Comboni Vincenzo and Another v Shankar's Emporium (Pte) Ltd
[2007] SGHC 55

Case Number : Suit 343/2005

Decision Date : 20 April 2007

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Nehal Harpreet Singh SC and Kelly Fan (Drew & Napier LLC) (instructed) and Vijai Parwani (Parwani & Co) for the plaintiffs; Ang Cheng Hock, Mohammed Reza and Yew Zhong Ming (Allen & Gledhill) for the defendants

Parties : Comboni Vincenzo; GB & Associates Inc — Shankar's Emporium (Pte) Ltd

Trusts – Constructive trusts – Remedial constructive trust – Whether remedial constructive trust should be imposed – Whether recipient acting unconscionably or displaying want of probity in receiving funds from fraudulent scheme – Nature of categories of knowledge constituting necessary unconscionability to found remedial constructive trust

Trusts – Express trusts – Constitution – Whether words "for the account of" constituting express trust where no evidence existing to show transferor of funds intending for recipient to hold money on trust

Trusts – Recipient liability – Funds from fraudulent scheme transferred into recipient's bank account – Whether recipient receiving funds knowing they were transferred in breach of trust – Whether recipient having knowledge of fraud after receipt – Whether recipient liable as constructive trustee

20 April 2007 Judgment reserved.

Kan Ting Chiu J:

1 In this case, there is an intriguing account of fraudsters deceiving their unsuspecting victim into parting with substantial sums of money, which find their way into the bank account of a third party.

2 The fraudsters' victim is the first plaintiff, Vincenzo Comboni ("Mr Comboni"). Mr Comboni, a retired banker, a licensed financial trustee in Switzerland, and a practising solicitor in Italy, is in his seventies. Mr Comboni is a director of the second plaintiff, GB & Associates Inc ("GB").

3 The recipient of the funds, Shankar's Emporium (Pte) Ltd is a company incorporated in Singapore.

The plaintiffs' case

The investment management agreement and the three remittances

4 Mr Comboni's troubles began when his son forwarded to him an unsolicited email from one Frank Nsugbe ("Nsugbe"). Nsugbe claimed that his father who was murdered in Zimbabwe had left US$20m ("the funds") with a security firm in South Africa, and he was looking for assistance investing the funds.

5 Mr Comboni offered his professional services. He replied to Nsugbe's email and through Nsugbe, he came into contact with Charles Khumalo ("Khumalo") who was purported to be a lawyer. Mr Comboni had received from Khumalo a letter dated 18 December 2003[note: 1] on paper printed

with the letter head "A.C Khumalo & Associates (Solicitors and Fund Managers)" together with a draft investment agreement. The words "A.C. Khumalo & Associates" were stamped next to Khumalo's signature in the letter.

6 In January 2004, Mr Comboni travelled to Johannesburg to meet Nsugbe and Khumalo, and to execute the investment agreement. During this meeting he obtained another letter from Khumalo which attested to Nsugbe's entitlement to the funds. Interestingly, this letter which was dated 24 January 2004[note: 2] was printed with the letter head "C. Khumalo & Associates (Solicitors and Fund Managers)" without the precedent "A" of the letter of 18 December 2003. This second letter also bore a stamp next to Khumalo's signature which read "Charles Khumalo and Associates".

7 Mr Comboni did not take notice of these discrepancies, and proceeded to sign, in the name of GB, an investment management agreement with Nsugbe, on terms that were evidently favourable to GB.

The three remittances

The first remittance

8 After the investment management agreement was signed in January 2004, Mr Comboni and GB did not receive the funds that were to be invested. Eventually, in April 2004, Mr Comboni received a telephone call from a person identifying himself as Allen Davis ("Davis") who purported to represent an entity in Canada known as the Foreign Payment & Credit Centre ("FPCC"). Davis claimed to be able to assist in expediting the transfer of the funds.

9 On 16 April 2004, Mr Comboni received a fax from FPCC[note: 3] which gave him instructions to verify the transfer of the funds via the Deutsche Bank, New York, to his account number. He complied with the instructions and was told that US$18,720,000 would be transferred from the Deutsche Bank, but he did not receive the funds.

10 Instead, Mr Comboni received by fax a memo dated 19 April 2004[note: 4] under the letterhead of a "RBC Group" with an address in Toronto. The fax bore a transmission imprint "Royal Bank of Canada", and Mr Comboni treated it to be a memo from the bank. The memo stated that the remittance of US$18,720,000 was held up pending the payment of insurance bond fees of US$125,080 to an entity described as the "American British Insurance Corporation", and the US$18,720,000 would be paid out after the insurance bond was provided.

11 On the same day, Mr Comboni received a fax from FPCC[note: 5] which advised that the payment for the insurance bond was to be paid to:

BANK NATIONALE DE PARIS, NEW YORK

UID CHIP NO:0768

SWIFT CODE:BNPASGSG

CREDIT A/C NO:200195286-003-39 OF

BANK NATIONALE DE PARIS SINGAPORE

BENEFICIARY: SHANKAR'S EMPORIUM PTE LTD

A.C. NO: 50-000160-00791

BY ORDER OF : LIKO

and the funds would be released thereafter.

12 That was the first time Mr Comboni became aware of the defendant, and he was assured, after he went into the defendant's website and learnt that it was a Singapore incorporated company, because of Singapore's reputation as a corrupt-free and transparent country. Being so assured, Mr Comboni arranged for the payment of the insurance bond.

13 However, after he had made the arrangements, he received another fax from FPCC on 21 April 2004[note: 6] requesting the payment to be made to the defendant's account with the DBS Bank in Singapore thus:

BANK OF NEW YORK, NEW YORK

SWIFT CODE: IRVTUS3N

FAVOURING: DBS BANK, SINGAPORE

SWIFT CODE: DBSSSGSG

A/C NO: 0001-000953-01-0-022

BENEFICIARY: SHANKAR'S EMPORIUM PTE LTD

BY ORDER OF : LIKO

14 Mr Comboni complied with these instructions as well and recalled the remittance he had made earlier. He then instructed UBS AG to pay US$125,080 to the defendant's DBS account and that the remittance advice was to specify "For account of Vincenzo Comboni" and this was confirmed in the UBS AG's debit advice.[note: 7] In his affidavit of evidence-in-chief, Mr Comboni explained that he had requested that the words "For account of Vincenzo Comboni" be inserted "to highlight to the Defendant that it was I who was remitting the moneys to them and hence they had to account to me for it."[note: 8]

15 One may ask why Mr Comboni, an experienced banker and a lawyer, did not communicate directly with the defendant and seek its agreement and confirmation. It is also noteworthy that Mr Comboni gave a different explanation for the insertion of those words when he was cross-examined, which I shall deal with at the appropriate stage of this judgment.

16 This then led to the first remittance of US$125,080 on 22 April 2004.

The second remittance

17 Mr Comboni deposed in [22] and [23] of his affidavit of evidence-in-chief:

22. A few days later, I received another call from the said Allen Davis informing me that a further payment of USD380,000 was required and that the balance sum for the insurance bond was to be paid by the entity called Liko.

> 23. I then arranged to transfer the sum of USD 380,000 to the Defendants [*sic*] account with DBS bank as requested on 27th April 2004. The payment was similarly arranged through the 2nd Plaintiffs' bank account with UBS AG Bank. Again, I also instructed the payment details to state that the monies were "For the account of Vincenzo Comboni" so that the Defendants knew that they had to account to me for this payment.

18 For this remittance, also from the account of GB, the debit advice also recorded that the details of payment included the words "By order of Liko for account of Vincenzo Comboni".[note: 9]

19 Mr Comboni had also asked for receipts for these two remittances. He received two invoices,[note: 10] issued by "Shanker Emporium Pte Ltd (Insurance Brokers)" with an address in Toronto.

20 He accepted the receipts despite the differences in the name and the address of the company. He explained in [24] of his affidavit of evidence-in-chief that:

> 24. I did not think anything was amiss then and only realised much later that there was a very slight variation in the spelling in that the Defendants are known as "Shankar" and not "Shanker".

The third remittance

21 No funds were released to Mr Comboni or GB after the first and second remittances. Mr Comboni explained further in his affidavit of evidence-in-chief:

> 27. On further contacts made with the said Allen Davis, I was led to believe that a further and final remittance of USD 620,000 to the Defendants [*sic*] account in Singapore would result in the prompt transfer of the Funds into my account. As I had already transferred the sum of USD 505,080 into the Defendants' account, I agreed to effect this last remittance.
>
> 28. Again I wish to stress that I was comforted in the knowledge that the payment was being effected to a Singapore registered company.
>
> 29. So on 7th May 2004, I arranged to transfer the sum of USD620,000 from my personal account maintained with Banca Popolare di Sondrio bank in Italy to the Defendants' bank account maintained with DBS bank.

22 At this stage, I should point out that Mr Comboni did not explain why he agreed to make the second and third remittances when the RBC Group memo of 19 April 2004 referred to in [10] hereof stated that the fee payable for US$18,720,000 was US$125,080. Why did he not ask what these additional sums in the second and third remittances were for, and comply without query?

23 The third remittance was made, as evidenced in a SWIFT message from the paying bank, Banca Popolare di Sondrio dated 7 May 2004[note: 11] showing that the payment was made out of Mr Comboni's account (not GB's accounts as in the previous two remittances) and the beneficiary was stated as "Shankar's Emporium Pte Ltd By Order of Liko" for "Cover Balance for USD 1,000,000 Refundable cash bond".

Discovery of the truth

24 Neither Mr Comboni nor GB received any of the promised funds. Davis made the excuse that Liko

had failed to provide additional insurance cover. Davis agreed to refund the US$1m that GB and Mr Comboni had paid on the three remittances.

25 No refunds were made. Subsequent efforts to trace Davis, Nsugbe, Khumalo and FPCC bore no results. When Mr Comboni was cross-examined by counsel for the defendant, he admitted that he should have been more careful, and if he had made reasonable precautions, the fraud would have been exposed.

26 Mr Comboni deposed at [35] and [36] of his affidavit of evidence-in-chief:

> 35. On hindsight, and based on professional searches made after the events which evidenced that:
>
> (a) The Investor had presented himself by a false passport and no trace could be found in Zimbabwe of the asserted death of a person by the name of his assumed father;
>
> (b) The person, by the self-asserted name of Charles Khumalo, who had pretended to be the Investor's solicitor and issued to me, on a letterhead, a legal opinion on which I had been induced to sign the Investment Agreement, is neither a solicitor nor a traceable person; and
>
> (c) The Canadian entity – Allen Davis – who was aware of both my own expectation of the Funds as well as my phone and fax numbers and at the same time was familiar with the name, bank accounts and location of the Defendants and using the name of a non-existent entity, ie FPCC – cannot be traced.
>
> I realise that I was the victim of an elaborate conspiracy and that the Defendants were a party to this conspiracy and say that I am entitled to claim my money back from the Defendants.
>
> 36. I had engaged M/s Dun & Bradstreet, a leading provider of business information to investigate Shanker's Emporium Pte Ltd – Toronto… They could not find anything on this entity. I also engaged a private investigator in Ontario, Canada to fully investigate into Shanker Emporium Pte Ltd. They too could not find anything on Shanker Emporium Pte Ltd and confirmed that it does not exist.

The defendant's account of the events

27 The defendant deals with consumer electronic goods, home appliances, office equipment and general merchandise, which it exports worldwide. It has been in this business for 50 years and is one of the largest players in this business in Singapore. Liko or Liko Ltd, the entity referred to in the remittances, is a Nigerian company which has been purchasing goods from the defendant since 1999.

28 The defendant has been exporting goods to Liko and other customers in Nigeria for more than 20 years. As Nigeria does not have a fully-convertible currency, Nigerian importers employ indirect methods of remitting foreign currency out of Nigeria.

29 Hiro J Bhojwani ("Mr Bhojwani"), the defendant's director and main witness explained in his affidavit of evidence-in-chief:

> 15. [A] common Nigerian practice of effecting payment to the Defendant would be for its Nigerian customers to arrange for the foreign currency to be remitted to the Defendant through third party brokers or payment agents, who in turn may be using overseas agents (i.e. who are

not in Nigeria). What happens in such situations is that the Nigerian customer would pay their broker the amount of money in Nigerian currency payable to the Defendant for goods sold, and their broker would arrange for payment to be made to the Defendant mostly in US$ currency through agents who may be overseas.

16. Sometime in 2002 to 2003, as a method of confirming to the Defendant that payment for its goods sold were on their way, the Defendant began requiring its customers to send the Defendant either a copy of the interbank SWIFT message showing the payment, or a copy of the debit advice from the remitting bank to the remitter showing payment having been made from his account. This SWIFT message would identify the payment details and the financial institution remitting the payment to the Defendant on the customer's behalf. The fact that the customer is able to send the Defendant a copy of the SWIFT message provides the Defendant with evidence of the link between the customer and the overseas third party remitter. The SWIFT message was relied upon by the Defendant as confirmation that the funds were transferred on behalf of the Defendant's customer. This is because the customer is able to send a copy of the SWIFT message, and we gather from this that the remitting party must be in touch with the customer, because the customer could not have come into possession of the specific SWIFT message without the consent and cooperation of the remitting party.

17. In 2003, the Defendant started a practice as regards receiving payments from customers in that, whenever the Defendant received a payment from a third party, the Defendant needed to know for which customer the money was being remitted. In practice, therefore, the Defendant would require that the SWIFT message have some sort of reference to the Defendant's customer. For example, in the first 2 remittances that are the subject of this action, the name of the Defendant's customer, Liko Limited ("Liko"), clearly appeared on the face of the remittance details: "By Order of: Liko". The Defendant believed that this provided reasonably good protection that the funds received from third party remitters were indeed for the purpose of paying the Defendant monies owed to it by its customers. …

30 In August/September 2003, the defendant was aware that some of the remittances it received may be tainted. The Commercial Affairs Department had sought information of the defendant to assist the Swiss authorities which were investigating some payments received by it.

31 In October 2003, the defendant sent letters to its Nigerian customers including Liko. It is reasonable to infer that the investigation contributed to the defendant's decision to send the letter of 2 October 2003 to its customers. The letter merits reproduction:

As you are aware, after the terrorist attacks in the US on Sept 11, 2001, international authorities are being extremely vigilant on all transfers of funds as part of their exercise to crack down on terrorism. The Singapore government conforms to international standards of scrutiny on all money transfers and assists overseas governments and investigation authorities whenever required.

Over the past year, we have faced increasing problems with various authorities on remittances received into our account from you, our customers, when you use brokers. In some cases our directors and senior managers have had to record formal statements with the Commercial Affairs Department of the Singapore Police for the benefit of our customers. In addition, we have been handed numerous requests through our banks for return of funds. To protect your interests, we have put in a lot of effort to justify that the funds should not be returned to the remitter.

All this unnecessary scrutiny makes both, you, our customers and us, very suspect in the eyes of international authorities and banks. Besides, we spend a lot to time, effort and money in justifying

to the various authorities that you and we are genuine traders so that you don't lose your funds. To benefit us both, we request your assistance in implementing the following procedures so that both of us can concentrate on our business with little interruption from these side issues:

1. Ideally, we would like the remittance to come from your account directly, or under a remittance advice stating your company's name as the remitter. The second best option is that the remittance states your personal name as the remitter.

2. Please also add the following lines to the narration "*In payment of outstanding invoices*"

3. In cases where you cannot remit from your own account, please request the broker to always put your company's name in the reference field of the remittance, along with the narration in point 2 above .. This way, our bank is assured that the funds are coming from a legitimate source and in payment of genuine trade transactions. Please do not put your account numbers as reference. Customers have running account numbers and errors can cause delays in credit to your account. Even when miss-spelt, names in the reference field are still identifiable and more convincing to the banks than numbers.

4. Please do not pay the brokers for the funds they remit until they give you a Bank Advice from the remitting bank. The bank advice is the document that the bank sends to remitter, their customer, informing the remitter of the transaction. This is the most vital document and helps us establish both that you sent the money to us and we received the money from you in good faith.

5. If the broker cannot give you a bank advice, he must give you a copy of the Remittance Advice before you pay him. The remittance advice is the inter-bank correspondence copy of the telex or SWIFT transfer. Insist on it showing your company name in the reference field.

6. When you call us and we confirm that our bank has received the funds, please still insist on the broker sending you a copy of the Bank or Remittance Advice before you pay him – we may NOT credit your account unless we receive proper documents from you.

7. Please do not take our notification of having received funds as a go ahead for making the payment to the broker. Just because you have paid the broker is not sufficient argument for us to credit your account.

8. To credit your account we will need the above Bank or Remittance Advice along with your indemnity letter (format attached) stating that the funds have no illegal bearing and that should the funds be recalled we are authorized to debit your account. For your benefit, we advice that you get a similar letter from your broker for your own records. We do not need this letter from the remitter.

9. From time to time, we will circulate names of BLACKLISTED brokers whose remittances have come under scrutiny and created problems for our customers and us on numerous occasions. We will, thereafter, NOT ACCEPT ANY REMITTANCES from these brokers, despite your indemnity and undertakings. We urge you not to use them or their affiliates for remittances as you might end up losing money. With immediate effect, we are blacklisting Springforte Ltd, Kofaz Nigeria Limited and Franchise Agency Ltd ("Amechi"). Please do not remit any funds to our account directly through these brokers or their affiliates.

We expect that both of us will benefit from enforcing this discipline. It is better to put in the extra effort now than to leave ourselves exposed to outside factors we cannot control.

I'm sure, you will appreciate that once the brokers understand that you will only pay them on compliance of certain measures, they will heed your requests.

Please sign and return a copy of this letter as your acknowledgement and acceptance of the procedures we request. We look forward to a smoother transaction flow.

[Emphasis in original]

32 The defendant set out the manner in which the three remittances from the plaintiffs were received and dealt with:

23. The monies forwarded to the Defendant by the Plaintiffs were received by the Defendant in its DBS bank account on 3 separate occasions – US$125,080.00 on 23 April 2004, US$380,000.00 on 27 April 2004 and US$620,000.00 on 12 May 2004.

1st remittance

24. On 23 April 2004, the Defendant obtained information that fresh remittances were received in the Defendant's bank account, one of which read "US$125,080.00 – GB Associates (Ref: Liko)". Before receiving the remittance, the Defendant was contacted by Liko Limited ("Liko"), a company with which the Defendant had dealt since 1999, telling the Defendant to expect to receive the amount of US$125,080.00. When the Defendant received the remittance, the amount of the remittance and the name of the remitter matched what was told to the Defendant by Liko. On 26 April 2006 [*sic*], the Defendant received from Liko an indemnity letter and a handwritten memorandum (both dated 26 April 2004). On 27 April 2004, the Defendant received from Liko by fax a copy of a SWIFT message dated 22 April 2004. The handwritten memorandum from Liko requested the Defendant to utilise the remittance of US$125,080.00 to the Defendant's bank account to credit the sums of US$74,080.00 and US$51,000.00 to offset amounts owing to the Defendant respectively by Liko and Christoniac Nigeria Ltd ("Christoniac") (another of the Defendant's Nigerian customers). On 7 May 2004, the Defendant received a copy of an indemnity letter from Christoniac for the amount of US$51,000.

25. As the Defendant's requirements for the receipt of third party remittances had been complied with, the Defendant utilised the remittance towards reducing the amounts owing by Liko and Christoniac to the Defendant. Because the amounts owing by Liko was paid down using a portion of the remittance received, the Defendant extended more credit to Liko and Christoniac through the shipment of new goods to Liko and also the releasing of bills of lading for goods that had been shipped to Liko and Christoniac.

2nd remittance

26. On 27 April 2004, the Defendant obtained information that 1 fresh remittance was received in the Defendant's bank account, which read "DBS – Sepl – US$380,000 – GB+Associates (Ref: by order Liko)". Sometime before receiving the remittance, the Defendant was again contacted by Liko informing the Defendant to expect the sum of US$380,000. Thereafter, from 5 May 2004 to 11 May 2004, the Defendant received from Liko a copy of the SWIFT message (dated 27 April 2004) for US$380,000, a handwritten memorandum stating which of the Defendant's Nigerian customers' accounts were to be credited with the US$380,000 to pay down the amounts owing by them, as well as indemnity letters from all these customers whose accounts with the Defendant were to be credited.

27. Again, as the Defendant's requirements for the receipt of third party remittances had been complied with, acting on Liko's instructions, the amount owing by all these customers were paid down using the remittance received and the Defendant extended more credit to these customers through the selling of more goods to them and the subsequent release of bills of lading to them.

3rd remittance

28. On 12 May 2004, as per the Defendant's daily routine practice, it received information of 1 inward remittance received that morning, which read "Remittance received as follows: - DBS – Sepl – US$620,000 – Comboni AVV (Ref: Cover balance US$1m refundable cash bond b/o Liko)". Prior to the remittance, Liko had called the Defendant to inform it to expect a remittance of about US$620,000 on Liko's behalf. Upon noticing this description in the remittance details, the Defendant notified Liko that it could not accept the US$620,000 as the remittance described the money as being paid with respect to a refundable cash bond. The Defendant asked Liko to have the remittance details suitably amended.

29. Subsequently, on 17 May 2004, DBS Bank (the Defendant's receiving bank for this remittance) informed the Defendant that they had received instructions from the remitting bank that the narration "Cover balance US$1m refundable cash bond" had been deleted from the remittance details. On 20 May 2004, DBS Bank then sent to the Defendant by fax a copy of a SWIFT message dated 17 May 2004 received by DBS Bank from Banca Popolare di Sondrio, the remitting bank, stating "REF SWIFT MESSAGE 103 DATED 07 MAY 2004 FOR USD620,000 VALUE 11 MAY IN FAVOUR OF SHANKAR'S EMPORIUM PTE LTD PLEASE DELETE IN FIELD 7C: REF COVER BALANCE FOR USD 1,000,000 REFUNDABLE CASH BOND". The amendment to the remittance advice and deletion of the words "REF. COVER BALANCE FOR USD 1,000,000 REFUNDABLE CASH BOND" could not have been made without instruction and/or directions by the Plaintiff to Banca Popolare Di Sondrio and/or the Plaintiff's agreement or consent.

30. Between 18 to 24 May 2004, the Defendant, in accordance with its procedures, received instructions from Liko in relation to how to utilise the sum of US$620,000. There was a handwritten memorandum from Liko which confirmed that it arranged the remittance of US$620,000 to the Defendant's bank account with DBS and instructed the Defendant to offset the said sum against the sums of US$300,000, US$70,000, US$120,000, US$100,000 and US$30,000 owing to the Defendant by some of its other Nigerian customers. The Defendant also received indemnity letters from all of its customers whose accounts were to be the credited [*sic*] with the US$620,000 remitted.

31. Similarly with the first and second remittances, because the amounts owing by the Defendant's customers whose accounts were credited was paid down, the Defendant extended more credit to these customers through the selling of more goods to them and the subsequent release of bills of lading post-remittances to these customers.[note: 12]

The plaintiffs' claims

33 The plaintiffs filed a long statement of claim. While it contained a full recitation of the facts the plaintiffs relied on, the legal bases or causes of action could have been set out in a more orderly manner than they were. There were references to:

(a) a conspiracy between the defendant, Davis, Liko and Nsugbe,[note: 13]

(b) the defendant knowingly participated in a fraudulent and dishonest design against the

plaintiffs, thereby becoming a constructive trustee of the plaintiffs of all monies received by it,[note: 14]

(c) the plaintiffs making the payments to the defendant as a result of a mistake,[note: 15] and

(d) the defendant acting negligently and causing damage and loss to the plaintiffs.[note: 16]

34 When the plaintiffs opened their case, the issues were narrowed down to:

(a) Whether the words "For the account of Vincenzo Comboni" in the first two remittances created an *express trust* in favour of Mr Comboni (although express trust was not pleaded by the plaintiffs);

(b) Whether the defendant was liable to account to the plaintiffs for the three remittances on grounds of *knowing receipt*; and

(c) Whether the defendant was liable in conspiracy.[note: 17]

35 In the course of the hearing, the claim in conspiracy was abandoned, leaving issues (a) and (b).

Express trust

36 As I had noted in [14] above, Mr Comboni did not specifically inform the defendant that when it received the first two remittances, that it was to hold them in trust for him.

37 The facts show that there was no reason for Mr Comboni to do that. He thought when he made the remittances that they were for payment of insurance bonds. It would be illogical for him to seek to impose a trust on the payments.

38 When he was cross-examined on the purpose of the words "For account of Vincenzo Comboni" in the first two remittances, his replies were revealing:

Q Right. And you see, for the first two remittances, the account holder was not you, it was GB Associates, right?

A Correct.

Q Right. So, you put the words "For account of Vincenzo Comboni" in the first remittance and the second remittance so that when you sent the SWIFT message to FPCC they will know that you are the person that arranged it. Correct?

A Correct.

Q Thank you. But for the third remittance – the third remittance, there are no words "For account Vincenzo Comboni" because you are the account holder and your name would appear there already. Right?

A Correct.[note: 18]

39 Mr Comboni's counsel went through the above with him in re-examination:

Q Moving on to a different area. In relation to the first two remittances, your remittance advice

said "By order of Liko for account of Vincenzo Comboni", can you tell us what your intention was in putting the words "For account of Vincenzo Comboni"?

A My intention was to make it known to the receiving entity that while the remittances were made by order of Liko, they were also for account of. You can make a remittance for account of anyone. It can be a remittance with no indication. You can make a remittance for account of someone. In such a case it was meant to be specific that they were made for account of a specific person mentioned by name.

Q And based on the words "For account of Vincenzo Comboni" to your understanding and intention at the time, if Liko had asked the defendants to credit the monies to some other account, what was the defendant expected to do?

A In my view, it was expected to ask for clarification from the remitting bank because he would see the discrepancy between what appeared to be indicated in the remittance and what would have come out of instructions received from Liko.[note: 19]

40 There is no sense from the answers that Mr Comboni intended the defendant to hold the money on trust, and there is no basis for imposing an express trust on the money that the defendant received. The plaintiffs' claim on express trust is misconceived.

Knowing receipt

41 This is a more contentious issue than the express trust issue. The root of the contentions is omission of a narration " In payment of outstanding invoices" in the three remittances. Counsel for the plaintiffs castigated the defendant for not giving disclosure of the letter of 2 October 2003 and not referring to it in its affidavits of evidence-in-chief, and suggested that the defendant was trying to suppress this potentially damaging piece of evidence.

42 The procedures set out in that letter the defendant sent to its customers required that remittances carry the narration. Those words were emphasized in italic script and were underlined in the letter. The remittances from GB and Mr Comboni did not carry the narration.

43 Why did the defendant accept the payments? Counsel for Mr Comboni took Mr Bhojwani through the rationale for the letter of 2 October 2003. On the first day of cross-examination, the following emerged:

Q And the system is set out in your letter --- your sample letter of 2nd October 2003 at 1DB15?

A That's correct.

Q That is the system that you felt would reasonably address your concerns and which would reasonably be accepted by your Nigerian customers?

A That's correct.

Q Page 15, you set out the background and explained why you needed to implement these new measures?

A That's correct.

Q Page 16, you set out the new measures –

A Yes.

Q -- that you felt could reasonably address your concerns –

A That's correct.

Q -- and measures which reasonably could be accepted by the Nigerians?

A: That's correct.

Q And these, in your view, were necessary, otherwise you could not be sure whether or not funds are tainted?

A We felt that this would eliminate tainted funds.

Q Right. And if they were not complied with, you could not be sure?

A If they were not complied with, we were not sure.

Q If they were not complied with, there was a real possibility that the funds could be tainted?

A Yes, there was.[note: 20]

44 However, Mr Bhojwani's evidence changed on the next day, when he said that the narration was not an absolute necessity. He said that when the defendant was in the process of setting out the new payment procedures for their customers' compliance:

> … we needed to try and drive home to our clients the need to comply with our new requirements. At the time if I had said to my clients, "Please try and put your company's name and try and put the narration", they would have just laugh it off and not bother. But by saying put it "always" they knew that we were trying to be serious about it. And so they try to comply as much as they could. Those clients who could put both the narration – the narration and their name in, that would have been really ideal for us. But we were not expecting it. In reality we were expecting them – we were hoping that they would comply with putting their name into the remittance. …[note: 21]

45 Counsel for the plaintiffs was not impressed with Mr Bhojwani's explanation and pressed him further on:

Q And so this is what you felt in September 2003 [when the procedures formulated] having only the name but not the narration is less than ideal?

A That's correct.

Q So in September 2003 you believed that something would be missing if you did not have the narration?

A Something would be missing? The narration will not be missing – would be missing.

Q Your concerns would not be alleviated if you had only the name and not the narration?

A No, we were quite comfortable with just the name.[note: 22]

and

Q In September 2003, you did not think it was important or necessary to have the narration?

A We felt it – we did not feel it was necessary. We felt it would be ideal but not necessary.

Q Let me understand that. In September 2003, you felt it would be ideal to have both the name and the narration?

A That is correct.

Q Why would you need both the name and the narration?

A The name together with the narration should make things more – make more clear to all parties in the sense that the remitter would then know the purpose of the remittance.[note: 23]

46 When counsel accused him of changing his evidence, Mr Bhojwani demurred with the explanation that:

> When I spoke yesterday, I was confused also at the same time my mind was confused about what I know now versus what I knew in September 2003. I don't feel I was being contradictory.[note: 24]

47 I have some difficulties with Mr Bhojwani's explanation. First, on the face of the letter, the requirement for the narration was not a "do-it-if-you-can" request. Secondly, even if it was intended to be optional, there was no evidence that Liko had informed the defendant that it was unable or unwilling to arrange for the narration to be included. All that is known is that when Liko failed to provide the narration, the payments were accepted by the defendant without complaint or reservation.

48 It is difficult for any firm conclusion to be drawn whether

(a) the narration was mandatory;

(b) the narration was optional; or

(c) the defendant did not take a firm position on it.

49 In any event, the significance of the factual distinctions between the three positions has to be considered in the context of the pleaded case. The plaintiffs were asserting that the defendant was liable to account for the remittances on the grounds of knowing receipt.[note: 25] The defendant contended that the assertion was fundamentally flawed. The defendant submitted that strictly speaking:

> …before even addressing the other important requirement of whether the recipient had the requisite knowledge of the breach of fiduciary duty or breach of trust, the Plaintiffs must first establish that the Plaintiffs' assets had been disposed off or transferred away in breach of trust or in breach of fiduciary duty.[note: 26]

citing the Court of Appeal judgment in *Caltong (Australia) Pty Ltd and Another v Tong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 3 SLR 241 at [31]:

> 31 To be liable for knowing receipt which would render the recipient a constructive trustee, three elements must be proved, and in the words of Lord Hoffmann in *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685 at 700; [1994] 1 BCLC 464 at 478:
>
> > the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and, thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.

and emphasising that as the funds remitted from the accounts of GB and Mr Comboni were never subjected to or impressed with a trust, there can be no question of knowledge of a breach of trust.

50 However, the defendant acknowledged that the strict requirement does not always apply. The defendant accepted that knowledge of a breach of trust is not a necessity if a remedial constructive trust is found against the defendant. This was explained by the Court of Appeal in *Ching Mun Fong(executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2001] 3 SLR 10 at [34] that:

> A remedial constructive trust arises "*where the court imposes a constructive trust de novo on assets which are not subject to any pre-existing trust as a means of granting equitable relief in a case where it considers just that restitution should be made*" (per Slade LJ in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 478; [1989] 3 All ER 14 at 56.
>
> [emphasis added]

and the Court of Appeal went on to say at [36] that:

> A remedial constructive trust is a restitutionary remedy which the court, in appropriate circumstances, gives by way of equitable relief. In order for a remedial constructive trust to arise, the payee's conscience must have been affected, while the moneys in question still remain with him.

51 The statement in italics was not Slade LJ's statement of the law, but was a reference to a submission made by counsel. The learned judge explained at 479:

> While we have had the benefit of very full argument on almost all other aspects of the law involved in this case, we have neither heard nor invited comprehensive argument as to the circumstances in which the court will be prepared to impose a constructive trust de novo as a foundation for the grant of equitable remedy by way of account or otherwise. Nevertheless, we are satisfied that there is a good arguable case that such circumstances may arise and, for want of a better description, will refer to a constructive trust of this nature as a "remedial constructive trust."

52 Although remedial constructive trusts are recognised in Canada and the United States of America, there are doubts whether remedial constructive trust is recognised in English law – see *Re Polly Peck International Plc (in administration) (No 2)* [1998] 2 BCLC 185 and Snell's *Equity*, 31st ed. (Thomson Sweet & Maxwell) at 24-09, the Court of Appeal (and the defendant) has remedial constructive trust as part of the law of Singapore without reservation.

53 Against the background of these propositions, the plaintiffs' claim would succeed if a remedial constructive trust is established. In this context, the vital issues are first, what does it mean for a recipient's conscience to be affected, and second, whether the defendant's conscience was in fact affected in this case.

54 The plaintiffs' case is that the defendant was in knowing receipt. The plaintiffs relied on the five categories of knowledge referred to by Peter Gibson J in *Baden and others v Société Générale pour Favoriser le Developpement du Commerce et de L'Industrie en France S.A.* [1993] 1 WLR 509 ("*Baden*") (at 575-576) which are as follows:

(a) actual knowledge;

(b) wilfully shutting one's eyes to the obvious;

(c) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;

(d) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and

(e) knowledge of circumstances which would put an honest and reasonable man on inquiry.

and submitted that:

> In summary, the courts in Singapore have held that a recipient knowing of circumstances sufficient to put him on inquiry whether a breach of trust or fiduciary duty has occurred, has constructive notice if he shuts his eyes to the obvious or fails to make such inquiries as an honest and reasonable man would. It appears that the courts accept that for knowing receipt, it is enough if the defendant knows of facts that would put an honest and reasonable person on inquiry. This position covers all 5 categories of knowledge set out above.[note: 27]

55 Specifically, the plaintiffs contended that:

> … in disregarding its own system of 2 October 2003 requiring the SWIFT messages from all 3rd party remittances to state both the name of the Nigerian customer and the narration specifying the purpose of the payment, the Defendant received tainted 3rd party funds (including 3 remittances from the Plaintiffs) with the knowledge, actual or constructive, that these funds could be the proceeds of fraud perpetrated on the 3rd party remitters. The cases establish that in these circumstances, the Defendant cannot in good conscience retain the Plaintiffs' monies.[note: 28]

56 The Court of Appeal in *Rajabali Jumabhoy & Ors v Ameerali R Jumabhoy & Ors* [1998] 2 SLR 439 discussed the concept of a constructive trust. LP Thean JA in delivering the judgment of the court noted at [107] that:

> There is no clear definition of a constructive trust. The learned authors of *Snell's Equity* (29th Ed) define a constructive trust at p 192 as follow:
>
> > The constructive trust imposed by law is not capable of precise definition and is continually developing. For the present it is sufficient to say that a constructive trust is a trust which is

imposed by equity in order to satisfy the *demands of justice and good conscience*.

In *Carl Zeiss Stiftung v Herbert Smith & Co & Anor (No 2)* [1969] 2 Ch 276 ["*Carl Zeiss Stiftung*"], at p 300, Edmund Davies LJ said:

> English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.

However, his Lordship identified 'want of probity' as a useful touchstone in considering the circumstances giving rise to a constructive trust. He said at p 301:

> The concept of '*want of probity*' appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts, and I have not found it misleading when applying it to the many authorities cited to this court.[*sic*] It is because of such a concept that evidence as to 'good faith', 'knowledge' and 'notice' plays so important a part in the reported decisions. It is true that not every situation where probity is lacking gives rise to a constructive trust. Nevertheless, the authorities appear to show that nothing short of it will do. *Not even gross negligence will suffice*.
>
> [Emphasis added]

and then went on to discuss knowing receipt at [108]:

> Where a person acquires a trust property, whether gratuitously or for valuable consideration, in breach of trust on the part of the trustee, and has knowledge of the breach of trust whether actual, constructive or imputed, then he would be liable as a constructive trustee to account to the beneficiaries under the trust. Such a constructive trust is based on 'knowing receipt' ie knowledge of the recipient that the property received is trust property and is in breach of trust. Such knowledge is absolutely essential to found a constructive trust based on knowing receipt.

57 The judgment also referred to Sir Robert Megarry VC's judgment in *Re Montagu's Settlement Trusts* [1987] 1 Ch 264 where the learned judge set out, at 285, the relevant considerations for imposing a constructive trust based on knowing receipt:

> (1) The equitable doctrine of tracing and the imposition of a constructive trust by reason of the knowing receipt of trust property are governed by different rules and must be kept distinct. Tracing is primarily a means of determining the rights of property, whereas the imposition of a constructive trust creates personal obligations that go beyond mere property rights.
>
> (2) In considering whether a constructive trust has arisen in a case of the knowing receipt of trust property, the basic question is whether the *conscience of the recipient is sufficiently affected to justify the imposition of such a trust.*
>
> (3) Whether a constructive trust arises in such a case primarily depends on the knowledge of the recipient, and not on notice to him; and for clarity it is desirable to use the word "knowledge" and avoid the word "notice" in such cases.
>
> (4) For this purpose, knowledge is not confined to actual knowledge, but includes at least knowledge of types (ii) and (iii) in the *Baden* case [1983] B.C.L.C. 325, 407, i.e. actual knowledge that would have been acquired but for shutting one's eyes to the obvious, or wilfully

and recklessly failing to make such inquiries as a reasonable and honest man would make; for in such cases there is a *want of probity which justifies imposing a constructive trust.*

[Emphasis added]

58 The Court of Appeal applied the prevailing English law, and used "conscience" or "want of probity" (which are expressions of the same concept), as the foundation of a constructive trust.

59 After the *Baden* categories were enunciated, it was thought by some that knowledge under any of the categories would constitute the necessary unconscionability or lack of probity to found a constructive trust. The plaintiffs took this to be the position.

60 However, doubts have been raised over the application and effect of the *Baden* categories. In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, a decision of the English Court of Appeal, Nourse LJ referred to *Baden* and sounded a note of caution at 454:

> Two important points must be made about the *Baden* categorisation. First, it appears to have been propounded by counsel for the plaintiffs, accepted by counsel for the defendant and then put to the judge on an agreed basis. Secondly, though both counsel accepted that all five categories of knowledge were relevant and neither sought to submit that there was any distinction for that purpose between knowing receipt and knowing assistance (a view with which the judge expressed his agreement: see [1993] 1 WLR 509, 582e-f), the claim in constructive trust was based squarely on knowing assistance and not on knowing receipt: see p 572d. In the circumstances, whatever may have been agreed between counsel, it is natural to assume that the categorisation was not formulated with knowing receipt primarily in mind. This, I think, may be confirmed by the references to "an honest and reasonable man" in categories (iv) and (v). Moreover, in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 293 Millett J warned against over-refinement or a too ready assumption that categories (iv) and (v) are necessarily cases of constructive knowledge only, reservations which were shared by Knox J in *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700, 761g.

and he went on to add at 455:

> In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, which is now the leading authority on knowing assistance, Lord Nicholls of Birkenhead, in delivering the judgment of the Privy Council, said, at p 392g, that "knowingly" was better avoided as a defining ingredient of the liability, and that in that context the *Baden* categorisation was best forgotten. Although my own view is that the categorisation is often helpful in identifying different states of knowledge which may or may not result in a finding of dishonesty for the purposes of knowing assistance, *I have grave doubts about its utility in cases of knowing receipt.* Quite apart from its origins in a context of knowing assistance and the reservations of Knox and Millett JJ, any categorisation is of little value unless the purpose it is to serve is adequately defined, whether it be fivefold, as in the *Baden* case [1993] 1 WLR 509, or twofold, as in the classical division between actual and constructive knowledge, a division which has itself become blurred in recent authorities.
>
> What then, in the context of knowing receipt, is the purpose to be served by a categorisation of knowledge? It can only be to enable the court to determine whether, in the words of Buckley LJ in *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405, the recipient can "conscientiously retain [the] funds against the company" or, in the words of Sir Robert Megarry V-C in *In re Montagu's Settlement Trusts* [1987] Ch 264, 273, "[the recipient's] conscience is sufficiently affected for it to be right to bind him by the obligations of a

constructive trustee". But, if that is the purpose, there is no need for categorisation. *All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.*

For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.

[Emphasis added]

indicating a move from reliance on the *Baden* categories, and a reversion to conscience as the criteria. I therefore regard conscience/probity as the proper test for a constructive trust, and I will not rely on the *Baden* categories, especially the fourth and fifth categories.

Conscience/probity

61 Some thought had gone into the drafting of the letter of 2 October 2003. If all the requirements in the letter are complied with, there would be little or no room for complaint because the customer arranging to make the payment is identified and it is made clear that the payment tendered was for payment of the outstanding invoices of the customer.

62 The defendant must have realised that without the narration there is a higher risk that a payment may be tainted. Nevertheless, although it had requested Liko to put in the narration, it accepted the remittances without the narration.

63 Did the defendant know of the fraud that was perpetuated on Mr Comboni? Was there such a want of probity on the defendant's part such that it was unconscionable for it to retain the payments?

64 Unconscionability relates to the state of a person's knowledge. When a person knowingly assists in a breach of trust, or knowingly receives property in respect of which a breach of trust is committed, equity intervenes and constitutes him a constructive trustee. The knowledge could be actual knowledge, or it could be a wilful avoidance of the knowledge, *ie* knowledge within the second and third *Baden* categories. But when there is no actual knowledge or wilful avoidance of the knowledge, and the person's awareness comes within the last two *Baden* categories, his conscience should not be called into question. He will not be deemed a constructive trustee, and any liability on his part would be founded in tort or contract for his failure to discharge his tortious or contractual obligations.

65 The defendant knew that if the narration was supplied, there is little or no room of an allegation of fraud by a third party. Without the narration, it would have the assurance that the remitter was aware that the payments were made to it for the account of Liko, but there is no assurance that the remitter knew that the payment was for Liko's outstanding invoices. But that is a long way from saying that when it received the payments made without the narration, it had knowledge of the fraud or was wilfully avoiding knowledge of it. At the highest, it can be said that the defendant knew that without the narration, there was a possibility of fraud. In the circumstances, its conscience was not so affected that it cannot be allowed to keep the funds.

66 My conclusion, following the foregoing review of the law and the facts, is that the plaintiffs have not proved their claims against the defendant in trust.

Assumption of risk

67 There are other matters which I should address. In its defence, the defendant had raised issues to shield it from having to account for the remittances. The issue which related to the claim made on the basis that the remittances were made by mistake was that the plaintiffs had voluntarily assumed the risk in making the remittances, and they should bear the loss. The defendant relied on the propositions in Goff & Jones*, The Law of Restitution*, 6th ed. (London: Sweet & Maxwell, 2002) at 4-030 that:

> [I]f the payer has assumed the risk of his mistake recovery will be denied.

citing as authority Parke B's pronouncement in *Kelly v Solari* (1841) 9 M & W 54 at 59 that:

> If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it.

68 On the facts, I do not find that the plaintiffs had assumed any risk in making the payments. The sad fact of the case was that Mr Comboni was completely taken in by the fraudsters. He had believed them, and did not think that there were risks in making the payments. He and GB did not assume any risks when they made the remittances.

Change of position

69 A second issue was that the defendant had changed its position on the receipt of the remittances. When the remittances were received, the instructions of Liko were to apportion and credit the sums remitted in favour of Liko and seven other existing Nigerian customers of the defendant. The defendant complied with these instructions, with the result that the accounts of Liko and seven other Nigerian customers were debited and further credit was extended to these parties and some bills of exchange were released to them. The defendant has stopped trading with Liko, but is carrying on business with the other seven customers. Mr Bhojwani deposed that the defendant would have "little recourse given the difficulty of pursuing the recovery of remittances in Nigeria."

70 The defendant cited the judgment of Lord Goff of Chieveley in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 579 that:

> [W]here 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.

71 This defence is only available to a party which had acted in good faith. Lord Goff added the qualification at 580:

> It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer.

The exclusion does not apply in this case because the defendant received the remittances in good faith.

72 The plaintiffs' response was that the defendant had not adduced any evidence that the Nigerian parties had refused to forgo and return the benefits they derived from the remittances. There is some superficial force in that, but that cannot dispose of the matter. It is doubtful if the Nigerian companies will voluntarily forgo and return the benefits they had obtained. If the matters were that simple, the defendant would surely have received those payments from them and returned them to the plaintiffs, rather than to defend this action. Any effort to reverse the benefits of the remittances from Liko and the other seven companies is likely to be resisted, and the action that the defendant will have to take will not be straightforward, and success will not be assured.

73 In the event, it is neither appropriate nor necessary for me to make a ruling on this matter. The reason for this is that this is a defence that the defendant can rely on if it was found to be a constructive trustee. As the defendant was not a constructive trustee, this defence does not apply.

The US$103,043.49 with the defendant

74 There is a sum of US$103,043.49 standing to Liko's account with the defendant at the time of the hearing. The plaintiffs contended that this sum should be returned to them.

75 The defendant denied that it was liable to do that. It contended that:[note: 29]

> 153. … The claim in money had and received is a personal claim in restitution, and not a proprietary claim. This personal claim for money had and received can be defeated by the defence of *bona fide* change of position. … the Defendant has established on the evidence that it had changed its position in good faith in respect of the monies received from the Plaintiffs, in that the Defendant had *bona fide* applied the Plaintiffs' monies to its trading business with its Nigerian customers. The fact that there is a sum of US$103,043.49 standing in Liko's account with the Defendant that has no connection with the earlier transactions is not relevant to the Plaintiffs' claim.
>
> 154. … The sum of US$103,043.49 will be applied by the Defendant to recover the losses suffered by it as a result of the US freezing order proceedings. [These proceedings which were commenced in 2004 and settled in 2005 were not connected with the three remittances.] If the Defendant were to pay over this sum to the Plaintiffs (despite the Plaintiffs having no legal basis for their claim), the Defendant would be further out-of-pocket in respect of its claim against Liko.

76 The last sentence of [153] in stating that the sum was not connected with earlier transactions, *ie* transactions made before the three remittances, confirmed that the sum was derived from the three remittances. For this reason, the money is money tainted by the fraud.

77 The change of position alluded to was not explained. In particular, it was not made clear how the defendant would consider applying the sum which is still standing in Liko's account with the defendant to recover losses it incurred in the freezing order proceedings in the United States.

78 The defendant had no knowledge of the fraud when it received the money, and did not receive them as a constructive trustee. However, a party's state of knowledge is not static and it may change. In this case, when Mr Comboni recounted the manner in which he was drawn into the fraud, the defendant did not challenge the fact that a fraud was perpetrated. The defendant's case was that Mr Comboni was careless in allowing himself to be deceived, and that the defendant had no knowledge of the fraud when it received the remittances.

79 By the end of the trial, the defendant must have known that these remittances were tainted by

fraud. If it still did not know that, it knows it now, in view of my decision.

80 The defendant does not take the position that it was holding the money in trust for Liko for disbursement towards future purchases because they are no longer doing business with one another. However, it does not want to return the sum to the plaintiffs because it intends to apply it to recover claims that it will be making against Liko.

81 The defendant's position is flawed. By this time, it knows that the sum had been paid by the plaintiffs to it as a result of a fraud. It cannot retain the sum unless there are proper grounds which excuse it from doing that. The reason put up, that it intends to use the sum towards payment of its claims against Liko, is without merit in law or equity. The defendant has no right to use the plaintiffs' money and use it to satisfy its claims against Liko.

82 Support for this conclusion can be drawn from Lord Browne-Wilkinson's judgment in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 705:

> (i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).
>
> (ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

83 Proposition (ii) was discussed and examined against a factual background similar to the present case in Alastair Hudson, *Equity & Trusts,* 4th ed. (London: Cavendish Publishing Ltd) at 427-428:

> As a result of the requirement that the conscience of the holder of the legal interest is affected, 'he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience'. Therefore, the defendant must have knowledge of the factors which are suggested to give rise to the constructive trust. Let us suppose a simple, everyday example. Nicholas is queuing at the till in his local supermarket. He has not bought very many goods and therefore his bill comes to a little less than £10. He pays with a £10 note. Mistakenly, the person working on the till thinks that Nicholas has proffered her a £20 note and so gives him change as though from a £20 note: that is, she hands him a £10 note and coins. The question would be as to Nicholas's obligations in relation to the £10 note which he has mistakenly received from the till operative. There can be little doubt that in good conscience Nicholas ought to inform the till operative of her mistake and return the £10 note to her.
>
> The important question for the law relating to constructive trusts is the time at which Nicholas realises that he has been given £10 more than he is intended to receive. If he realises at the moment when the till operative hands him the £10 note that she has made a mistake, and he runs from the shop laughing at his good fortune, he would be a constructive trustee of that £10 for the supermarket as beneficiary from the moment of its receipt. If he absent-mindedly received and pocketed the note (thus taking it into his possession) without realising the error, and did not ever subsequently realise that he had £10 more than he should have had, then he would never be a constructive trustee. If he absent-mindedly pocketed the £10 note without realising the mistake but was accosted by an employee of the supermarket who informed him for the first time

of the mistake, then from the moment he was informed by that employee he would be a constructive trustee – but not before. That is the importance of the statement in *Westdeutsche Landesbank* that there cannot be liability as a constructive trustee until the defendant has knowledge of the facts said to affect his conscience.

84 On the facts, the defendant takes the position of Nicholas, and becomes a constructive trustee when it is aware of the fraud.

Conclusion

85 The plaintiffs' claims as pleaded, on express trust and constructive trust in knowing receipt at the time of receipt are dismissed.

86 With respect to the sum of US$103,043.49, although the issue of post-receipt knowledge was not part of the pleaded case, it was a matter that came up clearly, and was referred to by the parties. I will give judgment to the plaintiffs for this sum, to bring the matters arising from the three remittances to a close.

87 On the question of costs, taking into account the fact that the plaintiffs' extensive allegations made against the defendant which were abandoned or dismissed, and the defendant's unreasonable refusal to return the US$103,043.49 to the plaintiffs which it had no basis to retain, each party should bear its own costs.

[note: 1] Plaintiffs' Bundle of Documents ("PBD") 40

[note: 2] PBD 17

[note: 3] PBD 18

[note: 4] PBD 51

[note: 5] PBD 19

[note: 6] PBD 20

[note: 7] PBD 21

[note: 8] Affidavit of evidence-in-chief of Vincenzo Comboni para 21

[note: 9] PBD 22

[note: 10] PBD 23

[note: 11] PBD 24

[note: 12] Defendant's Opening Statement [23] – [31]

[note: 13] Amended Statement of Claim para 3

[note: 14] Amended Statement of Claim para 8

[note: 15] Amended Statement of Claim para 4

[note: 16] Amended Statement of claim para 22

[note: 17] Plaintiffs' Opening Statement para 39

[note: 18] Notes of Evidence pages 163-164

[note: 19] Notes of Evidence page 193

[note: 20] Notes of Evidence pages 237-238

[note: 21] Notes of Evidence pages 255-256

[note: 22] Notes of Evidence page 261

[note: 23] Notes of Evidence page 262

[note: 24] Notes of Evidence page 264

[note: 25] Plaintiffs' Opening Statement para 39

[note: 26] Defendant's Closing Submissions para 16

[note: 27] Plaintiffs' Closing Submissions para 80

[note: 28] Plaintiffs' Closing Submission para 86

[note: 29] Defendant's Reply Submissions paras 153 and 154