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Case No: HC10C00532

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

11 January 2012

Before :

MR STEPHEN MORRIS QC

(Sitting as a Deputy High Court Judge)

- -

Between :

ARMSTRONG DLW GMBH	**Claimant**
- and –	
WINNINGTON NETWORKS LTD	**Defendant**

- -
- -

Luke Harris (instructed by **Stephenson Harwood**) for the **Claimant**
Victor Joffe QC (instructed by **Myers & Sons Solicitors**) for the **Defendant**

Hearing dates: **17, 18, 19, 20 and 21 October 2011**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Stephen Morris QC

Introduction

1. In this action, commenced on 17 February 2010, the Claimant, Armstrong DLW GmbH ("Armstrong") claims relief against the Defendant, Winnington Networks Limited ("Winnington") in respect of 21,000 carbon emission allowances known as European Union Allowances ("EUAs"). On 28 January 2010 those EUAs ("the EUAs") were transferred from Armstrong's own carbon emissions account at the German Greenhouse Gas Emissions Trading Scheme Registry ("the German Registry") to Winnington's carbon emissions account at the UK Greenhouse Gas Emissions Trading Scheme Registry ("the UK Registry"). That transfer was effected as a result of an email fraud perpetrated upon Armstrong by an unknown third party, and to which, it is accepted, Winnington was not party. The issue is which of these two parties should bear the loss for the fraud of the third party. The EUAs were immediately sold on and transferred by Winnington to a regular counterparty.

2. Armstrong now puts its claim on three alternative bases. The first two bases are said to be common law restitutionary claims: a claim to vindicate its proprietary rights in the EUAs, which I refer to as the "proprietary restitutionary claim"; and, secondly, a personal claim at law for restitution on the basis of unjust enrichment to recover the value of the EUAs. Thirdly, Armstrong brings a personal claim in equity based on Winnington's knowing (or unconscionable) receipt of the EUAs or their traceable proceeds.

Structure of this judgment

3. In this judgment I set out, first, the relevant background and, secondly, the relevant legal principles. I then make observations on the witnesses before turning to the facts in detail, making my relevant findings of fact. Finally I apply the legal principles to the facts. My conclusion is at paragraph 290 below.

Background

The Parties

4. Armstrong is a company with its registered office in Germany. It is a producer of PVC and linoleum floor coverings and is part of a group of companies owned by Armstrong World Industries Inc, a US listed company. It operates two factories in Germany - at Delmenhorst and at Bietigheim-Bissingen. Until September 2009 both factories contained power plants. Herr Heinrich Leiber is, and was at all material times, the Armstrong employee responsible for emissions trading scheme ("ETS") trading accounts. Herr Markus Bruchmann is, and was, an employee working in the IT department at Delmenhorst. Armstrong has no history of trading in EUAs.

5. Winnington is a company registered in England with a head office in Crewe. It is engaged in the business of facilitating the supply and distribution of new and high demand technology products. In addition it trades in EUAs (and in other commodities). Winnington is a member of a group of companies. The group has a turnover of approximately £50 million and employs around 30 staff. Mr Adrian John Sumnall is, and was at all material times, managing director of Winnington. Mr Neil

Pursell, a certified accountant and former partner in a firm of accountants, is, and was at the time, a director of Winnington, and responsible for finance and due diligence. Mr Paul Byatt was, at the relevant time, the European purchasing manager at Winnington.

The EU Emissions Trading Scheme and EUAs

6. EUAs are the creature of the EU Emissions Trading Scheme ("ETS") established under EU law pursuant to EC Directive 2003/87/EC of the European Parliament and Council ("the ETS Directive"), as amended and supplemented by further directives and Commission regulations. The ETS was created with effect from 1 January 2005.

7. Every company (an "operator") within the EU that owns an "installation" that emits carbon dioxide above a certain minimum level must participate in the ETS. Each Member State sets a cap on its CO_2 emissions for each installation within the Member State's territory that emits CO_2 above the minimum level during each year.

8. Each operator governed by the ETS is credited with an allocation of EUAs at the beginning of the compliance year. By Article 3 of the ETS Directive, an "allowance" (an EUA) means an allowance to emit one tonne of CO_2 during a specified period, which shall be valid only for the purposes of meeting the requirements of the ETS Directive and is transferable in accordance with the provisions of the ETS Directive. This credit of EUAs is made into a registry account, known as the Operator Holding Account, for each installation. This is an electronic account set up in the national registry in the relevant Member State.

9. Each operator governed by the ETS must monitor its CO_2 emissions at its installations. At the end of a compliance year, an external audit of the operator's CO_2 emissions is carried out. This audit determines the level of CO_2 emitted by the operator during the year and how many EUAs this represents. The operator of each installation must then submit to the national administrator of the ETS the correct number of EUAs to match its emissions in the relevant compliance year.

10. If an operator does not submit enough EUAs to meet its compliance obligations, it will be fined for every tonne of CO_2 it has emitted beyond its submission of EUAs.

11. Any surplus of EUAs held by the operator after it has met its compliance obligations may be carried forward to the following year. Armstrong's practice has been to retain any surplus EUAs it holds. EUAs can also be "retired" by arrangement with the relevant national administrating entity without being used to meet compliance emission reduction targets.

Trading in EUAs

12. Pursuant to Article 12 ETS Directive, companies may, if they wish, trade the EUAs they have been credited with during the compliance year, provided that, at the end of the year, the company has enough EUAs to cover its emissions for that year. Trading in EUAs is not confined to companies with compliance obligations and, subject to Member State rules, anyone can open a registry account in a Member State registry in order to engage in trading in EUAs, without also being an operator. Such a person is referred to as a "trader". A trade of an EUA is formally completed when an EUA is

transferred from one registry account to another. Trades are regularly executed by the transfer of EUAs to and from different registry accounts in different Member States.

Registries and accounts

13. Regulation 2216/2004 ("the Registries Regulation") provides for the establishment of inter-connected electronic registries in Member States for the trading of EUAs. Each installation and each trader has an account with one of the national registries. Each person with an account in a registry may have one or more authorised representative, who is a natural person who can access the registry and carry out transfers. The national registry issues to each such authorised representative a username and password: see Article 66 of the Registries Regulation. (Article 66(2) itself envisages the possibility of the security of the password having become compromised). The user name and password are required to effect *any* transfer of the EUAs.

14. In addition, the UK national registry imposes an additional security requirement. Each authorised representative is required to install a digital certificate on to the particular PC that he uses for access to the secure part of the registry. In this way, if a third party obtained the username and password of a particular authorised representative, he would not be able to use that information to access the account, unless he was able also to use the authorised representative's own PC for access to the registry. At the relevant times, the German Registry did not have such a requirement. In present case, both Mr Sumnall and Mr Pursell were authorised representatives who had access to Winnington's registry account. This is addressed further in paragraph 137 below.

15. Each account with a national registry has a unique account number. Within that number, there is a designation which indicates the Member State in question: for example, DE designates the German Registry and GB designates the UK Registry. Further there are different numerical designations depending upon whether the account is in the name of an operator or a trader; the former being designated by the number 120 and the latter by the number 121.

16. All trades in EUAs take place via and are logged through a central EU Community Independent Transaction Log ("CITL") established under Article 5 of the Registries Regulation. Armstrong says the CITL is open to the public and can be searched to find out various accounts and transaction details. In particular, if one has the account number of a company's registry account, the identity of the account holder can be found out simply by searching the CITL website.

The nature of an EUA

17. EUAs are entirely electronic. They only exist online in national registries. There is no title document or other physical evidence of their existence. However, each EUA has its own individual number and is easily identifiable. If an EUA is sold, it is simply removed from the registry account of one operator or trader and added to that of another operator or trader.

Armstrong's German Registry accounts

18. At relevant times, both Delmenhorst and Bietigheim-Bissingen were "installations" and Armstrong was "the operator" of the installations for the purposes of the ETS. As at January 2010, Armstrong held two accounts at the German Registry, one for each installation. Each account contained EUAs to be used to meet Armstrong's compliance obligations under the ETS in respect of the CO_2 emissions of the relevant power plant. Although the power plant at Delmenhorst ceased activity in September 2009, nevertheless as at January 2010 Armstrong continued to hold EUAs in its Delmenhorst account, to be used to meet compliance obligations for the period up to September 2009, which, in turn, were not due to be performed until April 2010. Armstrong's account with the German Registry for Delmenhorst was held under account number DE-120-1712-0. Thus, as indicated above, "DE-120" denotes that this is an account held at the German Registry by an operator. As at January 2010, the Delmenhorst Account contained 22,064 EUAs.

Winnington's UK Registry account

19. Winnington is registered at the UK Registry with account number GB 121-2090-0. Thus, as indicated above, "GB-121" denotes that this is an account held at the UK Registry and by a trader. It is a legitimate trader in EUAs and has active accounts with 15 banks and major brokers. It has been trading EUAs since August 2009 and to date has traded over 1 million units. It carries out both futures trading and "spot trades" which are electronic trades of EUAs at an agreed price. Trading in EUAs takes place very quickly and they can be sold several times in a day; they rarely remain for long in Winnington's account.

The facts in very brief outline

20. On 25 January 2010, a Mr Bhovinder Singh, claiming to represent a company in Dubai called Zen Holdings Limited ("Zen") contacted Winnington to inquire whether it was interested in trading EUAs with Zen. Further conversations and emails ensued between Winnington and Zen and Mr Singh on that day and on 26 January 2010.

21. On 28 January 2010, 21,000 EUAs owned by Armstrong were transferred from Armstrong's Delmenhorst account with the German Registry into Winnington's account with the UK Registry.

22. That transfer was done without the authority of Armstrong and was the result of a "phishing" email fraud perpetrated upon Armstrong. On the same day, Winnington agreed to purchase 21,000 EUAs from Zen Holdings Limited ("Zen") for a price of €267,645 ("the Transaction"). Pursuant to that agreement to purchase, at 1130am on 28 January 2010 Winnington received into its account the 21,000 EUAs transferred from Armstrong's account. At that point in time, Winnington did not know that the holder of the account from which the EUAs had been transferred was Armstrong (as opposed to Zen or anyone else). Winnington then immediately sold on the 21,000 EUAs through TFS Green at a price of €272,500. At between 1318 and 1330 on the same date, Winnington effected payment of the purchase price to Zen to the latter's bank account with Standard Chartered Bank ("SCB") in Dubai.

The Claim and relief sought

23. By the Particulars of Claim, Armstrong sought a wide variety of remedies, including a declaration that Winnington holds the EUAs or their substitutes or proceeds on constructive trust for Armstrong and/or an order for delivery up of any assets found to belong to Armstrong and/or an order for payment of a sum equal to the value of the EUAs. The Particulars of Claim appeared to contain five different legal bases for these claims: a common law claim on the basis of money had and received; a claim for restitution of the EUAs based on unjust enrichment; liability in equity on the basis of knowing receipt of trust property; an equitable proprietary claim on the basis that Winnington holds the EUAs or their proceeds on constructive trust; and some form of tracing claim or remedy.

24. However in closing Mr Harris, counsel for Armstrong, narrowed the relief sought to a claim for a money judgment for the value of the EUAs plus the profit generated by the onward sale to TFS Green; and the bases of this claim were narrowed to the three alternatives set out in paragraph 2 above. Claims for proprietary relief in equity and for accounts and enquiries are no longer pursued.

25. In its defence, Winnington denied the various claims on the basis, principally, that it had no knowledge of the circumstances in which Armstrong came to lose the EUAs. Winnington was a bona fide purchaser for value of the EUAs without notice and also relied upon the defence of change of position. In its defence, Winnington also brought a Part 20 counterclaim against Armstrong for damages for negligence equal to the value of any sums which Armstrong might recover against Winnington. The negligence alleged was said to be the conduct of Herr Leiber of Armstrong in responding to the phishing email by giving his username and password, thereby enabling the EUAs to be stolen. This counterclaim was however withdrawn at the outset of closing submissions.

26. Armstrong's essential claim on the facts is that Winnington's due diligence procedure (known as "KYC") was insufficient and was not followed through, that at the point of entering and concluding the Transaction, Winnington knew very little about the counterparty Zen, and that in all the circumstances it knew or consciously closed its eyes to the risk that the Transaction was fraudulent or improper or alternatively that it knew of circumstances which would have led a reasonable person in its position to have made further inquiries.

27. Winnington's case on the facts is that it did not know that the Transaction was fraudulent and that there was nothing inherently suspicious about the Transaction or the lead up to its conclusion. Accordingly Winnington did not have relevant "notice" nor was its conduct "unconscionable" or other than in good faith.

The Relevant Legal Principles

Introduction

28. The legal question at the heart of the dispute is as follows. If B steals A's property and sells it to C, does A have a claim against C for the property or its value, and if so, what is the legal basis of A's claim and what defences, if any, does C have to such a claim?

29. Where the property in question is goods, the matter is covered by the law of conversion and the principles are relatively clear. However, where the property in question is a chose in action or some other intangible property, the position is less clear.

30. Armstong's claims here raise a number of issues of law, some of which are novel and all of which have been the subject of very detailed argument by the parties. The issues fall into three main categories: first, the nature of an EUA in law as property; secondly, the legal basis of the claims (or causes of action) brought by Armstrong; and thirdly the nature and content of the defence(s) relied upon by Winnington. I deal with the relevant legal principles under these heads.

31. Ultimately Mr Joffe, counsel for Winnington, did not dispute either that an EUA is a property right of some sort nor that, one way or another, Armstrong does, in principle, have a legal basis for a claim for recovery of such an EUA. In this way, the main issue between the parties would appear in principle to be as to the nature and the content of the defences available to Winnington. The reason the first two issues have been debated so rigorously is because of perceived differences in the outcome as regards the content of the relevant available defence. However, on analysis, it may be that, in practice, there is not much difference in the content of the different defences and how each might apply to the facts of the present case. Nevertheless it is important to consider each of the issues in turn.

The Parties' contentions in summary

Armstrong's case

32. First an EUA constitutes property. Whilst it may be regarded as being akin to a chattel or documentary intangible, it is a chose in action or if not, then certainly, a form of other intangible property.

33. Secondly, the facts of the present case give rise to three alternative causes of action or legal bases for claim: the first two causes of action are common law personal claims of a restitutionary nature and the third is a personal claim arising in equity. The three bases are said to be:

- First, Armstrong has a "proprietary restitutionary claim" to vindicate its continuing legal title to the EUAs (or their substitutes) in the hands of Winnington. This is a claim based, in particular, upon *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (on one analysis of that case) and *Trustee of FC Jones & Sons v Jones* [1997] Ch 159 and is available in respect of a chose in action and any form of other intangible property.

- Secondly, and alternatively, regardless of title to the EUAs, Armstrong has a common law restitutionary claim based on Winnington's unjust enrichment in respect of the EUAs, to the detriment of Armstrong. This is a claim based, in particular, upon a different analysis of *Lipkin Gorman*.

- Thirdly, and in the further alternative, Winnington is personally liable to Armstrong on the basis of "unconscionable" (or knowing) receipt of trust property; on

this basis, Winnington received legal property in the EUAs, whilst equitable title remained with Armstrong throughout.

34. Thirdly, as regards "defences" available to Winnington

- First, change of position is accepted as being a defence to both forms of restitutionary claim. That defence is not available where the defendant has not acted in "good faith" and the relevant test for absence of good faith is that laid down by the Court of Appeal in *Niru Battery Manufacturing Co v. Milestone Trading Ltd* [2003] EWCA Civ 1446 [2004] QB 985.

- Secondly, bona fide purchase for value without notice is not a defence to either of the restitutionary claims. If it is a defence, notice of types (1) to (3) ("actual/reckless") *and* of types (4) and (5) ("constructive") (as identified in *Baden v Société Générale pour Favoriser le Développment du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509) constitutes "notice" that defeats such a defence.

- Thirdly, *Baden* types (4) and (5) knowledge, as well as *Baden* types (1) to (3) knowledge are sufficient to establish "unconscionable" receipt for the purposes of the receipt of trust property claim.

Winnington's case

35. First, it is accepted that an EUA constitutes property. However an EUA is neither a chattel (chose in possession) nor a chose in action. Rather it is a form of "other intangible property".

36. Secondly, as regards the three asserted causes of action (or legal bases):

- First, there is no "proprietary restitutionary claim" available in law as alleged. Such a claim arises (if at all) only in respect of the receipt of money, on the basis of a claim for "money had and received". Whilst the common law provides a remedy in respect of receipt of land, goods, money and some documentary choses in action, there is no common law claim in respect of other forms of intangible property, such as an EUA.

- Secondly, a restitutionary claim for unjust enrichment does not arise on the facts of the present case, because (a) Winnington did not receive its "benefit" directly from the claimant, Armstrong and (b) Winnington was not "enriched" at all (save to the extent of the small profit it made on the onward sale to TFS Green).

- Thirdly, in principle, a claim for unconscionable receipt of trust property *does* arise in the present case. Here, legal and equitable ownership of the EUAs were separated at the point when the EUAs were appropriated by the third party fraudster (whether Zen, Mr Singh or someone else). The EUAs at that point became "trust" property and, when they were transferred to Winnington, Winnington was then in "receipt of trust property".

37. Thirdly as regards defences:

- First, as regards change of position, Winnington broadly agrees with Armstrong, save as to the precise content of the test for absence of good faith.

- Secondly, bona fide purchase for value without notice *is* a defence to both forms of the restitutionary claims. Only *Baden* types (1) to (3) notice, and not *Baden* types (4) and (5) notice, constitute "notice" that defeats such a defence. Alternatively even if types (4) and (5) notice are sufficient, then in a commercial context such notice will be established only where the facts known to the defendant point to the probability (and not just the mere possibility) of fraud or impropriety.

- Thirdly, *Baden* types (1) to (3) knowledge (and not generally *Baden* types (4) and (5) knowledge), are sufficient to establish "unconscionable" receipt for the purposes of the receipt of trust property claim; alternatively types (4) and (5) will be sufficient only where the facts actually known point to the probability of a breach of trust.

38. The main issues of law can be summarised as follows:

1. What is the nature of an EUA as property, and in particular is it a chose in action or a form of other intangible property?

2. Does Armstrong have a claim based on a "proprietary restitutionary claim" in general, and can such a claim be made in respect of a chose in action or a form of other intangible property?

3. Is bona fide purchase for value a defence to a proprietary restitutionary claim?

4. Is change of position a defence to a proprietary restitutionary claim?

5. Does Armstrong have a claim based on unjust enrichment at all?

6. What is the requisite "state of mind"/knowledge of the defendant to constitute:

   (a) "notice" in the context of the bona fide purchase for value defence;

   (b) "absence of good faith" in the context of a change of position defence;

   (c) "unconscionability" for the purposes of the personal claim based on receipt of trust property?

7. Did Armstrong retain legal title to the EUAs throughout or did Winnington obtain legal title upon transfer of the EUAs into their account?

39. In the following paragraphs I address the first six questions. Question 7 is addressed in paragraphs 273 to 276 below.

(A) The Nature of EUAs as property

40. There is no dispute between the parties that EUAs are capable of constituting, and do constitute, property as a matter of law. What is in issue, however, is their precise nature and characterisation as property, because, so Winnington contends, EUAs are not a type of property which the common law protects by a relevant cause of action. In particular the "common law proprietary claim" is not available in respect of property of the nature of an EUA. For this reason I have received detailed and wide-ranging submissions from counsel on the fundamental nature of the concept of

"property", the classification of categories of "property" in English law and on the nature of the EUAs as property.

41. At the heart of the legal difficulties to which this case gives, or may give, rise is the somewhat novel nature of a European Union Allowances (EUA). This novelty arises from two particular features: the first is that an EUA is a creature of European legislation and the second is that an EUA exists only in electronic form. So, for example, if an EUA could be characterised as tangible property (or indeed as a documentary intangible), it could be subject to an action for conversion and, broadly, liability would be strict; there would be no defence at all available to an innocent purchaser in the circumstances arising in the present case. On the other hand, as is common ground, a pure chose in action cannot be the subject of an action for conversion: *OBG v Allan* [2008] 1 AC 1.

The nature of property

42. At common law, the characteristics of property were described by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 at 1247-8 as follows:

> "*Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability*"

Categories of property recognised in English law

43. The traditional categorisation of property in English law is, first, a division between real and personal property. Personal property is described in *Halsbury's Laws of England* (4th edn) Vol 35 para 1201 as "*roughly ... all forms of property, movable or immovable, corporeal or incorporeal, other than freehold estates and interests in land ...*". Personal property is then divided into chattels real and chattels personal. Here we are concerned with "chattels personal". These are sub-divided into "tangible" and "intangible" property.

44. Tangible property, otherwise referred to as "choses in possession", are corporeal things, which are tangible, moveable and visible and of which possession can be taken. They are capable of transfer by delivery.

Choses in action and intangible property

45. "Choses in action" are described in *Halsbury's Laws of England* (5th edn) Vol 13 para. 1 as follows:

> "*The expression "chose in action" or "thing in action" in the literal sense means a thing recoverable by action, as contrasted with a chose in possession, which is a thing of which a person may have physical possession. The meaning ... has expanded over time, and is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession*"

In a footnote to that paragraph, *Halsbury's Laws* goes on to state that:

> *"it is impossible to give an accurate and complete definition of what it means and may include at the present day. The various kinds of property included under the term have little in common beyond the characteristic fact of their not being subjects of actual physical possession."*

A chose in action is capable of being the subject matter of theft, but not, as indicated above, of conversion.

46. *Halsbury's Laws* goes on to identify certain classes of chose in action: debts, rights under a contract, rights or causes of action, shares, intellectual property, equitable rights and leases. Debts include negotiable instruments, including bills of exchange, promissory notes and cheques. Then at para. 12, *Halsbury's Laws* specifically identifies "*Rights which are not choses in action*", stating *"A number of other rights and forms of property have been held not to be choses in action"*. It includes in that class an export quota (citing the *Nai-Keung* case (see below)). Such property rights might be described as intangible property *other than* choses in action.

Documentary intangibles

47. A particular sub-category of property is constituted by what are sometimes described as "documentary intangibles": *Goode on Commercial Law* (4th edn) p32 and *Bridge: Personal Property Law* (3rd edn) p6. They have a somewhat hybrid nature. *Goode* describes documentary intangibles as "*rights to money, goods or securities which are "locked up" in paper in such a way that the document is considered to represent the right, which thus becomes transferable by transfer of the document itself*". These include documents of title to the payment of money (instruments) (including bills of exchange, promissory notes and cheques), to negotiable securities (eg bearer bonds and notes) and to goods (eg bills of lading). Documentary intangibles that can be transferred by endorsement (rather than mere delivery) are termed "negotiable". According to *Goode*, the significance of "documentary intangibles" is that the document which evidences the rights is itself to be equated with goods and is susceptible to the same remedies for specific delivery and damages for conversion. *Halsbury's Laws* (4th edn) Vol. 35 para 1205 describes a bill of exchange or promissory note as partly a chose in possession and partly a chose in action. The debt secured by them is a chose in action, but the actual document is a chose in possession. They can be the subject of an action for conversion, because of the chose in possession aspect of their nature: see *Clerk & Lindsell on Torts* (20th edn) §§17-34 and 17-37.

The precise nature of an EUA

48. As a matter of substance, I do not consider that the holder of an EUA has a "right" which he or she can enforce by way of civil action. It is not a "right" (in the Hohfeldian sense) to which there is a correlative obligation vested in another person. It does not give the holder a "right" to emit CO_2 in this sense. Rather it represents at most a permission (or liberty in the Hohfeldian sense) or an exemption from a prohibition or fine. But for the entitlement to the EUA, the holder would either be prohibited from emitting CO_2 beyond a certain level or at least would be required to pay a fine if he did so. In this way, the holding of the EUA exempts the holder from the payment of that fine.

49. An EUA is a creature of the ETS. As a matter of form an EUA exists only in electronic form. It is transferable automatically by electronic means within the registry system. Under the ETS legislation it is transferable under the terms of the ETS Directive. It has economic value, first because it can be used to avoid a fine, and secondly, because there is an active market for trade in EUAs. The evidence before me establishes that substantial amounts of money change hands between a transferor and a transferee. Each EUA has its own unique number and can be located by reference to that number.

EUA as property

50. Applying the test enunciated by Lord Wilberforce in *NPB v Ainsworth*, in my judgment, an EUA is "property" at common law. It is definable, as being the sum total of rights and entitlements conferred on the holder pursuant to the ETS. It is identifiable by third parties; it has a unique reference number. It is capable of assumption by third parties, as under the ETS, an EUA is transferable. It has permanence and stability, since it continues to exist in a registry account until it is transferred out either for submission or sale and is capable of subsisting from year to year.

EUA as tangible property

51. There are elements of an EUA which might suggest that it is property akin to a chose in possession. Certainly if represented by a physical certificate (as opposed to a purely electronic document), it might well be said that, to that extent, an EUA was a chattel or at least a documentary intangible, and on that basis, capable of being subject to a claim for conversion. Furthermore, each EUA is unique and specifically identifiable, by a specific number. For my part, I can see arguments why they might be regarded as similar to, or a modern version of, a chose in possession. However, ultimately it was not contended by either party, and I am not prepared to find, that, on the present state of the law, an EUA is a chose in possession. Whilst there has been debate in the context of electronic bills of lading and other electronic documents, the current state of the law has not developed to the point where something which exists in electronic form only is to be equated with a physical thing of which actual possession is possible.

EUA as intangible property

52. Rather I am satisfied that an EUA is "intangible" property. Three decided cases are of particular relevance to this issue: *A-G for Hong Kong v Nai-Keung* [1987] 1 WLR 1339, *In Re Rae* [1995] BCC 102, and most significantly *In re Celtic Extraction* [2001] Ch 487. A fourth case, *Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177 provides further insight, both generally and in the context of trust property. For present purposes, it is necessary to refer in detail only to these latter two cases.

53. *In re Celtic Extraction* concerned waste management licences granted pursuant to a statutory scheme for waste management under the Environmental Protection Act 1990. The issue was whether such a licence constituted "property" for the purposes of s.436 Insolvency Act 1986. Section 436 provides that "*"property" includes money, goods, things in action, land and every description of property wherever situated* ..."

54. Addressing this issue, Morritt LJ (as he then was) referred first to both the *Nai-Keung* and *Rae* cases in the following terms:

> *"In Attorney General of Hong Kong v Nai-Keung [1987] 1 WLR 1339 the Privy Council considered that textile export quotas were property within the definition in the Theft Ordinance of Hong Kong and therefore capable of being stolen. The definition was: "property includes money and all other property, real and personal, including things in action and other intangible property." The export of textiles from Hong Kong was prohibited except under licence. A licence would be granted to the holder of a valid quota allocation certificate. Such quotas were registered with the Department of Trade and Industry and were transferable for value either temporarily or permanently. The Judicial Committee considered that the benefit of an export quota was not a thing in action but was a form of "other intangible property". As Lord Bridge of Harwich observed, at p 1342:*
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> > *"In summary, to be registered as the holder of an appropriate quota is a prerequisite to obtaining an export licence; it confers an expectation that, in the ordinary course, a corresponding licence will be granted, though not an enforceable legal right ... It would be strange indeed if something which is freely bought and sold ... were not capable of being stolen."*
>
> *A similar conclusion was reached by Warner J in In re Rae [1995] BCC 102. In that case a bankrupt had been licensed under the Sea Fish (Conservation) Act 1967 in respect of four fishing vessels. The licences terminated on his bankruptcy. But the Ministry of Agriculture, Fisheries and Food, the department which issued such licences, recognised an "entitlement" in the holder or the person to whom he "waived" his entitlement to be considered for the grant of new licences. Such an entitlement had value. The question was whether the benefit of the entitlement remained with the bankrupt or passed to his trustee for the benefit of his creditors. Warner J decided that the "entitlement" was within the definition of "property" as a present interest in property, namely the vessels. He considered it to be immaterial that the entitlement was also incidental to other things, such as the exercise of the minister's discretion"*

55. Morritt LJ then referred to the Australian case of *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1, concerning petroleum exploration permits, as follows:

> *"By the time this case reached the High Court of Australia it was common ground that a permit to explore for petroleum in an area in the continental shelf granted under the Petroleum (Submerged Lands) Act 1967 was property within the meaning of the Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990 which required the Commonwealth to provide "just terms" for any acquisition of property. Brennan CJ indicated his agreement with the views of the lower courts. He observed, at pp 13-14:*

"Those rights were susceptible of exercise during the currency of the permit. As a permit may be transferred and interests in a permit may be created or assigned subject to approval, the interests of the permittee and the interests of WMC were susceptible of sale and assignment. These qualities of the permit and WMC's interest in it are indicative of the proprietorial character of the rights possessed respectively by the permittee and WMC."

Toohey J, at p 27, cited with approval the test applied by Black CJ in the court below, namely: "the rights ... were clearly identifiable, assignable, stable, potentially of very substantial value and were not, because of their statutory foundation, inherently defeasible."

56. Morritt LJ concluded by identifying a three fold test for property in the following terms:

"It appears to me that these cases indicate the salient features which are likely to be found if there is to be conferred on an exemption from some wider statutory prohibition the status of property. First, there must be a statutory framework conferring an entitlement on one who satisfies certain conditions even though there is some element of discretion exercisable within that framework: Attorney General of Hong Kong v Nai-Keung [1987] 1 WLR 1339; In re Rae [1995] BCC 102; Commonwealth of Australia v WMC Resources Ltd 194 CLR 1. This condition is satisfied by the provisions of sections 35(2), 36(3) and 43 of the Environmental Protection Act 1990. Second, the exemption must be transferable: National Provincial Bank Ltd v Hastings Car Mart Ltd [1965] AC 1175; Attorney General of Hong Kong v Nai-Keung [1987] 1 WLR 1339; Commonwealth of Australia v WMC Resources Ltd 194 CLR 1; de Rothschild v Bell [2000] 2 QB 33. This is satisfied by the terms of section 40(1) of the 1990 Act. The requirement that the transferor and transferee should join in the application demonstrates the transferability of the waste management licence even though it takes the form of a surrender and regrant by the agency. Third, the exemption or licence will have value: Attorney General of Hong Kong v Nai-Keung [1987] 1 WLR 1339; In re Rae [1995] BCC 102; Commonwealth of Australia v WMC Resources Ltd 194 CLR 1. In In re Mineral Resources Ltd [1999] 1 All ER 746, 753, Neuberger J commented that there is a market in waste management licences. There was no evidence to that effect in these cases and the agency did not agree that there was any market. However it was common ground that money does change hands as between transferor and transferee. Further the very substantial fees the agency is entitled to charge and in fact receives is a good indication of the substantial value a waste management licence possesses for the owners or occupants of the land to which it relates.

In my view a waste management licence comes within the definition of "property" contained in section 436 of the Insolvency Act 1986. It is in my view "property" properly so called. In the alternative I consider that it is an "interest ... incidental to, property," namely the land to which it relates."

57. In *Swift v Dairywise*, the question was whether milk quota under the EU legislative regime was property which could be held on trust (i.e in which equitable interests could subsist). Under the scheme, a holder of "quota" was exempt from a levy which would otherwise be payable in respect of milk production. Quota could only be attached to a holding of land from which milk could be produced. The issue was whether a farm company which did have a land holding could be said to hold that quota on trust for its sister company which did not have any such land holding. Jacob J held that quota could be subject to a trust, applying in the course of his analysis, the reasoning in *In re Celtic Extraction*. He said (at 1183H-1184C and 1184G-1185C):

> "*The first question therefore is whether quota can be the subject of a trust. The respondents submit that it is not by its nature capable of forming the subject matter of a trust. They say this follows because it is not a free standing and freely marketable asset. Because it is merely an exemption from a levy and must be attached to a producer's holding, it cannot be held by a producer on trust.*
>
> *I reject those submissions. Quota has commercial value and a legal effect. Merely because there are limitations on how it may be held or conveyed is not a reason for equity to refuse to impose a trust where conscience so requires. Take a simple case. A asks B, who has a euroholding, to acquire quota for him and to hold it on trust. He pays B to do so and B duly acquires quota. It seems to me elementary that A can call upon B to deal in that quota in any manner permitted by the rules applicable to quota. A, assuming he has no euroholding, could not require B to transfer the quota to him but he could require B to realise the quota and transfer the proceeds to him. And if A acquired a euroholding he could call upon B to set in train the machinery described by Rattee J. for transfer to A's euroholding*
>
> ...
>
> *I am reinforced in my conclusion by the reasoning in In re Celtic Extraction Ltd ...*
>
> *All of those tests* [identified by Morritt LJ] *are satisfied by quota. It is "property" within the statutory definition. I can see no reason why equity, by analogy, should not also treat quota as "property" capable of being the subject of a trust and every reason as to why it should. The fact that quota must be attached to land merely means that the trustee (who necessarily will also hold the land) cannot deal in his land as though the trust was non-existent. But that is a consequence of his becoming a trustee, not a reason for equity to say there cannot be a trust. And there really is no hardship—after all he can free any particular parcel of land from the quota by use of the established methods by which farmers deal in quota."*

Conclusion

58. Thus in my judgment, applying the three fold test identified by Morritt LJ in *In re Celtic Extraction* leads to the conclusion that an EUA is certainly "property" and

intangible property under the statutory definition there in place. First, there is, here, a statutory framework which confers an entitlement on the holder of an EUA to exemption from a fine. Secondly, the EUA is an exemption which is transferable, and expressly so, under the statutory framework. Thirdly the EUA is an exemption which has value: see paragraph 49 above.

59. Whilst the cited case law concerned the meaning of "property" as specifically defined in various statutes, in my judgment, the reasoning of Morritt LJ applies equally to the characteristics of property at common law. Indeed, Morritt LJ himself relied upon *National Provincial Bank v Ainsworth.* Moreover the terms used in statutory definitions are themselves derived from common law concepts - for example in *In re Celtic*, the s.436 statutory definition refers to "things in action" and "every description of property"; the meaning of these terms, in turn, must be derived from the common law notion of "property". Further, applying the reasoning of Jacob J in *Swift v Dairywise*, an EUA is also capable of forming the subject matter of a trust and thus something in which equitable ownership can be held. There is a close analogy between the exemption conferred by milk quota and the exemption conferred by an EUA. Accordingly an EUA constitutes "property" and it is "intangible property".

60. The final issue here is whether an EUA is to be regarded as a "chose in action" or, instead, some form of other intangible property. Armstrong suggests it may be a "chose in action"; Winnington contends strongly that it cannot be a chose in action. On the one hand, in *Nai-Keung*, the Privy Council concluded that the quota there was not a chose in action, but rather fell within the term "other intangible property" as that term appeared in the statutory definition in that case. On the other hand, in *In re Celtic Extraction*, the statutory definition in question did not have such an additional category of property, but was confined to "things in action" and "every description of property". Morritt LJ did not specify into which of these two categories the waste management licence fell.

61. In my judgment, strictly an EUA is not a chose in action in the narrow sense, as it cannot be claimed or enforced by action. However to the extent that the concept encompasses wider matters of property, then it could be so described. For reasons set out below, ultimately I do not consider that it matters whether an EUA is a chose in action or merely some form of "other intangible property".

(B) Common law claims

Two distinct claims?

62. Mr Harris puts Armstrong's case for "restitution" at common law on two distinct bases: a "proprietary restitutionary claim" to vindicate the claimant's persisting legal property in the EUAs, and alternatively, a claim in restitution for "unjust enrichment". Decided cases and some leading authors and textbooks make the distinction between these two types of claim: see, in particular, *Trustee of FC Jones* and *Foskett v McKeown* [2001] 1 AC 102 and *Chitty on Contracts* (30th edn) (chapter editor G. Virgo) Vol 1 §§29-010, 29-017, 29-158 and 29-170 to 171 and *Goff and Jones: The Law of Restitution* (7th edn) Chapter 2, and in particular §§2-003 and 2-004. Dr Lionel Smith in his book *Smith: The Law of Tracing* (1997) distinguishes (at pp285-286) between "Type A claims" and "Type B claims", which correspond, respectively, with restitution for unjust enrichment and proprietary restitutionary claim. He

describes a "Type B claim" as a *personal* claim which depends for its creation on the prior violation of (or interference with) a *proprietary* right, and cites a claim for the tort of conversion as an illustration of such a Type B claim (as indeed does *Chitty* §29-170).

63. Restitution for unjust enrichment is based upon the notion that the defendant has been "enriched" at the claimant's expense. It gives rise to a personal remedy to disgorge or pay the amount of the enrichment to the extent that it is unjust. By definition, such a claim would suggest that the claimant has lost, and the defendant has gained, property in a relevant asset. By contrast, a proprietary restitutionary claim is based on the notion that the claimant has, at all times, retained legal title to the relevant asset, which asset has been transferred away from the claimant and it (or its substitute) has found its way into the hands of the defendant. Here the claimant can claim restitution of *value* from the indirect recipient of the asset, regardless of the fact that the recipient has not retained the assets or its substitute: *Chitty*, supra, §§29-158 and 29-170. In this way the claim is described as "proprietary" even though the remedy remains "personal". The distinction between the two types of claim is made at its clearest, by Lord Millett in *Foskett v McKeown*, supra, in the passage headed "The cause of action" set out in paragraph 81 below.

64. This analysis has not been universally accepted by leading academic commentators. The other school of academic thought disputes the existence of such a clear separation of these two types of claim, considering, instead, that the claims are both aspects of "unjust enrichment": see *Burrows: The Law of Restitution* (3rd edn) Chapters 8 and 16, and especially at pp168-172. Much of the debate has centred upon analysis of the House of Lords decision in *Lipkin Gorman* and in particular whether it is a case of "unjust enrichment" or a case of a "proprietary restitutionary claim". That issue in turn gives rise to debate about the nature of the defences available to such a claim.

Following and tracing

65. A key element in the leading cases and academic analysis is the concept of, and effect of the rules on, "tracing". Many of the cases involve claims in respect of an asset in the hands of the defendant which asset is not the original asset held by the claimant. Two points are now clearly established. First, "tracing" is neither a basis for a claim (or a cause of action) nor a remedy granted by a court. Rather it is a means, or process, of identifying an asset as being a substitute for an asset originally held by the claimant. It is a "step along the way" in the bringing of a claim. Secondly, "tracing" is to be distinguished from "following". *Burrows*, supra, at p117, puts this distinction in this way:

> "*Following refers to where there is no substitution of an asset, merely a change of personnel: for example B steals A's bike and gives it to C and C gives it to D. The asset is the original asset and it is that which is being followed into different hands*"

66. These points are made by Lord Millett in *Foskett v McKeown* (at 127B-C and 128D-E):

> *"Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old"*
>
> *"Tracing is also distinct from claiming ... It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim"*

67. In my judgment, this distinction is very important in the present case. Initially, Armstrong put its case on the basis that the EUAs which were received by Winnington on 28 January 2010 into its registry account were different EUAs from those which had been lodged in Armstrong's account, and, in this way, were "substitutes" for Armstrong's EUAs. Accordingly in the Particulars of Claim and in opening submissions, some emphasis was placed on the concept of "tracing". However in Mr Harris' final submissions, this distinction was not emphasised and it appeared to be accepted that the EUAs in the two accounts were the same EUAs. In my judgment, given the unique reference number of each EUA, and their transferability between accounts, a specific numbered EUA transferred from one registry account to another constitutes the same "asset" or item of property. (This is confirmed by the evidence of Mr Pursell at paragraph 10 of his witness statement). Thus, to the extent that Armstrong's claim is based upon receipt by Winnington of the EUAs into its account, then that claim does not involve any question of tracing, but rather it is a case of "following" the original asset.

68. On the other hand, to the extent that Armstrong's claim is made in respect of the proceeds of Winnington's onward sale of the EUAs to TFS Green (in the sum of €271,266.25), then such a claim would necessarily involve "tracing" the EUAs into the money or chose in action which represents those proceeds.

69. By contrast, the three leading cases, central to the debate as to the nature of the common law restitutionary claims, each involved "tracing" properly so called. The asset or property received by the defendant was not the same asset in respect of which the claimant had originally held property. *Burrows*, supra, at p122, a proponent of the "unjust enrichment" analysis of these cases, nevertheless accepts that, in a "following" case the claimant is asserting a pre-existing property right in the original asset and for that reason the claim does indeed fall outside the law of unjust enrichment, and rather truly within the sphere of property law, on the basis of the vindication of property rights.

The three leading cases

70. I turn to address the three principal cases relevant to the common law claims.

Lipkin Gorman v Karpnale

71. Cass, a partner in the plaintiff firm of solicitors, drew cash, without authority, from the firm's client account at a bank. He then took that cash to the defendant gambling club, where he gambled away most of the cash (although he did receive back some winnings). The solicitors brought an action against the club seeking to recover the moneys which Cass had stolen. The contracts between Cass and the club were held to be void as gaming and wagering contracts. The House of Lords held that the firm

was entitled to trace its original property subsisting in the chose in action, constituted by its bank balance, into its product, the cash held by Cass, which was then paid over to the defendant club. On that basis, the firm was entitled to recover the money from the club, to the extent of the club's winnings from Cass. The House of Lords recognised, in general, the defence of change of position to a claim for restitution based on unjust enrichment, and held, on the facts that, to the extent that the club had paid out gambling winnings to Cass, the club was entitled to rely on such a defence. The House of Lords further held that, on the facts, the club had not given "valuable consideration" for the cash it received from Cass, because of the fact that the contract between Cass and the club was a gaming and wagering contract rendered void by statute.

72. I make the following observations on *Lipkin Gorman*. First, it was a claim based on "tracing". The solicitors' original asset was the chose in action represented by its own bank balance. They then "traced" their property rights in that asset into the cash which Cass obtained as the proceeds of the cheque.

73. Secondly, the case was special on its facts, because of the invalidity of the contractual arrangements between Cass (B) and the club (C). So in fact, the club gave "no consideration" for Cass's cash and was in the position of a "donee" from B. On that basis, the club was "enriched" at the solicitor's expense. Lord Templeman's view, at least, was that if it had given valuable consideration, it would not have been enriched at all and, it is certainly arguable, that there could have been no case of unjust enrichment at all: see in particular at 560A-B and 566G-H.

74. Thirdly, their Lordships in terms characterised the claim as being a claim in "unjust enrichment at the solicitor's expense": see Lord Templeman at 559E-560A, 566H and Lord Goff at 572E, 577H and 578C-E. Further the solicitors' claim in these circumstances was stated to be a common law action for money had and received, in respect of the cash in the hands of the club.

75. Fourthly, however, a crucial element in Lord Goff's analysis was that the solicitors had legal title, not only to the original chose in action, but also to the cash held by Cass and given to the defendant club: se 572B-C, F and H. For this reason, those who support the distinction between the two types of claim (see paragraph 62 above) consider that *Lipkin Gorman* is, in substance, a case of a "proprietary restitutionary claim": see *Chitty*, supra, at §29-174 fn 977. Mr Harris submitted, and Mr Joffe did not seriously dispute, that the subsequent analysis of Lord Millett in *Trustee of FC Jones* and *Foskett* represents the current state of the law. These cases vindicated the academic view that *Lipkin Gorman* is in substance a case of a "proprietary restitutionary claim" and not a claim for restitution for unjust enrichment. In this regard, Mr Harris pointed in particular to the analysis of Professor Virgo in *Principles of the Law of Restitution* (2nd edn) at p.645-646. On the basis that this analysis currently represents the law as a matter of decided authority, I accept this submission.

76. Finally I deal below with what was said in *Lipkin Gorman* about the defences of change of position and bona fide purchase for value.

Trustee of FC Jones & Sons v Jones

77. FC Jones & Sons was a firm of potato growers that went into bankruptcy. After the act of bankruptcy but before adjudication, the defendant, the wife of one of the partners, received the proceeds of cheques to the value of £11,700 drawn by her husband on a partnership bank account and invested them with commodity brokers for dealing in potato futures. The defendant then received £50,760 from those dealings by the brokers and paid the sum into her own bank account at Raphael's bank. The firm's trustee in bankruptcy claimed the sum of £50,760 from Raphael's. Raphael's then interpleaded and paid the sum into court.

78. The Court of Appeal upheld the trustee in bankruptcy's claim to the entire amount (including the profit made from futures dealing), holding that the defendant wife had never had any title at all to the original sum or the enhanced sum. The trustee's claim arose at common law; he could trace his original property in the chose in action, represented by the balance in the partnership bank account, into the proceeds of the defendant's dealings with the money, and into the balance at the Raphael's bank. Millett LJ, giving the leading judgment, held (at 164E-H, 166H-167B and 168C-D) that the plaintiff's claim was based in common law and not equity. The plaintiff had retained legal title to the relevant assets throughout. By contrast the husband and the defendant never obtained any title and had not been constituted a constructive trustee. Millett LJ further held (at 170F) that the appropriate cause of action was simply an action for debt against Raphael's bank, and, specifically, (at 164G-H, 168E-G) was not a claim for money had and received. It was a proprietary claim as distinct from a claim for money had and received. By contrast, Nourse LJ (at 172C-F) considered that the claim was a claim for money had and received, but did not go further to explain the legal basis for his view that the claim was based on "conscience".

79. It is particularly worthy of note that the asset in respect of which the trustee eventually asserted his claim was the balance standing in the defendant's name at Raphael's bank, i.e. a chose in action: see per Millett LJ at 163D,167A-B 170F-G and Beldam LJ at 171H. As it was put at 170F, the issue was whether the trustee (or the defendant) had legal title to the chose in action in the Raphael's account. (Although ultimately by way of the interpleader proceedings, the bank paid the balance as moneys into court). Finally, I note that Beldam LJ (at 171G-H) cites *Lipkin Gorman* as authority for a claim arising on the basis of vindication of legal property rights.

Foskett v McKeown

80. A Mr Murphy effected a whole-life policy held on trust for his children. Before he died, five premiums had been paid, some of which had been paid from deposits which he held on trust for the claimants, who were potential purchasers of land in Portugal. The House of Lords held that the policy moneys paid on Murphy's death were held on trust for the claimants and Murphy's children pro rata according to their respective contributions to the premiums. The claimants could trace their moneys into the premiums and the insurance policy (a chose in action) and then into the insurance moneys held in the policy trustees' bank account. It is worth noting again, that the claimants could trace their property rights from one chose in action to another and that the claim they made was a claim against the balance standing to the credit of the defendant policy trustees in their bank account, another chose in action.

81. Lord Millett gave the leading speech of the majority. After examining the nature of tracing and following, he held that the cause of action was one based on vindication of property rights and not one based on restitution for unjust enrichment. He said (at 127D-F, 128F-G and 129 D-H):

> "*Having completed this exercise, the plaintiffs claim a continuing beneficial interest in the insurance money. Since this represents the product of Mr Murphy's own money as well as theirs, which Mr Murphy mingled indistinguishably in a single chose in action, they claim a beneficial interest in a proportionate part of the money only. The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no "unjust factor" to justify restitution (unless "want of title" be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair, just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.*
>
> ....
>
> *The successful completion of a tracing exercise may be preliminary to a personal claim (as in El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717) or a proprietary one, to the enforcement of a legal right (as in Trustee of the Property of F C Jones & Sons v Jones [1997] Ch 159) or an equitable one.*
>
> ...
>
> *The cause of action*
>
> *As I have already pointed out, the plaintiffs seek to vindicate their property rights, not to reverse unjust enrichment. The correct classification of the plaintiffs' cause of action may appear to be academic, but it has important consequences. The two causes of action have different requirements and may attract different defences.*
>
> *A plaintiff who brings an action in unjust enrichment must show that the defendant has been enriched at the plaintiff's expense, for he cannot have been unjustly enriched if he has not been enriched at all. But the plaintiff is not concerned to show that the defendant is in receipt of property belonging beneficially to the plaintiff or its traceable proceeds. The fact that the beneficial ownership of the property has passed to the defendant provides no defence; indeed, it is usually the very fact which founds the claim. Conversely, a plaintiff who brings an action like the present must show that the defendant is in receipt of property which belongs beneficially to him or its traceable proceeds, but he need not show that the defendant has been enriched by its receipt. He may, for example, have paid full value for the property, but he is still required to disgorge it if he received it with notice of the plaintiff's interest.*

Furthermore, a claim in unjust enrichment is subject to a change of position defence, which usually operates by reducing or extinguishing the element of enrichment. An action like the present is subject to the bona fide purchaser for value defence, which operates to clear the defendant's title."

82. Lord Hoffmann (at 115G) and Lord Browne-Wilkinson (at 108F-G) both expressly endorsed Lord Millett's view that the claim was one to vindicate property rights, and not a claim in unjust enrichment.

83. Whilst it is the case that on the facts the claimants were seeking to enforce their equitable property rights (arising under the pre-existing trust of their purchase moneys), it seems to me that there is no reason why the distinction drawn by Lord Millett between the two types of action does not apply with equal force where the claimant is seeking to enforce his subsisting *legal* title to property. Lord Millett's first statement (at 127E-F) about the nature of a claim based on property rights is general in nature, and not confined to beneficial ownership only. Moreover, his general observation (at 128F-G), referring to *Trustee of FC Jones* as a claim to enforce a legal right, is made as one example, amongst others, of the type of claim he is considering.

The Proprietary Restitutionary Claim

84. In my judgment, on the current state of the authorities and in particular the three leading cases referred to above, there is a basis of claim which can conveniently be labelled a "proprietary restitutionary claim" which is distinct from a claim for restitution on grounds of unjust enrichment. *Burrows*, a proponent of the contrary argument, concedes (at pp170-171) that the effect of Lord Millett's speech in *Foskett v McKeown* is in line with Professor Virgo's analysis and makes acceptance of his own view "more difficult".

85. The essence of such a claim at common law is that the claimant is seeking to enforce his subsisting legal property rights in an asset held by the defendant. The asset in respect of which the claimant is asserting a claim may be identified by "following" the claimant's original asset into the defendant's hands or by "tracing" it into a substitute asset in the defendant's hands. Furthermore, in a case of "following", where the asset claimed is the claimant's original asset, there is no scope for the conceptual difficulties identified in the academic debate surrounding the "tracing" claims.

86. This type of claim does not arise where the relevant asset is a chattel or land or even a documentary intangible, because there are other distinct causes of action in tort covering these types of property. It *does* arise where the asset in the hands of the defendant is money (possibly, under the old common law action for money had and received).

87. Mr Joffe however submits that, whatever the position as regards money, there is no authority for there being such a basis of claim (or cause of action) where the asset in respect of which the claimant brings his claim is a chose in action or other intangible property. In such a case, he submits, there is no identifiable "cause of action" known to law. The only possible cause of action is "money had and received" and that only applies to money in the hands of the defendant. (The issue is not, as Mr Harris suggested, the nature of the original asset, but the nature of the asset received by the defendant) There is, he submits, no warrant for extending the law to cover such a

cause of action, particularly in the light of the firm view of the majority in the House of Lords in *OBG v Allan*, supra, rejecting the possibility of there being a common law claim for conversion of a chose in action.

88. I do not agree with this submission. In my judgment, there is no reason why, in an appropriate case, a claimant does not have a personal claim at law to vindicate his legal proprietary rights in respect of a chose in action or form of other intangible property. Nor does any authority preclude such a claim.

89. First, *Trustee of FC Jones* positively supports the existence of such a claim. The claim there was a common law proprietary restitutionary claim. The asset in respect of which the claimants (originally) asserted their legal title was balance of sums standing in the bank account at Raphael's bank. That was a chose in action. It was not money.

90. Secondly, I do not accept that the proprietary restitutionary claim has to be characterised as, or brought in the form of, an action for money had and received. It is no longer necessary to fit any particular claim into any particular "form" of action: see *Letang v Cooper* [1965] 1 QB 232. What is required is a legal basis for a claim (or cause of action). That there is such a legal basis is established by *Trustee of FC Jones* case (and probably also *Lipkin v Gorman*). In fact, Millett LJ, giving the leading judgment in *Trustee of FC Jones* indicated expressly that the claim is not an action for money had and received, but rather a claim in simple debt. On the other hand, Nourse LJ in his judgment did describe the claim as being one for money had and received. This observation was not accompanied by any detailed analysis, nor did he give any specific consideration as to why he considered that an action for money had and received could lie in respect of a chose in action (which, on analysis, he did). Nevertheless the "label" or "form" of the action does not matter. Even though Millett LJ and Nourse LJ appeared to disagree about the "label" or "form", it is clear that the Court of Appeal held, unanimously, that there was a legal basis of claim (a cause of action).

91. Thirdly, the issue has been addressed by Dr Smith in his textbook *The Law of Tracing* (cited with approval by Lord Millett in *Foskett v McKeown*). Dr Smith says (p337) of a claimant's legal proprietary right into traceable proceeds:

> "*It is a property right less than ownership, which does not carry with it a right to immediate possession; hence it will not generate liability in conversion. Moreover, although it will generate a Type B personal liability in money had and received on the part of a subsequent recipient, it will not generate that liability on the part of a trustee in bankruptcy.... Of course, the cases involve money, since they are about money had and received... But it would be possible for another type of case to arise: for example, assume that in Lipkin Gorman, the rogue Cass had used the withdrawn money to buy a car. If he gave it away, it might be appropriate for the donee to be liable, but if he sold it for value to a good faith buyer, it might not.*"

Dr Smith then footnotes the words "donee to be liable" in the last sentence with the following comment:

> *"In such a case, the form of action in money had and received might be inappropriate. In the old language, the plaintiff could use another sub-category of indebitatus assumpsit, namely quantum valebat, meaning „as much as it was worth". This can be seen roughly as "goods had and received"*

Dr Smith (at p372) further discusses the nature of the common law claim which arises upon receipt of the claimant's property:

> *"It is ... unclear whether this limited common law proprietary right can be asserted in respect of a subject matter other than money. For example, assume that if someone gets hold of the plaintiff's car, sells it, and gives the proceeds to the defendant, the defendant is liable to the plaintiff in money had and received. Assume instead that someone gets hold of the plaintiff's money, and uses it to buy a car which he then gives to the defendant. If we want money <u>and other assets</u> to be treated alike, then it appears that this should generate a Type B liability on the part of the defendant. It may be that such a claim could be framed as one in "goods had and received", or perhaps, to use the old language, quantum valebat. Again, it might also be possible that a claim in „goods had and retained" could be established so as to yield liability in the second measure."*
>
> *(<u>emphasis</u> added)*

92. In these passages, Smith contemplates that a claim might lie for receipt of property other than money which are the traceable proceeds of the claimant's legal property. Whilst he does not, in terms, address the position of intangible property other than money (nor consider the "label" of such a claim), nevertheless, in addressing the position in relation to goods, he is using "goods" as an example to illustrate a broader proposition of general application covering Type B claims (ie proprietary restitutionary claims) in respect of money and all other forms of assets.

93. Finally, the fact that there can be no claim in *conversion* in respect of choses in action or other intangibles does not mean that there can be no proprietary restitutionary claim in respect of choses in action or other intangibles. Conversion is a strict liability tort with no room for defences of bona fide purchase. That is not the position with a proprietary restitutionary claim. Lord Hoffmann's observations in *OBG v Allan* (at §§95-97 and 102-106) on the statutory modification of the law of conversion and on the extension of conversion to documentary intangibles are to be seen in the context of whether, as a matter of policy, there should be *strict* liability in respect of such documents and thus for choses in action (and not whether there should be no claim at law at all). There is no reason why the law should provide protection for land, chattels, documentary intangibles and money but not for other intangibles.

94. In my judgment, as a matter of authority and principle, *if* and where legal title remains with the claimant, a proprietary restitutionary claim at common law is available in respect of receipt by the defendant of a chose in action or other intangible property.

Unjust enrichment claim

95. If, on the facts of the present case, there is a proprietary restitutionary claim, then in my judgment, there is no claim for restitution based on unjust enrichment. This follows from my acceptance of the two distinct types of claim, based on Lord Millett's analysis in *Foskett v McKeown* and upon the view that *Lipkin Gorman* is a proprietary restitutionary claim. Based on that separation, the present case falls clearly on the side of being a proprietary restitutionary claim.

96. A key element of a claim based on unjust enrichment is that the defendant has been "enriched". Where the defendant has given full value for the benefit received, it is hard to see that he has been enriched at all: see Lord Templeman at 560A-B. The present case is very different on the facts from *Lipkin Gorman* .

97. Further, the general rule is that a claim in unjust enrichment is only generally available where the benefit has been provided directly by the claimant to the defendant, and not where it has been provided indirectly via a third party. In the latter case, the defendant will have been enriched at the third party's expense. *Burrows*, supra, pp75-76 identifies, as an exception to this rule, the case where the claimant has title and can trace through the third party. But this exception only applies if *Burrows*' view of *Lipkin Gorman* is accepted and the proprietary restitutionary claim is not accepted as a separate claim.

98. So if, contrary to my conclusion above, *Lipkin Gorman* were to be correctly analysed as a restitutionary claim for unjust enrichment (because for example *Foskett v McKeown* cannot be said to apply to legal title, as opposed to equitable title), then I would have accepted that, in the present case, Armstrong's claim in the present case could have been made on this basis, if legal title to the EUAs did not pass to anyone.

Defences: Availability

(1) Propriety Restitutionary Claim

99. I agree with Mr Joffe that bona fide purchase for value without notice is a defence to a proprietary restitutionary claim. As a matter of principle, given the proprietary nature of this cause of action, then bona fide purchase for value should be available.

100. In support of his argument, Mr Joffe relied heavily upon passages from the speeches of Lord Templeman and Lord Goff in *Lipkin Gorman*. I agree that certain passages in Lord Goff's speech (in particular at 571A, 572C-D, 577A-B, 580H-581A) do support the argument. I am less sure about Lord Templeman's speech. In my judgment the section of his speech dealing with this issue is in the context of the question whether, in that case, the defendant club could be said to have been "enriched" at all, for the purposes of a claim which he analysed in terms of unjust enrichment: see 560A and 560F. The question was whether the club had given good consideration for the benefit it received, and if it had, then it could not have been enriched.

101. Nevertheless, I consider that bona fide purchase is a defence to the proprietary restitutionary claim. First, Lord Millett took this view in clear terms in *Foskett v McKeown* (at 129D-H set out at paragraph 81 above). Secondly, that it should be a defence follows as a matter of principle from the proprietary basis of the claim: see

Chitty, supra, §29-175. Thirdly, if, as I accept above, *Lipkin Gorman* is to be analysed in substance as a proprietary restitutionary claim, then, on the basis of *Foskett*, Lord Templeman's analysis can and should properly be framed in terms of a defence of bona fide purchase for value. Fourthly, *Goff & Jones*, supra, §42-001 supports this conclusion.

102. Armstrong's principal argument is that bona fide purchase operates to "clear" only equitable title and does not clear legal title (and that *Foskett v McKeown* was, of course, a case based on assertion of equitable proprietary rights). However, on the basis that *Lipkin Gorman* is a proprietary restitutionary claim, and if, as I find, bona fide purchase for value was considered to be a defence in *Lipkin Gorman*, then if that defence had been established there, it necessarily would have cleared "legal title" because the plaintiff firm retained legal title and not just equitable title. *Burrows'* view, supra, at pp.573-575 supports this analysis.

103. As regards change of position, whilst both counsel appear to accept that this too is a defence to a proprietary restitutionary claim, I am less sure. Change of position is essentially a defence to a claim for restitution based on unjust enrichment. Change of position was certainly discussed, and accepted in principle, as a defence in *Lipkin Gorman*. However Lord Goff's consideration of the defence was in the context of his view that the case was to be analysed as one of unjust enrichment. If *Lipkin Gorman* is in substance to be analysed as a proprietary restitutionary claim, then it does not follow, as a matter of principle, that change of position is or should be a defence to the latter form of claim. Lord Millett's analysis in *Foskett v McKeown* (at 129H) and *Chitty*, §29-175 support this conclusion. It is hard to see why, if the defendant purchases with notice, he should still be able to rely on change of position to defeat the claimant's legal title.

(2) Unjust enrichment

104. Change of position is a defence to a claim for restitution based on unjust enrichment. This is clearly established: see *Lipkin Gorman* and *Foskett v McKeown*.

105. As regards bona fide purchaser for value as a defence to claim for unjust enrichment, it is plain that there are two schools of thought: see *Burrows*, supra, pp573-580. These two schools of thought mirror the two different views of the *Lipkin Gorman* case and the nature of the propriety restitutionary claim. If, as I consider, the law as it currently stands is that set out by Lord Millett in *Foskett* and there are two distinct strands of claim and, *Lipkin Gorman* is in substance a proprietary restitutionary claim, then in my judgment, bona fide purchase is not strictly a defence to an unjust enrichment claim. On this basis, in an unjust enrichment case, the passing of title to the defendant is the very basis for the claim in the first place. See *Chitty* supra §§29-175 and Lord Millett in *Foskett v. McKeown* above.

Defences: content

(1) Good faith change of position

106. Change of position is a defence to a common law restitutionary claim based on unjust enrichment. On the foregoing analysis that the common law claim here is a proprietary restitutionary claim, change of position does not arise in the present case.

However, if that conclusion is wrong, and indeed in any event, one particular aspect of this defence, upon which I heard substantial argument, merits consideration: that is the issue of "good faith" or absence of it. Change of position is only available to a defendant who acted in good faith. The leading case on the content of "good faith" or its absence is the *Niru Battery* case and in particular the Court of Appeal's approval of the first instance judgment of Moore-Bick J.

107. The Court of Appeal rejected a submission that bad faith or absence of good faith only arose if there was dishonesty. Conduct which was honest could nonetheless be in bad faith: see Clarke LJ at §§144 and 163 and Sedley LJ §§181 to 184. Clarke LJ (at §§164 and 165) then went on to address the content of the requirement of good faith, by expressly approving the following two passages from the judgment of Moore Bick J:

> *"I do not think that it is desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, in so far as it is capable of definition at all, will have to be worked out through the cases. In my view it is capable of embracing* ***a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself****. The factors which will determine whether it is inequitable to allow the claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where* ***the payee has voluntarily parted with the money much is likely to depend on the circumstances in which he did so and the extent of his knowledge about how the payment came to be made****. Where he knows that the payment he has received was made by mistake, the position is quite straightforward: he must return it. This applies as much to a banker who receives a payment for the account of his customer as to any other person: see, for example, the comment of Lord Mersey in Kerrison v Glyn Mills Currie & Co (1912) 81 LJKB 465, 472.* ***Greater difficulty may arise, however, in cases where the payee has grounds for believing that the payment may have been made by mistake, but cannot be sure. In such cases good faith may well dictate that an inquiry be made of the payer. The nature and extent of the inquiry called for will, of course, depend on the circumstances of the case, but I do not think that a person who has, or thinks he has, good reason to believe that the payment was made by mistake will often be found to have acted in good faith if he pays the money away without first making inquiries of the person from whom he received it."***
>
> *"The need to make inquiries of Bank Sepah is not a matter to be viewed in terms of a duty owed by one banker to another; it is a matter to be viewed in terms of a duty of good faith which a person who has received a payment that* ***he has good reason to think was made under a mistake owes to the person who made it. If under those circumstances the payee fails to make inquiry of the payer before disposing of the money he can properly be described as failing to act in good faith because he acts in the knowledge that he may be infringing the rights of another despite having the means of avoiding that consequence."***
>
> ***(emphasis** added)*

108. Thus, bad faith is not limited to dishonesty, but is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind falling short of outright dishonesty. Further, good faith might require a duty to make further inquiries, not only where the defendant has good reason to believe that the payment was made - in that case - by mistake, but where he thinks he has such good reason.

109. Mr Harris submitted that the duty to inquire based on *Niru Battery* arises not only where the defendant appreciates that a payment was mistaken, but where he ought to have so appreciated. He relied upon the decision in *Jones v Churcher* [2009] EWHC 722 (QB) [2009] 2 Lloyd's Rep 94, where HH Judge Havelock Allan QC after setting out §164 of *Niru Battery*, continued at §46 of his judgment.

> "*The principle which I derive from the Niru Battery case is that where the payee has sufficient knowledge of how the payment came to be made as to cause a reasonable person to doubt whether it was an intended payment, but does not have actual knowledge that it was a payment made under a mistake, good faith requires that he should at least make some inquiry into the circumstances before disposing of the money.*"

110. However I accept Mr Joffe's submission that "good faith" does not go so far as to require the making of inquiries which a reasonable person would have realised should be made, but which the defendant did not in fact so realise. Mere negligence is not sufficient to establish bad faith. Where Moore-Bick J referred to the payee having "*good reason*" to believe (or think), I consider that he was referring to what the payee actually knows or believes i.e. knowledge of circumstances which give rise to actual suspicion or doubt on the part of the payee. This is borne out by the fact that he was referring to the payee who had "*grounds for believing ... but cannot be sure*". If, which I am not sure is the case, HH Judge Havelock Allan QC was referring to doubts that would have been caused to the reasonable person but not to the payee himself, then I do not think that this gloss on *Niru Battery* is borne out by Moore-Bick J's judgment.

(2) Bona fide purchaser for value

111. In order to establish this defence, the defendant must show a purchase for value of the legal estate in property in good faith and without notice: *Lewin on Trusts* (18th edn) §41-114.

112. In present case, the key element is "notice". I make two initial observations. First, there is little authority on the concept of notice where bona fide purchaser is relied upon as a defence to a common law claim to defeat legal title. Most, if not all, of the authorities relate to cases where bona fide purchase is relied upon in equity to defeat equitable title. Secondly, there is often an overlap between, and sometimes a mixing of, the concept of "notice" for this defence and the concept of "knowledge" in the context of knowing or unconscionable receipt of trust property. However in present circumstances, I do not consider that there is any relevant distinction to be drawn between "notice" and "knowledge": see further on this *Lewin*, supra, §§42-50 and 42-56.

113. Much of the argument has centred upon the well known classification of five types of knowledge (or notice) identified by Peter Gibson J in the *Baden* case, supra. Those five types are (1) actual knowledge (2) wilfully shutting one's eyes to the obvious (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make (4) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (5) knowledge of circumstances which would put an honest and reasonable man on inquiry. Commonly, types (1) to (3) are regarded as forms of "actual knowledge" or notice and types (4) and (5) are regarded as forms of "constructive knowledge" or notice.

114. Both parties accept that *Baden* types (1) to (3) knowledge (or notice) constitute "notice" so as to defeat the bona fide purchaser defence. There is a dispute as to whether, and to what extent, other lesser degrees of knowledge do so too. Armstrong contends that *Baden* types (4) and (5) are sufficient. Winnington contends that they are not enough; or alternatively if they are, then only in limited circumstances.

115. *Lewin*, supra, §41-131 (cited by both parties) considers that the rules concerning "notice" require special consideration in the context of commercial transactions. As regards "constructive notice" in the commercial context, *Lewin* states:

> *"the purchaser may be fixed with notice, in the absence of actual knowledge, 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 on 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."*

116. *Lewin*, in a footnote to this passage, then cross-refers forward to §42-58 of the text (in a section dealing with "knowing receipt"). §42-58 again states that the rules about knowledge in the context of commercial transactions are different:

> *"One view is that in the context of commercial transactions knowledge within types (1) to (3) of the Baden classification is requisite; the alternative view is that, while types (4) and (5) knowledge are sufficient, the inferences which should be drawn and the inquiries which should be made must be considered in the particular context involved and it is only if in that particular context the inquiries in question ought reasonably to be made that the defendant may be fixed with knowledge* [citing here Macmillan v BIT]. *Even if types (4) and (5) knowledge suffice in the commercial context, this may be only where the facts actually known to the defendant point to the probability (as distinct from the possibility) of a breach of trust and where the defendant has been guilty of commercially unacceptable conduct in the particular context involved".*

The reference to "commercially unacceptable conduct" is derived from the view of Knox J in *Cowan de Groot Properties v Eagle Trust plc* [1992] 4 All E R 700 at 761 h-j.

117. The application of the concept of notice in a commercial context was considered by Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc* (No 3) [1995] 1 WLR 978 at 1014.

> *"Worse still, Macmillan 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 Berlitz 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.*** *In this regard it is necessary to bear in mind what Bowen L.J. said in Sanders Bros. v. Maclean & Co. (1883) 11 Q.B.D. 327, 343:*
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> > *"But the practice of merchants, it is never superfluous to remark, is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and any one who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings ..."*

118. This was cited and expanded upon by Lord Neuberger MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 at §§97 et seq, who said, in particular, at §109.

> *"In this case it appears to me that the question which the judge had to determine was whether, on the facts known to the banks as at the three dates identified in para 95 above, a reasonable person with their attributes (ie 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."*

119. In my judgment, these cases do support the alternative view that *Baden* type (4) and (5) knowledge or notice will be sufficient to render the defendant liable, but only on a modified basis. On the other hand, I agree with Mr Harris' submission here that these two cases are considering the circumstances when "constructive" notice in the *Baden* (4) and (5) sense will arise; and do not apply where there is actual (including "blind eye") notice.

120. Mr Harris submits that, since the elements of "without notice" and "good faith" are distinct, even if the defendant did not have notice, the defence will not be available if he was acting in bad faith and that, as a matter of fact, it is possible for a defendant not to have notice and yet still be acting otherwise than in good faith. This can arise because, adopting the test for good faith in *Niru Battery*, bad faith includes failure to act in a commercially acceptable way and sharp practice (which is conduct "more than" notice in *Baden* types (4) and (5). In support of this submission he relies upon a passage from *Lipkin Gorman* (at 580C-D).

121. In my judgment, the passage cited from *Lipkin Gorman* does not support Armstrong's submission here. Further, whilst I accept that in principle the ingredients of "notice" and "good faith" are distinct, it is difficult to envisage a situation in practice where a defendant is found not to have notice and yet still to have acted in bad faith. This is particularly so on the basis that notice *does* include *Baden* type (4) and (5) notice on the modified basis above and further on the basis, contrary to Armstrong's submission above, that "good faith" does not extend to mere negligence or "objective" reason to believe.

122. On the other hand, there is much to be said for aligning the relevant "states of mind" in all three types of claim. Given both the analysis of Moore-Bick J in *Niru* and the view of *Lewin* that in the commercial context, "commercially unacceptable conduct" might be regarded as sufficient to establish the modified *Baden* types (4) and (5) notice or knowledge, it seems to me that where a defendant with knowledge of certain facts has acted in a "commercially unacceptable way", this should be sufficient to defeat the defence of bona fide purchaser and to establish "unconscionability" for the purposes of receipt of trust property, as well as defeating the defence of change of position.

123. In my judgment, the position, in a commercial context, can be summarised as follows:

(1) *Baden* types (1) to (3) knowledge constitute "notice" so as to defeat the defence. In order to defeat the defence on this basis, it is not necessary to show that the defendant realised that the transaction was "obviously" or "probably" improper or fraudulent; the possibility of impropriety or the claimant's interest is sufficient.

(2) In other circumstances, mere negligence is not sufficient. *Baden* types (4) and (5) knowledge constitute "notice" such as to defeat this defence only if, on the facts actually known to this defendant, a reasonable person would either have appreciated that the transaction was probably fraudulent or improper, or would have made inquiries or sought advice which would have revealed the probability of impropriety.

(C) Personal claim in equity

124. Armstrong's further alternative claim is a claim for personal liability for unconscionable (or knowing receipt) of trust property. The requirements for such liability are (1) a disposal of the plaintiff's assets in breach of trust (2) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff and (3) knowledge on the part of the defendant that the assets he received are traceable to a breach of trust: Hoffmann LJ in *El Ajou v Dollar Holdings Plc* [1994] 2 All E R 685 at 700 as approved by Nourse LJ in *Bank of Credit and Commerce*

International (Overseas) Ltd v Akindele [2001] Ch 437 at 448B-C. In the present case the first and third elements call for elaboration.

(1) Property subject to a trust

125. As regards item (1), *Lewin*, supra, §42-22 breaks this down into a further three elements: the existence of property subject to a trust, the transfer of that property and the transfer being in breach of trust. In my judgment, the property which the defendant receives must, at the point of receipt, be "trust property"; it must be "subject to a trust". Legal and equitable title must have become separated by the time of receipt of the property by the defendant. The question is: where B steals A's intangible property and then transfers it to C, has legal and equitable title to the property become separated, and if so, how?

126. Mr Harris submits, effectively, that, assuming legal title to the EUAs did not remain with Armstrong, then *at* the point of receipt of the EUAs *by Winnington*, Winnington itself was constituted as constructive trustee of the EUAs for the benefit of Armstrong; that this was the requisite separation of legal and equitable interests; and that, therefore, what Winnington was receiving was "property subject to a trust". Thus, he submits, Armstrong's "beneficial interest under a (constructive) trust was created at the very instant that [the EUAs] were registered with Winnington at the UK registry". I do not accept this analysis. Knowing receipt is concerned with the receipt by a third party of property already subject to a trust. I cannot see how the very same act of receipt can create, for the first time, the alleged trust and, at the very same time, constitute third party receipt of trust property.

127. Mr Joffe puts forward an alternative analysis, which I prefer. It is the thief, B, who becomes the trustee of the property held on constructive trust for A, and when C receives the property he is receiving property from B which is already subject to a trust. This analysis is supported by the well known observation of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 at 715, when considering the example of a stolen bag of coins:

> *"I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: Stocks v. Wilson [1913] 2 K.B. 235, 244; R. Leslie Ltd. v. Sheill [1914] 3 K.B. 607. Moneys stolen from a bank account can be traced in equity: Bankers Trust Co. v. Shapira [1980] 1 W.L.R. 1274, 1282C-E: see also McCormick v. Grogan (1869) L.R. 4 H.L. 82, 97."*

128. Thus on this analysis, at the point of the theft, B becomes constructive trustee for A, and it is at that point that legal and equitable title to the property has become separated. Then, when the property is transferred to C, C is a recipient of property which has already become subject to a pre-existing trust.

129. Lord Browne-Wilkinson's observation has subsequently been the subject of substantial judicial and academic analysis and comment (upon which I did not receive any detailed submission from the parties). Nevertheless, in my judgment, in so far as it relates specifically to the case of theft or a bare transfer (and perhaps also where there is a contract between A and B which is void), it is accepted as representing the law: see *Goff & Jones*, supra, §4-040, and *Chitty*, supra, §29-160.

(2) "Knowing" or "unconscionable" receipt

130. The current position as to the circumstances in which receipt of trust property by a defendant will render that person liable to the owners of the beneficial interests is now to be found in the Court of Appeal's decision in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 where, after concluding that there was no need for the *Baden* categorisation, Nourse LJ said:

> "*All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.*
>
> *... I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. A test in that form, though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led. Moreover, it should better enable the courts to give commonsense decisions in the commercial context in which claims in knowing receipt are now frequently made...*"

131. *Lewin*, supra at §42-49 (and others - *Goff & Jones*, supra, §33-029) comment that, despite what the Court of Appeal said in *BCCI v Akindele*, the *Baden* classification of knowledge is still useful in distinguishing different types of knowledge for the purpose of determining what kind of knowledge makes it unconscionable for the defendant to retain the trust property. Both parties agreed that it was thus helpful (and indeed necessary) to consider which types of *Baden* "knowledge" would render receipt of trust property "unconscionable" and then each made arguments in line with their arguments on the issue of "notice" for the bona fide purchaser defence, suggesting that the tests for knowledge and for notice overlap considerably. I agree. *Lewin* suggests that this is the case (by its express cross-reference between the two issues in the commercial context, see paragraphs 115 and 116 above).

132. In my judgment, the position, in a commercial context, can be summarised as follows:

(1) *Baden* types (1) to (3) knowledge on the part of a defendant render receipt of trust property "unconscionable". It is not necessary to show that the defendant realised that the transaction was "obviously" or "probably" in breach of trust or fraudulent; the possibility of impropriety or the claimant's interest is sufficient.

(2) Further *Baden* types (4) and (5) knowledge also render receipt "unconscionable" but only if, on the facts actually known to this defendant, a reasonable person would either have appreciated that the transfer was probably in breach of trust or would have

made inquiries or sought advice which would have revealed the probability of the breach of trust.

The Witnesses

133. As to the evidence placed before me, in addition to the documentary evidence, oral witness evidence was relied upon by both parties. Armstrong called Herr Leiber and a Mr Michael Walsh, who is a private investigator. Winnington called Mr Sumnall, Mr Byatt and Mr Pursell. Each witness verified his witness statement and was then cross-examined.

134. **Herr Leiber** gave oral evidence for about just over two hours in total at the close of the first day and on the morning of the second day. He gave his evidence through an interpreter. Much of his cross-examination was directed towards Winnington's allegation that he and Armstrong had been negligent in failing to spot the fraudulent nature of the phishing email. As matters have turned out this allegation is no longer pursued and, accordingly, his evidence has become less relevant, save perhaps in so far as it might cast light on Winnington's own knowledge of the ETS system and belief in its security. Herr Leiber was a careful witness who gave considered and thoughtful answers. His evidence was fair and consistent and in general I accept his evidence as reliable.

135. **Mr Walsh** gave oral evidence very briefly only. Mr Walsh works for a firm of investigators who were employed by Armstrong's solicitors to investigate Winnington, its directors, and Zen and Mr Singh. His witness statement exhibited a draft report he had prepared dated 11 March 2010. That report disclosed, first, that a Mr Bhovinder Singh had been involved in a VAT carousel fraud, secondly that no further information had been ascertained about Zen and thirdly that no direct link between Mr Singh and Winnington had been established. The summary in his report further stated, first that "current directors of Winnington ... have been associated with two companies ... which were suspect of being involved in VAT carousel fraud" and that Mr "Sumnall ... could well have been aware of Singh's well-publicised conviction for fraud". In fact, as regards Mr Singh's conviction, this was put to Mr Sumnall in cross-examination, who denied knowledge of it at any relevant time. This was not pressed further. Secondly, as regards the suggestion that the directors of Winnington had been involved in VAT carousel, I accept Mr Joffe's submission that the detailed evidence attached to Mr Walsh's report demonstrated that the two companies had not been involved in a VAT carousel fraud and that the suggestion in the report summary to the contrary was unfair and unfounded. To that extent Mr Walsh's evidence in the summary is not reliable

Witnesses called by Winnington

136. As regards the witnesses called by Winnington, Mr Harris made two general points on their credibility. First, he sought to rely upon the fact (accepted by Mr Joffe) that Winnington had acted in breach of the undertaking given to this Court on 14 February 2010 (see paragraph 202 below) to support a general attack on the credibility of Mr Sumnall and Mr Pursell. Breach of a court undertaking is a very serious matter. However in my judgment there is no evidence that this breach was a deliberate act on the part of Mr Sumnall and Mr Pursell to seek to evade the terms of the undertaking. The breach was "technical" in the sense that it required citation of Court of Appeal

authority (in *CBS v Lambert*) to show that the creation of a charge over property fell within the list of prohibited acts. In fact Mr Pursell himself continued to believe that what had been done did not constitute a breach. For these reasons I am not prepared to find that the breach of undertaking is of itself a reason to disbelieve their evidence in this court. The second point made by Mr Harris is more telling. Both Mr Sumnall and Mr Pursell persistently responded to questions about ownership and authority to sell the EUAs, by repeatedly invoking, sometimes verbatim, the proposition that the mere fact of receipt of the EUAs into their account was proof of ownership. As I find at paragraph 228 below, I do not accept that at the time they actually believed this to be the case, certainly not as a matter of certainty. The fact that they persistently prayed it in aid as a defensive justification for their actions does undermine their credibility.

137. Further, in the course of evidence, much was sought to be made of the evidence given by Mr Sumnall and Mr Pursell about access to Winnington's registry account. Each of Mr Sumnall and Mr Pursell had his own username and password. Some confusion arose from Mr Sumnall's evidence that he did not access the registry and from Mr Pursell's evidence as to use of different computers for gaining access to the account. Eventually, it was clearly established that Mr Pursell was the primary authorised representative for Winnington's account; he used two different PCs for the purpose of gaining access to the account: his PC in the office and a personal laptop. His PC as the office had his own digital certificate loaded on it, and there he used his own username and password. However, the laptop in fact had Mr Sumnall's digital certificate loaded on it, and when Mr Pursell used that computer for access, he used Mr Sumnall's username and password. I accept that Mr Pursell's initial evidence on this was confused. He said initially (before his laptop was discovered) first that Mr Sumnall's certificate was installed on Mr Sumnall's computer at the office and that he used Mr Sumnall's computer when he was in the office. He then said that it was installed on his own desktop PC at the office and he used Mr Sumnall's log in on his own computer in the office. Nevertheless, ultimately, I consider that neither Mr Sumnall nor Mr Pursell was trying deliberately to mislead the court on this issue.

138. **Mr Sumnall** gave evidence from about midday until the close of the second day. He was a nervous witness. His evidence was defensive and at times evasive. He gave the impression of seeking to distance himself from all involvement in relevant matters. On several occasions in his evidence, he answered by saying that a particular issue was the responsibility of his other fellow directors. In particular, KYC was Mr Pursell's responsibility. He gave the impression of having little hands on involvement either in relation to the details of EUA trading at all or in relation to KYC procedures or in relation to the Transaction itself. At times his answers were wrong and he contradicted himself. Initially he said that spot trading of EUAs did not necessarily involve having internet access, but when Mr Pursell's own evidence was put to him, he changed his evidence completely. He claimed that when he was informed that there might have been a breach of the undertaking given to the Court on 24 February 2010, he had "immediately offered a personal guarantee". In fact the offer of a personal guarantee was made 17 days after the issue of breach had been raised, and only three days before the trial commenced. His evidence about his own access to Winnington's registry account was, at best, confused. Overall I find that his evidence was, in general, unhelpful and did not assist much in the determination of disputed issues of fact.

139. **Mr Byatt** gave evidence on the morning of the third day. Initially he gave his evidence in a "matter of fact" manner which came across well. He had a good understanding of the business. However certain aspects of his evidence were less impressive, revealing telling inconsistencies and gaps. *First*, he gave inconsistent evidence about whether Mr Pursell, when authorising him to go ahead with the Transaction, gave him a reason for so doing. He refused to accept that there was any inconsistency between his witness statement and what he said in oral evidence (which there plainly was). His eventual attempt at an explanation for the discrepancy was most unconvincing: see paragraph 170 below. *Secondly*, there was a discrepancy between his witness statement and what he said in cross-examination about *when* Mr Singh had said to him that he would be not be able to get any further information. In his witness statement Mr Byatt said that Mr Singh had told him that he would find it hard to obtain any further KYC information at that point in time because in Dubai most people finish work early on a Thursday. In cross examination, he was asked about whether this statement was made in his first or second conversation that day with Mr Singh. Eventually, he said that that in fact it had taken place later and after the EUAs had been transferred and that at that later point in time, he had been trying to get further information to take business to the next level. In other words his evidence was that the reference to Dubai on Thursday was in a third conversation with Mr Singh. This evidence was inconsistent with paragraph 11 of his witness statement which clearly suggests that this was said in the second conversation with Mr Singh and *before* Mr Pursell had authorised the Transaction. These examples illustrate a lack of accuracy and consistency in Mr Byatt's evidence which seriously undermines the reliability of that evidence.

140. *Thirdly*, he gave evidence in cross-examination that he had also had a direct telephone conversation with "Ravi" (Ravi Sharma) of Zen, despite the fact that there was no reference at all to any such conversation in his (or indeed anyone else's) witness statement. Mr Harris submitted that this conversation had been invented and was untrue. I accept that the fact that there was no mention of this conversation in his witness statement was surprising and Mr Byatt's explanation for the omission was confused. Further when pressed in cross-examination about this conversation, Mr Byatt's responses were thin on the detail. Mr Harris submitted that the conversation was the result of a deliberate decision by Mr Byatt taken in conjunction with Mr Pursell, to mislead the court. However it is hard to see why Mr Byatt would do this - the conversation with Ravi was not central to the issues in the case. I am not satisfied, on balance, that Mr Byatt was lying about the existence of this call.

141. Overall as regards Mr Byatt, he was a witness who gave inconsistent evidence on important points and did not have any clear recollection of the detail of the specific events and who, when seeking to reconstruct what must or might have happened, appeared to have been open to suggestion by those seeking to assist his recollection. For these reasons, I do not rely on his evidence on disputed issues.

142. **Mr Pursell** was the last witness to give evidence. He was cross-examined at some length, over the afternoon of the third day and for the morning of the fourth day. In general he gave his evidence in a considered manner and appeared to have a reasonably strong grasp of the detail. However he too came across as being defensive of his and his company's actions. His initial evidence about his access to Winnington's registry account (and the use of his and Mr Sumnall's username and

password) was confused, and, in fact, ultimately shown to be wrong. His own further investigations did in fact reveal the true position. He was personally very upset by the allegation that he had deliberately lied to the court about this issue. In my judgment, whilst that initial evidence was muddled, I am satisfied that he did not seek to mislead the court on that. Nevertheless in other, and more important, respects his evidence was inconsistent and he refused to accept certain facts that were plainly true - for example, the plain meaning and purpose of his own email of 1256 on 28 January. He sought to avoid answering important direct questions. He did this because he realised that the answer could only damage his employer's case. Ultimately I did not find his evidence to be credible on key points in issue.

The Facts

143. In this section, I start by giving a chronological account of the relevant events, making certain observations on the way: sub-section (A). Then against the background of this largely undisputed account, in sub-section (B) I identify certain key areas of disputed fact, and make findings on those areas, by reference to a more detailed assessment of the relevant evidence.

(A) The relevant sequence of events

Winnington's trading activities and "Know Your Customer" procedures.

144. At the heart of the issues of fact lies consideration of the "Know Your Customer" procedures adopted by Winnington both generally and in the lead up to the Transaction. Such procedures, referred to as KYC procedures, are inquiries made by a trader about a counterparty and its business generally in advance of entering into business relations and, obviously, for the purpose of finding out about the counterparty, its nature, business, personnel - so as to become acquainted or better acquainted, and so as to reduce risks, to put it generally - of things going wrong. In their witness statements, both Mr Sumnall and Mr Pursell described the KYC procedures as "due diligence" procedures.

145. Mr Pursell's evidence was, and Winnington's case in general, is that KYC documentation, both in general and in the present case, was sought for three purposes: first, to check that (where Winnington was a purchaser) it would receive the EUAs it had agreed to buy; secondly, to prevent money laundering; and thirdly, to prevent VAT carousel fraud. VAT carousel fraud could not arise as regards the UK, because EUAs were zero rated for VAT; but it could arise in respect of trades in EUAs involving other member states. According to Winnington, KYC documentation was *not* sought in order to check that the seller of EUAs "owned" or had authority to sell the EUAs. Such documentation was not needed because, as the Winnington witnesses persistently and repeatedly stated, the fact of transfer by the seller of the EUAs was itself proof of the seller's ownership and/or authority to trade.

146. Winnington submits that the KYC information it received in this case from Mr Singh and Zen, when combined with the fact of transfer before payment, was sufficient for the Transaction. Armstrong disputes this.

25 January 2010

Telephone call from Mr Singh to Mr Sumnall

147. On the morning of 25 January 2010, Mr Sumnall received a telephone call from a Mr Bhovinder Singh, a business acquaintance whom Mr Sumnall had come across a number of years earlier. According to Mr Sumnall's affidavit and later witness statement, Mr Singh told Mr Sumnall that he was working as a freelance trader, in, amongst other things, EUAs. Mr Singh told Mr Sumnall that he had noticed, from its website, that Winnington traded in EUAs. Mr Singh told him that he had got "a very big player in the Middle East" that he could introduce to Winnington. He said he was "representing" this company and it was based in Dubai. Mr Sumnall had said he was interested as Winnington was looking to establish links with the Middle East. Mr Singh said that the Dubai contact was named Zen Holdings Limited ("Zen"). Mr Singh gave Mr Sumnall an address for Zen and an email address - zenholdings@mail.com - so that Winnington could get in touch with Zen. Mr Singh told Mr Sumnall that Zen had EUAs to sell.

148. In cross examination, Mr Sumnall said that, before this call, he had not spoken to Mr Singh for at least over a year. He said that when Mr Singh had said he was "representing" Zen he, Mr Sumnall, took that to mean acting as agent. He was not sure what kind of agent he was. He accepted that he had no interest in clarifying with Mr Singh what the nature of his arrangement with Zen was. He did not ask how long Mr Singh had been representing Zen. Whilst he accepted that, with hindsight, he wished he had asked such questions, he did not accept that it was a mistake at the time not to have done so, as he handed the matter over to Mr Byatt, who he believed was more than capable of taking the business opportunity further. Mr Sumnall accepted, in cross-examination, that "*every aspect of Mr Singh's relationship with Zen was vague at this point*" to him.

Mr Sumnall passes on information to Mr Byatt

149. On the same day, probably in the morning, Mr Sumnall passed on the information about Zen to Mr Byatt. In cross-examination Mr Byatt said that Mr Sumnall did not tell him anything about the company Mr Singh was representing or the relationship between Mr Singh and that company.

Mr Byatt calls Mr Singh

150. Mr Byatt then called Mr Singh on his UK mobile telephone number. During the call Mr Byatt realised that he (or rather a subordinate colleague of his) had previously had dealings with Mr Singh, when Mr Byatt had been working for a company called 20:20 Logistics. Mr Singh told Mr Byatt that he was a representative of a company in Dubai and gave Mr Byatt further details about Zen. Mr Singh appeared to Mr Byatt to be very informed about energy related trading, referring to ROCs (UK Renewable Obligation Certificates) and RECs (US Renewable Energy Certificates) and gave the impression that he knew what he was talking about. (At that point in time, neither Mr Sumnall (nor anyone else at Winnington) was aware of the fact that Mr Singh had previously been convicted of offences involving fraud; and it is not suggested that they were ever so aware.)

151. However in cross-examination Mr Byatt said that he personally did not recall Mr Singh's name. It had been a colleague of his who had previously dealt with Mr Singh. Mr Byatt said that Mr Singh did not say that he was a director, shareholder or employee of Zen. He said that he did not find it odd that Mr Singh was not more specific about the nature of the relationship with Zen. When it was put to him that part of his job was to know who he was dealing with, he, too, responded by saying that the KYC procedure was Mr Pursell's responsibility.

152. There is some dispute about the type of transaction with Zen that Mr Byatt believed was being discussed at this time. I address this further in paragraphs 217 to 219 below.

153. Then Mr Byatt informed Mr Pursell of Mr Singh's contact and of the prospect of Winnington commencing a trading relationship with Zen.

Mr Pursell email to Zen at 1329

154. At 1329 on 25 January 2010, Mr Pursell, as the person responsible for KYC procedures, sent an email to Zen at its web based email address entitled, "Introduction Letter" which also attached *Winnington's* own KYC documentation. After introducing Winnington and its then current activities trading in energy and emissions markets, the email continued:

> "*Our client driven organisation is keen to build its portfolio of key trading partners. With this, we would very much like to take this opportunity in inviting yourselves to contact us with the relevant information and documentation required in order to establish a relationship.*
>
> *I attach our certified KYC documents and I invite you to return your certified KYC documents to use so that we can explore a trading relationship.*"
>
> *(emphasis added)*

155. The letter continued by referring expressly to Winnington's own proprietary website and then listing 9 items of its own "statutory company information". Item 9 was stated to be "Copy EUETS approval". These 9 items ran to some 28 pages of materials. The "EUETS approval" took the form of an email form the UK Registry to Mr Pursell approving Winnington's account application and giving its account number. Mr Pursell, in his witness statement, said that Winnington's information was sent in this way "so that Zen could be satisfied that the Defendant was a bona fide company." By way of comment, this neatly encapsulates the purpose of KYC generally.

156. I make the following observations on this first letter of introduction. The email was not addressed to any particular individual at Zen or to Mr Singh himself. Mr Pursell said in cross-examination, the letter and attachments were a standard pack for KYC sent out to every contact. Amongst *Winnington's* own KYC documents which were attached were details of Winnington's own EUETS registry account. This letter did not expressly specify what KYC documents *from Zen* that Winnington wished to see. However, the implication was the Winnington was seeking a similar list of documents. What was being explored was a "trading relationship". Mr Pursell said in

cross-examination, and Winnington submits, that this was a reference to a "trade account" (which would include credit terms), rather merely to a spot trade. However this is disputed by Armstrong, suggesting that "trading relationship" did not make any such distinction between trade account and spot trade. I address this issue further at paragraphs 216 to 225 below. It is said by Armstrong, and I accept, that since it was known at this point in time that Zen was based in Dubai, and further since there could be no possibility of VAT carousel fraud arising with such a counterparty, this initial request for KYC information cannot have been requested for the purposes of addressing the risk of VAT carousel fraud. This was accepted by Mr Pursell in cross examination.

157. At 1358 Zen emailed Mr Pursell thanking him for the documents and saying that the requests had been passed to Zen's compliance department. Zen's email came from the same web based free email service.

26 January 2010

158. On the next day there was an exchange of emails.

Zen to Pursell 1252

159. First, Zen sent an email to Mr Pursell at 1252 attaching three items: a letter from Zen, signed by a Mr Ravi Sharma, to Winnington expressing Zen's desire to commence a prosperous business relationship with Winnington; Zen's certificate of incorporation, showing that Zen was incorporated in the Republic of the Seychelles in July 2005; and Zen's memorandum and articles of association, also dating from July 2005. The letter had a heading in the company's name with its phone and fax numbers and a PO Box address in Dubai. The letter, addressed specifically to Mr Pursell, commenced:

> "*Dear Neil*
>
> *Many thanks for your e-mail in regards to trading emissions allowances. I appreciate your interest in opening a trading account with our company. ...*"

It then went on to state Zen's experience and resources in the carbon trading field and concluded:

> "*Should you require any further information do not hesitate to contact us.*"

160. Armstrong refers to the following facts. The letter from Zen had no formal company details on the headed letter stationery and there was no reference to a website. Mr Sumnall accepted in cross examination that having headed notepaper with company details on it is an important part of a company's professional image. The email address stated was, as before, "zenholdings@mail.com". This was accepted by Mr Byatt and Mr Pursell in cross-examination, to be a non-proprietary address - a free web-based internet address. Zen had not sent any other details in response to Mr Pursell's request in his email at 1329 on the day before. On its face, and in view of its concluding words, the letter appeared to be a complete and final response to Mr Pursell's request for "your certified KYC documents".

Pursell to Zen 1410 ("the 1410 Email")

161. At 1410 Mr Pursell replied as follows:

> *"Ravi*
>
> *Thanks for the information*
>
> *However in addition please provide the additional information as listed below.*
>
> *1.List of directors and shareholders*
>
> *2.Copy of directors and shareholders passports*
>
> *3.Copy of directors and shareholders utility bills to proof address*
>
> *4.Copy of rent agreement or utility bill for the company address*
>
> *5.Copy of business licence or equivalent to operate out of the UAE*
>
> *6.Company bank details*
>
> *7.Company registry account details and proof that the account is owned by the company*
>
> *8.Company, contact phone, fax and directors mobile numbers.*
>
> *We need the above to properly open a trade account with you.*
>
> *Once I receive the above I can send to you our standard terms & conditions etc.*
>
> *Regards..."*
>
> *(emphasis added)*

This is an important email, which I consider in more detail in paragraphs 222 to 225 below. I have the following immediate observations.

162. *First*, it appears that Mr Pursell considered that the previous response from Zen at 1252 was not sufficient and that he considered it incumbent upon him to obtain this further and proper information before opening a trade account. *Secondly*, by its own terms, it does appear that Mr Pursell is considering whether Winnington should open a "trade account" with Zen. The reference to terms and conditions confirms this - and this would appear to be reference to terms and conditions which relate, inter alia, to terms of credit. *Thirdly*, it appears that, to some extent, the KYC items here sought *from* Zen are drawn from, or track, Winnington's own list of KYC items sent *to* Zen on the previous day. Winnington in submission and evidence positively accepts this. As Winnington further accepts, some of the items on the list do not seem necessary for purposes of a trade account at all. *Fourthly*, item 7, relating to "registry account

details" is the most pertinent in the present context. Whilst it does "reflect" item 9 in Winnington's own letter of introduction of the previous day, the wording of the request is more expanded, and expressly and thus consciously seeks registry account details and proof that Zen was the owner of that account.

163. Winnington's case is that at this point Mr Pursell still did not yet know that there was going to be a spot trade and that this email was seeking KYC information for a trade account. Whilst some of the items sought are unnecessary for a trade account, that was merely because the list was a copy across from its own list. This is addressed further in paragraphs 223 and 224 below.

28 January 2010: the day of the fraud

164. 28 January 2010 was the date of the fraudulent transfer. During the course of the day, relevant events occurred concerning both Armstrong and Winnington, although neither party knew, at the time, of the other party's involvement with these related events. I deal with them in turn.

(1) Events at Armstrong

165. At 0845 German time (0745 UK time), Herr Leiber received the email, which gave rise to the fraudulent extraction of the EUAs. The email, in German, was sent from "hans.frederick@tradingprotection.com", and addressed specifically to Herr Leiber and was entitled "Emission Trading Scheme (EU ETS) - New Security Measure". It appeared to come from the German Registry. It requested Herr Leiber to update the security system of Armstrong's emission trading software. It read, in translation, as follows:

> *"As an authorised user of your account type 120@https://www.register.dehst.de/crweb/public/login.do, please note that you are requested to react to this email.*
>
> *Unfortunately there were attacks in all member countries against the Emission Trading System (EU ETS), especially on 7 January 2010.*
>
> *Consequently, we are increasing the level of security for all member pages. In collaboration with the European Commission, we are contracting the services of a top rate security company http://www.tradingprotection.com effectively immediately and introducing NEW SECURITY STANDARDS under their guidance, which you must observe to use the service further.*
>
> *We are using the following service to protect trade as well as provide 100% secure access and protection for your user account via **128 BIT REVOLVING USB SECURITY CODE***
>
> *The code is a digital security measure, which provides you with a NEW code each time when you long into your user account via a USB device, which is connected to your computer, the user account and the secure server. This makes it **impossible** for anyone else to access your account, even if another person knows your user name and password."*

The email then purported to explain how this supposed new code works. It then went on to set out Herr Leiber's full details and continued:

> *"Are the data shown above correct?* ***If YES, click*** *the link below and*
>
> ***ENTER THE 10-PLACE SECURITY CODE ASSIGNED TO YOU:***
>
> *8i3f44sr9i*
>
> *http://www.tradingprotection.com/EUETS/requestSECUREkey/users77xh5xx6s-ger.htm*
>
> ***IMPORTANT*** *ONLY CLICK THIS LINK ONCE and follow the instructions (you are led in three steps through the process ...)*
>
> ...
>
> ***IMPORTANT:*** *if you receive an email requesting you to disclose your user name and password* ***DO NOT*** *respond. We would never ask for such data; please forward such e-mails directly to abuse@tradingprotection.com*
>
> ...
>
> *Regards,*
>
> *Hans Frederick*
>
> *Security Manager"*

Herr Leiber's evidence was that in order to execute the instructions as per the email, he was required to enter his German Registry username and password, and this is what he did.

166. Herr Leiber believed that the email had come from the German Registry. The sender's email signature at the bottom of the email gave an email address at the German Registry, together with the website of the German Registry. Upon receiving the email, Herr Leiber showed it to, and discussed it with, his colleague, Herr Bruchmann. He did this because he was unsure about the reference in the email to the technical term, "128 Bit Revolving USB Security Code". Having discussed the matter together, Herr Leiber and Herr Bruchmann decided to proceed as instructed in the email. Herr Leiber executed the update as required by entering his username and password.

167. It is not disputed that what happened later that day was that the person, to whom Herr Leiber disclosed his username and password (or another person to whom those details were passed on), gained access to Armstrong's account at the German Registry and transferred the EUAs to Winnington's account at the UK Registry.

(2) Events at Winnington

First conversation between Mr Byatt and Mr Singh 0830

168. At about 0830 Mr Singh telephoned Mr Byatt to say that he had 21,000 EUAs which he was looking to sell and inquired whether Winnington would be interested in buying them. When asked in cross examination what Mr Singh had said about "ownership" of the EUAs, Mr Byatt said that Mr Singh had told him that he "had" the 21,000 EUAs.

The decision to authorise the Transaction

169. According to Mr Byatt's evidence in cross-examination, Mr Byatt then spoke again to Mr Pursell and obtained authority to trade. This conversation is not clearly referred to in the witness statements of either Mr Byatt or Mr Pursell. To the extent that it might be impliedly referred to in Mr Byatt's witness statement, it is not entirely clear *when* this conversation took place. However in cross-examination Mr Byatt was sure that it took place after his first conversation with Mr Singh and before he spoke to TFS Green.

170. In his witness statement, Mr Byatt said that Mr Pursell had given a specific reason for authorising the Transaction without all KYC information: "*I understood from Mr Pursell that not all the KYC documentation requested was required as Winnington was going to receive the EUAS before sending the money out*". However in cross examination he was adamant that all that was said by Mr Pursell was that it was okay to trade on the basis of the information he had got. He strongly denied that Mr Pursell had mentioned the sequence of the Transaction as the reason. He then explained the discrepancy by saying that the words "*I understood*" referred to an understanding he had gained later after the event. In his witness statement, Mr Byatt went on to say *"With this information in mind Neil decided that we had enough due diligence to trade on the basis that we received the EUAs before releasing payment"*.

171. Armstrong submits that this decision to authorise the Transaction without having received the requested KYC information is the first element of Winnington's conduct which gives rise to liability. This is addressed further in paragraphs 212 to 238 below.

Byatt speaks to TFS Green

172. After receiving authorisation from Mr Pursell, Mr Byatt then called his main broker, TFS Green to get an indicative price for an onward sale of the EUAs.

Second conversation between Mr Byatt and Mr Singh: agreement for sale the EUAs between Zen and Winnington

173. Mr Byatt then went back to Mr Singh and quoted a purchase price. On that call, they agreed a price of €12.745 per unit. This call occurred at about 1030. According to Mr Byatt's witness statement, Mr Singh told Mr Byatt that he would deposit the EUAs in Winnington's account shortly.

174. As set out above, in his witness statement Mr Byatt suggests that it was in the course of this conversation that Mr Singh had explained why the KYC information had not been obtained. Winnington submitted that this was a perfectly normal conversation and nothing could be said to have put Mr Byatt on notice of impropriety. The explanation for not being able to provide further KYC information at that time was acceptable. However, in cross examination Mr Byatt in fact accepted that this part of the conversation did not take place then, but only later. In view of the inconsistencies in Mr. Byatt's evidence, I do not accept that this issue was discussed at that time.

The transfer of the EUAs from Armstrong to Winnington

175. At 1130 English time Winnington received a transfer of the EUAs into its account at the UK Registry. The relevant UK emissions registry account document shows that these EUAs came from account DE-120-1712-0. This was, in fact, Armstrong's Delmenhorst German Registry account.

176. At 1150 Winnington transferred all the EUAs to TFS Green for onward sale. Although the evidence was confused, the contemporaneous documents show that the EUAs were sold on to a third party, other than TFS Green. The purchaser paid €271,266.25 (net of brokerage and VAT) for the EUAs. In cross examination, Mr Byatt said that it was normal for an onward sale such as this to be made so quickly, because TFS did not guarantee to hold its quoted indicative price. Winnington submits, and I accept, that on this basis that there is no evidence that they were being sold on rapidly to TFS Green for an improper purpose.

Further exchanges concerning KYC documentation

177. At 1226 Zen emailed Mr Pursell, purportedly in response to Mr Pursell's request for further KYC documentation made in the 1410 Email two days earlier. Zen attached only a further copy of its certificate of incorporation and of its memorandum and articles of association and did not attach any of the information requested in Mr Pursell's email. The email merely added "*All other information I will send shortly*".

178. Armstrong submits that Zen's failure, at this time, to provide the outstanding elements of KYC requested was suspicious. Zen simply resent the same information as previously sent, despite the terms of the chaser email from Mr Pursell, and gave no explanation as to why it had ignored, or not responded to, the terms of that email. By contrast, Winnington submits that, in Dubai many employees leave work early on a Thursday and that the failure to provide the information requested by Mr Pursell could have been due to any number of reasons or administrative error. In his witness statement, Mr Pursell states that delay was not unusual as traders do not regard KYC documents as a priority. In cross examination, Mr Pursell said it did not strike him as odd or suspicious that Zen was just re-sending the same information. I do not accept Mr Pursell's evidence here. In my judgment, the fact that Zen just re-sent the limited information that they had already sent was a matter for concern, and the fact that Mr Pursell responded within half an hour by chasing up some of that information demonstrates that it was a matter of concern for Mr Pursell at the time.

179. At 1242 Zen emailed Mr Pursell with details of its bank account with SCB in Dubai.

Email from Mr Pursell to Zen at 1256 ("the 1256 Email")

180. At 1256 on 28 January Mr Pursell emailed Zen (in response to Zen's 1242 email) in the following terms:

> *"Thanks*
>
> *Do you have the IBAN number for the account?*
>
> *Also please confirm that Zen Holdings is the holder of the registry account DE 120-1712-0*
>
> *On receipt of confirmation I will wire the funds"*
>
> *(emphasis added)*

181. This is a very significant document. At this point in time the EUAs had been transferred into Winnington's account. Winnington had not paid Zen for the EUAs. The confirmation sought that Zen was the holder of the account was not in fact received prior to the transfer of the payment funds to Zen. The question then arises as to what, if any, explanation does Mr Pursell give, first, for requiring confirmation about account details as a pre-condition to making payment, and secondly, for then going ahead and allowing payment to be made without this confirmation. I address these questions in detail in paragraphs 251 to 271 below.

Payment is made by Winnington to Zen: 1300 to 1330

182. At 1259 Mr Pursell emailed Zen asking whether they had a corresponding bank for their account. At 1318 Zen emailed Mr Pursell in response, merely giving the same details of its bank account with SCB in Dubai which it had sent in its email of 1242.

183. Then, and without obtaining a response to the 1256 Email, at about 1318 Winnington actioned payment to Zen of the price of €267,645 from Winnington's HSBC account to Zen's account with Standard Chartered Bank in Dubai. The payment log shows that the payment was processed at 1331.

184. According to Mr Byatt's own witness statement (at paragraph 14), he, Mr Byatt, after the EUAs had been transferred to TFS Green, "instructed" Mr Pursell to send payment to Zen.

185. At 1407 Zen emailed Mr Pursell asking for confirmation that Winnington had sent payment. At 1411 Mr Pursell emailed Zen to confirm that payment had been sent an hour earlier and that Winnington's account had been debited and requesting an invoice.

Third conversation between Mr Byatt and Mr Singh

186. After payment had been sent, Mr Byatt says in his witness statement that he rang Mr Singh to inform him of the fact that payment had been made. In the same call, Mr

Singh informed My Byatt that he possibly had another 80,000 EUAs which he could offer. Nothing came of this.

Alleged conversation between Mr Byatt and Ravi of Zen

187. It was at about this point in time that, according to Mr Byatt's evidence in cross examination, he called Ravi at Zen and told him of the fact that payment had been made by Winnington to Zen. However I do not consider that such a conversation adds materially to the relevant events.

(3) Back in Germany

188. Meanwhile at 1443 German time Herr Leiber became aware that there may have been something untoward about the email he had received earlier. He received an email from Herr Michael Kroehnert of Emissionshaendler.com, another entity trading in EUAs, warning that emails headed "Emissions trading scheme (EU ETS) - new security measure" were fraudulent.

189. At 1702 German time Herr Leiber received an email from the German Registry advising all account holders to be aware of a type of "phishing" email. The email advised users who had been the victim of the phishing attack should go to the German Registry and deliberately enter an incorrect password so as to lock the account and prevent further unauthorised access. Herr Leiber did this and obtained a new username and password for the Delmenhorst account. Later in the day Herr Leiber became aware of press reports that the EU ETS had been the victim of a phishing scam.

(4) In the UK

190. At 1716 Zen emailed Mr Pursell to thank him for sending payment and asking for Winnington's purchase order. At 1801 Zen emailed Mr Pursell with a copy of a bank statement "as requested". This document showed Zen's account with Standard Chartered and consisted of a single page computer print off showing an account numbered 02-3673294-01 in Zen's name and with a nil balance

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191. On 29 January further exchanges took place as follows. At 0944 Mr Pursell emailed Zen again requesting KYC documentation items, in the following terms

> "*To complete our KYC requirements we still need the following:*
>
> *List of all directors and shareholders*
>
> *Copy of all directors and shareholders passports*
>
> *Proof of address for directors and shareholders, copy utility bills etc*
>
> *Proof of company address*

Copy of EUS registry account login page to proof account ownership ..."

(emphasis added)

192. In his witness statement Mr Pursell said that he sent this further request for the KYC information, including the registry account details, so that he could have all documentation on file for future deals; and in future he could structure the deals differently he would not necessarily have to insist on receiving the EUAs before payment. In cross examination, he said that he did not need this information for the Transaction, since it had already been completed, and accepted that there was no urgency in pressing for this information.

193. I make the following observations on this email. First, the request regarding the EU ETS registry account is not in the same terms as either of the previous requests for this information made at 1410 on 26 January and at 1256 on 28 January. What is now being asked for specifically and for the first time is the registry account "login page" and as proof of ownership. At the very least, this suggests that, rather than just "cutting and pasting" the wording of the first request, particular thought was given by Mr Pursell as to what he was asking for. Secondly, the words "complete" and "still" suggest to me that this is information outstanding from earlier and from the initial request. They are inconsistent with the suggestion that the information is now being sought as something extra for the purposes of future transactions on a trade account (as opposed to what was required for the earlier spot trade). Thirdly, in my judgment, no adequate explanation has been given for why this was being sent again.

194. At 1042, Zen replied to Mr Pursell by email stating "*We will get this information to you later today*" and asking for further proof of payment. At 1055 Mr Pursell responded by sending Zen a copy of Winnington's online banking report showing that the payment had been processed.

In Germany

195. Back in Germany, at about 12 noon, Herr Leiber was contacted by Magdalena Weiglein from the German Registry, asking whether he had authorised a transfer of 22,000 EUAs the previous day. Upon being told that he had not authorised the transfer, Mrs Weiglein told him that Armstrong's account had been suspended. About an hour later, Magdalena Weiglein emailed Herr Leiber confirming that the EUAs had been transferred to a GB account and a further 1,000 EUAs had been transferred to an account with the Danish Registry. At 1432 German time, Herr Leiber emailed the German Registry confirming that the transactions the previous day were fraudulent.

In the UK

196. At 1357 UK time Zen emailed Mr Pursell, commenting that the online banking report did not mention Zen's name. At 1410 Mr Pursell replied by email to Zen, providing further proof of payment and stating once again:

> *"I still have not received your KYC's, To complete our KYC requirements we still need the following:*
>
> *List of all directors and shareholders*

Copy of all directors and shareholders passports

Proof of address for directors and shareholders, copy utility bills etc

Proof of company address

Copy of EUS registry account login page to proof account ownership"

(emphasis added)

197. As Mr Pursell observed in cross examination, this repeats, verbatim, the wording of Mr Pursell's email of that morning. The fact of it having been sent again so soon and the repeated use of the words "still" indicate that Mr Pursell was chasing this information with a good deal of urgency. Mr Pursell's evidence in cross examination was that, despite this, there was no urgency. He denied that he was pressing for the information because he knew the transaction was irregular without having received it. I do not accept that answer as being credible.

After 29 January 2010

198. At 1729 on 31 January (a Sunday), Zen emailed Mr Pursell, in which it commented "*With reference to your e-mail on Friday requesting additional information will be provided Monday morning.*" It was never so provided.

199. On the Monday, 1 February 2010, Zen emailed Mr Pursell attaching its invoice for the EUAs, stating the purchase price to be €267,645. In re-examination, Mr Pursell said that the invoice, a normal document, indicated to him that Zen were efficient and that no risk was indicated to him at all.

200. Herr Leiber emailed the UK Registry to report the fraud indicating that it was aware of the situation and was in the process of reporting the matter to "the relevant authorities".

201. On 11 February 2010, TFS Green informed Mr Byatt that the EUA market had been severely affected by a huge theft. EUAs worth about €350 million had been stolen. TFS Green said that they had stopped purchasing EUAs while they considered their position.

Proceedings

202. On 17 February 2010, on a without notice application made by Armstrong, Floyd J granted an injunction and disclosure order against Winnington, prohibiting any dealings with the EUAs or their proceeds and requiring the provision, by affidavit, of detailed information concerning the acquisition and disposal of the EUAs or their proceeds. On the same date the claim form was issued. On 19 February 2010 Mr Pursell notified Zen of the service of the injunction which stated that the EUAs Zen had sold were stolen. On 22 February 2010 Mr Sumnall swore and served his affidavit as required under the disclosure order of 17 February. On 24 February 2010 Winnington gave an undertaking to the Court in lieu of a freezing injunction, not to dispose of or deal with or diminish the value of its assets up to the value of €272,500. Statements of case were exchanged between February and June 2010.

(B) The issues of fact arising

203. Armstrong submits, on these primary facts, that Winnington shut its eyes to the obvious possibility of fraud or at least knew such circumstances as would indicate to an honest and reasonable man that the transaction was probably improper and/or behaved in a commercially unacceptable way; and that it did so at the following specific points in time on 28 January 2010:

(1) at the time that Mr Pursell authorised the transaction shortly before the receipt of the EUAs at 1130; and/or

(2) upon receipt of the EUAs at 1130; and/or

(3) between onward sale to TFS Green at around 1150 and payment to Zen at around 1300-1330.

204. Winnington responds to this case by relying upon a number of specific factual features in the case.

(1) At the time of authorisation

205. In support of its case here, Armstrong relies upon, first, certain specific features of the background context to the trade with Zen; and secondly and specifically, the fact that, as part of its own KYC procedure, Winnington had asked for, but not received, specific information concerning Zen's "Company registry account details" in Mr Pursell's 1410 Email of 26 January 2010. Armstrong observes that at the point that Mr Pursell authorised this transaction Mr Pursell had received nothing more by way of KYC information than the bare company information that Zen had provided first time round (i.e. at 1252 on 26 January). The decision to authorise was taken on the basis of that information alone, and even though Mr Pursell had indicated that this was not enough, having sent a request for more details.

206. Winnington submits that there was nothing suspicious. Mr Pursell knew that Messrs Sumnall and Byatt knew of Mr Singh; he believed what Mr Singh had said about Zen. Mr Pursell believed that Zen was engaged in EUA trading. This was to be a spot trade and no credit was involved. The steps in Winnington's case are as follows:

- First, there is (and was) a distinction between opening a "trade (or trading) account" with a customer and carrying out a "spot trade" and a consequent difference in what is required by way of KYC procedures in respect of each. Less stringent KYC information is required for a spot trade.

- Secondly, in the present case, what was being contemplated between 25 and 27 January 2010 was the opening of a "trade account" with Zen; and thus the KYC inquiries made by Winnington in that period in time were those suitable for a trade account. It was only on 28 January that the prospect of a "spot trade" arose; and that was what was concluded on 28 January. As a result less KYC information was needed for the Transaction.

- Thirdly, further, at the time, Winnington believed that (a) ETS registry accounts were secure and that there was no possibility that EUAs could be stolen and that,

as a result, (b) the fact of transfer between registries was itself proof of ownership and authority to transfer EUAs.

- Fourthly, thus, at the time that Mr Pursell authorised the Transaction, he did not need to have a response to the request for registry information made in the 1410 Email to be satisfied about Zen's ownership of the EUAs because:

  (a) the information about registry account was being sought only for a future "trade account" relationship and was not needed for the instant spot trade; what Winnington had received by then was sufficient for the latter; and

  (b) as registries were believed to be secure, the transfer itself of the EUAs in due course would be sufficient proof of Zen's ownership and/or authority.

(2) At the time of onward sale

207. In support of its case here, Armstrong relies, additionally, upon the fact that, by that time, Winnington had learnt of the account number from which the EUAs had been transferred and, more specifically, that that account number indicated that the account was a German account and an operator account. Despite this knowledge, Winnington sold on the EUAs without even asking the information which it went on to ask in the 1256 Email. Winnington contends however that it did not at that time know that the account was a German account nor an operator account.

(3) Between onward sale and payment

208. In support of its case here, Armstrong relies, additionally, upon, the terms of Mr Pursell's 1256 Email as demonstrating that Winnington knew that it needed to have, and consciously sought, confirmation of account ownership before completing the transaction by payment; and the fact of payment then being made, without receipt of this information, indicated a further shutting of the eyes and wilful taking of risk by Winnington.

209. Winnington's response is that it did not have any suspicions or doubts at this time and that there was no reason for it to have any. The question about the registry account was asked merely for internal purposes of checking that the EUAs had been received from Zen.

210. These rival contentions thus raise the following five distinct areas of factual dispute.

  a. What Winnington knew about Zen and Mr Singh

  b. The KYC procedure and the distinction between a "spot trade" and a "trade account"

  c. Transfer of EUAs as proof of ownership

  d. The effect of knowledge of the account number DE-120-1712-0

  e. The significance of the 1256 Email.

211. I make my findings of fact in relation to each in turn.

(a) Background factual context

212. I find the following as facts. First, Mr Singh "cold called" Mr Sumnall just three days before the Transaction was completed. Mr Sumnall had had no contact with Mr Singh for well over a year. Secondly, in the course of their initial conversations with Mr Singh, Mr Sumnall and Mr Byatt found out practically nothing about Mr Singh's relationship with Zen, other than he was "representing" Zen. Thirdly, Mr Sumnall accepted that every aspect of that relationship was "vague" to him. (See paragraphs 147 and 148 above). Fourthly, there were no corporate details (such as a registered company number or a registered address or directors) on Zen's letter heading and it had no proprietary website. Mr Sumnall accepted that such matters were important to give a professional image. Fifthly, Zen's email address was a free internet based email, rather than its own proprietary email address. Sixthly, prior to the 1410 Email, Winnington had already requested, generally, Zen's KYC documents (of a similar type to the documents Winnington had sent) and all that had been sent, in purported compliance with the request, were three formal corporate documents. Finally, by the time of authorisation and at the point of concluding the Transaction, Winnington had known of the existence of Zen for only three days. Mr Purcell accepted in cross-examination that trust builds up and risk goes down over time and that until that week Winnington did not have any kind of relationship with Mr Singh.

213. I accept, as Mr. Joffe submitted, that Mr Pursell gave examples of companies he knew without a proprietary email address or a proprietary website and that there was no expert evidence that it was unusual in the trade not to have a website. Mr Joffe also submitted that the fact that the headed notepaper had no company details did not matter, since these details were contained in the documents which Zen *had* sent attached to its email of 26 January at 1252.

214. I accept that Mr Harris did somewhat exaggerate the significance of some of these individual features and that there was no specific evidence before me as to what was, and what was not, good practice in EUA trading at that time.

215. Nevertheless it is the accumulation of the above facts which forms important relevant context to the issues in this case. If, as must be the case, the purpose of KYC was to find out about the counterparty and to establish its bona fides, Winnington knew precious little about Zen. That was a reason for additional caution and is, I find, highly material context in which to assess what Winnington then did about pressing for the KYC information which it was seeking.

(b) The KYC procedure and "spot trade" vs "trade account"

216. First, as to whether what was being considered by Winnington on 25 and 26 January was a "trade account" relationship with Zen or merely a "spot trade", the evidence is unclear. The original letter of introduction from Mr Pursell on 25 January referred merely to "a relationship" and a "trading relationship" and not to a "trade account". It was also a standard form letter as regularly sent by Winnington. On the other hand, it is the case that in the 1410 Email on the next day, Mr Pursell refers to the opening of a trade account. This wording was, possibly, in response to Zen's own reference to a "trading account".

217. Mr Byatt's evidence here is relevant. In the context of questions concerning his first conversation, it was put to him that he should have found out who Zen's and Mr Singh's trading contacts were. He responded:

> "*Ultimately I mean when the original contact was made it was on the basis of a spot trading relationship with Mr Singh and Zen Holdings, then yes I would have to go further and maybe get trade references, et cetera, but that's only if I'm going to start applying credit or credit insurance to doing trades with Mr Singh and Zen Holdings*"

218. That answer suggested clearly that, at this stage, Mr Byatt considered that what was in prospect was "spot trading". Similarly a little later in his cross examination he indicated that "*Neil was still looking for extra KYC information to progress the relationship from spot trade on to a trading account*".

219. However, subsequently, Mr Byatt gave further, conflicting, evidence on this in response to questions from me. First he said that he was "*looking into setting up a trade account at some point in time*". He then said that the Thursday morning was the first time that the possibility of a spot trade arose.

220. On the basis of this evidence I do not accept that discussions on 25 and 26 January were concerned clearly and solely with a possible "trade account" relationship, including the provision of credit. I find that at that point in time neither Mr Pursell nor Mr Byatt had in mind such a clear distinction between a "spot trade" and a "trade account".

221. Secondly, and in any event, I do not accept Winnington's proposition that different KYC procedures applied to spot trade as opposed to trade account business. The initial letter of introduction was Winnington's standard form letter and made no distinction between the two types of trade. Many of the same risks, and in particular, any risk as to ownership of, or authority to trade, the particular EUAs, would apply to both. There might be different risks in relation to the risk of non payment, if credit was to be offered. Some of the information being sought was as relevant to a spot trade as to a trade account.

222. In particular, I do not accept that the information sought about registry account details in item 7 in the 1410 Email would be relevant to a trade account, but not relevant to a spot trade. Taking each of the purposes of KYC put forward by Winnington in turn, first, as regards VAT carousel fraud, Mr Pursell accepted in cross examination that this was not an issue in the case of Zen at all and so it was irrelevant, whether what was proposed was a spot trade or a trade account. Secondly, as regards money laundering, again in cross examination, Mr Pursell accepted that it was not an issue in the present case, on either basis of trading. Thirdly, as regards the purpose of ensuring delivery before payment, on *Winnington's* case, the registry account details were not relevant to this risk at all.

223. On this analysis and in the light of my observations on the 1410 Email (in paragraph 162 above), Mr Pursell's claim that the registry account details sought in that Email was KYC information needed for trade account, but not for a spot trade makes no sense. He and Winnington have not been able to offer any reason why item 7 was needed for a "trade account" relationship but not for a spot trade.

224. Finally, the terms of the later 1256 Email seeking registry account information in respect of the "spot trade" transaction which had by then just taken place, completely undermines the credibility of Mr Pursell's evidence that this information was needed only for a trade account. As I find in paragraph 265 below, that information was being sought for this Transaction, a spot trade.

225. Accordingly, I find that, whatever the purpose of seeking the registry account information (in item 7 of the 1410 Email), Winnington was seeking that information for a spot trade as well as for a "trade account" relationship. I also find that indeed the purpose of seeking that information was in order to ascertain ownership of, and/or authority to trade in, the EUAs being traded.

(c) Transfer as proof of ownership

226. Winnington maintains that at the relevant time its relevant directors and employees believed that ETS registry accounts were secure and that only an authorised person could transfer allowances and thus that the fact of transfer was sufficient proof of ownership. This was why they did not need the KYC information to prove ownership. In order to be sure of ownership or authority to trade, generally and in relation to the Transaction, Winnington requested that EUAs be transferred *prior* to payment being made.

227. I accept that there is certainly logic in the proposition that if the registry accounts are believed to be entirely secure, then the fact of transfer of an EUA does prove ownership or least authority to trade. In fact, as indicated by what happened in the present case, the accounts were not entirely secure. The question however is whether Mr Pursell and Mr Sumnall did believe that they were entirely secure, and even if they did, whether they truly believed that the fact of transfer was sufficient proof of ownership of the EUAs.

228. I find that neither Mr Pursell nor Mr Sumnall did actually believe or work on the assumption that the registry accounts were *entirely* secure, and, further and more importantly, that they did not believe, or work on the assumption, that mere transfer of EUAs was sufficient to prove ownership of the EUAs.

229. First, I accept that neither Mr Sumnall nor Mr Pursell nor indeed Herr Leiber had envisaged that EUAs could be stolen in the way that they were stolen and had thought, in general terms, that registry accounts were secure because of the user ID and password procedures. However, in cross-examination, both Mr Sumnall and Mr Pursell accepted that they were aware of "phishing" scams in relation to bank accounts and that there was an analogy to be drawn between the security of bank accounts and the security of the registry accounts. In particular, Mr Pursell said that he was aware of phishing scams, that bank security was a good analogy although he thought that corporate banking particularly was very secure. He accepted that he was not aware of security arrangements for the German Registry nor of the fact that, at the time, they were subject only to user ID and password protection and not additional measures (ie digital certificates), as in the UK.

230. The overall effect of Mr Pursell's evidence on this issue was that whilst he believed that fraud was highly unlikely, it was not impossible. At paragraph 23 of his witness statement, Mr Pursell said:

"If asked I would have said that a theft or fraud could only happened where it was an inside job or as a result of someone stupidly giving away their user details and secure password. Those scenarios seemed incredibly unlikely given the values involved and that the EUA system is part of high commerce where good systems and security would be put in place."

231. In cross examination this passage was put to him and the following exchange took place.

Q: [in para 23 of the witness statement] ... *You did at least accept in principle that it might happen in those circumstances, didn't you?*

A: I've said that, yes".

232. Secondly, as regards the fact of transfer as proof of ownership, the key relevant evidence relied on by Winnington is Mr Pursell's witness statement evidence at paragraphs 21 and 30:

"If we did not have all the KYC documentation, then in order to be certain that the vendor owned or was authorised to trade, we would request the EUAs were transferred prior to the Defendant paying the price for them.

"Not all the KYC documentation was required for the particular transaction eventually agreed because the deal with Zen was structured so that the Defendant would receive the EUAs before sending payment. Consequently if Zen was able to transfer the units I could be satisfied that Zen was authorise to carry out the transfer"

(emphasis added)

233. In other words, he says that it is the fact of transfer *before payment* that abrogated the need for the KYC information relating to registry account details. I do not accept the logic of this. If mere transfer does prove ownership, it does so whenever the transfer takes place - whether before or after payment. Indeed Mr Pursell expressly accepted this in cross-examination - as did Mr Sumnall. Insisting on transfer *before* (rather than after) payment guards against the risk of non-performance (i.e. non delivery) and not against the risk that the transferor does not have title or authority. Applying the logic of Mr Pursell's position about transfer, if Winnington paid first (before transfer) the risk it would be running would be non-performance by the transferor and not "no-authority or ownership" because if, after payment, the seller did in fact transfer, then on Winnington's own argument transfer would prove authority. Accordingly I do not accept Mr Pursell's evidence in his witness statement that ensuring that Zen transferred *before* Winnington paid was *the* reason why other proof of ownership was not required "for the particular transaction".

234. Thirdly, as to whether nevertheless Mr Pursell (and Mr Sumnall) believed that transfer (at any time) was sufficient proof of ownership, I do not accept this either. If they had believed this, then, in the instant case at least, there would have been no

reason for including within the KYC sought, a request for registry account information.

235. Finally, Mr Pursell's sending of the 1256 Email, which I address further below, wholly undermines the credibility of Mr Pursell (and Mr Sumnall) on this issue. That email was sent *after* transfer of the EUAs, and at that time, as I find below, Mr Pursell believed that the EUAs received had been sent by Zen. I also find below that that email concerned the EUAs which had just been transferred (and not future trading). If Mr Pursell had believed that transfer was sufficient to prove ownership and/or authority, then, *by the time of the 1256 Email*, on his own account, he would have no reason at all to ask again about the registry account.

Conclusion at time of authorisation of the Transaction

236. In cross-examination Mr Sumnall was asked whether it would not have been proper to trade, until the KYC procedures had been completed. His answers were at first evasive. Finally the following exchange took place.

> *"Q: Whatever KYC procedure you company had put in place had to be completed before you traded with Mr Singh*
>
> *A: Yes"*

237. He thus accepted that the relevant KYC procedure should have been completed before trading.

238. I find as follows. Winnington was asking specifically for registry account information so as to be satisfied that Zen owned or had authority to transfer EUAs. At the time of the authorisation of the Transaction, Winnington knew very little about Zen and had not received the KYC information which it was specifically seeking for the purposes of the Transaction and even though, at that time, Mr Pursell, by sending the 1410 Email, had indicated that what Winnington had received to date was not sufficient. Despite this, Mr Pursell consciously took the decision to authorise the Transaction.

Upon receipt of the EUAs

239. Upon receipt of the EUAs at about 1130 on 28 January, Winnington became aware of the account number from which the EUAs had been transferred, namely DE-120-1712-0. That number in fact denoted, inter alia, that the owner of that account was an operator, as opposed to a trader, and that the account was held at the German Registry.

240. The first point which Armstrong makes is that by that time therefore Winnington knew or should have known that the EUAs had come from a German operator, and that, given that Zen was, to its knowledge, a Dubai trader, that should have caused Winnington to make further enquiries before transferring the EUAs on to TFS Green (let alone paying for them).

241. As regards this point, the relevant evidence relating to Winnington's knowledge that the account was an operator account is as follows.

242. In cross examination, it was put to Mr Pursell that he would have known by that time that the account was an operator account and yet Zen was a trader (and that was a reason for his subsequent inquiry). His attention was directed to the transaction history document from the UK Registry and he was asked following questions:

> *"Q: Now, did it strike you as strange that this was a 120 number that was coming in?*
>
> *A: No, because 120 and 121 are the most common types of account holders within the registries"*
>
> ...
>
> *"Q: 120 is an operating account, isn't it?*
>
> *A: That's correct, and there are hundreds of thousands of operator accounts across Europe, we believe"*

243. Whilst it appears from the first exchange that Mr Pursell was being asked about his knowledge *at the time* and the second answer indicates that Mr Pursell knows that 120 is an operator account, that latter answer does not make it clear whether this was something that Mr Pursell knew as at 28 January 2010.

244. Subsequently, he gave further evidence in response to questions from me, as follows.

> *"Q: You indicated in cross examination that designation 120 was an operator account*
>
> *A: I was informed that that was the case ..."*

However this answer does not say expressly when Mr Pursell was so informed. The evidence continued:

> *"Q: Was it surprising that the EUAs that were received from them came from an operator's account*
>
> *A: It didn't surprise me because it didn't flag anything up, it didn't indicate anything to me that any was different at all, my Lord*
>
> *Q: But you must have known they weren't an operator?*
>
> *A: We believe they that* [sic] *access to the account, but I can't answer that question because I didn't know. It didn't flag up an issue for me at the time"*

245. In my judgment, whilst aspects of this evidence do suggest that Mr Pursell knew *at the time* that 120 designated an operator's account, in my judgment, the evidence as a whole is not sufficiently clear, on the balance of probabilities, for me to make a finding of fact to that effect. Further, even if Mr Pursell did know at the time that the account was an operator account, there is insufficient evidence for me to find that such knowledge was sufficient to raise concerns on the part of Mr Pursell on the basis that Zen did not have access to such an operator account.

246. Secondly, as regards the fact that the account was a German account, there is no evidence that Mr Pursell was conscious of this fact at the time. The only evidence is that Mr Pursell accepted, in general, that the designation "DE" is a reference to the German Registry account. Further questions about emails confirming transactions did not disclose that Winnington would at the time have received an email showing that the trade had originated from the German account.

247. Finally, there is no evidence to support Armstrong's proposition that, even if Mr Pursell did not know that the account was a German operator's account, a reasonable person in Mr Pursell position at the time would have so known or noticed.

248. However, regardless of Winnington's knowledge of the precise meaning of the designation DE-120, I find that Mr Pursell by that time knew of circumstances which indicated to him that he should have made further inquiries before the EUAs were transferred on to TFS Green at 1150. Mr. Pursell accepted, in cross examination that, in general, if Winnington did not have the number of a seller's account before a transfer, it would need to ask the seller to ascertain that the EUAs received related to the transaction in question. He further accepted that if the seller said that the EUAs were not from him, doing nothing was not an option and that in that case he imagined that Winnington would start an investigation. The following exchange then took place:

> *"Q. It would not be an honest thing to keep the allowances until you knew that you were to have them?*
>
> *A. We would ascertain what the situation was before we could get to the next ... before we could then decide what to do. We'd take legal advice once we ... it's never happened, so I can't comment.*
>
> *Q. If it turned out that the allowances had been transferred to you by mistake, it wouldn't be an honest thing to keep them, would it?*
>
> *A.* (inaudible) *no, we wouldn't keep them."*

249. By those answers, I take Mr Pursell to have accepted that it would not be honest to do anything with the EUAs until Winnington knew that they were properly entitled to them. The hesitations in his first answer indicate that he knew the significance of the questions.

250. Now whilst Mr Pursell's evidence (which I refer to below) was to the effect that he did, by then, believe that the EUAs which had just been received had come from Zen, I do not accept that, at this point in time, he was sure that this was the case or that the transfer was regular. As I find below, if he had believed this, then he would not have sent the subsequent 1256 Email. Indeed this was why the 1256 Email was then sent (as Mr Pursell's evidence at paragraph 36 of his witness statement in fact said). It follows that at the time that the EUAs were transferred to TFS Green at 1150, Winnington was, at the least, not sure that they were fully entitled to them. He appreciated that further inquiry was needed but nevertheless consciously took the risk of transferring the EUAs on to TFS Green. On Mr Pursell's own evidence about the propriety of dealing with EUAs in those circumstances, I find that the passing on of

the EUAs without such certainty, at the least, was commercially unacceptable conduct.

Between onward sale and payment to Zen

The 1256 Email: the reason for the further request for registry account details

251. This is a very important email for two reasons: first because on its face Mr Pursell was asking, again, for registry account details and this time as a condition for Winnington making payment for the EUAs, and secondly because in fact Mr Pursell did not wait to receive those details before authorising the payment.

252. Winnington submits that Mr Pursell was not asking for this information to ensure that the Transaction had been properly authorised nor to confirm that the EUAs which had just been transferred were in fact owned by Zen. Winnington instead proffers two other reasons for the sending of this email.

The evidence

253. Mr Pursell's witness statement evidence on this email was as follows:

> "*35. I requested extra KYC documentation after the transfer of the EUAs had gone through, but I did not believe it was necessary prior to authorising the transaction eventually agreed with Zen.*
>
> *36. Firstly, I sent an email to Zen asking for proof that Zen owned the EUA Registry account number DE-1712-0. This was for internal purposes so that I could check that the 21,000 EUAs received were from Zen. Traders will sometimes transfer EUAs into your account with little warning, and I have to check from whom those EUAs have been received.*"

254. Paragraph 36 continued by giving his explanation for subsequently authorising payment despite not receiving an answer, as follows:

> "*I believe that Paul Byatt spoke to Mr Singh who confirmed that Zen indeed sent the 21,000 EUAs. I was not expecting 21,000 EUAs from any other trader that day, and I decided that it was safe to assume that the EUAs received were the ones sent by Zen. I therefore arranged the transfer of the monies into the bank account* [of Zen]."

255. However, in cross-examination, Mr Pursell gave a different account. He said:

> "*I'm asking for confirmation, although I was satisfied at the time that they had - it was their account because they'd transferred the credits. ...*
>
> *The very fact that they'd delivered the credits to us promptly made be me believe they were going to be, you know, a very good trading relationship, so I was trying to accelerate the details so we can enter into a far better relationship*"

256. The "conditionality" in the 1256 Email concerning the wiring of the funds was then put to him. His answers make little sense:

"A. I was asking for the information- it wasn't conditional I was going to wire the funds because I'd had proof that they delivered the units into our account"

Q: You don't say "Can I have the information and I'm going to wire the funds, do you?

A: No, it says what it says

Q: You wanted the information before you wired the funds, didn't you?

A: It wasn't the reason why -- I was satisfied at that point that they owned the EUAs."

257. Then Mr Pursell said quite clearly that the reason he had sent the email was to "*develop the relationship with Zen*" (for the future). When specifically asked whether there was any other reason, he responded with the same answer, namely the *future* trading relationship. The explanation contained in paragraph 36 of his witness statement was then put to him, as being a completely different reason. In his answer, he sought to elide the two reasons, but in my judgment unsuccessfully. He said that what he had said in his witness statement was referring to checking *future* transfers of EUAs. When it was put to him that paragraph 36 referred in terms to the 21,000 EUAs which had just been transferred, he had no explanation. He could not explain why he had given two quite different reasons for sending the 1256 Email. Further he said that by that time they must have believed that the EUAs, which they had already received, had come from Zen, because, he accepted, otherwise it would not have been honest for them to have passed them on to TFS. Eventually he said that there were two reasons for the email: developing the relationship and for future reference they would have a note on file for future allocation. He said that at the time he sent the email, he believed that the allowances received had come from Zen. It was put to him that he had wanted the information because he knew he had to have it. He responded by saying that he didn't need it and reverted to saying that the fact of transfer was sufficient to satisfy them, and that if he had had to have that information, he would not have sent the EUAs on to TFS Green. When it was put to him that in fact he took a commercial risk, he denied that.

258. Subsequently, and in relation to the two further emails sent on 29 January seeking the registry account information, he could not explain why, if he only required it for a future trading relationship, he was pressing for the information so urgently. He accepted it was not urgent.

Findings on the 1256 Email

259. As regards the 1256 Email, I find as follows.

260. First, at the time it is sent, Winnington has concluded a contract for purchase of 21,000 EUAs from Zen, and Winnington has received into its registry account that precise number of EUAs from a specific numbered registry account. Winnington was aware of the registry account number from which the EUAs had been sent.

261. Secondly, by its terms, Mr Pursell is asking Zen to confirm that Zen is the holder of that specific numbered registry account. Further, by its express terms, the provision

of that confirmation is a condition to Mr Pursell authorising payment for those 21000 EUAs. Mr Pursell was not able to deny this.

262. Thirdly, the obvious inference from the email itself is that Mr Pursell was seeking confirmation that Zen was the owner and/or authorised to transfer the 21,000 EUAs and he was doing this before payment, at the very least, to check that everything was in order. The fact that Mr Pursell was asking for this information on this basis, together with the background context and Zen's failure to provide this information previously, indicated that Mr Pursell had doubts about the Transaction.

263. Fourthly, Mr Pursell in his evidence denied the inference. He gave two completely different reasons for the sending of this email. The first explanation, which Mr Joffe too maintained in his closing argument, was that the information was sought for internal "booking in" purposes to check that the EUAs which Winnington had received had come from Zen. However, Mr Pursell's own account in cross examination was that by that time Winnington, and he himself, knew that they had received the EUAs from Zen (they were not expecting any from any one else). The second explanation, given for the first time in cross examination, was that this request had nothing at all to do with the Transaction. Rather he was seeking this information solely for the purpose of further *future* trading relationship with Zen. However that answer is not credible, because the email expressly links the provision of the information with the Transaction, by making it a condition that the information be provided prior to him authorising payment for the 21,000 EUAs in question. Whilst in cross-examination he eventually sought to suggest that both were reasons for sending the email, and indeed Mr Joffe so submitted in closing, I do not accept that, in cross examination, Mr Pursell did maintain his reliance upon the first explanation; rather he referred to allocating or booking in *future* transactions. I find that neither explanation put forward is credible, and I do not accept Mr Pursell's evidence here.

264. Fifthly, what confirms this conclusion is the fact that the email makes payment for the 21,000 EUAs conditional upon provision of the confirmation sought and the fact that when the plain meaning of this condition was put to Mr Pursell in cross examination, he could not provide a sensible answer. The key fact which Mr Pursell and Mr Joffe, could not get round was that Mr Pursell went ahead and made payment within a matter of 20 minutes and without receiving the confirmation he had expressly sought. If the email did make payment conditional, then Mr Pursell had no answer and could have had no answer to the question why, contrary to the terms of his own email, he had wired the funds even though he had not received the information requested. The only possible answer to that question is that he deliberately took the risk that the EUAs did not belong to Zen. Instead, in order to avoid having to answer that question, he denied the plain meaning of the condition in the email. Rather he said, and Mr Joffe submitted in closing, that the confirmation and payment were not connected. In my judgment, that answer is plainly contrary to the terms of the email, and not credible and I reject it.

265. Sixthly, thus, I reject both of the reasons given by Mr Pursell for the sending of this email. I find that the only possible inference is that he sent the email in order to confirm that Zen was the owner of the EUAs received after the Transaction, and to do so before paying over the purchase price, and that he did so because he himself had, at the very least, some concerns as to whether Zen was the owner of the EUAs and he

wanted to double check that it was the owner. He himself appreciated that there was a possibility that the EUAs might not belong to Zen.

266. I find further that Mr Pursell authorised payment before receiving the confirmation, before allaying those concerns and doubts. By doing so, he consciously chose to take the risk that the EUAs did not belong to Zen. He wilfully and recklessly closed his eyes to the possibility that the EUAs did not belong to Zen which he by then had appreciated. At the very least, Mr Pursell knew that something further was needed to make the Transaction regular and without finding that out, that there was a risk. He knew of circumstances which caused him to ask questions. He asked those questions, but did not wait for an answer. It was the not waiting for an answer which was wilful and reckless. This conclusion is further supported by the fact that on the next day, Mr Pursell pressed, as a matter of urgency and on two occasions, for an answer to the registry account question: see paragraphs 191 to 193 and 196 and 197 above.

267. Finally, as indicated in paragraph 235 above, I further find that the fact that Mr Pursell asked for this information in this email at that time wholly undermines his evidence that he believed that the mere fact of transfer of the EUAs was proof of authority and ownership.

268. As indicated above, Mr Pursell accepted that it would not have been honest to deal with EUAs until he knew that Winnington had properly received them. The real reason that this question was asked was to make sure that Zen owned or had authority to sell the EUAs.

269. Even if, as Mr Joffe submitted, the prior contextual circumstances might not on their face have been sufficient to give rise to a probability that the transaction involved fraud or indeed to a suspicion on the part of a reasonable person that it was anything other than perfectly innocent, in my judgment, I find that in fact Mr Pursell did have actual concerns about the regularity or propriety of the Transaction. He knew that something was needed to make the transaction regular. He was by this time actually concerned about ownership.

270. Why, in fact, Mr Pursell changed his mind between 1256 and 1318 can only be a matter for speculation. It is possible that Mr Pursell did not send the 1256 Email with the genuine desire to find out the registry account details (and payment was always going to be made in any event). On that basis, the 1256 Email would appear to be an attempt "cover tracks" for the record and that in itself would be indicative of knowledge of suspicious circumstances or concerns. Alternatively, and more likely, the 1256 Email, when sent by Mr Pursell, was a genuine inquiry upon which payment depended; in that case there was a change of mind within the course of the next 30 minutes. Such a change of mind on the part of Mr Pursell itself indicates a conscious taking of risk.

271. Why he and Winnington in general took such a risk, particularly when the profit at stake was a matter only of a few thousand pounds, is not entirely clear. But in my judgment whatever the motivation behind the taking of the risk, the evidence shows inexorably that they did knowingly take the risk.

Conclusions: application of the law to the facts

272. In conclusion I now apply the legal principles set out earlier in the judgment to these findings of fact.

Title to the EUAs

273. As I have found above, in my judgment, the EUAs which were received into Winnington's registry account were the same EUAs as had been in Armstrong's registry account prior to the phishing fraud. The starting point is to determine whether, on the facts, by the time that the EUAs were received by Winnington at 1130 on 28 January 2010, legal and equitable title to the EUAs had become separate, or rather, legal title (as well as beneficial ownership) remained with Armstrong.

274. On the basis of the observation in *Westdeutsche* (paragraph 127 above), the question is whether the third party fraudster (Zen, Mr Singh or someone else) became a constructive trustee of the EUAs. If so, the basis of Armstrong's claim lies in unconscionable receipt of trust property. If not, and Winnington retained full legal title and ownership, then the basis of Armstrong's claim is the common law proprietary restitutionary claim.

275. I have not found this issue easy. The intangible nature and electronic form of the EUAs coupled with the speed with which it appears that the EUAs were taken out of one account and transferred to another account make it difficult to compare the situation with the thief who steals physical property or a bag of money and passes it on to a third party. Nevertheless in my judgment the better analysis is that the third party fraudster did become a constructive trustee of the EUAs, on the basis indicated by Lord Browne-Wilkinson in *Westdeutsche*.

276. Some time between 0745 and 1130 on 28 January 2010, the third party fraudster gained de facto ministerial control over the EUAs lying in Armstrong's account. At that point the EUAs were "stolen" in the sense that Armstrong had ceased to have control over them. To the extent that the fraudster had obtained ministerial control, he was to be regarded as, at least, in possession of the EUAs. He was in a position such that he could offer to sell them to strangers, such as Winnington, and subsequently effect their transfer away. In fact (and for obvious reasons) it appears that the third party effected this transfer very soon after gaining access to and control over the EUAs in Armstrong's account. But it did not necessarily follow that this should happen quickly or immediately. It was perfectly feasible for the third party to hold on ministerial control for some considerable time, not least because, in the case of Armstrong, Armstrong had no intention to "trade" the EUAs. It is also perhaps just feasible to envisage that a fraudster might transfer stolen EUAs into its own registry account. Whatever control the fraudster had at that time, I consider that (1) that control gave him some form of de facto legal title and (2) that this did not deprive Armstrong of its beneficial entitlement to those EUAs, and thus (3) all the while the EUAs remained held by the fraudster they were held on constructive trust for Armstrong.

Unconscionable receipt of trust property

277. On this basis, Armstrong's claim lies in receipt of trust property and the issue then is whether Winnington's receipt of the EUAs was "unconscionable" as required by *BCCI v Akindele*. In the light of my conclusions in paragraph 132 above, that in turn requires considering of the degree of "knowledge" held by Winnington at relevant times.

278. On the basis of my findings at paragraphs 238, 250, 265, 266, 269 and 271 above, I conclude that the state of Winnington's knowledge of the relevant circumstances was such as to render its receipt of the EUAs "unconscionable". Whilst I accept that no-one at Winnington had actual knowledge of the "phishing" fraud nor, in this way, that the EUAs were "stolen", I am satisfied that the relevant personnel at Winnington were actually aware that there was a possibility that Zen did not have title to, or authority to sell, the EUAs and that they consciously and deliberately "closed their eyes" to that risk or possibility. They did so at each of three distinct points in time.

279. First, when Mr Pursell authorised the Transaction (at between 0830 and 1130 on 28 January. At that point in time, Winnington knew very little indeed about Zen in general: see paragraph 215 above. Mr Pursell had asked specific KYC questions, including in particular a direct question about proof of registry account details, to which he had had no response. As I have found, that question was asked specifically for the purpose of establishing Zen's ownership of, or authority to transfer, the EUAs. The failure to send the information in response to the 1410 Email was itself inherently suspicious and should have set alarm bells ringing. At this point Winnington deliberately and consciously decided not to follow its own KYC procedure and thus, in this regard, was also consciously taking a risk in authorising the transaction.

280. Secondly, by the time that Mr Pursell or Mr Byatt transferred the EUAs on to TFS Green (at about 1150 on 28 January), Winnington knew of the details of the transferring account, but had received no confirmation that that account belonged to Zen. By transferring to TFS Green without even asking further questions, Winnington consciously took the further risk that it was passing on EUAs which might not belong to Zen.

281. Thirdly, Winnington consciously took a risk when Mr Pursell authorised payment to Zen for the EUAs without having received the confirmation as to ownership which he had sought less than half an hour earlier in the 1256 Email. At that point in time, Mr Pursell himself had real suspicions or concerns about Zen's title to the EUAs. The very fact of sending the 1256 Email establishes that he had those suspicions and concerns. At the least, he knew that he had to have that information in order for the Transaction to be regular and proper and that without that information, there was a real risk that it might not be.

282. Indeed this was not just a case where the defendant failed to make inquiries that should have been made, but rather was a case where the relevant inquiries *were* made, but not followed through by awaiting a response to those inquiries. Winnington deliberately and consciously chose to take the risk that the EUAs did not belong to Armstrong. Mr Pursell raised the question in the first place because he had doubts and then wilfully closed his eyes to the risk to which those doubts gave rise. What

Winnington did was to fail, wilfully and recklessly, to pursue the inquiries which not only an honest and reasonable man would have made, but which it had in fact made.

283. In this way, by not awaiting an answer to the inquiries, Winnington was either "wilfully shutting one's eyes to the obvious" or at the very least "wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make".

284. Put another way, Winnington's knowledge fell within, at least, *Baden* type (3), because Winnington wilfully and reckless failed to make such *further* inquiries as an honest and reasonable man would have made in the circumstances then pertaining.

285. These facts constitute knowledge within the band of *Baden* types (2) and (3) and in any event are such as to render Winnington's receipt of the EUAs unconscionable.

286. In these circumstances, it is not necessary for me to consider an alternative analysis on the basis of the "modified" *Baden* types (4) and (5) knowledge identified in paragraph 132(2) above. However, if, contrary to my findings above, the state of Mr Pursell's knowledge was such that he did not in fact subjectively have his own suspicions and concerns, I would not have been satisfied that, on the facts actually known to Winnington, a reasonable person would have appreciated that the transfer was probably (as opposed to possibly) in breach of trust. However I *am* satisfied that on the facts actually known to Winnington at the time a reasonable person would have made further inquiries or sought advice which would have revealed the probability of the breach of trust. This is established, in my judgment, by the very fact that Winnington itself did make those inquiries, which, had they awaited the response, would have revealed the probability of the breach of trust. I am further satisfied that Winnington behaved in a "commercially unacceptable" manner, specifically in transferring on the EUAs to TFS Green without asking further questions: see paragraph 250 above.

Proprietary Restitutionary Claim

287. If contrary to my conclusion in paragraphs 275 and 276 above, there was no relevant separation of legal and beneficial title to the EUAs, then, in my judgment, legal title remained, at all relevant times, vested in Armstrong. On that basis, I am satisfied, first, that Armstrong does have a proprietary restitutionary claim at common law for the value of the EUAs in accordance with the principles set out in paragraphs 84 et seq above. The EUAs constitute a chose in action or even some form of other intangible property: see paragraph 59 above. That is no bar to the bringing of such a proprietary restitutionary claim: see paragraph 94 above.

288. Secondly, as to Winnington's defence of bona fide purchase for value without notice, I conclude that Winnington did, at the relevant times, have sufficient "notice" of the fraud or impropriety such as to defeat such a defence. Since I have found that the tests for "notice" and the test for "knowledge" (for the purposes of unconscionable receipt of trust property) are broadly similar, I rely upon the findings of fact and reasons I have made in relation to the "unconscionable" nature of the receipt of trust property as establishing "notice". For the reasons set out in paragraphs 278 to 285 above, I find that Winnington had notice within *Baden* types (2) and (3) knowledge described in paragraph 123(1) above. If, contrary to the foregoing, the facts do not

establish types (2) and (3) knowledge, for the reasons set out in paragraph 286 above, I find that Winnington had notice within the "modified" *Baden* types (4) and (5) knowledge described in paragraph 123(2) above.

289. Finally, if change of position is a defence to a proprietary restitutionary claim, and even if Winnington can point to some distinct conduct said to amount to a relevant "change of position, I find that Winnington did not act in good faith. Applying the analysis of Moore-Bick J in *Niru Battery*, my conclusions in paragraphs 278 to 286 above establish that, at the least, Winnington failed to act "in a commercially acceptable way"; Winnington had "good reason" to believe that the transfer of the EUAs was not regular and yet failed to make proper inquiries of the transferor before completing the Transaction.

Conclusions

290. In the light of my conclusions at paragraphs 276 and 285 (or alternatively at paragraphs 287 and 288), Armstrong's claim in this action succeeds and it is entitled in principle to a money judgment in an appropriate sum.

291. I will now hear further submissions as to the appropriate orders to be made consequential upon this conclusion. In particular, I will hear submissions as to the precise amount of the money judgment, and interest. As regards the former, whilst Armstrong seeks judgment in a sum representing the value of the EUAs together with the profit generated by the onward sale to TFS Green, it is not clear to me what is meant by "the value of the EUAs", in particular whether the value is itself represented by the onward sale price to TFS Green.

292. I propose dealing with this and other consequential matters, including costs, immediately following the handing down of this judgment, unless any party requests that they be dealt with subsequently and in which event, I will give further directions as to the procedure to be followed, including for the service of written submissions.

293. Finally I should add that I am grateful to both Mr Harris and Mr Joffe for the assistance they have provided to the Court in the presentation of oral and written argument in this matter.