Neutral Citation Number: [2024] EWCA Civ 423

Case Nos: CA-2023-000615
CA-2023-000643

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Mrs Justice Joanna Smith
[2023] EWHC 364 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2024

Before:

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

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Between:

(1) GREIG WILLIAM ALEXANDER MITCHELL **(2) KENNETH MELVIN KRYS** **(Joint Liquidators of** **MBI INTERNATIONAL & PARTNERS INC** **(in liquidation))**	**Applicants/ Respondents to the appeals**
- and –	
(1) SHEIKH MOHAMED BIN ISSA AL JABER	**Respondent to the application/ Appellant**
(2) MASHAEL MOHAMED AL JABER **(3) AMJAD SALFITI** **(4) JJW HOTELS & RESORTS UK HOLDINGS LIMITED**	**Respondents to the application**
(5) JJW LIMITED **(registered in Guernsey, in liquidation)**	**Respondent to the application/ Appellant**

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Jonathan Crow KC, Clare Stanley KC and Jia Wei Lee (instructed by **Mishcon de Reya LLP**) for **Sheikh Al Jaber**
James Fennemore (instructed by **Locke Lord (UK) LLP**) for **JJW Limited (registered in Guernsey, in liquidation)**
Joseph Curl KC and Jon Colclough (instructed by **Clyde & Co LLP**) for **Mr Mitchell and Mr Krys**

Hearing dates: 26 & 27 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. These are appeals from a judgment ("the Judgment") given by Joanna Smith J ("the Judge") on 24 February 2023. They raise difficult issues as to the liability of the first respondent to the application, Sheikh Mohamed Al Jaber ("the Sheikh"), for breach of fiduciary duty and of the fifth respondent to the application, JJW Limited ("JJW Guernsey"), a company incorporated in Guernsey, for knowing receipt.

Basic facts

2. The Sheikh is an international businessman and the founder and chairman of a large number of companies operating in the commercial property, finance, hospitality and food industries. Some of the companies incorporate the letters "MBI" in their names. As the Judge noted in paragraph 25 of the Judgment, the Sheikh has explained that the "MBI" is derived from the "Mohamed Bin Issa" found in his own name.

3. MBI International & Partners Inc ("the Company") was incorporated in the British Virgin Islands ("the BVI") and in 2004 became a "business company" under the provisions of the BVI Business Companies Act 2004 ("BCA 2004"). The Sheikh is both the Company's sole shareholder and a director. The only other director from 2006 was the second respondent to the application, Ms Mashael Al Jaber, whose father is the Sheikh.

4. By 2008, the Sheikh was contemplating a restructuring of companies associated with him. The restructuring would have involved a public offering of shares ("the IPO") in another BVI company, JJW Hotels & Resorts Holding Inc ("JJW Inc"). The Sheikh was the only director of JJW Inc until 23 December 2016, when he was succeeded by MBI International Holdings Inc ("MBI International Holdings") and, in February 2018, by MBI International Holding Group Inc. MBI International Holdings and MBI International Holding Group Inc were both incorporated in the BVI.

5. At the end of January 2009, the Sheikh held 8,038,120 shares in JJW Inc while the Company held 129,000. In March 2009, the Company acquired 891,761 further shares in JJW Inc in two tranches. 567,556 shares were transferred to the Company by a transfer agreement dated 18 March 2009 by JJW Guernsey for a consideration of €56,755,000. A further transfer agreement with the same date provided for the transfer to the Company of 324,205 shares for €32,420,500 by JJA Beteiligungsverwaltungs GmbH ("JJAB"). From 18 March 2009, therefore, the Company was the registered holder of 1,020,873 shares in JJW Inc, which represented 11.2% of its total issued shares.

6. On 10 October 2011, a winding-up order was made in the BVI in respect of the Company pursuant to an application by Unicredit Bank Austria AG on the basis of a debt of €4,340,965.10. The application was supported by Immoconsult Ares Leasinggesellschaft mbH, which asserted a claim of €6,321,838. Mr David Kinnon was appointed as liquidator on 11 October 2011. He was replaced as the liquidator by Ms Charlotte Caulfield from 31 March 2014, and the respondents, Mr Greig Mitchell and Mr Kenneth Krys ("the Liquidators"), became the liquidators on 8 July 2019.

7. On 10 October 2013, the Sheikh applied for the liquidation of the Company to be terminated. However, the application was dismissed on 30 October 2013 by Bannister

J, sitting in the BVI High Court of Justice (Commercial Division). The Sheikh appealed that decision, but the appeal was dismissed by the Eastern Caribbean Court of Appeal on 14 January 2015.

8. On 8 March 2016, JJW Guernsey was entered in JJW Inc's share register as the new holder of the 891,761 shares which the Company had acquired from JJW Guernsey and JJAB in 2009. The registration was effected pursuant to a written resolution of the Sheikh as the sole director of JJW Inc dated 29 February 2016. The resolution stated that "share transfer instruments … from [the Company] wishing to transfer shares in [JJW Inc] (the 'Transferring Shares')… to [JJW Guernsey] have been received and reviewed by the Director" and that the "Director" (i.e. the Sheikh) had "ascertained that the Instruments of Transfer were signed for and on behalf of the transferor on the 6th day of July 2010 (the 'Signing Date')" so that "beneficial ownership of the Transferring Shares transferred to [JJW Guernsey] on the Signing Date". It was "resolved that … the Instruments of Transfer are each in a form consistent with [JJW Inc's] articles of association and [BCA 2004] and the transfer of the Transferring Shares to [JJW Guernsey] is authorised and approved by the directors" and, further, that "the registered agent of [JJW Inc], Maples Corporate Services (BVI) Limited, be and is hereby authorised and instructed … to … update [JJW Inc's] Register of Members to reflect the transfer of the Transferring Shares to [JJW Guernsey]". It was noted that the Sheikh "discloses that he is a director of [the Company] and that he is also a member (direct or indirect), director, officer or trustee of [JJW Inc] and, accordingly, is interested in the matters which are the subject of these resolutions".

9. The "Instruments of Transfer", which were not themselves dated, provided for the transfer of the 891,761 shares in JJW Inc from the Company to JJW Guernsey. Each of the two transfers ("the Share Transfer Forms") was signed by the Sheikh "For and on behalf of MBI International & Partners Inc" (i.e. the Company) as "Director".

10. The Judge concluded in paragraph 453 of the Judgment that the resolution of 29 February 2016 "was designed to address the fact that the Share Transfer Forms had <u>not</u> been signed in July 2010 and that no steps had been taken at that time to effect any transfer". In paragraph 456 of the Judgment, the Judge said:

> "I find in all the circumstances that the Sheikh signed the Share Transfer Forms in 2016 and that he did not act honestly, or in good faith, in doing so and in causing the transfer of the 891K Shares (or purported transfer) to JJW Guernsey on 8 March 2016, pursuant to the February 2016 Resolution. Further he did not act in the best interests of the Company."

There is no appeal from these findings.

11. JJW Inc's share register records the transfer of the 891,761 shares in JJW Inc from JJW Guernsey to MBI International Holdings on 23 June 2017. JJW Inc minutes dated 17 July 2017 refer to indebtedness of JJW Inc to MBI International Holdings of €600 million. Minutes of a further meeting, of JJW Inc's board on 27 July 2017, explain that MBI International has assigned its debt to the fourth respondent to the application, JJW Hotels & Resorts UK Holdings Limited ("JJW UK"), and that, on the advice of the auditors, it is "in the best interest" of JJW Inc, its shareholders, employees and creditors, "to proceed with the offer to acquire a 100% of [JJW Inc],

taking over all the assets and liabilities by [JJW UK]" ("the July 2017 Resolution"). JJW UK, a UK company, is wholly owned by MBI International Group UK Holdings Limited, which is also a UK company. It became common ground before the Judge that at this stage JJW UK took over all JJW Inc's assets and liabilities.

12. Shortly before this, on 9 June 2017, Registrar Derrett had made an order recognising the liquidation of the Company as a foreign main proceeding in accordance with the UNCITRAL Model Law on Cross-Border Insolvency, as set out in schedule 1 to the Cross-Border Insolvency Regulations 2006, and recognising Ms Caulfield as the Company's foreign representative.

13. The present proceedings were issued in May 2019. They came on for trial, with a 10-day time estimate, at the beginning of February 2021. On the fourth day, when the Sheikh was due to give evidence, a list of corrections to the Sheikh's witness statements was served as a result of which the Liquidators applied for permission to amend their points of claim. In the days that followed, the Judge both granted such permission and heard evidence from expert witnesses as to BVI law. The trial was then adjourned and, although it resumed in July 2021, further adjournments proved to be required as a result of the Sheikh's ill health. The trial eventually resumed, and was concluded, in October 2022, the Judge having taken the view that there was no prospect of the Sheikh ever being well enough to give oral evidence.

14. A winding-up order had been made in respect of JJW Guernsey in Guernsey on 31 July 2020. Not having funding to do so, JJW Guernsey was not represented at the trial, but counsel appeared for it at the hearing at which consequential matters were addressed following the handing down of the Judge's judgment.

15. It was alleged by the Liquidators at the trial that, in the period before the Company went into liquidation, the Sheikh and his daughter acted in breach of duty "in denuding the Company of its assets". The Judge did not consider those claims to have been made out, and she also rejected allegations in respect of the 129,000 shares in JJW Inc which the Company had acquired by the end of January 2009 and, as regards the Sheikh and his daughter, of unlawful means conspiracy. In contrast, the Judge concluded that the Sheikh had acted in breach of duty in causing the 891,761 shares in JJW Inc to be transferred into JJW Guernsey's name and that JJW Guernsey was liable to account as a constructive trustee as a result of its receipt of those shares. On that basis, the Judge ordered the Sheikh and JJW Guernsey to pay the Liquidators €67,123,403.36 as equitable compensation on a joint and several basis. The Judge arrived at that figure by reference to accounts for JJW Inc as at 31 December 2016 ("the 2016 Accounts").

16. The Sheikh and JJW Guernsey both now challenge the Judge's decision in this Court. Permission to appeal was granted by the Judge herself.

Some aspects of BVI law

The impact of insolvency on directors

17. The decision of the Court of Appeal in *Measures Ltd v Measures* [1910] 2 Ch 248 indicates that, under the law of England and Wales, a director ceases to hold office when a winding-up order is made in respect of the company in question. The position

under BVI law is somewhat different. Section 175(1) of the BVI's Insolvency Act 2003 ("IA 2003") provides that, with effect from the commencement of the liquidation of a company:

> "(a) the liquidator has custody and control of the assets of the company;
>
> (b) the directors and other officers of the company remain in office, but they cease to have any powers, functions or duties other than those required or permitted under this Part …. "

18. Directors thus continue to hold office, but their powers, functions and duties are at an end except as "required or permitted" under the Act while the liquidator has custody and control of the company's assets.

The significance of registration as a shareholder

19. The Judge summarised provisions of BCA 2004 relating to share registration as follows in paragraph 435 of the Judgment:

> "i) Section 41 provides that the company shall keep a register of members, containing (amongst other things) the names and addresses of the persons who hold registered shares in the company, together with the date on which the name of each member was entered in the register.
>
> ii) Section 42(1) provides that the entry of the name of a person in the register of members as a holder of a share in the company 'is prima facie evidence that legal title in the share vests in that person'.
>
> iii) Section 43 provides the BVI court with jurisdiction to rectify the share register, where information required under section 41 is omitted or inaccurately entered, on the application of a member of the company or any person who is 'aggrieved' by the omission or inaccuracy."

20. The Judge went on to say this:

> "436. Accordingly, the experts agree that the legal proprietor of shares is the person whose name is entered into the share register and that such person will remain the legal proprietor for as long as his name remains in the share register. As Lord Collins observed in *Nilon Ltd v Westminster Investments* [2015] UKPC 2 at [39] (in the context of considering the circumstances in which a claim for rectification under section 43 BCA 2004

may be brought) '[t]here is no doubt that the legislation is primarily concerned with legal title'.

…

439. Under BVI law, there is an evidential (rebuttable) presumption that MBI International Holdings is currently the beneficial owner of the 891K Shares. Mr Lowe [i.e. one of the experts] explained in his oral evidence, and I accept, that BVI cases identify this as a 'strong prima facie presumption' such that 'cogent' evidence is needed to rebut it (see *Chen v Ng* [2017] UKPC 27 (on appeal from the BVI) at [40]-[42] and *Ng v Peckson Ltd & Chen* BVIHCMAP2019/0011 at [25]-[26])."

21. In paragraph 502 of the Judgment, the Judge said:

> "I find that the Alleged 2016 Disposition, by which I mean the signing by the Sheikh of Share Transfer Forms on behalf of the Company on or around 29 February 2016 and the registration of JJW Guernsey as the owner of the 891K Shares in JJW Inc on 8 March 2016 was void … pursuant to section 175(3) of the IA 2003".

Given, however, the explanation of the relevant BVI law which she had given earlier in the Judgment, I do not think that the Judge meant that the registration of JJW Guernsey as the holder of the 891,761 shares was without legal effect. Nor would such a conclusion be consistent with the Judge's remark in paragraph 518 of the Judgment that "[u]pon receipt of the 891K Shares (legal title being conferred by registration), there was an obligation on JJW Guernsey immediately to restore them". It is plain, I think, that the Judge considered that JJW Guernsey had obtained legal title to the shares as a result of its entry as their holder in JJW Inc's register of members.

The appeals

22. The Sheikh appeals on the basis that the Judge was wrong to find him to have committed any breach of duty; that, even supposing that there was such a breach, the Judge should not have ordered him to pay any compensation; and that the Judge's award of compensation was anyway inappropriate because the 891,761 shares transferred to the Company by JJW Guernsey and JJAB in March 2009 were subject to an unpaid vendor's lien. For its part, JJW Guernsey does not dispute liability, but it joins the Sheikh in his other grounds of appeal.

23. The appeals thus give rise to three issues:

    i) Did the Sheikh commit a breach of duty ("the Liability Issue")?

    ii) Was the Judge wrong to award any compensation even if the answer to the Liability Issue is in the affirmative ("the Compensation Issue")?

iii) Were the 891,761 shares in JJW Inc subject to an unpaid vendor's lien ("the Lien Issue")?

The Liability Issue

The Judge's reasoning

24. The Judge noted that the evidence of the experts on BVI law, which she accepted, was "to the effect that owing to the terms of section 175 of the IA 2003, the powers and duties of a company's directors effectively cease upon the liquidation of that company, save where a director holds company property – in which case he will have a duty (whether a fiduciary duty or a duty at common law) not to deal with that property, but to turn it over" and that there was accordingly "a duty post-liquidation (whether it be characterised as a fiduciary duty or not) not to deal or 'intermeddle' with company property and to account for that property": see paragraphs 357, 358 and 360 of the Judgment. The Judge thought it "very hard to see how, ordinarily, [a director's] fiduciary duties could persist" following a liquidation when he is "effectively divested of his powers and duties": paragraph 367. The Judge was, however, "persuaded that the obligations of fiduciary stewardship owed by directors are capable of continuing post-liquidation in respect of company property (albeit in a much reduced form and applicable only in circumstances where unauthorised dealing with company assets occurs), whether they are described purely as fiduciary obligations or as giving rise to liability as a constructive trustee": paragraph 390. The Judge went on:

> "391. I do not consider that the fact that the liquidator has 'custody and control' of the assets of the company pursuant to section 175 of the IA 2003 … affects this conclusion. The underlying rationale for the obligation of fiduciary stewardship on a director post-liquidation under BVI law is the need to hold to account a director who seeks to exercise control over company property and engages in unauthorised dealing with that property. In such a situation, the liquidator (who should be the fiduciary steward) will quite obviously have been deprived of that stewardship.
>
> 392. The potential for the continued existence of such obligations appears to me to be rooted firmly in the original assumption of responsibility by a director, as fiduciary steward, for company property. If a director (operating under BVI law) retains a company's property post-liquidation (which of course he should not do) then I accept that (always subject to the specific circumstances) he continues to hold it in a fiduciary capacity. If, without authority, he subsequently deals with that property adversely to the liquidation (or if he deals with property over which he is still able to exercise control), then he will have breached his fiduciary duty of stewardship and he must

> account for the property as if he were a constructive trustee."

25. The Judge added in paragraph 396 of the Judgment:

> "Standing back, and considering the coherence of the parties' respective arguments, I agree with the Liquidators that it would be surprising if the liability of a director under BVI law for misappropriation of, or unauthorised dealing with, company assets could be extinguished solely by reason of the relevant dealing having taken place after liquidation of the company (notwithstanding his or her continuing status as a director)."

The Sheikh's case in outline

26. Mr Jonathan Crow KC, who appeared for the Sheikh with Ms Clare Stanley KC and Mr Jia Wei Lee, argued that the Judge was wrong to consider that the Sheikh had a "fiduciary duty of stewardship" after the Company had gone into liquidation. Although the Sheikh will have remained in office as a director, his powers and functions came to an end with the liquidation and so there was no longer anything to which any fiduciary obligation could attach. While, moreover, the Judge spoke of a director of a company in liquidation having a duty not to deal with company property that he holds, the Sheikh did not hold the shares in JJW Inc that are at issue, nor even have custody or control of them: prior to their transfer to JJW Guernsey, they were held by the Company and, under section 175 of IA 2003, custody and control of the Company's assets, including the shares in JJW Inc, was vested in the liquidator. Reference to "intermeddling", Mr Crow maintained, does not assist. "Intermeddling", Mr Crow said, is a label or (echoing Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160, at paragraph 17) a "portmanteau term" used to describe a number of distinct scenarios which can give rise to legal liabilities (including knowing receipt, dishonest assistance and acting as a de facto director or as a trustee de son tort), none of which is in point in the present case. Mr Crow accepted in the course of his submissions that if someone exercises de facto a power that is held by a person who owes fiduciary duties, he will himself be subject to those duties. However, he submitted that the Sheikh had not assumed to exercise a power held by a person with fiduciary duties: he had acted as a director at a time when the Company's directors no longer had any powers. Nor could he otherwise have incurred liability as an intermeddler. The authorities show that a trustee de son tort is only answerable for property he receives, and the Sheikh did not receive the JJW Inc shares. Further, to be a de facto director a person must be "part of the corporate governing structure" and, once the Company was in liquidation, the Sheikh had no role to play in its "governing structure".

Analysis

27. Where a chattel is misappropriated, a claim can be brought for conversion. If, therefore, the Sheikh had misappropriated share certificates (i.e. pieces of paper) in respect of the 891,761 shares in JJW Inc, the Liquidators could have alleged conversion. It is not, however, possible to convert a chose in action such as a share: see *OBG Ltd v Allan* [2008] 1 AC 1, especially at paragraphs 94-106. That being so, there can be no question of the Sheikh having committed that tort by executing the

Share Transfer Forms. If the Sheikh's conduct has given rise to any liability on his part, that must be on a different basis.

28. The Sheikh will, of course, have had fiduciary obligations as a director of the Company during the period before it was the subject of a winding-up order. Had the Company been incorporated in this jurisdiction, it seems that the Sheikh would have stopped being a director at that stage. Under BVI law, the Sheikh remained a director post-liquidation. I doubt, however, whether that matters. Section 175 of IA 2003 provides for a director to cease to have "any powers, functions or duties other than those required or permitted under this Part", and the Liquidators have not identified any relevant "powers, functions or duties" which that Part of the 2003 Act "required or permitted". In the circumstances, I find it hard to see why, post-liquidation, the Sheikh should have been subject to fiduciary obligations which he would not have had if the Company had been incorporated in the United Kingdom.

29. It would also strike me as surprising if the Sheikh's status as a director were crucial. As I have mentioned, Mr Crow accepted that liability could arise if a person purported to exercise a power held by a fiduciary. More specifically, Mr Crow spoke of a person who assumed to himself the ability to exercise a power vested in a liquidator being visited with the obligations that the liquidator owed. I should not have thought that the existence of a remedy in such a case should depend on whether the intermeddler was or had been a director. The vice would essentially be the same if the intermeddler were a stranger rather than anyone who was or had ever been a director.

30. The word "intermeddling" can, as Mr Crow said, be applied to a number of situations in which liabilities can arise. While these may have in common the idea of inappropriate interference or involvement, the overall genus has various species. One of them, as Mr Crow mentioned, is where a person acts as a de facto director. The Supreme Court commented on when a person is to be considered a de facto director in *Revenue and Customs Commissioners v Holland, In re Paycheck Services 3 Ltd* [2010] UKSC 51, [2010] 1 WLR 2793 ("*Paycheck*"). In that case, where it was alleged that a Mr Holland was liable for misfeasance under section 212 of the Insolvency Act 1986 as a de facto director, Lord Collins considered that the question was "whether Mr Holland was part of the corporate governing structure of the composite companies and whether he assumed a role in those companies which imposed on him the fiduciary duties of a director": see paragraph 94. Lord Collins had said in the preceding paragraph:

> "It does not follow that 'de facto director' must be given the same meaning in all of the different contexts in which a 'director' may be liable. It seems to me that in the present context of the fiduciary duty of a director not to dispose wrongfully of the company's assets, the crucial question is whether the person assumed the duties of a director. Both Sir Nicolas Browne-Wilkinson V-C in *In re Lo-Line Electric Motors Ltd* [1988] Ch 477, 490, and Millett J in *In re Hydrodam* [1994] 2 BCLC 180, 183, referred to the assumption of office as a mark of a de facto director. In *Fayers Legal Services Ltd v Day* (unreported) 11 April 2001, a case relating to breach of fiduciary duty, Patten J, rejecting a claim that the defendant was a de facto director of the company and had been

> in breach of fiduciary duty, said that in order to make him liable for misfeasance as a de facto director the person must be part of the corporate governing structure, and the claimants had to prove that he assumed a role in the company sufficient to impose on him a fiduciary duty to the company and to make him responsible for the misuse of its assets. It seems to me that that is the correct formulation in a case of the present kind. See also *Primlake Ltd v Matthews Associates* [2007] 1 BCLC 666, para 284."

31. I do not think that any liability that the Sheikh may have incurred in the present case will have stemmed from his having been a de facto director. There is no doubt that he was a director, but he was a de jure director rather than a de facto one. His powers and functions had come to an end under section 175 of IA 2003, and the transfer of the 891,761 shares was a single, isolated instance of purporting to act as a director despite the Company being in liquidation. He was no longer "part of the corporate governing structure".

32. That the Sheikh was not a de facto director does not, however, mean that he did not incur liability as an intermeddler on another basis. In fact, as Lord Collins explained in *Paycheck*, it was not until quite recently that the concept of de facto directorship was first applied in relation to anyone other than a person who had been a director or whose appointment as such had been defective. Lord Collins observed in paragraph 54 that "[f]or almost 150 years de facto directors in English law were persons who had been appointed as directors, but whose appointment was defective, or had come to an end, but who acted or continued to act as directors". In paragraph 82, Lord Collins said:

> "It seems that there is not a single case prior to the 1980s in which the term de facto director was applied to anyone other than one who had been appointed a director, but whose appointment was defective, or one who had been, but had ceased to be, a director. Consequently the extension of statutory provisions relating to disqualification of directors and wrongful trading by directors to persons who had not been appointed as directors but who took part in management was a judicial innovation, first fully articulated in *In re Lo-Line Electric Motors Ltd* [1988] Ch 477 by Sir Nicolas Browne-Wilkinson V-C."

33. Cases referring to two other species of intermeddler, a trustee de son tort and an executor de son tort, are, it seems to me, of more help to the Liquidators. In *Soar v Ashwell* [1893] 2 QB 390, a trustee de son tort case, a solicitor to a trust had invested money with which he had been entrusted by the trustees but himself retained half of the proceeds. The solicitor contended that a claim for an account was barred by lapse of time, but the Court of Appeal disagreed. Lord Esher MR said at 392:

> "The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or

> has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust."

In the course of his judgment, Bowen LJ referred at 396 to "the obvious view that a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends", while Kay LJ spoke at 405 of a constructive trust arising "where a stranger to the trust has assumed to act and has acted as a trustee" and concluded at 406:

> "I think that Ashwell [i.e. the solicitor] did assume to act and acted as trustee of the funds which he received, and that he has not duly discharged himself from the plaintiff's share of those funds, and must therefore be treated as an express trustee."

34. A passage from the then current edition of *Lewin on Trusts* which Lord Neuberger quoted with approval in *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, at paragraph 54, was to similar effect. It read:

> "If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee de son tort and he may be called to account by the beneficiaries for the money he has received under the colour of the trust. A trustee de son tort closely resembles an express trustee. The principle is that a person who assumes an office ought not to be in any better position than if he were what he pretends: he is accountable as if he had the authority which has been assumed."

Much the same wording is now to be found in paragraph 42-101 of the 20th. edition of *Lewin on Trusts*.

35. Two cases cited by Lord Collins in *Paycheck* in which there was reference to the position of an executor de son tort are also noteworthy. As Lord Collins noted in *Paycheck*, at paragraph 73, an executor de son tort is "a person who has not been lawfully appointed executor or administrator who by reason of his intrusion upon the affairs of the deceased is treated for some purposes as having assumed the executorship". In *Gibson v Barton* (1874-75) LR 10 QB 329, Blackburn J said at 338:

> "There are many instances in which a person who de facto exercises an office cannot defend himself by saying, when he is called upon to bear liability in consequence of his wrong, 'I am not rightfully in the office, there is another man who may turn me out.' An executor de son tort is an instance in which a man incurs all the liabilities of an executor as to third persons, and he is not permitted to say, 'I am not executor; there is another man who may take out probate.' The answer is, 'Your liability as to a third person rests upon your being executor de son tort; you have usurped the office and must bear the liabilities.'"

Likewise, in *Re Canadian Land Reclaiming and Colonizing Co (Coventry and Dixon's case)* (1880) 14 Ch D 660, Jessel MR said at 664-665 in a passage which was not affected by the reversal of his decision on appeal:

> "We are familiar in the law with a great number of cases in which a man who assumes a position cannot be allowed to deny in a Court of Justice that he really was entitled to occupy that position. The most familiar instance is that of executor de son tort."

36. I cannot see why principles similar to those seen in *Soar v Ashwell*, *Gibson v Barton* and *Re Canadian Land Reclaiming and Colonizing Co* should not also apply in relation to a person who assumes to act as a company director.

37. In the present case, Mr Crow advanced two principal objections to the Sheikh having incurred liability as an intermeddler. One was to the effect that liability for intermeddling can arise only in relation to property that the intermeddler has received and the Sheikh did not receive the 891,761 shares in JJW Inc. Another proceeded on the basis that liability for intermeddling arises where a person has assumed a role which would have carried with it the power that was purportedly exercised. Here, Mr Crow said, the opposite is the case, since, on the Judge's findings, the Sheikh executed the Share Transfer Forms as a director at a time when, as a result of its liquidation, the Company's directors no longer had any powers. The Sheikh cannot have assumed to act as a director, and become subject to fiduciary duties, by purporting to do something that a director had no power to do, Mr Crow argued.

38. So far as the first of these points is concerned, it is fair to say that the Courts have in a number of cases referred to a trustee de son tort being liable for property he has received. In *Pearce v Pearce* (1856) 22 Beav. 248, a Mrs Williams had agreed to become a trustee but had never in fact been duly appointed. She was nonetheless held liable after the trust fund had been lost. Sir John Romilly MR said at 250-251:

> "Mrs. Williams evidently accepted the trust, and, I regret also to say, I have come to the conclusion that her estate must be made liable, even upon her own statement of the case. She consents to become a trustee, though she resisted at first; she really knew nothing at all about the matter; she was an old lady and a widow, and it was evidently out of friendship to the Plaintiff that she consented to become a trustee. She was never regularly appointed trustee, but she acted as such, and may be said to have been in the nature of a trustee *de son tort*, if that expression may be borrowed from the case of an executor; and <u>in that character she can only be answerable for the monies she actually received</u>. But this money was actually received by her, it was transferred into her name, and it could not have been got out of her name without her consent" (emphasis added).

39. In *Lyell v Kennedy* (1889) 14 App Cas 437, a Mr Kennedy had managed property on behalf of its owner, and after her death he continued to receive rents and pay them into a separate ear-marked bank account. In the course of his judgment, the Earl of Selborne cited previous decisions and went on at 459-460:

> "The principle of those decisions, as stated by Turner L.J. in the latter case, was, that a person who had assumed to be a trustee 'could not be heard to say, for his own benefit, that he had no right to act as a trustee.' Mr. Lewin, in his learned and accurate treatise upon the Law of Trusts, thus puts it (7th ed. p. 191):
>
> > 'If a person, by mistake or otherwise, assume the character of trustee when it really does not belong to him, and so becomes a trustee de son tort, he may be called to account by the cestui que trust for the monies he received under colour of the trust'" (emphasis added).

40. One of the questions in *Jasmine Trustees Ltd v Wells & Hind* [2007] EWHC 38 (Ch), [2008] Ch 194 was whether individuals who had not been validly appointed as such were nevertheless "trustees of the settlement" within the meaning of section 69(1) of the Taxation of Chargeable Gains Act 1992. Mann J held that they were not. He said in paragraph 42 of his judgment:

> "It can be accepted that a trustee de son tort is a kind of constructive trustee - Millett LJ says as much in the paragraph preceding those cited by [counsel] [from *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, at 408-409]. Such a trustee does not really take the trust property in the consensual manner referred to by Millett LJ in his description of the first type, but insofar as the trustee de son tort has property which he holds in his own name he will be a trustee of that property for the ultimate beneficiaries. To that extent it can be accepted that a trustee de son tort of that kind 'really is a trustee'. However, the question in this case is not whether the de facto trustees are trustees; it is whether they should be treated as being trustees *of the settlement*. The status of a trustee de son tort is limited. He will be liable for breach of trust much as a properly appointed trustee would be but the doctrine is more about liabilities than anything else. The trustee de son tort will be obliged to hold the property for, and to account to, the beneficiaries, but on the other side of the coin will not have the powers of the trustee conferred by the settlement …. It would be contrary to principle to allow such a person to arrogate powers to himself by virtue of his 'intermeddling', even if that intermeddling is innocent" (emphasis added).

41. Further, the passage from *Lewin on Trusts* which, as mentioned in paragraph 34 above, Lord Neuberger quoted in *Williams v Central Bank of Nigeria* referred to a trustee de son tort being "called to account by the beneficiaries for the money he has received under the colour of the trust" (emphasis added).

42. However, the Courts were not in these cases concerned with intermeddling with company property. It is well-established that, in a corporate context, equitable principles are capable of being applied by analogy to trusts even though property is vested in the company rather than its directors. In *In re Lands Allotment Co* [1894] 1 Ch 616 ("*Lands Allotment*"), Lindley LJ said at 631:

> "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees, and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust, and are in respect of such moneys to be treated as trustees."

In a similar vein, Kay LJ said at 638:

> "Then comes the question, what was the position of the directors who made an improper and *ultrà vires* investment of that kind? Now, case after case has decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or quasi trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust."

43. Likewise, in *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 Buckley LJ said at 405:

> "A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust *(Re Lands Allotment Co* ([1894] 1 Ch 616 at 631, 638, [1891–94] All ER Rep 1032 at 1034, 1038), per Lindley and Kay LJJ)."

44. It is also, I think, worth referring to two cases concerned with liability as an executor de son tort: *New York Breweries Co Ltd v Attorney General* [1899] AC 62 ("*New York Breweries*") and *Inland Revenue Commissioners v Stype Investments (Jersey) Ltd* [1982] Ch 456 ("*Stype*").

45. In *New York Breweries*, individuals named as executors in the will of a testator domiciled in New York had been granted letters testamentary there. They neither obtained a grant of probate in this jurisdiction nor intended to do so, but nevertheless persuaded an English company in which the testator had had shares to transfer them into their names. The question was whether probate duty was payable, and the House of Lords, affirming the decision of the Court of Appeal, held that it was on the basis that the company had made itself an executor de son tort. The Earl of Halsbury LC said at 68-69:

> "Undoubtedly the persons who are concerned in this case, having the control and dominion over the property in question, did an act whereby the title to the property belonging to the deceased person became vested in somebody else, and they are not either 'executors' or 'administrators' in the sense in which those words are used in the Taxing Acts. Primâ facie therefore they are executors de son tort, and, primâ facie, as it appears to me, they have taken possession of and administered the property in respect of which this question arises."

At 71, the Earl of Halsbury LC said:

> "In what way could a person, dealing with this particular class of property, otherwise intermeddle with the estate? The appellants have done that which, as I say, has created a new title in somebody else. The peculiar character of the property is such that it does not admit of its being manually and physically handed over; but they have done a legal act, and by virtue of that legal act they have enabled it to be dealt with by somebody else, and made available by him for any purpose he desires."

46. *Stype* also concerned intangible property, albeit money rather than shares. The case related to the estate of Sir Charles Clore. When Sir Charles died, the defendant had contracted to sell land in England which it held as a nominee for Sir Charles. Following Sir Charles' death, the defendant completed the sale and directed the purchaser to remit the price to its bank account in Jersey. No capital transfer tax having been paid, the Inland Revenue brought proceedings against the defendant on the footing that it was liable for intermeddling with Sir Charles' English estate. The Court of Appeal held the claim to be well-founded. Giving the judgment of the Court, Templeman LJ said at 474:

> "[I]t seems to us that if a stranger so deals with proceeds of sale of English property belonging to a deceased in such manner as to submit the proceeds of sale to another jurisdiction and is unable to pay and account for the proceeds of sale to the English representatives when constituted in England, the stranger has intermeddled with the estate and constituted himself an executor de son tort, liable to pay capital transfer tax in England.
>
> … By procuring payment of the £20 million in Jersey, Stype Investments [i.e. the defendant] transferred the right to the £20 million from the personal representatives constituted in England to the personal representatives constituted in Jersey …. The act of transferring title from English personal representatives to Jersey personal representatives constituted an intermeddling with the English estate and constituted Stype Investments executor de son tort.
>
> … [J]ust as the intermeddling in the *New York Breweries* case transferred title from the English representatives when

> constituted to the American representatives already constituted, so in the present case Stype Investments transferred title from the English representatives when constituted to the Jersey representatives when constituted."

47. In all the circumstances, I do not think the fact that the Sheikh did not himself receive the 891,761 shares is an objection to the Liquidators' claim. Company property can, as it appears to me, be the subject of intermeddling without ever being in the hands of the intermeddler. In particular, causing title to such property to be transferred elsewhere can potentially amount to intermeddling regardless of whether the intermeddler receives the property.

48. Turning to the other contention mentioned in paragraph 37 above (that the Sheikh cannot have become subject to fiduciary duties by purporting to do something that a director had no power to do), it is true that, by the time the Share Transfer Forms were executed, the directors of the Company had as a result of the liquidation ceased to have any powers. If, therefore, the Sheikh had attributed the Share Transfer Forms to 2016, when they were in fact executed, it would have been apparent that the Sheikh was purporting to exercise a power he no longer had, and the Share Transfer Forms would not have justified the entry of JJW Guernsey in JJW Inc's register of members as the holder of the 891,761 shares. Instead, however, the Sheikh claimed that the Share Transfer Forms had been executed in 2010, before the powers of the Company's directors had come to an end, and it was doubtless on that basis that JJW Inc's registered agent, Maples Corporate Services (BVI) Limited, entered JJW Guernsey as the holder of the shares. The Sheikh was thus purporting to have exercised a power which a director of the Company would have had at the date which the Sheikh gave for the execution of the Share Transfer Forms. While, therefore, the Sheikh lacked any power to transfer the shares by 2016, he purported to have exercised powers of a director which existed when, according to the Sheikh, the Share Transfer Forms were executed. As was said by Mr Joseph Curl KC, who appeared for the Liquidators with Mr Jon Colclough, the Sheikh impersonated someone with authority to execute the Share Transfer Forms, namely, a pre-liquidation director. That being so, it strikes me as entirely consistent with equitable principles that, as regards the execution of the Share Transfer Forms, the Sheikh should be considered to have been subject to the fiduciary duties that he would have had if his powers as a director of the Company had not ceased. He claimed to have exercised such a power, and it does not therefore lie in his mouth to say that, the Share Transfer Forms having been executed later than he claimed, he was not subject to the fiduciary duties that accompanied such power.

49. I would add that it does not appear to me to be of any significance that, the Sheikh having in fact lacked the power to execute them, the Share Transfer Forms were, as the Judge said, "void". While they were not valid, they in fact facilitated the registration of the 891,761 shares in JJW Guernsey's name and, hence, the transfer of title from the Company to JJW Guernsey. The Share Transfer Forms had practical effect despite their lack of legal validity. The Judge specifically said in paragraph 454 of the Judgment that there could be "no doubt that the Sheikh caused the registration of the 891K Shares" and found in paragraph 456 that the Sheikh "did not act honestly, or in good faith, in [signing the Share Transfer Forms] and in causing the transfer of

the 891K Shares (or purported transfer) to JJW Guernsey on 8 March 2016, pursuant to the February 2016 Resolution".

50. Standing back, the law would, as it seems to me, be deficient if the Sheikh were not to have committed any wrong by causing title to the 891,761 shares to be transferred away from the Company through the execution of Share Transfer Forms which he had no right to execute. As it happens, the Sheikh was a director of the Company both in 2010, when the Share Transfer Forms were supposedly executed, and in 2016, when they were in truth executed. I should have thought, however, that a stranger who had never been a director of the Company should equally be deemed to have acted wrongfully if he had procured the transfer of shares in the Company by pretending to be a fiduciary (whether a director or a liquidator) with power to do so.

51. In the circumstances, I do not accept the first ground of appeal advanced by the Sheikh. Like the Judge, I consider that the Sheikh acted in breach of fiduciary duty in causing the 891,726 shares to be transferred into JJW Guernsey's name by executing the Share Transfer Forms.

The Compensation Issue

The Judge's reasoning

52. The Judge agreed with the Liquidators that the equitable compensation to be awarded should be assessed on a "substitutive" basis rather than (as the Sheikh had contended) a "reparative" one: see paragraphs 559 and 560 of the Judgment). That being so, it was not appropriate to take into account "counterfactuals … premised upon hypothetical intervening events" on which the Sheikh relied: paragraph 562. The loss to the Company was "the value of the 891K Shares that were (purportedly) transferred away to JJW Guernsey and subsequently dissipated" and "counterfactual arguments about whether or not the JJW Inc Shares would ever have been sold, and if so, at what value," were not relevant to the ascertainment of that loss: paragraph 563. In any event, in so far as the Sheikh sought to advance a case based on a counterfactual and/or an intervening act breaking the chain of causation, "the onus lies on [the Sheikh and other 'MBI Respondents'] to satisfy the court on balance that their case is correct", and the Judge was not so satisfied, she said in paragraph 567. "The Liquidators and their predecessors," the Judge said, "were under a duty to realise the JJW Inc Shares (see section 185(1)(a) IA 2003) and there is no proper evidential basis to conclude that they would not have discharged that duty if it had been open to them to do so". In response to a suggestion by the Sheikh that Ms Caulfield had not been called to give evidence because she would not have been able to say truthfully that she had tried or wanted to realise the 891,761 shares, the Judge said in paragraph 569:

> "It seems to me on the evidence that she was doing what she could to progress the Liquidation in the face of stonewalling from the Sheikh, that the steps she took to progress the Liquidation were reasonable and, in so far as it is necessary for me to do so, I find that had she been provided with accurate information she would have taken appropriate steps 'to take control' of the 891K Shares and to realise them for the benefit of the creditors."

53. The Judge considered that the 2016 Accounts represented "an accurate snapshot of the financial position of JJW Inc as at 31 December 2016" and "the best available evidence of the value of the loss to the Company" and were "sufficient to satisfy the burden that rests with the Liquidators to establish their loss": paragraph 572 of the Judgment. The Judge commented in paragraph 573:

> "[The MBI Respondents] have … adduced no evidence in support of the proposition that there would have been no market for the 891K Shares (or that they would have had no value, or a reduced value) had the Liquidators sought to realise them at or around that date [i.e. 31 December 2016] or that the directors of JJW Inc would have refused or delayed the registration of the transfer pursuant to the terms of the Articles of JJW Inc (a point raised in argument but not anywhere pleaded). If the MBI Respondents wished to seek to make out these defensive points at trial, the onus was on them to produce the necessary evidence. They have not done so."

The Judge concluded in paragraph 576:

> "Assessing the available evidence as at the date of this judgment and having regard to hindsight and the application of common sense, I consider that making an award of €67,123,403.36 (or the equivalent in pounds sterling) would provide appropriate equitable compensation for the misappropriation of the 891K Shares. Accordingly, I make that award against both the Sheikh and JJW Guernsey (Issue 28)."

54. The Judge explained that Mr Curl had invited the Court to "do the best it can with the evidence it has" and suggested that an account would be "a waste of time" because "the Sheikh is just going to stonewall us again": paragraphs 547 and 571 of the Judgment. The Judge agreed that "an order for an account is most unlikely to shed further light on the matter": paragraph 570. She also recorded that she "did not understand the MBI Respondents to suggest that the court should order an account, or that there was any additional evidence that they would wish to rely upon if the court were to make such an order": paragraph 575.

55. It can, I think, be seen from the Judgment that the Judge proceeded on the basis that the transfer of JJW Inc's assets and liabilities to JJW UK in 2017 rendered the 891,761 shares in JJW Inc valueless. Thus:

    i) The Judge noted that the Liquidators had relied on the "27 July 2017 Resolution pursuant to which all of JJW Inc's assets were transferred to JJW UK such that, as at the time of transfer, the JJW Inc Shares must have been worthless" and referred to the value of the shares having been "wholly dissipated": see paragraphs 557 and 558 of the Judgment;

    ii) The Judge spoke in paragraph 563 of the value of the shares having been "dissipated";

    iii) The Judge said in paragraph 574:

> "I bear in mind that the July 2017 Transfer appears (on the MBI Respondents' own evidence) to have had the effect of denuding the 891K Shares of all value and I note that the MBI Respondents have not sought to adduce any evidence to contradict that state of affairs, whether as at the date of the transfer or the date of judgment (which for these purposes is the relevant date)."

56. The Judge's comments reflected the way in which the Liquidators had put their case at trial. In paragraph 403 of their written closing submissions, the Liquidators had said:

> "In the instant case, the Liquidators do not seek to bring a concealed derivative claim and do not rely on losses to JJW Inc to ground any part of their claims. All the alleged wrongs were directed at the Company, not JJW Inc. While it is now common ground between the parties that JJW Inc has no assets (for … the MBI Respondents allege and the Liquidators accept that all JJW Inc's assets were transferred away from it in July 2017), there is no need for JJW Inc to have suffered any wrong under that restructuring for the Liquidators' claim to be made out."

Elsewhere in their closing written submissions, the Liquidators said that "the unchallenged evidence shows that restitution of the 891K Shares at the date of judgment will not satisfy the Company's loss" and that the 2017 restructuring "caused the value of JJW Inc to be reduced to nil": see paragraphs 445 and 446.

57. I have to say that I would not myself regard it as obvious that the transfer of JJW Inc's assets and liabilities to JJW UK made shares in JJW Inc worthless. The 2016 Accounts reported that, as at 31 December 2016, JJW Inc had liabilities totalling €775 million, including €595 million owing on "Owners' current account", but also that the company had assets amounting to €1,457 million and, hence, net assets of nearly €682 million. It is far from clear how, in the circumstances, all JJW Inc's assets could properly have been transferred away in return for no more than JJW UK assuming responsibility for JJW Inc's (much smaller) liabilities. Even assuming that such a transaction could have been sanctioned with the unanimous consent of JJW Inc's members, it cannot have received it since the Company held 129,000 shares and had no knowledge of the transfer. Nor has the Sheikh provided any satisfactory explanation (or, really, any explanation at all) for what was done. The Judge noted in the Judgment that Ernst & Young, Cairo, had said in a letter dated 30 June 2017 that by the end of 2016 they had been so concerned about JJW Inc's status that they had been unable to continue as the company's auditors in the absence of a restructuring, that minutes of a meeting of JJW Inc dated 17 July 2017 mention a person at the meeting declaring that JJW Inc was not in a position to pay its debt to MBI International Holdings and that "all possible avenues would need to be explored": see paragraphs 114 and 117. The Judge also referred to "contemporaneous evidence as to the commercial considerations which caused various inter-connected companies to re-structure their affairs at this time": paragraph 541. To my mind, however, there remain unanswered questions as to the propriety of the transfer of JJW Inc's assets, whether JJW Inc might have a valuable claim in respect of it and whether a shareholder could bring a derivative claim or seek relief on an unfair prejudice basis.

It is not inconceivable that the Company could even now put itself in a position to mount a valuable claim by having JJW Inc's register of members rectified in its favour.

58. Be all that as it may, however, I agree with Mr Crow that, for the purposes of this appeal, we must assume that the 891,761 shares became worthless with the transfer of JJW Inc's assets and liabilities to JJW UK in 2017. Not only is that the basis on which the Judge proceeded, but (a) her approach accorded with the Liquidators' case before her and (b) the Liquidators have not attempted to challenge that approach in the appeal.

The appellants' case in outline

59. Mr Crow submitted that there is no legally relevant difference between "substitutive" and "reparative" claims. Equity's overarching aim is to restore to the claimant what has been lost as a result of the breach and so the Court has to ask itself what would have happened but for the breach. Even supposing, however, that there is a material distinction between "substitutive" and "reparative" claims, the Liquidators' true claim must be for consequential loss (on the footing that, but for the Sheikh's breach of duty, Ms Caulfield would have realised the 891,761 shares before their value collapsed in 2017) and so "reparative". A "substitutive" award would have been for a payment in lieu of the shares themselves, but from 2017 onwards they were worthless and, since loss fell to be assessed as at the date of trial, there was no justification for any such award. Mr Crow further argued that the Judge did not explain why she considered that the Company's loss should be measured by reference to the value of the 891,761 shares in 2016-2017; that no finding that Ms Caulfield would have realised the shares before they lost their value was open to the Judge on the evidence; and that the Judge's interpretation of the 2016 Accounts was erroneous.

60. Mr James Fennemore, who appeared for JJW Guernsey, supported the Sheikh's submissions.

Analysis

61. As Lord Browne-Wilkinson explained in *Target Holdings Ltd v Redferns* [1996] 1 AC 421 ("*Target*"), at 434, the "basic right" of a beneficiary of a trust is "to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law". Where there has been a wrongful paying away of trust assets, Lord Browne-Wilkinson went on, "the liability of the trustee is to restore to the trust fund, often called 'the trust estate', what ought to have been there". The "basic rule", Lord Browne-Wilkinson said, is that the trustee "must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for the loss": "[i]f specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed". In a similar vein, in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 ("*AIB*"), at paragraph 116, Lord Reed referred to the "orthodox view that the equitable obligation arising from a breach of trust affecting the trust fund is to restore the fund to the position it would have been in but for the breach, and that the measure of compensation, whether it is payable into the trust fund or directly to a beneficiary, should be assessed on that basis".

62. There has been much debate as to whether, where trust property has been misapplied, a distinction is to be drawn between "substitutive" and "reparative" claims. A linked question is the extent, if any, to which the different bases on which Courts of equity would historically take accounts still matter. *Underhill and Hayton*, *"Law of Trusts and Trustees"*, 20th. ed., which is a proponent of the suggested distinction, explains the position in these terms in paragraph 91.7:

> "there are two types of compensatory claim which can lie against trustees: substitutive performance claims and reparation claims. These are mediated through proceedings for an account in different ways. In the case of a substitutive performance claim where the trustees have made an unauthorised distribution of trust property or used trust funds to purchase an unauthorised investment, the court will not permit the trustees to enter the distribution or expenditure into the accounts as an outgoing because it will not permit the trustees to say that they acted in breach of duty. Instead, they will be treated as though they have spent their own money and kept the trust assets intact. The accounts will be falsified to delete the unauthorised outgoing, and the trustees will be ordered to produce the relevant trust property *in specie* or pay a money substitute out of their own pockets. Reparation claims are brought into the scheme of the accounts in a different way. The loss claimed by the beneficiaries is translated into an accounting item by surcharging the trustees with the amount of the loss as if they had already received this amount for the beneficiaries. They must then pay this sum into the trust funds out of their own pockets."

In paragraph 91.11, the editors state:

> "Substitutive performance claims are claims for a money payment as a substitute for performance of the trustees' obligation to produce trust assets *in specie* when called upon to do so. Claims of this sort are apposite when trust property has been misapplied in an unauthorised transaction, and the amount claimed is the objective value of the property which the trustees should be able to produce."

63. This analysis chimes with views expressed by Lord Millett, notably in *Libertarian Investments Ltd v Hall* (2013) 17 ITELR 1 ("*Libertarian*"), a decision of the Hong Kong Court of Final Appeal. He said in paragraph 168:

> "Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either in specie or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable

> compensation; but it is not compensation for loss but restitutionary or restorative."

64. There are others who dispute the validity or usefulness of differentiation between "substitutive" and "reparative" claims. For example, *Burrows*, *"Remedies for Torts, Breach of Contract, and Equitable Wrongs"*, 4th. ed., at 517, argues that *Target* "should be applauded for (impliedly) rejecting older cases that may have supported the view that the accounting remedy can operate differently from the remedy of equitable compensation". In *"Four questions on fiduciaries"* (2018) 32(1) Tru LI 22, Dame Sarah Worthington comments at 42:

> "The focus should, it seems, be straightforwardly on the precise nature of the particular obligations in issue and their intended objectives. As it is, the language of equitable compensation and accounting lies like a cloak over so much of fiduciary law. It does not illuminate, explain or justify what goes on under its cover."

65. The divergence of view has an obvious significance in relation to whether a defendant can escape or reduce liability by invoking a counterfactual. Suppose, for example, that a trustee had misapplied £1,000 early in 2008. When sued for breach of trust, is it open to him to say that the £1,000 would otherwise have been invested in bank shares which would have lost much of their value in the financial crisis? Or must he return the £1,000 to the trust fund regardless of what would have happened had there been no misapplication?

66. No such issue arises in the present case, however. The appellants are not seeking to lessen their liability by reference to what *would have* happened if the 891,761 shares had not been misappropriated. They emphasise that the shares have *in fact* become worthless.

67. As *Underhill and Hayton* explains, a "substitutive" claim is one for "a money payment as a substitute for performance of the … obligation to produce trust assets *in specie*". Where, as here, the misapplied property is of no value, a "substitutive" approach will on the face of it yield no money substitute. No payment is needed to take the place of something of no worth. A "substitutive" approach could avail the Liquidators only if it were appropriate to assess the value of the 891,761 shares at a date before JJW Inc transferred its assets to JJW UK.

68. However, numerous authorities indicate that loss should be determined by reference to what has happened by the time of trial. Thus:

    i) In *Re Dawson* [1966] 2 NSWR 211, Street J said, "The obligation to restore to the estate the assets of which [the defaulting trustee] deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation";

    ii) In *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 ("*Canson*"), a decision of the Canadian Supreme Court, McLachlin J said at 555 that "the losses are to be assessed as at the time of trial, using the full benefit of

hindsight" and, at 556, that "[t]he plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight";

iii) In *Target*, Lord Browne-Wilkinson said at 439 that "[e]quitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach". At 437, Lord Browne-Wilkinson had explained:

> "But the fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach. I can see no justification for 'stopping the clock' immediately in some cases but not in others: to do so may, as in this case, lead to compensating the trust estate or the beneficiary for a loss which, on the facts known at trial, it has never suffered";

iv) In *Libertarian*, Ribeiro PJ said in paragraph 91 that "the loss is assessed at the time of judgment and the court is entitled to take into account any post-breach changes affecting the value of the lost trust property" and Lord Millett said in paragraph 168 that "[t]he amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight"; and

v) In *AIB*, Lord Toulson said in paragraph 135 that "[t]he measure of compensation should … normally be assessed at the date of trial, with the benefit of hindsight".

69. That last quotation includes the word "normally", and in *Libertarian* Lord Millett said in paragraph 171:

> "In an appropriate case the defendant will be charged, not merely with the value of the property at the date when it ought to have been acquired or at the date when the account is taken, but at its highest intermediate value. This is on the footing either that the defendant was a trustee with power to sell the property or that he was a fiduciary who ought to have kept his principal informed and sought his instructions."

That comment may possibly reflect an observation in a Canadian case, *McNeil v Fultz* (1906) 38 SCR 198, at 205, to the effect that, in the case of a trustee wrongfully withholding property, "loss must be calculated on the assumption that the securities would have been sold at the best price obtainable". Nicholas Stewart QC, sitting as a Deputy High Court Judge, relied on *McNeil v Fultz* in *Jaffray v Marshall* [1993] 1 WLR 1285, but that decision was disapproved in *Target*. Lord Browne-Wilkinson said of *Jaffray v Marshall* at 440:

> "In my judgment that case was wrongly decided not only because the wrong principle was applied but also because the judge awarded compensation by assessing the quantum on an assumption (viz. that the house in question would have been sold at a particular date) when he found as a fact that such sale would not have taken place even if there had been no breach of trust."

70. Mr Curl drew an analogy with damages awarded for conversion. In *BBMB Finance (Hong Kong) Ltd v EDA Holdings Ltd* [1990] 1 WLR, Lord Templeman, giving the judgment of the Privy Council, noted at 412 that "[t]he general rule is that a plaintiff whose property is irreversibly converted has vested in him a right to damages for conversion measured by the value of the property at the date of conversion". Mr Curl argued that it would be odd if compensation for a misappropriation of trust property were assessed on a less generous basis. However, focusing on the position at the date of trial will, of course, be less favourable to the *defaulting trustee* if the property has risen in value, not fallen, since the misappropriation, and, in any event, analogies with tort law are of very limited use. In *Canson*, McLachlin J expressed concern at 543 that "analogy with tort … overlooks the unique foundation and goals of equity".

71. In all the circumstances, it seems to me that a "substitutive" approach would not warrant the award of any compensation on the facts of this case. The question must rather be whether the Liquidators can sustain the Judge's decision on the basis that, if the 891,761 shares had not been misappropriated, they would have been sold at a time when they were still valuable.

72. It is worth, I think, referring in this context to *Thanakharn v Akai Holdings (No 2)* (2010) 13 HKCFAR 479, a decision of the Hong Kong Court of Final Appeal. In that case, certificates in shares in Akai Electric worth $50 million had been lodged with a bank by way of security for a loan in December 1998. By December 1999, when the loan was due for repayment, the value of the shares had fallen to some $32.9 million, and their value had dropped further by the time the bank sold them the following year for some $20.5 million. It having been held that the individual who had committed the claimant (Akai) to the transaction had had no authority to do so, Akai, which had owned the shares, was awarded $22.5 million, the excess over $20.5 million being accounted for by interest and fees (see paragraph 122). Lord Neuberger observed in paragraph 123 that this was "clearly the correct sum to have awarded Akai by way of common law damages", but he explained in paragraphs 124 and 125 that Akai claimed a greater sum on the footing that the bank became liable for knowing receipt in either December 1998 or December 1999 and that equitable compensation "should be assessed by the value of the Shares, as at either (i) when they were wrongfully received by the Bank, or (ii) when the Bank wrongfully refused to hand them back, namely by reference to their value in (i) December 1998 or (ii) December 1999, as either basis would produce a higher level of compensation than the assessment by reference to the proceeds of sale". Rejecting the contention, Lord Neuberger said:

> "153. In this case, it appears to me clear that equitable compensation should be assessed by reference to the value of the Shares at the date when they were sold by the Bank, even if the claim for knowing receipt arose some 18 months earlier. As [counsel for the Bank] pointed out, until the Shares were

> actually sold, it was always open to Akai to recover them from the Bank. Even more significantly, it seems to me clear that, if the Bank had not accepted the share certificates and retained them until selling the shares, Akai would have retained those shares until Akai Electric was placed into [administration] by the Japanese courts. The uncontested evidence very strongly suggests that this is so: Akai Electric was Akai's effective operating subsidiary; there was no history of the STC group transferring its assets, let alone its shareholdings in subsidiaries, out of its ultimate control; after the Bank returned the 5.5m Akai Electric shares to Akai, they were retained by Akai until they became valueless.
>
> 154. In those circumstances, it is clear on the balance of probabilities, indeed it is, in truth, clear beyond any real doubt, that, if the Bank had returned the share certificates to Akai, far from being sold earlier than the date upon which the Bank sold them, Akai would have kept the Shares until they had become worthless. The ironic fact is that Akai is substantially better off as a result of the Bank having received and sold the Shares. Of course, that does not mean that Akai has no right to equitable compensation, and the Bank is entitled to keep the proceeds of sale of the Shares: normal equitable principles entitle Akai to elect between receiving a sum equal to the proceeds of sale of the Shares or, unless it is impossible to obtain them, an equivalent number of Akai Electric shares.
>
> 155. Accordingly, even though I consider that, although Akai may well have a claim in knowing receipt, it takes matters no further."

73. The fact that Akai would have kept the shares until they had become worthless thus served to preclude Akai from claiming more than the proceeds of sale. Its right to a sum equal to those proceeds derived from its entitlement to elect for them rather than Akai Electric shares. It would seem that Akai could not have claimed any equitable compensation if the shares had lost their value without a sale having been effected.

74. In the present case, as I have mentioned in paragraph 52 above, the Judge found "in so far as it [was] necessary for [her] to do so" that "had [Ms Caulfield] been provided with accurate information she would have taken appropriate steps 'to take control' of the 891K Shares and to realise them for the benefit of the creditors". Mr Crow, however, maintained that it was inappropriate to assume that Ms Caulfield had been "provided with accurate information" and that, in any event, the Judge should have concluded that Ms Caulfield would not have realised any significant sum before the 891,761 shares lost their value in July 2017.

75. In arriving at her conclusion, the Judge referred in paragraph 568 of the Judgment to a letter which Ms Caulfield sent to the Sheikh on 16 September 2015. Ms Caulfield explained in that letter that her "fees as Liquidator remain outstanding and continue to accrue" and asked the Sheikh to remit $398,917.97 in that regard "to avoid [her] taking immediate steps to realise the Company's investments". Ms Caulfield also

spoke of the need for funds to meet a claim by David Britt and, potentially, other claims. So far as David Britt was concerned, Ms Caulfield said this:

> "I am now therefore obliged to take immediate steps to recover funds in order to pay David Britt's claim. Not doing this could be deemed to be a breach of my statutory duties and it is therefore imperative that I take action now. As such I am now inviting you to settle this claim to avoid me commencing the realisation of the Company's investments."

76. The Judge also referred in paragraph 568 of the Judgment to Ms Caulfield and her predecessor having been "faced with a campaign of stonewalling and misinformation from the Sheikh"; to requests for information about the assets and liabilities of the Company, including the JJW Inc shares, having been met with no, or unhelpful, responses; to the liquidation suffering from funding issues; and to the pursuit of information under the BVI statutory regime being unlikely to be fruitful.

77. The finding quoted in paragraph 74 above was subject to important limitations. The Judge did not make an unequivocal finding that, if the 891,761 shares had not been transferred to JJW Guernsey, they would have been sold or otherwise realised by July 2017, let alone as to the basis on which any such realisation would have been effected. She spoke of Ms Caulfield taking "appropriate steps" to realise the shares "had she been provided with accurate information". She did not express any conclusion as to whether (and, if so, how and when) such a realisation would in fact have been achieved or for what price.

78. Nor, in my view, would the Judge have been justified in making a finding that, but for their transfer, the shares would have been sold or otherwise realised by July 2017. My reasons include these:

    i) No witness gave evidence to that effect. Ms Caulfield herself was not called;

    ii) There appears to have been no evidence as to how such a sale would have been achieved. The shares represented a relatively small interest in a BVI company in respect of which Ms Caulfield had limited information and for which further information was not readily available. It is far from clear how Ms Caulfield would have gone about selling the shares. It is still less clear that she would have been in a position to do so by July 2017;

    iii) The likelihood of Ms Caulfield having sold the shares by July 2017 is further reduced by the funding problems that evidently existed;

    iv) The letter of 16 September 2015 does not assist the Liquidators. As I understand it, the Sheikh did not provide any funds in response to the letter, yet Ms Caulfield still did not take any steps to realise the shares; and

    v) The Company's other shares in JJW Inc (viz. the 129,000 it had acquired by January 2009) were not sold.

79. Of course, the difficulties which Ms Caulfield faced were to some extent, on the Judge's findings, attributable to "stonewalling", "misinformation" and failure to

cooperate on the part of the Sheikh. I do not think that matters, however. As I see it, the key question is whether Ms Caulfield would *in fact* have sold the shares by July 2017, not whether she would have done so if, contrary to the reality, the Sheikh had been co-operative. The Judge rejected "the existence (after Liquidation) under BVI law of … a free-standing duty of co-operation", "any continuing duty to disclose wrongdoing" and "any other general duty 'to disclose'": see paragraph 423 of the Judgment. In any case, the focus has to be on what would have happened if the Sheikh had not committed the single breach of duty which the Judge found proved.

80. In all the circumstances, it seems to me that the Liquidators have not established any loss. There is, in my view, no proper evidential basis for a finding that, if the 891,761 shares had not been transferred to JJW Guernsey, they would have been sold or otherwise realised by July 2017. To the contrary, the evidence indicates that the shares would not have been disposed of by the time JJW Inc transferred its assets to JJW UK. On that basis, the Liquidators would not have been any better off if the share transfer had never happened. They would have retained the shares, but they would still have become valueless.

81. I have considered whether any distinction is to be drawn between the Sheikh and JJW Guernsey in this context. I can see no reason to do so. While, as Mr Fennemore conceded, JJW Guernsey may have become a knowing recipient, there is no evident reason for it to have a liability to pay equitable compensation which exceeds that of the Sheikh.

82. In short, I would allow the appeals of both the Sheikh and JJW Guernsey on this ground.

The Lien Issue

The appellants' case in outline

83. The transactions by which the Company bought the 891,761 shares in JJW Inc from JJW Guernsey and JJAB in March 2009 provided for sums totalling €89,175,500 to be paid for them. No payment having in fact been made by the Company, the appellants contend that the shares were subject to unpaid vendors' liens in favour of the sellers. That being so, the appellants argue, the value of the Company's interest in the shares was the value of the shares *less* €89,175,500. The Judge, so it is said, was mistaken in deciding otherwise.

The contractual terms

84. The two transfer agreements in respect of the 891,761 shares were in equivalent terms. Clause 2 of that relating to the 324,205 shares transferred by JJAB provided as follows:

> "2. TRANSFER OF SHARES
>
> 2.1 The Seller [i.e. JJAB] hereby irrevocably transfers its legal and beneficial interests in the Company Shares [i.e. the 324,205 shares in JJW Inc] to the Buyer [i.e. the Company] free from Encumbrance in consideration

for €32,420,500.00 (the 'Consideration') to be paid on demand by the Buyer to the Seller in such way that is mutually agreed by the Buyer and the Seller.

2.2 Upon receipt of the Consideration by the Seller, completion of the transfer of the Company Shares pursuant to this Agreement shall take place immediately, when

2.2.1 the Seller shall deliver to the Buyer a share transfer [form] duly executed by the Seller in respect of the Company Shares in favour of the Buyer and procure that the Company shall register such transfers and issue and deliver to the Buyer a certificate representing the Company Shares in the name of the Buyer; and

2.2.2 the Seller shall, at the request of the Buyer, do and execute or procure to be done and executed all such acts, deeds, documents and things as may be reasonably necessary to give effect to this Agreement."

85. Clause 1.1 of each agreement stated that "Encumbrance" "includes any mortgage, charge, pledge, lien, hypothecation, security interest, trust arrangement, option or other third party interest whatsoever".

86. Clause 3.2 of each agreement provided for it to be governed by Guernsey law, but there was no suggestion that that law differed in a material respect from that of England and Wales.

The Judge's reasoning

87. Rejecting the argument that the 891,761 shares were subject to any unpaid vendor's lien, the Judge said in paragraph 488 of the Judgment:

> "In my judgment, the terms of the March 2009 Transfers, objectively construed, plainly exclude the existence of the lien for which the MBI Respondents contend. Clause 2.1 expressly provides that the transfers will take place 'free from Encumbrance'. Encumbrance is a defined term which 'includes any mortgage, charge, pledge, lien, hypothecation, security interest, trust arrangement, option or other third party interest whatsoever'. This is extremely broad and expressly includes reference to a lien. The terms of the March 2009 Transfers give rise to a clear and manifest inference that it was the intention of the parties to extinguish any possibility of a lien. That this is so is entirely consistent with the rationale and purpose of the March 2009 Transfers to which I have already referred. The existence of the lien would have prevented a sale of the 891K Shares by the Company in the IPO and use of the proceeds of

> sale to pay the consideration, thereby thwarting the purpose and rationale for those transfers."

Is the point open to the appellants?

88. The Liquidators argue that the appellants should not be allowed to contend for an unpaid vendor's lien. The point, they say, did not feature in the Sheikh's re-amended points of defence, was not included in the list of issues which was agreed between the parties for the trial and was not something on which the experts on BVI law were asked to comment. On top of that, very little was said about the subject in either the Sheikh's opening note for the trial or the Sheikh's closing submissions to the Judge.

89. On the other hand:

    i) The re-amended points of defence asserted that JJW Guernsey was "a secured creditor such that the Company had an equity to redeem that security" and "was a secured creditor entitled to be registered as the shareholder of JJW Inc" (see paragraphs 85(2)(i) and 89(2));

    ii) The agreed list of issues included as Issue 14(b), "did JJW Guernsey have security over … those shares [i.e. the 891,761 shares in JJW Inc which the Company had acquired from JJW Guernsey and JJAB]?";

    iii) The Sheikh's opening note for the trial stated, "in equity a vendor of property … has a lien on the property to secure the payment of the purchase price" (see paragraph 34);

    iv) The parties agreed a bundle of authorities for the trial which included authorities relevant only to whether there was an unpaid vendor's lien;

    v) The Sheikh's written closing submissions asserted that JJW Guernsey was entitled to be registered as beneficial owner of the 891,761 shares by virtue of, among other things, "the unpaid vendor's lien" and that "JJAB and JJW Guernsey would always have retained an equitable interest in the shares by virtue of the unpaid vendors' lien arising by operation of law" since "[e]ven where a vendor executes an outright conveyance of the legal estate and delivers the documents of title, he still retains an equitable title to secure the payment of unpaid purchase money" regardless of whether "the conveyance contains an express receipt for the purchase money" (see paragraphs 420 and 431);

    vi) In his oral closing submissions to the Judge, Mr Curl rejected the "suggest[ion] that there might be an unpaid vendor's lien";

    vii) In her oral closing submissions to the Judge, Ms Stanley developed the contention that there was an unpaid vendor's lien, citing *Barclays Bank plc v Estates & Commercial Ltd* [1997] 1 WLR 415 ("*Barclays*") as well as *Halsbury's Laws of England*;

    viii) The Judge addressed the question whether there was an unpaid vendor's lien in the Judgment;

ix) The Liquidators did not suggest to the Judge that she should not address that question, nor complain of her having done so; and

x) The Judge noted in paragraph 485 of the Judgment that "BVI law in this regard appears to be on all fours with English law".

90. In *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293, Tomlinson LJ considered that an argument put forward as a ground of appeal was "really unsustainable, because it is simply too late to complain of the course taken at trial". The case is cited as authority as follows in paragraph 16.0.1 of the White Book:

> "Complaints that a party was permitted to rely upon an unpleaded point at trial cannot be raised by way of appeal unless, at the trial, the complaining party requested the judge expressly to rule upon the point. Thus, if this is done and a ruling is made preventing departure from the pleading, the other party is obliged formally to seek permission to amend their pleading (*Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293)."

91. In all the circumstances, the appellants should, as it seems to me, be permitted to pursue the unpaid vendor's lien point. If the Liquidators wished to object that it had not been properly pleaded, it was incumbent on them to do so before the Judge and not to raise the issue for the first time in this Court. On top of that, the matter featured (albeit rather faintly) in the Sheikh's re-amended points of defence and opening note as well as in the Sheikh's written closing submissions and, in a more extended form, in the Sheikh's oral submissions in closing. The Liquidators thus had an opportunity to respond both to the point being raised and to its substance. It is hardly surprising, therefore, that the Judge addressed it in the Judgment.

Legal principles relating to unpaid vendors' liens

92. Millett LJ, with whom Waite and Thorpe LJJ agreed, summarised the law relating to when an unpaid vendor's lien will arise in these terms in *Barclays* at 419-420:

> "As soon as a binding contract for sale of land is entered into the vendor has a lien on the property for the purchase money and a right to remain in possession of the property until payment is made. The lien does not arise on completion but on exchange of contracts. It is discharged on completion to the extent that the purchase money is paid: *In re Birmingham, decd.; Savage v. Stannard* [1959] Ch. 523, cited with approval in *London and Cheshire Insurance Co. Ltd. v. Laplagrene Property Co. Ltd.* [1971] Ch. 499, 514. Even if the vendor executes an outright conveyance of the legal estate in favour of the purchaser and delivers the title deeds to him, he still retains an equitable lien on the property to secure the payment of any part of the purchase money which remains unpaid. The lien is not excluded by the fact that the conveyance contains an express receipt for the purchase money.

> The lien arises by operation of law and independently of the agreement between the parties. It does not depend in any way upon the parties' subjective intentions. It is excluded where its retention would be inconsistent with the provisions of the contract for sale or with the true nature of the transaction as disclosed by the documents. It is also excluded where, on completion, the vendor receives all that he bargained for: *Capital Finance Co. Ltd. v. Stokes* [1969] 1 Ch. 261 and *Congresbury Motors Ltd. v. Anglo-Belge Finance Co. Ltd.* [1971] Ch. 81."

"[T]he test", Millett LJ said at 420, "is an objective one": "[t]he question is: what intention is to be attributed to the parties from the transaction into which they have entered?" At 412, Millett LJ observed that "the intention of the parties is to be objectively ascertained from the documents they have executed and that what is required to exclude the lien is that there should be a clear and manifest inference that it was the parties' intention to exclude it".

93. In *Barclays*, a Mr Bensley had sold land to his son for £70,000, but, notwithstanding the fact that the conveyance contained a consideration and receipt clause, only £19,000 had been paid on completion. As a matter of law, the balance of £51,000 was payable on demand, but the expectation was that the land would be sold off in plots and that these sales would provide the son with a means of payment. Mr Bensley was held to have an unpaid vendor's lien. Millett LJ said at 424:

> "Mr. Bensley, as a vendor, retained the lien by operation of law unless there was something in the transaction itself which would lead to the necessary inference that the parties must objectively be taken to have excluded the lien. Mr. Bensley and his son almost certainly had no idea that equity would hold Mr. Bensley entitled to an unpaid vendor's lien. That, however, is irrelevant. In my view, therefore, the fact that the vendor expects the purchaser to sell the property in lots free from incumbrances is not enough to exclude the lien, though it may postpone it to the sub-purchasers' equitable interest."

At 425, Millett LJ said:

> "I then turn to the question of whether there is anything in the present case which would lead to the irresistible inference that Mr. Bensley and his son must be taken to have excluded the unpaid vendor's lien. In my judgment there is nothing. Mr. Bensley did not receive the whole of the purchase money on completion, nor did he receive all that he bargained for. He received £19,000 out of a minimum of £70,000 and received no other security or means of payment whatever. All that can be relied upon now is the fact that Mr. Bensley and his son both contemplated that the land would be developed, if possible, and sold in lots, and that, if so, then Mr. Bensley could expect to receive the balance of the purchase money and whatever profit was available out of the proceeds of the redevelopment.

> To my mind it follows that Mr. Bensley must be taken to have expected to be called upon to subordinate his unpaid vendor's lien to any mortgage which was needed for the redevelopment of the property, but that his consent would be required for such subordination when the time came, and that the transaction would not exclude the existence of the lien in the meantime."

94. In contrast, there had been held to be no unpaid vendor's lien in *In re Albert Life Assurance Company* (1870-71) LR 11 Eq 164 ("*Albert Life*") or *In re Brentwood Brick and Coal Company* (1876) 4 Ch D 562 ("*Brentwood Brick*"). In *Albert Life*, the Western Life Assurance Society ("the Society") had agreed to transfer its assets to the Albert Life Assurance Company ("Albert") in return for Albert taking on the liabilities of the Society. A liquidator of the Society contended for an unpaid vendor's lien on the basis that Albert had failed to perform its undertaking to indemnify the Society against liabilities, but Bacon V-C decided to the contrary. Bacon V-C said at 179-180:

> "If, then, the intention of the parties to this instrument be considered, it seems impossible to infer that, consistently with that intention, any such lien as the *Western Society* contends for could have been contemplated. The intention expressed in the agreement is, that 'an amalgamation of the *Western Society* and a transfer of its business and liabilities and assets to the *Albert Company*' should be effected. That is, as I read it, that the business and dealings of the amalgamated company shall, for the future, be carried on in the same manner and by the same means as those of each society had been theretofore carried on separately; that the assets of both should form a common stock, subject to all the existing liabilities and debts of both companies, and to all such as should thereafter be contracted by the *Albert Company*. To hold that there should be any distinction between any of the articles of which this common stock consisted would frustrate the very object of the arrangement - and it may, I think, be also properly observed that, if it had been so intended, nothing would have been more obvious and simple than to preserve and secure such distinction by declaring trusts to that effect - of which the document referred to contains no trace. Then the terms in which the transfer is made are as explicit as the intention is plain. They are, that 'in consideration of the transfer of the funds and property of the *Western Society* , the *Albert Company* shall pay and satisfy all claims and demands upon the said society when and as the same shall successively arise, and shall take upon itself all other the liabilities of every description of the said society.'
>
> It appears to me, therefore, clear, upon the principles I have adverted to, that the claim of the *Western Company* cannot be sustained; for it is impossible to infer from the nature of the transaction that it was the intention of the parties that any lien

> upon the assets transferred should exist; and, further, by the very terms of the contract, not only is such an inference excluded, but the true construction of the contract is, that the consideration for which the transfer was made was not the payment of any price, nor was it a condition of the transfer that the engagement of the *Albert Company* should be performed, but the consideration was simply and solely the agreement that the company should take upon itself the debts and engagements of the *Western Society*, and all the risk and loss which might attend the realisation of the assets transferred."

95. In *Brentwood Brick*, the appellant had sold its interest in a brickfield on the basis that the purchaser would pay £6,000 to be paid from 50% of "all sum or sums of money received or to be received by the [purchaser] on the sale of shares" and 50% of "all money by way of capital to be at any time borrowed by the [purchaser]". It was held that there was no unpaid vendor's lien. James LJ, with whom Brett JA agreed, said at 565:

> "the nature of the transaction excludes vendor's lien. This is not the case of a simple agreement to sell for £6000. No doubt the vendor got a higher price by agreeing to accept payment in the way he did, and taking his chance of capital being subscribed or capital being borrowed to an amount sufficient to pay him. He says in fact, 'Half of the first capital moneys that come in to the extent of £6000 is to be my purchase-money.' No day for payment was named: he agreed to receive his purchase-money if and when capital should come in. He got for his property a charge upon and a right to the capital of the company to the extent of £6000 when it came in. To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property."

Baggallay JA said at 565, "it is evident that the party selling did not intend to rely on the security of the estate but on the funds of the company".

96. Millett LJ said this about *Brentwood Brick* in *Barclays* at 422:

> "It is clear that the case would have gone the other way if the consideration had been £6,000 simpliciter, even though it was obvious to both parties that the company would have no means of paying the £6,000 unless it was able to borrow money or issue shares to that amount. The fact that the parties contemplated that the purchase price would be paid out of money raised by borrowing or issuing shares was neither here nor there. What was determinative was that the consideration expressed in the conveyance was not £6,000 simpliciter but £6,000 to be paid if and when the company borrowed or issued shares to that amount."

97. The Court of Appeal cited *Barclays* when holding that there was no unpaid vendor's lien in *George Wimpey Manchester Ltd v Valley & Vale Properties Ltd* [2012] EWCA Civ 233, [2012] 2 EGLR 113 ("*Wimpey*"). In that case, the respondent had agreed to sell its leasehold interest in a property to the freeholder. The Court of Appeal concluded that it did not have an unpaid vendor's lien. Arden LJ, with whom Black LJ and Sir John Chadwick agreed, said in paragraph 35 that "an unpaid vendor's lien is in this case excluded by the very nature of the transaction". She explained as follows:

> "39. In this case, the exclusion of the lien, in my judgment, stems from the fact that the intention which the parties have expressed is that merger should follow swiftly upon completion. The idea of enforcing a lien for the unpaid purchase price after completion is inconsistent with that agreement. The lien would give the vendor a beneficial interest in the property which, unless discharged, would prevent the merger taking place. Merger is an essential feature of the transaction.
>
> 40. In those circumstances, it is not correct to say … that the unpaid vendor's lien would only make any difference if there was a default on the part of the purchaser so that the lien became enforceable. The very existence of the lien is inconsistent with the parties' common intention of achieving a merger of the freehold and leasehold interests in the property on completion."

Analysis

98. The Judge gave two reasons for concluding that there was no unpaid vendor's lien. The first was that the terms of the 2009 share transfers were such as to exclude the existence of such a lien. I am not myself persuaded that that is correct. It is true that the transfers provided for the transfer of the shares "free from Encumbrance" and that the definition of "Encumbrance" included a reference to "lien". However, the definition concluded with the words "or other third party interest whatsoever", suggesting that the preceding words also related to "third party" interests, not to an interest of the transferor. Further, my own understanding is that a vendor who has sold land can have a lien for unpaid consideration even where the disposition was expressed to be made with "full title guarantee" and, hence, to be made on the basis of an implied covenant that the person making it is disposing of the property "free … from all charges and incumbrances (whether monetary or not), and … from all other rights exercisable by third parties": see section 3 of the Law of Property (Miscellaneous Provisions) Act 1994. I agree with the Appellants that such provisions are directed at undisclosed third party interests and do not serve to preclude liens in favour of unpaid vendors.

99. The other reason which the Judge gave for her conclusion was that an unpaid vendor's lien "would have prevented a sale of the 891K Shares by the Company in the IPO and use of the proceeds of sale to pay the consideration, thereby thwarting the purpose and rationale for those transfers". In that connection, the Judge had accepted in paragraph 466 of the Judgment that the 2009 transfers "were taking place against the

background of the IPO and that payment for the transferred shares was expected to be recovered in the context of the IPO". As the Judge had explained in paragraph 31, the IPO had been intended to form part of a restructuring involving both a public offering of shares in JJW Inc and a major bond issue by JJW Inc. In paragraph 479, the Judge found that "[t]he intention behind the transfers … was that the Company would generate profits from sale of the 891K Shares in the IPO, which profits it would then use to pay the consideration for the transfers". The Sheikh had himself said in his re-amended points of defence that the "entire rationale and purpose of the [2009 transfers] was to enable the Company to generate returns in the BVI from the IPO and to use those returns to pay the [consideration for the shares] to JJW Guernsey and [JJAB]".

100. *Barclays* shows that the key question is whether there is "a clear and manifest inference that it was the parties' intention to exclude [the unpaid vendor's lien]". *Barclays* indicates, too, that the fact that the vendor expects the purchaser to sell the property free from incumbrances is not on its own enough to justify the inference. It is also, however, apparent from the authorities that an unpaid vendor's lien can be excluded where it would be inconsistent with the object of the transaction. Thus, in *Albert Life* a lien would have "frustrate[d] the very object of the arrangement" by precluding a "common stock" and in *Wimpey* a lien would have been "inconsistent with the parties' common intention of achieving a merger of the freehold and leasehold interests … on completion". There is, moreover, a close analogy between the present case and *Brentwood Brick*. Millett LJ explained in *Barclays* that in *Brentwood Brick* "[t]he fact that the parties contemplated that the purchase price would be paid out of money raised by borrowing or issuing shares was neither here nor there" and that "[w]hat was determinative was that the consideration expressed in the conveyance was not £6,000 simpliciter but £6,000 to be paid if and when the company borrowed or issued shares to that amount". The position in the present case is comparable: not only is it apparent that the "entire rationale and purpose" of the 2009 transfers was to enable the Company to generate returns from share sales from which the purchase prices would be paid, but the consideration expressed in the transfers was not €32,420,500 or €56,755,000 (as the case may be) "simpliciter". The transfers provided for those sums to be paid "on demand … in such way that is mutually agreed by the Buyer and the Seller". It is fair to note that the transfers thus included reference to payment "on demand". Even so, it seems to me that, reading the transfers in their factual context, the fact that they spoke of payment "in such way that is mutually agreed" meant that the Company would be able to insist on payment being made from the proceeds of the IPO, in accordance with the transfers' "entire rationale and purpose". In the circumstances, the "clear and manifest" inference is, I think, that the parties *did* intend to exclude a lien which would at best complicate the intended sale of the shares through the IPO and that payment should be effected as "mutually agreed" from the proceeds of sale. The parties were not envisaging that JJW Guernsey and JJAB would subordinate liens on the sale of the shares, but that there would be no liens at all.

101. I therefore agree with the Judge that the 891,761 shares were not subject to an unpaid vendor's lien.

Overall conclusions

102. I agree with the Judge that the Sheikh committed a breach of fiduciary duty in causing the 891,761 shares to be transferred into JJW Guernsey's name by executing the Share Transfer Forms. I also agree with the Judge that the shares were not subject to an unpaid vendor's lien. Unlike the Judge, however, I do not consider the Liquidators to have proved any loss or, hence, that any award of compensation should be made. I would therefore allow both appeals and set aside paragraph 1 of the Judge's order, by which the Sheikh and JJW Guernsey were ordered to pay equitable compensation.

103. That does not mean that the Liquidators are not entitled to any of the relief they sought. The re-re-amended points of claim included claims for declarations to the effect that the Sheikh had acted in breach of fiduciary duty and that JJW Guernsey knowingly received property of the Company. As I have explained, the Sheikh did, in my view, act in breach of fiduciary duty, and JJW Guernsey did not dispute that, if that was so, it had knowingly received the Company's property. If the Liquidators wished us to grant declaratory relief to that effect, my provisional view is that it would be appropriate for us to do so.

Lord Justice Arnold:

104. I agree.

Lord Justice Snowden:

105. I also agree.