**Hilary Term**
**[2017] UKSC 6**
*On appeal from: [2014] EWCA Civ 1516*

# JUDGMENT

# Akers and others (Respondents) *v* Samba Financial Group (Appellant)

**before**

**Lord Neuberger, President**
**Lord Mance**
**Lord Sumption**
**Lord Toulson**
**Lord Collins**

## JUDGMENT GIVEN ON

## 1 February 2017

**Heard on 27 and 28 April 2016**

*Appellant*
Mark Hapgood QC
Lord Pannick QC
Brian Green QC
Alan Roxburgh
(Instructed by Latham & Watkins (London) LLP)

*Respondents*
Mark Howard QC
David Brownbill QC
Adam Cloherty

(Instructed by Morrison and Foerster (UK) LLP)

**LORD MANCE: (with whom Lord Neuberger, Lord Sumption, Lord Collins and Lord Toulson agree)**

1. This is an appeal from an order of the Court of Appeal (Longmore, Kitchin and Vos LJJ) dated 4 December 2014, which set aside an order of the Chancellor dated 28 February 2014 staying the present proceedings. The points raised are novel and difficult, and the focus of submissions has shifted at each instance.

2. The proceedings are brought by a Cayman Islands company, Saad Investments Co Ltd, in liquidation, ("SICL") and its Joint Official Liquidators ("the Liquidators"), appointed as such in winding up proceedings commenced in the Cayman Islands on 30 July 2009. The English Companies Court has recognised the Cayman Islands winding up proceedings as a foreign main insolvency proceeding by orders under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030). The proceedings are against Samba Financial Group ("Samba"), which was served as of right within the jurisdiction on 19 August 2013, but which then applied for the proceedings to be stayed. The ground then given was that "there exists another forum which is clearly and distinctly more appropriate" than England. In the course of the appeals leading to the Supreme Court, the ground has effectively transmuted into a case that SICL's claim has no prospect of success, for a reason or reasons which will appear. The parties have argued the appeal, and the Supreme Court will address it, on that basis.

3. Before the Supreme Court many of the issues which required attention below are no longer relevant. The appeal can as a result be approached on the basis of assumed facts and matters which can be shortly stated. They include the following.

4. Mr Al-Sanea, a Saudi Arabian citizen and resident closely involved with SICL, was the legal owner of shares, valued at around US$318m, in five Saudi Arabian banks, one of them Samba itself. He was registered as their owner in the Saudi Arabian Securities Depositary Centre. SICL claims that Mr Al-Sanea had agreed to hold these Saudi Arabian shares at all material times on trust for SICL. The trusts arose allegedly as a result of six transactions. In the first transaction in 2002, Mr Al-Sanea by share sale agreement agreed to transfer to SICL the "beneficial ownership" of the relevant shares, but to continue to hold the legal title "in order to comply with legal requirements in Saudi Arabia". In a second transaction in 2003, Mr Al-Sanea agreed to hold "legal ownership of [the relevant] shares as nominee for SICL in order to comply with the legal requirements in Saudi Arabia". In the remaining four transactions, in respectively 2006, 2007 and on two

occasions in 2008, Mr Al-Sanea made declarations of trust for SICL in respect of the relevant shares.

5. It is now common ground, for the purposes of this appeal, that all six transactions by which Mr Al-Sanea purported to constitute himself a trustee for SICL can be treated as subject to Cayman Islands law. It is also common ground that the law of Saudi Arabia, where the shares are sited, does not recognise the institution of trust or a division between legal and equitable proprietary interests, although it does recognise a different institution, amaana, the precise implications of which have not been explored in evidence.

6. On 16 September 2009, Mr Al-Sanea transferred all the Saudi Arabian shares to Samba, purporting thereby to discharge personal liabilities which he had towards Samba.

7. The present proceedings are brought by SICL and the Liquidators against Samba in reliance on section 127 of the Insolvency Act 1986, which provides:

> "Avoidance of property dispositions, etc.
>
> In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void. …"

By section 436 of the 1986 Act the concept of "property" is defined in wide terms:

> "'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property; …"

8. In the courts below, and when the matter first came before the Supreme Court, the critical issue was identified as being whether SICL had equitable proprietary interests in the shares in respect of which Mr Al-Sanea had purportedly constituted himself trustee. It appears to have been assumed that, if SICL had such interests, then they were disposed of by Mr Al-Sanea's transfer of title in the shares to Samba. Samba's submission was that SICL could have no such equitable

proprietary interests, since the law of Saudi Arabia, the lex situs of the shares, does not recognise purely equitable proprietary interests.

9. Following the oral hearing before it, the Supreme Court invited and received two sets of supplementary written submissions focusing more precisely on the questions (a) whether there was any "disposition" within section 127, even if SICL had equitable proprietary interests in the shares, and (b) why, if there was, it could not also be said that there was such a disposition, even if SICL only enjoyed personal rights in respect of the shares.

10. At all instances of this case, detailed submissions have been addressed on the Convention on the Law Applicable to Trusts and on their Recognition, scheduled to the Recognition of Trusts Act 1987. These submissions focused, before the Chancellor, on article 15 and, before the Court of Appeal and Supreme Court, on both articles 4 and 15 of that Convention. The 1987 Act states in section 1(1) that "The provisions of the Convention set out in the Schedule … shall have the force of law in the United Kingdom". The Convention as scheduled contains the following provisions:

> "CHAPTER I - SCOPE
>
> Article 1
>
> This Convention specifies the law applicable to trusts and governs their recognition.
>
> Article 2
>
> For the purposes of this Convention, the term 'trust' refers to the legal relationship created - inter vivos or on death -by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.
>
> A trust has the following characteristics -
>
> (a) the assets constitute a separate fund and are not a part of the trustee's own estate;

(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Article 3

The Convention applies only to trusts created voluntarily and evidenced in writing.

Article 4

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

Article 5

The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved.

CHAPTER II - APPLICABLE LAW

…

CHAPTER III - RECOGNITION

Article 11

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust.

Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

In so far as the law applicable to the trust requires or provides, such recognition shall imply in particular -

(a) that personal creditors of the trustee shall have no recourse against the trust assets;

(b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;

(c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;

(d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

Article 12

Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the state where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.

Article 14

The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts.

## CHAPTER IV - GENERAL CLAUSES

Article 15

The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters -

(a) the protection of minors and incapable parties;

(b) the personal and proprietary effects of marriage;

(c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;

(d) the transfer of title to property and security interests in property;

(e) the protection of creditors in matters of insolvency;

(f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

Article 16

The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws.

Article 17

In the Convention the word 'law' means the rules of law in force in a state other than its rules of conflict of laws.

Article 18

The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy."

11. In the Court of Appeal, the first issue under article 4 was whether this article excludes the application of the Convention to the trusts created or declared by Mr Al-Sanea, bearing in mind that Saudi Arabian law does not recognise any division of legal and beneficial interests. Secondly, assuming the Convention to apply, SICL relied on its provisions regarding applicable law in Chapter II in submitting that the trusts were governed by Cayman Islands law. That is an issue that has, for present purposes, disappeared, since the present appeal proceeds on the basis that the transactions creating or declaring the trusts were subject to Cayman Islands law. Thirdly, assuming the Convention otherwise to apply, Samba argued in the courts below that the effect of article 15(d) was to remit the question whether, under the trusts, SICL acquired any equitable proprietary interest in the shares to Saudi Arabian law, being, it submits, the lex situs designated by English common law as the law governing questions of title. Samba succeeded on this point before the Chancellor (para 63), but lost before the Court of Appeal on the basis that there were triable issues whether under Saudi Arabian law the arrangements constituted by the six transactions were valid and whether any rule precluding the separation of legal and equitable title or precluding foreigners from owning Saudi Arabian property was mandatory, in the sense that it could not be derogated from within the meaning of that term in article 15.

12. The first issue, whether or not the Convention applies to the trusts, focuses on the exclusion introduced by article 4. SICL submits that the concept of "preliminary issues relating to the validity ... of other acts by virtue of which assets

are transferred to the trustee" goes no further than to exclude issues about the alienability, or transferability, of the assets to the trustee. It submits that article 4 leaves all further issues concerning the capacity of the trustee to declare a trust in respect of the shares or to create a beneficial interest in the shares under such a declaration to be governed under the Convention by the governing law of the trust, ie for present purposes, Cayman Islands law. Samba on the other hand submits, drawing on passages in the travaux préparatoires, that all these issues are excluded from the Convention by article 4, and remitted accordingly to the common law, under which it submits Saudi Arabian law, as the lex situs of the shares, governs them.

13. On this issue, the Court of Appeal accepted SICL's case. It held (para 55) that:

> "Provided that the property that is made the subject of a trust can be alienated at all under the lex situs, questions as to the validity and effect of placing such assets in trust, even though the assets are shares in a civil law jurisdiction, can be determined by the governing law of the trust. To put the matter in the context of this case, the declarations of trust will not be dividing the equitable and legal interests in the shares under Saudi Arabian law. That is not possible. But the declarations of trust may give SICL rights under the trust in respect of those shares that will have to be determined by the governing law of the trust, taking into account that under Saudi Arabian law a division of equitable and legal interests is not possible. All these matters will have to be worked out at the next stage of this litigation when the court comes to consider the effect on the rights granted by the declarations of trust of the transfer to Samba which took effect under Saudi Arabian law."

On the present appeal, Samba criticises this passage as obscure, and submits that, in so far as it suggests that an equitable proprietary interest can exist in an asset sited in a jurisdiction which knows no such concept, it is wrong.

14. In the light of the further and more broadly ranging submissions which the Supreme Court has now received, I doubt if it matters for present purposes either whether the Convention applies or even whether SICL's interests in relation to the shares can properly be described as proprietary. The limited focus in the courts below, on the issue whether the trusts gave SICL equitable proprietary interests in the shares, is largely subsumed in a more general question whether, whatever the nature of SICL's interests under the trusts, there was any disposition of property within the meaning of section 127.

15. As to what constitutes "property", this is always "heavily dependent on context … - something can be 'proprietary' in one sense while also being non-proprietary in another sense": M Conaglen, *Thinking about proprietary remedies for breach of confidence* (2008) Intellectual Property Quarterly 82, 89, referring to R Nolan, *Equitable Property* (2006) 122 LQR 232, 256-257. As the Chancellor noted (para 62), there is a school of thought (which can be dated to FW Maitland, *Equity - a Course of Lectures* (1936)) which analyses the equitable interests created by a common law trust not as proprietary, but as personal or "obligational", even as against third parties. The issue "whether trusts are properly seen as part of the law of property or as an aspect of the law of obligations" is described by Swadling in Burrows, *English Private Law* (3rd ed) (2013) para 4.140 as a "difficult question"; see also Burrows, *The Law of Restitution,* (3rd ed) (2011), pp 191-193, Nolan, *Equitable Property* (2006) 122 LQR 232. Supporters of a personal analysis include B McFarlane, *The Structure of Property Law* (2008); see also Watt, *The Proprietary Effect of a Chattel Lease* (2003) Conveyancer and Property Lawyer 61. A recent discussion of the pros and cons of each analysis appears by P Jaffey in *Explaining the Trust* (2015) 131 LQR 377. Jaffey concludes that, although a trust involves personal rights against the trustee, only a proprietary analysis explains satisfactorily those aspects which concern the beneficiary's position vis-à-vis third parties, such as the trustee's creditors and recipients of unauthorised transfers of trust property.

16. As before the Chancellor, so before the Supreme Court, the parties were content to proceed on the basis of the "conventional" analysis that a trust creates a proprietary interest, at least to the extent that such an interest is capable of existing and being recognised in the relevant asset. In this judgment, I am also content, without expressing any view about the appropriate analysis, to proceed on the same basis.

17. At common law, the nature of the interest intended to be created by a trust depends on the law governing the trust. This law therefore determines whether the intention is to give a beneficiary an equitable proprietary interest in an asset held on trust or a mere right against the trustee to perform whatever functions the trust imposes upon him with regard to the use and disposal of foreign shares and income derived from them: see Dicey, Morris & Collins, *The Conflict of Laws* (15th ed) (2012), vol 2, para 22-048, citing *Archer-Shee v Garland* [1931] AC 212.

18. Where the intention is to create an equitable proprietary interest, then the common law position is as stated in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 705F, per Lord Browne-Wilkinson:

> "Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary

> interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice."

The initial inquiry is therefore whether an equity subsists, which it will prima facie do at common law, so long as the relevant property (original or substitute) does not pass into the hands of a transferee for value of the legal interest without notice of the equity. But a further issue may arise under the law of the situs of the relevant property.

19. The situs or location of shares and of any equitable interest in them is in the jurisdiction where the company is incorporated or the shares are registered (which is presently unimportant, since in this case they coincide in Saudi Arabia): *Dicey*, op cit paras 22-044 and 22-048, Underhill and Hayton, *Law of Trusts and Trustees* (19th ed) para 100.128, both citing *In re Berchtold* [1923] 1 Ch 192, *Philipson-Stow v Inland Revenue Comrs* [1961] AC 727, 762, per Lord Denning.

20. It is established by Court of Appeal authority (and was not challenged on this appeal) that, where under the lex situs of the relevant trust property the effect of a transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise subsist, that effect should be recognised as giving the transferee a defence to any claim by the beneficiary, whether proprietary or simply restitutionary: *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387. In that case, bona fide chargees for value of shares situated in New York and held on trust for Macmillan were thus able, by application of New York law, to take the shares free of Macmillan's prior equitable interest of which the chargees had had no notice. As will appear, I do not consider that any different position would result under the Convention.

21. That does not mean that a common law trust cannot or will not exist in respect of shares, simply because the lex situs may treat a disposition of the shares to a third party as overriding any interest of the beneficiary in the shares. A trust existed in respect of the shares in issue in *Macmillan v Bishopsgate* until they were disposed of under the lex situs by transfer to bona fide purchasers for value without notice. But a common law trust can also exist in respect of shares, such as the Saudi Arabian shares presently in issue, even though Saudi Arabian law does not recognise equitable proprietary interests at all and may not (though this has not been investigated) give any effect at all to a common law trust.

22. A common law court concerned with Cayman Islands trusts in respect of Saudi Arabian shares will give them their intended effect to the greatest extent possible, having regard to the overriding effect of any disposition under their lex situs. This is so both at common law and under the Convention. Thus, as between the immediate parties to the present trusts, Mr Al-Sanea and SICL, Mr Al-Sanea cannot deny the validity or effect of the trusts, or assert a right to deal with assets subject to a trust or their proceeds as his own, simply because Saudi Arabian law does not recognise the trusts as giving rise to the separate equitable proprietary interest that would exist if the shares were situated in, say, the United Kingdom or Cayman Islands. If Mr Al-Sanea were to be the subject of bankruptcy proceedings or a receivership in the United Kingdom or Cayman Islands, it is equally clear that his creditors could not claim that the Saudi Arabian shares formed part of his estate in bankruptcy.

23. The Supreme Court was referred to *Attorney General v Jewish Colonization Association* [1901] 1 QB 123 and *Marlborough (Duke) v Attorney General* [1945] 1 Ch 78. In these cases the issue was whether foreign shares held on trust were taxable as on a succession, in the first case on the death of the settlor and the termination of his life interest, and in the second case on the death of the beneficiary of the trust. This issue turned on the application of general words in section 2 of the Succession Duty Act 1853: "every past, or future disposition of property … shall be deemed to confer … 'a succession'". The courts held these general words to be limited to property held on trust under an English law trust, but applied them even though the property consisted of foreign shares. In the former case, a contrary argument raised by the taxpayer was that, under the Austrian law of the domicile of settlor (which may also have been the situs of some or all of the shares), "an Austrian father cannot divest himself of property so as to impair the rights of his children to 'legitim,' and any alienation at any time having that effect may on the death of the father be set aside" (p 133). It was argued that Austrian law must govern accordingly. Both AL Smith MR and Collins LJ (pp 133 and 137) noted that, if such an event had occurred, then to that extent the settlement might have been ineffective. But, in circumstances where it had not occurred, they held the trust to be an effective English law trust giving rise to a taxable succession on the settlor's death, while recognising that the actual implementation of the trust in respect of foreign assets might in some circumstances be affected by foreign law. While these are cases from a different area of the law, their recognition of English law trusts in respect of foreign shares, subject only to any possible qualifications on their implementation arising under foreign law, is generally consistent with the analysis which I have indicated in the preceding paragraphs.

24. The validity and enforceability of English law trusts in respect of foreign assets has also been considered in an instructive series of English authorities. First, the English courts have regularly stated their willingness to enforce in personam

trusts in respect of property abroad. As the Earl of Selborne LC said in *Ewing v Orr Ewing* (1883) LR 9 App Cas 34, 40:

> "The Courts of Equity in England are, and have always been, courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries: *Penn v Baltimore (Lord)* (1750) 1 Ves Sen 444."

25. Second, they have exercised such jurisdiction, applying the principles of English law to enforce contracts and trusts relating to foreign property, even though the lex situs did not recognise such principles. Thus, in *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502, the Court of Appeal held that the equitable rule against clogging the equity of redemption of a mortgage applied to a contract governed by English law and would be enforced against a contracting party as regards land abroad in a state where the equity of redemption may not be recognised. Cozens-Hardy MR stated (pp 513-514):

> "For centuries the Court of Chancery has, by virtue of its jurisdiction in personam, applied against parties to a contract or trust relating to foreign land the principles of English law, although the lex situs did not recognize such principles."

He cited in support Lord Cottenham's words in *Ex p Pollard* Mont & Ch 250:

> "… If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities."

He continued:

> "To take a simple case, if A by an English contract agreed to give a mortgage to secure an English debt upon land in a foreign country, the law of which country does not recognize the existence of what we call an equity of redemption, which was the case of our common law, and if a mortgage was given and duly perfected according to the lex situs, I feel no doubt that our courts would restrain the mortgagee from exercising the rights given by the foreign law and would treat the transaction as a mortgage in the sense in which that word is used by us. In doing this our courts would not in any way interfere with the lex situs, but would by injunction, and if necessary by process of contempt, restrain the mortgagee from asserting those rights. Similar observations would apply to a trustee, if the lex situs does not recognize trusts."

26. Thirdly, the situation envisaged by the last sentence of this last quotation is directly covered by Court of Appeal authority in *Lightning v Lightning Electrical Contractors Ltd* (1998) 23(1) Tru LI 35. It concerned a claim by Mr Lightning to be the beneficiary under a resulting trust in respect of land in Scotland, bought by an English company to which he had advanced the purchase price. Scots law, the lex situs of the land, did not recognise any equitable interest. The company having gone into receivership, Mr Lightning obtained a declaration in English proceedings that the property or its proceeds of sale were held on trust for him.

27. Peter Gibson LJ, giving the lead judgment, applied the Earl of Selborne's words in *Ewing* and endorsed the statement by Parker J in *Deschamps v Miller* [1908] 1 Ch 856, 863, that the court would act where there was "some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in a view of a Court of Equity in this country, would be unconscionable" and that whether it would do so did not depend "on the law of the locus of the immovable property".

28. Peter Gibson LJ also recognised that the lex situs can, under the principle recognised in *Macmillan v Bishopsgate*, have a significance in the case of a third party transfer. He said, at p 38, that the English court had

> "not unnaturally regarded English law as applicable to the relationship between the parties before it in the absence of any event governed by the lex situs destructive of the equitable interest being asserted."

The English court would thus "accept jurisdiction and apply English law as the applicable law, even though the suit relates to foreign land", but:

> "In contrast if the equity which is asserted does not exist between the parties to the English litigation, for example where there has been a transfer of the property to a third party with notice of an equity but by the lex situs governing the transfer, the transfer extinguished the plaintiff's equity, the English court could not then give relief against the third party even though he is within the jurisdiction."

In *Lightning* itself, as Peter Gibson LJ pointed out:

> "No event governed by Scottish law [had] occurred whereby any equity arising under English law was destroyed."

29. Henry and Millett LJJ agreed, the latter putting the position forcefully as follows, at p 40:

> "If A provides money to B, both being resident in England, to purchase landed property in his own name but for and on A's behalf, and B does so, the consequences of that transaction are governed by English law. It would be absurd if they were governed by the law of the place where the property in question happened to be located.
>
> Such a rule would lead to bizarre results if, for example, A's instructions were to buy properties in more than one jurisdiction, for the consequences of the same arrangement might then be different in relation to the different properties acquired. It would also lead to bizarre results if A left it to B's discretion to choose the property to be acquired, since that would give B the unilateral power to decide on the legal consequences of the transaction which he had entered into with A."

30. Fourthly, all these authorities were recently and instructively examined by Roth J in *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch). The case concerned an agreement by Midland to sell to Luxe shares in 20 companies, 17 of which were incorporated in Russia or the Ukraine, with the lex situs of the shares in them being also there. Midland defaulted, sold the shares in the

Russian and Ukrainian companies elsewhere and, when sued by Luxe, argued that, since Russian and Ukrainian law did not recognise the concept of a beneficial interest at all, and since "questions of ownership and therefore proprietary interests in shares are governed by the lex situs of the companies", it followed that "whatever might have been the position if these had been shares in English companies, there were no beneficial interests in the shares which could pass to Luxe" under the share sale agreement (para 30).

31. Addressing this argument, Roth J noted that the "sort of trust, and thus beneficial interest" which arises on the sale of land or of shares in private companies, "arises only because the agreement is specifically enforceable" and is "In a sense, therefore, … the corollary of the remedy of specific performance" and "is not a full trust in the classic sense" (para 31). He continued, citing *Lake v Bayliss* [1974] 1 WLR 1073:

> "32. It is by reason of this trusteeship that the vendor who breaks his contract of sale by reselling to someone else has been held to be accountable to the first intended purchaser for the proceeds of sale."

32. Roth J then engaged in the following analysis, which is worthwhile quoting in extenso:

> "35. Is the application of these principles precluded by the fact that the property is held through subsidiaries in a country the law of which does not recognise the concept of a lesser proprietary interest or that it does not recognise a beneficial interest at all? The fact that Midland held the shares through subsidiaries does not in itself preclude the sale and purchase agreement from being specifically enforceable, as Midland for present purposes accepts. The obligation to be enforced would be that Midland must procure that the shares are transferred. I do not see that this in itself would prevent the qualified trust relationship from arising.
>
> 36. Does the applicability of the lex situs to questions of ownership alter the position *as between the contracting parties*? It is trite but nonetheless important to recall that equity acts in personam. The parties here have chosen to govern the relationship as between themselves according to English law. Unless precluded by authority, it seems to me that as a matter of principle where the parties have expressly chosen English

> law and the exclusive jurisdiction of the English court, they have voluntarily subjected themselves to the English system of remedies. In my judgment, it is at the very least well arguable, and if necessary I would hold, that this includes the 'qualified trusteeship' that applies as the corollary in such a case to the availability of specific performance, unless that gave rise to a situation that was directly contrary to the lex situs in the sense of interfering with the operation of the local law."

33. After considering *British South Africa Co v De Beers Consolidated Mines Ltd* and *Lightning v Lightning Electrical Contractors Ltd*, Roth J continued:

> "41. I do not consider that the reasoning in *Lightning* is confined to the particular case of a resulting trust. On the contrary, it seems to me of general application. And the observation made by Millett LJ resonates in the present case, since three of the 20 companies of which Midland sold its shareholding were Guernsey or Irish companies, for which as I apprehend the lex situs recognises a beneficial interest. As it happens, those companies are of negligible value, but that obviously cannot affect the principle. If Midland's analysis were correct, the English court would find that Luxe had acquired as against Midland a beneficial interest in those shares but not in the shares of the other companies incorporated under a different system of law, and that it would thus have a very limited proprietary claim.
>
> 42. Moreover, it is accepted by Luxe that any beneficial interest in the shares sold to Troika was destroyed or terminated by that sale. Its claim is to the proceeds in Midland's hands. Thus no interference with property transfers under Ukrainian (or Russian) law is involved. There is no reason why equity, acting on the conscience of Midland as a proper defendant to English proceedings, cannot require that Midland holds those moneys for the benefit of Luxe."

34. It is clear therefore, that in the eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction, the law of which does not recognise trusts in any form.

35. In non-common law jurisdictions, a similar approach may also be expected. In Scotland, the civil law concept of patrimony has been developed to explain the

protection of trust property held by a trustee against claims by the trustee's personal creditors: *Glasgow City Council v Board of Managers of Springboig St John's School* [2014] CSOH 76, para 17 per Lord Malcolm. Following Italy's ratification of the Convention, Italian courts have also recognised common law trusts as creating a separate patrimony, rather than a new kind of property right: see *Italy: The Trust Interno* by Alexandra Braun in Hayton's *The International Trust* (3rd ed) (2011). Whether Saudi Arabian law would, in any proceedings before a Saudi Arabian court, adopt a similar approach, by treating the relevant transactions as amounting to amaana, even though Saudi Arabia is not a party to the Convention and its law does not recognise distinct equitable proprietary interests, is, as the Court of Appeal noted (para 75), presently unknown: see also para 5 above.

36. The decision by Lord Hodge sitting in the Outer House in the Scottish case of *Joint Administrators of Rangers Football Club Plc, Noters* 2012 SLT 599 concerned contracts, made in 2011 and subject to English law, between Rangers and two English limited liability partnerships (collectively "Ticketus"). Under the contracts, Ticketus had paid Rangers large sums for future tranches of season tickets in respect of a defined number of seats of different types at specified future matches in each of the seasons from 2011-2012 to 2014-2015. Rangers having gone into administration, its administrators applied for directions as to whether they could be prevented from terminating the contracts. Ticketus argued that they had acquired rights which were more than mere personal rights, and which could be enforced by specific performance. Lord Hodge held, first, relying on the travaux préparatoires (in particular paras 55 to 57 of the Explanatory Report prepared by Professor Alfred E von Overbeck), that the concept in article 4 of the Convention of a preliminary issue relating to the validity of an act by which assets were transferred to a trustee included an issue relating to the validity of a declaration of trust. He held, second, that whether the agreements between Rangers and Ticketus in respect of season tickets gave Ticketus more than purely personal rights was such an issue, and, third, that this issue fell accordingly outside the Convention and was to be determined under Scots private international law rules by reference to Scots law, as the lex situs of the future tickets to be issued and the stadium seats to which they related. He went on (para 33):

> "If I am correct in my conclusion that Scots law applies, the difficulty which Ticketus faces in asserting a trust over the proceeds of sale of the season tickets agreement tickets is that the proceeds do not yet exist. On the assumption that the Ticketus agreements are sufficient to amount to a declaration by Rangers of a trust over the STA tickets and the proceeds of their sale, the non-existence of both is fatal to the creation of a trust. Where the truster and trustee are the same person it is our law that there must be constructive delivery of the trust subjects to himself as trustee of an irrevocable trust: see *Allan's*

> *Trustees v Lord Advocate* 1971 SC (HL) 45, in which Lord Reid at p 64 spoke of the doing of 'something equivalent to delivery or transfer of the trust fund.'"

37. The essence of the decision was, therefore, that there was nothing which, at least in Scots law, was capable of giving rise to any form of proprietary interest or as being the subject of any trust, which was what Ticketus were claiming. The decision, under Scots law, to apply Scots law to this question, does not determine the common law position or detract from Roth J's analysis in *Luxe*. The approach taken in the second and third steps of Lord Hodge's reasoning set out above is open to question, at least through English legal eyes (see also the query raised about its correctness by George L Gretton, Lord President Reid Professor at Edinburgh University, in *The Laws of the Game* [2012] Edinburgh Law Review 414, 418). But it is unnecessary to consider this further on this appeal. On an English appeal relating to common law trusts, it is the approach indicated by Roth J in *Luxe* and by the Court of Appeal in *Lightning* that is correct and applicable.

38. In the light of the above, to regard a trust as falling outside the Convention under article 4, simply because its assets consist of assets in a jurisdiction which does not recognise a division between legal and equitable proprietary interests, is wrong. Even if the Court of Appeal was wrong to limit article 4 to the question whether the assets were alienable, in the sense of being capable of transferable to the trustee or anyone else (see paras 12-13 above), an issue on which it is unnecessary to reach any final conclusion, there was nothing invalid about the declarations of trust.

39. There is nothing in the Convention to suggest that it was intended to be inapplicable to a trust simply because the trust was in respect of assets in a jurisdiction which does not recognise some form of separation of legal and equitable interests. Rather, the contrary - since one object of the Convention was to provide for the recognition of trusts in jurisdictions which did not themselves know the institution. There must be many common law trusts which have or acquire assets in civil law or other jurisdictions which do not recognise the concept of an equitable proprietary interest in the English common law sense. All that the provisions for recognition of a trust in article 11 of the Convention contemplate, "as a minimum" is "that the trust property constitutes a separate fund". But that does not mean that there must exist a concept of equitable proprietary interest or any separation of legal and equitable proprietary interests under the lex situs of the relevant assets. The further provisions of article 11 remit to the law governing the trust the further consequences of recognition of a trust. But article 11(d) also recognises that third parties may have acquired rights in respect of trust assets under, in particular, the lex situs of the assets, which may prevent the recovery for the benefit of the trust of trust assets which the trustee has, in breach of trust, alienated. The provision in article 15 that, if "recognition of a trust is prevented" by the application of a

provision of the law designated by the conflicts law of the forum which cannot be derogated from by voluntary act, "the court shall try to give effect to the objects of the trust by other means" is a further pointer towards the Convention's general aim of accommodating the institution of trust, so far as possible, with other systems.

40. Article 15 itself appears as designed to address the impact of relationships or transactions separate from the trust itself. The Explanatory Report by Professor von Overbeck, which is part of the travaux préparatoires, notes (para 136) that the first paragraph of article 15 "preserves the mandatory rules of the law designated by the conflicts rules of the forum for matters other than trusts". Paragraph 138 of the Report proceeds to draw a parallel with the last sentence of article 11(d), noting that this is general, whereas article 15 is limited in application to mandatory rules. In the present context, it is in my opinion the last sentence of article 11(d), not article 15(e) or (f), which is primarily applicable when determining what, if any, rights and obligations Samba may have in relation to the shares as a result of their transfer to Samba by Mr Al-Sanea.

41. On the face of it, this last sentence of article 11(d) would remit to Saudi Arabian law the question whether Samba acquired free of SICL's interests under the trusts, whether or not those interests can be categorised as proprietary. The existence under Saudi Arabian law of the institution of amaana might in this context prove relevant. That is not however an issue presently before the Supreme Court.

42. The issue before the court in the light of the expanded submissions which it has received is whether SICL has any basis for alleging that there was a disposition of property within the meaning of section 127. Viewing the matter in the light of the common law principles set out in paras 21 to 34 above, I would regard the present trusts not only as intended to create, but also as creating equitable proprietary interests in the Saudi Arabian shares, enforceable at common law at least as between SICL and Mr Al-Sanea and anyone else other than a transferee from Mr Al-Sanea in circumstances giving the transferee a good title under Saudi Arabian law. But, in the context of the present issues under section 127, there is to my mind a considerable case to be made for saying that it cannot matter. The definition of "property" in section 436 is wide enough to embrace both equitable proprietary and purely personal interests.

43. Sir Nicholas Browne-Wilkinson V-C said of section 436 in *Bristol Airport Plc v Powdrill* [1990] Ch 744, 759D, that "It is hard to think of a wider definition of property". The case concerned a chattel lease, which it was argued gave rise only to contractual rights. The Vice-Chancellor said (p 759E-F):

> "Although a chattel lease is a contract, it does not follow that no property lease is created in the chattel. The basic equitable principle is that if, under a contract, A has certain rights over property as against the legal owner, which rights are specifically enforceable in equity, A has an equitable interest in such property. I have no doubt that a court would order specific performance of a contract to lease an aircraft, since each aircraft has unique features peculiar to itself. Accordingly in my judgment the 'lessee' has at least an equitable right of some kind in that aircraft which falls within the statutory definition as being some 'description of interest … arising out of, or incidental to' that aircraft."

44. Any equitable proprietary interest arises out of, or is incidental, to the shares. In my view, a purely personal interest in having the shares dealt with by the trustee and holding the trustee to account in accordance with the trust might equally well be said to be an "interest … arising out of, or incidental to, property". If so, the appeal could be approached on the basis that SICL's rights under the trust constituted relevant property within section 436, whether they were equitable proprietary or purely personal rights. In either case, the question would arise whether the transfer by Mr Al-Sanea of the shares to Samba constituted a "disposition" within the meaning of section 127, bearing in mind that the disposition would not affect the interests involved, unless they were overridden under Saudi Arabian law by Samba's acquisition of the shares. However, even if it is only equitable proprietary interests that are capable of being regarded as relevant property for present purposes, the key question remains whether there was any disposition of them within the meaning of section 127.

45. I have found this a difficult issue. On the one hand, it can be said that "trust assets" have been "misappropriated", "misapplied", "dissipated" or, in terms of article 11(d) of the Convention, "alienated". Such phrases can be found in academic textbooks. Thus, Snell's *Equity* (33rd ed) (2015) para 30-013 reads, under the head "Misapplication":

> "Where the breach consists in a misapplication of trust assets, the first question is whether the trustee should specifically restore the assets to the trust or restore their value by making a money payment. If the trustee still has the original assets, he may effect restoration in specie by transferring them back to the trust fund. If the original assets are no longer available, then the beneficiary may elect to assert a proprietary remedy over any traceable proceeds in the hands of the trustee or a third party."

Likewise, Swadling in Burrows, *English Private Law*, para 4.151 reads:

> "The recipient of rights dissipated in breach of trust does not automatically step into the trustee's shoes, inheriting the powers and duties of his transferee [sic, this should presumably be 'transferor']. He is only liable to restore the rights dissipated in breach of trust, either to the former trustee, or, more likely, to other persons nominated by the beneficiaries. This right of the beneficiaries to recover the trust rights is good against all transferees of rights dissipated in breach of trust bar one, the transferee of a common law right who takes in good faith, for value, and without notice, actual, implied, or constructive, of the fact of the dissipation being in breach of trust. If the transferee is such a person, compendiously known as 'equity's darling', then the effect of the transfer will be to destroy the beneficiary's right to reconveyance."

46. SICL submits that it is misleading to regard a beneficiary as owning only the equitable interest, and that he or it is entitled to "the entirety of the interest in the relevant property". They point out that, in other contexts, such as tax, the courts have held trust beneficiaries to be assessable to income tax on trust income on the basis that they owned the trust income: see eg *Baker v Archer-Shee* [1927] AC 844, *Corbett v Inland Revenue Comrs* [1937] 1 KB 567. Further, although the trustee remains accountable as such, a wrongful disposition by a trustee of trust assets does not give to the beneficiary as against the recipient of trust property the same rights as the beneficiary had under the trust as against the trustee. As explained by Nolan, *Equitable Property* (2006) 122 LQR 232, 243, 247 and 250 and by Jaffey, *Explaining the Trust*, above, p 383, the beneficiary has only the right to have the trust assets restored to the original trustee, or, if the trust was a bare trust to which the rule in *Saunders v Vautier* (1841) 4 Beav 115, applies, to himself; see also the citation from Swadling in Burrows, *English Private Law*, in the previous paragraph of this judgment.

47. More generally, it can be said that section 127 introduces a prima facie right to recover any property disposed of in which SICL had the legal title, subject only to a power in the court to validate the disposition by order; and that it is well established, in the light of the *pari passu* principle operating in insolvency, that validation will, save in exceptional circumstances, only be ordered in relation to a disposition occurring after the inception of the winding up "if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors …": *Express Electrical Distributors Ltd v Beavis* [2016] 1 WLR 4783, para 56, per Sales LJ.

48. On the other hand, SICL's case can be said to overlook the considerable difference which exists between an unrestricted legal title to an asset, which can normally be disposed of to a third party, and a legal title in relation to which a beneficiary has trust rights, which continue to exist and be enforceable unless and until overridden by a transfer under the lex situs as recognised in *Macmillan v Bishopsgate*.

49. In *Ayerst v C & K (Construction) Ltd* [1976] AC 167, 177G-H Lord Diplock referred to the legal ownership of property subject to a trust as held by the trustee "not for his own benefit but for the benefit of the cestui que trust or beneficiaries", but went on to say that

> "Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements … the 'legal ownership' in the trustee, what came to be called the 'beneficial ownership' in the cestui que trust."

50. The metaphor of a "division" or "split" of title needs to be approached with some caution. Swadling in Burrows, *English Private Law*, para 4.149, speaks of:

> "the falsity of statements which talk in terms of a 'division' or 'separation' of rights when rights are held on trust, or even worse, of legal and equitable 'titles' existing before the creation of the trust."

Swadling, citing Australian authority, suggests an analysis according to which an equitable interest is "not carved out of a legal estate but impressed" or "engrafted" onto it (para 4.150). Likewise, in *Fiduciary Ownership and Trusts in a Comparative Context* (2014) ICLQ 901, Daniel Clarry refers to the concept of "fiduciary ownership … whenever title is held by a person in respect of property that is designated for a purpose protected by law" (p 930), and suggests "a concerted effort to move away from the use of 'dual' or 'split' ownership metaphors in trusts discourse towards the fiduciary ownership of trust property in both the common and civil law traditions" (p 933). Jaffey, op cit, p 386, also notes that one of the difficulties about the proprietary approach (which he advocates) is that

> "it has sometimes been understood in a way that makes it seem paradoxical. That is the 'dual ownership' or 'split ownership' approach. On this approach, it is said that both the trustee and the beneficiary are owners of the trust property, the trustee at

> law and the beneficiary in equity. … Considering the position overall, clearly one cannot say that the trustee and the beneficiary are both separately the owners of the trust property, at least in the ordinary sense of ownership."

Rejecting any idea of "simultaneous allocation" of all the elements of ownership to both the trustee and the beneficiary, he however opts (p 387) for an analysis of

> "distribution according to which the trustee has the right of control over the property, carrying with it the power to manage the property and to deal with it as owner vis-à-vis other parties, signified by legal title, and the beneficiary, where there is a single beneficiary, has the right to all the benefit and enjoyment of the property, which is beneficial ownership."

51. It is unnecessary on this appeal to examine these slightly differing analyses further. What is clear, on any analysis, is that, 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. They continue to be capable of enforcement unless and until the disposition of the legal title has the effect under the lex situs of the trust asset of overriding the protected trust rights. If the trust rights are overridden, it is not because they have been disposed of by virtue of 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 (under common law) bona fide third party purchasers for value (equity's "darling" in the terms of para 4.151 in Swadling in Burrows, *English Private Law*, cited in para 45 above).

52. The position was neatly summarised by Lloyd LJ in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195; [2013] Ch 91, para 106:

> "a transferee of the legal title to property under a disposition made in breach of trust, or a successor in title to such a person, does not have the beneficial title to the property, which remains held on the original trusts, unless either the transferee, or a successor in title, was a bona fide purchaser for value without notice. The trustee acting in breach of trust can transfer the

> legal title, but cannot vest the beneficial interest in the property in a bona fide purchaser for value without notice, since he does not own that title and is not acting in a way which enables him, under the trust, to overreach the beneficiaries' equitable interest. Despite that inability, the availability of the bona fide purchaser defence means that a transaction in favour of a bona fide purchaser for value without notice is as effective as it would be if he could vest the beneficial title in the purchaser. Thereafter the purchaser can deal with the asset free from any prior claim of the beneficiaries."

53. In these circumstances, I conclude that section 127 is neither aimed at, nor apt to cover, the present situation. Section 127 addresses cases where assets legally owned by a company in winding up are disposed of. The section is necessary to enable the company to recover them, by treating the disposition as void. The court's power to validate the disposition is a necessary safety valve, to cater for situations in which validation would be appropriate, bearing in mind the position of creditors as well as that of the other party to the transaction. Any such disposition will involve issues which arise directly between the company (embracing in that concept its creditors in liquidation) whose property is disposed of and the other party to the transaction, although the section embraces situations where the company's property is held by, for example, a director or agent and is disposed of by him to a third party: *In re J Leslie Engineers Co Ltd* [1976] 1 WLR 292.

54. The holder of interests such as SICL's does not need protection on the lines of section 127, in order to protect its property or to protect or enforce its interests. Mr Al-Sanea disposed of his legal interest in the shares. That involved him in a breach of trust. But it did not involve any disposition of SICL's property. SICL's property, whether it consisted of an equitable proprietary interest or personal rights to have the shares held for its benefit, continued, despite the disposal of the legal title, unless and until that disposal overrode it. If the disposal overrode SICL's interest as regards a third party transferee of the legal title such as Samba, that was not because of any disposal of SICL's interest. It was because SICL's interest was always limited in this respect.

55. In some circumstances, the term "disposition" may, as Lord Neuberger demonstrates, embrace destruction or extinction of an interest. In the present context, one might also pray in aid academic descriptions of the wrongful alienation of trust property (even if it did not override any beneficial interest in such property) as a "misapplication of trust assets" (see Snell's *Equity* (33rd ed), paras 30-013, 30-050 and 30-067) and a "disposition … in breach of trust" (see Swadling in Burrows, *English Private Law* (3rd ed), para 4.151). But the natural meaning of "disposition" in the context of section 127 is in my view that it refers to a transfer by a disponor to a disponee of the relevant property (here the beneficial interest), not least when

the section goes on to render any disposition "void" unless the court otherwise orders. I agree with Lord Neuberger's and Lord Sumption's further reasoning on this point.

56. I do not, in these circumstances, see any basis for extending, or any need to extend, section 127 to cover three-party situations where legal title is held and disposed of to a third party by a trustee, and the beneficiary's beneficial interest either survives or is overridden by virtue of the disposition of the legal title to the third party. The law regulates, protects and circumscribes beneficial interests under a trust in a manner which is separate from and outside the scope of section 127.

57. It follows that I would allow the appeal, set aside the order made by the Court of Appeal, and declare that for the purposes of section 127 of the Insolvency Act 1986 there was no disposition of any rights of SICL in relation to the shares by virtue of their transfer to Samba. On the way the case has been put to date, it would appear to follow that there should be an order either to restore the judge's order of a stay of the proceedings brought by SICL and the Liquidators, or to strike out the proceedings. But I would allow the parties 21 days in which to make written submissions inviting any other order, including an order for remission of the matter to the High Court to enable an application to save the proceedings by amendment of the pleadings.

**LORD NEUBERGER:**

58. The assumed facts and the issue can be very shortly summarised. Mr Al-Sanea held certain shares on trust for the benefit of Saad Investments Co Ltd ("SICL"), and, six weeks after the compulsory winding up of SICL commenced, he transferred those shares to Samba Financial Group ("Samba") in discharge of some of his liabilities to Samba. The question which arises is whether, if Samba was a bona fide purchaser for value of the shares without notice of SICL's beneficial interest, the transfer, at least in so far as it relates to SICL's beneficial interest, is to be treated as "void" for the purposes of section 127 of the Insolvency Act 1986. Section 127(1) provides that a "disposition of the company's property … made after the commencement of the winding up is, unless the court otherwise orders, void."

59. In the case of a compulsory liquidation, the "commencement of the winding up" is, at least in a domestic case, the date of the presentation of the petition to wind up - see section 129 of the 1986 Act. In this case, however, SICL is a Cayman Islands company and the winding up petition was made to, and the winding up order was made by, the Grand Court of the Cayman Islands. The case has accordingly proceeded on the basis that the commencement of the winding up was "at the latest, the date of recognition of [those] foreign proceedings" by the High Court of England

and Wales - per Sir Terence Etherton C at first instance, (2014) 16 ITELR 808, para 11.

60. There is no doubt but that SICL's equitable interest in the shares constituted "property" in the light of the very wide definition of that expression in section 436 of the 1986 Act, which is set out in para 7 of Lord Mance's judgment. As Sir Nicolas Browne-Wilkinson V-C said in *Bristol Airport Plc v Powdrill* [1990] Ch 744, 759, "[i]t is hard to think of a wider definition of property". Having said that, I do not think one actually needs to rely on the width of the statutory definition in section 436: one only has to consider whether section 127 would apply if SICL had purported to transfer its equitable interest in the shares after its winding up had commenced, to realise how inappropriate it would be if the definition in section 436 did not extend to equitable interests.

61. The more difficult question is whether there is in circumstances such as the present a "disposition" of the equitable interest in the shares, assuming that Samba was a bona fide purchaser for value of the shares without notice of that interest.

62. As Lord Mance says, where a legal estate is sold to a bona fide purchaser for value without notice, any equitable interest is not transferred to the purchaser: it is overridden, or to put it more colloquially, it is lost or disappears. Lloyd LJ accurately summarised the position in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91, para 106, when he said that a "trustee acting in breach of trust … cannot vest the beneficial interest in the property in a bona fide purchaser for value without notice, since he does not own that title and is not acting in a way which enables him, under the trust, to overreach the beneficiaries' equitable interest"; but, nonetheless, "the availability of the bona fide purchaser defence means that a transaction in favour of a bona fide purchaser for value without notice is as effective as it would be if he could vest the beneficial title in the purchaser".

63. As Lord Mance also points out, where the legal owner transfers the legal estate to a bona fide purchaser for value with no notice of the beneficial interest in breach of trust, the person who owned the beneficial interest does not by any means lose all its other rights. In particular, it retains all its personal rights against the trustee, ie the party who sold the legal estate. In other words, following the transfer of the shares in this case, SICL retained its personal rights against Mr Al-Sanea, but (assuming Samba was a bona fide purchaser for value without notice and subject to section 127), SICL lost any proprietary rights or interest it had in the shares.

64. The fact that SICL retains its personal rights against Mr Al-Sanea notwithstanding the loss of its beneficial interest in the shares appears to me to be irrelevant to the issue whether section 127 applies. If a transaction would otherwise

be a disposition within the section, there is no reason for disapplying the section merely because the company in question would not be deprived of its personal rights by the disposition. Similarly, the fact that an equitable interest is more precarious than a legal interest appears to me to be nothing to the point. The very purpose of section 127 is to impeach transactions which would otherwise be effective, and it seems to me to be inconsistent with that purpose to exclude from its ambit a transaction which would otherwise be lawful, and to which a particular right or interest is otherwise susceptible of being defeated.

65. There is undoubtedly a powerful argument for saying that a transfer by the legal owner of the legal estate for value in an asset to a bona fide purchaser who has no notice of the existence of an equitable interest in that asset cannot amount to a disposition of that equitable interest. As already mentioned, and as Lord Mance demonstrates, there is no question of Mr Al-Sanea having transferred SICL's equitable interest in the shares to Samba: he simply transferred his legal ownership of the shares to Samba, and, on the assumption that Samba was a bona fide purchaser for value without notice, the equitable interest effectively disappeared. In those circumstances, at least on the basis of the meaning which it naturally conveys, section 127 simply does not apply: a "disposition" normally involves a disponor and a disponee, and so there has simply been no disposition. Indeed, in an Australian first instance decision, *In re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liquidation)* [1974] 1 NSWLR 254, 258, Street CJ in Eq expressly so stated, albeit in a very different context from the present.

66. However, it is fair to say that the word "disposition" is linguistically capable of applying to a transaction which involves the destruction or termination of an interest. Etymological analyses can fairly be said to be suspect in this sort of context, but it seems to me to involve a perfectly natural use of language to describe SICL's interest in the shares as having been "disposed of" by the transfer of those shares to a bona fide purchaser.

67. And it is possible to claim support for such a view in relation to section 127 from respected authors. Thus, Professor Sir Roy Goode in *Principles of Corporate Insolvency Law*, 4th ed (2011) at para 13-127 states that "[s]ection 127 bites on beneficial ownership, not necessarily on the legal title". And at para 13-128, he says that "[t]he word 'disposition' … must be given a wide meaning if the purpose of the section is to be achieved, particularly in view of the fact that there is no exception in favour of transfers for full value"; particularly relevantly for present purposes, this passage continues: "'[d]isposition' should therefore be considered to include not only any dealing in the company's … assets by sale, exchange, lease, charge, gift or loan but also … any other act which in reducing or extinguishing the company's rights in an asset, transfers value to another person". Sir Roy then explains that on this basis "'disposition' includes an agreement whereby the company surrenders a lease or gives up contractual rights". And *McPherson's Law*

*of Company Liquidation*, 3rd ed (2013), para 7-015, states that section 127 "only [applies to] property which belongs in equity to the company" and "is confined to the company's beneficial interest in property".

68. There is also some judicial support for the notion that "disposition" can extend to extinguishment. Thus, Wynn-Parry J said in *In re Earl Leven, Inland Revenue Comrs v Williams Deacon's Bank Ltd* [1954] 1 WLR 1228, 1233, that "[t]he word 'disposition', taken by itself, and used in its most extended meaning, is no doubt wide enough to include the act of extinguishment". However, he rejected such a wide interpretation of that word in the Finance Act 1940, partly because it produced "a quite unexpected result" and partly because in other sections of that Act "it is clear that where the legislature intended that … 'disposition' should include 'extinguishment', it was at pains to make express provision". Accordingly, the extinguishment of a liability to pay insurance premiums did not amount to a "disposition" for the purposes of section 44(1) of the 1940 Act.

69. In another revenue case, *Inland Revenue Comrs v Buchanan* [1958] Ch 289, the Court of Appeal held that the surrender of a life interest under a will trust in favour of those people entitled in remainder operated as a "disposition" of that life interest for the purposes of sections 20 and 21 of the Finance Act 1943. At p 298, Jenkins LJ specifically rejected the argument that there was no disposition because "a surrender of a life interest destroys the interest and there is nothing left". This again provides support for the notion that the fact that property ceases to exist as a result of a transaction does not prevent the transaction involving a "disposition" of that property. But, of course, all depends on the statutory context and how they apply to the facts of the particular case.

70. There is also a policy argument for concluding that in a case such as the present, the equitable interest is the subject of a "disposition" for the purposes of section 127, particularly bearing in mind the fact that the court has a dispensing power. The purpose of section 127 is to ensure that, at least once the winding up procedure has been started, a company's property is retained, in particular for the purpose of being available in order to be distributed *pro rata*, ie fairly, among its creditors. On the face of it, at any rate, that should apply as much to property which is held for it by a third party as to property which it holds in its own name.

71. It would appear that Mr Al-Sanea was a bare trustee of the shares - ie the whole of the beneficial interest in the shares was vested in SICL. A transfer of the bare legal estate by the trustee to a purchaser with notice of the trust would not be caught, because he would only acquire the bare legal interest, which would normally be worth nothing, and no disposition of the company's property would have occurred. And a transfer by the company of its equitable interest would undoubtedly be caught by section 127 as it would involve a disposition by the company of that

interest. It can therefore be said to be surprising if a transfer by the trustee which involved the transferee effectively obtaining the whole of the equitable interest previously owned by the company was not caught by the section.

72. Nonetheless, I have reached the conclusion, in agreement with Lord Mance, that there is no "disposition" of an equitable interest within section 127, when there is a transfer by the legal owner of the legal estate, which is subject to that equitable interest, to a bona fide purchaser for value without notice of that equitable interest.

73. As already mentioned, the natural meaning of section 127 appears to me to carry with it the notion of a disponor transferring property to a disponee, and on that basis there was no disposition of SICL's equitable interest in the shares in this case. Although, as explained above, there are arguments for departing from the natural meaning of section 127, I consider that they are outweighed by the arguments the other way.

74. In my view, Sir Roy Goode is right when he says that the surrender of a lease or the giving up of contractual rights by a company would be a "disposition" within section 127, as would a surrender of a life interest (and a company can no doubt have such an interest, at least if it is contingent on an individual's life) as discussed in *Buchanan*. However, there are differences between a surrender (whether of a lease, contractual rights, or a life interest) and the loss of a beneficial interest on a transfer of the legal estate to a bona fide purchaser for value without notice of that interest. In the former case, the person who is the disponor is the same as the person who loses the property; whereas in the latter case the disponor is, *ex hypothesi*, not the person who loses the property. And, in the former case the disponee is well aware of the property which is ceasing to exist: as far as he is concerned, its extinction is the purpose of the transaction; in the latter case, the disponee is, by definition, unaware of the property which is being disposed of.

75. Section 127 can operate harshly so far as people dealing in good faith with a company are concerned. In many cases, a person dealing with a company will be unaware that a petition has been presented (particularly if the presentation occurred very recently), and the section contains no exception for transactions in the ordinary course of business or for transactions for which the company receives full value. The fact that the court will often sanction transactions in the ordinary course of business under its statutory dispensing power is by no means a wholly satisfactory answer to this. As Fox LJ explained in *In re SA & D Wright Ltd* [1992] BCC 503, 505, when deciding whether to validate a disposition under section 127, the court "must always do its best to ensure that the interests of the unsecured creditors will not be prejudiced", and, where there is said to have been a benefit in validating, "the court must carry out a balancing exercise". And, as Sales LJ put it more recently in *Express Electrical Distributors Ltd v Beavis* [2016] 1 WLR 4783, para 56, validation

will ordinarily only be granted "if there is some special circumstance which shows that the disposition in question … has been … for the benefit of the general body of unsecured creditors".

76. But it would not merely be harsh, but positively unfair for a bona fide purchaser of a legal estate from a third party to find that, because of section 127, the transaction in question was liable to be held void owing to the existence of an equitable interest held by a company of which he had no notice. As explained in para 74 above, the position is very different from the surrender of a lease or of contractual rights. A person taking a surrender of a lease or contractual rights from a company knows both that he is dealing with the company and that he is dealing in the lease or the rights. A bona fide purchaser for value of an asset without notice of a company's equitable interest in the asset would be unaware both of the company (or at least that it had an equitable interest) and of the equitable interest (as if he knew about it he would be bound by it, as he would not be a bona fide purchaser).

77. So far as the passages in the books quoted in para 67 above are concerned, it seems to me that, read in context, they do not support the view that section 127 applies in a case such as this. The authors were not directing their minds to a case where the disponor was someone other than the company concerned or its agent. As already mentioned, Sir Roy's examples all involved the company as disponor, and the passage quoted from *McPherson* was directed to explaining why completion by a company of a prior contract to sell its property does not fall within section 127. The dicta and decisions in the two cases referred to in paras 68-69 above must, of course, also be assessed by reference to their respective legal and factual contexts. In both *Earl Leven* and *Buchanan*, the courts were construing a revenue statute, and, more importantly, the transaction involved disponors transferring property which they owned beneficially.

78. As to the other issues discussed in the judgments of Lord Mance, Lord Sumption and Lord Collins, I agree with what they say and there is nothing I can usefully add.

**LORD SUMPTION:**

79. The facts to be assumed for the purposes of this appeal are that Mr Al-Sanea held shares in various Saudi Arabian banks on trusts governed by Cayman Islands law for the claimant Saad Investments Co Ltd ("SICL"); and that on 16 September 2009, six weeks after SICL went into liquidation, he transferred them to the defendant Samba Financial Group in discharge of personal liabilities which he owed to them. The transfer is said to be void under section 127 of the Insolvency Act 1986

as a "disposition of the company's property … made after the commencement of the winding up."

80. The appeal arises out of what is, in point of form, an application by Samba to stay the proceedings on the ground of *forum non conveniens*. But the real ground of the application is that the proceedings are bound to fail. There are four critical steps in Samba's argument:

> (1) The transmission of property is governed by the lex situs, which in the case of registered shares is the law of the company's incorporation, in this case Saudi Arabia. This proposition is well established and was not seriously disputed: see *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387. It applies as much to the transmission of an equitable as to a legal interest in shares: Underhill & Hayton, *The Law Relating to Trusts and Trustees*, 18th ed (2010), para 100.128.
>
> (2) The law of Saudi Arabia does not recognise trusts or any other distinction between the legal and beneficial interests in property. It treats the registered owner of shares in a Saudi Arabian company as their sole and entire owner. This was found as a fact by the Chancellor of the High Court, and is no longer disputed.
>
> (3) It follows that an instrument purporting to create a trust over shares in a Saudi Arabian company was ineffective to do so, even though governed by a law (that of the Cayman Islands) which recognised trusts.
>
> (4) Accordingly SICL can have had no equitable interest in the shares capable of being "disposed of" within the meaning of section 127 of the Act.

81. The real issues raised by this argument have been obscured by the narrow basis on which it was presented in the courts below. The focus of the argument was on point (3). Although point (4) was perhaps the most critical step of all, it was left to one side, and this court was initially told that it was agreed not to be in issue "at this stage". This was unfortunate, for it meant that the oral argument proceeded on an artificial basis. There could be no proper analysis of the nature of the proprietary interest said to have been disposed of within the meaning of section 127, or of the way in which that provision operates in relation to such an interest. The omission was ultimately made good after the conclusion of argument by the service of written submissions at the request of the court. This means that it is possible for us to address the issue on a rather broader basis of principle than the courts below. It also means

that a number of the issues which featured in argument below can be seen not to arise.

82. As the beneficiary of a trust, SICL had two main legal rights. First, it had a right to have the trust administered according to its terms. This was a personal right against the trustee. The only relevant condition for its enforceability is that Samba should be before the court. Since it has been properly served with the proceedings, that condition is satisfied. Secondly, SICL had a true proprietary right. The proprietary character of an equitable interest in property has sometimes been doubted, but in English law (which is in this respect the same as Cayman Islands law), the position must be regarded as settled. An equitable interest possesses the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 705 (Lord Browne-Wilkinson).

83. There are a number of reasons why the proprietary interest of the beneficiary may not be effective or enforceable. Obvious examples include cases where the property or its traceable proceeds have been transferred to a bona fide purchaser for value without notice; and cases where the property has been consumed or destroyed, or has ceased to be traceable. But that will not affect the beneficiary's personal rights, if any, against the trustee or his amenability to personal remedies. Those rights will remain enforceable, for example by an action for the restoration of the trust assets or for equitable compensation for their loss. The personal and proprietary rights of the beneficiary exist independently, and neither is dependent on the continued existence of the other. For this reason, the beneficiary's proprietary interest in property is of limited practical importance. It is relevant only as between the beneficiary and a third party, or for the purpose of asserting a prior claim to specific assets in an insolvency. Even then, equity acts in personam by requiring the trustee to perform his trust or a relevant third party to account.

84. The question whether some species of proprietary interest is capable of existing is necessarily a question for the general law. Unless the general law recognises the possibility of such an interest, it is self-evident that the parties cannot create or transfer it. That necessarily provokes the question: the general law of which jurisdiction? Normally, it will be the lex situs. This would be obvious in the case of land, but is equally true of shares. Shares in a company are legal rights against that company, dependent on the law of its incorporation. The principle is the same as that which applies where a person assumes a contractual obligation to transfer an interest which is incapable of existing under the lex situs. It is stated in Anton's *Private International Law*, 3rd ed (2011) at para 21.61, in a passage adopted by Lord Hodge in *In re Joint Administrators of Rangers Football Club Plc* 2012 SLT 599, para 19: "while the contractual aspects of a contract to assign corporeal moveables

are governed by the law applicable to the contractual obligation, the final question of proprietary right must be determined by the lex situs."

85. None of this, however, means that where a person assumes the liabilities of a trustee under an instrument governed by another law which recognises the concept, that instrument is void or cannot be enforced according to its terms. It remains effective to create personal rights against the trustee, who may be ordered to give effect to the trust, either by specifically performing it where that can be done, or making good his breach of duty financially. The law of Saudi Arabia will treat the trustee as the owner of the entire interest in the shares with all the rights that that entails, but equity will exercise its personal jurisdiction to compel him to deal with the shares in accordance with his trust. The same is true of equitable obligations in respect of property which are imposed by law, where the amenability of the defendant to the personal jurisdiction of the court has always been enough to justify the enforcement of his obligations.

86. In *El-Ajou v Dollar Land Holdings Plc* [1993] BCC 698, 715-716, the question was whether the recipient of trust money was accountable as a constructive trustee on the footing of knowing receipt when before reaching him the property had passed through the hands of persons in a number of civil law jurisdictions where equitable interests were not recognised and the legal owner was treated as having the entire interest in the property. The reason was that as between the alleged constructive trustee and the beneficiary, the former's amenability to personal remedies was unaffected by any issue as to existence of rights in rem:

> "Although equitable rights may found proprietary as well as personal claims, it has long been settled that they are classified as personal rights for the purpose of private international law. The doctrine was stated by Lord Selborne LC in *Ewing v Orr Ewing* (1883) 9 App Cas 34 at p 40 as follows:
>
> > 'The Courts of Equity in England are, and always have been, Courts of conscience, operating in personam and not in rem: and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries …'

> In *Cook Industries Inc v Galliher* [1979] Ch 439, Templeman J entertained an action in which the plaintiff claimed a declaration that the defendants held a flat in Paris together with its contents in trust for the plaintiff, and made an order compelling the defendants to allow the plaintiff to inspect the flat. The fact that the subject-matter of the alleged trust was situate in France, a civil law country, was no bar to the jurisdiction. DLH is, therefore, answerable to the court's equitable jurisdiction as regards assets situate abroad, even in a civil law country …
>
> An English court of equity will compel a defendant who is within the jurisdiction to treat assets in his hands as trust assets if, having regard to their history and his state of knowledge, it would be unconscionable for him to treat them as his own. Where they have passed through many different hands in many different countries, they may be difficult to trace; but in my judgment neither their temporary repose in a civil law country nor their receipt by intermediate recipients outside the jurisdiction should prevent the court from treating assets in the legal ownership of a defendant within the jurisdiction as trust assets. In the present case, any obligation on the part of DLH to restore to their rightful owner assets which it received in England is governed exclusively by English law, and the equitable tracing rules and the trust concept which underlies them are applicable as part of that law. There is no need to consider any other system of law."

A similar analysis was applied by the Court of Appeal in *Lightning v Lightning Electrical Contractors Ltd* [1998] NPC 71 and more recently by Roth J in *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch).

87. Section 436 of the Insolvency Act 1986 defines "property" as including

> "money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property."

These are exceptionally wide words. It is plain that an equitable proprietary interest in property under a trust and a personal right to have the trusts of that property

administered according to their terms are both "property" for the purposes of the Act, including section 127.

88. SICL's problem is not that it lacked a beneficial interest in the shares but that Mr Al-Sanea did not dispose of that interest by transferring the shares to Samba. Mr Al-Sanea purported to transfer the legal interest to Samba. That was the only interest that he had. He did not purport to dispose of SICL's interest. Only SICL could do that, and it did not do so. The disposition of the legal interest did not itself extinguish any equitable interest of SICL in the shares. It only meant that that interest fell to be asserted against Samba, subject to the usual equitable defences. Samba's position in law was that it took the shares on a bare trust to restore them to the beneficial owner, unless it was a bona fide purchaser for value without notice. Since Samba gave value in the form of the discharge of Mr Al-Sanea's debt, its liability to restore the shares must depend on whether they are accountable on the basis of notice. Section 127 is irrelevant to the disposition of the only interest which matters for present purposes, namely SICL's equitable interest in the shares.

89. It is arguable, as Lord Neuberger observes, that the transfer of the legal interest in movables may constitute a "disposition" of an equitable interest if its effect is that the equitable interest is extinguished. But the difficulty about the argument, and the reason why I would reject it, is that equitable interests arise from equity's recognition that in some circumstances the conscience of the holder of the legal interest may be affected. When the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected. On the facts pleaded in the present case, the equitable interest of SICL was defeated not by the act of the transferor (Mr Al-Sanea) but by absence of anything affecting the conscience of the transferee (Samba). The rules of equity which protect transferees acquiring in good faith and without notice are among the fundamental conditions on which equitable interests can exist without injustice.

90. The reality is that the transaction of 16 September 2009 was simply a transfer of the shares in breach of trust, and any rights of SICL against Samba depend on the law relating to constructive trusts and not on section 127 of the Insolvency Act. The law relating to constructive trusts has achieved a high level of development, reflecting a careful balance between the competing interests engaged in such cases. Wide as the term "disposition" is, the coherence of the law in this area would not be assisted by giving it a meaning inconsistent with the basic principles governing the creation and recognition of equitable interests and founded on a very different balance of the relevant interests. There is no claim in this case to make Samba accountable as a constructive trustee, and no allegation of notice. For that reason, the proceedings as presently framed must fail.

91. I arrive at this conclusion without reference to the Convention on the Law Applicable to Trusts and on their Recognition. The purpose of the Convention is to procure the recognition of the main incidents of a trust by contracting parties whose law would not otherwise recognise them. It is therefore of limited significance in jurisdictions such as England and the Cayman Islands which do recognise trusts. It might have modified the law of Saudi Arabia if Saudi Arabia had been party to the Convention, but it is not. The argument before us turned mainly on articles 4 and 15, both of which are set out in the judgment of Lord Mance. But neither of them is in point. Article 4 provides that the Convention does not apply to issues as to the validity of instruments creating a trust. But there is no question as to the validity of the trusts in issue here, since they are certainly valid under the law of the Cayman Islands which governs them. Samba's argument relates not to the validity of the trusts themselves but to the existence of a proprietary interest in the trust assets having regard to the legal characteristics of those assets in Saudi Arabian law. But that is irrelevant given the undoubted validity and legal sufficiency of the trustee's personal obligations under Cayman Islands law. As to article 15, that provision is concerned only to preserve the effect of mandatory rules of a relevant law which may be inconsistent with the recognition of some incidents of a trust. It follows that the only potentially relevant provision of the Convention is article 11, which determines the extent to which obligations under a trust are to be effective in England. But as between SICL and Samba it does no more than refer the latter's liabilities to the law selected in accordance with the choice of law rules of the forum, in this case the law of the Cayman Islands: see article 11(d).

92. I would accordingly allow the appeal. Subject to argument about the precise form of order, I would declare that for the purpose of section 127 of the Insolvency Act 1986 there was no disposition of any rights of SICL in relation to the shares by virtue of their transfer to Samba. Logically, it follows that the proceedings should be struck out. But I would remit the matter to the High Court to deal with any consequential matters, in case it be contended that they can be saved by an appropriate amendment to the pleadings.

**LORD COLLINS:**

93. I agree with Lord Mance that this case does not raise the interesting and difficult questions on the Hague Convention which were argued, first before the Chancellor and the Court of Appeal, and then in the oral argument in this court before the parties were asked to provide written submissions on the combined effect of sections 127 and 436 of the Insolvency Act 1986.

94. This appeal came to this court as a preliminary issue on a wholly artificial basis, namely that the liability of Samba (which was in fact the whole point of the proceedings) was agreed not to be in issue "at this stage" (as it was put several times

in the oral argument) and that the sole question was whether as between SICL and Mr Al-Sanea the declarations of trust by SICL had a proprietary effect. Because the liability of Samba had been expressly and artificially excluded, there was no full analysis in the full context of the question of what is meant by the expression "proprietary interest", since both parties proceeded on the basis that there was a prior question as to whether SICL itself ever acquired a proprietary interest from Mr Al-Sanea in the light of the assumption that Saudi Arabian law had no trust concept.

95. It is understandable why the original application before the Chancellor was for a stay of the proceedings with the ultimate object of ensuring that, if the proceedings were in Saudi Arabia, they would be bound to fail. It is also understandable why a discretionary jurisdictional route was taken, since the defendant approached it as if it were a case of personal jurisdiction based solely on the presence in London of a branch of Samba, which had nothing to do with the transfer of the shares in Saudi Arabia. As the Chancellor pointed out (at para 54), the claim could have been put on the basis of constructive trust if there were a sufficient factual basis, and the failure to do so emphasises the artificially narrow basis of the claim.

96. But in the light of the way the claim was formulated, the real question was not one of the proper exercise of judicial jurisdiction, but rather a question of legislative jurisdiction, namely the extra-territorial scope of section 127 of the Insolvency Act 1986 and its application to the shares. The combined effect of sections 127 and 436 of the Insolvency Act 1986 is that the avoidance provisions of section 127 apply to property "wherever situated".

97. If this were a purely domestic case there would be no possible doubt of the effect of the declarations of trust: they give the beneficiary "the paradigm of an equitable interest in property": Snell's *Equity*, para 2-002. "Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property ...)": *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, at 705.

98. It was only after further submissions were requested after the hearing of the appeal that there was any exploration of the issues under section 127 of the Insolvency Act 1986. For the reasons given by Lord Mance, I do not consider that there was any "disposition" of SICL's property.

99. It follows that the scope and effect of the Hague Convention do not fall to be decided. The Hague Convention was promoted by the United Kingdom. It was

"particularly intended to build bridges between countries of common law and countries of civil law" and for common law states "the principal interest [was] obviously to have the trusts created under their laws recognized in the countries which do not have this institution" (von Overbeck Explanatory Report, January 1985, paras 12, 14).

100. There was exceptional interest in the Convention from states, and its conclusion owed much to the work of the fine scholar Professor Alfred von Overbeck, who died in April 2016, Mr Adair Dyer and Mr Hans van Loon (respectively later Deputy Secretary-General and Secretary-General of the Hague Conference on Private International Law) and Professor A E Anton and (particularly) Professor David Hayton of the UK delegation. But in the event although 32 member states of the Hague Conference adopted the draft Convention, only 12 states are now parties to the Convention, and it says much about the likely principal uses of the Convention that they include Liechtenstein, Luxembourg, Monaco, San Marino and Switzerland.

101. There was considerable discussion in the travaux of the Hague Conference about whether the Convention was to apply to declarations of trust (because article 2 refers to assets being "placed" under the control of the trustee). But there can be no doubt that it applies to declarations of trust, not only because the travaux make it clear that it was so intended, but more importantly, that is the clear effect of the Recognition of Trusts Act 1987, section 1(2), which provides that the scheduled provisions of the Hague Convention apply not only to the trusts described in articles 2 and 3, but also to all other trusts under United Kingdom law.

102. There has never been any suggestion in the authorities that an effective declaration of trust could not be made over shares in a company incorporated, or shares registered, in a country which does not recognise the trust concept. *Attorney General v Jewish Colonisation Association* [1901] 1 QB 123 and *Duke of Marlborough v Attorney General* [1945] Ch 78 are only indirect authority, but they have been, correctly, regarded as recognising English trusts over foreign shares irrespective of whether the place of incorporation or place of registration recognises the trust concept: cf *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch) (Roth J). But for the reasons given by Lord Mance, this is not the occasion for considering the effect on third parties.

103. I would therefore allow the appeal, and I agree with the order which Lord Mance proposes.