Neutral Citation Number: [2021] EWHC 2027 (Ch)

Case No: CH-2020-000205

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
ON APPEAL FROM ICC JUDGE PRENTIS' ORDER DATED 23 JULY 2020

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 20/07/2021

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

(1) PAUL ATKINSON and GLYN MUMMERY (as Joint Liquidators of Grosvenor Property Developers Ltd)
(2) GROSVENOR PROPERTY DEVELOPERS LIMITED (in liquidation) **Appellants**

- and -

(1) SANJIV VARMA also known as SANJEEV VERMA
(2) ARJUN KADKA
(3) GROSVENOR CONSULTANTS FZE
(4) SIDDHANT VARMA
(5) JONATHAN ENGLAND **Respondents**

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Rory Brown and Andrew Shipley (instructed by **Gunnercooke LLP**) for the **Appellants**
James Ramsden QC and Oliver Hyams (instructed by **Keystone Law**) for the **Fourth and only Respondent to this appeal**

Hearing dates: 12 May 2021
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MICHAEL GREEN

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10.30am on 20 July 2021

Mr Justice Michael Green :

Introduction

1. This is an appeal by the Joint Liquidators of Grosvenor Property Developers Limited (the **Company**) against the Order dated 23 July 2020 of Insolvency and Companies Court Judge Prentis (the **Judge**). The Order was made consequent on the Judge's reserved judgment handed down the same day (the **Judgment**) following the trial of various claims brought by the Appellants against the Second, Fourth and Fifth above-named Respondents. The appeal concerns only the Fourth Respondent, Mr Siddhant Varma, who, without any disrespect, I will call "**SVJ**", as the Judge did, to avoid confusion with the First Respondent, who is SVJ's father (**his father** or the **First Respondent**). The Judge dismissed all of the Appellants' claims against SVJ.

2. The appeal is now confined to two Grounds in relation to the claim in unjust enrichment made against SVJ: (1) that the Judge was wrong to have found that SVJ was not unjustly enriched at the expense of the Company by his receipt of £2 million from the Company (**Ground 3**)[1]; and (2) that the Judge was wrong to find that SVJ could rely on a change of position defence (**Ground 4**). The Judge refused permission to appeal, but on 11 February 2021, I granted the Appellants permission to appeal on those two Grounds. To overturn the Judge's Order in relation to SVJ, the Appellants have to succeed on both of their Grounds of Appeal.

3. There have been a number of other judgments in these proceedings that will need to be considered:

   (1) On 13 May 2020 Deputy ICC Judge Agnello QC handed down judgment on the Appellants' claims against the First and Third Respondents, both of whom had been debarred from defending the claims (the **Agnello judgment**);

   (2) On 13 July 2020, HH Judge Johns QC, sitting as a deputy High Court Judge, handed down judgment on a contempt application brought by the Appellants against the First Respondent (the **Johns judgment**); this was after the trial in this claim had concluded but before the Judge handed down his Judgment; this found the First Respondent guilty of eight counts of contempt;

   (3) On 27 November 2020, the Court of Appeal (Lewison, Rose and Stuart-Smith LJJ) handed down judgment on the First Respondent's appeal from the Johns judgment (the **CA judgment**); the appeal was dismissed.

4. An important part of this appeal and the other judgments is the story of the diamonds and jewellery (the **diamonds**). The First Respondent has maintained that the diamonds were family heirlooms and that his mother, Mrs Nirmala Varma, had given him the diamonds on instructions to sell them and to give £2 million of the proceeds to her grandson, SVJ. The First Respondent said that the diamonds were invested by way of capital contribution in the Third Respondent (**GCFZE**) a company incorporated in the United Arab Emirates and wholly owned and controlled by the First Respondent. GCFZE then purportedly sold the diamonds to the Company for

[1] Grounds 1 and 2 were not pursued by the Appellants at the permission to appeal hearing. For convenience I retain the same numbering as in their Grounds of Appeal.

£4.95 million, of which £3.123 million was paid, and out of that, SVJ was paid £2 million. SVJ's case throughout is that he was not involved at all in the Company's business and he was expecting and thought that the £2 million was indeed an inheritance from his grandmother that had been promised to him.

5. The Appellants' case is that this was a fraud perpetrated on the Company whose money was simply misappropriated. The Company was incorporated on 16 December 2016 ostensibly for the purpose of acquiring and redeveloping the Grosvenor Hotel in Bristol. Investors were persuaded to put in £7.6 million to the project. However the hotel was never purchased and no steps appear to have been taken towards its redevelopment. As Rose LJ (as she then was) said in the CA judgment, "*it appears that the whole enterprise was a fraud*". The Company was put into compulsory liquidation on 14 November 2018. The Appellants have made concerted efforts to recover some of the investors' lost money including by pursuing these proceedings.

6. The First Respondent was not actually a *de jure* director of the Company but he was alleged to be a *de facto* director and in ultimate control of it and its assets. The Second Respondent was the sole *de jure* director of the Company from 9 June 2018 until it went into liquidation. He did not attend the trial before the Judge and the Judge found him liable to restore to the Company the value of the diamonds that he had purportedly caused the Company to purchase from GCFZE, which the Judge valued at the purported sale price of £4.95 million. The Fifth Respondent was the sole *de jure* director of the Company from incorporation until his resignation on 9 June 2018. He too did not turn up to the trial and the Judge found that he acted dishonestly throughout and that he was therefore liable for the £6.5 million that he allowed to be paid away from the Company.

The Claim against SVJ

7. The Appellants brought claims against SVJ in respect of a total amount of £2,357,302 that they said was the traceable proceeds of the Company's misappropriated money. Of that sum, this appeal is only concerned with the sum of £2 million that was paid to SVJ on 8 August 2017 by the First Respondent. The Appellants put their case on two bases: knowing or unconscionable receipt; alternatively, unjust enrichment.

8. The Judge appeared to find that the £2 million received by SVJ was misappropriated Company money. At para. [204] of the Judgment the Judge said: "*The £2m was therefore the traceable proceeds of the First Respondent's and Mr England's breaches of fiduciary duty*."

9. From paras. [216] to [260] of the Judgment, the Judge dealt with the knowing receipt claim and concluded that SVJ did not have the requisite knowledge that the £2 million was the traceable proceeds of a fraud. Instead the Judge accepted SVJ's explanation, supported by evidence from his mother and maternal grandmother and even though it was inherently implausible and it was an "*extraordinary story*", that the £2 million was his inheritance from his paternal grandmother, whom SVJ had spoken to and seen a letter from shortly before his receipt of the £2 million took place. Furthermore SVJ had no knowledge of the business in Bristol and he trusted his father as he appeared to

be a wealthy and successful businessman. The Judge therefore rejected the knowing or unconscionable receipt claim against SVJ on the grounds of a lack of knowledge.

10. Then, in one sentence, the Judge also rejected the claim in unjust enrichment. At para. [261] he said (underlining added):

> "So too, given my acceptance of the story of the inheritance, does the claim in unjust enrichment [fail]."

11. Having produced an impressive judgment on all other aspects of the case, the lack of reasoning on unjust enrichment is surprising. I agree with Rose LJ's comment in the CA judgment about the judgment at para. [29]: "*After a careful and comprehensive analysis of many different pieces of evidence pointing in opposing directions, Judge Prentis held that the claim of knowing or unconscionable receipt against [SVJ] therefore failed*". She did not say anything about his treatment of the unjust enrichment claim.

12. By his "*acceptance of the story of the inheritance*" was the Judge deciding that the diamonds existed and were sold to the Company? Or was he simply saying, after going through in detail what SVJ thought and knew about the provenance of the £2 million, that he accepted SVJ's story that he thought the £2 million was an inheritance?

13. This is the core of the Appellants' appeal. They say that, in order to conclude that SVJ was not unjustly enriched at the expense of the Company, the Judge would necessarily have to have found that:

> (1) The diamonds existed; and
>
> (2) They had been liquidated by the First Respondent by transferring them to GCFZE and thereafter their sale on to the Company.

In other words the Judge would have to have found that the inheritance story actually happened and was not just something that SVJ thought and believed had happened.

14. The Appellants say that such findings were not open to the Judge both because they were not part of SVJ's case and also because no reasonable judge could have made them on the evidence before him.

A. GROUND 3

The Judge's findings relevant to unjust enrichment

15. The Judge began his consideration of the claims against SVJ in para. [91] of the Judgment where he posed the question (underlining added):

> "Directly or indirectly engaged by each of the claims against SVJ is the question: what did he know about the fraud from which he received £2,357,302, comprising … £2m on 8 August 2017 from his father?"

It seems fairly clear that the Judge's starting point was that the money received by SVJ was the proceeds of a fraud on the Company.

16. Then at para. [204] the Judge concluded that:

> "The £2m was therefore the traceable proceeds of the First Respondent's and Mr England's breaches of duty."

The Judge then went on to consider whether SVJ had the requisite knowledge of this.

17. Having set out the law on knowing or unconscionable receipt, the Judge turned to the way that he perceived the unjust enrichment claim to be put. At paras. [213] and [214] he said as follows:

> "213. As with the other unjust enrichment claims, that in relation to the £2m is placed on a narrow basis. The Amended Particulars of Claim state that SVJ "received £2,000,000 of the Company money or its traceable substitute for no legitimate commercial purpose and without providing any consideration whatsoever to the Company". After providing the origins and transmission of the money they say that SVJ "has been enriched at the expense of the Company and the enrichment was unjust in that [SVJ] has provided nothing in return for his receipt of the traceable proceeds of £2,000,000 of Company money".
>
> 214. Again, the origin of the monies, which meets *Menelaou*[2], is not in issue. As to "nothing in return", if indeed SVJ was bequested £2m from the Jewellery then his receipt of that sum would constitute something in return, as its receipt would be due transmission of the sum with attendant release as between SVJ and his father of the latter's obligation to account. It would not matter that the Company had not received consideration from SVJ, because he was never dealing with it directly. Alternatively, the Company treating itself in its claims against the First Respondent, Mr Khadka, and Mr England as having disbursed sums for the Jewellery, which has been treated as acquired for the Company, the receipt of that sum by SVJ representing his rights in the Jewellery cannot be characterised as unjust."

18. Para. [214] seems to be the basis for the Judge's ultimate conclusion on unjust enrichment but I find it a little difficult to follow. The first part seems to be dependent on a finding that the £2 million <u>was</u> SVJ's inheritance, by virtue of being the proceeds from the sale of the diamonds to the Company. Whether this finding was open to the Judge is discussed below.

19. The alternative section of para. [214] seems to be based on the way that the Appellants put their claim against the other Respondents, which in some way disabled them from claiming that SVJ's receipt was unjust. I do not understand the relevance of the claims against the First Respondent and Mr England which were based on breaches of fiduciary duty in relation to misappropriations of Company money. In relation to Mr Khadka, the Judge based his order on Mr Khadka's statement that he held the diamonds and was able to return them to the Appellants. The Judge did not

[2] *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176; referred to earlier in the Judgment at para. [140]

however necessarily believe Mr Khadka but just in case he did actually have the diamonds he made an order for their delivery up or alternatively for payment by Mr Khadka of their value. I agree with Rose LJ's summary of the Judge's findings in this respect, which were clearly conditional, in para. [45] of the CA judgment:

> "Properly understood, Judge Prentis' findings in relation to the gift of the Jewellery to GCFZE and its sale to [the Company] went no further than upholding the [Appellants'] claim that *if* the Jewellery existed and *if* it had been sold by GCFZE to [the Company] and *if* Mr Khadka has held the Jewellery or its proceeds on behalf of [the Company] then he must certainly account for that to the [Appellants]."

20. The Judge continued in his Judgment to consider SVJ's knowledge "*that the £2m was the traceable proceeds of fraud*" (para. [216]). He then goes through all the evidence he heard in relation to whether SVJ honestly believed that the £2 million was an inheritance, which included what he did with the money after receipt. In paras. [248] to [258] the Judge goes through each of the Appellants' pleaded particulars of knowledge giving his conclusions on each one. In amongst those, the Judge said at para. [253]:

> "Fourthly is an averment that the £2m was not an inheritance. It was."

21. It is unclear from that very brief paragraph whether the Judge was finding that the £2 million was an actual inheritance or an intended inheritance that SVJ was expecting to receive. Given that it appears in the section dealing with SVJ's knowledge, it is likely that it is the latter. That finding also seems to be the basis for the Judge's conclusion at para. [261] and his "*acceptance of the story of the inheritance*". That must be SVJ's story, and he did not have any knowledge of the actual provenance of the money. I am not therefore sure that the Judge was finding that the £2 million was SVJ's actual inheritance.

22. The Appellants say that such a finding was necessary for the Judge to make in order to decide that SVJ was not unjustly enriched at the Company's expense. This ground of appeal is therefore concerned with such a factual finding if indeed it was made.

The Appellants' submissions on Ground 3

23. Mr Rory Brown, together with Mr Andrew Shipley, representing the Appellants, advanced four reasons in support of this Ground of Appeal that "*the decision the £2m was an inheritance was one which no reasonable judge could reach on the evidence*." The four reasons are:

(1) Such a finding was not available to the Judge on SVJ's pleaded and evidential case;

(2) The First Respondent's diamonds story was inherently highly improbable;

(3) The finding was inconsistent with the Judge's other findings;

(4) There was no cogent evidence before the court that GCFZE had received the diamonds from the First Respondent or that the Company had received the diamonds from GCFZE.

24. As to (1), Mr Brown submitted that SVJ essentially put the Appellants to proof that the monies he received were misappropriated Company monies or their traceable proceeds. He said that SVJ put forward no positive case on that front in his pleadings. In his evidence at trial, SVJ said that his belief that the monies were his inheritance was based on what he had been told by his father and grandmother. Mr Brown relied on the recent Court of Appeal decision in *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287 to submit that the Judge had therefore gone outside the bounds of SVJ's pleaded and evidential case to find that the inheritance actually happened.

25. In relation to (2), Mr Brown referred to a number of fairly obvious factors that rendered the story of the diamonds inherently improbable. These included: the unlikely circuitous route that was allegedly taken by the First Respondent to transfer the £2 million inheritance to SVJ; that the Company took in investment for the purposes of renovating the hotel in Bristol, not to be investing in diamonds; that fabricated documents were used to support the route the diamonds took; that there were no photographs, insurance details or valuations of the diamonds; and that the First Respondent was a proven liar. Mr Brown complained that the Judge did not perform any real analysis of the evidence to support a finding of inheritance unlike in the Agnello and Johns judgments both of which found (the latter to the criminal standard and upheld by the CA judgment) that the Company never received the diamonds and the transactional documents were fabrications or lacked credibility.

26. As to (3), Mr Brown submitted that a finding that this was an inheritance would be inconsistent with the Judge's findings in relation to Mr Khadka and Mr England. If the diamonds existed and had been sold to the Company, there would be some evidence of their existence and they would have been delivered up by Mr Khadka who said he had them.

27. And reason (4) is based on the lack of any direct or cogent evidence of the existence of the diamonds and their transfer to the Company. Both SVJ and his mother could not give evidence as to the existence of the diamonds – all that his mother could say is that she saw a letter that the First Respondent had showed her in which the diamonds were listed and she knew that the First Respondent's parents had lots of jewellery that was often worn. SVJ himself knew nothing about the involvement of the Company, as he admitted.

28. Even though this ground of appeal was purely on the factual findings that it was assumed the Judge had made, Mr Brown submitted that the Judge had wrongly conflated the legal tests for knowing receipt and for unjust enrichment. Knowledge is an essential element of knowing receipt, as one would expect, but in relation to unjust enrichment, knowledge of the recipient is a sufficient but not a necessary component of such a claim. The Judge's conclusion in para. [261] coming straight after his findings on SVJ's lack of knowledge shows that he assumed that SVJ's innocence meant that there was no unjust enrichment. Basing himself on what Lord Templeman said in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 560A-C (***Lipkin Gorman***) and referring to *Goff and Jones* on *The Law of Unjust Enrichment* (9th Ed) (***Goff & Jones***) paras. 8-01, 8-03, 8-109 and 8-112, Mr Brown submitted that an innocent

donee of funds misappropriated from a company by its directors is strictly liable in unjust enrichment to the company, subject to any defences he or she may have, such as change of position.

SVJ's submissions on Ground 3

29. Mr James Ramsden QC, appearing with Mr Oliver Hyams on behalf of SVJ, maintained that the Judge had found not only that SVJ understood his receipt of the £2 million to represent his promised inheritance but also that the receipt of the £2 million was actually his inheritance. Mr Ramsden QC said that this was clear from para. [253] of the Judgment.

30. Mr Ramsden QC submitted that that factual finding could not be challenged on appeal as it was based on the evidence before him and it was one that a reasonable judge could have reached. He referred to the well-known authorities on attacking a judge's factual findings on appeal: *Fage UK Ltd and anor v Chobani UK Ltd and anor* [2014] EWCA Civ 5 at [114] and *Grizzly Business Ltd v Stena Drilling Ltd* [2017] EWCA Civ 94 at [39].

31. As to the legal question, Mr Ramsden QC submitted that the Judge was quite right in para. [214] to focus on the issue of "*nothing in return*" and it did not matter that SVJ did not provide any consideration to the Company for the £2 million; the court only had to decide if something was given in return by SVJ and the discharge of his father's obligation to account for his inheritance was sufficient to establish that his enrichment was not unjust.

32. Mr Ramsden QC argued that there were four stages to establishing a claim for unjust enrichment: (1) the first question is whether there was an enrichment; (2) the second is whether there was guilty knowledge on the part of the recipient; (3) if the answer is "yes" to both questions, then the recipient is liable in unjust enrichment and no further enquiry is needed; (4) however, if the recipient is innocent, the further question is whether the circumstances makes the receipt of the monies unjust. Mr Ramsden QC referred to *Lipkin Gorman* and said that the focus of attention was as to what was given by the defendant in return, not necessarily to the victim, but it could have been to the wrongdoer himself (ie the solicitor Cass in *Lipkin Gorman* who had taken the money from the firm's client account and who received some winnings from the defendant).

Discussion of the unjust enrichment claim and Ground 3

33. It appeared from para. [214] of the Judgment that the Judge was framing the issue on unjust enrichment around whether SVJ gave "*something in return*" for the receipt of the £2 million. The first sentence of para. [214] is interesting because it appears that what the Judge was saying was that there was no issue as to the origin of the monies, which I take to mean that they came from the traceable proceeds of misappropriated Company monies. But the second sentence assumes that, if it is shown that the £2

million was actually SVJ's inheritance, then he would have given "*something in return*" by his release of his father's obligation to account for the inheritance.

34. That being so, one would have expected the Judge to have gone on to deal with the facts as to whether the diamonds actually existed and whether they were transferred by the First Respondent into GCFZE and thereafter sold by GCFZE to the Company. While there is some analysis by the Judge of SVJ's and his mother's evidence as to the likelihood of the existence of the diamonds, I do not believe that he makes a factual finding that they do exist. He certainly does not find that their transmission to the Company, via GCFZE, occurred.

35. Rose LJ in the CA judgment captured the essence of what the Judge was deciding:

> "43. Judge Prentis' concern was primarily with whether the evidence before him supported [SVJ's] defence that so far as he was concerned, he had been told and believed that the £2 million was his inheritance from the sale of his grandmother's jewels. In order to conclude that the defence was made out, the judge did not have to find that the Jewellery actually existed or that it had been bought and sold as between Grosvenor and GCFZE. His findings as regards the Jewellery and [SVJ] do not touch on the transaction between Grosvenor and GCFZE since whether or not it was true, the money was still the result of a breach of fiduciary duty.
>
> 44. Many of the doubts expressed by Judge Johns about the existence of the Jewellery still remain even taking into account the judgment of Judge Prentis and the new evidence. There are still no photographs of the Jewellery, no documents evidencing their valuation, insurance or ultimate sale. Mr Khadka claimed in April 2019 that he still held them on behalf of Grosvenor but his recent witness statement does not explain why he did not respond to the proceedings or comply with the Birss order or the judgment of Judge Prentis. That statement is ambiguous on the question whether he still holds the Jewellery or has sold it and, if the latter, what he has done with the money."

36. Rose LJ then continued to deal with the Judge's findings against Mr Khadka and whether they were only consistent with him finding that the diamonds existed and had been sold to the Company. I have set out in para. [19] above what Rose LJ said about that and how she correctly characterised the Judge's Judgment in that respect, being conditional on a number of things that had not been determined by the Judge. That in my view disposes of the alternative formulation of the unjust enrichment issue in para. [214] of the Judgment.

37. I agree with the way that Rose LJ explained what the Judge was actually deciding. He was only deciding whether to accept SVJ's "*story of the inheritance*" in order to determine whether he had the requisite knowledge of the wrongdoing that had taken place in the Company and which resulted in SVJ receiving £2 million of Company money. The Judge had already accepted the Appellants' case that the £2 million was "*the traceable proceeds of the First Respondent's and Mr England's breaches of fiduciary duty*" (para. [204]). That was not challenged by SVJ in his defence; he merely put the Appellants to proof of it. SVJ put forward no positive case that the £2 million was actually his inheritance, derived from his grandmother's diamonds.

38. In the circumstances, it seems to me that there are two possibilities:

(1) The Judge did not find that the £2 million was SVJ's inheritance; only that he honestly and reasonably believed that it was; or

(2) The Judge did find that the £2 million was SVJ's inheritance; and that he honestly and reasonably believed it to have been so.

39. If (1) is correct, then the Judge's legal test of "*something in return*" in para. [214] of the judgment would not be satisfied. There could be no release of the First Respondent by SVJ if he did not actually receive his inheritance. Accordingly, he was unjustly enriched at the expense of the Company, irrespective of his knowledge and the Judge was wrong to have rejected the Appellants' claim for SVJ's primary liability for unjust enrichment.

40. In my view, paras. [253] and [261] of the Judgment can be construed as the Judge merely accepting SVJ's story of the inheritance for the purposes of his knowledge, while not finding that the inheritance actually occurred. This accords with the way Rose LJ read the Judgment and I think it is correct. But it means that the necessary factual basis for the Judge's conclusion on unjust enrichment was simply not there. Even on the Judge's view of the law, it would have to be proved that the diamonds existed and there was an actual sale of them to the Company in order to show that SVJ had received his inheritance and given "*something in return*". By saying that, I am not necessarily accepting that the "*something in return*" test would, if satisfied that the inheritance had been proved, have been sufficient to render SVJ's enrichment not unjust. But I do not need to deal with that because, on this scenario, the Judge has not found the facts necessary to support the legal test he was applying.

41. If, on the other hand, (2) above is correct, then I agree with the Appellants that such a finding was not open to the Judge and no reasonable judge could have come to that conclusion on the evidence before him.

42. First it was not part of SVJ's case, whether in his pleadings or evidence, that the £2 million was his inheritance and had originated from his grandmother's diamonds. As was confirmed by Mr Ramsden QC's submissions at the trial, SVJ did not advance any positive case that "*the monies he is alleged to have received were not company monies or monies mingled with company monies or their traceable proceeds. It remains for the [Appellants] to prove that fact.*" The Appellants did prove that fact. There was no issue before the Judge as to whether the £2 million was actually derived from the diamonds. As Nugee LJ held in *Satyam Enterprises Ltd v. Burton* [2021] EWCA Civ 287 at [36]:

> "The present case however is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and submissions the cases that had been pleaded, but the Judge decided the case on a basis that had neither been pleaded nor canvassed before him. In our system of civil litigation that is impermissible, and a misunderstanding of the judge's function which is to try the issues the parties have raised before him."

Nugee LJ explained the reason for that in para. [38] being:

> "to decide a case on a basis that has not been explored in evidence or addressed in submissions is likely to leave at least one, if not both, parties with a profound and justified sense of unfairness."

43. Second, there was no analysis in the Judgment or findings in particular about the transfer of the diamonds into GCFZE and the sale of them by GCFZE to the Company and the inherent improbabilities of those transactions having taken place. Both the Johns judgment and the CA judgment had found to the criminal standard that those transactions had not taken place. So whether or not the diamonds existed, it is difficult to see that the Judge could have concluded differently. The only different evidence that he had was from SVJ and his mother and neither of them had any knowledge of those transactions. SVJ had expressly disavowed running a case that the money had come from his grandmother; his case was that this was what he had been told and it was what he believed.

44. Third, I do consider that such a finding by the Judge would be inconsistent with his finding that the £2 million was the traceable proceeds of the First Respondent's and Mr England's breaches of duty and his findings as to Mr Khadka's and Mr England's breaches of duty. Either it was misappropriated Company money, as the Judge found, or it was the proceeds from the sale of the diamonds. It could not be both.

45. And fourth, I agree with the Appellants that there simply was no evidence before the court from which the Judge could reasonably conclude either that the diamonds existed or that they were bought by the Company.

46. But as I have said above, I do not believe that the Judge did find that the diamonds existed and that they were bought by the Company. The consequence of the Judge not making a finding in that respect is that his conclusion in para. [261] cannot stand and based on what he said in para. [214], the Judge should have held that SVJ was unjustly enriched at the Company's expense by his receipt of the £2 million.

47. Accordingly the appeal on Ground 3 is allowed.

B. GROUND 4

The facts in relation Ground 4 – Change of Position

48. The Appellants have to succeed on Ground 4 as well in order to overturn the Judgment. The Judge decided that, even if he was wrong on primary liability, SVJ would have succeeded on his change of position defence. There is no dispute that the burden was on SVJ to establish the defence.

49. I can take the relevant factual findings from the Judgment.

50. On 9 November 2017, SVJ incorporated a company called Dare to Invest Limited (**Dare**). He invested the £2 million, which he had received on 8 August 2017, through Dare (Judgment [245]).

51. On 22 November 2017, SVJ transferred the £2 million to his solicitors, Portner Law. On 25 January 2018, Portner Law transferred it to Boodle Hatfield as a part

contribution towards the purchase of a property at 33 Charles Street, Mayfair, London W1 (the **Property**) (Judgment [201]).

52. The First Respondent had persuaded SVJ to invest in the Property by way of a loan to the First Respondent's company, Grosvenor PBSA Limited (**GPBSA**). A loan agreement was entered into in January 2018 between Dare and GPBSA for the lending of £2 million to GPBSA for the purposes of GPBSA acquiring and redeveloping the Property. An annual interest rate of 18% was provided for but it was unsecured, although Dare had the right to call for a second legal charge over the Property subject to the existing charge in favour of Greenwood Capital Europe Limited (**Greenwood**).

53. SVJ understood the total costs of purchase and redevelopment to be about £12.5 million but that, with a lease extension, the Property would then be worth "*close to 16-17 million*". As Greenwood was owed about £6 million, SVJ was confident that Dare's loan plus interest could be repaid (Judgment [265]).

54. SVJ was unaware that a further charge was granted over the Property on or around 17 May 2018 to PHD Finance & Investments Limited (**PHD**). He only found out about this at the end of the year and was very unhappy with his father for not having told him about the PHD charge (Judgment [269]).

55. As a result of the discovery of the second charge, which was for about £2 million, on 3 January 2019, SVJ caused Dare to enter into a six-year tenancy agreement of the Property with GPBSA. The rent was £300,000 pa and it was to be set off against and to extinguish the £2 million loan plus interest. This was because it appeared that GPBSA was otherwise unable to repay the loan and SVJ thought this would be the best way of protecting his inheritance (Judgment [270]).

56. However a week after entering into the tenancy agreement, SVJ cancelled it. As the Judge said at [270]:

> "SVJ cancelled this agreement, as "something [was] not adding up" (as to which he must have been right: there is no evidence of the chargeholders consenting to it). Dare's previous rights resurrected."

Those previous rights are the rights under the loan agreement. The Appellants rely on this to say that Dare still has rights against GPBSA which could be enforced.

57. On 28 March 2019, because of delays in the refurbishment, the lease not being extended and Greenwood appointing a receiver, the Property was sold at public auction. However it appears that that sale did not complete and GPBSA still owns the Property. Greenwood's charge was apparently redeemed and the receivership costs paid. But the First Respondent sold his shareholding in GPBSA to a Mr Nalin Patel for £1 (Judgment [271]).

58. SVJ was apparently furious with his father for having lost his inheritance through the investment in the Property and GPBSA. The Judge made the following important factual findings:

> (1) That any rights that Dare still has against GPBSA are "*worthless*"; and

(2) That "*the £2m has therefore been lost*" (Judgment [274]).

The parties' submissions on Ground 4

59. Ground 4 as set out in the Grounds of Appeal was purely based on an alleged error of law. The Appellants stated that the Judge had made an error of law "*in finding that [SVJ] had changed his position in such a way as to make it inequitable or unjust to require him to make restitution to the Company for the £2m of misappropriated Company money he received*." The Appellants then set out three reasons for their assertion:

(1) That SVJ could call on his father to account for failing to provide his intended inheritance;

(2) That there was no evidence adduced by SVJ to prove that GPBSA could not repay the loan to Dare; and

(3) That the Judge failed to take into account the interests of the Company's creditors in balancing whether or not SVJ should restore the £2 million to the Company.

60. The last reason was what influenced me to grant permission to appeal on this Ground. In refusing permission to appeal, the Judge had said this: "*Weighing the injustices to determine who should bear loss was not argued before me; and on the facts, would make no difference.*" It appeared that the Judge may not have therefore carried out such a balancing exercise.

61. In his oral submissions, Mr Brown focused far more on the first two reasons, saying that the law is clear that it is for SVJ to prove that the enrichment has been irretrievably lost. Relying on extracts from *Goff & Jones* and the cases on mitigation of loss, Mr Brown submitted that SVJ had not discharged the burden on him to show that he could not recover his promised inheritance from his father and/or that Dare could not recover the £2 million loan from GPBSA.

62. Mr Ramsden QC submitted that the points about recovery from the First Respondent and GPBSA are essentially appeals on the facts for which the Appellants do not have permission to appeal. Furthermore he said that SVJ fully pleaded his change of position defence and the Appellants did not, in their Reply, put forward any positive case on this, merely putting SVJ to proof of the facts in support of the defence. Accordingly the Judge's finding that the £2 million had been lost is unimpeachable.

63. As to the Judge's alleged failure to conduct the balancing exercise, Mr Ramsden QC submitted that the Judge had this very much in mind as is implicit from his para. [215].

Discussion on change of position and Ground 4

64. I did not understand there to be any challenge by the Appellants to the legal test as stated by the Judge in para. [215] as follows:

> "As to change of position, it is for SVJ to show that having been enriched, and caused by or in anticipation of the enrichment, his position has changed, such that meeting the claim would leave him worse off than if he had never received the enrichment; and that it would be unfair to require him to make restitution to such extent."

65. The first part of the Judge's test is what is called the "*but for*" causation requirement, that the alleged change of position "*was causally linked with his enrichment*" – see *Goff & Jones* at para.27-32. The Judge applied that test in para. [263] holding as follows:

> "The [Appellants] ask why SVJ should have a defence "if he made an imprudent investment (in effect putting it all on black)". He is entitled to such a defence because he was an innocent recipient, dealing with what he believed to be his monies. The change of position has its own inbuilt mechanisms to ensure it is applied justly."

66. The Judge in any event found that, so far as SVJ understood the position at the time, it was not an imprudent investment; nor was he to blame for failing to make inquiries or for cancelling the tenancy agreement (see paras. [278] to [279]). Accordingly the Judge decided it would be unfair to order SVJ to repay the £2 million that had been lost. This then satisfied the second part of para. [215] and the notion of fairness necessarily brings in a balancing exercise where the decision has to be made as to where the loss should fall between two innocent victims.

67. The Judge basically accepted on the facts the explanation that SVJ had pleaded and proved as to how he came to lose the £2 million. He rejected the Appellants' assertion that SVJ was left no worse off. In para.[275] he said:

> The [Appellants] state that if SVJ now had to repay the £2m he would be in no worse position because he had had the use of the £2m and chosen to invest it. That would be right were the investment still worth £2m, but change of position is a defence based upon the use of the enrichment."

68. The Judge therefore found that: SVJ was an innocent recipient of the £2 million which he thought was his inheritance; he invested the money in the Property by way of the loan to GPBSA which he would not have done had he not received the £2 million believing it to be his; and that the £2 million investment has been irretrievably lost. Those were findings that were open to the Judge to make and which it would be difficult to overturn on an appeal.

69. It seems to me that that is what the Appellants are now seeking to do on this appeal. They say that the Judge should not have found that the £2 million was irretrievably lost because SVJ had rights against his father and his company, Dare, had rights against GPBSA. They say that SVJ did not satisfy the burden of proof in that he did not adduce evidence showing the steps that he had taken to recover all or some of the £2 million.

70. This is therefore a factual appeal, not an error of law appeal, as stated in Ground 4. Furthermore, the Appellants did not plead any positive case on this; nor did they cross examine SVJ as to whether he had tried to pursue his father for his lost inheritance or as to any steps taken to cause Dare to pursue GPBSA for repayment of the loan. This is now what Mr Brown sought to argue on the appeal but I consider that the Judge's factual findings in this respect cannot properly be challenged.

71. Mr Brown submitted that, even though the Appellants had pursued the First Respondent vigorously and aggressively yet had not been able to recover anything from him, SVJ would have been likely to have had more success. He said that this was because the First Respondent would come under family pressure to pay his son the inheritance that he had lost and he would have been more disposed towards paying his son than the Appellants. However, as Mr Ramsden QC pointed out, the First Respondent and SVJ had completely fallen out since this had all arisen and the Appellants had not challenged this fact at trial. Furthermore, there is no evidence that the First Respondent has the wealth to satisfy the claim.

72. In my view this was a factual issue to be determined at the trial on the basis of the evidence before the Judge. The Appellants did not cross examine SVJ on this aspect. I know that Mr Brown said that he did not have to because the burden was on SVJ and he was not required to improve SVJ's case through cross-examination. Nevertheless, based on the evidence before him, the Judge was entitled to conclude that SVJ had proved that the £2 million had indeed been lost.

73. Similarly in relation to Dare's ability to sue GPBSA under the loan agreement, the Judge found that the termination of the tenancy agreement led to the resurrection of Dare's rights to sue for the repayment of the loan against GPBSA. However, the Judge concluded:

> "273. More materially, the evidence is that although Dare may still retain rights against [GPBSA], they are worthless. The sale at public auction [of the Property], an open market value, was at £6.6m. Greenwood was owed about £6m and PHD £2m.
>
> 274. The £2m has therefore been lost."

74. There was a debate before me as to how far a defendant has to go in proving the irreversibility of his or her unjust enrichment for the purposes of the change of position defence. Or put another way, in the language of restitution lawyers, what steps are required to have been taken by a defendant in order to reverse the disenrichment so as to prove change of position?

75. Under the heading "*Reversible Expenditure*", *Goff & Jones*, at paras. [27-21] to [27-23] state as follows:

> "The foregoing cases suggest that a wider principle is emerging, that transactions entered by a defendant do not count as detriment if they can be unwound: in the words of an Australian judge, a qualifying change of position "must be legally or practically irreversible or there must be significant difficulties in reversing the

> change".[3] This principle also seems to be at work in several cases where the courts have refused the defence in respect of tax payments made on the defendant's receipts, because these could be recovered from the tax authorities. [27-21]
>
> Some questions arise with regard to this rule. How much time, effort and expense can be expected of a defendant in unwinding a transaction? Where he has paid money to a third party, should he be required to pursue legal proceedings against the third party? The answers will turn on the facts of individual cases, but in analogous damages cases concerning the duty to mitigate, the courts have held that claimants need not undertake difficult litigation but may be required to act against third parties where this would be easy.[4] A further consideration is that in cases involving sequential transfers of value the law may allow claimants to recover from remote recipients of benefits, in which case it would seem to be unnecessarily complex to require an intermediate recipient to recover from his own payee in order to hand over the fruits of recovery to a claimant. This is discussed in Ch.6. [27-22]
>
> In *Australian Financial Services & Leasing Pty Ltd v Hills Industries,* the High Court of Australia held that "irreversible detriment" should itself be the test to determine whether a defendant's circumstances have changed to such an extent that he should be entitled to the defence of change of position. However, we agree with Henderson J's observations on this point in *Test Claimants in the FII Litigation v HMRC (No.2),* where he said that:
>
> > "…it may be relevant to consider whether the expenditure or loss relied upon is reversible, and (if so) how easily the defendant could take steps to reverse it…But it would be wrong to elevate this consideration into a general test of irretrievability. Expenditure may well be irretrievable, for example because it is immediately consumed, or for some other reason cannot be recouped from the payee, but that fact alone does not stamp the expenditure as a relevant disenrichment. Among other things, it also has to satisfy the causal 'but for' test if the defence is to be made out." [27-23]

76. Mr Brown relied particularly on the mitigation of loss cases but, as the extract above makes clear, a damages claimant need only undertake litigation against third parties where this would be "*easy*". If there is little chance of recovery, I do not think that a defendant to an unjust enrichment claim is obliged to pursue litigation to prove irrecoverability.

77. But the law on this is uncertain and it will have to develop on a case by case basis (as was said in *Goff & Jones*). In my view, this is not an appropriate case to attempt to answer the questions posed at the beginning of para. [27-22] of *Goff & Jones*. If this had been a contentious issue before the Judge at trial and he had decided, both on the law and the facts, that the lost inheritance was or was not recoverable, then it could properly have been the subject matter of this appeal and I may have had to decide

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[3] This was from *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* [2008] WASCA 119: (2008) 66 A.C.S.R. 594 at [202].

[4] The learned authors cited the well known damages cases of *Pilkington v Wood* [1953] Ch 770; and *Western Trust & Savings Ltd v Clive Travers & Co* [1997] P.N.L.R. 295.

whether the Judge had come to the correct answer on the law. However the Appellants chose not to pursue these points below and I do not think it is open to them to do so now on appeal.

78. The Judge clearly found, on the evidence before him, that the £2 million had been lost. In relation to recovering from GPBSA, that was on the basis that it was not worth pursuing because it did not have anything of value, presumably because there was no equity in the Property. In relation to SVJ suing his father, because the point was not pleaded or raised before him, the Judge does not deal with it in his Judgment. But it is implicit in his finding that the £2 million was lost that it was deemed irrecoverable from the First Respondent.

79. The other issue relied upon by the Appellants is the Judge's alleged failure to balance the interests of the Company's creditors, who lost significant sums as a result of the fraud on the Company, against the interests of SVJ who lost what he thought was his inheritance. As part of this argument, Mr Brown was also relying on SVJ's existing rights against his father and Dare's rights against GPBSA and comparing that position with the Company's creditors. But I have discounted those alleged rights and the Judge found them to be worthless. So the balance is between two innocent victims of a fraud and any further requirement to weigh up who should bear the loss.

80. This arises in the context of the Appellants having succeeded in establishing SVJ's primary liability in unjust enrichment. There is perhaps a little uncertainty, including in *Lipkin Gorman*, on whether the balancing exercise as to the justice of the case takes place when the Court is considering a defendant's primary liability or the defence of change of position. Nevertheless, it is not difficult to see which party Lord Templeman favoured in the well-known passage at p.360C-E of *Lipkin Gorman*, if the defence of change of position is established:

> "Complications arise if the donee innocently expends the stolen money in reliance on the validity of the gift before the donee receives notice of the victim's claim for restitution. Thus if the donee spent £20,000 in the purchase of a motor car which he would not have purchased but for the gift, it seems to me that the donee has altered his position on the faith of the gift and has only been unjustly enriched to the extent of the secondhand value of the motor car at the date when the victim of the theft seeks restitution. If the donee spends the £20,000 in a trip round the world, which he would not have undertaken without the gift, it seems to me that the donee has altered his position on the faith of the gift and that he is not unjustly enriched when the victim of the theft seeks restitution."

Lord Goff, at p.579F-H, more explicitly refers to change of position as the reason why it may be unjust to require a defendant to make restitution:

> "In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that

> he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these. The principle is widely recognised throughout the common law world."

81. Therefore, if SVJ established that he had in good faith changed his position to his detriment and that he had irretrievably lost the £2 million, that is a complete defence to the Appellants' claim in unjust enrichment. The Appellants seem to suggest that the creditors of the Company who have been defrauded of their investment have a particularly strong claim that should outweigh the innocent defendant who has irreversibly lost the enrichment. However I do not see that they are in any stronger position than any other fraud victim. On the facts found by the Judge, SVJ is just as innocent as they are.

82. Furthermore, Mr Ramsden QC submitted that if the Appellants wished to argue this point (and he maintained, I think correctly, that it was not argued below) they would have had to adduce evidence that the Company's creditors would actually make a recovery if the £2 million was returned to the Company. He said that there was no evidence that the £2 million would not be swallowed up by the Appellants' costs and disbursements, and in any event, each creditor would obviously only receive a *pro rata* dividend.

83. I think that demonstrates the perils of trying to compare who has the better claim to the money by reference to how innocent they each are. It is clear from *Lipkin Gorman* that if an innocent defendant can establish that he has irretrievably lost the money he received and that he would not otherwise have spent that money so he is in a worse position than he would have been without receiving it in the first place, then this will defeat the innocent fraud victim's claim. The Judge found that to be so in this case and there is no basis for interfering with his conclusion that SVJ could rely on a change of position defence.

84. Accordingly, I reject Ground 4 of the Appellants' appeal.

Conclusion

85. Because I have rejected Ground 4, the appeal is dismissed. The Appellants had to succeed on both Grounds, and even though they succeeded on Ground 3, they failed on Ground 4. The Appellants' claims against SVJ will remain dismissed and the Judge's Order is upheld in that respect.

86. If there are any consequential matters that cannot be agreed between the parties, then a further hearing may have to be arranged. Alternatively, depending on their nature, it may be sensible to deal with any such matters in writing.