Neutral Citation Number: **[2020] EWHC 2232 (Ch)**

Case No: BL-2018-002489

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **31 July 2020**

Before :

Mr Justice Nugee

- -

Between :

Stanford International Bank Limited (In Liquidation)	**Claimant**
- and -	
HSBC Bank PLC	**Defendant**

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- -

Patricia Robertson QC, Louise Hutton and Christopher Langley (instructed by **Eversheds Sutherlands (International) LLP**) for the **Defendant**

Justin Fenwick QC, Andrew de Mestre QC and James Knott (instructed by **Stewarts Law LLP**) for the **Claimant**

Hearing dates: **30 and 31 July 2020**

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APPROVED JUDGMENT

Mr Justice Nugee **Friday, 31 July 2020**

(**4.26** pm)

Judgment by **MR JUSTICE NUGEE**

1. I have before me an application by the defendant in this matter (**"HSBC"**) to strike out, or obtain reverse summary judgment under CPR Part 24 on, two discrete aspects of the claim which between them, if they were both successful, would dispose of the claim.

2. The claim is brought by Stanford International Bank Ltd (**"SIB"**), which is now in liquidation, by its joint liquidators. SIB was an Antiguan bank run by its ultimate beneficial owner, Mr Robert Allen Stanford, referred to in the pleadings and submissions as **"RAS"**, who has now been convicted in the United States and sentenced to a term of imprisonment far longer than the remainder of his natural life. The allegation in the claim is that the entire bank, SIB, was, from the start, a Ponzi scheme. It sold a large number of certificates of deposits to investors promising generous rates of interest and, like all Ponzi schemes, survived as long as it did by encouraging new, fresh investors to come in, and using their money to pay out those old ones who wanted to redeem their investments.

3. The allegations (with which I have not been troubled) are that the bank is heavily insolvent to the tune of some £5bn, I think, or more, that it was insolvent at all times, and that something over 80% of the monies contributed by investors were misappropriated in one way or another. It is, on any view, a scandalous history.

4. Although not formally admitted, as I understand it, in the Defence, it has not been suggested to me that there is any serious doubt that the liquidators' case in these respects is, at the very lowest, a credible one and very probably right.

5. The claim against HSBC – I will try and avoid saying "the bank" because both parties are banks – arises from the fact that HSBC operated as a correspondent bank for SIB from 2003 onwards and, in particular, operated four accounts, one sterling, one dollar, one euro and one Swiss franc account, for SIB, certainly the first three through its business in London and I think quite possibly the fourth as well.

6. The allegation is that HSBC failed in breach of its duty under *Barclays Bank plc v Quincecare Ltd* [1992] 4 AER 363 (**"the *Quincecare* duty"**) to take sufficient care to see that the monies that were being paid out from accounts under its control were being properly paid out. For present purposes HSBC accept that there is a sufficiently arguable case of breach of duty.

7. The argument has concentrated under this head, the *Quincecare* head, on the question of loss. The pleaded facts are that the *Quincecare* duty required HSBC to have reached a conclusion by 1 August 2008 at the latest that there was something very wrong and to have frozen payments out of the accounts. Instead, the accounts ran on until a date some time in, I believe, February 2009, when Mr Stanford was charged by the US authorities.

8. During that period it is alleged that £118m, or thereabouts, was paid by HSBC out of the accounts and the claim is to recover that £118m on the footing that if HSBC had acted as it is said that it should have done, none of that money would have been paid out.

9. I have a doubt as to whether the claim really lies for the whole £118m on any footing, because the amount of money in the accounts on 1 August 2008, when it is said that the balloon should have

gone up, was rather less. I was told by Mr Fenwick that an informal conversion of the various balances standing to the accounts amounted to just under £80m. But that is not a point which has been argued before me and I propose not to say any more about it. Whether it is £80m or £118m, the claim is in respect of the monies actually paid out in the period from 1 August 2008 until the accounts were frozen on, I think, 17 or 18 February 2009.

10. With the exception of one payment, it does not seem to be disputed that all of those payments were made either to individual investors holding certificates of deposit who had claims on SIB for the return of their capital and interest, or to another bank used by SIB, the Toronto Dominion Bank in Canada, which was the bank I was told that SIB used for at any rate its US customers; the pleading is that monies paid to Toronto Dominion Bank were then paid out again to depositors so that, whether directly or indirectly, all the money was paid out to the investors with the exception, as I have said, of one payment.

11. I will deal with that one payment now. It was a payment of $3m, then worth about £2.4m, to the England and Wales Cricket Board (**"the ECB"**), and it is not suggested that SIB was under any contractual liability to make that payment. It is suggested, indeed, that Mr Stanford may have promised money to the ECB and may – I do not know – have been contractually liable to pay it, but it is not suggested that SIB, as opposed to Mr Stanford personally, was under any obligation, contractual or otherwise, to make the payment and it is pleaded as a misappropriation by Mr Stanford. HSBC indeed does not seek to say on this hearing that the payment of the $3m discharged any contractual or other liability of SIB and, to that extent, that one payment stands rather apart from the rest.

12. I will deal with that payment now because it seems to me, as I made clear in argument, that there is no basis for striking out the claim for the $3m.

13. The argument that was advanced in written submissions by Ms Patricia Robertson QC, who appears for HSBC, was that the pleading did not suggest that there was any particular reason for HSBC to be alerted to something suspicious about SIB paying $3m to the ECB, it being entirely credible that a flourishing Antiguan enterprise might wish to sponsor a sporting endeavour in order to gain the reputational advantages that such corporate sponsorship can bring and that, there being no reason to suspect that payment, the claim in respect of the payment to ECB was unsustainable.

14. But in oral argument Ms Robertson accepted the force of a point I put to her as follows: the allegation you are facing, which you do not seek to say is not a triable allegation, is that you should have pulled the plug on 1 August 2008. Had you pulled the plug on 1 August 2008, the payment of $3m to the ECB would not have happened.

15. There is, it seems to me, no answer to that point and Ms Robertson, to her credit, did not suggest that really, in the final analysis, there was one. She of course made the point that if the claim only continues as a claim for about £2.4m, as opposed to a claim for £118m, that will very much affect the economics of the litigation as a whole and may lead to some practical consequences, but that, as she accepted, is not something that I am concerned with today.

16. On any view, therefore, I will allow that claim to go forward, that is the allegation that by failing, as it is said it should have done, to have frozen the accounts on 1 August 2008, HSBC has caused loss to SIB of at least £2.4m or whatever the equivalent of the payment to the ECB was.

17. That, by itself, means that the stay that I imposed at an earlier stage on the action, (and in particular a stay of disclosure which is the next major part of the proceedings) should come to an end, although I will of course give counsel an opportunity to address me on that. It does seem to me that there is no good reason why that should not now continue in the usual way.

18. Of far more significance is Ms Robertson's point for the balance of the £118m. This is a simple and beguilingly attractive point, which is that the claim for breach of the *Quincecare* duty is a common law claim for damages for breach of a tortious duty (or of an implied contractual duty, there being, in this respect, no difference between them). It is, as she was at pains to point out, not a claim for misappropriation by a director, not an equitable claim, not a statutory claim, not a discretionary claim; it is a common law claim for breach of a contractual duty (effectively a duty of care) or breach of a tortious duty of care and, like all such common law claims, the remedy sounds in damages. And it is the very first principle of damages that damages are compensatory and damages are only awarded (save in certain exceptional circumstances which do not apply here) to compensate for loss.

19. The point that is taken is that it is not disputed, and cannot now be disputed, as I will explain in a moment, that the monies which were paid out discharged proper contractual liabilities of SIB. That actually is a bit of an oversimplification. Where monies were paid direct to the holders of certificates of deposit, it is true that they discharged a contractual liability of SIB to them. Where monies were paid to the Toronto Dominion Bank, the point is a slightly different one, which is that transferring SIB's assets from one bank to another bank, where it had a credit balance, so that it could be paid on to certificate of deposit holders, was not a loss to SIB either, because the first stage of that, which was payment to Toronto Dominion Bank, did not in any way diminish SIB's assets, and the second stage of that, which did diminish SIB's assets, diminished the liability of SIB by a corresponding amount.

20. As I said, it is not disputed on this application that all the certificate of deposit holders who were paid out had a contractual entitlement to the monies that were paid to them, both principal and the generous rates of interest which they had been promised. I said I would explain that. The liquidators attempted in Antigua to devise methods by which they could claw back or recoup from those who had been preferred in this way (**"the preferred deposit holders"**) some or all of the monies they had received in order to effect a more equitable distribution, and brought proceedings to confirm that they could do that. But, after journeying through the courts in Antigua and the Eastern Caribbean Court of Appeal, the case ultimately arrived at the Privy Council where a judgment given by Lord Briggs made it clear that that route was not open to them, either under some common law doctrine of fraudulent preference or under the statutory provisions applicable in Antigua, and that the preferred deposit holders were entitled to keep the money because it was contractually due to them and they were in the fortunate position of being equity's darlings, being entitled to say that they were purchasers for value without notice and therefore entitled to keep the money, and the value they gave was the fact that they were contractually entitled to payment: see *re Stanford International Bank Ltd* [2019] UKPC 45, especially at [69]-[71].

21. So it is now common ground that all the payments, with the exception of the ECB payment, either went to Toronto Dominion Bank, where the money remained SIB's money and then on to deposit-holders in satisfaction of their contractual rights, or directly to deposit-holders in satisfaction of their contractual rights.

22. Ms Robertson says that the payment of £118m (or whatever the sum is) to the preferred deposit-holders may have caused a diminution in assets available to SIB of £118m, but it equally discharged £118m of SIB's liabilities. So, on a net asset basis, SIB was no worse off and, being no worse off, it has no claim for damages.

23. It is of course true, indeed trite law, that with some exceptions for benevolent payments and the like, somebody who is the victim of a wrongdoing, whether a breach of contract or a tort, and sues for damages has to give credit against the loss that he has suffered for any benefits that he has at the same time obtained by virtue of the wrong of which he complains. As I say, that is trite law; and it was not disputed by Mr Justin Fenwick QC, who appears for SIB.

24. In the case of a solvent person (or a solvent corporate entity), if somebody takes £100 of that person's money and uses it to discharge a debt owed by that person, it is easy to see that that person is overall no worse off. They may not have the money which they had previously, but, equally, they do not have the liability which they had previously either, and their net asset position is the same.

25. Mr Fenwick was not disposed to accept that even in the case of a solvent person or company that will always be a complete answer because there may be other losses. There may be losses, for example, flowing from the fact that a person is deprived of cash flow. I do not need to decide this point, but it is easy to see that that might be the case. It is easy to see that someone who needs, and whose solicitor is holding, cash to complete a purchase, for example, would be able to complain if instead of using the money to complete the purchase the solicitor used it to discharge some other debt, however much that other debt might be a liability of his, because the client might thereby be exposed to an action from the vendor for failing to complete the purchase and it is no comfort to say, "Oh, but, don't worry, your money, instead of being used in the way you wanted to use it, has been used for something else which you would have had to do sooner or later". So I do not dispute Mr Fenwick's suggestion that even in the case of a solvent person, wrongfully using his money to pay one of his debts can lead to consequential losses for which damages can be awarded, but where the loss that is claimed is simply the loss of the money paid out, in general I think Ms Robertson's proposition that you have to give credit for the fact that your liabilities have been diminished by a corresponding amount is probably in most, if not all, circumstances a good answer.

26. It does seem to me, however, that the position is or, at any rate, may very well be different if you are an insolvent individual or an insolvent company.

27. Take this case. As at 1 August 2008, SIB had, sitting in its HSBC accounts, a sum of some £80m or its equivalent. If HSBC had done what SIB alleges it should have done, which, as I say, has to be treated for present purposes as something that gives rise to a triable issue, HSBC would have frozen the accounts on 1 August 2008, the balloon would have gone up and SIB would sooner or later inevitably have collapsed into insolvent liquidation once it became apparent that it was unable to repay its certificates of deposit. Banks that cannot repay money to their depositors when they are liable to tend not to survive for very long.

28. So, in that scenario, which is, to my mind, the counterfactual that needs to be interrogated for the purposes of assessing damages, SIB would have had £80m available to it. It would, at the same time, have had a very large number, a much higher number, of liabilities – whether that be £5bn or £4bn does not for present purposes matter; the claimant's case is that SIB was always heavily

insolvent and indeed that is likely to be the nature of a fraud such as this. The effect of paying out the £118m odd over the next 6 months or so is no doubt that SIB has less assets than it would have done under the counterfactual – if nothing was left in its accounts, it would have £80m less. It is true that it may also have £80m (or indeed it may be £118m) less liabilities but for reasons given below I do not think this means the loss of the £80m is not a real loss. (In fact, it seems to me that the precise amount of liabilities that SIB had a result of being allowed to run on for another 6 months or so may be very different because, as with all Ponzi schemes, one has to keep sucking in new investors to pay out the old ones. The evidence is that from September 2008 there were various large withdrawals in favour of depositors (something which has been pleaded as a mini run on the bank), and since more than £80m was paid out, it seems probable that new depositors had to be, and were, found to fund (at least in part) those payments, so without a full investigation, one cannot tell whether the total quantum of liabilities as at February 2009 was in fact greater than the total liabilities would have been back in August 2008. It is certainly not self-evident, at any rate to me, that the overall liabilities would have been £118m, or even £80m, less. That itself seems to me to be a point which gives one pause for thought, although that was not a point that was argued by Mr Fenwick, or that Ms Robertson had to answer.)

29. The point that was argued by Mr Fenwick, which was a point that I myself put to Ms Robertson, was this: once your liabilities vastly exceed your assets, it really is a matter of indifference to you whether you have £5bn of liabilities or £6bn of liabilities. If your assets are only in the hundreds of millions, on any view you are hopelessly and irredeemably insolvent. You therefore have no net assets on any view, but a net liability, and if that net liability is only £5bn instead of £6bn (or £5.118bn), that does not make any difference to you – you still have no net assets.

30. In those circumstances, if you are a corporate entity, you are heading for insolvent liquidation inevitably and in an insolvent liquidation the pool of assets which belongs to you is then distributable among the creditors. It does not matter to *the company* whether those creditors amount to £5bn or £6bn. There will be nothing leftover for the company or its shareholders on any view. So if you ask the question: is the company – and I accept a point made, more than once, by Ms Robertson that the *Quincecare* duty is only owed to the company, it is not owed to the creditors, and I am not here dealing with the position of creditors, but with the position of the company – any worse off by having £118m (or £80m) of its assets wrongfully extracted from its bank accounts, it seems to me that the answer is Yes. Under the counterfactual SIB would have had £80m in the bank, and it would have had a very large number of creditors, the precise amount of which does not matter to it, but it would have that money in its bank accounts at HSBC, that is in actual assets.

31. Under what actually happened, it does not have the £80m. Does it have to give credit for the fact that it has also been saved £118m of liabilities? To my mind, the answer to that is No, because it does not make it any better off to be saved that £118m of liabilities. It is still as insolvent as it was – it is just that the pool of creditors is a slightly different mix.

32. It is possible, and Mr Fenwick accepted that it might be possible, that by analogy with what is called the *West Mercia* proviso (see *West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30, *re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch) at [135], [148]-[151]) it might be appropriate to say that where the total pool of creditors has been reduced by the £118m – not, as I say, in fact an obvious consequence of SIB continuing to trade for another 6 months but the basis on which this application has been argued – and thereby there has been a small (and on the facts

of this case it will be very small) increase in the dividend available to those creditors who have not been preferred, some adjustment to the damages might be appropriate.

33. I say no more about that because it was not argued before me, but it was recognised by Mr Fenwick that that might be something that would have to be taken account of at the end of the day (if duly pleaded) but it does seem to me that the bald proposition that where £118m of assets has been taken from a company and used to discharge £118m of its liabilities, there is therefore no loss to the company, is not one that in a case of a company such as this, which is wholly and irretrievably insolvent, that I feel disposed to accept.

34. The position seems to me to be this: if a company is solvent, then paying £100 of its money and discharging £100 of its liabilities, on the one hand reduces its assets but on the other hand is offset by a corresponding benefit to the company by reducing the creditors that have to be paid. But if the company is insolvent, then paying £100 on the one hand reduces its assets, but that is not offset by a corresponding benefit to the company and a reduction in its liabilities as it still does not have enough to pay them all and there has not in fact been any increase in its net assets as it still has no net assets at all.

35. Ms Robertson pressed me with the decision of Lightman J in *National Employers' Mutual General Insurance Association Ltd v AGF Holdings (UK) Ltd* [1997] 2 BCLC 191. It is quite late on the last day of term and I do not think it necessary to set out the facts of that case in detail. They can all be found by looking at the report. The allegation in short was that an insurance company, which had a right to an indemnity for payments to policyholders, had been damaged when the indemnifier came to arrangements, the net effect of which was that the indemnifier would pay the policyholders direct, taking an assignment of their claims against the insurance company. That was suggested to be tortious. It was suggested to be a breach of contract by the agents who were responsible for implementing it and a conspiracy or other economic tort by the indemnifier. Lightman J had little difficulty in disposing of that claim. Indeed, to his mind, he thought the answer was obvious, namely that the insurance company had not suffered a loss.

36. I have no difficulty with the decision in that case. The key to it is, as Lightman J says, that the effect of the bypass arrangements, as I will call them, was to save the insurance company from a liability to the policyholders. It was only that liability that it had a claim to be indemnified against, so it was a concomitant of that or, as Lightman J puts it, two sides of the same coin, that it did not receive the money from the indemnifier. As I say, I have no difficulty with the decision on the facts.

37. The way in which he put it is this, at 200H:

> "The startling feature of this case is that the Defendants' alleged wrongdoing in the first instance occasioned, not a loss, but relief from a liability, ie claims by UK policyholders. Relief from a liability of itself cannot of course of itself be a loss."

Then he said the only complaint can be a loss of the right of indemnity but that was the other side of the coin.

38. He said at 201D:

> "... Mr Burton's [that was for the claimants] case is that NEMGIA suffered loss because it was prevented from profiting from this wrong [that is not paying its policyholders] by

> withholding payment when placed in funds by NEMIC and so enabled to do so. I do not think that the loss of this opportunity constitutes damage or loss. The entitlement on the part of NEMGIA to the receipt of the reinsurance proceeds is entirely balanced by the immediate liability to the UK policyholders and both must be netted-off one against the other."

Then at 201G, he says:

> "The relevant question is: what loss did NEMGIA suffer – ie in money terms is NEMGIA worse off?"

Then his conclusion at 201H is:

> "In short, I can see no basis for a claim that the wrongful conduct on the part of the Defendants which I must assume, if directed against a solvent company amply able to meet its liabilities as and when they arise, can in law occasion that company loss: so far as it goes, it relieves that company of the administrative and cash-flow burden of which the practical arrangements adopted on completion in this case were designed to relieve NEMGIA. The position is not changed if the company is insolvent (unable to pay its debts as they accrue due) in need (if it is to continue to trade) of the facility to 'rob Peter to pay Paul'. Nor again is it changed if the company's liquidation is seen to be imminent by those who devise and implement the direct payment arrangement and indeed liquidation ensues. The critical focus of attention must be the assets and liabilities, the rights and obligations, of the company. The consequences of the direct payment arrangement are in this respect neutral and accordingly no substantial damages can be awarded."

39. As I say, I have no difficulty on the facts of that case. As Mr Fenwick said, it was a case where what NEMGIA was complaining of was that it had lost the opportunity to get in money because it had been deprived of the opportunity to expose itself to a liability to the policyholders. It is not a case where the money was already an asset of NEMGIA and someone had paid it away.

40. That seems to me to give rise to rather different considerations for the reasons that I have sought to explain. It does seem to me that on the alleged facts of this case SIB would be better off if the balloon had gone up on 1 August 2008, as it is said it should have done. It would then have had actual assets of £80m and the fact that it would have had slightly lower liabilities, indeed lower liabilities by £80m, or £118m, whatever the figure is, does not seem to me to be of a corresponding benefit to the company in the heavily and inevitably insolvent position in which it found itself.

41. Had SIB had the £80m, it would have had that money available for the liquidators to pursue such claims as they thought they could usefully pursue and for distribution to its creditors. The assumed and alleged beaches by HSBC have deprived it of that opportunity and that seems to me to be a real loss. To describe the position as one in which it is in exactly the same financial position as it would have been in on 1 August 2008 does seem to me, as Mr Fenwick suggested, contrary to one's instinctive and common sense reaction to the facts.

42. For those reasons, I propose to dismiss the application for summary judgment or strike-out of the *Quincecare* loss claim for the balance over and above the ECB payment. I am not asked to decide the point in favour of the claimant so it will technically be open to the defendant to continue to run these arguments in their pleadings and to run these arguments at trial, but I hope that the views

I have expressed will be of some assistance, both to the parties and, whether he or she agrees with them or not, to the person hearing the trial, on the assumption there is one. All I need to, and do, decide today is that the case is not so obviously hopeless as to entitle HSBC to an order for summary judgment in respect of it or to strike out the claim.

43. The other part of the application raises very different considerations. In addition to its *Quincecare* claim, SIB brings a claim against HSBC for dishonest assistance in relation to breaches of fiduciary duty by RAS. It has not been suggested before me that there is insufficient allegation, or material to support the suggestion, that RAS owed fiduciary duties to SIB, that he broke those fiduciary duties to SIB and that every single payment out of the £118m, including the $3m paid to ECB, was paid out in breach of duty. His duty was no doubt not to set up a fraudulent Ponzi scheme in the first place, but, having set it up, his only relevant duty was to administer the assets under SIB's control in such a way as to bring the fraudulent Ponzi scheme to an end as soon as possible. It was certainly not to continue to pay out the preferred deposit-holders with a view to maintaining the fiction that this was a bona fide business paying generous returns from genuine investments.

44. Nor has it been suggested before me that there is not a sufficient allegation of assistance. The assistance pleaded is that HSBC continued to allow SIB to operate its bank accounts. The only point that has been argued before me is whether there is a sufficient plea of dishonesty.

45. Mr Fenwick, to whom I am indebted for his careful submissions, made it clear that he, quite properly, was unwilling to plead dishonesty against any particular individual because he does not have the material – he would say does not yet have the material – to do so. He has, however, pleaded a case of dishonesty against HSBC collectively, as it were, and he maintains that he has put forward a sufficient allegation to survive a strike-out, making it clear that if disclosure, which in the light of the decisions I have already come to will now take place, reveals a case that can be properly pleaded against individuals, he will undoubtedly seek to amend to do so.

46. I do not propose to lengthen this judgment with extensive citation of authority. It is quite plain and not really disputed that dishonest assistance needs dishonesty, see what Lord Nicholls said in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 392B-C. Nothing less will do: see Lord Hughes in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 at [62]. It is also clear from the *Ivey* decision that the role of the fact-finder in a case of dishonesty is, firstly, to identify the actual subjective state of mind of a defendant and then to test that against an objective test of whether that is honest or no: see at [74]. None of that was in dispute.

47. Equally, I was shown a number of citations which make it entirely clear that current English law is that one cannot aggregate two innocent minds to make a dishonest whole. The classic case is drawn from a case of alleged fraudulent misrepresentation. That is a case called *Armstrong v Strain* [1952] KB 232, where the trial judge, Devlin J, had found that an estate agent had made representations as to a property which were untrue but which he did not know to be untrue, and that his principal, although knowing the facts which made such a statement untrue, did not know that his agent had made such a statement. Both were therefore acquitted of fraud. On appeal, the Court of Appeal accepted not only that they could not disturb his factual findings but that, on those factual findings, it was not possible to convict either of fraud.

48. That, as I say, is a thoroughly well-established principle in English law. It is conveniently summarised by Newey J, as he then was, in a case called *Greenridge Luton One Ltd v Kempton*

Investments Ltd [2016] EWHC 91 (Ch) at [77] to [79], which it is not necessary for me to read out, but under the heading, "*Aggregation of knowledge*", he sets out the proposition that the law does not recognise any conception of composite fraud, referring to *Armstrong v Strain*, and it is there put forward as an entirely orthodox and uncontroversial statement of the law, as, to my mind, indeed it is.

49. I am of course bound by the Court of Appeal in England. There were floated some Commonwealth authorities from Australia and New Zealand, one of which appeared to suggest a different application of the law, but, however interesting, I was told that they do not appear to have been followed in those jurisdictions and, in any event, as I say, I am bound by the Court of Appeal in England.

50. I proceed on the basis that it is not possible to make out a case of fraud against a person or against a corporate entity by saying that where there are two agents, or agent and principal, one of the two knew something and the other of the two knew something else and if you put them together and the same knowledge was held by the same person there would have been a knowing fraud or dishonesty.

51. Mr Fenwick accepted that broad proposition, though he sought to hedge it about with qualifications, such as that it is only when people are really innocent, not when some of them have been acting wrongfully, and it is only when people are in different departments, (although he accepted that was not in fact part of the test), and the like. It seems to me, however, that the position on the authorities is very simple and very stark. In a case of dishonesty you cannot say of two people, A and B, or however many people it is, that although no single one of them is dishonest somehow the corporate entity for which they work is dishonest. An "innocent" mind, for these purposes, in my judgment, simply means someone who is not dishonest. As Millett J said in *Agip (Africa) Ltd) v Jackson* [1990] Ch 265 at 293E there is a sharp difference between honesty and no. Negligence, however gross, is not dishonesty. Dishonesty requires crossing a threshold.

52. To my mind, when the authorities say that you cannot put together two innocent minds to make a dishonest whole, the "innocent" there does not refer to people who are entirely blameless in everything they do, it refers to people who are not themselves dishonest.

53. I therefore think that there is no case that can be made against HSBC that relies on aggregating knowledge held by different people if none of those individuals is alleged to be dishonest.

54. At this stage, as I say, Mr Fenwick is not able to, and does not, allege that any individuals are dishonest or, at any rate, not in any relevant way. There are a couple of paragraphs in the pleading, which it is not necessary to read out, which indicate that in relation to other matters, confirmations that KYC had been carried out or that the accounts had been operated in accordance with what was expected and the like, people may have said things "falsely or recklessly" and that may or may not amount to allegations of dishonesty against them. I need not resolve that because that is not the claim that is brought. The claim that is brought is dishonest assistance in continuing to operate the accounts from 1 August 2008 onwards.

55. So, insofar as the claim rests on aggregation of knowledge, I do not think that it is sufficient to allege, as Mr Fenwick does allege, that there were various things known to HSBC and that if they were all known to a single individual banker, that banker would be dishonest if he ignored them

and therefore they amount to a case of dishonesty because one can aggregate the knowledge for this purpose.

56. One cannot, in my judgment, put together knowledge held by one, two, five or 50 people working for the bank, who are not themselves personally dishonest, to make a case that the bank was dishonest.

57. That is not the only way in which Mr Fenwick puts his case. I do not have time, nor is it necessary, to read into this short, unreserved judgment all the allegations pleaded, which are long and careful, but I should refer to the summary of the case at paragraph 178 of the particulars of claim:

> "HSBC as an entity is to be regarded as having had knowledge of these facts and matters amounting to dishonesty [the previous parts of the pleading having set out a whole raft of things which were available to be known to HSBC], not because of the knowledge of any one individual, on the assumption which SIB makes for present purposes that no single individual had sufficient elements of such knowledge to give rise to a direct claim against them, but because it acted with corporate recklessness and/or by reference to the aggregated knowledge held by and/or conduct of the individuals within HSBC and/or HSBC was reckless in that it neither knew nor cared, and thereby turned a blind eye as to, whether SIB was being run dishonestly."

Then a whole lot of circumstances are set out and some of that detail I was referred to.

58. That rests on analysis on two more propositions. One is that corporate recklessness is sufficient to amount to dishonesty. I pressed Mr Fenwick on this because "reckless" is one of those unhelpful words which means different things in different contexts. The foundation for Mr Fenwick's submission that recklessness could amount to dishonesty is a statement by Lord Herschell in *Derry v Peek*, not an authority that was cited to me as such, although the relevant passage is helpfully found in Newey J's judgment in the case I have already referred to of *Greenridge*, at [75], where he said this:

> "Both sides made reference to *Derry v Peek* (1889) 14 App Cas 337. In that case, Lord Herschell explained the meaning of 'fraud' in the context of a claim for deceit in these terms (at 374):
>
> > 'Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief'."

59. It is that division of deceit into a threefold classification of knowingly, without belief in its truth, or recklessly careless whether it be true or false, that Mr Fenwick has built on to allege that a case of corporate recklessness, not knowing or caring whether SIB was being run properly or not, was a fraud on its investors, is sufficient to amount to dishonesty, but I do not think one can transpose the words of Lord Herschell when dealing with deceit, a tort which depends on fraudulent

misrepresentation, into a generalised allegation that if one does not know or care about something one is dishonest in relation to it.

60. That seems to me, with all respect to Mr Fenwick, stretching Lord Herschell's words beyond their proper application. The principle in *Derry v Peek* is not only well-established by authority but is very well-known and I have no problem with it at all. If one makes a statement of fact and knows it to be untrue, of course that is a fraud. If one makes a statement of fact and simply does not know whether it is true or not, that is also a fraud because saying that something is the fact is an assertion that you believe it to be a fact. If you have no belief that that is the fact, that is equally fraudulent and deceitful.

61. But I do not think one can simply say, therefore, that companies which act recklessly in the sense of not knowing and not caring are therefore dishonest. I go back to what Millett J said in *Agip v Jackson* in a very well-known passage at 293, where he is dealing with knowing assistance. He is dealing with knowing assistance before the guidance given by Lord Nicholls in *Tan*, but the thrust of his judgment is to similar effect. Having set out the well-known fivefold classification by Peter Gibson J in *Baden's* case, he says this:

> "According to Peter Gibson J, a person in category (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because 'he did not want to know' (category (ii)) or because he regarded it as 'none of his business' (category (iii)), that is quite another. Such conduct is dishonest and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."

62. The same applies to a company such as HSBC which does not ask questions which would have revealed the nature of SIB's business as being effectively a massive fraud. The question is why not? Is it because, however foolishly, they did not suspect wrongdoing? If so, they are not dishonest. It does not assist to say that they ignored their own policies, as indeed Mr Fenwick does say in elaborate detail. It does not assist to say that they had developed an ingrained culture of failing to obtain knowledge. Simply being very bad at what you should be doing is not dishonesty.

63. I of course am not in a position to say whether these allegations of ingrained culture of failing to apply its own policies, systems and procedures and like will be made out at trial or not. They may be very relevant to the *Quincecare* claim, but they are not relevant, to my mind, to the dishonesty claim, unless it is alleged that the reason they did not look is because they did not want to know. That collapses into an allegation of blind eye knowledge.

64. It is not pleaded, and I was taken with some care by Mr Fenwick through all the relevant parts of the pleading (and skimmed through the rest of the pleading), that any individual at HSBC knew that SIB was a Ponzi fraud. The case has to be that they turned a blind eye to that, but blind eye knowledge requires targeted suspicion: see what was said by Lord Scott as referred to in the

decision of the Court of Appeal in *Group Seven Ltd v Nasir* [2019] EWCA Civ 614, where in the judgment of the court there is a citation from *Twinsectra*, at [60] from the speech of Lord Scott, with whose speech Lord Steyn and Lord Hoffman agreed, as follows:

> "In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."

That was a case, as there explained, where the question arose in relation to marine insurance, but, as the Court of Appeal go on to say, the principles apply with equal force to the law of accessory liability.

65. Nowhere is it pleaded that HSBC did not investigate SIB's affairs more closely because it had a targeted suspicion that its affairs were fraudulent and did not look because it did not want to know.

66. When Nelson at the battle of Copenhagen is reputed to have put the telescope to his blind eye, it is said he knew perfectly well what signal he would see. It would be a signal from the Admiralty requiring him to cease hostile operations. The reason he put the telescope to his blind eye was because he did not want to receive knowledge of that which he suspected he would find.

67. No doubt the doctrine goes slightly wider than those facts, but I am bound by what the Court of Appeal has said in *Group Seven Ltd v Nasir* to apply what Lord Scott said in *Twinsectra* and, in those circumstances, absent an allegation of targeted suspicion and of a deliberate decision not to look, I do not think that the copious allegations made against HSBC amount, singularly or cumulatively, to allegations that can properly be characterised as allegations of dishonesty.

68. In effect Mr Fenwick said that this is terribly unfair because until he has had disclosure, he cannot plead a case against individuals and he should be given the opportunity to do so. I accept, as the Court of Appeal has very recently said in *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699, that a pleading may not be amenable to be struck out if it pleads dishonesty against a corporate entity without identifying individuals, as longs as it sets out the basis for alleging dishonesty against a corporate entity, but I do not think this pleading does set out a viable basis for alleging dishonesty against HSBC.

69. I am not going to give summary judgment on the point. I accept that material may emerge from disclosure. There has been extensive pre-action disclosure but not on the same scale as there will be under the Model D (or Model E even) extended disclosure which has been agreed by the parties or directed at the CMC. There may be more material which comes forward. I am reluctant (and I have said this before: see *Sharp v Blank* [2015] EWHC 3219 (Ch) at [34]) to grant summary judgment on a discrete aspect of a case at the instance of a defendant simply on the basis that the claimant does not yet have the material to plead something because I have a fear that doing that would prevent, by virtue of the doctrine of res judicata, the claimant being able to bring such a plea back in if the material did become available. I am conscious that for summary judgment purposes the court should have regard to the fact that claimants very often do not have the material which they will have available to them at trial.

70. Nevertheless, I am prepared to strike out the plea of dishonesty. It does not seem to me to be appropriate or consistent with the overriding objective that allegations of fact, which do not, in my judgment, amount in law to an allegation of dishonesty, should remain on the pleadings, cluttering up a case which is a complex enough case as it is. By striking them out, rather than granting summary judgment on them, it seems to me that the opportunity will be preserved for the claimant, if so advised, after disclosure, to seek to re-plead a case of dishonesty, if it can properly do so, having regard to the principles I have tried to draw from the authorities drawn to my attention and the material available to it after disclosure.

71. I say nothing as to whether such an amendment will be permitted. That will be a matter to be decided in accordance with the overriding objective by whoever hears any such application (and it may of course be that no such application can be and is brought), but it does seem to me that it is more in the interests of SIB, for the reasons I have sought to give, to strike out these claims, leaving them to be brought back in if there is sufficient material to do so (and if it is appropriate to give them leave to do so), than to grant summary judgment on them, which, as I say, I fear might preclude them from taking that course, however strong the material that might emerge.

72. In those circumstances, I dispose of the application as follows: I will strike out the allegation of dishonest assistance, but I will not strike out or give summary judgment on the *Quincecare* allegation and, subject to anything that counsel wish to say, I will lift the stay which I imposed pending the hearing of this application.