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Claim No: BL-2019-000676

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 15/6/2020

Before:

ROBIN VOS
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

Between:

(1) MICHAEL WARD
(2) CHRISTOPHER CARPMAEL
(3) EACH OF THE FURTHER CLAIMANTS LISTED IN
ANNEX 1 TO THE CLAIM FORM

Claimants

- and -

KATHARINE ANNE SAVILL

Defendant

HUGH MIALL (instructed by Morgan Rose Solicitors) appeared for the **Claimants**
JAMES MATHER (instructed by Kingsley Napley LLP) appeared for the
Defendant

Hearing date: 19-20 May 2020

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DEPUTY JUDGE ROBIN VOS:**Introduction**

1. The Claimants are 65 individuals who invested in one or both of two film development schemes. Each of the schemes was operated through an English limited liability partnership. The investment took the form of a payment of a sum of money to the relevant LLP.
2. The promoters of the film schemes were the Defendant's husband, Charlie Savill, and two other individuals.
3. The Claimants believed that their investments had been procured by fraud and that the funds which had been invested were diverted through a series of offshore entities for the benefit of the three promoters.
4. In 2015, the Claimants (along with other individuals who had invested in the two film schemes and two other similar film schemes operated by separate LLPs and promoted by the same individuals) therefore brought a claim against the three promoters and the four LLPs ("**the 2015 Proceedings**").
5. Following a hearing in March 2018, the Claimants in the 2015 Proceedings ("**the 2015 Claimants**") obtained a default judgment (no defence having been entered) against the seven defendants to those proceedings ("**the 2018 Judgment**"). The order made by Butcher J ("**the 2018 Order**") as a consequence of his judgment included a declaration that the 2015 Claimants had a beneficial interest in the money paid by them to the LLPs.
6. The Defendant, Mrs Savill, is the registered the owner of a substantial property in West London. The Claimants say that the property was purchased using funds which derived from their investments into the LLPs. They have therefore brought the current proceedings in order to establish that they have a proprietary interest in that property by way of a tracing/following claim.
7. As the starting point for their claim, the Claimants rely on the declaration relating to their beneficial interest in the money invested in the LLPs contained in the 2018 Order.
8. In her Defence, Mrs Savill does not deny that the court made a declaration contained in the 2018 Order that the Claimants have a beneficial interest in the money which they invested in the LLPs. However, she says that as she was not a party to the 2015 Proceedings, she is not bound by any judgment in those proceedings. As a result, she says that the Claimants must prove in the current proceedings that they do have a beneficial interest in those funds.
9. The Claimants, on the other hand, say that, whilst Mrs Savill is not bound by the 2018 Order, she cannot ignore its effects. On the contrary, they say that, in the absence of any challenge from Mrs Savill, they are entitled to rely on the 2018 Order as establishing their beneficial interest in the funds invested in the LLPs and therefore as the foundation of their proprietary claim against the property owned by Mrs Savill.

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10. On 20 January 2020, Deputy Master Henderson approved a consent order in which it was agreed that the court would determine the following question as a preliminary issue:

“Whether, contrary to paragraphs 8(c), 9(a) and (b) of the Defence, the declaratory judgments obtained by the Claimants in Claim CL 2015-000136 have such legal effect (including against the Defendant) so as to allow the Claimants to found their proprietary claim against the Defendant in relation to their alleged beneficial interest in [the property] without re-pleading and proving the facts or matters relied on by them in Claim CL 2015-000136 in order to obtain those declaratory judgments.”

11. This is the sole issue for me to determine.

The 2015 Proceedings

12. In the 2015 Proceedings, the 2015 Claimants claimed damages arising as a result of the alleged fraud as well as declarations relating to their beneficial ownership of the funds invested in the LLPs and their right to trace into property held by the defendants to those proceedings.
13. The 2015 Proceedings were delayed as a result of the first three defendants (Mr Savill and his two colleagues) being subject to a criminal prosecution and ultimately being convicted of conspiracy to cheat the public revenue in May 2016. This meant that particulars of claim were not served until early 2017.
14. In June 2017, the 2015 Claimants made an application to (amongst other things) join additional corporate entities and certain individuals (including Mrs Savill) as defendants to the 2015 Proceedings and to amend their particulars of claim.
15. In July 2017, the 2015 Claimants applied for a worldwide freezing order against (amongst others) Mrs Savill in order to prevent her dealing with the London property.
16. In February 2018, the 2015 Claimants applied for default judgment against the original seven defendants to the 2015 Proceedings on the basis that no defence had been filed.
17. Shortly before the hearing of these three applications in March 2018, the 2015 Claimants agreed to withdraw their application to join Mrs Savill as a defendant and for the grant of a worldwide freezing order against her. This was confirmed by a consent order approved by the Judge under which Mrs Savill gave certain undertakings and the Claimants agreed that:

“In any future proceedings [Mrs Savill] shall be permitted to raise any argument in those future proceedings that she could have raised in the current proceedings had she been joined to the current proceedings”.

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18. Mrs Savill and her counsel were however present at the hearing in March 2018 although took no part in the proceedings.
19. In his 2018 Judgment, Butcher J approved the joinder of the new defendants and the amendments to the particulars of claim. It is worth noting that the amended particulars of claim sought declarations against all of the proposed new defendants relating to the beneficial ownership of the sums invested by the 2015 Claimants and their ability to trace into property held by each of the new defendants which represents the traceable proceeds of those funds.
20. The 2018 Judgment also gave default judgment against the original seven defendants. As far as the proprietary claims were concerned, the terms of the 2018 Order made by Butcher J were as follows:

“IT IS DECLARED THAT:

- (a) Each of the Claimants was induced to invest into the Schemes (as defined in the Particulars of Claim dated 10 February 2017) by reason of the fraudulent misrepresentation of one or more of the Defendants.
- (b) Each of the Claimants has or retains a beneficial interest in the monies paid to one or more of the Fourth to Seventh Defendants during the commission of the Schemes as described in the Particulars of Claim, and in the amounts as set out in Annex A to the Particulars of Claim.
- (c) The Claimants are entitled to trace into property in the First to Seventh Defendants’ hands which represents monies invested into the Schemes and subsequently paid away and the traceable proceeds thereof.”

The issues for consideration

21. As set out above, the preliminary issue which I have to determine is whether the declarations in the 2018 Order are sufficient to allow the Claimants to bring a tracing/following claim against Mrs Savill in respect of the London property owned by her or whether the Claimants need to re-plead and prove the facts and matters relied on by them in obtaining those declarations.
22. The Claimants put forward two reasons why the declarations contained in the 2018 Order are sufficient:
 - (a) The 2018 Judgment is a judgment in rem and so binds the whole world.
 - (a) Even if the 2018 Judgment is not a judgment in rem, the effects and consequences of the declarations contained in the 2018 Order continue to have effect unless and until they are challenged by someone who has

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standing to do so by way of an application as part of the 2015 Proceedings to set aside the relevant part of the 2018 Judgment/Order.

23. I shall deal first with the effects and consequences of the 2018 Judgment/Order on the basis that these are not decisions in rem. I shall then go on to consider whether the 2018 Judgment/Order were in fact decisions in rem.

The effect and consequences of the 2018 Judgment/Order

24. Mr Miall, on behalf of the Claimants, accepts that, as she was not a party to the 2015 Proceedings, Mrs Savill is not bound by the 2018 Judgment/Order in the sense that there is no estoppel “per rem judicatam” preventing her from challenging the conclusions reached by the judge in those proceedings. However, he says that, in the absence of such a challenge, this does not mean that Mrs Savill can simply ignore the legal effects and consequences of the 2018 Judgment/Order. He stresses the need to distinguish between whether a judgment is binding on someone who is not a party to the proceedings and whether a judgment has some legal effect or consequence in relation to a stranger to the proceedings in the absence of any challenge to the judgment.

25. In support of this, Mr Miall referred to Halsbury’s Laws of England Volume 12A (2015), para 1591 which states that:

“Every final judgment is conclusive evidence against all the world of its existence, date and legal consequences.”

26. Phipson on Evidence 19th edition, 43-02 likewise confirms that:

“Judgments being public transactions of a solemn nature are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered.”

27. Whilst Mr Miall agrees that the decision of the Court of Appeal in *Hollington v F. Hewthorn & Company Limited* [1943] 1 K.B. 587 is authority for the proposition that a determination of one court cannot be used as evidence of the relevant fact or matter in proceedings before another court, he points out that the Court of Appeal confirmed at [596-597] that:

“A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue.”

28. Mr Miall also relies heavily on the decision of the House of Lords in *Mulkerrins v PricewaterhouseCoopers* [2003] UKHL 41. In that case, Mrs Mulkerrins was declared bankrupt. She believed that her bankruptcy was caused by PwC’s negligence and so brought an action against them for damages. However, an issue arose as between Mrs Mulkerrins and her trustee in bankruptcy as to whether the

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right of action against PwC had vested in the trustee in bankruptcy or was retained by Mrs Mulkerrins.

29. In a contested hearing in the County Court between Mrs Mulkerrins and the trustee in bankruptcy, the district judge held that the trustee in bankruptcy had no interest in the right of action against PwC. PwC was not given any notice of the proceedings between Mrs Mulkerrins and the trustee in bankruptcy.
30. PwC sought to strike out Mrs Mulkerrins' claim on the basis that it was not bound by the decision of the district judge, that the decision was wrong and that Mrs Mulkerrins therefore had no cause of action against it.
31. The House of Lords unanimously rejected PwC's arguments. Mr Miall drew attention in particular to Lord Millett's reasons at [12]:

“PwC, of course, were not parties to the proceedings in the bankruptcy court. They were not given notice of the proceedings and took no part in them. They are not, therefore, bound by the order of the district judge. But this does not mean that they can simply ignore it or that they are unaffected by it. It means only that they cannot be prejudiced by it. They cannot re-litigate the issue, not because it is res judicata as against them, but because they have no legitimate interest in doing so.”

32. Lord Walker's conclusions at [45] were similar:

“If (as I think) PwC had no right to be heard on the question of entitlement to the right of action, it is irrelevant that PwC was not bound by the district judge's order in such a way as to create an estoppel per rem judicatam.... But as the deputy judge said, the order certainly did bind the trustee in bankruptcy who was the only other possible contender for title to the right of action. The substantial effect of the order was not to assign the right of action, but to declare that it had not been affected by the bankruptcy. From the moment that the right of action arose, it was at all times in the legal and beneficial ownership of Ms Mulkerrins. If the trustee in bankruptcy, as the only possible rival claimant, was bound by the order, its practical effect was not open to challenge by PwC.”

33. Mr Miall submits that, in this case, Mrs Savill is in the same position as PwC. She cannot be prejudiced by the question as to whether the funds invested into the LLPs by the Claimants belong beneficially to the Claimants or the LLPs as she would always have taken the funds used by her to purchase the property subject to any equities which might affect the question as to who has a proprietary interest in those funds. Like PwC, she cannot therefore ignore the effect of the 2018 Order declaring that the Claimants have a beneficial interest in those funds. She is a stranger to the transaction between the Claimants and the LLPs and is not directly affected by the result.

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34. Mr Miall also placed some reliance on the decision of the Court of Appeal in *Behbehani v Al Sahoud* [2019] EWCA Civ 2301. In divorce proceedings in 2008, Mr Behbehani was ordered to pay his wife a lump sum. In her judgment, the judge had found that Mr Behbehani was the beneficial owner of most of the shares in a Spanish company, Setubal. Almost ten years later, in 2017, an order was made appointing receivers in respect of the shares in Setubal in an attempt to enforce payment of the lump sum due from Mr Behbehani. Mr Al Sahoud, who asserted that he had a beneficial interest in the shares, applied to set the receivership order aside. One of his grounds for doing so was that, as he was not a party to the proceedings in 2008, he was not bound by the court's determination that the shares were beneficially owned by the husband.
35. The Court of Appeal upheld the receivership order saying at [80] that:
- “unless and until it is established that the basis on which the court awarded the lump sum to the wife in 2008 – that the husband is the beneficial owner of Setubal 97 – was incorrect, the court is entitled, indeed obliged, to do what it fairly can to assist the wife to enforce the order, provided the rights of third parties not bound by the order are respected. In order to be respected, however, those rights must be established. A third party cannot expect to receive the protection of the court if not prepared for those rights to be scrutinised.”
36. Although Mr Miall accepts that the decision was made in a factually different context to the current proceedings, he submits that the decision demonstrates that even though a judgment may not be binding on a third party, that does not mean that it has no legal effect until such time as it is successfully challenged.
37. That a judgment may have an effect on a third party even though it is not binding on that person is, says Mr Miall, confirmed by the existence of CPR Rule 40.9. This allows a person who is not a party to proceedings but who is directly affected by a judgment or order to apply to have the judgment or order set aside or varied.
38. Mr Miall argues that if it were right that a judgment can never have any effect on a third party, CPR Rule 40.9 would be unnecessary. CPR Rule 40.9, he says, also ensures that there is no procedural unfairness where a third party would otherwise be affected by a judgment or order as it gives them the ability to attempt to have the order set aside or varied.
39. Mr Mather, on behalf of Mrs Savill, submits that, as she was not a party to the 2015 Proceedings, she is entitled to require the Claimants to prove that they have a beneficial interest in the funds invested in the LLPs and that, in accordance with longstanding and established principles, they are not entitled to refer to the 2018 Judgment/Order as evidence of that fact.
40. Mr Mather accepts that a judgment is conclusive evidence of its legal effect but argues that all this means is that the 2018 Order is evidence only that a declaration in relation to the Claimants' beneficial interest in the funds invested in the LLPs was made as against the original defendants to the 2015 Proceedings. It is not conclusive

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evidence that the Claimants in fact have a beneficial interest in those funds as against any other person.

41. That this is correct is, he says, confirmed by the rule (undisputed by Mr Miall) that a person is not prevented from re-litigating a matter decided in previous proceedings unless that person was a party (or privy) to those proceedings.
42. Mr Mather referred to the well-known principle in *Hollington* that a judgment in previous proceedings cannot be produced as evidence in subsequent proceedings of the matters decided in the previous proceedings. This principle, he says, is directly applicable in the current case, as can be seen from the decision of the Privy Council in *Calyon v. Michailaidis* [2009] UKPC 34.
43. *Calyon* was an appeal from the Court of Appeal of Gibraltar. It concerned a dispute as to the ownership of an art collection as between members of the Michailaidis family on the one hand and a Mr Symes on the other. Mr Symes had sold the art collection and the family discovered that part of the proceeds had been deposited with Calyon Bank in Gibraltar. They therefore brought proceedings in Gibraltar against Calyon claiming that Calyon had dishonestly assisted Mr Symes to misappropriate funds which they said were held on trust for them (as a result of the fact that they were the owners of the art collection).
44. Separate proceedings had previously been commenced in Greece between the family and Mr Symes to determine the ownership of the art collection. Shortly after the proceedings in Gibraltar had been started, the court in Greece delivered its judgment agreeing that the art collection belonged to the family and awarding them a sum of money representing the value of the art collection. Although an appeal was initially made against the decision of the Greek court, the appeal was withdrawn. Calyon were not aware of the proceedings in Greece until after the court had given its decision.
45. Following the judgment in the Greek proceedings, the family made an application in the Gibraltar proceedings for summary judgment in the form of a declaration that they were the owners of the art collection on the basis of the determination by the Greek court. It was this application which found its way into the Privy Council.
46. The privy council was clear that, based on the principles explained in *Hollington*, the family could not rely on the decision of the Greek court to prove in the Gibraltar proceedings that they were the owners of the art collection. Indeed, the Privy Council confirmed [at 23] that the position would have been no different had the previous determination been made by the court in Gibraltar:

“Suppose, then, that a judge of the Gibraltar Supreme Court had held, in proceedings between Christo’s heirs and Mr Symes and RSL, that Christo had been the owner of the Collection and that the title to the Collection had passed to his heirs on his death. What effect would such a judgment have as evidence in the present proceedings in which Mrs Michailaidis and the administrators sue Calyon? The answer to be derived from the approach of the law exemplified by the

decision in *Hollington v. F Hewthorn & Co Limited*
[1943] KB 587 is: None”

47. Mr Mather submits that this is precisely the situation in this case. The court has made a declaration (contained in the 2018 Order) that the Claimants have a beneficial interest in the funds invested in the LLPs. However, based on *Calyon*, they cannot rely on that declaration in subsequent proceedings to prove that they do in fact have a beneficial interest in those funds.
48. In further support of this proposition, Mr Mather referred to Grant & Mumford – Civil Fraud (First Edition) at [23-042] where the authors express the view that:
- “...if the defaulter is sued without joining any proprietary claim against the current holders of the property, it will be necessary in any subsequent proceedings advancing the proprietary claim against them to repeat the process of proving the original ‘wrongdoing’, as they will not be bound by the determination reached in the first set of proceedings.”
49. Although the authors do not provide any authority for their statement, Mr Mather submits that *Calyon* provides that authority. Mr Mather further submits that the position is no different in relation to declaratory judgments. In that context, he refers to Zamir & Woolf – The Declaratory Judgment (Fourth Edition) where the authors state at [6-02] that:
- “... a declaration will only bind the parties to the proceedings. If, therefore, someone who should have been joined as a defendant is not joined, there will be a danger of having to bring fresh proceedings in which he is joined, involving the expense and delay simply to re-determine a question already decided in the previous proceedings.”
50. Mr Mather points out that there is a clear rationale for the rule that a non-party should not be bound by findings made in previous proceedings which emerges from the decisions both in *Hollington* and *Calyon*. This is that it would be unjust for a person to be bound by findings which they have had no opportunity to defend.
51. Mr Mather submits that the existence of some separate principle that a judgment has a binding effect in relation to a person who was not a party to the proceedings is inconsistent with the clear principles set out above and is not borne out by the authorities.
52. Looking first at *Mulkerrins*, Mr Mather’s initial submission was that the decision was based on the special status of bankruptcy proceedings and was therefore inapplicable in other contexts although, by the end of the hearing, he did not rely on this distinction. More importantly, he says, *Mulkerrins* cannot be authority for the existence of a wider principle as it would otherwise drive a coach and horses through the principles explained in *Hollington*. Mr Mather makes the point that *Mulkerrins* is not mentioned by Phipson on Evidence in its detailed section on the effect of previous judgments.

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53. Turning to *Behbehani*, the second case relied on by Mr Miall, Mr Mather observes that it was always accepted that Mr Al Sahoud was not bound by the court's finding that the shares were beneficially owned by the husband and was free at any point to show that he was the beneficial owner of the shares. Instead, the case simply showed that Mrs Behbehani could pursue enforcement proceedings against her husband by way of a receivership order which took effect as an injunction against the husband and which had no effect on the title to the property to which it related (see *Masri v Consolidated Contractors UK Ltd* [2008] EWCA Civ 303 at [71]).
54. It was the receivership order, says Mr Mather, and not the determination of beneficial ownership which potentially affected Mr Al Sahoud. What the Court of Appeal decided was that a mere assertion by Mr Al Sahoud that he was the beneficial owner of the shares was insufficient to set aside the receivership order.
55. As far as CPR Rule 40.9 is concerned, Mr Mather accepts that the existence of the rule makes it clear that a person may be affected by a judgment in proceedings to which they were not a party. However he submits that, whilst there may be numerous examples of circumstances where this could be the case (for example a judgment in rem), it is not evidence of a wider principle that a declaration such as the one made in the 2018 Order has effect in relation to third parties unless it is set aside under CPR Rule 40.9.
56. I expressed some surprise at the hearing that the issue in this case does not appear to be one which the courts have previously had to address. The closest they have come to dealing with the point appear to be the decisions of the House of Lords in *Mulkerrins* and that of the Privy Council in *Calyon*.
57. However, *Mulkerrins* was dealing with a rather different situation where the issue was the ownership of the cause of action itself rather than the establishment of some fact which was essential to the claimant's case. Mr Miall distinguishes *Calyon* on the basis that the determination as to the ownership of the art collection was simply one step along a route to the ultimate decision which was an award of damages. There was no separate declaration as to the ownership of the art collection as part of the relief granted by the Greek court. He therefore says that *Calyon* is a perfectly conventional application of the principles explained in *Hollington*.
58. It is however instructive to examine the reasons given in *Hollington* for the principle which was applied in that case and which were developed by the Privy Council in *Calyon*.
59. Lord Goddard in *Hollington* gives two reasons why the findings in previous proceedings cannot be used in evidence in subsequent proceedings. The first is that the previous judgment is simply an opinion, albeit the opinion of a court. He says at [595] that:
- “It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be

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attached to the result. It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. ... So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant.”

60. The second reason given by the Court of Appeal, relying on the previous decision in the *Duchess of Kingston's case* (1776) 2 Sm. L. C., 13 edition, 644, is that it would be unjust for a person to be bound by a decision in proceedings to which they were not a party. Lord Goddard explained at [596-597] that:

“A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the *Duchess of Kingston's case*, ‘it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore... a judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers.’ This is true, not only of convictions, but also of judgments and civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without re-trying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue.”

61. Although *Hollington* was dealing with the question of whether an individual had been negligent and *Calyon* was dealing with the ownership of property, the Privy Council in *Calyon* considered at [27] the reasoning in *Hollington* to be “compelling” saying that:

“Unless a second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision. Which means that the previous decision itself cannot be relied upon.”

62. In its review of the reasons for the principle, the Privy Council went on to consider the conclusions in the Fifteenth Report of the Law Reform Committee (1967, Cmnd

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3391). This report examined the principles set out in the *Duchess of Kingston's case* and referred to in *Hollington*. It resulted in a reversal of the decision in *Hollington* to the extent that a previous conviction became admissible in civil proceedings to prove the conduct in question unless the contrary was proved. In relation to civil proceedings, the Privy Council at [30] reports the Committee as saying the following (at paragraph 38 of the report):

“But we do not think that, where there are two civil actions between different plaintiffs against the same defendant or by the same plaintiff against different defendants which do raise the same issue of fact, the findings of the court should be admissible in the second action. As we have already pointed out, in civil proceedings, the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve upon it in the second.”

63. The Privy Council wholeheartedly endorsed the statement saying at [31]:

“The Committee’s reasoning develops the reasoning in the first of the passages which the Board has quoted from Lord Goddard’s judgment in *Hollington*. Their Lordships find that reasoning compelling. What is more significant, perhaps, is that Parliament must have found the reasoning convincing since the Civil Evidence Act and its Scottish counterpart made no change to this aspect of the law.”

64. It is true that, as Mr Miall has pointed out, the finding of the Greek court as to the ownership of the art collection was simply a finding of fact (albeit a critical one) which led to the ultimate award of damages and was not itself embodied in a declaration of ownership by the Greek court. To that extent, *Calyon* is an example of an orthodox application of the principles described above.

65. However, given the reasons for the existence of the principle, it cannot in my mind make any difference whether the finding in question is simply part of the process by which the court decides whether the relief sought should be granted or whether, as in this case, the finding takes the form of a declaration in favour of the claimants.

66. The Privy Council in *Calyon* did not refer to this distinction. Indeed, in the question which the Privy Council posed at [23] (see [46] above), they asked themselves what the implications would have been had the Gibraltar Supreme Court “held” that the family was the owner of the Collection and what effect “such a judgment” would have as evidence in the present proceedings.

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67. In the *Duchess of Kingston's case*, the Chief Justice when explaining the principle referred at [644-645] to “the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon the facts found”. Again this suggests that there should be no difference between the facts found and the actual relief granted.
68. Hickinbottom J also came to the same conclusion in *R v Hertfordshire County Council* [2010] EWHC 2056 (Admin) saying at [39]:
- “... subject to exceptions not relevant to this claim, a judgment in personam is not even evidence of the truth of either the determination or any findings leading to that determination for or against strangers to the original proceedings (*The Duchess of Kingston's Case* (1776) 2 Sm LC 13th Edition 644; and *Hollington v F Hewthorn & Co Ltd* [1943] KB 587).”
69. I agree with Mr Mather that *Mulkerrins* is not authority for some wider principle that a declaration as to beneficial ownership such as the one in this case has some sort of effect on a person in the position of Mrs Savill unless and until it is positively challenged by her. The reason for this is that *Mulkerrins* was dealing with a very different situation. In the present case, the Claimants must be able to show that they have a proprietary interest in the funds which they invested in the LLPs in order to found the tracing/following claim against Mrs Savill. It is fundamental to their entire claim and it is something which they would normally have to prove in order to make good that claim.
70. On the other hand, in *Mulkerrins*, the question related to the ownership of the cause of action itself. It had nothing to do with the actual claim brought by Mrs Mulkerrins against PwC which related solely to the question as to whether PwC had been negligent.
71. In fact, in *Mulkerrins*, PwC did positively seek to challenge the previous decision as to the ownership of the cause of action. However, they were not allowed to do so. The reason that they were not allowed to do so is because the ownership of the cause of action was not something which concerned them. There was a very indirect effect on PwC in that if the cause of action were owned by the trustee in bankruptcy it might perhaps have been less likely that any action would have been brought against them or that, if it had, they might find it easier to recover their costs if they were successful (see Lord Walker at [42-44]). However, the ownership of the cause of action had no impact on the claim itself. There was therefore no injustice in not allowing PwC to contest the ownership of the cause of action.
72. Mrs Savill is in a completely different position. As Mr Mather submitted, the question as to whether the Claimants have a beneficial interest in the funds invested in the LLPs is of fundamental importance to her. If they do not, their claim will fail. Although, as Mr Miall has pointed out, Mrs Savill had no involvement in the transactions between the Claimants and the defendants to the 2015 Proceedings and has said that she has no knowledge of any matters relating to the alleged fraud, it does not necessarily follow that, having seen the Claimants' pleaded case, there is nothing she could say against that case. In that sense, she is in a similar position to

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the bank in *Calyon* which, it appears, had no involvement in any of the matters relied on by the family to establish their ownership of the art collection.

73. I also agree with Mr Mather that *Behbehani* does not assist Mr Miall. The question as to whether the husband was the beneficial owner of the shares was not, as it is in this case, an essential ingredient of some sort of claim being brought by Mrs Behbehani against Mr Al Sahoud. On the contrary, it was only relied on in the context of the appointment of a receiver in relation to the Setubal shares as part of the enforcement of the judgment Mrs Behbehani had obtained against her husband. To that extent, the determination of beneficial ownership did have an indirect effect on Mr Al Sahoud but it is not the type of effect which Mr Miall argues for in this case, consisting of proof of a fact which is a vital ingredient in a separate claim.
74. I also note that the determination of beneficial ownership in *Behbehani* was simply a finding of fact leading to the award of a lump sum in the divorce proceedings. There was no separate declaration in relation to the husband's beneficial ownership of the shares. It is therefore hard to see how this can be reconciled with the distinction which Mr Miall seeks to draw in the context of the *Calyon* case between a court order containing a declaration as to ownership as opposed to a simple finding as to ownership as part of granting some other relief.
75. It is true that, in *Hollington*, Lord Goddard accepted at [596-597] that:
- “A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue.”
76. However, he then goes on to give an example of a situation where A is held liable to pay a sum of money as damages to C as a result of B's negligence. In an action by A against B, the judgment is conclusive evidence of the amount of damages A has had to pay to C. It is clear from this example that Lord Goddard did not have in mind the consequences of a declaration of ownership and, in particular, whether such a declaration could be relied on in subsequent proceedings against another party. For the reasons set out above, there is in my view no reason to distinguish between a finding as to ownership and a declaration as to ownership.
77. Whilst I accept that there would be no need for CPR Rule 40.9 if a judgment were incapable of having any effect on a third party, it does not follow from this that a judgment which is embodied by a declaration as to ownership can be relied on in subsequent proceedings as proof of that ownership unless the person affected by it applies under CPR Rule 40.9 to set aside the order.
78. As Mr Mather says, one situation where CPR Rule 40.9 may be relevant is in the case of a judgment in rem. However, another situation which it clearly caters for is one where a person who is not a party to proceedings is affected by a judgment or order but there are no other ongoing proceedings which relate to the specific matter and to which that person is a party. *Behbehani* is perhaps an example of this. No proceedings had been brought by or against Mr Al Sahoud. Instead, his remedy was to apply to set aside the receivership order. As it happens, in that case, he could do so because the terms of the order itself envisaged the possibility of an application being made to set the order aside. However, even if the order itself had not contained

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such a provision, Mr Al Sahoud could have applied under rule 40.9 for the order to be set aside.

79. This is however very far from indicating that a judgment or order can be relied on in subsequent proceedings against a third party as conclusive proof of the matter to which the judgment or order relates.
80. On a proper understanding of the principle derived from the *Duchess of Kingston's case* and further explained in *Hollington* and in *Calyon*, no distinction should be drawn between the situation where a fact or matter is determined as part of the court's process of reasoning leading to the grant (or refusal) of some other form of relief and a situation where the determination of the fact or matter itself forms part of a declaration comprised in the relief granted. Given the reasons for the existence of the principle, it would make no sense for the ability of a claimant to rely on the previous judgment to depend on this distinction.
81. This does not of course mean that a judgment or order cannot affect a third party in some way. Clearly it can and, no doubt, will do so in many cases. *Behbehani* demonstrates this. That is however very different to extending the effect of the judgment or order so that it amounts to proof of a fact which is fundamental to a claim against somebody who was not a party to the previous proceedings.
82. It is true that Mrs Savill will have taken the monies used to purchase her property subject to any equities affecting those funds. She is however entitled to require the Claimants to prove each element of their claim rather than relying on a declaration made in proceedings to which she was not a party.
83. As the Claimants are unsuccessful on this first point, I now need to consider whether the 2018 Judgment/Order was a judgment in rem so that the declaration as to the Claimants' beneficial interest in the funds invested in the LLPs is binding against all the world.

Was the 2018 Judgment/Order a judgment in rem?

84. I was referred to a number of definitions or descriptions of a judgment in rem. Halsbury's (Vol 12A (2015) at 1597) describes it as:

“The judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. Apart from the application of the term to persons, it must affect the subject matter of the proceedings in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer.”

85. As is well-known, the key distinction between a judgment in personam and a judgment in rem is that a judgment in personam binds only the parties to the proceedings whereas a judgment in rem binds the whole world.
86. In the decision of the Privy Council in *Pattni v. Ali* [2007] 2 A.C. 85, Lord Mance stated at [21] that:

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“A judgment in rem... is thus a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between the parties or their privies in the litigation before it).”

87. In order for a judgment to take effect in rem, it is of course necessary that the court making the judgment must have jurisdiction to make a judgment in rem. Hickinbottom J confirmed in *Hertfordshire County Council* at [41] that the High Court has inherent power to make a judgment a rem.

88. There was some discussion at the hearing as to whether a declaration of ownership could take effect in rem. Mr Mather referred to the judgment of the Privy Council in *Pattni* where Lord Mance stated at [23] that:

“The fact that a judicial determination determines or relates to the existence of property rights between parties does not in itself mean that it is in rem.”

89. This does not however go as far as to say that a declaration as to ownership cannot take effect in rem and I did not understand Mr Mather to take that position. In my view he was right not to do so. In *Calyon*, the only reason given by the Privy Council [at 20] for the Greek judgment not taking effect in rem was that the property in question was never situated in Greece. There was no suggestion that there might be a more fundamental reason why the finding as to ownership of the property could not take effect in rem.

90. Mr Mather does however submit that it would very much be the exception rather than the rule for such a declaration to take effect in rem. In support of this he refers to the comment at [41] of Hickinbottom J in *Hertfordshire County Council* that:

“For obvious reasons, the grant of such jurisdiction is rare: it is a potentially severe jurisdiction, binding everyone without those who might be interested in the issue necessarily being given notice or an opportunity to be heard. Other than in exceptional cases, it would have the clear hallmark of injustice.”

91. Although Mr Mather accepts that this comment was made in the context of a decision as to whether a tribunal had power to make a judgment in rem (which it did not), he submits that the same principles must apply to the exercise by the High Court of its inherent jurisdiction. He points out that Hickinbottom J went on at [51] to say that:

“Claims before the courts generally involve the rights and obligations of those – and only those, privy to the proceedings. It is usually contrary to the interests of justice to determine rights and obligations of those who are not parties, and who may not have been given any notice or opportunity to make submissions on the issues.”

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92. In illustrating the narrowness of the exception for judgements in rem, Mr Mather also draws attention to the fact that a declaration as to ownership does not fall within any of the examples of the established categories of judgments thought to operate in rem set out in Phipson on Evidence (19th edition) paragraph 43-14 and 43-25.
93. Another factor put forward by Mr Mather as indicating that it would be unusual for a declaration to take effect in rem is the principle that, if possible, all those who might be affected by the declaration should be before the court or will have their arguments put before the court (see Zamir & Woolf - The Declaratory Judgement, paragraphs 6-01, 6-02 and *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387 at [120(6)]).
94. Mr Mather makes one further objection to a declaration as to beneficial interest taking effect in rem which is that, as the Earl of Selborne LC held in *Ewing v Orr Ewing* (1883) 9 App Cas 34 at [40-41]:
- “The courts of equity in England are, and always have been, courts of conscience, operating in personam and not in rem.”
95. However, as Mr Miall points out, a declaration is not a form of equitable relief but is based on the statute (see Snell’s Equity (34th Edition) paragraph 14-008 and *Chapman v Michaelson* [1908] Ch 238 at [241-242]). In addition, the Supreme Court confirmed in *Akers v Samba Financial Group* [2017] UKSC 6 at [82] that an equitable interest in property is a proprietary interest in that property.
96. Mr Miall accepts that it is uncommon for a judgment to take effect in rem but submits that, whether or not it does so, is purely a matter of analysis, referring in this context to *Pattni* where the Privy Council confirmed [at 37] that an Order could take effect partly in personam and partly in rem and that:
- “The extent (if any) to which an Order operates in part in rem and in part in personam is a matter of analysis, not severance.”
97. Mr Mather also drew attention to the fact that the judgment in this case was a judgment in default of any defence. He observes that the courts exercise caution in making a declaration on a judgment in default (see *Hayim v Couch* [2009] EWHC 104 (Ch)), that any judgment estoppel will be construed narrowly where a judgment was obtained in default (see *New Brunswick Railway Company v British and French Trust Corporation Limited* [1939] AC 1) and that, as a matter of general principle, anybody affected by a declaration should be before the court (see *Rolls Royce and London Passenger Transport Board v Moscrop* [1942] A.C. 332 at [345]). He therefore submits that the court should therefore be very slow to find that a judgment in default is a judgment in rem which binds the whole world.
98. Mr Miall’s response to this is that these are factors which the judge will no doubt have taken into account in deciding whether or not to grant the declaratory relief in the first place. The question as to whether the judgment takes effect in rem is a matter of analysis and nothing else.

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99. In reality, there is little difference between the parties as to the principles to be applied in determining whether the 2018 Order takes effect in rem.
100. Both parties ultimately accepted that a declaration as to be beneficial ownership is capable of taking effect in rem and that whether it does so is to be ascertained by an analysis of the judgment or order in question. They also agree that it is uncommon for a judgment to take effect in rem given the potential for injustice in that the judgment will bind the whole world. In my view, these principles are clear from the authorities to which I have been referred. The real difference between the parties is in the application of these principles to the 2018 Judgment/Order.
101. Mr Miall refers to both the terms of the 2018 Judgment and the 2018 Order as well as the transcript of the hearing before Butcher J on 27 March 2018 in support of his submission that the declaration contained in the 2018 Order that the Claimants had a beneficial interest in the funds invested in the LLPs takes effect in rem. Taken together he says they make it clear that the 2018 Order was intended to enable the Claimants to make proprietary claims against people who were not parties to the 2015 Proceedings. By way of example, Mr Miall refers to the following parts of the 2018 Judgment/Order:
- (a) The third declaration in the 2018 Order refers not only to property in the hands of the original seven defendants but more generally to the “traceable proceeds” of the monies invested in the schemes and subsequently paid away.
- (b) At [24] of the Judgment, the Judge observed that:

“The Claimants also say that significant sums of money have been removed from the schemes and paid away to various persons or entities for no reason obviously connected to film development and pre-production and for which there is no other obvious justification. In relation to payments and transactions in favour of the Respondents, Mr Peun has given an extensive account of the information presently available to the applicants. At Annex G to the existing Particulars of Claim and the draft amended Particulars of Claim, there is a summary of particular payments made to various of the Respondents and other parties.”

This, says Mr Miall, makes it clear that the Judge had in mind the fact that payments had been made not only to the original seven defendants to the 2015 Proceedings but also to “other parties” as well as to the Respondents to the applications under consideration.

- (c) At [58] of the Judgment, the Judge stated:

“I consider that the declaratory relief sought in respect of their asserted equitable rights is necessary in order to allow the Claimants to trace into property in the hands of the Defendants or which represents the Claimants’ property or proceeds. Without a declaration, the Claimants

could not pursue proprietary relief. Therefore, it seems to me a declaration is needed in order to do the Claimants the fullest justice to which they are, on their unopposed case, entitled.”

Mr Miall suggests that the reference not only to “property in the hands of the Defendants” but also to property “which represents the Claimants’ property or proceeds” makes it clear that the Judge was expecting the declarations which he made to form the basis of a claim for proprietary relief against whoever might hold such property or proceeds and not just the seven defendants to the 2015 Proceedings against whom judgment was being given.

(d) The Judge went on to say at [59] that:

“The nature of the declarations sought is such that they do not seek to specify particular property into which the Claimants are entitled to trace. The question of whether there is property into which the Claimants can trace and, if so what it is, remains at large.”

This, says Mr Miall, demonstrates that the Judge was well aware that there was a second stage to the process in which the Claimants would have to identify the property into which they were entitled to trace and deal with any other possible defences to a tracing claim and that, as a result of this, there would be no prejudice to third parties in making declarations which operated in rem and which would therefore be binding on those third parties.

102. Mr Miall also referred to various points in the transcript of the proceedings. I will not set these out in full, but they show that there was discussion of:
- (a) the fact that the Claimants intended to make a proprietary claim against Mrs Savill in relation to the London property held by her;
 - (b) the lack of any prejudice to third parties in making the declarations sought given the defences which would be available to a third party as part of the second stage to any tracing claim (for example a claim that the holder of the property was a bona fide purchaser for value – “equity’s darling”).
103. Mr Miall therefore submits that the Judge was well aware of the intention to make tracing claims against people other than the original seven defendants against whom the default judgment was obtained, including in particular Mrs Savill and that the Judge had satisfied himself that, in making the declaration, there would be no prejudice to third parties given the need to prove all other elements of any tracing/following claim and that, on this basis, it is clear that the declarations were intended to bind the whole world and therefore take effect in rem.
104. Mr Mather, however, points out that there is no discussion in the transcript of the proceedings or the 2018 Judgment as to whether the judgment should take effect in rem and, accordingly, no analysis or consideration as to whether, in the circumstances, a declaration which takes effect in rem would be appropriate.

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105. Looking at the procedural context of the declarations, Mr Mather notes that the default judgment was only given against the original seven defendants to the 2015 Proceedings, that those defendants were the only respondents to the application for the default judgment and that, until the 2018 Judgment/Order (which also dealt with the joinder of further defendants), those original seven defendants were the only defendants to the 2015 Proceedings. In addition, they had failed to defend the proceedings.
106. Bearing this in mind, Mr Mather submits that it is perfectly natural for the declarations to take effect only as against the original seven defendants to the 2015 Proceedings so as to enable tracing/following claims to be made against those defendants. In the context of paragraph 58 of the 2018 Judgment, Mr Mather argues that an order which enabled the Claimants to make proprietary claims against the original seven defendants is all that was needed “to do the Claimants the fullest justice to which they are, on their unopposed case, entitled”.
107. Whilst Mr Mather accepts that the Judge knew that there was a potential for tracing/following claims to be made against other parties, he argues that this does not mean that the Judge intended to address any aspect of those claims in the 2018 Order. That this is so, he suggests, is supported by the Judge’s comments in paragraph 58 of the 2018 Judgment where he refers to the continued non-participation of the original seven defendants justifying the making of the declarations at that time. This, says Mr Mather, suggests that the declarations were intended to be limited in their effect to those seven defendants and not to the other parties who he had just agreed should be joined (or indeed to any third parties).
108. Further support for this can, says Mr Mather, be drawn from the fact that the 2015 Claimants sought similar declarations as to their beneficial interest in the funds invested by them in the LLPs as against the new defendants in the amended Particulars of Claim. Mr Mather asks why they would have sought this relief (and indeed why the Judge would have allowed them to seek it) had anybody thought that the declarations in the 2018 Order took effect in rem.
109. All of this, submits Mr Mather, is borne out by the terms of the 2018 Order itself. Paragraph 3 reads as follows:
- “The Claimants are entitled to trace into property in the First to Seventh Defendants’ hands which represents moneys invested into the Schemes and subsequently paid away and the traceable proceeds thereof.”
110. It is clear from this, according to Mr Mather, that any tracing claim which would be made as a result of the declarations contained in the 2018 Order was limited to claims against the original seven defendants.
111. Finally, given that the 2018 Judgment was in default of any defence, Mr Mather submits that, by analogy with the authorities in relation to judgment estoppel (estoppel per rem judicatam), it should be interpreted narrowly (see *Brunswick* at [21] and *Goldcrest Distributions v McCole* [2016] EWHC 1571 (Ch) at [85]).

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112. Despite the submissions made by Mr Miall, I am very far from being satisfied that the 2018 Judgment/Order take effect in rem.
113. As Mr Mather has pointed out, it would be a significant step to make a declaration which is binding on the whole world with the potential for injustice referred to by Hickinbottom J in *Hertfordshire County Council*, particularly where the declaration is made in default of any defence. It seems to me that it would be a very rare case indeed that such a declaration would be appropriate and I would expect the relevant judgment or order to make it absolutely clear either expressly or by inference that it took effect in rem.
114. Although Butcher J clearly was aware of the potential for a tracing/following claim against Mrs Savill (and possibly also against other people who were not parties to the 2015 Proceedings) and, although he considered whether there could be prejudice to such persons before making the declarations sought (as he was bound to do – see *Hayim* [at 18(iii)] and *Goldcrest* [at 43]), it does not follow that the declarations take effect in rem.

In the context of joining the additional defendants as parties and amending the Particulars of Claim, Butcher J specifically refers [at 50] to the 2015 Claimants' intention to bring proprietary claims against those additional defendants. As Mr Mather has pointed out, the amendments to the Particulars of Claim sought relief which included declarations in exactly the same form as those made against the original seven defendants. Mr Miall's explanation for this is that the amended Particulars of Claim were produced in July 2017, long before the application for summary judgment against the first seven defendants had been made. However, it is apparent that the amended Particulars of Claim were further amended after that application had been made (for example to remove Mrs Savill as one of the new defendants) and yet there was no change to the relief claimed against the new defendants the 2015 Claimants sought to join. This provides strong evidence that the 2018 Order was not intended to take effect in rem.

115. The reference to property “which represents the Claimants' property or proceeds” in paragraph 58 of the 2018 Judgment cannot, in my view, be taken as compelling evidence that the judgment was to take effect in rem. The more likely explanation is that this was a loose use of language, particularly when set against the actual terms of paragraph 3 of the 2018 Order, which is clearly limited to property in the hands of the original seven defendants. The reference to “the traceable proceeds thereof” in paragraph 3 of the 2018 Order does not, as I read that paragraph, refer to property held by anybody other than the original seven defendants. Instead, it refers to the traceable proceeds of the funds invested in the LLPs which may now be represented by property in the hands of any of the first seven defendants.
116. Given the limited terms of paragraph 3 of the 2018 Order, it cannot be the case that paragraph 2 of that order binds the whole world.
117. My conclusion therefore is that the 2018 Judgment/Order do not take effect in rem and cannot therefore be relied on by the Claimants as against Mrs Savill to establish their beneficial interest in the funds invested by them in the LLPs.

Conclusion

118. As will be apparent from what I have said, my answer to the preliminary issue is that the declaratory judgments obtained by the Claimants in Claim CL-2015-000136 do not have such legal effect so as to allow the Claimants to found their proprietary claim against Mrs Savill in relation to their alleged beneficial interest in the property owned by her without re-pleading and proving the facts or matters relied upon by them in order to obtain those declaratory judgments.