Fraud - appeal against decisions of the Royal Court on 16 November, 2012 and 24 January, 2013.

[2013]JCA071

COURT OF APPEAL

11 April 2013

Before : James W. McNeill, Q.C., President
Jonathan Crow, Q.C., and
Sir David Calvert-Smith, Kt.

Between	**(1) The Federal Republic of Brazil**	**RESPONDENTS/Plaintiff**
	(2) The Municipality of Sao Paulo	
And	**(1) Durant International Corporation**	**APPLICANTS/Defendants**
	(2) Kildare Finance Limited	
And	**(1) Deutsche Bank International Limited**	**Parties cited**
	(2) Deutsche International Custodial Services Limited	
	(3) Deutsche International Corporate Services Limited	
	(4) Deutsche International Trustee Services (CI) Limited	

Advocate D. S. Steenson for the Applicants.

Advocate E. L. Jordan for the Respondents.

JUDGMENT

THE PRESIDENT:

INTRODUCTION

1. This is the judgment of the Court. In this action the second respondent is the principal claimant, the first

respondent being a necessary party to any claim brought outside Brazil by a public authority of that Republic. The action is for recovery of certain assets currently held by the Parties Cited in Jersey in the name of the appellants. Those assets are claimed as being the traceable proceeds of bribes, secret commissions or other fraudulent payments received by either or both of Paulo Salim Maluf and his son Flavio Maluf in early 1998, in connexion with a major public works contract in Sao Paulo, Brazil.

2. The essence of the claim, for which the Royal Court granted a decree, is that in the mid to late 1990's a wide-scale fraud was in operation in the municipality of the second respondents, resulting in payments to either or both of the Malufs. At the trial the respondents set out to show that certain of those monies could be traced into specific credits made to a bank account held in the name "Chanani" at Safra International Bank in New York, an account said to be beneficially owned and controlled by the Malufs. It was alleged that those monies were subsequently transferred to an account held in the name of the first appellant at Deutsche Bank, Jersey; the appellants being at the material time beneficially owned and controlled by the Malufs. Some of those funds were used to purchase Unit Trust assets now held by the Parties Cited as nominees for the appellants.

3. The bases of the claim for recovery from the present appellants are that they are personally accountable as constructive trustees of funds received by them with knowledge of their tainted origin, separately that of unjust enrichment and, separately again, that of proprietorship.

THE DECISION BELOW

4. After trial the Royal Court (H.W.B. Page, Q.C. and Jurats) concluded that the claim succeeded and, in November 2012, found and held:-

   (i) That the second respondent had been the victim of a fraud substantially as alleged;

   (ii) That Paulo Maluf was to some extent a party to that fraud, receiving some fifteen secret payments;

   (iii) That Flavio Maluf, knowing of the nature of such payments arranged for a large proportion of those funds to be transferred out of Brazil and into the bank account known as Chanani with Safra International Bank of New York, an account controlled by Paulo Maluf and beneficially owned by either or both of him and his son;

   (iv) That those latter payments were traceable into the bank accounts of the first and second appellants with Deutsche Bank in Jersey;

   (v) That the knowledge of the Malufs that such payments were the proceeds of a fraud on the present respondents was attributable to each of the defendants;

   (vi) That each of the present appellants was, accordingly, liable to the present respondents as constructive trustee;

   (vii) That the knowledge of the Malufs that the present appellants had no entitlement to such payments was attributable to each of the present appellants, giving rise to liability on the basis of unjust enrichment; and

   (viii) That the present respondents had a proprietary claim to specified monies from funds currently held by Deutsche Bank in accounts in the name of the present appellants.

THE APPEAL

5. Before this court the appellants did not seek to challenge the finding below that whatever material knowledge Paulo Maluf may have had was to be attributed to the appellants. Nor did they seek to challenge the finding that there was a fraud of some sort taking place in respect of the public works project with which the action dealt.

6. As far as the principal issues are concerned, the appellants challenged the findings that Paulo Maluf was involved in the fraud or that he and ultimately the present appellants received proceeds from the fraud.

7. The appellants contended that the Royal Court reached conclusions on the facts which were wrong and which no reasonable tribunal could have reached on the evidence before them. All the critical witness evidence had been hearsay and, whilst the fact that it was hearsay did not of itself prevent the court taking it into account, in the particular circumstances of this case it would be unfair to place any or any significant weight on such evidence where the claim sought to establish fraud. There was no reliable basis in the evidence for concluding that funds from the fraud were sent abroad and, in particular, paid into the Chanani account. The Royal Court was wrong to conclude that the hearsay evidence could be regarded as *"reliable and accorded considerable weight"* in establishing the transfer of monies abroad, the involvement of Mr. Paulo Maluf in sending money abroad and in the explanation supporting the reliability of a critical document. That document produced in evidence, and accepted by the present respondents as being critical to the claim, could not be relied upon as a genuine document, probative in its own right, in the absence of reliable authentication. In the circumstances before the Royal Court, it ought not to have dismissed the argument for the present appellants that the document was of unknown provenance and might have been a fabrication.

8. In addition to these arguments regarding the weight to be attached to hearsay evidence and the weight, if any, to be attached to the critical document, the appellants presented two arguments to this court in respect of tracing. The first was in respect of tracing into the Chanani account and the second in respect of tracing into the Durant account.

9. As regards tracing into the Chanani account, the appellants accepted, as they had done below, that Paulo Maluf owed fiduciary duties to the present respondents. If the decision that Paulo Maluf was party to the fraud on the respondents was upheld, the appellants did not seek to challenge the decision below that the respondents had an equitable, or proprietary, interest in the proceeds of the fraud. Nor would they seek to challenge that, if and to the extent that the appellants had received the traceable, identifiable proceeds of that fraud, they had knowledge of Paulo Maluf's breach of fiduciary duty such as to render it unconscionable for them to retain the benefit of those proceeds.

10. However, it was incumbent upon the respondents to have proven that the proceeds of the fraud could be traced through to the appellants' bank accounts in Jersey. Apart from general evidence that there was a fraud taking place, and how in general terms it worked, there was no attempt to prove that particular funds paid into the Chanani account were or represented proceeds of that fraud.

11. The respondents had expressly conceded at trial that they were unable to prove how the funds said to have been misappropriated allegedly reached the Chanani account. Even when the critical document was examined, important questions remained unanswered with the result that the respondents could not show that monies representing the proceeds of the fraud would have been paid into the Chanani account. The respondents were required to identify the traceable property at every stage of its journey whereas the Royal Court appeared to have accepted that, in the circumstances before it, the evidential burden had shifted to the present appellants upon the basis that evidence had been adduced from which *"in the absence of any other explanation a court would be more than justified in concluding that funds stolen from the municipality had found their way within a matter of days into the Chanani account"*. The case brought by the present respondents did not allege circumstances analogous to the maelstrom of payments situation referred to by Lord Neuberger of Abbotsbury in Sinclair Investments (UK) Limited-v-Versailles Trade Finance Limited & Others [2011] EWCA 347.

12. Turning to issues arising in respect of tracing into the Durant account, the appellants' argument proceeded before us upon the assumption, contrary to their primary case, that the sums paid into the Chanani account represented proceeds from the fraud. The appellants accepted that, applying the principles in Re: Hallett's Estate (1880) 13 Ch D 727-728, there was a presumption that where the money of an innocent party is mixed with that of a defaulting fiduciary, the defaulting fiduciary's money is spent first. The appellants therefore accept that the movements on the account were such that $7.7 million of the traceable proceeds in the Chanani account were paid out to the Durant account, as a sufficient amount of the alleged proceeds of the fraud remained in the Chanani account at material times to fund payments out to Durant of that sum.

13. The appellants argued, however, that payments from the Chanani account to the Durant account could not have been funded exclusively by the fraud monies on all of the occasions relied upon by the present respondents. Some payments must have been funded by other non-fiduciary money standing to the credit of the account, to which no claim could be made by the present respondents. The Royal Court had been persuaded by the present respondents that a principle of reverse tracing should be applied so that payments into the Durant account could be treated as having been fed by later payments into the Chanani account, such later payments also allegedly having been derived from the fraud.

14. Whilst there had been some academic argument for and against a principle of reverse tracing, as matters stood, no principle of reverse tracing was part of the law of England. Despite the fact that the law of Jersey does not necessarily follow the law of England (Re Esteem [2002 JLR 53]) it was not appropriate simply to create new principles on the basis of the particular facts of a single case.

15. In any event at the time when the payments to Durant were made in January 1998, the value of payments was such that they must have used money other than the proceeds of the fraud. Payments subsequently made into the accounts were used for other purposes (in part for further payments to Durant and in part for payments to other unrelated accounts). There was no basis for drawing any inference that the subsequent payments into the Chanani account were intended to reimburse that account for payments already made to Durant. The Royal Court had been wrong to use a pleading point arising out of the answers to determine the argument on reverse tracing against the present appellants. There was no admission that sums received through the fraud were paid into the Durant account. Nor was there any admission that sums identified in the hands of Deutsche Bank were derived solely from the monies paid into the Chanani account.

DISCUSSION

Hearsay Evidence

16. The trial below proceeded before a highly experienced Commissioner and Jurats. After a meticulous appraisal of the evidence, the Royal Court noted the terms of Article 6 of the Civil Evidence (Jersey) Law 2003 which provides:-

"(1) In estimating the weight (if any) to be given to hearsay evidence the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence".

17. The Royal Court then went on to consider each of the specific factors set out in Article 6(2) and a number of other factors peculiar to the case before it.

18. After referring to the speech of Baroness Hale in Polanski-v-Condé Nast Publications Limited [2005] UKHL 10 and to Welsh-v-Stokes[2007] EWCA Civ. 796 (paragraphs 22 and 23), the Royal Court stated:-

"173 Taking all these factors into account, and despite apparent inconsistencies of detail both internally and in relation to other statements, there is, quite plainly, substantial consistency across the board on major matters - consistency between witnesses as well as consistency with contemporaneous documents and information subsequently supplied by Flavio Maluf to Schellenberg Wittmer – and it appears to us that the hearsay evidence adduced can properly be regarded as reliable and accorded considerable weight at least to the extent that the witnesses speak from first-hand knowledge on the following topics: (1) the existence in late December 1997 and early 1998 of a scheme entailing the fraudulent diversion of funds supplied by the Municipality in the belief that they were required for the purpose of the Avenue Agua Espraiada project and the process by which that diversion was accomplished and a 'slush fund' created (Messrs. Santoro, Figueiredo, Fernandes, and Simeão De Oliveira); (2) the distribution from such fund of kickbacks to a number of persons who had no entitlement whatever to any part of the moneys made available by the Municipality (Messrs. Fernandes and Simeão De Oliveira); (3) in some cases the transfer of such kickbacks abroad via doleiros (Messrs. Simeão De Oliveira and Alves); (4) the involvement of Flavio Maluf in sending money abroad (Messrs. Simeão De Oliveira, Alves and van Otterloo); (5) the opening, control and beneficial ownership of the Chanani account (Vivaldo Alves); and (6) the explanation of the De Oliveira document and its companion documents (Simeão De Oliveira)."

19. The appellants' case is that the decision below was plainly wrong, but it depends upon an approach which isolates and analyses certain pieces of the Hearsay evidence before the Royal Court. It seems to us clear that a finding that the Royal Court had been plainly wrong on the facts of a case will not only be exceptional but extremely rare because the findings of fact are made by jurats: see Her Majesty's Attorney General for Jersey-v-O'Brien [2006] JLR 133. It therefore follows, in our opinion, that in a tolerably complex case such as the present, it is likely only to be where an essential finding of fact turns upon a discrete and critical piece of evidence that this court of appeal could reach a view that a determination by the Royal Court had been plainly wrong.

20. The principal thrust of the Appellants' argument before us on this point was, as we have said, to isolate and analyse the Hearsay statements which had been before the Royal Court, in order to seek to identify the existence and importance of inconsistencies. As the argument then ran, it was developed in two respects. First was to suggest that, having carried out that analysis it was clear that the Royal Court must have given much greater weight to the Hearsay statements than the judgment below bore to show. Second was to the effect that the Royal Court ought either to have accepted the whole of individual witness statements or rejected them. If accepted in whole they disclosed such inconsistency that the evidence was not sufficient to prove the requisite steps for the claim.

21. In our view, once it has been accepted – as it is by the appellants – both that it is open to the court of first instance to consider hearsay evidence and to give weight to it, an appellate court must exercise great care in identifying to what extent it is open to it to reach its own views as to the appropriate weight to be attached.

22. In Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 W.L.R. 577 at paragraph [15] Clarke LJ said ***"In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere."***

23. Advocate Steenson, for the appellants, submitted that where, as here, the evidence was almost exclusively documentary, the appellate court was in no different position to that of the court of first instance in evaluating evidence. We disagree. Even where there has been little oral evidence, in a complex case the court of first instance will have enjoyed a quite different opportunity to appraise and evaluate the evidence. First because of the systematic way in which the evidence will have been adduced at a trial and second because of the length of time taken. Given the extent of evidence adduced before the Royal Court in a case such as this, it is impossible for this court, as a court of review, to embark upon a similar exercise to that carried out by the Royal Court. Furthermore, it has been said that, where the questions considered at first instance are complex, the trial judge is entitled to what, in other jurisprudence, is referred to as a ***"margin of appreciation"***: see Biogen Inc-v-Medeva plc [1997] RPC 1, particularly at paragraphs 195 and 196.

24. We do not consider that there is any substance in the suggestion that the Royal Court must have given much greater weight to the Hearsay statements than the judgment below bore to show. The judgment is set out in great detail and takes considerable care to identify where the court had reservations as to what could be taken from the statements. As to whether or not individual Hearsay statements could be accepted in whole or in part, we consider that issue to be pre-eminently one for the court of first instance which is able to appraise the evidence of any witness and accept or reject individual portions; not only by reference in the ordinary course to any cross-examination, but by reference in a case such as this to other evidence, such as documents. Even after the careful analysis carried out by Advocate Steenson we could discern no basis upon which to find that the Royal Court had been plainly wrong in its approach to the Hearsay statements, the weight to be attached to them and the facts proven by them.

Documentary evidence

25. The only point in this part of the appeal where an essential finding of fact turned upon a discrete and critical piece of evidence was in respect of the critical document to which we have already referred.

26. The critical document was referred to below as "the De Oliveira document" or "document No. 10". The Royal Court considered the document to be of such importance, and the difficulty of conveying the full sense of it in words, that it was reproduced as an entirety in an appendix to the judgment: see paragraph 126.

27. As the Royal Court indicated (at paragraph 134), at the heart of the then plaintiffs' case was the contention that this document was a definitive statement of account prepared by Simeao De Oliveira recording payments to Paulo Maluf, from the fraud, in the course of January and early February 1998. In support of their submission, the plaintiffs had relied on the document itself coupled with depositions made by De Oliveira prior to their having been retracted by him. As the Royal Court noted (at paragraph 136), whilst there were uncertainties in those pre-retraction dispositions, the gist of De Oliveira's commentary was clear, and its details suggestive of a person who spoke with authoritative first-hand knowledge. In the view of the Royal Court, on the face of the document, taken together with that testimony, the document was a striking one which commanded serious consideration.

28. The Royal Court then proceeded to give detailed consideration to the respective contentions of the parties. It concluded, at paragraph 148, that there was little doubt but that the document was genuine, that it was in all probability compiled by De Oliveira himself or by someone else familiar with what was going on and that De Oliveira believed it to be a statement of account as at 5 February 1998 of amounts "due" to Paulo Maluf and payments made. Whilst there were certain gaps in connecting evidence, the Royal Court (at paragraph 150) agreed with the rhetorical observation by counsel for the plaintiffs as to what innocent explanation there could possibly be for a statement of account that included and linked payments received in Sao Paolo and monies paid into a bank account in New York controlled and beneficially owned by the Malufs in the course of a few weeks in late 1997 and early 1998. Again, whilst there were discrepancies, the Royal Court accepted (at paragraph 151) that these were likely to do no more than reflect the mechanics of banking operations.

29. The Royal Court concluded (at paragraph 154):-

> ***"Once the derivation of the figures is understood, in the absence of any plausible reason for thinking that document no.10 is a fabrication, it becomes, even without reference to any hearsay witness evidence, compelling evidence of two things: first, the existence of a direct link between funds received by Mendes Junior and moneys credited to the Chanani account, and, secondly, the quantum of the moneys so credited having been calculated at the rate of 20% of payments received by Mendes Junior (adjusted for tax). Add to this the fact, as we have found, that the Chanani account was***

controlled and moneys in it beneficially owned by the Malufs together with the absence of any conceivable reason why the Malufs should be receiving sums of money equivalent in value to a substantial percentage of funds made available to Mendes Junior by the Municipality of Sao Paulo – and receiving such money within a matter of days of funds being received by Mendes Junior – and the inference of involvement on the part of the Malufs in defrauding the Municipality is, on those grounds alone, a powerful one. We have, of course, also found that the defendants' explanation of the payments into the Chanani account in question, unsupported by evidence of any kind, does not begin to be credible."

30. Before this court the appellants initially contended that the document could not be relied upon as a genuine document which was probative in its own right in the absence of reliable authentication by a person who was the author of or involved in the compilation of the document.

31. In our opinion that submission, which was departed from, would have sought to place this document, important as it is, into a category which is not appropriate for the document. The document is not one falling into one of those special categories which still requires certain formalities of execution in order to prove itself: such as a will or other testamentary instruction. It is merely a commercial document, the evidential value of which may or may not be affected by proof, to the ordinary civil standard, as to its authorship or authentication.

32. The Royal Court dealt with the issue as to authentication as follows:-

"139 . One drawback to the parties' habit of using the term "the De Oliveira document" was that it tended to suggest that it was a single stand-alone document, rather than one of a series, as it plainly was: a series, moreover, with a number of features common to all, or at least many, of the documents - the typeface, the headings and layouts, the conversion of Brazilian reals to US dollars - every page of which, as previously noted, Simeão De Oliveira evidently had no difficulty in explaining in precise, detailed terms.

140. The weakness of Mr. Steenson's contention that Simeão De Oliveira did not say that he was the author of document no. 10 is that it fails to allow for the fact that all three of documents nos. 7, 9 and 10 are described by Mr. De Oliveira as involving the calculation of sums payable to the same person, Paulo Maluf, and for the possibility – the probability, we would say – that, having expressly established with the deponent that he was the author of document no.7, those interrogating him did not consider it necessary to repeat the question in relation to documents nos. 9 and 10.

141. Apart from being nothing more than speculation, Mr. Steenson's proposition that the De Oliveira document could very well have been fabricated was in our view implausible. He suggested for a start that there was something suspicious about the fact that throughout the document dates were written in the European style (day, month, year). But the same applies to all of the other twenty-two documents and to the schedules of payments and examples of sub-contractors' cheques exhibited by Joel Fernandes to his deposition of 13th June 2002. He also drew attention to the fact that the date in column 5 of the penultimate entry in section 05 of the document, "08.02.98",

was later than the date in the document heading, "05.02.98". But there is nothing in the least remarkable about that once one understands, as previously noted, that the dates in column 5 show when confirmation of payments abroad were made, whereas those in column 1 – all of which are earlier in time than 5th February 1998 – almost certainly represent the dates when the R$ payments in column 2 "accrued due" and would be the material ones for the purpose of a statement of the "POSIÇÃO EM 05.02.98" "

33. In our opinion that analysis was perfectly sound for the purpose of addressing the weight to be attached to a document which was capable of showing that certain links existed between monies received and payments made and the recipients of those payments. The civil standard of proof is not one beyond reasonable doubt but, rather, one upon the balance of probabilities. Accordingly the Royal Court, having before it a document capable of supporting certain assertions and being able on the evidence before it to reject - by application of the same standard - the suggestion that the document might have been fabricated, was entitled to reach the conclusions set out in paragraph 154.

34. Advocate Steenson contended, however, that whatever the De Oliveira document might be able to show as regards the movement of funds from the fraud to the Chanani account, it did nothing to remedy the lack of connexion of the Malufs – in particular Paulo Maluf – to the fraud, an element of the plaintiffs' case which was essential to the claim as a whole. As put, we agree; but the proposition fails to give weight – as the Royal Court did carefully – to certain matters closely associated to the transfer of the funds. Those matters were considered of importance by the Royal Court and, having ourselves had the advantage of considering them, we are of the opinion that the Royal Court was fully entitled to give weight to them in viewing the sometimes dim world of indeterminate or fictitious spirits which is that in which international transfers of funds of indeterminate origin often occur: cf Holt v IRC [1953] 1 WLR 1488, 1492 (Danckwerts J.).

35. Here, the existence of a major fraud is admitted but the involvement of the relevant individual denied. When there is a major fraud it may be that it is to be anticipated that the principal organisers and beneficiaries will have taken steps to hide their association with it: an example is found in Bank of Scotland v Macleod, Paxton, Woolard & Co 1998 SLT 258. Once the fraud is admitted or proven, even slight evidence of association may take on particular cogency and identify the essential element of active participation.

36. As we understood Advocate Steenson's clear and precise submissions, a critical issue for the plaintiffs was whether the evidence demonstrated that the Chanani account was a general account held by a money dealer (Sr Alves) for the purpose of handling a number of different clients' money or whether, as the Royal Court determined (at paragraph 57), the true beneficial owners of the account were the Malufs alone. In our view the evidence before the Royal Court was more than sufficient to enable it to reach that finding.

37. Set out succinctly, we consider that the particularly supportive evidence upon which the Royal Court was able to rely included the following. References are to paragraphs of the judgment below. The appellants are companies registered in the British Virgin Islands, Kildare being a wholly owned subsidiary of Durant (para. 5). The entire issued share capital of Durant was held beneficially by Sun Diamond Limited, but the share certificate was sent to Paulo Maluf (para. 25). The issued share capital of Sun Diamond Limited was represented by a single certificate in bearer form, held by Paulo Maluf (ibid). Sun Diamond Limited held the Durant shareholding as trustee of the Sun Diamond Trust (see the letter referred to in para. 38). The Sun Diamond Trust was settled in the BVI by Declaration of Trust by Sun Diamond Limited as trustee (para. 22). The trust was established on the instructions of Paulo Maluf and his wife (para. 23).

38. Each of those matters connected Paulo Maluf with Durant, but not with Chanani. The latter connexion is suggested by two other sources, absent any other adminicle of evidence. The importance of the first comes from the circumstance in which it was created. In 1999 – 2000 Deutsche Bank, providing custody services in Jersey to, among others, the appellants and prompted in part by the prospective implementation of the Proceeds of Crime (Jersey) Law 1999 commenced detailed enquiries as to the beneficial ownership of the appellants and other related companies (para. 27). This generated much work and documentation (para. 30). One such was a letter of 27 August 1999 detailing payments and issues as to control of certain entities (para. 32). Included in the information being provided to Deutsche Bank under cover of that letter were references to Chanani being controlled by Flavio Maluf (para. 59). Contemporaneously with that letter, and intimated to Deutsche Bank, was a memorandum executed by Paulo Maluf in which he expressly approved the letter confirming that it *"appropriately reflects an investment management policy in line with my wishes as settler of the Sun Diamond Trust"*. Absent any other evidence of appropriate weight, this memorandum would appear to place Paulo Maluf very close to transactions into and out of Chanani, an entity controlled by his son. As set out on page 5 of the letter referred to in paragraph 38 of the judgment below, the rationale of the Sun Diamond structure was lifetime succession planning by Paulo Maluf for his children in respect of long-standing investments and family business monies.

39. Not only was there no other evidence of material weight (if indeed there could be said to be any at all), the

other adminicle relied upon by the Royal Court gave a telling indication of the likely closeness of Paulo Maluf's connexion, on the balance of probabilities, with the Chanani account. Paulo Maluf executed three letters of wishes regarding the appropriate beneficial entitlements under the Sun Diamond Trust (para. 24). The first, dated 7 September 1996, sought to have Paulo Maluf and his wife identified as the principal beneficiaries during their lifetime. The second, dated 10 March 1997 [note the incorrect year given in para. 24] asked that during his lifetime his four named children be appointed as beneficiaries. The third, dated 16 January 1998, indicated that, during his lifetime, Paulo Maluf wished to be considered the primary beneficiary of the trust.

40. There is nothing unusual in finding a settlor issuing numerous letters of wishes in which, for such power that they carry, differing views are expressed as to the suggested identification of appropriate beneficiaries from the specified class. Normally, such changes will have been the result of some extraneous factor such as the death of a prospective beneficiary, or an estrangement, or a settlor considering that a firmer view be expressed as the prospect of his own death becomes more immediate. Here, whilst the first and second letters are quite close in time, there is nothing which particularly calls for explanation in a change from settlor and wife to the children of the marriage, especially if all children are of full age and capacity. However, the change back to the settlor alone some ten months later might be thought of as singular. As the learned Commissioner points out (para. 24) the significance of the third letter of wishes is that it was executed the day following the crediting to Durant's account with Deutsche Bank of the first of the six transfers of funds from the Chanani account alleged by the plaintiffs to be the proceeds of fraud. Absent any other explanation for the changed wishes, a change which in our view is on its face unusual, the change from children back to settlor would appear to be an indication that, at least for the time being, the settlor considered the trust assets to be his. In a matter of this nature – the attempt to identify what may have happened as part of a large scale fraud – it seems perfectly appropriate to note the close proximity in time of the execution of the letter and a transfer which brought funds into the trust. The immediate inferences from the juxtaposition are that there was something special about the funds which called for the unusual action and that the special nature was that the funds were seen by the settlor as in reality belonging to him.

41. The third letter of wishes, therefore, taken along with the Deutsche Bank documents is cogent evidence linking Paulo Maluf to the Chanani account which justifies the Royal Court's views at paragraphs 57 to 62 and findings at paragraph 229 (iii). Once the beneficial ownership of the Chanani account is established as including Paulo Maluf, the finding, at paragraph 229 (ii), that Paulo Maluf was party to the fraud was one which was open to the Royal Court on the evidence before it.

Tracing into the Chanani account

42. The next question is whether the respondents' money can be traced into the Chanani account. So far as that is concerned, in our judgment the Royal Court was fully entitled to reach the conclusion that the appellants' pleading "was a thing writ in water" (paragraph 74) and that there was no evidence of any kind to support their assertion as to the allegedly innocent source of the relevant payments into the Chanani account (paragraph 79). Nevertheless, the appellants submitted on appeal that the respondents could not identify their money ***"at every stage of its journey through life"*** (Borden (UK) Ltd v. Scottish Timber Products Ltd [1981] Ch 25, at 46) because even if it is accepted that substantial payments were made to the Malufs in relation to the fraud the trail goes cold when the money passes into the hands of the *doleiros*;and there is no verifiable link between the (assumed) payments made to the Malufs from the fraud and the credits subsequently received into the Chanani account.

43. The Royal Court dealt with this line of argument in paragraphs 203-212 of its judgment, and we would uphold its findings without lengthening this judgment unnecessarily by setting them out verbatim. In summary, the Royal Court's analysis was that tracing is a matter of evidence, and as such the question whether a plaintiff has discharged the burden on him will depend on an assessment by the trial court of the primary evidential material and the inferences which ought properly to be drawn from it. Where (as in this case) the respondents had raised a prima facie case on the basis of documentary material and hearsay statements (as to which we would pay tribute to the meticulous analysis in paragraphs 74-176 of the judgment below), and the appellants had failed to produce any evidence to rebut it, the Royal Court was fully entitled to reach the conclusion that the respondents' evidence should be accepted – particularly in light of the fact that (i) no satisfactory explanation was given for the Malufs' failure to give evidence, (ii) there was no evidence to suggest that the De Oliveira document was a forgery, (iii) Mr De Oliveira had himself specifically acknowledged his authorship of document No. 7, which obviously formed part of the same sequence of documents as the De Oliveira document itself, and (iv) the break in the life story of the funds (*i.e.* when they passed into the hands of *doleiros*) was in fact caused by the Malufs' own handling of the money.

44. We would add only this. It would, in our judgment, be too formalistic to latch onto the words of Buckley LJ in Borden as if they required, in every case, direct evidence of every movement of funds before a tracing claim could ever succeed. In an appropriate case the necessary links can be inferred from the circumstances, even in the absence of direct evidence, and that is essentially what happened in this case.

Tracing into Durant and Kildare

Introduction

45. The next question is whether the respondents' property can be traced from the Chanani account into the hands

of Durant and Kildare. So far as that is concerned, the only dispute between the parties is whether the respondents are entitled to the full amount of US$10,500,050.35, or the lesser sum of US$7,708,699.10.

46. As noted above, the difference between these two sums turns on a matter of timing: the last of the traceable payments into the Chanani account occurred after the last of the relevant payments out of that account to Durant. That being the sequence of events, the Royal Court was invited to answer three questions – two of general principle and one concerned with the facts of this particular case. First, as a matter of principle, does Jersey law adopt the 'lowest intermediate balance' rule in relation to tracing? Secondly, again as a matter of principle, does Jersey law recognise what has become known as 'backwards tracing'? Thirdly, if so, is backwards tracing available on the facts of this case such as to entitle the respondents to the full amount of US$10,500,050.35?

The general approach to tracing

47. Before answering these two specific questions of principle, it is convenient to start by making a number of general observations about tracing.

48. The starting point is to recognise the true nature of the exercise with which the court is engaged when it is asked to trace a plaintiff's property. As has been stated frequently, both in the case-law and in the text-books, in such circumstances the court is being asked to identify an asset which represents the plaintiff's property, in other words an asset which is not in reality the plaintiff's original property but one which the law is prepared to treat as a 'substitute' for that original. (We would refer by way of example to Foskett v. McKeown [2001] 1 AC 102, at 127-128 (Lord Millett), Goff & Jones The Law of Unjust Enrichment (8th ed.), §7-03, and Smith The Law of Tracing (1997), p. 6.)

49. That being the true nature of the process, the law should face up to the fact that, in deciding whether to allow or refuse a tracing claim in any given case, the court is liable to be making an evaluative judgment, rather than simply applying hard-edged rules. The question whether one asset 'represents' another, or is a 'substitute' for it, depends on whether there is a 'sufficient connexion' between the two (see the language used by Dillon LJ in Bishopsgate Investment Management Ltd v. Homan [1995] Ch 211, at 216-217, and also the commentary in Underhill & Hayton, The Law Relating to Trusts & Trustees (18th ed.), at §90.59). In allowing or refusing a tracing claim, the court is accordingly making a policy choice as to whether the law is prepared to recognise one asset as representing, or as a substitute for, another on the particular facts of the case in hand.

50. In this connexion, it is important to understand the context in which Lord Millett was speaking in Foskett v. McKeown at 127 when he said that tracing was a branch of property law, and that property law depends on the operation of ***"fixed rules"***. The point which he was making (as was Lord Browne-Wilkinson at 109) was that a proprietary claim is not a discretionary remedy, and that is undoubtedly true. Property rights are hard-edged. Tracing is a means of vindicating such rights. But that does not mean that the availability of tracing in any given case is itself dictated by hard-edged rules. Tracing requires the law to decide whether it is willing to recognise and enforce a property right in relation to any particular asset: as noted above, that depends on the application of protean concepts of equivalence and substitution, neither of which can properly be described as hard-edged. As a result, in exercising its tracing jurisdiction, the court will be concerned, in practice, more with questions of evidence than questions of principle (as the Royal Court rightly recognised in this case at paragraph 219 of its judgment, as did Lord Steyn in Foskett v. McKeown, at 113).

51. For these reasons, we would take this opportunity of specifically endorsing the approach adopted in Re Esteem (although we should emphasise that that approach was not disputed in this appeal). In short, the law of Jersey should and does recognise tracing. In particular, it should and does recognise tracing as a unitary concept, unencumbered by the burden of history which has complicated the position in England with separate rules of equitable and common law tracing. We would also add that the recognition of tracing in Jersey does not involve the importation into this jurisdiction of any substantive property law which is foreign to the law of Jersey (*cf* Re Esteem at §95). Rather, it involves the adaptation of a particular means of identifying and vindicating such substantive property rights as are recognised under Jersey law.

52. We add one point in deference to the industry of Advocate Jordan. She helpfully drew our attention to Golder v. Société des Magasins Concorde Ltd [1967] JJ 721, a case which was not cited in Re Esteem. In Golder (at 732) the court cited a passage from Pothier's *Traité des Obligations*, Part I, Chapter II, Article II, p. 177, which provides support in customary law for the recovery against third parties of the proceeds of fraud:-

> ***"Observez néanmoins que si le débiteur, lorsqu'il fait passer à un tiers la chose qu'il s'était obligé de me donner, n'était pas solvable, je pourrais agir contre le tiers acquéreur pour faire rescindre l'aliénation qui lui en a été faite en fraude de ma créance, pourvu qu'il ait été participant de la fraude, conscious fraudis, s'il était acquéreur à titre onéreux: s'il était acquéreur à titre gratuit, il ne serait pas même nécessaire pour cela qu'il eût été participant de la fraude."***

53. The court also quoted (at 734) a passage to similar effect from Domat, *Les Lois Civiles dans leur Ordre Naturel*, Livre II, Section II (Nouvelle Edition, p. 194).

54. With these general observations in mind, we can now turn to the two questions of principle which the Royal Court addressed.

The two questions of principle

55. The paradigm illustration of the lowest intermediate balance rule is supplied by James Roscoe (Bolton) Ltd v. Winder [1915] 1 Ch 62. In short, where trust funds are paid into a mixed bank account and the balance on the account fluctuates over time, the plaintiff will be entitled only to trace a sum equivalent to the lowest intermediate balance on the account, even if funds are subsequently paid into the account which replenish it from another source. By analogy, the appellants in this case say that the respondents cannot trace onwards from the Chanani account into the hands of Durant any amount exceeding the total sum of traceable funds standing to the credit of the Chanani account on the several dates when transfers were made from that account to Durant. If that approach is adopted in this case then, say the appellants, there was no traceable property left in the Chanani account when the last few payments out to Durant were made after the 23rd January 1998. On that basis, only the lesser sum of US$7,708,699.10 could be traced into the appellants' hands. The respondents do not dispute either the sequence of payments or the maths; but they challenge the legal consequences for which the appellants contend.

56. The paradigm example of backwards tracing arises in a situation where an asset is acquired using a loan, and the purchaser intends to and does subsequently repay the loan using traceable funds. In that situation, backwards tracing would allow the plaintiff to trace into the asset so purchased. If that approach can be adopted in Jersey then, the respondents say, the later traceable payments into the Chanani account can be regarded as reimbursing the (slightly earlier) last few payments to Durant, and as a result the full amount of US$10,500,050.35 can be traced into the hands of the appellants.

57. The question whether backwards tracing should be recognised in England remains unsettled. Both in the Royal Court and before us, the parties deployed the various judicial *dicta* and academic commentary which point in either direction. In terms of the case-law, we were shown: Agip (Africa) Ltd v. Jackson [1990] Ch 265, at 290 (affirmed [1991] Ch 547); BIM v. Homan, at 216-217 & 221; Foskett v. McKeown [1998] Ch 265, at 283-284 (Sir Richard Scott V-C), 289 (Hobhouse LJ) & 296 (Morritt LJ); Shalso v. Russo [2005] Ch 281, at §141. In terms of academic commentary, our attention was drawn to: Conaglen, Difficulties with Tracing Backward (2011) 127 LQR 432; Smith, Tracing into the Payment of a Debt (1995) 54(2) CLJ 290; Burrows, The Law of Restitution (3rd ed.), pp. 142-143; Underhill & Hayton, at §90.56 – 90.57.

58. We therefore approach the two questions of principle in the knowledge that English law on the lowest intermediate balance rule is fairly well settled, whereas the position on backwards tracing is unsettled. We also bear firmly in mind both the autonomy of Jersey law and the nature of the exercise with which the court is engaged in any tracing claim. In particular, the fundamental question in any given case is whether the plaintiff can establish a sufficient link between the property of which he was originally deprived and the property into which he is seeking to trace.

59. Taking that approach, we can see readily that, if the Jersey courts were ever presented with the same facts as in Roscoe v. Winder, the plaintiff would face considerable (but not necessarily insuperable) difficulties in establishing the necessary connexion between the property of which he had been deprived and any balance standing to the credit of the relevant account in excess of the lowest intermediate balance on the account. However, we would prefer to regard that not as an adoption by Jersey law of any lowest intermediate balance 'rule' but, rather, as an illustration, on particular facts, of a plaintiff failing to establish the necessary link between his original property and the full amount of the balance standing to the credit of the mixed bank account.

60. Similarly, we would expect that a plaintiff who sought to trace into an asset which had been acquired by means of a payment from a specific account before that account had received any trust property would face considerable (but not necessarily insuperable) difficulties in establishing the necessary link. Again, we would expect the outcome of any such case to turn not on any question of doctrinal principle as to whether Jersey law does or does not accept 'backwards tracing' in the abstract, but by reference to an application to the facts of the case in hand of the general question posed above .

61. With those observations in mind, we would fully endorse the approach taken by the Royal Court in paragraph 219 of its judgment:-

> ***"The appropriate way for the courts of this jurisdiction to address the subject is, we suggest, not by reference to any pre-conceptions of what is or is not conceptually possible or arguably supported by English authority, but ... as a matter of evidence – at least in cases where, as here, the account in question remains in credit throughout the***

> ***relevant period, there is no question of possible insolvency and prejudice to unsecured creditors, and there is no suggestion of any intervention by a bona fide purchaser for value, The question is, or should be, simply whether there is sufficient evidence to establish a clear link between credits and debits to an account, irrespective (within a reasonable timeframe) of the order in which they occur or the state of the balance on the account. It is unnecessary to posit any limitation on how, as a matter of evidence the necessary link can be proved: it might be by means of bank documentation ... or by reference to the defendant account-holders' intentions or in some other way. Nor is there any cause to diminish the effect of such a link, once recognised, by introducing the concept of a 'lowest intermediate balance rule'. As a matter of judicial policy, this approach appears to us to accord most closely with considerations of justice and practicality. Apart from anything else, to do otherwise would ... confer on any sophisticated fraudster the ability to defeat an otherwise effective tracing claim simply by manipulating the sequence in which credits and debits are made to his bank account."***

62. For these reasons, we do not consider that the questions of principle set out above lend themselves to binary answers. The courts in Jersey should not feel constrained either to adopt or reject any particular rules (such as the lowest intermediate balance rule, or backwards tracing as such) or to adopt specific labels to describe the links they identify (or the links that are missing) on the facts of any given case. Rather, the court should adopt the approach suggested in the judgment of the Royal Court, and ask itself whether, on the evidence, the plaintiff has established a sufficient link between his original property and the property into which he is seeking to trace.

Applying the law to the facts of this case

63. At trial the respondents submitted that there was a strong inference that the proceeds of the fraud were always intended to be invested through Kildare into Eucatex: given the coincidence in timing and of payments into the Chanani account and investments made into the Eucatex shares and debentures. The Royal Court accepted that there ***"may be something in this"***, but said that it was ***"not wholly persuaded"*** (paragraph 222). In saying that, we do not understand the Royal Court to have been rejecting the respondents' reliance on that evidence of coincidence outright; rather, it was saying that such evidence was not of itself sufficient to establish the necessary linkage without more. We agree with that assessment.

64. The Royal Court also held (paragraph 222) that ***"the more telling and conclusive point"*** in the respondents' favour was the fact that the appellants' own pleaded case was that all relevant payments into Durant were linked with one another (albeit, on the appellants' case, as commission allegedly earned in relation to Enterpa), as well as with the payments into the Chanani account. In our judgment, the Royal Court was fully entitled to take this factor into account in establishing the necessary link. Although not mentioned in this context in the judgment below, we would also note that, in the course of its money laundering review, the First Party Cited (Deutsche Bank International Ltd) wrote to Brunschwig Wittmer on the 15th March 2000 about Durant and Kildare, describing their origins in these terms:-

> ***"When the entities were originally incorporated, it was envisaged that all the funds received would be paid into the custody account, for the purpose of inward investment into Eucatex."***

65. The appellants nevertheless submitted in this court that the later payments from Chanani to Durant on the 21st and 23rd January 1998 must have used non-traceable money (which is true). From that starting point, they rely on the fact that (i) payments made subsequently into the Chanani account were used for other, unrelated purposes; (ii) there was no evidence that the proceeds of the fraud were always intended to be invested in Eucatex through Kildare; and (iii) there was no basis for drawing any inference that the later payments of traceable money into the Chanani account were intended to reimburse that account for the payments previously made to Durant.

66. Dealing with each of those submissions in turn, the first point cannot assist the appellants. Of course, the later payments into the Chanani account can be said (in a very imprecise way) to have been used for other, unrelated purposes, in the sense that payments were made out of the Chanani account (after those traceable proceeds had been received into the account) otherwise than for the purpose of making any further payments to Durant: but that is simply restating the fact that the later payments to Durant which the respondents are trying to trace were paid before the later traceable receipts into the Chanani account were received and thus merely restates the problem we are addressing, without answering it. In particular, it does not assist in demonstrating that the payments from the Chanani account to Durant were not made in anticipation of the receipt of funds into the Chanani account from the fraud.

67. The appellants' second point was that there was no evidence that the proceeds of the fraud were always intended to be invested in Eucatex through Kildare. We would reject that submission for the reasons already given.

68. The appellants' third point was that there was no basis for drawing any inference that the later payments of traceable money into the Chanani account were intended to reimburse that account for the payments previously made to Durant. To a large extent, this is simply a restatement of the appellants' second argument. However, based on the analysis of the law which we have already set out, we do not consider that it is a *sine qua non* for a plaintiff in this kind of factual situation to have to establish that the defendant intended to reimburse the depleted trust account. Whilst we recognise that Scott V-C referred to a defendant's intention in such a situation in Foskett v. McKeown at 283-284, we read that passage merely as being illustrative of a possible scenario in which backwards tracing might be allowed in England, not as an exhaustive definition of the preconditions which must be satisfied in all cases before backwards tracing can succeed. Indeed, it might be regarded as unprincipled and undesirable to hold that the success of a plaintiff's tracing claim necessarily depends upon establishing the defendant's subjective intentions. We would prefer to rest the decision, as the Royal Court did, on a more purposive approach.

69. The question in any given case is whether the plaintiff can establish a sufficient link between the asset of which he has been deprived and the asset into which he is seeking to trace. Where a traceable fund has been dissipated from an account, but untainted funds are subsequently paid into the same account, the necessary link might be established by showing that the defendant intended to reimburse the trust fund: but establishing that intention would merely be one means of establishing the necessary link. It would not be a necessary precondition to the success of a tracing claim in every such case. Similarly, in a case such as this where an asset is acquired by making a transfer out of an account before trust money is paid into the account, the true question is whether the plaintiff can establish a sufficient link between the trust money of which he was originally deprived, and the asset which has now been acquired. Again, that link might be established by demonstrating (either from direct evidence or through inference) that the defendant acquired the asset in anticipation of receiving the trust money, and in that sense that he intended to use the trust money to acquire the asset; but, again, reliance on the defendant's intention in that situation is merely one means of demonstrating the necessary link. In neither situation does the success of tracing depend in all cases, as a formal precondition, on proving the defendant's subjective intentions.

70. For these reasons, we dismiss the appeal against the tracing claim.

CONCLUSION ON PRINCIPAL ISSUES

71. For the reasons we have given we dismiss the substantive appeal on all grounds.

INTEREST

Introduction

72. In a separate judgment dated the 24th January 2013 dealing with interest and costs, Commissioner Page QC (sitting alone) awarded interest at the US Prime Rate plus 1%, compounded with monthly rests. The appellants sought to appeal against both (i) the rate of interest and (ii) the compounding of the interest. For this purpose they needed permission to appeal out of time, which we granted at the hearing.

Compound interest

73. The appellants accept (rightly, in our judgment) that the court below had jurisdiction to award compound interest. Nevertheless, the appellants submit that the Royal Court erred in making such an award in this case. Relying on Westdeutsche Landesbank Girozentrale v. Islington Borough Council [1996] AC 669, at 701C-D, 702D-E, 718E-F and 741F, their argument was that, in the absence of fraud, courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made in his position as such. In such situations, the appellants submit, an award of compound interest can be made in lieu of an account of profits improperly made by the trustee. They also relied on Black v. Davies [2005] EWCA Civ 531, at §78-90, in support of the proposition that if compound interest is to be awarded on the basis of fraud, then the relevant funds must have been both obtained and retained by fraud.

74. Applying the English authorities to the facts of this case, the appellants submit that neither of them was involved

in perpetrating the fraud, and that neither of them was in a fiduciary relationship with the respondents. As such, they submit, the precondition to an award of compound interest is not satisfied. Alternatively, they submit that since an award of compound interest is intended not to penalise a defendant but to act as a substitute for a disgorgement of profits, no such award ought to have been made on the facts of this case because the appellants did not generate any profit or gain. Further, the appellants say that they are not in the position of fiduciaries with regard to the respondents, and they point to the fact that the Deutsche Bank accounts have been frozen for some considerable time.

75. We reject this aspect of the appeal for an accumulation of reasons. First, it is stating the obvious to say that an appeal against the exercise of the Royal Court's discretion will not succeed unless the decision can be shown to have been wrong in principle.

76. Secondly, it is incorrect to say that the appellants in this case are untainted by the fraud: the Malufs' knowledge of the fraud is properly attributed to the appellants, as the Royal Court held in §50 and §229(v) of its main judgment and §9 of its judgment on interest and costs, and as the appellants acknowledge in §10 of their written submissions in the main appeal.

77. Thirdly, we do not consider that there is reason in principle to hold that a knowing recipient of fraudulently obtained funds must himself also have been guilty of perpetrating the fraud before an award of compound interest can be made against him. Any such finding would be an open invitation to fraudsters to park the proceeds of their dishonesty in the hands of nominees, and thereby reduce their exposure to the true owners. The Royal Court recorded in §10 of its judgment on interest and costs that Advocate Steenson had candidly admitted the force of the argument that a recipient of fraudulently obtained funds, knowing of their source, should be liable to an award of compound interest in the same way as the fraudster himself. In this connexion, our attention was drawn to United Capital Corporation Ltd v. Bender [2006] JRC 34A, at §53, in which it was accepted (in the context of an injunction) that the plaintiff had an arguable claim to compound interest against a defendant who was being pursued for knowing receipt. The court held that there was no reason in principle why a constructive trustee liable for knowing receipt should not be subject to the same awards of interest as an express trustee.

78. Fourthly, we consider it to be too restrictive to lay down any rigid rules as to the circumstances in which an award of compound interest might be made. In many cases, it may well be justified as a substitute for ordering a disgorgement of profits, but that is by no means the only situation in which compound interest can properly be awarded.

79. Fifthly, the fact that the funds in the Deutsche Bank accounts were effectively frozen does not alter the fact that the bulk of the traceable money was paid out by the appellants in acquiring unit trusts, which in turn acquired shares and debentures in Eucatex. Compound interest had been claimed from the very outset, and if the appellants had wanted to adduce relevant evidence as to the return they had made on those investments, they could have done so. Having chosen not to adduce such evidence, they cannot then invoke that factor as a basis for neutralising the court's ability to award compound interest.

80. For these reasons, we reject the submission that the Royal Court erred in awarding compound interest.

The rate of interest

81. So far as the rate of interest is concerned, the appellants submit that any award at a rate higher than that actually earned on the funds held in the relevant bank accounts is effectively penal, and an award of interest ought not to be penal.

82. The first problem they face (as already noted) is the fact that the bulk of the funds was invested in Eucatex and not left on deposit in bank accounts. Accordingly, a comparative exercise between the rate of interest awarded by the court and the rate earned on the funds on deposit is of no real assistance. Recognising the force of this point, Advocate Steenson sensibly abandoned his attempt to adduce late evidence of the Deutsche Bank interest rates.

83. His second problem was that it had been common ground in the court below that US Prime Rate was the correct starting point, as recorded in §14 of the judgment on interest and costs. The only debate before the Royal Court was whether it should be US Prime Rate without more (as the appellants contended) or US Prime Rate plus 2% (as the respondents contended). That being the scope of the argument in the court below, it is in our judgment quite impossible for the appellants now to say that an award of US Prime Rate plus 1% is wrong in principle.

84. The third point is to note, for the avoidance of doubt, that taking US Prime Rate as the starting point is entirely justifiable, not least in light of the practice of the English Commercial Court when dealing with awards in US Dollars (as to which see Fiona Trust v. Privalov [2011] EWHC 664 (Comm), at §15-16). In UCC v. Bender, at §55, the court fixed on a rate of 2% over LIBID.

85. Fourthly, as was pointed out in UCC v. Bender, at §54, the court rate is 2% over base rate, and as such it is not fixed by reference to the rate that can readily be earned on deposit.

86. For these reasons, we reject this aspect of the appeal.

The date from which interest should run

87. Finally, the appellants objected that the award of interest was unduly harsh bearing in mind the respondents' delay in initiating the proceedings: the civil investigation into Paolo Maluf began in 2001 and the criminal investigation began at the latest in 2002, but the respondents only issued these proceedings in 2009. Relying on Kuwait Airways Corporation v. Kuwait Insurance Company SAK (2000) 1 Lloyd's Rep IR 678, they submitted that the respondents' delay should impact on the date from which interest was ordered to run.

88. We reject that argument. As the Royal Court rightly held in §13 of its judgment on interest and costs, the appellants knew from the outset that the money was obtained through fraud, and in the circumstances it was entitled to reach the conclusion that any delay by the respondents should not impact on the award of interest.

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