[2015 Gib LR 159]

CREDIT AGRICOLE CORPORATION AND INVESTMENT BANK v. PAPADIMITRIOU

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Neuberger of Abbotsbury, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption and Lord Toulson): March 24th, 2015

Banking—banker and customer—due diligence—to be bona fide purchaser without notice, bank to prove lack of notice of third party's proprietary right to funds it holds—bank has notice if (1) actually knew right existed; (2) reasonable person in its position should have known right existed; or (3) should have made inquiries/sought advice as to source of funds and commercial purpose of transaction which would have revealed right's existence—bank should make inquiries/seek advice if reasonable banker would question propriety of transaction

The respondent brought an action against the appellant to recover the proceeds of the sale, by a third party, of a furniture collection belonging to her.

Christo Michailidis died in 1999, leaving a valuable collection of art deco furniture at the house in London he shared with the art dealer Robin Symes. After his death, Christo's title to the collection passed to his mother and not to Mr. Symes. After Christo's mother died, the respondent—Christo's sister—became the sole heir to her (and consequently Christo's) estate.

In 2000, Mr. Symes sold the furniture collection for $15m. At that time, his lawyer introduced him to the appellant, Credit Agricole Corporate & Investment Bank ("CACI"), as he had expressed a wish to establish a back-to-back credit facility.

In spring 2000, Mr. Symes acquired a Liechtenstein foundation (Pataco), and incorporated a British Virgin Islands company (Lombardi). Lombardi opened an account at CACI Gibraltar.

From the proceeds of sale of the furniture collection, amounts of $10.4m. and $4.4m. were paid into the accounts of two Panamanian companies. The $10.4m. was subsequently withdrawn in cash and paid into the account of Pataco, $10.3m. of which was later paid into Lombardi's CACI Gibraltar account. It was found at a preliminary stage that the $10.3m. was part of the proceeds of the sale of the furniture collection.

CACI Gibraltar conducted "know your customer" procedures in relation to Lombardi, as a result of which Mr. Symes was identified as the

beneficial owner of the company, his net worth as $50m., and his country of residence as the United Kingdom.

Christo's mother commenced the present proceedings in the Supreme Court to recover the proceeds of the sale of the furniture collection held by CACI in Lombardi's CACI Gibraltar account, submitting, *inter alia*, that she had a proprietary claim to them through Christo. The Supreme Court (Dudley, C.J.) dismissed the claim on the grounds that CACI had no notice of any impropriety in relation to the transaction (*i.e.* the transfer of the $10.3m. into Lombardi's CACI Gibraltar account) and was therefore a *bona fide* purchaser for value without notice (in proceedings reported at 2013–14 Gib LR 55). Christo's mother died, and the respondent, as her heir, appealed against this decision.

The Court of Appeal (Kennedy, P., Aldous and Potter, JJ.A.) allowed the appeal (in proceedings reported at 2013–14 Gib LR 260) on the ground that CACI had failed to show that it was a *bona fide* purchaser for value without notice because it had failed to make sufficient inquiries into the commercial purpose of the transaction to establish that it had no constructive notice of Mr. Symes's absence of a right to deal with the funds. The Court of Appeal rejected the Supreme Court's conclusion that CACI was only required to inquire as to the source of the funds in order to establish that it lacked constructive notice of any impropriety, holding instead that it should have made inquiries into the commercial purpose of the transaction as well as the source of the funds. It appealed against this decision.

The respondent submitted in the Court of Appeal and before the Privy Council that the Supreme Court had erroneously dismissed the claim because it had failed to apply the test for constructive notice correctly, and that CACI had failed to establish that it lacked constructive notice. If CACI had made adequate inquiries as to the commercial purpose of the transaction, as would have been the reasonable action of a bank at the time, it would have been put on notice that that transaction was improper in that it was intended to launder the money improperly acquired from the sale of the furniture collection. The Supreme Court failed to consider the commercial purpose and erroneously focused only on CACI's inquiries as to the source of the funds. The arrangement, structured as it was, could have had no purpose other than money laundering, as an alternative objective such as the repayment of a loan made by Citibank to another company owned by Mr. Symes could have been achieved by simple money transfer.

CACI submitted in reply that (a) the Supreme Court had considered the relevant questions and had been correct to hold that it was only required to make inquiries into the source of the funds, and (b) even if it had been required to inquire into the commercial purpose of the transaction, appropriate inquiries would not have put it on notice of any impropriety because Mr. Symes was introduced as someone wealthy, reputable and trustworthy, and his dispute with the Michailidis family was not known at the time. The purpose of the transaction was quite clearly to repay the Citibank loan, and the structure of the transaction could have been for tax

planning purposes, connected with his planned move to Switzerland, or in order for him to change banks.

Held, dismissing the appeal:

(1) There were three circumstances in which a bank would have notice of a proprietary right of a third party in property held by it: (1) when the bank in fact appreciated that a proprietary right in the property probably existed (actual notice); (2) when a reasonable person with the attributes of the bank should have appreciated, based on facts available to the bank, that the right probably existed (constructive notice); and (3) when the bank should have made inquiries or sought advice as to the source of the property and the commercial purpose of the transaction which would have revealed the probable existence of the right (constructive notice). The bank should have made such inquiries or sought advice if the facts known to it would have given a reasonable banker serious cause to question the propriety of the transaction (paras. 14–15; para. 20).

(2) It was for the bank to show that it lacked constructive notice of the impropriety of the transaction and was therefore a *bona fide* purchaser without notice (para. 21).

(3) The Court of Appeal had been correct to hold that, in order to establish that it was a *bona fide* purchaser without notice, CACI was required to show that it had investigated both the source of the $10.3m. in Lombardi's CACI Gibraltar account and the commercial purpose of the transaction. The Court of Appeal's conclusion that, if CACI had investigated the commercial purpose of the transaction, it would have realized that it was probably improper would be upheld and CACI therefore had constructive notice of the respondent's proprietary right in the $10.3m. and was not a *bona fide* purchaser for value without notice (paras. 25–28; para. 31).

Cases cited:

(1) *Barclays Bank plc* v. *O'Brien*, [1994] 1 A.C. 180; [1993] 3 W.L.R. 786; [1993] 4 All E.R. 477; [1994] 1 F.L.R. 1; [1994] 1 F.C.R. 357; (1993), 26 H.L.R. 75, considered.
(2) *Carl Zeiss Stiftung* v. *Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276; [1969] 2 W.L.R. 427; [1969] 2 All E.R. 367; [1969] F.S.R. 40; [1969] R.P.C. 316, *dictum* of Danckwerts, L.J. referred to.
(3) *Macmillan Inc.* v. *Bishopgate Inv. Trust plc (No. 3)*, [1995] 1 W.L.R. 978; [1995] 3 All E.R. 747, considered.
(4) *Nisbet and Potts' Contract, In re*, [1906] 1 Ch. 386, referred to.
(5) *Sinclair Invs. (UK) Ltd.* v. *Versailles Trade Fin. Ltd.*, [2012] Ch. 453; [2011] 3 W.L.R. 1153; [2011] 4 All E.R. 335; [2011] Bus. L.R. 1126; [2011] 2 BCLC 501; [2011] EWCA Civ 347, considered.

T. Mowschenson, Q.C. and *J. Restano, Q.C.* for the appellant;
S. Moverley Smith, Q.C. and *C. Simpson* for the respondent.

1 **LORD CLARKE,** delivering the opinion of the Board:

The parties

This is an appeal from an order of the Court of Appeal in Gibraltar (Kennedy, P., Aldous and Potter, JJ.A.) dated December 5th, 2013 (reported at 2013–14 Gib LR 260) allowing the respondent's appeal from the order of Dudley, C.J. made on February 27th, 2013 (reported at 2013–14 Gib LR 55) dismissing the respondent's claim. The Court of Appeal entered judgment for the respondent in the sum of $9.8m. but stayed execution of it pending an appeal to the Privy Council.

2 The claim was originally put in three ways before the Chief Justice. It was based upon dishonest assistance, knowing receipt and a proprietary right to the proceeds of sale of a collection of art deco furniture known as the Eileen Gray Furniture Collection ("the collection"). All three bases of claim failed before the Chief Justice. The respondent did not appeal against the dismissal of the claim based on dishonest assistance or knowing receipt. She did, however, appeal against the judge's rejection of the proprietary claim. It was common ground that the appellant ("the bank") was in possession of the proceeds of sale of the collection which the respondent could trace into the hands of the bank, and that her claim would succeed unless the bank could show that it was a *bona fide* purchaser without notice of the proceeds of sale of the collection which had been deposited with its branch in Gibraltar. The central issue in the appeal is whether the bank was on constructive notice of impropriety and whether the Court of Appeal applied the correct legal test.

The facts

3 The facts can be taken from various sources, in particular from two judgments given by the Chief Justice and from the judgment of the Court of Appeal. The first judgment given by the Chief Justice was on a number of preliminary issues and was given on November 11th, 2011. His second judgment was the judgment which led to the appeal to the Court of Appeal and the appeal to the Board. The facts are set out by Sir William Aldous in the Court of Appeal (2013–14 Gib LR 260, at paras. 11–15), with which Sir Paul Kennedy and Sir Mark Potter agreed. He set out verbatim (*ibid.*, at para. 12) the paragraphs of the second judgment given by the Chief Justice in which he set out the facts in detail (2013–14 Gib LR 55, at paras. 11–27). The facts are not in dispute.

4 Alexandros Michailidis ("Alexandros") was a wealthy man. He was married to Irene and they had two children, Despina Papadimitriou ("Despina") and Christo Michailidis ("Christo"). Although it appears that Christo had played a significant part in building up the collection, the Chief Justice held in his first judgment, which was dated November 11th,

2011, that the collection was built up by Alexandros and Irene and that, on the death of Alexandros in 1995, property in the whole collection became vested in Irene on the basis that she already owned a half share and the other half share passed to Irene on the death of Alexandros. Christo died as a result of a tragic accident in July 1999. Until his death, and at least since 1972, for very many years he had, as the Chief Justice put it, shared a home and life with Mr. Robin Symes at 1/3 Seymour Walk in London, SW10. Mr. Symes continued to live there after the death of Christo.

5 In his first judgment, the Chief Justice described the fate of the collection shortly in this way. In the spring of 2000, Mr. Symes sold the collection for $15m. through an art deco art dealer called Robert Vallois, although, as Sir William Aldous observed, he lied about the price to a court in England, saying that it had only been sold for about $4m. Of the total price of $15m., the sum of $4m. was paid to a Panamanian company, Xoilan Trader Inc. ("Xoilan"), and $10.4m. was paid to another Panamanian company, Tradesk Ltd. ("Tradesk"). Of the $10.4m., the sum of $10.3m. was paid into an account at the bank through a Liechtenstein foundation called Pataco Foundation ("Pataco"). The moneys were deposited in the Gibraltar branch of the bank and credited to the account of Lombardi Corp. ("Lombardi"), which was a British Virgin Islands company incorporated at the request of Mr. Symes. With the deposit in Gibraltar serving as a guarantee, the bank's London branch gave another Symes company, namely Robin Symes Ltd. ("RSL"), a facility for $10.3m., which was drawn down and thereafter repaid in full in the sum of $9,860,278.78 from the guarantee deposit held by Lombardi in Gibraltar. The balance was disbursed elsewhere for Mr. Symes's purposes. All these transactions were part of a fraudulent scheme devised by Mr. Symes.

6 When, in about the beginning of 2001, Christo's family found out about the sale of the collection by Mr. Symes, they took the view that he had no right to sell it. Proceedings were started in England, Greece and Gibraltar but, like Sir William Aldous, the Board can concentrate on the proceedings in Gibraltar. In about March 2004, the family discovered that part of the proceeds of sale of the collection had been deposited with the bank in Gibraltar. On April 7th, 2004, proceedings were started against the bank seeking payment of the amount deposited upon a number of grounds. Two main issues arose, both denied, namely whether the collection was owned by the claimants and, if that was established, whether the bank was liable to pay back the money.

7 Sir William Aldous describes (2013–14 Gib LR 260, at paras. 8 and 9) interlocutory skirmishing between the parties, including one before the Privy Council, which resulted in the two trials before the Chief Justice. In his first judgment, dated November 11th, the Chief Justice gave judgment on three preliminary issues. The first was ownership of the collection. The original claimant was Irene, claiming, as the Board understands it, on her

own behalf and/or as Alexandros's heir. In the course of the proceedings before the Chief Justice gave his first judgment, it was suggested that Christo may have owned the collection and his administrators were joined as second and third claimants. The Chief Justice held that the collection was owned by Alexandros and Irene and that, upon his death, his interest passed to Irene, whereafter the administrators of the estate were removed from the action which continued in the name of Irene until she died, when she was replaced by Despina, who is the present respondent. For the purposes of this appeal, nothing turns on the various changes of claimant parties.

8 The Chief Justice held that the $10.3m. transferred to Lombardi's account with the bank's Gibraltar branch was part of the proceeds of the sale of the collection and that Mr. Symes had failed to account for the proceeds of sale. The trial which led to this appeal took place before the Chief Justice between June 19th and 29th, 2012 and judgment was given on February 22nd, 2013.

The judgment of the Chief Justice

9 As indicated above, the Chief Justice dismissed the claims in so far as they were based on alleged dishonest assistance and knowing receipt. There is no appeal on those issues, so the Board is not concerned with them save in so far as they throw light on the question for decision, namely whether the bank established that, when it received the relevant moneys, it was a *bona fide* purchaser for value without notice.

10 The Chief Justice set out the facts in his judgment (2013–14 Gib LR 55, at paras. 11–27). They were reproduced in the judgment of Sir William Aldous (2013–14 Gib LR 260, at para. 12) because they were not disputed in the Court of Appeal. Rather than attempt to summarize them, it is convenient to set them out again here because they are not in dispute. In his judgment, in which the bank was referred to as "CACI," the Chief Justice concluded as follows (2013–14 Gib LR 55, at paras. 11–27):

> "11 In March 2000, Symes misappropriated the collection and sold it for $15m. Also in March 2000, Mr. Tavernier, a Swiss lawyer who at the time was, and still is, a non-executive board member of Credit Agricole (Switzerland) SA (a distinct legal entity from CACI), introduced Symes to CACI. According to Mr. Tavernier's witness statement, tendered pursuant to a hearsay notice, he made the introduction *qua* Symes's lawyer, as Symes had informed him that he wished to set up a back-to-back facility in respect of $10m. which Symes was to receive.
>
> 12 On March 10th, 2000, Despina agreed to temporarily increase by $3m. (until June 30th, 2000) her guarantee of RSL indebtedness

to Citibank on top of the $14m. and $1m. guarantee she had already given.

13 At about that time, Mr. Tavernier introduced Symes to the then head of private banking of CACI London, Guillaume de la Borde Caumont. A letter from Symes to Mr. de la Borde Caumont, dated April 25th, 2000, shows that they met on that day and that Symes sent him an RSL catalogue for an exhibition held in New York.

14 On May 3rd, 2000, Lombardi was incorporated with Mr. Johann Jakob and Ms. Nina Frittita—both of Audina—appointed as directors and with Audina as shareholder.

15 On May 4th, 2000, $10.4m. of the proceeds of sale of the collection was paid into an account in the name of Tradesk at LGT bank Liechtenstein. On May 8th, 2000, the entire $10.4m. was withdrawn in cash and paid into an account in the name of Pataco, a Liechtenstein foundation acquired by Symes that spring.

16 On June 6th, 2000, CACI Gibraltar began completing its 'know your client' ('KYC') procedures in relation to Lombardi, and on June 7th, Ms. Alix de Monspey, an account manager at CACI London, sent Ms. Frittita account opening forms for Lombardi requesting that they be returned to Mr. James Canepa at CACI Gibraltar who amongst other functions was the Legal and Compliance Manager at that branch. These were returned by fax on the same day and hard copies followed by courier. Copies of the passports of the two directors were also supplied, together with a confirmation dated June 7th, 2000, that Symes was the beneficial owner of the funds held by Lombardi. Lombardi's KYC form, which shows Symes as its beneficial owner and giving the United Kingdom as his country of origin and residence and reflecting his total net worth as $50m., was finally approved by Mr. Canepa on August 29th, 2000.

17 On June 8th, 2000, CACI London prepared a credit analysis in respect of a facility of $11.3m. in favour of RSL, for the purposes of repaying an existing facility with Citibank. The collateral is described as a guarantee of $10.3m. given by CACI Gibraltar and charge over antiques valued at $6m. The documentation stated to be required includes 'Guarantee from CAI Gibraltar' and the recommendation 'approval is recommended' was endorsed by Christopher Leonard, a credit manager at CACI London. The form also contains the comment: '. . . [I]t is envisaged that within a year, the reliance on the antiques will be reduced to nil and we will have a fully guaranteed facility, within standard guidelines.'

18 By fax dated June 9th, 2000, Mr. Tavernier provided Mr. de la Borde Caumont with a list of assets said to be worth $12m., capable

of being pledged as collateral for the facility to be granted to RSL, including an 'over life-size bronze figure' stated to be worth $6m.

19 Of some significance are two further documents generated for the purposes of the facility. Namely, a credit application entitled 'Credit Application No. 87 2. Data Input Request Branch London Code' signed by Ms. de Monspey as account manager; Mr. Leonard for the Credit Division; Mr. de la Borde Caumont *qua* local management and signed and dated June 13th by Andrew Trypanis, the Risk Senior Manager at CACI London and endorsed by him 'see comments.' The second document is the accompanying typed document in which Mr. Trypanis's manuscript comments are to be found. The credit application shows RSL as the applicant, with Robin Symes stated to be the shareholder, and with residence and nationality stated to be the United Kingdom, which given the layout of the form appears to be a reference to Symes. It is noteworthy that in contrast to unsigned drafts of the credit application—where the net worth of Symes is stated to be over $100m.—in the signed form, that entry is crossed out. The loan is stated to be for $11.3m., for the purpose of reducing an existing loan with Citibank, and the security to be provided is stated to be:

> 'Guarantee by CAI Gibraltar for $10.3m. (to remain silent);
>
> Charge over antiques; and
>
> Unlimited guarantee from Robin Symes.'

Flesh is then put to the bone in the detailed description of the proposal attached:

> '**Introduction**
>
> Robin Symes commenced as an art dealer in 1960, and has specialized in Ancient Art from 1967 on. His most notable clients have included J. Paul Getty, Norton Simon and Maurice Tempelsman. He has formed private collections—often in their entirety—and supplied most major museums with important acquisitions, many of which are now world famous. Robert [*sic*] Symes Ltd. is one of the top three European galleries. Amongst recent publications, the Ortiz, Leon Levy and Fleischman catalogues all contain material from the gallery in St. James's, as do many major institutional exhibitions.
>
> The premises from which the firm has operated since 1971 consists of an entire building of three floors in St. James's (Duke of York Street), which was originally founded in 1820. It retains much of its period charm, and functions both as a show room and office for the firm.

The client has been introduced by Maitre Tavernier (who is on the board of CAI Geneva) and we are in the process of opening the account. An account in the name of Lombardier [*sic*] Corp. (BVI company of which Robert [*sic*] Symes is ultimately the beneficial owner) is being opened in CAI Gibraltar and we are to receive a silent guarantee for $10.3m. to support this application. The other $1m. will be secured by various antiques, details of which will follow including valuations, proof of ownership and insurance. It is envisaged that they will be held in New York and be under the control of the bank (or an agent). The legal department have requested assistance/advice from NY lawyers in respect of the taking of the pledge/charge and the findings will be discussed once details are available.

Requirements

Mr. Symes is requiring a loan of $11.3m. to reduce an existing loan at Citibank. All that will remain at Citibank will be a loan of approximately $5m., which will be secured by a cash deposit of a similar amount and other assets in Geneva. From the 1998 accounts it appears that there [are] other bank facilities totalling over £10m. (see attached). As security for these facilities, various charges—including debentures and chattel mortgages—have been given. The charges register has revealed several charges in favour of Citibank NA, Hill Samuel Bank and Field Fisher Waterhouse, and these must be fully satisfied prior to drawing of any funds. Confirmation that the antiques being offered to support this application are unencumbered and that they are the personal property of the client will be required.

Repayment

Interests and capital will be repaid by the trading of his stock of antiques.

Repayment: Capital reduction will take place once assets are sold through normal trading (these assets to be separate from those pledged to us). A repayment schedule of $2m. per year will appear in the legal documentation, although it is suggested that the loan will be repaid prior to the final maturity date.

Security

Guarantee by CAI Gibraltar for $10.3m. (to remain silent).

Various scheduled items from his collection (see attached schedule).

Personal guarantee of Robin Symes to be supported by one antique (the first item on the schedule) to be under the control

of the bank (value $6m.) and not to be released until loan has been fully repaid.

Fees

Our margin would be 1.5% over LIBOR.

Arrangement fees: $20,000.

Five years, fixed for period of three months, although it is envisaged that the repayment will occur before the end of the term.

Recommendation

The facility is recommended, given the security and the very interesting return overall on the relationship for both CAI London and CAI Gibraltar. This is a well-known client who has been a longstanding private banking client of Citibank, and will be a good source of introduction to potential clients for PBK. Once the loan has been repaid, the cash deposit will remain in CAI Gibraltar.

[In manuscript:] Recommendation is based on documentation being satisfactory to our legal department, and furthermore the credit department must be satisfied on the control that we have over the statue, the valuation and the quality of the valuer. The insurance policy on the statue must be for an amount of not less than $6m. Finally, we must be satisfied on the provenance of the statue.

[Signed] Andrew Trypanis, 13/6/2000'

20 On June 15th, 2000, approval was obtained from the credit committee in Paris subject to 'DGCR conditions, and presentation and approval of audit for the Gibraltar side of the transaction.' The person with responsibility for DGCR endorsed the relevant document on June 19th, from which it may be readily inferred that such approval was given and confirmation of this conveyed to Mr. de la Borde Caumont and Mr. Leonard in CACI London, whilst a post-it attached to the fax marked 'FAO James Canepa' evidences that the approval was forwarded to Mr. Canepa at CACI Gibraltar.

21 CACI London was provided with corporate documentation, resolutions, register of charges and accounts of RSL. It is not in dispute that RSL's financial position, as reflected in those accounts as at December 31st, 1998, are as pleaded, and showed—

'(a) A profit for the year of £132,130 (as against a prior year loss of £941,545);

(b) net assets of just £517,706;

(c) amounts falling due to creditors within the year of £10.2m.; and

(d) stock of £9.4m.'

22 It is not in issue that the £10.2m. due to creditors included the loan from Citibank, which amounted to £9.4m. and which would, in the normal course of events, have been rolled over.

23 For the purposes of Lombardi opening its account with CACI Gibraltar, Mr. de la Borde Caumont provided a duly completed standard 'letter of introduction' dated June 26th, 2000, in which he states that he has known Symes for three months, which is defined as 'the Term.' The relevant passages of the letter then state:

> 'I/We certify that the customer, who informs me/us that he wishes to open an account and commence a business relationship with you, has been known to me/us for the Term. I/We also confirm that the above is his true name and address which correspond to his identity as verified by us. I am/We are in possession of full details regarding the customer's background and business operations. I/We confirm that the customer has throughout the Term been honest, respectable and trustworthy in his business dealings with me/us.
>
> I/We further certify to you that I/We are satisfied of the legitimacy of the funds to be held or dealt with by you for the customer. I/We can confirm that no information is in our possession relating to the source of those funds that would result in me/us making any report under internationally recognized money laundering measures . . .'

24 On or about June 28th, 2000, $10,299,985 was remitted by LGT Bank in Liechtenstein to CACI Gibraltar, via Bankers Trust Co., New York, endorsed as being sent by 'one of our clients.'

25 Notwithstanding the request for $11.3m. in the event, as documented in the facility letter dated June 30th, 2000, and signed for RSL on July 13th, 2000, the facility given was for $10.3m. From email exchanges between Mr. Leonard and Mr. Trypanis, one can surmise that the difficulties in obtaining a 'good charge' over a statue led Symes to request the reduction in the facility to $10.3m. in respect of which sum CACI London was fully secured by virtue of the CACI Gibraltar 'guarantee.' Also on June 30th, 2000, a board meeting of RSL resolved to open an account with CACI for the purposes of a loan facility for the maximum of $10.3m.; RSL executed a security agreement in favour of CACI London, granting a

security interest over works of art owned or to be acquired by it, and executed a deposit agreement as well as a chattel mortgage over certain antiquities. Although dated June 30th, 2000 in the heading, Symes gave a personal guarantee in respect of RSL's indebtedness to CACI on July 13th, 2000. The chattel mortgage was subsequently discharged in December 2000, when it emerged that RSL had a similar earlier and subsisting charge in favour of Citibank.

26 Albeit undated, by virtue of the fax transmission date on the document it appears that, also on June 30th, Lombardi executed a charge over securities and cash in favour of CACI Gibraltar, having executed the previous day a letter of counter indemnity in favour of CACI Gibraltar in the sum of $10.3m.

27 Evidently, consequent upon completion of the transaction, $3m. was on June 30th paid by CACI London to RSL's account with Citibank. It was however not until July 6th that a shareholders' meeting and thereafter a board meeting of Lombardi was held in which it was resolved to approve the transaction documents affording CACI Gibraltar a counter-indemnity for it to give the 'guarantee,' with the directors recording that they had been so instructed by the shareholders and that the same shareholders held shares in both RSL and Lombardi, and thereafter resolving that it was in the 'commercial interests' of Lombardi for the purposes of its business and within the express objects of the memorandum of association."

11 As Sir William Aldous noted (2013–14 Gib LR 260, at para. 13), between June 30th, 2000 and the end of January 2001, RSL used the facility in London and on August 13th, 2001, the bank transferred $9,860,278.78 to London. RSL's London account was closed on August 29th, 2001. Sir William identified the witnesses called on either side (*ibid.*, at paras. 14 and 15) and concluded that the evidence of Mr. Canepa, who was the compliance manager of the bank, could not be accepted unless supported by the documents but that the other witnesses of fact were honest witnesses. As to the experts, he preferred the evidence of the bank's expert, Mr. Palette, to that of the respondent's expert, Mr. Hopton.

The issue

12 Both in the courts below and before the Board, the parties accepted that the relevant test was that stated by Lord Neuberger, M.R. in *Sinclair Invs. (UK) Ltd.* v. *Versailles Trade Fin. Ltd.* (5), which must, of course, be considered in its context. That context includes the following part of his judgment ([2012] Ch. 453, at paras. 97–100):

"97 . . . the issue is simply whether on the facts known to the banks at the time at which they received the payments in question they had notice of TPL's proprietary right to the money so paid.

98 In *Barclays Bank plc* v. *O'Brien*, [1994] 1 A.C. 180, at 195–196, Lord Browne-Wilkinson explained:

> 'The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it.'

99 In *Macmillan Inc.* v. *Bishopsgate Investment Trust plc (No. 3),* [1995] 1 W.L.R. 978, at 1014, Millett, J., albeit in an addendum to his judgment, touched on the question of the nature of constructive notice in these terms:

> '[the plaintiff] attempted to establish constructive notice on the part of each of the defendants by a meticulous and detailed examination of every document, letter, record or minute to see whether it threw any light on the true ownership of the [relevant] shares which a careful reader—with instant recall of the whole of the contents of his files—ought to have detected. That is not the proper approach. Account officers are not detectives. Unless and until they are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the assumption that they are dealing with honest men. In order to establish constructive notice it is necessary to prove that the facts known to the defendant made it imperative for him to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper.'

100 In the present case, as at the three dates identified in para. 95 above, TPL's case is that the banks ought to have appreciated that the transfers of money effected on, or as at, those dates was 'probably improper' on the ground that the money was beneficially owned by TPL, or at least that the banks ought to have made inquiries before accepting the money. It is accepted by both TPL and the defendants that the issue is to be determined by asking what the banks actually knew, and what further inquiries, if any, a reasonable person, with the knowledge and experience of the banks, would have made, and, in the light of that, whether it was, or should have been, obvious to the banks that the transaction was probably improper."

13 Lord Neuberger then summarized his conclusion as to how the question should be put. He said ([2012] Ch. 453, at para. 109) that the question was whether, on the facts known to the banks on the three dates—

> ". . . a reasonable person with their attributes (i.e. those of a responsible large bank with the benefit of highly experienced insolvency practitioners as their appointed administrative receivers) should either have appreciated that a proprietary claim probably existed or should have made inquiries or sought advice, which would have revealed the probable existence of such a claim."

14 The approaches of Lord Browne-Wilkinson and Millett, J. do not seem to the Board to be entirely consistent. The position has, however, been resolved by Lord Neuberger (*ibid.*, at para. 109). As he indicates, it is important for these purposes to distinguish between three different circumstances. The first is where the bank in fact appreciates that a proprietary right in the property probably exists, so that the bank has actual notice of the right. That is not this case. The second is where a reasonable person with the attributes of the bank should have appreciated, based on facts already available to it, that the right probably existed, in which case the bank has constructive notice of the existence of the right.

15 The third is where the bank should have made inquiries or sought advice which would have revealed the probable existence of such a right. Here, too, the bank would have constructive notice of the right. The question is in what circumstances and to what extent it can properly be said that the bank should have made inquiries or sought advice. The cases suggest various possible approaches. So, for example, Lord Browne-Wilkinson said in the passage quoted in para. 12 above (*Barclays Bank plc* v. *O'Brien* (1) ([1994] 1 A.C. at 195–196)):

> "In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it."

The suggestion there is that the bank must make inquiries if the bank is on notice as to the *possible* existence of such a right.

16 What, then, is meant by *possible*? The Board does not think that Lord Browne-Wilkinson can have intended to refer to the mere possibility of the existence of a proprietary right. Although Lord Browne-Wilkinson referred more than once to possibility, he also referred in a similar context to there being "a substantial risk" (*ibid.*, at 196). As the quotation at para.

12 above shows, Millett, J. also referred to "the possibility of wrongdoing" (*Macmillan Inc.* v. *Bishopgate Inv. Trust plc (No. 3)* (3) ([1995] 1 W.L.R. at 1014)). After correctly referring to the fact that a bank's account officers are not detectives, he said (*ibid.*) that, unless and until they—

> ". . . are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the assumption that they are dealing with honest men. In order to establish constructive notice it is necessary to prove that the facts known to the defendant made it imperative for him to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper."

17 With respect to Millett, J., it is not absolutely clear what he meant. He was correct to say that the starting point is the assumption that the bank is dealing with honest men but it appears to the Board that there is some confusion between the first stage, at which the bank is alerted to "the possibility of wrongdoing" which it appears prompts an inquiry, and the second stage after the inquiries have taken place. If he intended to say that it was only necessary to carry out inquiries if it was obvious that, absent inquiries, the transaction was probably improper, the Board regards that as too high a test. The purpose of any such inquiries is to ascertain whether the transaction was improper. If the facts already known to the bank show that the transaction was probably improper without further inquiries, it appears to the Board that the bank would have had constructive knowledge of that impropriety without further inquiry.

18 As the Board sees it, the problem is largely resolved by Lord Neuberger's approach (*Sinclair Invs. (UK) Ltd.* v. *Versailles Trade Fin. Ltd.* (5) [2012] Ch. 453, at para. 109). He identifies the relevant persons at the bank and says that the bank will have constructive notice where they should either have appreciated that a proprietary claim probably existed or have made inquiries or sought advice, which would have revealed the probable existence of such a claim. However, the Board thinks that by "proprietary claim" Lord Neuberger must have meant "proprietary right." In the context of knowing receipt, in *Carl Zeiss Stiftung* v. *Herbert Smith & Co. (No. 2)* (2), Danckwerts, L.J. said this ([1969] 2 Ch. at 290):

> "In my view, knowledge of a claim being made against the solicitor's client by the other party is not sufficient to amount to notice of a trust or notice of misapplication of the moneys. In the present case, which involves unsolved questions of fact, and difficult questions of German and English law, I have no doubt that knowledge of the plaintiffs' claim is not notice of the trusts alleged by the plaintiffs."

In *Sinclair*, Lord Neuberger said ([2012] Ch. 453, at para. 108) that he agreed with the judge in that case that the reasoning in the *Carl Zeiss* case supported the proposition that notice of a claim was not the same as notice of a right. In these circumstances the Board considers that, in his next

paragraph (*ibid.*, at para. 109), Lord Neuberger must have intended to refer to the existence of a proprietary right and not a claim.

19 In that paragraph, Lord Neuberger identifies two alternative cases in which the bank would have constructive notice of a propriety right. The first is where the bank should have appreciated that a proprietary right probably existed. Lord Neuberger does not suggest that further inquiries or advice would be needed in that event, because the bank would have constructive notice of the right. The second is where the bank should have made inquiries or sought advice which would have revealed the probable existence of such a right. He does not identify the state of mind which should have led the bank to make such inquiries or seek such advice. It appears to the Board that Lord Neuberger did not intend to contradict Lord Browne-Wilkinson's approach at the earlier stage.

20 Thus, on the one hand, the bank's knowledge of facts indicating the mere possibility of a third party having a proprietary right would not be enough to put the bank on inquiry but, on the other hand, it is not necessary for the bank to conclude that it probably had such a right. The test is somewhere in between. It may be formulated in this way. The bank must make inquiries if there is a serious possibility of a third party having such a right or, put in another way, if the facts known to the bank would give a reasonable banker in the position of the particular banker serious cause to question the propriety of the transaction. This approach seems to the Board to be consistent with that expressed in *Lewin on Trusts,* 19th ed., at para. 41–134 (2014) in connection with commercial transactions. It says that in some commercial contexts a purchaser may be fixed with notice in the absence of actual knowledge, but—

> ". . . only where in the particular commercial context involved he has failed to draw inferences which ought reasonably to have been drawn in that context or has been put upon inquiry by knowledge of suspicious circumstances indicative of wrongdoing on the part of the transferor, but has failed to make inquiries that are reasonable in the circumstances."

21 In the opinion of the Board, the principles set out above apply here, subject to this. As stated in para. 2 above, it was common ground before the Board (as it was in the courts below) that the respondent is entitled to trace the proceeds of sale of the collection into the hands of the bank unless it establishes that it was a *bona fide* purchaser for value without notice. In short, as Sir William Aldous said (2013–14 Gib LR 260, at para. 33) (quoted below), it was for the bank to show that it lacked constructive notice of the impropriety of the relevant arrangements. This approach is consistent with that noted in a not dissimilar context in the well-known statement of Collins, M.R. in *In re Nisbet and Potts' Contract* (4) ([1906] 1 Ch. at 404).

The critical conclusions of the judge

22 As Sir William Aldous said (2013–14 Gib LR 260, at para. 20), the Chief Justice concluded that, although there could be legitimate argument as to whether or not there should have been more scrutiny, the bank did not consider that there was anything untoward with the transaction and that putting a structure in place to obtain a facility for the purposes of repaying another bank with an internal guarantee was standard. The fee charged did not raise a red flag and the size of the transaction would not have raised suspicion.

23 The Chief Justice summarized his conclusions as to dishonest assistance and knowing receipt on the one hand and as to the proprietary claim on the other as follows (2013–14 Gib LR 55, at paras. 98–99):

> "98 I am of the view that in principle it was perfectly proper for CACI to rely upon Mr. Tavernier as an introducer of substance, and given his directorship in CACI Suisse, to attach significant weight to his introduction. That said, there is substance in the criticism that too much stock was placed upon it and, allied to that, there was a somewhat lax approach to KYC, including insufficient inquiry into Symes's wealth. The bank also failed to comply with some of its own internal regulations and, no doubt because the transaction was structured through three different branches, it did not have a comprehensive overview of it. However, the standards by which the claimant would have had CACI scrutinize the transaction are, when viewed in the context of 2000, a counsel of perfection. It is clear from the evidence that the approach then was very different from what it is now and the level of scrutiny to which transactions were exposed far less stringent. It is evident from my review of the evidence that I agree with the opinion of both experts that there was no dishonesty on the part of any individual within CACI. Nor do I find any evidence to adequately support the proposition that any individual within the bank was aware that they had been drawn into a dishonest scheme and then turned a blind eye to it. Indeed, the fact that this was a transaction which was structured in two different jurisdictions and was then sanctioned by head office in a third jurisdiction strongly militates in support of my finding that there was no awareness of any wrongdoing or unconscionable conduct by CACI staff. To the extent that the claim is framed in terms of dishonest assistance and knowing receipt it therefore fails.
>
> 99 The proprietary claim requires somewhat distinct consideration. The bank's defence to that claim is that it was a *bona fide* purchaser for value without notice. It is evident from the foregoing that I accept that the bank acted *bona fide*; however, the issue remains as to whether it was on notice and what further inquiries—if any—it

> should have made, and whether following such inquiries it would have become apparent that the transaction was improper. The single most serious failing which the claimant's expert can ascribe to CACI is its failure to make full inquiry from LGT Bank as to the source of the funds. If such inquiries had been made from LGT Bank, and it had replied in line with the evidence before me, CACI would have been told that the moneys had been transferred by the Pataco Foundation of which Symes was the beneficiary. The proceeds of sale of the collection were laundered at or by the time it was paid into Pataco, and further inquiries by CACI as to their source would have disclosed nothing material which would have put them on notice that the transaction was probably improper. The proprietary claim also fails."

The appeal to the Court of Appeal and this appeal

24 The Court of Appeal allowed the respondent's appeal on the basis that there was ample evidence that the bank should have considered the commercial purpose of the scheme before entering into the transaction; that the Chief Justice did not address the commercial purpose; and that, if he had done so, he would have concluded that the bank would have concluded that it was improper. The bank challenges those conclusions in this appeal.

25 It is submitted on behalf of the bank that the Chief Justice did consider the relevant question. However, the Board is unable to accept that submission. The Chief Justice (*ibid.*, at para. 99) considered the questions of what further inquiries, if any, should have been made by the bank and whether, following such inquiries, it would have become apparent that the transaction was improper. Those were correct questions to have asked. However, the Chief Justice then said that the most serious failing which Mr. Hopton, the respondent's expert, could ascribe to the bank was its failure to make full inquiry from LGT Bank as to the source of the funds. It was submitted to the Court of Appeal (and is submitted to the Board) that the focus of the inquiry should not have been confined to the source of the funds but should have extended, in particular, to the commercial purpose of the transaction.

26 The Court of Appeal accepted that submission and so does the Board. The Court of Appeal held (2013–14 Gib LR 260, at para. 24) that there was ample evidence that, at the relevant time, a bank which was contemplating entering into a transaction of the type that took place should and would inquire as to the commercial purpose. It focused upon just some of the evidence. Thus Sir William Aldous observed that the Gibraltar Credit Application Form of June 20th, 2000 contained this comment: "we have been advised by Credit Agricole Indosuez London that they are to

establish the commercial benefit of the operation of the parties concerned." The Gibraltar Credit Committee added the manuscript comment: "We assume that CAI London has requested the B/O to seek independent fiscal advice—I suggest that the existence of the business benefit of the operation be well established prior to the issue of our guarantee."

27 Sir William further noted the following (*ibid.*, at para. 25). Mr. Bertrand de Margerie agreed in cross-examination that he would want to understand the purpose of the credit application. On being shown the credit application form, Ms. Alix de Monspey agreed that to approve a transaction it needed to be understood what its purpose was. Ms. Margaret Garner agreed in cross-examination that financial institutions should pay special attention to all complex unusual patterns of transactions which have no apparent economic or visible lawful purpose. Mr. Trypanis believed that, without obtaining the full information, the transaction left one in a suspicious situation that should have been reported to the MLRO for further investigation. Finally (*ibid.*), Sir William noted that the bank's expert, Mr. Palette, supported the evidence given and summarized above. He agreed that where a client was seeking to open a new account and enter into a transaction, the economic and commercial purpose of the transaction would be part of the overall check. A summary of the evidence on this aspect of the case is attached to the respondent's case. In the opinion of the Board, it supports the conclusions of the Court of Appeal.

28 The critical conclusion of the Court of Appeal (*ibid.*, at para. 26) is that the Chief Justice concentrated on the source of the funds and not what the commercial purpose of the transaction was. The Board agrees with the Court of Appeal that that is indeed what the Chief Justice did. In these circumstances, it was open to the Court of Appeal to reach its own conclusions. If the Chief Justice had focused on the commercial purpose of the transaction, he would have had to decide whether the result of a reasonable inquiry into the commercial purpose of the transaction, as opposed to into beneficial ownership, would have made it obvious that the transaction was probably improper.

29 Sir William Aldous noted (*ibid.*, at para. 27) the submission made on behalf of the bank that appropriate inquiry would not have alerted the bank to anything improper. In short, it was submitted (as it was submitted to the Board) that Mr. Symes had been introduced to the bank by a distinguished lawyer who was a director of an associated bank. He was thought to be a wealthy art dealer. At the time, the bank had not heard of the collection and there was no apparent dispute between him and the Michailidis family. The amount of money involved was not extraordinary and the back-to-back guarantee was quite normal at the time. The judge found there was no dishonesty. There was, it was submitted, nothing suspicious about the transaction. The respondent was not on notice of any impropriety which would suggest further inquiry. In any case, further

inquiry would not have rendered it obvious that the transaction was improper. The commercial purpose was clear, namely to repay an existing loan from Citibank using funds that belonged to Mr. Symes.

30 The Court of Appeal considered those points (*ibid.*, at para. 27) but concluded (*ibid.*, at paras. 28–33) that they were insufficient to rebut the inference it drew that, if the bank had given adequate consideration to the commercial purpose of the transaction, it would have concluded that the purpose of the arrangement was improper. Sir William Aldous said (*ibid.*, at paras. 28–32):

> "28 The appellant accepted that the perceived purpose was to pay the Citibank's loan. But that could have been done by a simple money transfer. What actually happened was that Mr. Symes had the money paid from Liechtenstein into two Panamanian companies. The money was then withdrawn from Panama accounts and transferred to a Liechtenstein foundation. On June 7th, Mr. Symes opened a deposit guarantee account in Gibraltar in the name of Lombardi Corp., which had been incorporated on May 3rd, 2000, and on June 28th, the money was remitted to that account. That enabled the bank in London to grant Robin Symes Ltd. a term loan facility which was used to pay Mr. Symes's debts. The web of companies used for the transaction would have involved expense, and created doubt as to the commercial purpose. The agreement with the bank was expensive. It required an annual fee of $51,500 over the five-year term, and a $1,000 arrangement fee. An arrangement fee of $20,000 was also charged to Robin Symes Ltd. The difference between the interest earned on the deposit and the interest payable by Robin Symes Ltd. was calculated at around £180,000. No doubt the bank had not overcharged, but that did not mean that there was a commercial purpose other than to launder money.
>
> 29 The appellant rightly submitted that the arrangement could not have any commercial purpose other than money laundering. No doubt it was arranged to pay Mr. Symes's debt to Citibank, but the use of a web of legal entities and the cost would have alerted a reasonable bank to the improper motive—namely, to launder the money.
>
> 30 It was suggested that the arrangement could have been perceived to have been carried out for tax purposes. That did not stand analysis, as Mr. Symes was, for tax purposes, resident in the United Kingdom. Thus, the suggested scheme could only be designed to avoid tax that was payable. It was also suggested that the commercial purpose was, or could have been, connected with Mr. Symes's proposed move to Switzerland. How that could have been was not explained, and I can see no reason for the web of legal entities, nor

> the cost, unless there had been an improper motive. The other reason advanced was that Mr. Symes simply wanted to change banks. One look at the commercial purpose would have shown that to be wrong. The change could have been made without the web of legal entities and at no cost.
>
> 31 Counsel reminded the court that anti-money laundering requirements were not as advanced in 2000 as they are today. In this case they were dealing with a client who appeared reputable and rich. They knew the funds belonged to Mr. Symes, and there was nothing to suggest that he did not have a good commercial reason for the arrangement. But the evidence was clear that in 2000, a bank should satisfy itself that there was a proper commercial reason for the arrangement. That the bank did not do. If it had considered the arrangement, it must in my view have concluded that it was improper (see para. 29 above).
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> 32 Mr. Palette suggested in his evidence that the premium fee was relatively normal in banking. That may be the reason why no attempt was made to ascertain the commercial purpose of the arrangement. It does not however address the need of the bank to ascertain the commercial purpose.
>
> 33 The judge should have concluded that the bank should have inquired as to the commercial purpose of the arrangement. If it had done so, it would have realized that such arrangement was improper. That being so, the bank did not establish that it lacked constructive notice of the impropriety of the arrangement and the absence of any right or entitlement on Mr. Symes's part to deal with the fund in question. I conclude that the respondent is not able to defeat the appellant's claim."

31 Subject to the following, the Board agrees with these conclusions. It was common ground before the Board that, in his judgment in the Court of Appeal, Sir William Aldous overstated the position insofar as he referred to the bank's knowledge of the so-called "web of companies" used by Mr. Symes for the transaction. The Chief Justice found as a fact (2013–14 Gib LR 55, at para. 87) that, if the bank had made inquiries as to the source of the money being paid into Lombardi's account with the bank's Gibraltar branch, it would have been told that the money was transferred by Pataco and that Mr. Symes was the beneficial owner; it would not have learned of the existence of Tradesk, which was the company which first received the appropriated proceeds. It was accepted on behalf of the respondent that the bank would not have had knowledge of Tradesk. However, the Board notes that, following inquiries, the bank would still have known of the existence of several other members of the "web": Pataco, Lombardi, and RSL. The Board therefore accepts the

submission made on behalf of the respondent in her case that this overstatement on the part of Sir William Aldous does not detract in any significant way from the correctness of his overall conclusions.

32 The Board will accordingly humbly advise Her Majesty that the appeal be dismissed.

33 **LORD SUMPTION:** I agree that this appeal should be dismissed for the reasons given by Lord Clarke. Whether a person claims to be a *bona fide* purchaser of assets without notice of a prior interest in them, or disputes a claim to make him accountable as a constructive trustee on the footing of knowing receipt, the question of what constitutes notice or knowledge is the same. It is a question which has taxed judges for many years. In particular, they have been much exercised by the question of under what circumstances a person is under a duty to make inquiries before he can claim to be without notice of the prior interest in question. Ultimately, there is little to be gained from a fine analysis of the precise turns of phrase which judges have employed in answering these questions. They are often highly sensitive to their legal and factual context. The principle is, I think, clear. We are in the realm of property rights, and are not concerned with an actionable duty to investigate. The hypothesis is that the claimant has established a proprietary interest in the asset, and the question is whether the defendant has established such absence of notice as entitles him to assume that there are no adverse interests. The mere possibility that such interests exist cannot be enough to warrant inquiries. There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in his hands) which calls for inquiry. The rule is that the defendant in this position cannot say that there might well have been an honest explanation if he has not made the inquiries suggested by the facts at his disposal with a view to ascertaining whether there really is. I would eschew words like "possible," which sets the bar too low, or "probable," which suggests something that would justify a forensic finding of fact. If even without inquiry or explanation the transaction appears to be a proper one, then there is no justification for requiring the defendant to make inquiries. He is without notice. But if there are features of the transaction such that, if left unexplained, they are indicative of wrongdoing, then an explanation must be sought before it can be assumed that there is none. In the present case, on the facts actually known to the bank, there was no apparent explanation of the interposition of the Panamanian and Liechtenstein entities unless it was to conceal the origin of funds derived from third parties. That was why the bank had to make inquiries before proceeding as if there were an innocent explanation.

Appeal dismissed.