



1 February 2017

PRESS SUMMARY

Akers and others (Respondents) v Samba Financial Group (Appellant) [2017] UKSC 6
On appeal from [2014] EWCA Civ 1516

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Sumption, Lord Toulson, Lord Collins

BACKGROUND TO THE APPEAL

The appeal has proceeded on the basis of assumed facts which include the following. Mr Al-Sanea held on trust for Saad Investments Co Ltd (“SICL”) shares to the value of around US\$318m in various Saudi Arabian banks. SICL went into liquidation and Mr Akers is one of its Joint Official Liquidators. Six weeks after the liquidation, Mr Al-Sanea transferred the shares to Samba Financial Group (“Samba”) in discharge of personal liabilities he owed to Samba. It is assumed that (i) the trusts are governed by Cayman Islands law and (ii) the law of Saudi Arabia, where the shares are sited (the “lex situs”), does not recognise the institution of trust or a division between legal and proprietary interests. In these proceedings brought against Samba, SICL and its Joint Official Liquidators contend that the transfers of shares were and are void under s. 127 of the Insolvency Act 1986 as a “disposition of the company’s property ... made after the commencement of the winding up”.

The appeal arises out of Samba’s application to stay the proceedings on the basis that Saudi Arabia is a more appropriate forum than England, although this ground has evolved into a case that SICL’s claim had no prospect of success. Below, and when the matter first came before the Supreme Court, argument focused on whether an equitable proprietary interest can exist in an asset sited in a jurisdiction which knows no such concept. It appears to have been assumed that, if SICL had such an interest, it was disposed of by Mr Al-Sanea’s transfer of title in the shares to Samba. In the Court of Appeal, detailed submissions were made on the Convention on the Law applicable to Trusts and on their Recognition (“the Hague Convention”), scheduled to the Recognition of Trusts Act 1987. The Court of Appeal held that as Cayman law, unlike Saudi law, recognised the division of the legal and beneficial interests in shares, the trusts were arguably valid.

Following the oral hearing before it, the Supreme Court invited and received two sets of supplementary written submissions focusing more precisely on the ultimately critical question of whether there was any “disposition” within s. 127 even if (i) SICL had equitable interests in the shares and/or (ii) SICL only enjoyed personal rights in respect of the shares.

JUDGMENT

The Supreme Court allows Samba’s appeal. The transfer to Samba did not dispose of any rights belonging to SICL within the meaning of s. 127. Lord Mance gives the lead judgment, with which Lord Neuberger, Lord Sumption, Lord Collins and Lord Toulson agree. Lord Neuberger, Lord Sumption and Lord Collins also give separate concurring judgments.

REASONS FOR THE JUDGMENT

At common law, the nature of the interest intended to be created by a trust depends on the law governing the trust [17-18]. The lex situs may treat a disposition of shares to a third party as overriding

any interest of the beneficiary in the shares. That does not mean, however, that a common law trust cannot or will not exist in respect of those shares [19-21]. A trust may be created, exist and be enforced in respect of assets located in a jurisdiction such as Saudi Arabia, the law of which does not recognise trusts in any form [22-34]. Nothing in the Hague Convention alters this conclusion, unsurprisingly given that one of its aims was to provide for the recognition of trusts in jurisdictions which did not themselves know the institution [39-40]. Lord Collins (with whom Lord Sumption agrees [91]) considers that the case does not raise the interesting and difficult questions on the Hague Convention which were argued at each stage of the proceedings [93-102].

The definition of “property” in s. 436 of the Insolvency Act 1986 is plainly wide enough to embrace both equitable proprietary and purely personal interests [42-43; 60; 87]. The question of whether there was any “disposition” of these interests is more difficult. It can be argued that the concept extends to misappropriation of assets subject to a trust [45-50] or destruction or extinction of an equitable interest in such assets, but this is not in context the natural meaning [55]. Where a trust exists, the legal and beneficial interests are distinct, and what affects the former does not necessarily affect the latter. Where an asset is held on trust, the legal title remains capable of transfer to a third party, although this undoubted disposition may be in breach of trust. But the trust rights, including the right to have the legal title held and applied in accordance with the terms of the trust, remain. They are not disposed of and continue to be capable of enforcement. If the trust rights are overridden (or, as Lord Neuberger puts it, they are lost or disappear [62]), this is not attributable to the transfer of the legal title. It is because they were protected rights that were always limited and in certain circumstances capable of being overridden by virtue of a rule of law governing equitable rights, protecting in particular bona fide third party purchasers for value (equity’s “darling”) [51-52; 83; 89].

Section 127 enables companies in winding up to recover assets legally owned by them by treating the disposition as void (subject to the court’s power to validate the disposition). It is neither aimed at, nor apt to cover, the present situation [53; 56]. Since on the assumed facts Samba gave value in the form of the discharge of Mr Al-Sanea’s debt, its liability to restore the shares depends not on s. 127, but on whether it is accountable on the basis of notice [54; 56; 88].

Lord Neuberger considers that the word “disposition” may in some circumstances embrace destruction or extinction of an interest, notably where there has been a surrender of a lease, contractual rights or a life interest [66-69]. There may also be reasons of policy for concluding that s. 127 applies equally in respect of property held for a company by a third party as it does to property which it holds in its own name [70]. However, there are important differences between a surrender and the loss of a beneficial interest on a transfer of the legal estate to a bona fide purchaser for value without notice which would make it unfair for s. 127 to apply in the latter as well as former case so as to render the transaction void. Unlike a person taking a surrender of a lease or contractual rights from a company, a bona fide purchaser for value without notice would, by definition, be unaware of both the company (or at least that it had an equitable interest) and of the equitable interest [74-76].

Lord Sumption notes that the law relating to constructive trusts has achieved a high level of development. Its coherence would not be assisted by giving the term “disposition” a meaning inconsistent with basic principles governing the creation and recognition of equitable interests, founded on a very different balance of the relevant interests [90].

The parties have 21 days to make submissions on the consequences of these conclusions, in particular as to whether the proceedings should be stayed or struck out or remitted to the High Court with a view to possible amendment to enable them to proceed on an alternative basis [57; 92; 103].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>