

Article

Byers v Saudi National Bank: circumventing the knowing receipt doctrine

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ABSTRACT

This article will map a category of unconscionable transfers that can circumvent the knowing receipt doctrine by design. It exposes and charts these transfers—herein referred to as Samba Transfers—by looking at *Byers v Saudi National Bank*. While *Byers* is the model case, Samba Transfers can occur in many situations. The Supreme Court’s decision in *Byers* has paved the way for this category of unconscionable transfers. This is because the court dealt with the ‘knowing receipt issue’ by resorting to reasons of principle rather than focusing on the defendant’s unconscionable behaviour. This article endorses the Supreme Court’s principled approach. Still, it asks whether Samba Transfers are a cause for concern following *Byers*. In particular, can the law on dishonest assistance come to the rescue if a recipient of assets has used the judgment in *Byers* as a blueprint to evade liability in knowing receipt?

INTRODUCTION

Equity’s role in the business world has increased over the years.¹ The personal liability of strangers to a trust is one example of how equity intervenes in the commercial field. Bankers, lawyers and advisers who come into contact with misapplied trust assets or are otherwise involved in a breach of trust may be personally liable to the beneficiaries.² Given its role in the business world, it is fortunate that the law of equity is more principled now than it was in the past.³

Yet, for all the progress over the years, some remain worried that an uncontrolled intervention of equity will undermine legal certainty.⁴ This worry is not surprising, given that equity is grounded in and continues to be associated with fairness and justice.⁵ In addition, the notion of unconscionability

is central to the equitable jurisdiction, so that intervention may follow if the defendant has acted unconscionably.⁶

While controlling unconscionable behaviour is one function of equity, a sound analysis of principle and doctrine should determine whether equitable intervention is warranted. In other words, the prevention of unconscionability should be accommodated within, rather than transcend reasons of principle. That said, judges may find themselves in a position where the principled answer to an issue appears at odds with equity’s historic role as the regulator of unconscionable conduct.⁷ *Byers v Saudi National Bank*⁸ arguably placed the court in such a position.

In *Byers*, the Supreme Court resolved the ‘knowing receipt issue’ (clarified below) by turning to reasons of principle

¹ Lord Briggs of Westbourne, ‘Equity in Business’ (2019) 135 Law Quarterly Review 567, 568; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 381–382.

² For example, it has been recognised that claims in knowing receipt are frequently made in the commercial context. See *Bank of Credit and Commerce International (Overseas) Ltd and Another v Akindele* [2001] Ch 437, 455; See generally *Royal Brunei Airlines* (n 1) 381–382.

³ The following statement is telling of this development: ‘Although equity jurisdiction was originally administered according to the conscience of the Chancellor, that long ago ceased to be the case and modern equity is governed by principle just as much as the law in general.’ *Guest v Guest* [2022] UKSC 27, [2024] AC 833, [161] (Lord Leggatt).

⁴ *Manchester Ship Canal Co Ltd v Vauxhall Motors Ltd (formerly General Motors UK Ltd)* [2019] UKSC 46, [2020] AC 1161, [2]; See also Briggs (n 1) 567.

⁵ As observed by Lady Arden: ‘Equity serves to finesse rules of law in deserving cases. It thus makes the system of law in England and Wales one which is more likely to produce a fair result than would be possible if equity did not exist.’ *Manchester Ship Canal Co Ltd* (n 4) [63]; Lord Briggs has also flagged this connection: ‘One of the principal functions of equity is to put right injustice to which the law is otherwise blind, by restraining the rigid application of legal rules where their implementation would be unconscionable.’ *Guest* (n 3) [4].

⁶ Lord Briggs recently highlighted the relevance of unconscionability in relation to equitable principles: ‘While the regulation of unconscionable conduct may be the underlying purpose of many equitable principles, the extent to which unconscionability acts as a determining factor in the operation of those principles in particular cases varies widely.’ *Byers and others v Saudi National Bank* [2023] UKSC 51, [2024] 2 WLR 237, [40]; See also Graham Virgo, *The Principles of Equity & Trusts* (5th edn, OUP 2023) [2.3].

⁷ In *Byers*, it was unsuccessfully argued that liability in knowing receipt was based on ‘equity’s historic role as the enforcer of the obligations of conscience’. *Byers* (n 6) [36] (Lord Briggs).

⁸ *Byers* (n 6); For a recent case note, see Anita Purewal, ‘Proprietary Interests and Knowing Receipt: *Byers v Saudi National Bank* [2023] UKSC 51’ (2024) 30 Trusts & Trustees 148.

rather than focusing on the defendant's unconscionable behaviour.⁹ The approach in *Byers* can be praised. But it also means that some unconscionable transfers involving misapplied assets fall outside the ambit of the knowing receipt doctrine. This article will refer to these as Samba Transfers. While the facts of *Byers* illustrate a Samba Transfer, it is shown below that various factual situations can underpin a transfer of this kind. Individuals may even attempt to use the judgment in *Byers* as a blueprint to circumvent liability in knowing receipt.

This article has two primary aims. First, to expose and map Samba Transfers. Secondly, to assess whether these transfers are a cause for concern in the aftermath of *Byers*. In dealing with the second aim, the article focuses on the law on dishonest assistance.

For clarity, this article presupposes that there is an underlying trust in existence when considering the knowing receipt doctrine and law on dishonest assistance. As such, it refers to breaches of trust rather than breaches of fiduciary duty, misapplied trust assets rather than misapplied assets of a company, and so on.

This article is structured into six main sections. In the upcoming section, the doctrine of knowing receipt is summarised. The section after that explores the knowing receipt issue in *Byers* and how the Supreme Court addressed this issue. This is followed by a section entitled 'Samba Transfers', which will map these transfers and their defining features. The fourth section considers how Samba Transfers might unfold if they involve registered land or a bona fide purchaser for value without notice. The final two sections are interlinked: They assess whether Samba Transfers are a cause for concern in light of, among other things, the law on dishonest assistance.

WHAT IS THE KNOWING RECEIPT DOCTRINE?

A claim in knowing receipt can succeed against a third party who has received and used an asset for his own benefit, despite knowing that he received that asset in breach of trust.¹⁰ The name of the game is the wrongful receipt of a trust asset with knowledge.¹¹ In terms of the degree of knowledge required, it is said that 'the recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt'.¹²

The knowing receipt doctrine is relevant where a proprietary claim is out of the question. For example, if the recipient has dissipated the asset wrongly transferred to him, a

proprietary claim is not possible since the property is gone. This is where a personal claim in knowing receipt might be pursued instead.¹³ Crudely put, if the claimant cannot get back his property, he can go after the recipient. The requirements of this personal claim were outlined in *El Ajou v Dollar Land Holdings plc*:

the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.¹⁴

THE KNOWING RECEIPT ISSUE IN *BYERS*

The knowing receipt issue in *Byers* required the Supreme Court to address this question: Is a claim in knowing receipt dependent upon the claimant retaining an equitable interest in the asset wrongfully transferred to the defendant?¹⁵ In other words, will the claim fail if the claimant's equitable interest in the asset was destroyed before it reached the hands of the defendant? The Supreme Court (unanimously) said yes.¹⁶ The doctrine is unavailable if the defendant never received **trust** property. This finding seems entirely unproblematic at first.

However, what if the defendant knew that the trustee's transfer—which gave him a clear title to the misapplied asset—was in breach of trust? Surely, the defendant's knowledge would make it unconscionable for him to use the asset as his own. The defendant's behaviour is not less unconscionable just because the equitable interest was destroyed before his receipt.¹⁷

While this might be the case, the Supreme Court confirmed that the defendant's knowledge and unconscionability makes little difference if the claimant's equitable interest has been destroyed before the receipt.¹⁸

Byers will contextualise the points made so far. In this case, shares were held on trusts for the claimant company. In breach of trust, the trustee transferred these to Samba Financial Group ('SFG').¹⁹ Crucially, this gave SFG a clear title to the shares. This happened because the governing law of the transfer was Saudi Arabian law, which meant that the claimant's equitable interest was extinguished following the transfer.²⁰

The story would have been unremarkable if SFG had been unaware of any wrongdoing on the trustee's part. That was

⁹ *Byers* (n 6) [43]–[47] (Lord Briggs), [144]–[174] (Lord Burrows); The Supreme Court also considered a number of reported cases. However, it was recognised that the knowing receipt issue had to be decided as a matter of equitable principle since the case law did not provide a definitive answer.

¹⁰ It is not a requirement that the third party receives the same asset that was misapplied in breach of trust. Instead, what is required is that the third party receives the traceable proceeds of the asset lost by the beneficiary. See Jamie Glistler and James Lee, *Hanbury & Martin: Modern Equity* (23rd edn, Sweet & Maxwell 2024) [25-008].

¹¹ Jamie Glistler, 'Security Interests and Knowing Receipt' (2023) 43 *Legal Studies* 624, 625.

¹² *Akindele* (n 2) 455 (Nourse LJ).

¹³ *Byers* (n 6) [5] (Lord Hodge), [41]–[42] (Lord Briggs).

¹⁴ [1994] 2 All ER 685, 700 (Hoffmann LJ).

¹⁵ *Byers* (n 6) [10] (Lord Briggs), [99] (Lord Burrows).

¹⁶ *ibid* [1] (Lord Hodge), [97] (Lord Briggs), [201] (Lord Burrows).

¹⁷ It has been suggested that 'independent of the proprietary basis, unconscionability alone is sufficient to fix a knowing recipient with liability'. See Bennett Au-Yeung and Samuel Yee Ching Leung, 'In Search of a Laundry Receipt' (2022) 28 *Trusts & Trustees* 360, 364.

¹⁸ *Byers* (n 6) [7] (Lord Hodge), [24]–[27] (Lord Briggs), [167]–[172] (Lord Burrows).

¹⁹ While SFG was the defendant at first instance, its assets and liabilities later became vested in Saudi National Bank, the respondent.

²⁰ *Byers* (n 6) [15] (Lord Briggs), [107] (Lord Burrows).

not the case. It was accepted that SFG essentially knew that the shares were transferred to it in breach of trust.²¹ Lord Burrows observed that ‘whatever level of knowledge a defendant is required to have for knowing receipt, it is satisfied in this case’.²² Despite SFG’s knowledge, the claim failed since the claimant’s equitable interest had ceased to affect the shares at the time of SFG’s receipt.²³

Lord Briggs highlighted that the knowing receipt issue had ‘forced the court to revisit the most basic equitable principles’.²⁴ He went on to justify his conclusion with reference to (among other things) five ‘powerful reasons of principle’.²⁵ Similarly, the judgment of Lord Burrows was partially devoted to uncovering ‘the principled answer to the knowing receipt issue’.²⁶

What about the prevention of unconscionability and the potential consequences?

The judgment in *Byers* shows that the Supreme Court’s answer was founded on reasons of principle.²⁷ SFG’s unconscionable behaviour was of little importance in resolving the knowing receipt issue.

It is important to emphasise that I agree with the court’s approach and decision in *Byers*. It demonstrates that modern equity is principled and can be developed in a predictable way.²⁸ That said, the case can spark mixed feelings. SFG’s behaviour can be seen as unacceptable. After all, SFG knowingly received misapplied shares for its own benefit,²⁹ and liability was avoided because of a technicality.

Trying to avoid the impact of this technicality, the appellants argued that the core purpose of the knowing receipt doctrine was the prevention of unconscionability.³⁰ Lord Briggs observed:

The appellants say that the claim in knowing receipt does not require any ... continuing equitable interest in the property in dispute. All it requires is that [SFG] knew that the [shares] were transferred to it in breach of trust, so that it would be unconscionable for [SFG] to use them for its own benefit.³¹

The discussions above have already revealed that the Supreme Court rejected this argument. So long as the recipient gets a clear title to the property, his (otherwise incriminating) knowledge of the breach of trust is irrelevant for the purpose of the knowing receipt doctrine.

A question that may come to mind concerns the consequences of the decision in *Byers*: Will the Supreme Court’s decision incentivise transfers that are designed to give recipients

a clear title to misapplied assets in order to evade knowing receipt claims? For example, will fraudsters start to move assets ‘through jurisdictions where the law extinguishes equitable proprietary interests’³² in a bid to sidestep the reaches of civil law? Some authors suggest that the requirement of a continuing equitable interest, as confirmed in *Byers*, might bring about such consequences and create ‘safe-haven jurisdictions’ for those involved in a breach of trust.³³

Lord Briggs and Lord Burrows dismissed this concern in *Byers*. They flagged the law on dishonest assistance as one reason for doing so.³⁴ This brings dishonest assistance into the spotlight. Can the defendant who got a clear title to the asset, albeit with knowledge of the breach of trust, be liable for dishonestly assisting in the trustee’s breach? For instance, could SFG, in *Byers*, be regarded as having dishonestly assisted in the trustee’s breach because of its receipt of the shares or some other act? Whereas an allegation of dishonest assistance might have been met with more success than a knowing receipt claim,³⁵ the trial judge observed:

neither in the re-amended particulars of claim nor in the amended reply to [SFG’s] amended defence have the claimants alleged that [SFG] acted dishonestly. [...] The claimants in argument—though at times they came close to alleging that [SFG] was an accessory to theft of the [shares]—did not (and could not) argue that their pleaded case could be taken as an allegation of dishonesty, such as would be required to establish liability as a constructive trustee for dishonest assistance in a breach of trust.³⁶

Dishonest assistance will be considered in detail later. For now, the takeaway is that the decision in *Byers* and the marginalisation of the defendant’s unconscionable behaviour means that individuals can sometimes avoid liability in knowing receipt despite having knowingly received assets in breach of trust and used these for their own benefit.

SAMBA TRANSFERS

Byers has opened the door for a category of unconscionable transfers that are beyond the ambit of the knowing receipt doctrine. This article will refer to these as Samba Transfers. This term refers to transfers with three features: First, a trust asset has been transferred (e.g., sold) in breach of trust. Secondly, a beneficiary’s equitable interest has ceased to affect this asset following the transaction. Finally, a third party who

²¹ *ibid* [14].

²² *ibid* [101].

²³ *ibid* [1] (Lord Hodge), [97] (Lord Briggs), [201] (Lord Burrows).

²⁴ *ibid* [11].

²⁵ *ibid* [43]–[47].

²⁶ *ibid* [144].

²⁷ *ibid* [43]–[47] (Lord Briggs), [144]–[174] (Lord Burrows).

²⁸ Admittedly, it would be a mistake to overgeneralise what can be learnt about the operation of equity as a body of law from a single case. While this point is accepted, *Byers* can still help to drive home the point that modern equity is governed by principle.

²⁹ SFG beneficially received the shares towards settlement of a debt. *Byers* (n 6) [67].

³⁰ *ibid* [82].

³¹ *ibid* [16].

³² *ibid* [173] (Lord Burrows).

³³ Bennett Au-Yeung and Samuel Yee Ching Leung (n 17) 366–367 and 368.

³⁴ *Byers* (n 6) [41] (Lord Briggs), [173] (Lord Burrows).

³⁵ Helen Pugh, ‘Knowing Receipt and the Proprietary Base’ (2021) 36 *Butterworths Journal of International Banking and Financial Law* 334, 336.

³⁶ *Byers v Samba Financial Group* [2021] EWHC 60 (Ch), [33] (Fancourt J).

knew that the relevant asset was transferred in breach of trust has received the now unaffected asset. The article uses the term **Samba Transfer Recipient** to refer to the knowing third party who gets a clear title to the misapplied asset.

The upcoming sub-sections expand upon the three defining features. This will aid in mapping the boundaries and potential structure of Samba Transfers.

Feature 1: Breach of trust

A Samba Transfer involves a breach of trust. Focusing on a breach of trust excludes from our consideration transactions where the equitable interest is said to be overreached following, for instance, an authorised sale of trust property.

Feature 2: the equitable interest ceasing to affect the asset

A Samba Transfer will adversely impact the beneficiary's equitable interest. More specifically, his equitable interest will have ceased to affect the asset as a consequence of the transfer. The expression ceasing to affect the asset should be broadly interpreted. It does not only refer to the equitable interest being destroyed once and for all. The interest can also cease to affect the property where the Samba Transfer Recipient acquires title to the property in priority to the beneficiary's equitable interest. The position involving registered land will serve as an example below.

In *Byers*, the Supreme Court summarised the ways by which the equitable interest can cease to affect a trust asset without the beneficiary's consent.³⁷ Three principal ways can be identified.³⁸

First, foreign law can apply to the transfer so that the equitable interest is overridden by operation of law.³⁹ This is what happened in *Byers*. Lord Burrows explained that the 'equitable proprietary interest under the trust ... was overridden, or extinguished, by the registration transferring the shares to [SFG] (applying Saudi Arabian law as the governing law of the transfer of the shares)'.⁴⁰

Secondly, the equitable interest can cease to affect the property owing to statutory provisions where the trust property is land.⁴¹ Assume that (i) a trustee has transferred land with registered title in breach of trust, (ii) this transfer was made for valuable consideration and (iii) the purchaser registered his title.⁴² The Land Registration Act 2002 ('LRA 2002') ensures that the purchaser—whether or not he had notice of the breach—will have priority over earlier unprotected interests, including the beneficiary's equitable interest.⁴³ Newey LJ summarised the position like this:

section 29 of the Land Registration Act 2002 has the consequence that a transferee for valuable consideration of registered land will take free of prior beneficial interests

even if he had notice that the transfer was in breach of trust unless the beneficiaries were in actual occupation at the time of the disposition.⁴⁴

The beneficiary's equitable interest may not be completely destroyed in this situation.⁴⁵ Still, we can say that his equitable interest has ceased to affect the property.

Thirdly, the equitable interest will cease to affect an asset that is sold to a bona fide purchaser for value without notice. Such a person is often called 'equity's darling'.⁴⁶ This transaction will override the beneficiary's equitable interest.

Feature 3: Sufficient knowledge

The final feature is that a third party—who knew about the initial breach of trust—has received the unaffected asset. In other words, the third party who got a clear title to the misapplied property knew about the initial breach of trust.

As in *Byers*, the trustee might transfer the asset directly to the Samba Transfer Recipient. A Samba Transfer can also involve an **intermediate** bona fide purchaser for value without notice.

Consider the following example: On day 1, the trustee ('T') sells an asset to equity's darling ('ED') in breach of trust. This will override the beneficiary's equitable interest as seen above. On day 2, ED transfers the asset to X, who knew all along that the initial transfer from T to ED was a breach of trust. This factual pattern involves the three defining features. It was made clear in *Byers* that X (the Samba Transfer Recipient) would not be liable in knowing receipt in a scenario like this one.⁴⁷ Lord Burrows observed that 'knowledge of the breach of trust does not count once legal title has passed to equity's darling'.⁴⁸

The message here is that a Samba Transfer can involve assets passing through the hands of a bona fide purchaser for value without notice.

The judgment as a blueprint?

The judgment in *Byers* can inspire and even aid individuals to (attempt to) circumvent the knowing receipt doctrine. Two points bring me to say this. First, the judgment reveals that knowledge of a breach of trust is irrelevant as long as the beneficiary's equitable interest has ceased to affect the relevant asset before it reaches the recipient's hands. Secondly, the judgment outlines how the beneficiary's equitable interest may cease to affect an asset without his consent: Overriding by foreign law, following the effect of the LRA 2002 and by selling the asset to equity's darling.

SAMBA TRANSFERS BEYOND BYERS

The facts of *Byers* demonstrate a Samba Transfer. Regarding the first feature, shares were transferred to SFG in breach of

³⁷ *Byers* (n 6) [19].

³⁸ *ibid* [20]–[21].

³⁹ *ibid* [21] and [28].

⁴⁰ *ibid* [107].

⁴¹ *ibid* [21].

⁴² See Matthew Conaglen and Amy Goymour, 'Knowing Receipt and Registered Land' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010).

⁴³ *Byers v SFG* (n 36) [94]–[106]; *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22, [26] and [62].

⁴⁴ *Byers v SNB* (n 43) [62].

⁴⁵ Matthew Conaglen and Amy Goymour (n 42) 168 write that 'section 29 does not in terms extinguish the prior equitable interests of the trust beneficiaries, but rather postpones them to the purchaser's registered interest'.

⁴⁶ *Byers* (n 6) [18].

⁴⁷ *ibid* [23]–[24] (Lord Briggs), [167]–[170] (Lord Burrows).

⁴⁸ *ibid* [167].

trust. In terms of the second feature, the transfer extinguished the claimant's equitable interest. As for the final feature, SFG essentially knew that the shares were transferred to it in breach of trust. For clarity, SFG was the Samba Transfer Recipient.

While *Byers* is the model case, Samba Transfers can occur in factual situations that differ from the particular facts of *Byers*. For example, they can occur in a purely domestic setting or involve an international dimension.⁴⁹ As indicated above, the trust property may be registered land and require an application of the LRA 2002. An intermediate bona fide purchaser for value without notice of the equitable interest can be part of the facts. The Samba Transfer Recipient can be more or less active in coordinating the interference with the equitable interest. The trustee's state of mind can also differ from case to case.

Drawing inspiration from two cases considered in *Byers*, this section highlights how a Samba Transfer may unfold if it involves registered land or equity's darling.

Haque: the land registration act 2002

*Haque v Raja*⁵⁰ can help illustrate how a Samba Transfer involving land with registered title might unfold.⁵¹ In this case, it was argued that the first defendant ('D1') held a building on resulting trust for the claimant.⁵² The first feature of a Samba Transfer was present because D1 sold the property to the second defendant ('D2'), allegedly in breach of trust.⁵³

The second feature followed from the transaction because having purchased the property, D2 was registered with title absolute,⁵⁴ but the claimant had neither taken steps to protect his alleged beneficial interest⁵⁵ nor was he a person in actual occupation at the time of the disposition.⁵⁶ As such, D2 took the land free of the claimant's beneficial interest.⁵⁷

As for the third feature, the claimant argued that D2 would have known that the transaction was a deliberate attempt to defeat the claimant's beneficial interest.⁵⁸ The claimant sought to 'make [D2] liable as a constructive trustee on the ground of his receipt of the Property with the requisite degree of knowledge of the alleged breach of trust'.⁵⁹

A few observations can be made before leaving *Haque*. First, Henderson J noted that the lack of evidence weakened

the claimant's allegations regarding D2's knowledge.⁶⁰ This led the judge to conclude that the knowing receipt claim had no real prospect of success on the facts.⁶¹

Secondly, Henderson J suggested that a knowing receipt claim was, in principle, 'not dependent upon the survival of the claimant's original beneficial interest as one which binds the Property'.⁶² The earlier parts of this article reveal that this opinion is inconsistent with the views expressed by the Supreme Court in *Byers*. In fact, Lord Briggs said that he disagreed with Henderson J's opinion.⁶³

Thirdly, following the Supreme Court's judgment in *Byers*, a claim in knowing receipt should be viewed as a no-go if the beneficiary's equitable interest has ceased to affect the property before the receipt. Nevertheless, the availability of a knowing receipt claim against a registered proprietor of land was not expressly settled in *Byers*. Lord Burrows said:

I have derived no assistance from considering sections 26 and 29 of the Land Registration Act 2002. The question as to whether a knowing receipt claim can be brought where there has been registration of title under that Act ultimately turns on statutory interpretation of those particular provisions. Although our decision in this case will be of central relevance in answering that question, there is no need for us to go on to decide it in this case and ... I therefore prefer to say nothing further about it.⁶⁴

Fourthly, despite not being expressly settled in *Byers*, the preferred view is that a knowing receipt claim should not be available against a purchaser of registered land, irrespective of any knowledge on his part.⁶⁵

Macmillan: Equity's darling

Inspiration can be drawn from *Macmillan Inc v Bishopsgate Investment Trust Plc*⁶⁶ to visualise a potential Samba Transfer involving equity's darling. The relevant facts can be summarised briefly.⁶⁷ Mr Maxwell controlled a company that held shares on trust for another company ('C') in his ownership.⁶⁸

The first feature of a Samba Transfer can be identified since the shares were used to secure loans, and this occurred in

⁴⁹ See also Michael Ashdown, 'Attacks on Trusts in Civil Law Jurisdictions' (2023) 29 *Trusts & Trustees* 429.

⁵⁰ *Haque v Raja* [2016] EWHC 1950 (Ch), [2016] 7 WLUK 745.

⁵¹ It should be noted some of the claimant's allegations were described as speculative and unsupported by firm evidence. *ibid* [48]–[52]; In spite of this, the claimant's story (if taken at face value) paints a picture of the type of factual pattern that can underpin a Samba Transfer involving registered land.

⁵² The property had been registered in the sole name of D1. However, the claimant argued that he had provided the entire purchase price and that it was understood between the parties that he was the sole beneficial owner of the property. *ibid* [4] and [14].

⁵³ *ibid* [15] and [17].

⁵⁴ *ibid* [3].

⁵⁵ *ibid* [32].

⁵⁶ *ibid* [36].

⁵⁷ *ibid* [44].

⁵⁸ *ibid* [17].

⁵⁹ *ibid* [46].

⁶⁰ *ibid* [48]–[52].

⁶¹ *ibid* [52].

⁶² *ibid* [47].

⁶³ *Byers* (n 6) [91].

⁶⁴ *ibid* [174].

⁶⁵ In disagreeing with the Law Commission's view, Matthew Conaglen and Amy Goymour (n 42) make a compelling case as to why a knowing receipt claim should not be available against purchasers of registered land.

⁶⁶ *Macmillan Inc v Bishopsgate Investment Trust Plc* [1995] 1 WLR 978.

⁶⁷ While this article only summarises the relevant facts, it should be noted that *Macmillan* was a complex case. It involved three key defendants. Some issues and considerations were common to all of them. Yet, there were also significant differences in terms of how each defendant acquired its interest in the disputed property.

⁶⁸ *Macmillan* (n 66) 984.

breach of trust.⁶⁹ As part of this scheme, shares had been deposited with Lehman Bros.⁷⁰

The second defining feature can also be identified because Lehman Bros was a bona fide purchaser without notice when it took the shares by way of security.⁷¹ As equity's darling, Lehman Bros effectively acquired an interest in the shares superior to C's interest. Lehman Bros then sold the shares to D2, one of its associated companies.⁷² This meant that D2 derived title via equity's darling.⁷³

This brings us to the third feature. When the sale from equity's darling to D2 was completed, D2 had actual knowledge of C's claim to the shares.⁷⁴ However, such knowledge was not relevant at this point. The Court of Appeal observed that '[D2] obtained as good a title as Lehman Bros. previously had, even if they now had notice of a breach of trust'.⁷⁵

Interestingly, Lord Briggs flagged the striking similarity between the facts of *Byers* and *Macmillan*:

In both cases a trustee for the claimant company misapplied foreign situated shares beneficially owned by the claimant by transactions abroad which, under the applicable foreign law, had the effect of giving the recipients clear title, or at least superior title, to the shares, over any equitable beneficial interest of the claimant.⁷⁶

To summarise, *Haque* and *Macmillan* can help to paint a picture of potential Samba Transfers involving registered land and equity's darling. Following the judgment in *Byers*, a claim in knowing receipt should not succeed against the recipient in any situation where the beneficiary's equitable interest ceased to affect the asset before it reached the defendant's hands.

SAMBA TRANSFERS AS A CAUSE FOR CONCERN?

A Samba Transfer Recipient will have acquired an asset at someone else's expense. He has participated in a transaction that is detrimental to the beneficiaries of a trust. Many Samba Transfer Recipients will have behaved unconscionably.⁷⁷ Liability in knowing receipt can be avoided because of a technicality rather than the absence of unconscionability. Some may view this as inconsistent with the traditional role of equity.

It does not follow from the remarks above that Samba Transfers will become a widespread problem after the decision in *Byers*. A few reasons can support this assertion.

First, whereas an equitable interest can be described as fragile,⁷⁸ there are not that many ways by which the beneficiary's equitable interest can cease to affect an asset without his consent.⁷⁹ Three ways were outlined above: namely, overriding by foreign law, following the LRA 2002 and the asset having been sold to equity's darling. This limits the feasibility of Samba Transfers since they depend on giving the relevant recipient a clear title to the misdirected asset.

Secondly, it will probably be difficult to organise certain Samba Transfers. This is particularly the case if they involve an intermediate bona fide purchaser for value without notice. Such a scheme hinges on the oblivious participation of someone with the status of being equity's darling.

Thirdly, the law on dishonest assistance appears to offer a framework within which to hold certain Samba Transfer Recipients accountable. As recognised by Fancourt J:

if ... the equitable interest has been overridden or extinguished as a consequence of the transfer, the claimant no longer has the basis for a claim in knowing receipt, though he may have ... a claim for dishonest assistance against the recipient.⁸⁰

The upcoming section will consider the link between Samba Transfers and the law on dishonest assistance.

DISHONEST ASSISTANCE

Unlike the knowing receipt doctrine, accessorial liability is not dependent upon the defendant having received a **trust** asset.⁸¹ Accessorial liability can arise in the absence of any receipt.⁸²

Strangers to a trust can be liable for dishonest assistance if the following elements can be established: (i) A trust was in existence; (ii) the trustee breached that trust; (iii) the third party assisted the trustee in committing his breach; and (iv) the third party was dishonest in offering his assistance.⁸³

The first two elements will, by definition, be satisfied as part of a Samba Transfer. This means that this article only considers the elements of assistance and dishonesty below.

⁶⁹ *ibid* 978 and 984–985.

⁷⁰ *ibid* 985.

⁷¹ *ibid* 1011–1012.

⁷² *ibid* 986.

⁷³ Millett J said: 'Each of the defendants claim to have been, or in the case of [D2] to have derived title through, a bona fide purchaser for value of the shares without notice of [the claimant's] interest.' *ibid* 983.

⁷⁴ *ibid* 986 and 1011. Specifically, the sale was completed when the shares were registered in the name of D2, and this is when D2 had knowledge of the claimant's claim to the shares.

⁷⁵ *Macmillan Inc v Bishopgate Investment Trust Plc* [1996] 1 WLR 387, 395 (Staughton LJ).

⁷⁶ *Byers* (n 6) [75].

⁷⁷ A recipient's blameworthiness can vary depending on the circumstances. Recipients who assume an active role will be more to blame than those who are passive. Nevertheless, even a passive form of participation and receipt can provoke a sense of disapproval.

⁷⁸ *Byers* (n 6) [39].

⁷⁹ *ibid* [114] (ii).

⁸⁰ *Byers v SFG* (n 36) [74].

⁸¹ *Byers* (n 6) [41]; *Royal Brunei Airlines* (n 1) 382.

⁸² *Royal Brunei Airlines* (n 1) 382.

⁸³ *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129, [29]; *Magner v Royal Bank of Scotland International Ltd* [2020] UKPC 5, 22 ITEL 863, [10].

Assistance: the conduct element

The element of assistance can be described as the conduct element.⁸⁴ The incriminating assistance can take many forms and shapes. A person might have persuaded the trustee to commit the breach of trust or facilitated it by preparing documentation to transfer the relevant asset.⁸⁵ Having received an asset—knowing it should not have been transferred in the first place—might represent how one assists in the breach.⁸⁶ In other words, it may be possible to argue that the receipt of an asset is how the third party assists in the breach of trust.⁸⁷ Lord Millett has highlighted the possibility of treating ‘the receipt itself as incidental, being merely the particular form taken by the defendant’s participation in the breach’.⁸⁸ What happens after the asset has been misapplied also counts. A third party can assist by making it more difficult to recover the asset⁸⁹ or helping to conceal the breach.⁹⁰

It is even noted in *Underhill & Hayton, Law of Trusts and Trustees* that a ‘failure to act should be capable of amounting to assistance’.⁹¹ Despite what seems to be a low threshold for the satisfaction of the conduct element, the third party’s assistance needs to be ‘more than minimal’.⁹²

It should be relatively easy to demonstrate that a Samba Transfer Recipient has assisted if he was the facilitator of the breach. Suppose that the trustee owes a debt to X, who persuades the trustee to hand over a trust asset in satisfaction of the debt. Assume that the transfer destroys the claimant’s equitable interest. X has arguably assisted in this situation. He instigated and facilitated the breach. He also participated in a transaction that removed the asset from the beneficiary’s potential recovery.

Despite the observations above, the conduct element should not be trivialised. Davies writes: ‘Simply receiving misapplied property is inherently passive.’⁹³ Lord Burrows agreed with this notion in *Byers*.⁹⁴ The point is that mere receipt might fall short of ‘more than minimal’ assistance.

It is speculated that the main difficulties will occur where a Samba Transfer Recipient has derived title via equity’s darling. In this context, the claimant’s equitable interest is overridden by the **first transfer** from the trustee to equity’s darling. It is not the **second transfer** by equity’s darling to the Samba Transfer Recipient that destroys the interest. Can the second recipient be said to have assisted in the first transfer and trustee’s breach? The conduct element seems problematic on these facts.

However, the Samba Transfer Recipient might, in fact, have done things to facilitate the breach. For example, he

might have misled equity’s darling into thinking that the trustee was entitled to sell the asset. If X influences equity’s darling into accepting trust assets, then this will give assistance to the trustee since equity’s darling might have distanced himself from the transaction had it not been for the acts of X.

Naturally, a purchaser can lose the protection of being equity’s darling.⁹⁵ If X is orchestrating a dishonest scheme that depends on the involvement of a bona fide purchaser for value without notice, X must be mindful not to say anything that can remove the purchaser’s protection. For example, X’s scheme might not go as intended if he accidentally reveals to the first purchaser that the transfer from the trustee to the purchaser will involve a breach of trust.

Group Seven Ltd v Notable Services LLP can support the points above. Among other things, this case suggests that a stranger can be seen as having assisted the trustee if the stranger encourages someone else into thinking that the trustee is reliable and entitled to deal with an asset as his own.⁹⁶

This case involved a fraudster and trustee who wanted to satisfy a firm of solicitors as to the source of some money. They enlisted a third party to help them convince the firm that the money could be dealt with freely. Ultimately, the third party’s statements were found to have influenced the firm’s behaviour and view of the fraudster. This intervention was regarded as having assisted the trustee in committing the breach.⁹⁷

To summarise, Samba Transfer Recipients run the risk of assisting in a breach of trust by participating in a transaction that adversely affects the claimant’s equitable interest.

Dishonesty: the mental element

A stranger will not be liable just because his acts assisted in a breach of trust. Simply participating in everyday transactions could land individuals in trouble if liability only depended upon the assistance bit.⁹⁸ The law requires something more. It requires that the third party has acted dishonestly in giving his assistance.⁹⁹ This requirement can be distinguished from the conduct element: ‘Dishonesty hinges upon what the defendant knows, and therefore relates to the mental element’.¹⁰⁰

Three points can be emphasised regarding the mental element. First, it is clear that dishonesty is the hallmark of

⁸⁴ Paul Davies, ‘The Mental Element of Accessory Liability in Equity’ (2022) 138 *Law Quarterly Review* 32, 35–36.

⁸⁵ *Royal Brunei Airlines* (n 1) 384.

⁸⁶ *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [87] (Lord Millett); See also the following comment: ‘Mr Leach’s wrongdoing is not confined to the assistance he gave Mr Sims to commit a breach of trust by receiving the money from him knowing that Mr Sims should not have paid it to him (though this is sufficient to render him liable for any resulting loss)’. *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [107] (Lord Millett).

⁸⁷ Matthew Conaglen and Amy Goymour (n 42) 178.

⁸⁸ *Dubai Aluminium* (n 86) [87].

⁸⁹ *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch), [2010] 7 WLUK 4, [243]–[244].

⁹⁰ *Twinsectra* (n 86) [107].

⁹¹ Paul Matthews, Charles Mitchell, Jonathan Harris and Sinéad Agnew, *Underhill and Hayton: Law of Trusts and Trustees* (20th edn, LexisNexis 2022) [102.65].

⁹² *Group Seven* (n 83) [110](1).

⁹³ Paul Davies (n 84) 42.

⁹⁴ *Byers* (n 6) [149].

⁹⁵ *ibid* [20].

⁹⁶ *Group Seven* (n 83) [107]–[107.1].

⁹⁷ *ibid*.

⁹⁸ *Royal Brunei Airlines* (n 1) 387.

⁹⁹ *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, [2018] AC 391, [62]; *Group Seven* (n 83) [58]; *Royal Brunei Airlines* (n 1).

¹⁰⁰ Paul Davies (n 84) 35.

accessory liability for breach of trust.¹⁰¹ Secondly, after *Ivey v Genting Casinos (UK) Ltd* and *Group Seven*, it is equally clear that an objective test of dishonesty should be applied.¹⁰² Thirdly, *Ivey* and *Group Seven* tell us that Lord Nicholls got dishonesty right in *Tan*.¹⁰³ In that case, Lord Nicholls said that acting dishonestly means ‘not acting as an honest person would in the circumstances. This is an objective standard’.¹⁰⁴

This brings us to the question of how the court will apply the objective test of dishonesty. The test involves two stages.¹⁰⁵ First, the court must ascertain what the third party knew or believed in the relevant circumstances. For example, did he know or believe that the transaction he participated in involved misapplied trust property? Secondly, after ascertaining what the third party knew or believed, the court must ask whether his conduct was dishonest ‘according to the standards of ordinary decent people’.¹⁰⁶

The objective test is bad news for Samba Transfer Recipients. By definition, they will have known that the trustee’s transfer was in breach of trust. They cannot shelter behind their own moral code to defeat a claim that they acted dishonestly. They cannot say that they never viewed it as dishonest to partake in a transaction that defeated the claimant’s equitable interest. The ordinary decent person will be the judge of that. That brings us back to what Lord Nicholls said in *Tan*:

In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others’ property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries.¹⁰⁷

These remarks are relevant in relation to Samba Transfer Recipients. The transfer they have been involved in has destroyed or adversely affected the beneficiary’s equitable interest. It has removed the asset from the beneficiary’s potential recovery. Thus, if a Samba Transfer Recipient is found to have assisted in the breach, then, by virtue of his knowledge, he should be regarded as having acted dishonestly in the circumstances.

To summarise, while a Samba Transfer Recipient will circumvent the knowing receipt doctrine, the law on dishonest assistance can likely catch the most audacious third parties who participate in a Samba Transfer, including the Samba Transfer Recipient himself.

Why map samba transfers?

It should be possible to demonstrate that certain Samba Transfer Recipients have assisted in the breach of trust

(because of their receipt or other conduct) with a dishonest state of mind (because of their knowledge of the trustee’s breach). For this reason, it appears unlikely that Samba Transfers will become a widespread problem. Yet, this does not render it irrelevant to map this category of unconscionable transfers.

First, there are no guarantees that the law on dishonest assistance will always catch Samba Transfer Recipients. The assistance element can probably cause a problem. It was mentioned above that the assistance must be more than minimal. Linked to this point, Lord Burrows seemingly agreed with the remark that simply receiving misapplied assets is inherently passive.¹⁰⁸

Secondly, the law on dishonest assistance did not come to the rescue in *Byers* itself. Of course, it was not alleged that SFG had acted dishonestly, so liability for dishonest assistance could not be established.¹⁰⁹ Even so, we are left wondering if SFG would have been liable as an accessory if dishonesty had been alleged.

Thirdly, mapping Samba Transfers is relevant in exposing situations in which a claim for dishonest assistance is more suitable than a claim in knowing receipt.

Finally, exposing Samba Transfers is one way to engage with the broader ramifications of the Supreme Court’s principled approach in *Byers*. As mentioned above, this approach has opened the door for unconscionable transfers that can evade an important equitable doctrine. Whether or not the law on dishonest assistance can come to the rescue, some may be critical of the extent to which the defendant’s unconscionability was marginalised in *Byers*. It can be seen as inconsistent with the general nature and functions of equity. For others, the approach is well-reasoned and a testament to the assertion that ‘modern equity is governed by principle just as much as the law in general’.¹¹⁰

CONCLUSION

This article has examined and exposed Samba Transfers in light of the judgment in *Byers v Saudi National Bank*. These transfers have three defining features. They involve an asset being transferred in breach of trust, the beneficiary’s equitable interest ceasing to affect that asset and a third party who has received a clear title to the property with knowledge of the trustee’s breach. This article has suggested that these transfers can often be seen as unconscionable. Still, the Supreme Court made it clear that they do not engage the knowing receipt doctrine. This is because the availability of this doctrine is contingent upon the claimant having retained an equitable interest in the asset that the defendant received.

¹⁰¹ *Group Seven* (n 83) [58]; Embracing dishonesty can be criticised for its ambiguous boundaries. Indeed, while a mental element is undoubtedly necessary for practical reasons, the notion of dishonesty is difficult to define and associated with various problems. Recognising these aspects, Davies notes that returning to ‘knowing assistance’ in equity would be desirable. In other words, a defendant should have actual knowledge or blind-eye knowledge that they are participating in a primary wrong to be liable as an accessory. See Paul Davies (n 84) 47–50.

¹⁰² *Ivey* (n 99) [62] and [74]; *Group Seven* (n 83) [58].

¹⁰³ *ibid.*

¹⁰⁴ *Royal Brunei Airlines* (n 1) 388.

¹⁰⁵ *Ivey* (n 99) [74]; *Group Seven* (n 83) [58].

¹⁰⁶ *Group Seven* (n 83) [58].

¹⁰⁷ *Royal Brunei Airlines* (n 1) 388.

¹⁰⁸ *Byers* (n 6) [149].

¹⁰⁹ *Byers v SFG* (n 36) [33].

¹¹⁰ *Guest* (n 3) [161] (Lord Leggatt).

This article has suggested that Samba Transfers are not a general cause for concern in the aftermath of *Byers*. For one, the law on dishonest assistance can likely catch the most audacious third parties in a Samba Transfer, including the Samba Transfer Recipient. However, it does not follow that the law on dishonest assistance will always catch a Samba Transfer Recipient. The alleged assistance might not pass the threshold of being more than minimal. Alternatively, dishonesty might not have been alleged, and if so, a claim for dishonest assistance cannot succeed. *Byers* is a point in hand.

More broadly, this article has highlighted that the Supreme Court dealt with the knowing receipt issue in *Byers* by resorting

to reasons of principle rather than focusing on the defendant's unconscionable behaviour. The court's approach offers one example of the principled nature of modern equity and how the regulation of unconscionability is merely one factor in determining whether equitable intervention is warranted.

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Article