never has anything to do with it and that restitution covers the field to the exclusion of equitable principles, then that's wrong.

And 195 is revealing.

MR JUSTICE MILES: Sorry, wait a minute. (Pause). Restitution, yes.

MR ROBINS: That's why 195 is important, because what Lord Burrows says is that BCCI v Akindele, which concerned an executed contract, and all other cases on directors acting in breach of fiduciary duty to their companies by entering into contracts with defendants under which the company's assets have been transferred to the defendants, have been correctly reasoned. There is nothing wrong with them. There is nothing wrong with any of the analysis in any of the cases before Criterion. What Lord Burrows is objecting to is what he sees as a suggestion that it is all about the analysis at law applying law of contract and restitution and that equitable principles have nothing to do with it. So, the very point he is making is the one that I submitted earlier he is making, which is to say, take this hypothetical scenario, it may give rise to restitutionary remedies, it may give rise to equitable remedies. It is wrong to say that restitution is the only game in town and that none of the equitable analyses in prior cases are correct.

Then, in 197, he says:

"In any event, in ... Akindele there would have been a complication in applying contractual principles. This was because the relevant payment was made by a third party rather than by the contracting company." He says in that, after setting out the facts, just between D and E:

"The Court of Appeal dealt only with knowing receipt and did not embark on any contractual analysis. But given that the relevant purported contract was between ICIC and Akindele and not between BCCI (Overseas) Limited and Akindele, it is understandable that the Court of Appeal confined its attention to the knowing receipt claim based on the breach of fiduciary duty by the directors of BCCI (Overseas) Limited to that company by the transfer of the assets of that company to Akindele."

So he's saying you can't just look at things solely through the contractual spectacles because that's not always going to work. In some cases, you need to apply the equitable analysis.

Then he goes on to say:

"For the same reason, it is far from clear that Lord Nicholls' criticism of the Court of Appeal can be supported. It would appear that Lord Nicholls' reasoning has not subsequently been relied on in the case law as casting doubt on the approach to knowing receipt in BCCI v Akindele ..."

That's when he notes:

"Lord Neuberger ... sitting in the Hong Kong Court of Final Appeal, described Lord Nicholls' criticism as 'an uncharacteristically obscure remark'. It may be, therefore, that Homer nodded. Of course, this is not to deny that the 'unconscionability' test ... is unsatisfactory for the different reason set out ... "The upshot for our purposes is that, as is common ground between the parties ... the Criterion case does not materially affect the issues in this appeal." Which is why it is entirely obiter. To sum up what I have said, the gist of all of that is that Lord Burrows seems a bit touchy and has perhaps taken umbrage with what he perceives as a suggestion that equity has no part to play in the analysis and that the field is covered by principles of contract law and restitution.

MR JUSTICE MILES: I think what emerges from this discussion is that this may be quite a narrow point that he's dealing with, that if you look back at Criterion, at the passage from Criterion, Lord Nicholls says that where the contract is invalid, you would have a proprietary claim if the asset was still in the hands of the recipient. He says that at line F. So if the agreement is set aside, by which I take him to include if it is void, "B will be accountable for any benefits he's received under the agreement."

Then he goes on to say A will have a proprietary claim if B still has the assets. And then he goes on to say "and he will have a restitutionary claim". Then he goes on to say -- this is, I think, perhaps the bit that Lord Burrows is disagreeing with. He then goes on to say, "but he will not have a knowing receipt claim", whatever the -- even, as I see it, in the circumstances where the agreement has been set aside. And then Lord Burrows, I think, in 195, is going on to say, "Well, that's wrong". But he's dealing with the knowing receipt claim in this passage rather than the proprietary claim.

MR ROBINS: Yes, and it is always difficult, because of the confusion in terminology that we have discussed, to know whether, when people are talking about knowing receipt they are using it as shorthand for an equitable proprietary claim or whether they are --

MR JUSTICE MILES: No, I don't think it is in this case, because that was the very point in Byers, so they are very careful to distinguish between an equitable proprietary claim and a knowing receipt claim because that's what this whole case was about.

MR ROBINS: If that's the basis on which they are using the term "knowing receipt", then -- it is certainly right that one of the concerns Lord Burrows is addressing is the apparent suggestion that the equitable remedy of knowing receipt has no part to play. But I think, so far as we can discern from his remarks, he has thought that Lord Nicholls is potentially going a bit further and saying that the territory is covered by the law of contract and restitution.

At law, if a contract induced by misrepresentation or liable to be rescinded on some other grounds is rescinded and the defendant still has the asset, you have a claim at law to recover the asset in specie. The defendant is ordered to reconvey the asset to the claimant. Some of the old cases say that, at law, legal title can be revested in the claimant by the court. The invention of equity was to say, pending the reconveyance of the item in specie, the defendant will hold it on trust for the claimant; presumably, on the basis that equity considers done that which ought to be done.

So, when Lord Nicholls is talking about A having a proprietary claim if B still has the assets, I think it would be wrong to assume that he is necessarily talking about an equitable proprietary claim rather than the sort of proprietary claim that arises at law following rescission.

It may be that that is not how Lord Burrows read it. His point certainly seems to be that, in certain circumstances -- and he gives an example -- there may be equitable claims, including equitable proprietary claims, and it would be wrong to suggest, if it is being suggested, that the law of contract and restitution covers the field to the exclusion of equity. That's the example he gives just between B and C:

"Alternatively, if the contract is void, the company may choose to bring an equitable proprietary claim if the traceable asset is still retained or a personal claim for knowing receipt based on the defendant having knowingly received the company's assets ..." So he does seem to be -- it may be that he's tilting at windmills, but he seems to be dealing with what he perceives to be a suggestion that the principles of equity can be excluded and that the ground is covered sufficiently by the law of restitution.

MR JUSTICE MILES: The reason I make that point is -- I mean, I take your point, but the reason I make it is, if you go back to what Lord Nicholls says, he's saying he thinks Akindele was wrong. Well, that was a knowing receipt case, not a proprietary claim case, and he makes the -- there is a punchline of Lord Nicholls' speech at paragraph 5, where he says, "Either way, therefore, whether the agreement is set aside or not, questions of unconscionability", which is the test, obviously, from Akindele, "do not arise".

MR ROBINS: Correct. But -- and the "but" is that the springboard for the knowing receipt claim is, as the Supreme Court holds in Byers, the equitable proprietary claim. If you don't have that, you don't get home on the basis of unconscionability alone.

MR JUSTICE MILES: No, but the flip-side, the converse, is obviously not true, which is that, just because you have an equitable proprietary claim, you don't necessarily have a knowing receipt claim.

MR ROBINS: Correct.

MR JUSTICE MILES: I think that's what he's dealing with.

MR ROBINS: Correct. Well, he's dealing with the equitable proprietary claim and the personal consequences, which depend on unconscionability. He gives that as the alternative. He says in 196, "Yes, you may have a restitutionary claim", and he says it is a common law restitutionary claim reversing the defendant's unjust enrichment, but, alternatively, you might have an equitable proprietary claim or a knowing receipt claim. It is that "alternatively" that really encapsulates the point he's making, which is to say that we can't all get too carried away on the law of restitution.

MR JUSTICE MILES: I will obviously have to look at this very carefully. If the defendants are right to say that those words "if a contract is void" is, as it were, part of the -- a central part of his reasoning here, albeit the whole passage is obiter, I think it is accepted, do you then say, well, anyway, the contract would be void here? Is that part of your case? Because Mr Curry seemed to be anticipating that argument.

MR ROBINS: Before I deal with that, could I just make one, point, which is: if what my Lord says is correct, you then have a situation where the decision of Lord Burrows is internally inconsistent because he's said that the equitable interest --

MR JUSTICE MILES: I understand that. You're saying that, in order for it to be a consistent judgment, he can't have meant that.

MR ROBINS: Absolutely.

MR JUSTICE MILES: But supposing that, when I come to analyse this, I am against you on that point, Mr Curry was anticipating your argument that -- an argument that you would then say, well, okay, but then the contract is void on the facts that you have alleged.

MR ROBINS: We have not pleaded --

MR JUSTICE MILES: I am asking whether that's part of your case.

MR ROBINS: Yes. The reason I'm hesitating is, we have not pleaded in terms that the contract is void. We have pleaded certain facts. We have set out the law in respect of contracts entered into without authority. But I think it is fair to say, and I'm driven to say, it is not featured as a particularly clearly signposted part of our case.

MR JUSTICE MILES: Yes.

MR ROBINS: If your Lordship were driven to find that the contract was void, then --

MR JUSTICE MILES: I won't do that unless it is part of your pleaded case.

MR ROBINS: The factual averments are there, but we haven't said in terms it therefore follows that the contract is void. To run that argument, I would need to be saying we don't need to plead the law and it is enough to have set it out in a skeleton argument, but that, I hope, explains my --

MR JUSTICE MILES: The next point is that there are some contracts which your clients have relied upon, I think, because they have appointed receivers and that sort of thing.

MR ROBINS: Yes. Administrators, yes.

MR JUSTICE MILES: Administrators.

MR ROBINS: Yes.

MR JUSTICE MILES: So, in those cases, it seems hard to see how you could, at the same time, say the contracts are void, because that would undermine the appointments, presumably.

MR ROBINS: If you have an agent acting outside the scope of their authority, can't the principal ratify their acts?

MR JUSTICE MILES: But that must be on the basis that -- if the contract under which they're appointed is void, then it may be -- I don't know -- that their appointment is void.

MR ROBINS: Well, it is not an argument that's ever been made, and I don't think there's anything in our submissions that would enable someone to pick up that argument and run with it. But, obviously --

MR JUSTICE MILES: I detected that the defendants at some stage -- some of the defendants -- it is not open to the Surge defendants because it is not a point available to them, but some of the defendants, I recall, have said at some stage that -- have made this point that your clients have relied on certain contracts and, therefore, can't now say that those contracts can be set aside. I mean, they wouldn't be set aside, they could actually be declared to be void. But I don't know where that leaves things.

MR ROBINS: I'm not sure it really does. Let's take LOG as an example. The administrators were appointed by an order of the court on the basis that LOG was indebted to LCF.

If you said, well, the contract is void, the contract of loan, then there would be a restitutionary liability in respect of money having received under a void contract. There is still a liability. I'm not sure it would have given anyone an argument to say there is no liability here and an administrator should be --

MR JUSTICE MILES: Have you relied on some security contracts?

MR ROBINS: -- appointed. I think, in the case of Prime, some administrators may have been appointed under a charge.

I'm told we rely on our capacity as a qualifying floating charge holder in relation to London Group. So, yes, there would be some instances where the security has been -- or the rights conferred by the security have been exercised by appointing administrators. That could only be the case if the security was enforceable. You'd then need to look at the definition of "liabilities" to see whether it was limited to securing liabilities under the loan agreement or whether it was broad enough in sort of all monies terms to catch and secure any restitutionary liability in respect of monies having received. It could give rise to complications. I'm afraid I'm not in a position now to --

MR JUSTICE MILES: In any event, you have not asked the court to declare that any of these contracts are void.

MR ROBINS: No. As I say, that's not the way in which we put it. I think it would be fairly difficult, given that we haven't said in terms in our pleaded case, "Oh, well, if there was a contract, it was void". My Lord has seen how the parties have approached it. We pleaded that the monies were misapplied in breach of fiduciary duty. The Surge defendants responded to that by saying, "We are a bona fide purchaser for value without notice", and we said, "No, you're not". So, that's how the case has proceeded and that explains why -- obviously, if their response had been to say, "You haven't rescinded the contract", we might have responded differently by rescinding it or, potentially, if we managed to get confident there was no risk of any read-across to other circumstances, we might have run the argument that it was wholly void. But that's not the way the case developed.

MR JUSTICE MILES: Jumping around a bit, another point that occurred to me when listening to these submissions is -- I raised the example yesterday of a contract like the Surge contract where there's a series of performances after the contract is entered into, where it may or may not be possible to say that the original contract was void, but where it could be said then that subsequent performance of it rendered it a series of misappropriations. That's one example.

MR ROBINS: Yes.

MR JUSTICE MILES: Another example that occurs to me while thinking about this is, actually, loan agreements -- because it could be that there's a loan agreement which, when entered into, is a valid loan agreement because it could be thought, at that point, by the director, that the company was dealing with a genuine borrower, as it were, and then the director realises that, actually -- I'm taking an extreme example again -- the company doesn't actually have any business at all, but the borrower then says, "Right, I want to draw down on this facility". At the point of drawdown, the director is in breach of fiduciary duty if he or she causes the transfer of the monies to the borrower. But it may not be possible to say that the original contract is void. It is another example along the same lines.

MR ROBINS: Yes. One can think of many examples. You may have a case where, after the making of the loan agreement, a director of the lender buys a very large shareholding in the borrower which he doesn't disclose and decides not to rely on an event of default clause to terminate but instead allows further drawdowns to be made in a conflict of interest position. So, yes, one can think of any number of scenarios that might arise in the real world where the proposition for which Mr Curry contends would cause real injustice.

MR JUSTICE MILES: Right.

MR ROBINS: I think the final point on this bit, before the break, is just to show your Lordship the pleading in the defence. It is at <B2/6> at page 10 at paragraph 5(12)(b). It is said:

"... it denied that the Surge defendants received any monies subject to a constructive trust ... Further and in any event (i) they are entitled to rely on the defence of bona fide purchaser for value/good consideration ..."

Then at page 32, 45(5), at the top of the page: "... any and all payments were received by Surge as bona fide purchasers for value without notice and/or for good consideration and so no proprietary claim can lie." On the same page, subparagraph (4) in the same terms. So that's how the parties joined issue on this. The argument that Mr Curry now advances, that no proprietary claim will ever lie without rescission, has never been pleaded and wasn't, in fact, advanced at any stage until closing submissions. The pleaded defence is "bona fide purchaser for value without notice". So, to that extent, we'd say Mr Curry's submissions to your Lordship are inconsistent with his client's pleaded case. Maybe I can deal with Mr Curry's final point I need to deal with on the pleadings before the shorthand writer's break.

Mr Curry said that the pleaded allegations of knowledge were equally consistent with honesty. I think that was one of the final points he made. Of course, that's only relevant to the claims for fraudulent trading and dishonest assistance. It is not relevant to the question of bona fide purchaser for value without notice or, for that matter, knowing receipt, which turns on unconscionability. We know that's something less than dishonesty.

But, in any event, what we plead is that the 25 per cent paid to Surge was not a fee that would be paid by an honest money lender.

If someone is doing something that no honest person would do and you help them, then, by definition, that's dishonest. So, the allegations that we plead are not equally consistent with honesty in any event. My Lord, I have a short bit of material in respect of Mr Ledgister. I don't think it will take more than five or ten minutes. I don't know whether --

MR JUSTICE MILES: We will take a five-minute break now, and then you can make those points.

(3.20 pm)

(A short break)

(3.25 pm)

MR ROBINS: My Lord, as regards Mr Ledgister's submissions, Mr Ledgister said, at page 48 of yesterday's transcript -- I'm afraid I don't have a bundle reference for it as it hadn't been uploaded when I made these notes. He said Blackmore were looked at very closely: "It was determined that that was not a fraud. Blackmore was not a fraud."

My Lord, there is no evidence of that. There is no evidence of it being determined that Blackmore was not a fraud. We don't even know anything about the existence or extent of any investigation. There is no evidence before your Lordship of who investigated or what they looked at or what they found. Of course, even if we had some sort of investigator's report, it wouldn't be admissible. There is no evidence in these proceedings that Blackmore was a fraud, although my Lord might think that Mr McCreesh's proposal to pay a backhander of half a per cent to Mr Thomson isn't exactly consistent with honest business practices.

But, equally, there is no evidence that it wasn't a fraud. Mr Careless can't ask your Lordship to find as a fact that Blackmore was not a fraud or that there was nothing wrong with Blackmore.

Then, at page 80, Mr Ledgister said:

"Now, it would be a completely different situation if the special knowledge that they had was knowledge of, for example, the security numbers being a lot lower than that which PwC had reported ... That's special knowledge. If they knew the number was 10 million, for example, yet reported 60 million to the public, that's different. That wasn't the case that arose here." Well, yes, it is. As demonstrated by my Lord's exchange with Mr Ledgister at the end of his submissions, when your Lordship asked about Mr Careless's evidence, that he'd known from fairly early on there were only a few borrowers, and yet also knew that his salespeople were saying 121, 150, hundreds, to the public.

So, the hypothetical example that Mr Ledgister gave in respect of security valuation is exactly what happened here in respect of the number of borrowers. Then Mr Ledgister took my Lord through some documents in support of the proposition that Mr Careless took comfort from and relied on the involvement of Kobus. The documents that we saw don't really support that proposition.

To go through them fairly quickly, if we could look at <SUR00139198-0001>, that doesn't really do anything to support the proposition. We just see there is a markup of a document.

The next one is <SUR00077492-0001>. Can we go back? I was just looking at the right-hand page: sourcing borrowing companies; monitoring their performance. It seems they're things Mr Careless knew were wrong. Let's look at the next one, <SUR00077492-0001>. There's an email. Mr Thomson is involved, but Mr Careless doesn't appear. So I'm not sure how it supports the proposition that Mr Careless took comfort from, and relied on, the involvement of Kobus. It is an email that doesn't involve him.

Then <SUR00037335-0001>. This was the email from Kobus. Mr Careless is copied in to this one. Kobus is saying that he's going to listen to a few calls a week. Well, so what?

<SUR00033581-0001>. Again, Mr Careless isn't involved in the email chain, so it doesn't really support the proposition.

<SUR00060523-0001>. Again, Mr Careless isn't involved in the email chain.

What this does show is that Mr Thomson was the source of Kobus's information, but it doesn't support the proposition for which it was advanced. <SUR00071971-0001>. Kobus wants to see, we see from the bottom of the page, an email with an "unsubscribe" link. Well, so what?

<SUR00073250-0001>. Again, there is an email but Kobus is involved, Mr Careless isn't involved. So, it's nothing to do with any of the interactions between them. <SUR00080155-0001>. Again, this doesn't relate to any of the points on which we rely. It doesn't support the proposition that Mr Careless's knowledge of Kobus's involvement led him to believe that there was no impropriety. It doesn't do anything to rebut any of the points that we have advanced in relation to that. <SUR00082049-0001>. Again, there's an email exchange, but Mr Careless isn't involved. So it is nothing to do with his interactions with Kobus. <SUR00145326-0001>. We saw this in my opening submissions. Mr Careless is not involved, but we know from the other documents we looked at that it was something seen by him, and the attachment is <SUR00145327-0001>. This is after the Ernst & Young accounts, which reveal that there are only 11 borrowers. In the middle of the page, Kobus has corrected the statement which Mr Careless had known for a long time was misleading, and which was being used to mislead the public. It now says:

"How many clients have we lent to?

"The audited accounts for 2017 indicated 11." But it does still contain other things which Mr Careless knows are misleading, including, for example, what's said about GST and why there is no online presence or literature for GST. It said: "GST does not need to advertise as they receive sufficient introductions, via their network of financial industry professionals, to new business." Words which seem to be designed to give the impression that GST is some legitimate third party outfit, not just Mr Sedgwick with a different hat on. And the reference, towards the bottom of the page, to LCF using a network of professional introducers to source lending opportunities is, again, something that Mr Careless knew to be untrue. It was Mr Golding, the man behind LCF, causing that company to lend to other businesses with which he was involved, including, Mr Careless said, Prime.

Then, at the bottom of page 2, we saw it before, this is a document very shortly after Mr Thomson has said that the value of the security is £1 billion, and Kerry has reported that to Mr Careless, saying, "a billion, not a typo", Kobus is now saying it's 300 million. It is completely inconsistent with the £1 billion figure which nobody believed. At the bottom of page 3, we see the additional questions from Kerry. We know that Mr Careless asked her to delete the final question, which was essentially, "How on earth is LCF's business model sustainable?", which I say is a paradigm example of failing to make appropriate enquiries for fear of confirming your suspicions.

On the final page, the final answer, to 5, "What is your average lending fee?". As we have said in our written closing submissions, it means that LCF's business model is necessarily unsustainable, and that's a point, if we could bring it up at <A6/1>, at page 385, where we quote, in paragraph P3.397, what Kobus said, and we say in the next paragraph:

"This must have been another major cause for concern. First, it was inconsistent with LCF's marketing materials, which said that LCF charged interest of 12 per cent to 20 per cent per annum on loans. Secondly, if true, it meant that LCF was inevitably insolvent."

Then in the next paragraph:

"The business model as described by Kobus was completely unsustainable."

We gave an example of a bondholder investing £100,000 for three years at 8 per cent. 25 per cent is paid to Surge immediately. The remaining 75 per cent is lent to a borrower for, say, three years. According to Kobus, there is a facilitation fee of £1,500. The borrower would then pay interest at 1.75 per cent on top of the bond interest, so that would be 9.75 per cent per annum, £22,000 over the term. On maturity, the loan is repaid. LCF has received a total of £98,500 from the borrower. But at the same time it is liable to pay £124,000 to the bondholder in principal and interest, leaving it £25,500 short.

We make the point in the next paragraph: "The only way in which LCF's business model could have made sense even in theory would have been for LCF to require the borrowers to pay Surge's commission as well. But that would have resulted in a total one-off fee of 35.3 per cent of the amount of the loan ..." That's because, if you are paying £25,000 to Surge and £2,000 to LCF --

MR JUSTICE MILES: 2 per cent.

MR ROBINS: Sorry, 2 per cent to LCF, then the fees that you are paying are 35.3 per cent of the cash amount that you receive. But there's no explanation in any of LCF's materials to suggest that's what's happening. LCF is, in fact, talking about a small turn and a 12 to 20 per cent rate of interest.

Then we make the point in P3.401:

"After LCF had collapsed ... Kerry stated that she had been completely unaware that LCF was in fact requiring [the] borrowers to pay D6's commissions." We can look at that document in a moment. If she thought LCF's borrowers were not paying D6's commissions, she must have thought LCF was inevitably doomed to insolvency.

The document, if we can look at footnote 2232 on the next page, <SUR00122130-0001> -- we have looked at it before -- this is after LCF's collapse. She's emailing Mr Careless, saying:

"Yesterday you mentioned that Alun had said it is in the audit that LCF passed on the cost of raising money to the borrowers.

"He is right, here it is ..."

And there is a quote:

"The transaction costs incurred by the company in relation to the issue of bonds ... are passed on to the borrower by the company by way of a deduction in the initial value of the loan ..."

She says:

"I must admit I didn't pick that up when I read the audit originally. I didn't register this meant that they charged a 25 per cent fee to borrowers." So she thought that LCF bore the 25 per cent fee without passing it on to the borrowers, but, as I said, on the basis of what Kobus had told them, that would mean that LCF was inevitably insolvent because its own income from the borrowers wouldn't be anywhere near sufficient to generate what it needed in order to pay the 25 per cent plus the principal plus the interest to the bondholders.

MR JUSTICE MILES: Was Mr Careless asked about what he understood in the course of the evidence? I know there were certain moments when the business model, as it were, was raised with him.

MR ROBINS: His answer, as I recall -- I don't have the reference -- was to say, "Well, that's a matter for them, that's a matter for LCF".

MR JUSTICE MILES: Was he asked what his understanding was?

MR ROBINS: I'm afraid I don't have a reference. What I can do is find one. <A5/29> at page 15. Probably about five pages beforehand, page 39. If I could ask my Lord to look at that while I just have a go at finding what we were just otherwise looking for.

MR JUSTICE MILES: Can we carry on with this? These bits don't seem to be dealing with the 25 per cent.

MR ROBINS: Let me just find the bit I'm looking for. My recollection is I put the figures that we just looked at -- the word to look for is "facilitation". Isn't that what Kobus said?

I'm afraid I can't find that. Can we have a look for it, when we have got the time, and email your Lordship's clerk with the reference? The reason for going through those documents at this stage was to say they don't support the submission that Mr Careless's involvement with Kobus satisfied him that LCF's marketing materials weren't misleading. Then finally, my Lord, if we can go to <A6/1.1>, this is a table that we have prepared which lists the factual topics not addressed in the Surge defendants' oral closing submissions. Obviously, the parties filed and exchanged their written closing submissions. Oral closing submissions were the first opportunity the parties had to address what the other had said in writing.

In Mr Ledgister's oral submissions yesterday, he failed to deal with a very large number of factual points on which we rely and in respect of which we have made submissions. We have identified those points in their abbreviated terms in the column on the left-hand side of the page. We have explained in the middle where we address them in our written closing submissions, and then, on the right-hand side, we have given the references to the oral closing submissions. Obviously, I didn't address or amplify absolutely everything orally, but I covered most of the points in oral submissions.

Nothing in this table, save to the extent mentioned in the footnotes, was actually addressed by Mr Ledgister yesterday.

If we look at the next page, we can see that includes, bottom left, two up from the bottom, the discovery that the borrower companies were connected to D4 and the complaints from the FCA, et cetera. On the top right, the facts relating to knowledge of connections between GST and LCF, et cetera. So, we hope it is a helpful table to identify the points that were not challenged during the closing submissions by Mr Ledgister. I think there is a third page as well.

MR JUSTICE MILES: There is a passage here, which you refer to in your closing submissions, about 25 per cent commission. I don't know if it is worth just looking at that for a moment.

MR ROBINS: Which one is that?

MR JUSTICE MILES: Four down on the last page.

MR ROBINS: Let's have a look at <A6/1> at pages 481 to 482.

MR JUSTICE MILES: Can we go down the page?

MR ROBINS: It may be that my memory is playing tricks on me, but I remember an exchange where I was putting the figures to Mr Careless and he agreed with them. But I'm afraid I don't have the reference.

If we can find it, if it is not a figment of my recollection, then we will send the reference to your Lordship's clerk.

Subject to any other points that your Lordship has for me, that's as much as I propose to say by way of reply.

MR JUSTICE MILES: Thank you very much. There may have been a couple of additional authorities referred to in reply, I think. I don't know whether anyone wishes to make any submissions about them?

Further submissions by **MR CURRY**

MR CURRY: I'm grateful, my Lord. First -- it doesn't directly arise out of additional authorities -- you may recall yesterday I said I would arrange for an article that Lord Burrows had referred to to be added to the bundle. It has been and it can be found at <S3/12>.

MR JUSTICE MILES: Right.

MR CURRY: I said I wouldn't make any submissions on that article. I am not going to. It may be that it throws some light on what Lord Burrows had in mind when he said what he said in the passages that your Lordship has been referred to.

So far as the additional authorities go, what I say about them is simply this: whatever may have been the case with any of the other judges involved, given the cases that were being presented to them and the submissions they had received, in my submission, it cannot be right that Lord Burrows himself was labouring under any misapprehension as to the distinction between mere equities and equitable proprietary rights when he said what he said in the passages that your Lordship has been referred to, and the submissions that the Surge defendants have made about that are based primarily on what Lord Burrows has to say, and, therefore, whilst I don't, and indeed can't, disagree with what my learned friend says about the distinction between mere equities and equitable proprietary rights, in my submission, that is not something that is relevant to -- I was about to say "construing", but of course your Lordship isn't going to construe a judgment. That is not relevant when understanding and applying what Lord Burrows had to say. Unless I can assist you further on any particular authority, I wasn't going to go through them any more than that.

MR JUSTICE MILES: Right.

MS DWARKA: I have no comments to make.

MR JUSTICE MILES: Well, that concludes the trial. Thank you all for your extremely helpful and clear submissions, and that goes not just to those who were speaking, but to their entire teams.

I am grateful that the trial was conducted throughout with moderation and good humour by all concerned.

Thank you, too, to the excellent transcribers and document -- I don't know what you call yourself -- document operators from Epiq.

It won't surprise you if I say that it will take some time for a judgment to be produced in this case. I think it unlikely that the judgment will be produced before fairly well into next term. I very much hope that it will be produced in the course of next term. I raise that point now, in case anyone has anything to say about it. But, given the length of the trial, I don't suppose anyone has any other expectation. But if anyone does wish to say anything, then please say so now.

Then there is the separate matter of the application which is to be heard next week.

MR ROBINS: Yes. On that note, I have been told that we will be back in this court with the same monitors and setup and that we won't need hard copy bundles.

MR JUSTICE MILES: So we will keep the same tech, and I am assuming we will have the same team from Epiq then.

MR CURRY: If by "same team" your Lordship was referring to my learned leader and I --

MR JUSTICE MILES: No, I said "the same team from Epiq".

MR CURRY: I'm sorry, I misheard your Lordship. (3.55 pm)

(The hearing concluded)

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