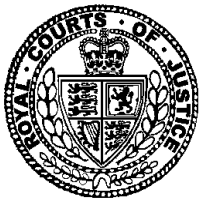

Neutral Citation Number: [2019] EWCA Civ 416

Case No: A2/2018/0072

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
CHANCERY DIVISION
Mr Justice Birss
HC/2013/000606 and HC/2017/001598

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2019

Before:

LORD JUSTICE McCOMBE
SIR ERNEST RYDER
(Senior President of Tribunals)
and
LORD JUSTICE FLOYD

- -

Between:

SAMBA FINANCIAL GROUP	**Appellant**
- and -	
1.MARK BYERS	
2.HUGH DICKSON	
(Joint Official Liquidators of SAAD INVESTMENTS COMPANY LIMITED)	
3.SAAD INVESTMENTS COMPANY LIMITED	
(in liquidation)	**Respondents**

- -
- -

Andrew Onslow QC and Alan Roxburgh (instructed by Latham & Watkins) for the Appellant
Mark Howard QC and Adam Cloherty (instructed by Morrison & Foerster (UK) LLP) for the Respondents

Hearing date: 12 February 2019

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Approved Judgment

Lord Justice McCombe:

Introduction

1. This is an appeal by Samba Financial Group ("Samba"), a company incorporated in the Kingdom of Saudi Arabia, from the order of 6 December 2017 of Birss J. By his order the judge gave permission to the Respondents, Saad Investments Company Limited ("SICL") (a company incorporated in the Cayman Islands) and its Joint Official Liquidators (Mr Stephen Akers, Mr Mark Byers and Mr Hugh Dickson) to re-amend their Particulars of Claim in the action. At the same time he dismissed an application by Samba to stay the proceedings or strike out the Claim Form and the Particulars of Claim.

2. In resistance to the re-amendment application Samba sought to stay the proceedings on *forum non conveniens* and abuse of process grounds and further argued that to permit the amendment would have the effect of depriving it of a limitation defence. This latter argument arose because of the doctrine of "relation back", whereby the re-amended claim would be deemed to have been commenced, within the limitation period, on the date of issue of the original claim form on 14 August 2013. In this case, the primary limitation period is to be taken to have expired on 16 September 2015. Accordingly, Samba submitted, the application for permission to re-amend the Particulars of Claim should be refused and the action should be dismissed or struck out. It is the limitation question that is in issue on this appeal.

Factual Background

3. The background to the action was this. On 16 September 2009 a Mr Maan Al-Sanea had transferred to Samba a number of shares in various Saudi Arabian banks in purported payment or part payment by him of debts owed by him to Samba. At the date of transfer the shares were worth about US$318 million. SICL claimed and claims that the shares were held by Mr Al-Sanea on trust for it and that the transfer by Mr Al-Sanea to Samba was made in breach of that trust.

4. SICL went into liquidation in the Cayman Islands on 30 July 2009. The English courts recognise the Cayman winding-up proceedings as foreign main insolvency proceedings for the purposes of the Cross-Border Insolvency Regulations 2006. In the present proceedings, as originally formulated, the respondents sought an order under s.127 of the Insolvency Act 1986 that the transfer be declared void as a disposition of SICL's property after the commencement of winding-up. No claim was made against Samba, at that stage, that it held the shares as constructive trustee for SICL. Indeed, the respondents had made the conscious decision not to include such a claim in the proceedings.

Procedural History

5. The action went through a number of procedural vicissitudes (more fully summarised by the judge in his judgment ([2017] EWHC 3106 (Ch)) involving disputes as to relevant proper law and as to jurisdiction and *forum conveniens*. In the High Court, Sir Terence Etherton C (as he then was) stayed the proceedings on the basis that the

relevant proper law was that of Saudi Arabia and that that country was the more appropriate forum for the proceedings. The Court of Appeal (Longmore LJ, and Kitchin LJ and Vos LJ (as they then were)) found that it was at least arguable that the law of the Cayman Islands governed the matter and would have lifted the stay, subject to the possibility of a further appeal to the Supreme Court. That appeal was duly brought.

6. In the Supreme Court, the case took an unexpected turn when it was put to the parties by the court (initially in argument by Lord Sumption) that the relevant transfer might not have been a "disposition" of SICL's property at all within the meaning of s.127 of the 1986 Act. Following further submissions on that point, the Supreme Court held that the transfer was indeed not a "disposition" for the purposes of the section.

7. In broad terms, the reasoning was that where an asset was held on trust, the legal title remained capable of transfer to a third party, even though in breach of trust. The trust rights, including the right to have the legal title held and applied in accordance with the terms of the trust, were not thereby "disposed of" and continued to be capable of enforcement by the beneficiary unless and until the dealing with the legal title had the effect, under the *lex situs* of the asset, of overriding those rights. If the rights were overridden that was not because of a "disposition" of them by the transfer of legal title but because of their limited nature and because they were capable of being defeated, for example by acquisition by bona fide purchasers for value.

8. The Supreme Court decision that there had been no disposition for the purposes of s.127 meant that the claim as originally formulated had to fail. However, the court remitted the proceedings to the High Court to permit the respondents to attempt to save the action by applying to re-amend the claim.

Application for Permission to Re-Amend the Particulars of Claim; the New Claims

9. The respondents made that application. They deleted entirely the claim under s.127, which the Supreme Court had held was bound to fail, and in its place formulated a claim in constructive trust against Samba personally, a claim which, as I have mentioned, they had previously deliberately eschewed. The new claim is presented in some 6 ½ pages of pleading, alleging features of "Samba's knowledge and conduct" in paragraphs 37A to 37F of the draft. I annex a copy of those paragraphs to this judgment.

10. It will be seen that the allegations of relevant knowledge and conduct include the following matters.

11. It is said that Mr Al-Sanea himself was a director of Samba until 2003 (six years before the dealing in question). Mr Saud Algosaibi, a director of Samba until shortly before the transfer, is said to have known of SICL's practice to hold shares using Mr Al-Sanea as a nominee. Reliance is placed upon his directorship of AHAB from 1990 to 2003, a company which paragraph 10 of the pleading tells us obtained a freezing order in the Cayman courts against a number of parties, including Mr Al-Sanea, in July 2009. Also relied upon is SICL's "longstanding relationship" with Samba as a borrower, an owner of shares in Samba and as a depositor with Samba. The shares are said to have comprised at times up to 8% of SICL's total equity investments. Cross-

reference is made to a "SICL/Samba Facility Agreement" made in 2004, which is said to have been amended from time to time thereafter, under which Samba lent US$60 million to SICL. From this it said that it is to be inferred that Samba would, in the course of its same "longstanding relationship", have taken and did take detailed steps to understand how SICL's shares in Saudi Arabian banks were held and by whom. It is said those steps would have revealed that Mr Al-Sanea held the shares in issue on trust for SICL. "Further or alternatively", as it is alleged, a reasonable bank would have or ought to have appreciated (or should have made inquiries) "which would have revealed the probability that" the shares were held by Mr Al-Sanea on trust for SICL.

12. The new pleading goes on to allege that Samba recklessly failed to make inquiries that "an honest and reasonable bank" would have made and which would have revealed the trusts. It is then alleged that Samba received in July 2007 an information memorandum called "the RCF Document", SICL's business plan, accounts and annual reports. From these documents it is said that Samba would have known of SICL's shareholdings in the banks in which the disputed shares were held. It would have known that Mr Al-Sanea's registered holding in Samba would have been as a nominee for SICL of which he was the ultimate beneficial owner.

13. There is then outlined in the pleading the freezing of Mr Al-Sanea's Saudi Arabian assets, the proceedings by AHAB in the Cayman Islands in July 2009 and the winding-up of SICL and the appointment of the three individual respondents to this appeal as liquidators. These events, it is alleged, would have given rise in Samba to suspicions and an appreciation of a need to make enquiries with regard to the transfer of the disputed shares in breach of freezing measures in Saudi Arabia and in the Cayman Islands.

14. For Samba, it was pointed out to us by counsel that the directions order made on 20 November 2018 (by HH Judge Klein, sitting as a Judge of the High Court) in respect of the new claim has identified that the date ranges for relevant disclosure in the newly formulated claim are to be (for the present respondents) 1 January 1980 to the present date and (for Samba) 1 January 1987 to 14 August 2013.

The Decision on the Application by Birss J

15. The cross-applications by the present respondents for permission to re-amend in these terms and by Samba to stay/strike out the action came before Birss J on two days in October 2017. A number of points were advanced by Samba in resistance to the amendment application and in support of its own application to bring the action to an end. One argument was that the newly formulated claim was bound to fail because Saudi Arabian law was the applicable law and under it the new claim had no proper legal foundation. The judge found that there were properly arguable grounds in favour of both Saudi law and Cayman law being the relevant system. Accordingly, he held that it was correct not to refuse permission to amend on the basis that it was bound to fail under Saudi law.

16. Next, Samba relied upon the limitation point, namely that to allow the amendment to be made would defeat a good limitation defence. In response, the respondents relied upon CPR r.17.4(2). Under r.17.4(1), sub-rule (2) applies where a limitation period has expired. Rule 17.4(2) provides as follows:

> "(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

17. The judge held that he was not confined to looking at the pleadings alone to see whether the new claim arose out of "the same or substantially the same facts" as the old claim. He said that one could look at a number of statements made by Samba or its advocates, in earlier parts of the proceedings, in which they said that Samba did not know of SICL's alleged interest in the shares in question. His conclusion on this point was expressed in paragraph 51 of his judgment as follows:

> "51. … I find that although it is true that the position has never been pleaded formally, the defendant has from the outset advanced a positive case to the court about its state of knowledge and bona fides. Although no formal Defence was filed, these issues were raised and (if it matters) would have been pleaded in a formal Defence at that time if the procedure required it. Given what the defendant was telling the court, the defendant must have investigated these matters at the time. These issues are the very same questions which arise on the new claim and therefore the new claim satisfies the test in CPR r17.4. For that reason I would allow the amendment. It does not prejudice the defendant."

18. Accordingly, the judge decided that he would permit the amendment, having also rejected a defence argument of abuse of process, based upon the decision in *Henderson v Henderson* (1843) 3 Hare 100.

19. Apart from applying for permission to make the amendments, in 2017 the respondents also began a new action based upon their same new constructive trust claim. That claim would be outside the primary limitation period but there would be the opportunity for the respondents to allege fraud or concealment until the date upon which they say they discovered the transfer in October 2011 and on that basis to extend the applicable limitation period.

20. The judge also decided that, if he had disallowed the amendment to the present 2013 proceedings, he would not have struck them out, but would have adjourned the amendment application to the trial of the 2017 action, allowing the court trying that claim to decide what to do about the costs of the 2013 action.

21. The judge refused permission to appeal. Samba sought permission from this court and the application came before Asplin LJ. She also refused permission except on two grounds relating to the limitation issue. Those grounds are:

> "6. The Judge wrongly held that the New Claim arises out of the same or substantially the same facts as the s.127 Claim; so that under CPR 17.4(2) the re-amendments are to be permitted notwithstanding the expiry of any limitation period applicable to the New Claim.

7. The Judge ought to have held that:

(i) The New Claim does not arise out of the same or substantially the same facts as the s.127 Claim; so that the Court has no power to permit the amendments under CPR 17.4(2).

(ii) Samba has a reasonably arguable limitation defence.

(iii) Permission to re-amend is to be refused because the grant of permission would prejudice Samba's limitation defence."

The Appeal

22. The appeal has been argued for Samba by Mr Onslow QC (who did not appear below) and Mr Roxburgh. The appeal has been resisted for the respondents by Mr Howard QC and Mr Cloherty. The arguments, both oral and written, have been presented succinctly and with great skill on both sides. I express my gratitude to all counsel.

23. I have set out above CPR r.17.4(2), conferring on the court the jurisdiction to allow amendments, in cases of this type, where it is sought to bring in a new cause of action after the expiry of a relevant limitation period. However, as counsel reminded us, one must start with an examination of the statute pursuant to which the rule of procedure was made. The relevant provisions are to be found in s.35 of the Limitation Act 1980. That section provides as follows:

"**35.— New claims in pending actions: rules of court.**

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced— …

… (b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

(a) the addition or substitution of a new cause of action; …

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor [the county] court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim. …

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there

> mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following—
>
> > (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; …"

24. Having regard to the decision of this court in *Goode v Martin* [2002] 1 WLR 1828 at 1840 (per Brooke LJ, with whom Latham and Kay LJJ agreed) CPR r.17.4(2) falls to be read as follows:

> "The court may allow an amendment whose effect will be to add … a new claim, but only if the new claim arises out of the same facts or substantially the same facts as *are already in issue on* a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings." (Emphasis added.)."

Brooke LJ said,

> "This would bring the sense of the rule in line with the language of the 1980 Act which is the source of the authority to make the rules contained in CPR r.17.4."

25. The three questions confronting a judge in the position of Birss J in this case are set out the judgment of Tomlinson LJ in *Ballinger v Mercer Ltd.* [2014] 1 WLR 3597, at 3606, paragraph 15 as follows:

> "15. It is accepted on all sides that the judge correctly set out the three stage test that the claimants needed to satisfy before being granted permission to raise a new claim in an existing action: (i) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? (ii) If so, do they seek to add or substitute a new cause of action? (iii) If so, does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?"

As Mr Onslow pointed out, in the present case, items (i) and (ii) are to be answered in the affirmative and the only point in issue is item (iii).

26. Mr Onslow for Samba advanced two overarching submissions in support of the appeal. First, he submitted that what was "in issue" in the proceedings, before the disputed application to amend, is to be determined solely by the pleadings in the action. Secondly, he submitted that, even if some leeway outside the pleadings is permitted in the application of CPR 17.4(2), the new pleading for which the judge

granted permission did not make a case arising out of "the same facts, or substantially the same facts" as the case advanced initially. It was, argued Mr Onslow, a fundamentally different claim founded upon a very complicated congeries of new facts.

27. On the first point, it is clearly right, as Mr Howard for the respondents accepted, that the claim advanced in respect of the s.127 claim, as pleaded, made no such allegations as now appear in the new pleading. It simply asserted a proprietary right of SICL in the disputed shares, the fact of the transfer of them in September 2009, the commencement of the winding-up and the claim for an order declaring the transfer void under the section. No defence had been filed and no doubt none was required to be filed because of the jurisdictional challenges that were still in issue all the way up to the Supreme Court.

28. However, Mr Howard submitted that the proceedings as initially formulated would inevitably have raised, in the end, the question whether (in receiving the transfer in 2009) Samba had acted in good faith without notice of the alleged trust in favour of SICL. That would have been, it was argued, essentially the same issue as whether Samba took the shares as constructive trustee, as alleged in the new claim. Mr Howard was able to go further and say that it was clear that Samba was aware that that was the likely issue, having regard to statements made on four different occasions to the court (identified in paragraph 33 of his skeleton argument) that it had acted in good faith and to two stated assumptions by the judges that the good faith of Samba would be the issue between the parties "at the substantive stage" of the action and/or if Samba sought an order validating the transfer under the court's statutory power to do so.

29. It was argued for Samba, however, that the test of "the same or substantially the same facts" provided a jurisdictional threshold for the court leading to the question whether the discretion to allow the amendment ought to be exercised in favour of the applicant party. Until that threshold was crossed, it was not necessary to embark upon a factual enquiry as to whether facts were or were not likely to have been investigated by the opposite party in respect of the claim as originally formulated. It was, it was said, the function of the pleadings to answer the threshold test of what was in issue in the original proceedings. As they were dealing with an application to raise a new cause of action after the expiry of the limitation period, it was right that the Act and the Rules should set firm and hard lines, as to what was and what was not permitted, in a way that could be readily understood and applied. Thus, it was for the applicant wishing to amend to show that, by the time of expiry of the original limitation period the necessary facts had been pleaded that would found the new claim as it had founded the old. Thus, the argument went, it was insufficient for the respondents here simply to assert that resistance to the amendment amounted to no more than a misguided resort to "form rather than substance". It was to be noted, Mr Onslow pointed out, that there has been no reported case in which a party has been permitted to make amendments inserting a new claim after expiry of the limitation period alleging facts which went outside the ambit of the pleaded facts of the original claim.

30. For the respondents, it was argued that, in asking what was in issue on the initially pleaded case, it was not necessary to confine oneself to the pleadings alone. It was permissible to look more widely and to see what, in substance, was likely to be in issue in any particular case. From that, one would fulfil the purpose of the rule in

preventing a party having to meet a claim that he/she should not be presumed to have investigated already in the context of the original claim. In the present case, it had been asserted on behalf of Samba, on more than one occasion earlier in the proceedings, that it had acted throughout in good faith. Mr Howard said that that assertion could not have been made by counsel without instructions to that effect and it should, therefore, be assumed in the case of a bank such as Samba that the instructions had been given on the basis of a proper investigation of the facts.

31. In contrast, we were shown by Mr Onslow a number of passages in written submissions by the respondents to the Supreme Court in which it was asserted that at stage 1 of the inquiry under s.127 (i.e. the stage which the proceedings had reached in the Supreme Court), the only question was whether there had been a relevant disposition; it was only at stage 2, when that question had been answered in the affirmative, that any question of a validation order could arise. It was then said in those submissions that it was uncertain whether a validation order would be sought. In such a case, if a validation order were sought, a number of questions would arise, one of which would be a contention by SICL that Samba had not acted in good faith. In one of these submissions, the respondents argued that:

> "…the bona fide purchaser defence is not relevant to the validation question, a question which raises quite different issues".

A number of such issues (six) were then advanced, including at the end the statement that,

> "…SICL will contend at trial that Samba was not acting bona fide."

32. Given the extent of these issues said to be relevant to the availability to Samba of the validation jurisdiction as canvassed by the time that the proceedings reached the Supreme Court, Mr Onslow submitted, it was hardly to be assumed that Samba had investigated the facts of a constructive trust claim of the very detailed nature now pleaded in the Re-Amended Particulars of Claim.

33. He also said that, quite apart from any issue of Samba's good faith, there were a number of other issues in play which would have been the subject of investigation in defence to the original claim. There was the "disposition" issue itself, which emerged in the Supreme Court – perhaps not the strongest point as a candidate for likely investigation by Samba at the early stages since this was a point raised by the court itself at a very late stage. However, there remained issues of whether there were any relevant trusts at all and, if so, whether the disputed shares were subject to them. There was the question of whether the law as to priorities of claims under Saudi law would mean that Samba's rights would prevail over the trusts. There was also an issue of whether the alleged "fronting" arrangements for the holding of the shares were unlawful. It was argued that the extent of the early investigations of the facts, to be assumed to have been carried out by Samba in respect of the original claim, should be seen in that light.

34. With that outline (and outline only) of the principal submissions advanced by the parties, I turn to the decided cases.

The Decided Cases

35. We were referred by Mr Onslow first to this court's decision in *Paragon Finance plc v DB Thakerar & Co. (A firm)* [1999] 1 All ER 400, decided under the parallel to CPR r. 17.4 in RSC Ord. 20 r.5. It was held that to add to a claim in breach of contract, negligence and breach of fiduciary duty against a solicitor by a former client, a new claim in fraud, conspiracy to defraud and intentional breach of fiduciary duty did not involve "the same or substantially the same facts" as the original claims.

36. Millett LJ (as he then was) said, at p.418 g-h:

> "… In the *Thakerar* case Chadwick J observed that it would be 'contrary to common sense' to hold that a claim based on allegations of negligence and incompetence on the part of a solicitor involved substantially the same facts as a claim based on allegations of fraud and dishonesty. I respectfully agree. In all our jurisprudence there is no sharper dividing line than that which separates cases of fraud and dishonesty from cases of negligence and incompetence."

In the same case, Pill LJ referred to *Sterman v EW & JW Moore Ltd.* [1970] 1 QB 596, where in turn Lord Denning MR referred to the "wise words" of Holroyd Pearce LJ (as he then was) in *Ponting v Wood* [1962] 1 QB 594 at 609 where he said that the court would lend its aid "to regularising the procedure of a known genuine case commenced before the limitation period expired but containing technical defects". However, Pill LJ contrasted such a case with a case where fraud was to be added to a claim based on breach of duty which was otherwise innocent. He said, at [1999] 1 All ER at 420 d-g:

> "Where it is sought to add allegations of wrongdoing which is intentional, the position is in my judgment different. The change cannot be categorised as a technicality. I accept the submission made on behalf of the plaintiffs that the critical question is the extent to which the facts on which the new cause of action is based depart from those already pleaded (and not the seriousness of the new allegation). However, to allege that an injury is caused intentionally is to add a new allegation of fact which gives the allegations of fact as a whole a substantially different character. In *Letang v Cooper* [1964] 2 All ER 929, [1965] 1 QB 232, this court recognised the division in actions for personal injuries 'according as the defendant did the injury intentionally or unintentionally' (Lord Denning MR (with whom Danckwerts LJ agreed) [1964] 2 All ER 929 at 932, [1965] 1 QB 232 at 239). Moreover as Bowen LJ stated in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483, [1881-5] All ER Rep 856 at 861, 'the state of a man's mind is as much a fact as the state of his digestion … it is as much a fact as anything else'. The addition of allegations of intentional wrongdoing take these cases beyond the power conferred by s35(4) because the claims do not arise 'out of the same facts or substantially the same facts'."

37. That is not quite our case because, while the initial claim was based simply on a transfer (which might have been wholly innocent) arising after winding-up, the possibility of an inquiry into the good faith of the defendant was at least potentially in issue. However, it is to be noted that the addition of a positive and detailed claim of absence of good faith can well be said to be different from the formal s.127 claim that might be met by a claim for a validation order which might raise issues of good faith.

38. *Goode v Martin* [2002] 1 WLR 1828 was a very unusual case. The claimant was injured on 24 August 1996 while sailing as a guest on the defendant's yacht. She had no memory of how the accident had occurred. On 21 October 1997 she issued a claim in negligence based on a factual account given by a fellow guest. On 23 January 1998 a defence was served relying on a different version of the facts. The 3 year limitation period expired on 24 August 1999. On 14 April 2000 the claimant served a draft amended statement of claim which relied upon the facts as the defendant himself asserted them to be. The Master refused the application to make the amendments and the judge upheld that decision. This court allowed the claimant's appeal by reading CPR 17.4(2) as encompassing cases where the same or substantially the same facts are "already in issue" in the existing claim, even if not originally relied upon by the claimant: see above. This was a case where the facts relied upon by the claimant in the amended claim were not those originally advanced by her, but facts raised by the defendant. However, they were clearly already in issue on the face of the pre-existing pleadings.

39. *Goode v Martin* had been heard at first instance by Colman J and he had reason to consider the relevant principles again in 2006 in *BP plc v Aon Ltd.* [2006] 1 Ll. R 549, a case which was cited in this court in *Ballinger* (supra). In that case, Tomlinson LJ (with whom the Master of the Rolls and Briggs LJ (as he then was) agreed) said:

> "34. Helpful guidance as to the proper approach to the resolution of this question was given by Colman J in *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549, 558 where he said:
>
> > "52. At first instance in *Goode v Martin* [2001] 3 All ER 562 I considered the purpose of section 35(5) in the following passage: 'Whether one factual basis is "substantially the same" as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.'
> >
> > "53. In *Lloyd's Bank plc v Rogers* [1997] TLR 154 Hobhouse LJ said of section 35: 'The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to

> rely on any cause of action which substantially arises from those facts.'
>
> "54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts."
>
> 35. In the *Welsh Development Agency* case [1994] 1 WLR 1409 Glidewell LJ said, in an often quoted passage at p 1418, that whether or not a new cause of action arises out of substantially the same facts as those already pleaded is substantially a matter of impression.
>
> 36. Less well known perhaps is the cautionary note added by Millett LJ in the *Paragon Finance* case [1999] 1 All ER 400, 418, where he said, after citing the passage from Glidewell LJ to which I have just referred: "In borderline cases this may be so. In others it must be a question of analysis."
>
> 37. I would also point out, as did Briggs LJ in the course of the argument, that "the same or substantially the same" is not synonymous with "similar". The word "similar" is often used in this context, but it should not be regarded as anything more than a convenient shorthand. It may serve to divert attention from the appropriate inquiry.
>
> 38. I acknowledge straightaway, as did counsel before us, that on this part of the case we were given far more assistance than was the judge. Whilst I would accept that the judge did not misdirect himself, he did not in my view carry out a sufficient analysis of the extent to which the defendants would be required by the new claims to embark on an investigation of facts which they would not previously have been concerned to investigate."

In my judgment, the last paragraph just quoted is of particular relevance in the present case, with reference to Mr Onslow's submission that the judge here did not carry out the type of evaluative exercise of the new pleading which the rule and the decided cases envisage. Mr Howard argued that no such evaluation was necessary as Samba's case was a simple one, namely that it was a bona fide purchaser.

40. It is to be noted that in the *Ballinger* case Tomlinson LJ said the words "the same or substantially the same" are not synonymous with "similar": Loc. Cit. p. 3611, paragraph 37. He also quoted with approval Colman J's identification of the purpose of the test laid down in s.35(5) of the Act, i.e. that a defendant is not to be put in the position of having to,

> "…investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim".

Both matters clearly have their validity, but the emphasis upon whether facts are the "same" or only "similar" and what is beyond the ambit of the original claim may well need careful analysis. A point emerging from the next case to which we were referred.

41. The case was *Mastercard Inc. v Deutsche Bahn AG* [2017] EWCA 272. There, Sales LJ (as he then was) (with whom Arden LJ (as she then was) and King LJ agreed) emphasised that the question of whether to permit an amendment under CPR 17.4(2) was not one of case management, but an important substantive question of law. At paragraphs 35-37 of his judgment, Sales LJ said:

> "35. It is clear from the structure of CPR Pt 17.4(2) that the court only has a discretion to allow an amendment ("may allow …") to introduce a new claim (i.e. cause of action) into an existing claim where a limitation period defence will be circumvented by operation of the "relation back" rule when a prior condition has been satisfied, namely that the new claim arises out of the same or substantially the same facts as the already existing claim. Although it is sometimes said that this is substantially a matter of impression (see *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 W.L.R. 1409, at 1418 per Glidewell LJ), it was emphasised by Millett LJ in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All E.R. 400, CA, at 418, that while in borderline cases this may be so, "In others it must be a question of analysis" (and see *Ballinger v Mercer Ltd* at [36], set out below). It is clear from Pt 17.4(2) itself that the condition must be satisfied before permission to amend can be granted in a case to which it applies. In some cases, that may involve an evaluative judgment by the court in which it is possible to say that there is more than one answer which could rationally be given on the point, and in relation to which it could not be said of any of those answers on appeal that it is "wrong" such that an appeal should be allowed (CPR Part 52.21(3)(a)). In other cases, the issue may be more clear-cut and admit of a single answer which is right, so that if a different answer is given by a judge it can readily be seen on appeal to be wrong. In both sorts of case it is, strictly, a matter of analysis whether the judge has made the proper or an acceptable evaluation on the question whether the condition has been satisfied.
>
> 36. This is a substantive question of law, and an important one. Parliament has decided that valuable limitation defences which it has introduced for the benefit of defendants should only be circumvented by operation of the "relation back" rule where the precondition has been satisfied. This is not a matter of discretion for a judge.

> 37. On this appeal, therefore, I do not accept Mr Beal's contention that the judge's decision to allow the introduction of the new claim in the APOC to allege that the CAR is an unlawful restriction on competition is a case management decision with which this court should not interfere, In my judgment, on proper analysis the condition in CPR Pt 17.4(2) is not satisfied and the judge erred in his assessment that it was and in granting permission to amend to introduce the new claim with the benefit of the "relation back" rule. This court is therefore in a position to say the judge was wrong and the appeal should be allowed, for the reasons which follow."

At paragraph 41, Sales LJ quoted Brooke LJ in *Goode v Martin* (supra) as follows:

> "At [42], Brooke LJ said:
>
> > "The 1998 Act, however, does in my judgment alter the position. I can detect no sound policy reason why the claimant should not add to her claim, in the present action, the alternative plea which she now proposes. No new facts are being introduced: she merely wants to say that if the defendant succeeds in establishing his version of the facts, she will still win because those facts too show that he was negligent and should pay her compensation."

Sales LJ continued at paragraph 42:

> "42. The important feature of *Goode v Martin* is that in order to make out her newly formulated claim, the claimant did not need or propose to introduce any additional facts or matters beyond those which the defendant himself had raised in his pleaded defence. In effect, the claimant was allowed to say, "Well, if you are going to defend yourself against my existing claim by reference to those facts you have now pleaded in your defence, I rely on those very facts (if established at trial) to say that you are liable to me". In such a case, the defendant has chosen to put those facts in issue in relation to the claimant's existing claim and there is no unfairness and no subversion of the intended effect of the limitation defence introduced by Parliament to allow the claimant to rely on the defendant's own case as part of her claim against him."

42. We were referred to other passages from the judgments in the *Mastercard* case which appear to me to be specific to the facts then before the court and do not present any further statements of principle from which we can derive assistance.

43. There is only one other case to which I believe I should refer. That is *Papadimitriou v Crédit Agricole Corpn and Investment Bank* [2015] 1 WLR 4265, a case in the Privy Council on appeal from the Court of Appeal of Gibraltar. The case concerned the extent of inquiries incumbent on a bank in order to avoid liability as a constructive

trustee. We were taken by Mr Howard to the short additional judgment delivered by Lord Sumption, in agreeing with the opinion of the Board (on the appeal as a whole) given by Lord Clarke of Stone-cum-Ebony. The passage from Lord Sumption's judgment was this (at paragraph 33):

> "33. … Whether a person claims to be a bona fide purchaser of assets without notice of a prior interest in them, or disputes a claim to make him accountable as a constructive trustee on the footing of knowing receipt, the question what constitutes notice or knowledge is the same. It is a question which has taxed judges for many years. In particular they have been much exercised by the question in what circumstances a person is under a duty to make inquiries before he can claim to be without notice of the prior interest in question. Ultimately there is little to be gained from a fine analysis of the precise turns of phrase which judges have employed in answering these questions. They are often highly sensitive to their legal and factual context. The principle is, I think clear. We are in the realm of property rights, and are not concerned with an actionable duty to investigate. The hypothesis is that the claimant has established a proprietary interest in the asset, and the question is whether the defendant has established such absence of notice as entitles him to assume that there are no adverse interests. …"

I would note in addition that Lord Sumption continued as follows:

> "33. …The mere possibility that such interests exist cannot be enough to warrant inquiries. There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in his hands) which calls for inquiry. The rule is that the defendant in this position cannot say that there might well have been an honest explanation, if he has not made the inquiries suggested by the facts at his disposal with a view to ascertaining whether there really is. I would eschew words like "possible", which set the bar too low, or "probable" which suggest something that would justify a forensic finding of fact. If even without inquiry or explanation the transaction appears to be a proper one, then there is no justification for requiring the defendant to make inquiries. He is without notice. But if there are features of the transaction such that if left unexplained they are indicative of wrongdoing, then an explanation must be sought before it can be assumed that there is none. ..."

I quote those passages largely for the statement that questions about the duty to make inquiries are often "highly sensitive to their legal and factual context".

Discussion

44. In my judgment, the statement by Lord Sumption in *Papadimitriou* (supra) is of particular relevance to the issue before us as to whether the facts of this new claim are "the same or substantially the same" as were in issue on a claim in which the respondents had already claimed a remedy in these proceedings. The new claim is based on allegations of knowledge to be inferred from a multitude of facts said to have been known and of a plethora of sources of inquiry that it is said ought to have been undertaken over a very lengthy period indeed. It is a claim made against a Saudi Arabian company in respect of shares in other Saudi Arabian companies which were traded on the Saudi stock market. What is to be taken to be known by Samba in that context and what inquiries it ought to have made must be extremely fact sensitive and very sensitive to the legal and commercial context of the disputed transfer.

45. I do not consider that Samba, in asserting its good faith in the four one-line passages, relied upon by the respondents from submissions in the earlier stages of the proceedings, is to be assumed to have made an investigation of the highly detailed factual case upon which the new constructive trust claim is advanced.

46. Until the new claim was advanced, the parties were immersed in a complex legal battle about issues of proper law, jurisdiction and *forum conveniens*, so much so that the ultimately decided issue as to the proper application of s.127 of the 1986 Act had escaped their attention until raised by one of the judges in the Supreme Court. It is not surprising that Samba had asserted its good faith, but, in my judgment it is fanciful to assume that the detailed facts now alleged would have been investigated by Samba to the extent that the respondents contend. As far as we have been shown, in the proceedings prior to the respondents' failure in the Supreme Court, we have seen no material emanating from the respondents' side indicating their case that Samba had *not* been acting in good faith and relying on facts of the type and volume now pleaded. Indeed, as already mentioned, the respondents had consciously decided not to make any such case at the time of the original claim. Prior to formulation of the amendment, the respondent's case on absence of good faith appears to have been entirely unformulated.

47. The one item of evidence that we were shown at the hearing of the appeal was a short statement of 14 July 2017 by a Mr Beji Tak-Tak, who says that he was the Chief Risk Officer with Samba at the time of the transfer of the disputed shares. This statement was, we were told, before Birss J on the hearing of the applications in October 2017. In it, Mr Tak-Tak states that he did not know or suspect the existence of trusts in favour of SICL and did not see any need to make inquiries. He gives his reasons. This statement was produced to us in argument by Mr Howard in support of his submission that, having asserted that it was a bona fide purchaser, there was no evidence from Samba that it had not investigated the position. However, neither was there assertion of any facts of the kind now alleged by the respondents to counter Samba's assertion; they were simply not "in issue".

48. I do not say that the statement from Mr Tak-Tak can be anything more than the briefest of position statements on behalf of Samba and, in the light of the claim now made, there will clearly be a contest about such matters and a large amount of documentary and other evidence relevant to the question. However, in my judgment, it reinforces the point that the new pleading raises a positive case of bad faith on the part of Samba based on a volume of new facts which were not at any stage asserted by the respondents at the earlier stages of the proceedings. Mr Tak-Tak's statement does

not give any indication that, at the earlier stages, Samba should be assumed to have investigated a claim of the character now made.

49. In my judgment, with respect to the learned judge's careful judgment, he did not conduct any real evaluation of the new claim against the facts in issue in the old claim. No doubt he accepted a submission along the lines of that made by Mr Howard before us that no such evaluation was necessary. I disagree. As I think Sales LJ was saying in the *Mastercard* case, it is necessary to make an evaluation of the new case as against the old case in order to ask the threshold question whether the new case arises out of the same or substantially the same facts as the old one. In this case, I do not find that the judge really asked the question how the extensive pleaded facts related to the bare assertion of good faith by Samba in the absence of any facts adduced by the respondents in contradiction of that assertion. The claim now made by the respondents is of an entirely different character from the claim they advanced previously.

50. Having carefully considered the new pages of the pleading, I do not consider that the newly formulated claim arises out of the same or substantially the same facts as those already in issue in the old claim. Broadly similar allegations, implicitly made or understood will not do. In real terms, paraphrasing the words of Colman J in the *BP v Aon* case (supra) (which should not be read as a statute) I find that the new case puts Samba in the position of being obliged to investigate facts and obtain evidence well beyond the ambit of the facts that it could reasonably be assumed to have investigated for the purpose of defending the amended claim at the stage that it had reached before the amendment application. It may be that Samba will have to address those facts in the new 2017 action, but there is no reason to deprive it of the benefit of any accrued limitation period in the present action.

51. So far I have not addressed Mr Onslow's submission that the application for permission to amend should have failed at the first hurdle in this case because the question arising under CPR r.17.4(2) has to be determined solely on the pleadings and on the pleadings the new facts do not appear at all.

52. In my judgment, in the vast majority of cases what is "in issue" in an existing claim will usually be determined by examination of the pleadings alone. It will be the primary, and probably the only, source of material for deciding the question. In some cases, however, such as those considered above where, for example, there has been an extensive evidential battle on a summary judgment application or on a jurisdictional question, it may be possible to discern that facts are already in issue in a case prior to being crystallised in formal pleadings. Nonetheless, I consider that such cases will be rare. Certainly, I do not see that the "one line" assertions of good faith (which are not accepted by the other side) to which our attention was drawn, present sufficient material on which to find that wide ranging factual allegations of an absence of good faith are already in issue in the action.

Conclusion

53. For these reasons, I would allow the appeal. I would quash the judge's order granting permission to re-amend the Particulars of Claim. I believe that it necessarily follows that the 2013 action should be dismissed. I cannot see that it is right to leave on foot

an action which is bound to fail. I would invite submissions in writing from the parties as to the correct order for costs in that action in that event.

Sir Ernest Ryder (Senior President of Tribunals):

54. I agree with both judgments.

Lord Justice Floyd:

55. I agree with McCombe LJ that the appeal should be allowed for the reasons he gives in paragraphs 44-50 above. The new constructive trust claim does not arise out of substantially the same facts "as are already in issue on" the existing claim. I also agree with the order he proposes. I add some words of my own because this case has some unusual, but potentially important features.

56. First, neither counsel was able to show us a case touching on the question dealt with in paragraphs 51 and 52 of McCombe LJ's judgment, namely whether it is permissible to look outside the pleadings to determine what facts are "already in issue on the existing claim". Whilst I can understand that there might be situations where it would strike one as fair to enquire more widely, there are obvious practical difficulties in defining the scope of the permissible enquiry if it is not limited by the pleadings. Does the pool of facts in which it is permissible to fish for the basis of the new cause of action include facts alleged in party and party correspondence, or in every witness statement which has been filed? Do transcripts of submissions and evidence count? I am inclined to think that the decision in *Goode v Martin* might have been different if the defendant had merely set out its version of the facts in correspondence, or his counsel had done so in a skeleton or oral argument at a case management conference. My provisional view is that neither the Act nor the rule contemplates such a broad-ranging enquiry to determine what facts are in issue. The scope of such an enquiry has obvious practical implications for judges deciding on amendment applications. I would prefer, however, to leave a final decision on that issue to a case where it affected the outcome.

57. A second unusual feature of the present case, effectively a consequence of the first, is that the respondents argue that they are entitled to rely on facts, as yet unpleaded by them or their opponent, even though it might never be necessary for either side to rely those facts as part of its case. Significantly, Mr Howard's skeleton argument put his case as being that Samba "would *necessarily* have been required to advance [a good faith, lack of knowledge] defence to the s. 127 Claim". But that is not so. Apart from anything else, Samba did succeed in defending the claim on a different basis, and there were other grounds on which it argued that the claim should fail which did not depend on a showing of good faith (see paragraph 33 above). To allow a party to rely on a fact that its opponent might or might not wish or need to plead might be said to be going further than permitted by the language of the Act and rule because it is not a fact "already in issue" on the original claim. It also might be said to go beyond the purpose of the rule as stated by Hobhouse LJ in *Lloyd's Bank plc v Rogers* [1997] TLR 154 where he said:

> "The policy of the section was that, if factual issues were *in any event going to be litigated* between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts" (my emphasis).

ANNEX

37A. Samba's knowledge and conduct was and is such:

37A.1. as to require Samba to deal with the Disputed Securities only in accordance with SICL's rights under the Trusts; and

37A.2. as to make it unconscionable for Samba to retain the benefit of the Disputed Securities and/or to deal with the Disputed Securities as Samba's own.

37B. In particular, Samba knew that the Relevant Securities (and therefore the Disputed Securities) were being held on trust for SICL by Mr Al-Sanea. Pending disclosure, the Claimants rely on the following facts and matters:

37B.1. Mr Al-Sanea was (as indicated at paragraph 4 above) a director of Samba from 2003 to 2006. Mr Al-Sanea knew that he was holding Relevant Securities (and therefore Disputed Securities) on trust for SICL and Mr Al-Sanea's knowledge is to be attributed to Samba.

37B.2. From around December 2003 until on or around 12 September 2009, i.e. shortly before the September Transfer, Mr Saud Algosaibi ("Mr Algosaibi") was a director and chairman of the board of directors of Samba, sitting on its Executive Committee. Mr Algosaibi knew that it was SICL's practice to purchase and hold shares in Saudi Arabian banks by using Mr Al-Sanea as its nominee and that Mr Al-Sanea was holding Relevant Securities on trust for SICL, including because he was a director of AHAB from late 1990, and AHAB's managing director from 2003.

37B.2.1. AHAB was a party to the 2003 Samba Agreement (referred to at paragraph 27 above), by which Mr Al-Sanea agreed to hold certain

Relevant Securities (being shares in Arab National Bank, Banque Saudi Fransi and Saudi British Bank) as "trustee" and "nominee" for SICL.

37B.2.2. AHAB was also the counterparty to a "Master Agency Trust and Service Agreement" with SICL dated 17 July 2007, pursuant to which AHAB agreed to assist SICL in the acquisition of assets situated in Saudi Arabia and inter alia to "hold the legal title" to such assets "as trustee on behalf of SICL in trust".

37B.3. By September 2009, Mr Al-Sanea had become the registered holder of approximately 71 million shares in Samba, i.e. approximately 7.8% of the total shares in Samba (and almost 30 million of which he held on trust for SICL), which made him the fourth largest registered shareholder in Samba. AHAB was also a substantial shareholder in Samba at all material times.

37B.4. Mr Algosaibi's knowledge is to be attributed to Samba.

37C. Further or alternatively, it is to be inferred that Samba knew that the Relevant Securities (and, therefore, the Disputed Securities) were being held on trust for SICL by Mr Al-Sanea. Pending disclosure, the Claimants rely on the following facts and matters.

37C.1. SICL had a longstanding relationship with Samba, both as a borrower of substantial sums from Samba, as the owner of substantial shareholdings in Samba and as depositor holding cash balances at Samba's London branch.

37C.2. To Samba's knowledge, the Relevant Securities comprised a very significant percentage (at times almost as much as half) of SICL's equity investments and a significant percentage (at times as much as around 8%) of SICL's total assets.

37C.3. In circumstances where:

37C.3.1. Samba lent US$60m to SICL, under the SICL/Samba Facility Agreement;

37C.3.2. Samba participated in the Facility Agreement (i.e. the US$2.815 billion unsecured revolving loan facility to SICL);

37C.3.3. Samba knew that SICL could not, as a company incorporated in the Cayman Islands, itself be registered as the registered holder of shares in Saudi Arabian banks, and would instead have held such shares through a nominee;

37C.3.4. Samba knew that SICL's substantial shareholding in Samba itself was not held directly by SICL, and must therefore have been held through a nominee,

it is to be inferred that, as a rational commercial lender, Samba would, in the course of its longstanding relationship with SICL, have taken and in fact did take detailed steps to understand and satisfy itself as to how SICL's shareholdings in Saudi Arabian banks were held, and by whom such shareholdings were held on SICL's behalf. Such steps would have revealed that Mr Al-Sanea held the Relevant Securities (and therefore the Disputed Securities) on trust and as nominee for or on behalf of SICL.

37D. Further or alternatively:

37D.1. In the context of what Samba actually knew, a reasonable bank in its position would have appreciated that (alternatively would or ought to have made inquiries or sought advice which would have revealed the probability that):

37D.1.1. The Relevant Securities (and therefore the Disputed Securities) were held by Mr Al-Sanea on trust for SICL; and

37D.1.2. The September Transfer was a breach of trust; and/or

37D.1.3. In the light of what Samba actually knew, Samba recklessly failed to make such inquiries about the September Transfer, the Relevant Securities and the Disputed Securities as an honest and reasonable bank would make: had Samba made such inquiries, it would have learned that Mr Al-Sanea held the Relevant Securities (and therefore the Disputed Securities) on trust for SICL.

37E. Pending disclosure, in support of the allegations at paragraph 37D above the

Claimants rely, in addition to those set out at paragraphs 37B-C above, on the following facts and matters:

37E.1. By reason of being a lender under the Facility Agreement, Samba received inter alia (a) the Information Memorandum relating to the Facility, dated July 2007 referred to at paragraph 31 above (the "RCF Document"), (b) SICL's Business Plan for 2007 – 2011 (the "Business Plan"), (c) SICL's interim and final consolidated financial statements for at least the period 30 June 2004 to 31 December 2008 and (d) the annual reports of SICL for 2007 and 2008.

37E.2. Accordingly:

37E.2.1. Samba knew that SICL had substantial shareholdings, valued at approximately US$701m as at July 2007, in "the five Saudi Arabian banks", being the same five banks in which the Disputed Securities were held, and including shareholdings in Samba itself;

37E.2.2. Samba knew that SICL continued to hold substantial shareholdings in Saudi Arabian financial services companies at the time of the September Transfer (with similar values to those referred to at 37E.2.1 above);

37E.2.3. Samba, therefore, would or ought to have appreciated that SICL owned and continued to own the Disputed Securities at the date of the September Transfer.

37E.3. Generally, Samba:

37E.3.1. knew that SICL could not, as a company incorporated in the Cayman Islands, itself be registered as the registered holder of shares in Saudi Arabian banks, and would instead have held such shares through a nominee;

37E.3.2. must have known that SICL's substantial shareholding in Samba itself was not held directly by SICL, and must, therefore, have been held through a nominee;

37E.3.3. must have known that Mr Al-Sanea was the registered holder of approximately 71 million shares, i.e. a very substantial and

approximately 7.8% shareholding in Samba;

37E.4. Samba also knew (as evidenced in the RCF Document and Business Plan) that:

37E.4.1. Mr Al-Sanea was the ultimate beneficial owner of SICL;

37E.4.2. SICL's only purpose was, like the Saad group of companies generally, to hold and manage the assets of Mr Al-Sanea and his immediate family;

37E.4.3. The shares in "the five Saudi Arabian banks" had been acquired by SICL over a number of years from "1998 onwards";

37E.5. In addition:

37E.5.1. (As indicated at paragraph 7 above) on around 28 May 2009, SAMA froze all Saudi Arabian assets of Mr Al-Sanea and the Saad group of companies (of which SICL was the parent) and entities and individuals associated with them ("the SAMA Freezing Order"). It is to be inferred that, as a Saudi Arabian bank subject to the jurisdiction of SAMA, Samba knew about, was notified of and was required to act in accordance with the SAMA Freezing Order (which was in any event widely reported in the press at the time).

37E.5.2. As indicated at paragraph 11 above, on 27 July 2009, AHAB commenced proceedings in the Cayman Islands against SICL, Mr Al-Sanea and others alleging that a large scale fraud had been perpetrated against AHAB by Mr Al-Sanea and others. It is to be inferred that Samba knew about these proceedings, not least because they were widely reported in the press at the time and in any event Samba would have been informed about them as one of the lenders under the Facility Agreement.

37E.5.3. The SAMA Freezing Order triggered an event of default under the Facility Agreement (under which Samba was one of the lenders); and lender banks thereunder petitioned for the winding up of SICL on 30 July 2009;

37E.5.4. Samba knew on, or shortly after, 5 August 2009, and thus at the time of

the September Transfer, that the JOLs had been appointed as provisional liquidators of SICL by the Grand Court of the Cayman Islands and that SICL was massively insolvent and in liquidation;

37E.5.5. On 6 August 2009, Samba was formally notified of the Cayman Freezing Order (referred to at paragraph 10 above). Accordingly, Samba would have known that, at the time it was made, the September Transfer was in breach of the Cayman Freezing Order.

37E.6. In light of the knowledge at 37E.1. – 37E.5. above, a reasonable bank, and therefore Samba, would or ought to have:

37E.6.1. concluded that SICL's shareholdings in Saudi Arabian banks (and therefore that the Relevant Securities and the Disputed Securities) were in fact held on trust for SICL by a Saudi Arabian person;

37E.6.2. discerned a strong (and in any case sufficient) likelihood that the Disputed Securities were held by Mr Al-Sanea on behalf of SICL;

37E.6.3. been profoundly suspicious about a transaction in which Mr Al- Sanea, an alleged fraudster and beneficial owner of a massively insolvent company, was proposing to transfer to it shares in the five Saudi Arabian banks valued at approximately US$437m in breach of the Cayman Freezing Order and the SAMA Freezing Order;

37E.6.4. in either case, made enquiries about the shares which were the subject of the September Transfer, as a result of which Samba would have discovered that the Disputed Securities were in fact held on trust for SICL by Mr Al-Sanea.

37E.7. It is to be inferred that the September Transfer, which involved a transfer of shares totalling around US$512m in value, as well as cash totalling approximately SAR 54m, must have been the subject of detailed discussions and negotiations between the parties for some time before it occurred. Mr Algosaiabi was removed as or ceased to be a director of Samba just four days prior to the September Transfer.

37F. In the premises, upon its receipt of the Disputed Securities:

37F.1. an equity arose and remains between SICL and Samba in relation to the Disputed Securities; and

37F.2. Samba became accountable to SICL as a constructive trustee of the Disputed Securities, and remains so.