CHANCERY BAR ASSOCIATION LECTURE 2017

***Akers v Samba*: Equity's Darling Reigns Supreme.**

1. Having been lecturing for nearly two years now on procedural subjects, such as Chancery Modernisation, the Reform of Civil Justice and the Online Solutions Court, this kind invitation to address a (if not the) most distinguished gathering of equity lawyers imaginable came as a welcome opportunity to return to the more rigorous sphere of black letter law. Illegality sprang to mind, but for the fact that Lord Sumption beat me to it in his address to you in 2012. The endlessly fascinating subject of remedial constructive trusts has now probably been done to death. But my search for something different was completed when I alighted on the recent unanimous decision of the Supreme Court in *Akers & Ors v Samba Financial Group* [2017] UKSC 6, handed down in February this year and still, in the stately world of chancery litigation, hot off the press.
2. This case is a "must read" for chancery lawyers, for at least four and a half reasons. Taking them in the order in which the treats are presented to the reader, the first is that it contains a useful canter for the uninitiated through the Convention on the Law Applicable to Trusts and on their Recognition, scheduled to the Recognition of Trusts Act 1987, a valiant effort to give effect to trusts and equitable interests in a world in which so many systems of law give limited (or no) recognition to principles which lie embedded in every equity lawyer's brain, and in the hearts and consciences of most. In the end this Convention played no part at all in the outcome of the case, but Lord Mance's and Lord Collins' joint tutorial on its meaning and effect is worth several CPD points in its own right.
3. Secondly, the case trenchantly affirms, with the highest authority, the principle laid down by the Court of Appeal in *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 Tru LI 35, and more broadly by by Roth J in *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch), that a trust created validly according to the law applicable to the transaction creating it is not invalidated or rendered ineffective

Commented [I1]: This is the citation given in the SC jgt in *Akers*, so I've left as is. Tru LI refers to 'Trust Law International' . The alternative citation given on Westlaw is [1998] NPC 71 ('New Property Cases') which also seems relatively obscure.

merely because the *lex situs* applicable to the trust property provides otherwise. Lord Mance said, at [34]:

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

4. The third reason is that it contains a penetrating, albeit not entirely conclusive, analysis of what we mean when we speak of legal and equitable interests in property, and of their creation, transfer, destruction and extinction. I expect that we all think individually that we know what we mean by those expressions, but their Lordships' principled analysis demonstrates, to me at least, that we frequently use language about these matters that derives from less than unanimous thinking about the basic principles, and a blinkered understanding of some of the consequences.
5. The fourth reason is that the Supreme Court came to an, at first sight, remarkable conclusion about the interaction, or rather the lack of it, between s.127 of the Insolvency Act 1986 and the destruction of an insolvent company's beneficial interest in intangible property as the result of a transfer of legal title to the property by the trustee, in breach of trust, to a bona fide purchaser for value, i.e. to equity's darling, after presentation of a winding up petition against the company. While the first three reasons which I have described make the judgments a 'must-read', I hope you will think, by the end of it, that this fourth one justifies a full lecture.
6. The remaining half reason for reading *Akers v Samba* is that it is a striking example of a case where the real and decisive issue (in relation to the interpretation and effect of s.127) only emerged for the first time after the conclusion of oral argument in the Supreme Court, so that it had to be addressed by a final appellate tribunal for the first time, and by reference only to written submissions. Furthermore it was decided contrary to what was probably (although not certainly) an original tacit assumption as to the effect of s.127 by both the courts below (which included Sir Terence Etherton and Sir Geoffrey Vos, successive Chancellors of the High Court) and by the very eminent legal teams on both sides.
7. As is well known, s.127 renders void any disposition of the property of a company, or of its shares, made after the presentation of a winding up petition, subject to the

court's discretionary power to order otherwise, either prospectively or after the event. It provides:

"Avoidance of property dispositions, etc.

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

S.127 is the equivalent in the corporate context of a very similar provision applicable to personal bankruptcy, now to be found in s.284 of the Insolvency Act 1986, which applies between the presentation of a bankruptcy petition and the vesting of the bankrupt's property in his trustee. The bankruptcy version can be traced back to a statutory origin as long ago as 1571 (in the Act touching Orders for Bankrupts 13 Eliz c.7,) about which Lord Coke said this, in 1584 (in *The Case of Bankrupts* 2 Co Rep 25):

> "if, after a debtor becomes a bankrupt, he may prefer one (*creditor*) it would be unequal and unconscionable, and a great defect in the law, if after he hath utterly discredited himself by becoming a bankrupt, the law should credit him to make a distribution of his goods."

8. A similar provision has always applied to corporate insolvency, from the Joint Stock Companies Act 1856, and achieved something like its current form in s.153 of the Companies Act 1862. In *Re Wiltshire Iron Co* (1867-68) LR 3 Ch App 443 at [446] Lord Cairns referred to s.153 as:

> "A wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of property of a company in extremis"

9. This important provision buttresses the *pari passu* principle by which all the assets of an insolvent company are to be shared among its creditors, by prohibiting any disposal of its property (even for full value) during the period between the onset of its winding up, which dates back to the presentation of the winding-up petition (not just its advertisement), and the time when its property falls under the custody of its liquidator. It contains serious traps for the unwary person dealing with the company during that twilight period. The company remains under the control of its directors,

and persons dealing with it may be entirely unaware that a petition has been presented, even if it has been advertised. Sometimes the directors may be as well, where the petition has yet to be served. In this respect it is even more rigorous than its bankruptcy equivalent, because the voiding effect of s.284 is disapplied by subsection (4)(a):

"in respect of any property or payment which he (*i.e. the recipient*) received before the commencement of the bankruptcy in good faith, for value and without notice that the…petition had been presented"

10. Many in this room will remember cutting their teeth in the Companies Court making applications for prospective dispensation from this austere regime while winding up petitions have been pending, and seeking to persuade the court that some form of continued trading will be beneficial to the company's stakeholders, even if a winding up order is later made. As Lord Neuberger acknowledged, the rigour and potential for unfairness of this provision is tempered only by the court's dispensing power (at [75]). It applies to the company's property of any kind, the relevant definition of "property" in s.436 being in the widest possible form. As Sir Roy Goode puts it in his Principles of Corporate Insolvency law, 4th ed. (2011), at p.610:

"it applies as much to bona fide business transactions as to preferences; it nullifies transactions that increase the company's asset value no less than transactions which reduce that value. Indeed, it effectively paralyses the company's business, for without the court's leave not so much as a stitch of cloth can be disposed of, not one penny spent even to acquire an asset worth a pound, and technically the company cannot even pay cash into its bank account. Hence the importance of the company's ability to obtain authority from the court which will enable it to continue trading pending the hearing of the petition."

11. Furthermore s.127 does not lie side by side with statutory provisions protecting creditors from transactions at an undervalue and preferences. It lies end to end with them, and provides the only relevant protection against dissipation of that kind once a petition has been presented. This is because statutory control of undervalues and preferences applies only to a period which ends with the commencement of the

winding-up, and that is defined as being the date when the petition is presented: see s.240(3)(e) and s.129(2).

12. Nor is the prohibition in s.127 limited, expressly at least, to dispositions by the company itself, although s.284 is expressly so limited in relation to bankruptcy. For example, s.127 applies to all dispositions of shares in the company, which are ordinarily made by others.

13. The ratio of *Akers v Samba* in the Supreme Court is that where a company held beneficial interests in valuable intangible property (namely shares in other companies), a transfer of those shares by the company's trustee, in breach of trust, to a bona fide recipient for value which destroyed the company's beneficial interest, after the commencement of its winding up, was simply not a disposition of the company's interest in the shares at all, so that s.127 did not render it void. The transferee (equity's darling) did not have to seek the court's dispensation from the rigour of s.127. On the assumed facts of the case, there must be grave doubt whether the transferee would have obtained it. The impugned transaction did the company and its creditors nothing but harm, and the receipt of the property was in reality a pure windfall for the transferee, which was a creditor of the trustee rather than the company, and gave no fresh consideration.

14. The main purpose of this lecture is to examine the potential consequences of this decision. It is commonplace for modern companies to hold valuable portfolios of intangible assets such as shares, hedging derivatives and other financial products, and these are equally frequently owned through various forms of business trust structure, as the courts' minute examination of the Lehman collapse has clearly demonstrated. A critical question is whether the basis of the decision in *Akers v Samba* depends upon the transfer by the trustee having been in breach of trust. If it does, then the propensity for rectitude of most trustees of the type who (or which) hold such intangibles for corporate beneficiaries may limit the inroad upon the protection afforded by s.127 to a small minority of cases, although s.127 will have failed to protect the company's property for its creditors where it may well have been most needed. But if it is not so dependent, then the consequential breach in the protective statutory dyke will be wide indeed.

15. The centrality of this issue about s.127 in the litigation which led to this decision appears initially to have been obscured by the colourful cross-border context in which the relevant events occurred. The company was incorporated in the Cayman Islands.

The shares in which it held the beneficial interest were in companies incorporated in Saudi Arabia, whose law does not recognize trusts or purely beneficial interests in property, and which is not a party to the Convention. The trusts were established by transactions governed by Cayman Islands law.

16. The facts (or assumed facts, since the appeal arose out of an attempt to stay English proceedings on *forum conveniens* grounds) can be simply stated. The company, SICL, was the investment vehicle for a Saudi Arabian citizen Mr Al-Sanea. In transactions between 2002 and 2008 he declared himself a trustee for SICL of a portfolio of shares, worth in excess of US $300 million, in five Saudi banks, including his bank Samba, to which he (but not the company) was personally heavily indebted. SICL was itself over-geared, and in July 2009 its bankers presented a winding up petition against it in Cayman. On 16 September 2009, Mr Al-Sanea transferred all the Saudi Arabian shares to Samba, purporting thereby to reduce or discharge personal liabilities which he (not SICL) owed to Samba. SICL was later ordered to be wound up, and the English Companies Court has recognised the Cayman Islands winding up proceedings as a foreign main insolvency proceeding by orders under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030). SICL and its liquidator then sought a declaration in English proceedings that Mr Al-Sanea's transfer of the shares to Samba was void by reason of s.127. Samba applied to stay those proceedings on *forum conveniens* grounds, and also to strike them out on the basis that they were bound to fail. It relied mainly on the argument that since Saudi law (the *lex situs* in relation to the shares) did not recognize trusts, no attack on its title could succeed.

17. Usually a transfer of trust property in breach of trust to equity's darling still gives rise to some proceeds in the trustee's hands to which the beneficiary's interest can attach, as where the transaction is by way of unauthorized sale for money, whether or not at an undervalue. But the transaction in the present case produced nothing at all for SICL, just as if the trustee had paid the company's money into his personal overdrawn bank account. There is no evidence that Samba held security for Mr Al-Sanea's debt to which SICL might have been subrogated. Since Samba was not SICL's creditor, it did not even operate as a preferential payment of one of SICL's liabilities. A practically minded businessman would say that it therefore achieved as complete a dissipation of SICL's 100% beneficial interest in the shares as could be imagined. A dissipation, yes, but not, according to the Supreme Court, a disposition within the meaning of s.127.

18. It is time to look closely at their Lordships' reasoning, to which Lord Mance, Lord Neuberger and Lord Sumption all contributed in their judgments, each agreeing fully with the others. The starting point is that they all accepted that SICL's beneficial interest in the shares was part of "the company's property" within the meaning of s.127, regardless whether such a beneficial interest be regarded in the traditional way as proprietary, or as a bundle of personal rights against the trustee as holder of the legal title, and against any other person to whom that title might be transferred other than equity's darling. This was because of the very wide definition of "property" in s.436 (see Lord Mance at [42]-[44], Lord Neuberger at [60] and Lord Sumption at [87]).
19. But they all agreed, in terms which differed a little between them, and with varying degrees of confidence, that there was no disposition (by anyone) of the company's interest in the shares within the meaning of s.127. Lord Mance acknowledged (at [45]) that he had found it a difficult issue, and declined to decide whether he preferred the concept of property being split into legal and beneficial ownership, or the notion that beneficial interests are "impressed or engrafted" onto the legal estate (at [50]). It was enough for him that legal and beneficial title were separate and distinct. He continued (at [51]):

> "Where an asset is held on trust, the legal title remains capable of transfer to a third party, although this undoubted disposition may be in breach of trust. But the trust rights, including the right to have the legal title held and applied in accordance with the terms of the trust, remain. They are not disposed of. They continue to be capable of enforcement unless and until the disposition of the legal title has the effect under the *lex situs* of the trust asset of overriding the protected trust rights. If the trust rights are overridden, it is not because they have been disposed of by virtue of the transfer of the legal title. It is because they were protected rights that were always limited and in certain circumstances capable of being overridden by virtue of a rule of law governing equitable rights, protecting in particular (under common law) bona fide third party purchasers for value (equity's "darling"…)."

19. Lord Mance (at [52]) relied on a similar analysis by Lloyd LJ in *Independent Trustee Services Ltd v GP Noble Trustees Ltd (Morris Intervening)* [2012] EWCA Civ 195; [2013] Ch 91. In that case a husband had stolen money from a pension fund of which he had been trustee, which he used to satisfy a consent Court order to make financial

provision for his wife in divorce proceedings. That would have made her equity's darling, but for her unfortunate decision later to have the order set aside on the ground of her husband's fraudulent concealment from her of the true extent of his assets. The Court of Appeal held that this deprived her of that favoured status, and with retrospective effect, so that the pension trustees succeeded in asserting the trust's interest against the sum paid to her, to the extent that it was still in her hands. Lloyd LJ said this, at [106]:

"…a transferee of the legal title to property under a disposition made in breach of trust, or a successor in title to such a person, does not have the beneficial title to the property, which remains held on the original trusts, unless either the transferee, or a successor in title, was a bona fide purchaser for value without notice. The trustee acting in breach of trust can transfer the legal title, but cannot vest the beneficial interest in the property in a bona fide purchaser for value without notice, since he does not own that title and is not acting in a way which enables him, under the trust, to overreach the beneficiaries' equitable interest. Despite that inability, the availability of the bona fide purchaser defence means that a transaction in favour of a bona fide purchaser for value without notice is as effective as it would be if he could vest the beneficial title in the purchaser. Thereafter the purchaser can deal with the asset free from any prior claim of the beneficiaries…"

20. Returning to *Akers v Samba*, Lord Mance then concluded (at [53]-[56]) that, while s.127 was intended to avoid transfers by the company of its own legal title to assets, it was neither intended, or needed, to apply to a transfer by a trustee for the company of legal title, in order to provide statutory protection for the company's beneficial interest. "Disposition" in his view required that there be a transfer of the relevant property (i.e. the beneficial title) by a disponor to a disponee, which did not occur. He acknowledged that in other contexts destruction or dissipation might amount to a disposition, but not under s.127.
21. Lord Neuberger proceeded from the same starting point as Lord Mance, namely Lloyd LJ's analysis, in the *Independent Trustee Services* case (at [62]). He also arrived at the same end point, namely that the fact that there was, on the assumed facts, no disponor transferring the beneficial interest and no disponee, was fatal to the attempt to invoke s.127 (at [72]). But he got there only after a more nuanced weighing of the pros and cons of a wide or narrow interpretation of s.127.

22. At [66] he acknowledged that the word “disposition” is linguistically capable of applying to a transaction which involves the destruction or termination (rather than transfer) of an interest, and he later referred to tax cases with dicta to that effect. He continued:

“Etymological analyses can fairly be said to be suspect in this sort of context, but it seems to me to involve a perfectly natural use of language to describe SICL’s interest in the shares as having been “disposed of” by the transfer of those shares to a bona fide purchaser.”

So he looked for an answer which fairly balanced what I might call chancery analysis of the bones of the transaction with a construction of s.127 which paid due regard to its underlying policy.

23. The court had been shown (or sent) passages from Sir Roy Goode’s *Principles of Corporate Insolvency Law,* which, at para 13-128 says this, as cited by Lord Neuberger in full (at [67]):

“the word ‘disposition’ ... must be given a wide meaning if the purpose of the section is to be achieved, particularly in view of the fact that there is no exception in favour of transfers for full value. ‘Disposition’ should therefore be considered to include not only any dealing in the company’s ... assets by sale, exchange, lease, charge, gift or loan but also ... any other act which, in reducing or extinguishing the company’s rights in an asset, transfers value to another person”. Sir Roy then explains that, on this basis, “‘disposition’ includes an agreement by which the company surrenders a lease or gives up its contractual rights.”

24. Lord Neuberger was in no doubt at all that, if the company had itself transferred its beneficial interest, or even surrendered it, s.127 would have applied (at [71]). That was a main reason why he regarded such beneficial interests as “property” within the wide meaning attributed to that word by the Act. He continued (at [71)]:

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

25. I respectfully agree. Lord Neuberger’s reasoning for suppressing, or managing, that

surprise can be summarized as follows (at [73]-[77]):

a. The natural meaning of disposition required a disponor and disponee,
b. Arguments for a secondary, wider, meaning were outweighed by the arguments the other way,,
c. There is a real difference between a surrender of an interest by a company itself, and the loss of it caused by the trustee transferring legal title to equity's darling,
d. S.127 can operate harshly upon transferees, despite the court's power to validate,
e. But to apply s.127 to such a person who had no notice that the company had any interest in the property at all "would not merely be harsh, but positively unfair".
f. None of the academic writers, including Sir Roy Goode, were thinking of a case where the disponor was someone other than the company or its agent.
g. The tax cases were similarly not focused on this type of transaction, and there was no reason why a word in a revenue statute should be construed in the same way as in s.127.

26. I think it is a fair reading of Lord Neuberger's judgment as a whole, that he found this issue at least as difficult as did Lord Mance. It was for him a question of statutory interpretation, with serious arguments on both sides which had to be balanced.
27. Lord Sumption did not express, or reveal, any similar uncertainties in his analysis. The outcome, in his view, flowed inevitably from a proper understanding about the nature of equitable interests, and propriety interests in particular, which rendered s.127 simply irrelevant to the dispute between the parties, even if they had all been based in England, and their dealings governed purely by English law. There is probably no substitute for reading his own forceful and persuasive analysis but, in order to ground my review of the implications of the case as a whole, I will attempt what will inevitably sound like a rather lame summary.
28. Lord Sumption began with the same analysis of the part personal, part proprietary, nature of a beneficial interest under an English trust, the personal rights existing against the trustee, and the proprietary rights existing *in rem* in relation to the property, subject to equitable defences such as that enjoyed by equity's darling (at [82]). But he pointed out that even the proprietary rights depended for their effect upon the conscience of the holder of the legal title for the time being being sufficiently

affected. This was central to his conclusion, as appears from [89]:

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

29. He had already concluded that Mr Al-Sanea had only ever been able to dispose of the legal title, and that only the company could dispose of its beneficial interest in the shares. Mr Al-Sanea therefore could not, and did not purport to, dispose of the beneficial interest, and it was lost to the company only because Samba was, or was assumed to be, equity's darling (at [88]). He therefore concluded that the issue between SICL and Samba depended entirely on the developed law relating to constructive trusts, which he described as reflecting the law's "careful balance between the competing interests engaged in such cases" (at [90]), and not on s.127. He put the outcome in this way (at [90]):

> "Wide as the term "disposition" is, the coherence of the law in this area would not be assisted by giving it a meaning inconsistent with the basic principles governing the creation and recognition of equitable interests and founded on a very different balance of the relevant interests."

30. So, what are the implications? Plainly, and unless there is an amendment to s.127, this ancient ban on dispositions of company property after the commencement of its winding up will simply not apply to any destruction, dissipation or diminution in the value of company property brought about by a disposal of legal title to the relevant property by a trustee acting in breach of trust, in favour of equity's darling. This is a unanimous decision of the Supreme Court, for reasons which, although perhaps not

quite identical, disclose a sufficiently clear ratio. There is no sensible prospect that *Akers v Samba* will go the way of *Stone & Rolls Ltd (in liquidation) v (Moore Stephens (a firm)* [2009] UKHL 39*,* being described by the Supreme Court only 6 years after the decision as "to be put on one side, and marked 'not to be looked at again'" (*per* Lord Neuberger in *Jetivia SA & Anor v Bilta (UK) Ltd (in liquidation) & Ors* [2015] UKSC 23 at [30].

31. Nor does the reasoning of the decision really depend upon the recipient being equity's darling. Even if not, the relevant transfer of the legal title in breach of trust will still not be avoided by s.127. The company will be able to pursue its equitable proprietary rights against the recipient, for whatever value that may bring, but the transaction will not be avoided, because there will *a fortiori* have been no disposition of the company's beneficial interest. Thus, if a voluntary recipient pays money transferred by the company's trustee into a personal overdrawn account, or damages the property in a way that does not itself amount to a disposition of the company's interest, or parts with it in a way which gives rise to a change of position defence, or a defence to a *Re Diplock* claim, the company's creditors will have to take the consequences. This is because the company's beneficial interest is simply not disposed of by a transaction by the trustee in breach of trust.
32. The ratio of the decision is probably not confined to egregious breaches like that assumed to have been committed by Mr Al-Sanea, which really amounted, in language which a jury might use, to a theft of the shares. I say probably, rather than definitely, because there is a view, to which I shall return, that a transaction in merely technical breach of trust may nonetheless destroy the beneficiary's interest by a transfer of legal title, even to a volunteer.
33. A more typical breach might consist of a sale and purchase of shares or some other intangibles by a trustee purportedly exercising a power to transpose investments, but unfortunately swapping the existing property for some other investment lying ever so slightly outside the confines of his authority as discretionary investment manager of the company's portfolio. The breach might consist of the transfer of listed securities by a nominee for the company on the instructions of one of its directors, where the nominee failed to heed warning signs that the director was exceeding his authority.
34. Clearly, the decision has no effect upon the protection provided to the company's creditors by s.127 in any case where the company also has legal title. Thus, in a slight variation of the last example given above, if the same director instructed the company

secretary to execute a transfer of a block of shares vested in the company at law, rather than held by a nominee, then s.127 would clearly apply to avoid the transaction. The same would also apply to company property held by a mere agent, provided that the agent was not of the trustee type, holding legal title to the property in his own name. In such cases there is a disponor and a disponee because, there being no initial trust or division of legal and beneficial title, the company's legal title carries with it full ownership, and that is transferred by the impugned transaction.

35. Much more difficult, and important, may be the question whether the Supreme Court's analysis applies in such a way as to render s.127 irrelevant to a transfer of legal title by a trustee for the company who does not thereby commit a breach of trust at all, even though it occurs after the presentation of the winding up petition. It is, as I have observed, extremely common for companies' holdings of securities and other intangible financial products to be held on some kind of business trust structure. Both the company and its trustee may be entirely unaware that a winding up petition has been presented, so that the proposition that such a transfer (e.g. on the company's instructions) may not involve a breach of trust is by no means an academic chancery conceit.

36. Before re-examining their Lordships' reasoning in an attempt to teazle out the answer to a question which they did not need to ask, it is perhaps worth going back to basic principles, about the differences in effect upon a beneficial interest of a transfer of legal title by a trustee acting, or not acting, in breach of trust. The starting point is that the trustee's ability to dispose of the legal title does not depend in any way upon the terms of the trust. It derives purely and simply from having the legal title vested in him, i.e. from being the legal owner.

37. Furthermore the transfer of legal title to property (whether or not by a trustee) is generally effective to confer ownership of the property on the recipient (whether a volunteer or equity's darling) unless, as Lord Sumption explains, there is something about the transaction or the circumstances sufficient to affect the conscience of the recipient, either immediately or at some later date before the beneficiary seeks to assert his rights against the recipient. That is how, in principle, equitable proprietary interests work.

38. There is however this difference, at least in theory, between the way in which an equitable interest is destroyed by a transfer by a trustee of legal title in breach of trust to equity's darling and the way it is destroyed by a transfer which is not in breach of

trust. The difference is encapsulated in the word "overreaching", and differences in its meaning, compared with "overriding" which is what happens to an equitable interest when the legal title is transferred to equity's darling. Overreaching is defined by the editors of *Snell's Equity*, 33rd ed. (2015) at para 4-013 as:

" an incident of a trustee's equitable authority to make dispositions of the trust property. Its primary effect is to subordinate the interest of the beneficiary under the trust to the interest acquired by the disponee from the trustee. The disponee therefore takes his interest in the property entirely free of, or in priority to, the beneficiary's interest."

39. Where the beneficiary's interest is overreached in this way, it is usually described as being transposed from the original property onto the proceeds of its disposition. But this is not a condition of overreaching. Sometimes there will be no such proceeds, as where the authorized disposition is otherwise than by way of sale. Trustees may have a power to advance capital to a particular beneficiary, from a pool of assets in which others have a beneficial interest. Trustees may have power to appropriate assets to satisfy the interest of a particular beneficiary, or to pay debts and expenses. None of these types of transfer generate any proceeds, but overreaching occurs nonetheless.
40. A critical difference, at least in theory, between overreaching and overriding, which is the label I will use to describe the destruction of a beneficiary's interest by the transfer of legal title in breach of trust to equity's darling, is that overreaching operates regardless whether the transferee is, or is not, equity's darling. As in the examples given above, the transferee may not be a purchaser at all. Lloyd LJ had overreaching well in mind, by way of distinction from overriding, in the *Independent Trustee Services* case, in the passage which I have quoted.
41. But in the corporate context, where business property is held for a company, the practical effect of these differences should not be over-exaggerated. In practice the transferee will almost always be equity's darling, wherever the transfer is not in breach of trust. Company portfolios of intangibles are held for the income (or gains) which they produce, or for sale. The transfer will almost certainly be a breach of trust if it is otherwise than by way of sale, i.e. otherwise than to a bona fide purchaser for value. Since overreaching means that the equitable interest of the company never affects the transferee, he (or it) will not have notice of it. "Notice" in this context does not mean notice of some previous beneficial interest which has ceased to affect the

property, but notice of an interest which would bind the transferee if he was not equity's darling, i.e. an interest which has not been overreached. This is not a purely academic or chancery point. Someone who buys property held by trustees may well know that the trustee holds it for a beneficiary, but will usually have no reason to think (if it be the case) that the trustee was exceeding his investment or other powers by selling it. Such a purchaser will still be equity's darling.

42. Furthermore there is no time difference, or at least nothing but a *scintilla temporis,* between the destruction of a beneficial interest which occurs as a result of overreaching, and the overriding of it by a transfer in breach of trust to equity's darling. Such artificial moments in time have now largely ceased to have legal consequences: see *Abbey National Building Society v Cann & Anor* [1990] 2 WLR 832. Overriding effects an immediate and total destruction of the previous beneficial interest from the moment of transfer, not at some later date when the transferee first relies on the defence of being equity's darling after a challenge by the previous beneficial owner. The darling transferee may in the meantime pass the legal title to a pure volunteer, who will have the full benefit of equity's generous treatment of his predecessor in title. Plainly it is of no avail to the beneficiary to notify the darling recipient of its interest after the transaction has taken place. That will not affect the conscience of the transferee, if he was equity's darling at the moment when he received the property.
43. Nothing in the *Independent Trustee Services* case suggests otherwise. Although the financial provision order which had originally made the wife equity's darling was only revoked some time after her receipt of the pension trust's money, she did not cease to enjoy that status, in the eyes of the law, only from the date of its revocation, however difficult that may seem to a historian, who looks at events, as it were, day by day. She lost it purely because of the retrospective effect of the setting aside of the order, so that she was to be treated as if she had not received the money for value in the first place. That clearly appears from the judgment of Patten LJ, and nothing in Lloyd LJ's judgment suggests otherwise. Had the poor wife only sought a variation rather than a revocation of the order, she might have been OK.
44. Nor is the type of destruction which occurs that different in kind. *Snell's Equity* speaks of overreaching subordinating the previous beneficial interest to that of the transferee, and of the transferee's interest having priority over it. That is exactly how overriding works.

45. The differences between overreaching and overriding which survive this analysis perhaps come down only to these. Where overreaching occurs, it is something intended by the creator of the trust to be achieved by the relevant transfer of the legal title, and it is that transfer, rather than the status of the transferee, which brings about the destruction of the beneficial interest in the property transferred. By contrast the transfer in breach of trust is not intended by the creator of the trust to destroy the beneficial interest, and does not do so on its own, but only because of equity's fondness for the status of a transferee who is equity's darling. In the corporate context the creator of the trust will usually be the company, which buys the relevant intangible asset in the first place, on terms that it be held by nominees on its behalf.
46. But are these largely technical differences sufficient to justify excluding s.127 from having any effect upon the first (the transfer in breach of trust) where overriding occurs, but allowing it its usual invalidating effect (subject to the court's dispensing power) in relation to the second, where overreaching occurs? And does the theoretical difference produce a sufficiently bright line of distinction to be workable in practice?
47. It is convenient to take the second question first. Not all equity lawyers accept that overreaching is strictly confined to transfers of legal title by trustees who are not acting in breach of trust. The editors of *Lewin on Trusts* say that overreaching is only displaced where the breach of trust is of an egregious rather than technical kind (19th ed. (2015) at para 41-014). If that is right (although it finds no support among other text book writers) the dividing line will be fuzzy indeed, rather like the old, now discredited, company law distinction between negligence and gross negligence by directors. All the more so if it will need an authoritative decision to establish whether *Lewin* is right.
48. It may be that the true distinction is between an unauthorized transaction, and one which is authorized, but which still involved the trustee in some breach of a duty of care (e.g. a sale pursuant to a power to transpose investments, but at a negligent undervalue). Lord Millett teaches us that there is all the difference between negligence and breach of fiduciary duty. Negligence is carelessness, whereas breach of fiduciary duty is disloyalty. Negligence is the creature of the Common law, whereas fiduciary duty is the creature of equity. But why, in the corporate context, should it matter, as the criterion for the application or disapplication of s.127? The more disloyal, egregious, unauthorized or inequitable the breach, the greater the need for

s.127 to protect the creditors from the consequences, rather than the other way round.

49. As to the first question, namely whether the technical differences between overreaching and overriding really justify drawing a line between them for the purposes of applying or disapplying s.127, I wonder whether their Lordships in *Akers v Samba* would necessarily have agreed upon the answer. The authorized transfer in accordance with the terms of the trust would still be a three-cornered affair, vis-à-vis the company's beneficial interest, and therefore apparently outside the confines of dispositions by the company of its own legal title to assets which Lord Mance considered to be all that s.127 was about. There would no more be a disponor and disponee of the company's beneficial interest where it is overreached than in the case of overriding by egregious breach of trust in the case before the Supreme Court. He spoke of the company's beneficial interest being overridden as something brought about by a rule of law applicable to equitable interests, rather than being disposed of by a transfer of the legal title. But the same may be said of overreaching. It is also a rule of law (or equity), triggered by a transfer of the legal title, which has essentially the same effect upon an equitable interest as overriding, as Lloyd LJ made clear.

50. For Lord Neuberger, the decisive point would appear to have been his view that it would be positively unfair for a transferee who might know nothing of the company at all to have the transfer invalidated by s.127 because of a prior winding up petition. But the same will often be true of the transferee from a trustee not acting in breach of trust. If the trustee is a nominee selling in a market, like a stock exchange, or even OTC, there is no reason in the modern world of intangible financial products why such a transferee would have any knowledge of the ultimate beneficial owner of the assets, or the slightest reason to enquire.

51. But I read Lord Sumption's analysis as suggesting that the absence of a breach (or at least an egregious breach) of trust might have made all the difference. For him, the key feature of the reason why, in equity, the transfer in breach of trust to equity's darling meant that there was no relevant disposition was because everything depended upon the conscience of the transferee, rather than upon overreaching, as a mechanism triggered by the disposition of the legal title, in accordance with the terms of the trust. Overreaching does not depend upon the conscience of the transferee, save in the negative sense that, wherever it occurs, the transferee's conscience will of course be entirely clear.

52. In the *Independent Trustee Services* case, Lloyd LJ makes a clear distinction between overreaching and overriding, in the passage which I have quoted, although not of course for the purpose of defining the ambit of s.127. Where the trustee acts in accordance with the terms of the trust, he does by transferring the legal title vest the beneficial interest in the transferee.

53. These "what ifs" are all of course speculative, and my views about them entirely provisional, and will remain so until a case comes along which puts the issue to the test. To a practical business person, it might well seem strange that the ambit of the rather tough, blunt, form of protection for the *pari passu* principle provided by s.127 could sensibly depend upon such fine chancery distinctions, in circumstances where, apart from the effect upon s.127, they would make little practical difference in the corporate context.

54. I doubt whether either answer to this conundrum will leave business onlookers or insolvency practitioners entirely satisfied. Let us look at the two answers in turn, and start with the answer which says that breach (or egregious breach) of trust makes no difference. S.127 does not therefore treat as a disposition any destruction of a beneficial interest which occurs upon the transfer of legal title by a trustee for the company, whether by overriding or by overreaching. Suppose that directors of a hard-pressed company wish to flog off its in-the-money derivative portfolio to a friendly (or even family owned) firm down the road to raise a bit of hard cash, or simply transfer it to the company's bank to reduce the company's unsecured overdraft. Prior to the presentation of a winding up petition they would be constrained by ss.238 and 239, which enable the court to undo transactions at an undervalue and preferences. But if they wait until the presentation of a winding up petition, they can proceed with the same transactions without any statutory consequences, since s.127 is powerless to intervene, if the share portfolio is held by nominee trustees. As I have mentioned, ss.238 and 239 cease to apply once the petition is presented.

55. It is true that s.238 applies only to transactions 'entered into by a company'. S.239 applies only to things 'done, or suffered to be done' by a company. Now it may be that an egregious breach of trust of the type assumed to have been committed by Mr Al Sanea satisfies neither of those conditions. The trustee may be acting on a frolic of his own, entirely unsuspected by the directors. I suggest no concluded view, not least because the case is still proceeding at first instance. But what about a transfer of legal title to intangibles by nominee trustees on the instructions of the company's directors,

either at an undervalue or in favour of a creditor thereby preferred? It would be a bold defending counsel who suggested to the Companies Court Judge that the transfer was not something entered into by, done by or at least suffered to be done by the Company. The fact that the directors gave the instructions to sell or transfer to nominee trustees rather than to the Company secretary (in a case where the company itself held the legal title) would be given short shrift as a basis of distinction. If it occurred within the relevant statutory period before the presentation of the petition it would be caught by either s.238 or 239. But if s.127 does not apply at all to transfers of legal title to property beneficially owned by the company, there is a serious gap in the protection which is currently assumed to apply, just when the pressure on the directors to misbehave is at its greatest.

56. Turning to the alternative answer, namely that s.127 applies to avoid overreaching, i.e. to transfers in accordance with the trustees' duty but not to overriding, i.e. transfers in breach of duty, the first problem would lie in trying to explain to a commercial business person the chancery intricacies of the difference between the two. They have the same consequences, and both occur at the same time, namely the time of the transfer of legal title. The second, I suggest insuperable, problem would be trying to explain why Parliament had intended to make that distinction, so as to invalidate a transfer for full (or some) value received by the company, but leave inviolable a transfer by way of virtual theft by the trustee, which produced no proceeds at all, as on the assumed facts in *Akers v Samba.*

57. It would not be a correct explanation to say that s.127 only invalidates transfers where the company was itself the prime mover. First, s.127 is not only concerned with dispositions by the company itself. Second, overreaching is not limited to cases where a nominee trustee acts in accordance with the company's instructions. The trustee may have discretionary powers to transpose investments, without seeking the company's instructions, and the exercise of these powers in accordance with the terms of the trust will, on this analysis, overreach the company's beneficial interest.

58. Nor could the explanation be that nominee trusts are different from other trusts, so that s.127 can somehow lift or look through them, like some kind of diaphanous equitable veil. At least some of the shares in *Akers v Samba* were, on the assumed facts, held by Mr Al Sanea as nominee for SICL.

59. To an insolvency practitioner it will I think come as a surprise that s.127 has been revealed only in 2017 to have this flaw, after well over a century and a half in which it has not previously been detected. It may be because the widespread holding of company property through trustees is a relatively recent phenomenon. All I can say is that the risk that s.127 may be inapplicable to all transfers of company property by trustees, including nominees, regardless of breach of trust, is something which calls for fairly urgent attention. Dodgy directors aware of the presentation of the winding up petition could easily evade s.127, first by transferring relevant company property to a nominee, and then instructing the nominee to transfer it, e.g. to a creditor they wish to prefer, or to a family member or friend at an undervalue. The transfer to the nominee will not be a disposition of the company's beneficial interest. It will remain with the company. The transfer by the nominee will not be either, because it will only be a transfer of legal title, even if the company's interest is overreached. Even if the transfer is in breach of trust, the buyer at an undervalue and the preferred creditor will both be equity's darlings. It may seem surprising to an insolvency lawyer that an unsecured creditor who receives property in reduction or satisfaction of a debt, but gives no fresh consideration, should be equity's darling, but ancient cases do say so (see *Thorndike v Hunt* (1859) 3 De G. & J. 563 and *Taylor v Blakelock* (1886) L.R. 32 Ch. D. 560).
60. The final guardian of the *pari passu* principle is not the courts, but Parliament, although it might at the moment have other things on its mind. It would not be difficult to devise an amendment to s.127 that required all such transfers (whether or not in breach of trust) to be deemed to be dispositions of the company's property, if it remains the wholesome and necessary provision which Lord Cairns adjudged its predecessor to be in the mid 19th Century. It certainly performs a useful service. It is for example the only reason why banks freeze a company's account once made aware of a winding up petition, unless a validation order has been obtained. It avoids the need for creditors suspicious of the good faith of directors having to come to court for a freezing order while the petition is pending, or for the appointment of a provisional liquidator.
61. But it must be recognized that s. 127 is of much less general application to corporate insolvency than it was in the mid 19th century. It does not apply to creditors' voluntary liquidation, or to administration, and these are becoming much more the 'normal' route into corporate insolvency than compulsory winding-up. That is a route

becoming increasingly confined to cases where the company's members or directors just won't face up to the sad reality of insolvency. But that kind of case might be thought to be precisely where s.127 performs its most important function.

62. Since the arrival of "distributing administration", where the administrator gets in the company's property and (after giving notice) distributes it *pari passu* just like a liquidator, administration rather than winding up has tended to become a preferred route, even where the prospect of saving the business as a going concern is remote. Many directors, facing a winding up petition, eventually follow advice from an insolvency practitioner to put the company into administration or voluntary liquidation before the return date, and the petition usually ends up being dismissed (or suspended if the appointment of administrators is made by a floating charge holder).
63. One possible solution to a serious weakening in the protection afforded to creditors by s.127 might be to extend the reach of ss.238 (dealing with transactions at an undervalue) and 239 (dealing with preferences) beyond the date of the presentation of the petition until the company's property really is taken out of the hands of the directors by the appointment of a liquidator.
64. Perhaps therefore, in an age where 'debtor in possession' forms of re-structuring and insolvency processes are gaining ground in many parts of the developed world, this case shows that s.127 is, like a much loved but very old, toothless, domestic pet, starting to show its age, and may even be ready to be quietly and painlessly put to sleep. Many would mourn its passing, and think that it performs a vital function. But changing the law in Parliament is politics, and none of my business. At the moment s.127 just continues to stagger along, even if only on three legs.