
**OUTER HOUSE, COURT OF SESSION**

**[2020] CSOH 101**

**A240/18**

OPINION OF LORD ARTHURSON

In the cause

THE JOINT BANKRUPTCY TRUSTEES OF GREGORY HUGH COLIN KING

Pursuers

against

HUGH COLIN GODFREY STANLEY KING

Defender

**Pursuers: C Sandison QC; Dentons UK and Middle East LLP Solicitors**
**Defender: D Thomson QC, N Tosh; MacRoberts LLP**

16 December 2020

**Introduction and pleadings**

[1] The pursuers in this action seek, firstly, declarator that the issued shares in Randin S.A ("Randin") are held by the defender on constructive trust for them and, secondly, payment by the defender of the sum of £6 million with interest. The pursuers are the Joint Bankruptcy Trustees of Gregory Hugh Colin King ("Mr King").

[2] The defender is the father of Mr King. The framework of facts advanced on record by the pursuers can be summarised as follows. The pursuers are the assignees of Heather Capital Limited (in liquidation) ("Heather"). The right to vindicate certain rights enjoyed by Harvest Finance Limited (in liquidation) ("HFL") in respect of the defender is further vested

in the pursuers. HFL was formerly known as Mathon plc and then Mathon Limited ("Mathon"). Mathon was a company related to Heather which carried on the business of providing bridging finance secured over heritable property by lending money advanced to it for that purpose by Heather. Mr King was a director of Mathon from 1 May 2007 until 20 July 2007 and controlled its activities at all material times. On 4 April 2008 Mr King caused Mathon to transfer the sum of £12 million held by it to an account controlled by a Manchester-based law firm, which firm transferred the sum received by it from Mathon to a Glasgow law firm on or around 22 April 2008. The pursuers have thereafter on record set out a continuing narrative in respect of the flow of certain funds, amounting to £6 million, to a Spanish law firm ("DBT"), which averments make reference to the purchase of a property in Marbella, Spain, and to the signing of a purchase deed on 30 April 2008. The pursuers thereafter aver that the Glasgow firm exhibited a Deed of Gift bearing to have been executed by Mr King on 30 April 2008 and bearing to gift the sum of £6 million from him to the defender and further aver that the defender had no good reason to suppose (because none existed) that Mr King was genuinely making him a gift of £6 million, and that he did not receive that sum in good faith.

[3] The pursuers' pleadings continue with the averments that the monies transferred from the Glasgow firm to DBT were used to purchase the property in Marbella; that title thereto is held by a Spanish registered company, La Zagaleta Parcella 25 SLU ("LZP"); and that the sole shareholder in LZP is a Uruguayan-registered company, Randin, the defender being the sole shareholder in Randin. The pursuers thereafter assert by way of averment that:

> "The defender is therefore in control of Randin and, thus, LZP. The defender's shares in Randin were acquired as part of a unitary scheme to secure for him the beneficial (but not apparent) ownership of the Property acquired with the funds

> taken in breach of fiduciary duty from Mathon by Mr King, and no separate substantive consideration was paid by him for their acquisition. He, his wife and other members of his family have since 2008 occupied the property from time to time as a holiday home."

[4] On the basis of these asserted collective factual averments, the pursuers' case against the defender on record is thereafter put in Articles 11 and 12 of Condescendence as follows:

> "The sum of £6 million claimed to have been gifted by Mr King to the defender was not Mr King's to give. It was … part of an unlawful diversion of funds by Mr King from Mathon, in breach of the fiduciary duties owed by him to it. No beneficial right of title to the funds made available to him by Mr King in this manner vested in the defender… He held, and holds, those funds and their fruits (including the shares in Randin) as a constructive trustee for the pursuers as assignees of Mathon. With reference to the defender's averments in answer, the defender was the recipient of £6 million belonging to Mathon. That he used that sum to purchase the Property through the mechanism of LZP and Randin does not alter the nature of his liability to account for it to Mathon as a constructive trustee… The exact circumstances in which, and the reason(s) why, the sum of £6 million was transferred by Mr King to the defender are not known and not admitted."

**Submissions for the defender**

[5] Senior counsel for the defender invited me to sustain his eighth plea-in-law in respect of prescription and to pronounce decree of absolvitor, which failing to sustain his second plea-in-law to the relevancy of the pursuers' averments and to dismiss the action. He submitted that the pursuers had failed relevantly to aver that the defender was a constructive trustee in respect of the sum of £6 million, there being no relevant averments on record of breach of fiduciary duty by Mr King and no relevant averments of knowledge of any such breach of fiduciary duty on the part of the defender. Senior counsel further submitted that, even if the defender was otherwise liable to account to the pursuers in the sum of £6 million received by him, any obligation which he had to account to them in respect of that sum was an obligation to redress unjustified enrichment, which obligation

had been extinguished by application of short negative prescription in terms of section 6 of the Prescription and Limitation (Scotland) Act 1973.

[6] Addressing the first chapter of his submissions, namely the relevancy of the pursuers' averments of a constructive trust, senior counsel observed that insofar as the pursuers had offered to prove that the defender had no good reason to suppose that Mr King was genuinely making him a gift of £6 million, that was not the same as offering to prove that the defender knew or ought to have known of any breach of fiduciary duty. Although the pursuers had averred that the sum had not been received by the defender in good faith, there were no averments of primary fact on record to support such an assertion. Senior counsel noted that the pursuers in their averments in answer had accepted that they did not know the circumstances in which Mr King had made the claimed gift to the defender. The defender's position was that there was nothing untoward in respect of the gift, which the defender had duly received in good faith. Putting matters shortly, senior counsel contended that there was a distinct absence of any averment pertaining to knowledge or breach of fiduciary duty by Mr King set out on record. The reference to the defender's shares in Randin having been acquired as part of a unitary scheme were not accompanied by any offer to prove that the defender ought to have known of this purported scheme and of any breach of fiduciary duty. The pursuers had not explained what fiduciary duties were owed by Mr King at the date of the relevant transfer of funds in April 2008, it being a matter of agreement on record that Mr King was not at that time a director of Mathon.

[7] Turning to the gravamen of the pursuers' case against the defender on record, namely the defender's status as a constructive trustee for the pursuers in their capacity as assignees of Mathon, senior counsel argued that it was unclear why the contention on the

part of the pursuers was that it was the defender, rather than LZP, who had become a constructive trustee for Mathon. It was further unclear why the pursuers had asserted that the asset said to be subject to the constructive trust was a sum in the hands of the defender, rather than the property in Marbella itself.

[8] Senior counsel for the defender proceeded to develop his submissions under reference to an article by Professor Gretton, "Constructive Trusts" (1997) 1 Edin LR 281, that author in turn therein referring to Wilson and Duncan, *Trusts, Trustees and Executors*, 2nd ed (1995), para 6-61, to the effect that conventional wisdom has it that Scots Law recognises that a constructive trust may arise in two main types of case, namely:

> "(1) Where a person in a fiduciary position gains an advantage by virtue of that position.
>
> (2) Where a person who is a stranger to an existing trust is to his knowledge in possession of property belonging to the trust."

Senior counsel submitted that the present case was within the second category of case identified in Professor Gretton's article, the stranger being the equivalent of the defender and the trust relationship being established between Mathon and Mr King. This appeared to be the pursuers' case on record, but, in order to make that case good, the pursuers would require relevant averments (i) that the monies in question had been paid over in breach of a fiduciary obligation of trust, and (ii) that the defender knew about that. In respect of these two essential requirements concerning the creation of a constructive trust the pursuers' averments had failed to achieve the requisite standard.

[9] In what both senior counsel agreed to be the leading case in this area of law, namely *Commonwealth Oil & Gas Co Ltd* v *Baxter* 2010 SC 156, under reference to *dicta* of Lord Nimmo Smith at paragraphs 84 to 87 and paragraph 94 and of Lord President Hamilton at paragraphs 16 and 17, it was plain that the element of knowing receipt was a vital

requirement of any claim to enforce a constructive trust, the relevant requirements being put by Lord Nimmo Smith at paragraph 94 in the following manner:

> "It appears to me to be clear from the authorities quoted above that knowing receipt depends in the first place on the prior existence of an asset which is subject to a trust in favour of a beneficiary. It is the disposal of that asset, in breach of fiduciary duty, and receipt of that asset by the recipient in knowledge of that breach, which together give rise to a constructive trust over that asset in the hands of the recipient."

[10] Senior counsel founded further upon certain *dicta* of Lord Drummond Young in the subsequent authority of *Ted Jacob Engineering Group Incorporated* v *Robert Matthew, Johnson-Marshall and Partners* 2014 SC 579, in particular at paragraphs 98 and 99, which *dicta* refer back in turn to those of the Lord President and Lord Nimmo Smith in *Commonwealth Oil & Gas Co Limited, supra*. Senior counsel observed that there may well be circumstances in which, on the facts averred by the pursuers in the present case, an obligation under unjustified enrichment may arise, but not, he submitted, a claim based on constructive trusteeship. The requirements of the constitution of a constructive trust are quite particular, senior counsel submitted, and in this case these had not been met by the pursuers. Absent an averment of knowledge on the part of the recipient that the sum in question had been received in breach of trust or of fiduciary duty, the claim could not be characterised properly as one under a constructive trust. In any event, the pursuers had failed to set out what fiduciary duties were owed by Mr King, who was not a director at the time of the transfer. In passing senior counsel referred to *dicta* of Lord Hodge in *Macadam* v *Grandison* [2008] CSOH 53 at para 35 for the short proposition that even where trust property is no longer traceable in his or her hands, a person who has been enriched by the consequences of another's breach of trust cannot retain the gratuitous benefit but is liable to reverse the unjustified enrichment.

[11] The second and shorter chapter of the defender's submissions focused upon prescription, proceeding upon the basis that the nature of the remedy sought by the pursuers in this case was restitutionary rather than proprietary and in particular that it was based on an obligation to redress unjustified enrichment. That being the case, the five year short negative prescription would apply and the claim ought properly to be regarded as having been extinguished by prescription: section 6 of the 1973 Act. In schedule 1 of the Act, defining the obligations to which section 6 has application, it is clear from the terms of paragraph 1(b) thereof that the short negative prescription is applicable to any obligation based on a redress of unjustified enrichment, including any obligation of restitution. The short negative prescription is not applicable, however, to any obligation specified in schedule 3 of the Act as an imprescriptible obligation: schedule 1 paragraph 2(h). Senior counsel contended that the only potentially applicable imprescriptible obligation which could be said to apply to the defender in terms of schedule 3 would be that described in (f), namely "any obligation of a third party to make furthcoming to any person entitled thereto any trust property received by the third party otherwise than in good faith and in his possession." Schedule 3(e), relating to certain obligations of a trustee, could not apply, on the basis that a constructive trustee could not be said to be a genuine trustee for these purposes.

[12] In support of that contention senior counsel referred to a Supreme Court decision in respect of certain English limitation provisions, namely *Williams* v *Central Bank of Nigeria* [2014] AC 1189, and in particular to Lord Sumption at 1199E-F. Senior counsel submitted that "constructive trustee" was a shorthand expression for someone who was treated as a trustee, even though he was not a trustee as such. Senior counsel submitted on that basis that in terms of the schedule 3 list of imprescriptible obligations, applying the same

reasoning to the 1973 Act as set out by Lord Sumption in *Williams*, *supra*, a constructive trustee could only thus potentially be caught therein in terms of schedule 3(f). That having been said, senior counsel's position, under reference to the first chapter of his submissions, was that the pursuers' averments did not relevantly engage schedule 3(f), any trust property in that category of imprescriptible obligation requiring to have been received otherwise than in good faith, and there being no relevant averments on record to the effect that the defender was not in good faith. In addition, schedule 3(f) made it clear that any trust property required to be in the possession of the defender, and in the present case the pursuers' pleadings did not set out any averment to the effect that the defender's shares in Randin had been acquired by him using the contested sum of £6 million. If the defender had not used that sum, the Randin shares could not be considered to be trust property, or the fruits thereof. For Schedule 3(f) to be applicable, therefore, the pursuers would require to aver that the defender had acquired the trust property otherwise than in good faith and further that he was still in possession of the trust property, and on both counts the pursuers' averments plainly fell short. Discounting therefore any imprescriptible obligations in schedule 3, one fell back of necessity upon the applicability of the short negative prescription in terms of schedule 1 paragraph 1(b). The transaction complained of in this case having occurred in 2008, and the action itself having been raised in 2018, any putative obligation to make restitution had duly been extinguished by the operation of prescription in terms of section 6 of the Act.

**Submissions for the pursuers**

[13] Senior counsel for the pursuers proposed that further procedure take the form of a proof before answer, submitting that the applicable law was uncertain in a high degree and

that proper resolution of the cause would be likely to be a fact-sensitive matter and a task best undertaken on established facts after proof.

[14] The pursuers' case in outline was a simple one, senior counsel submitted, and could be stated succinctly as follows. Mr King, the son of the defender, in breach of fiduciary duty, diverted £12 million from a company which he controlled, Mathon, whose assignees the pursuers are. For no consideration (and it was of note that the defender accepted that there was a gift in this case), Mr King transferred £12 million to the defender and in turn the defender used part thereof, through Randin and LZP, to buy a villa in Marbella. In this action the pursuers sought recovery of the value of the sum extracted, contending that the defender presently holds that value. The nub of the pursuers' case was that the £6 million in issue had been part of an unlawful diversion of funds by Mr King from Mathon; that the defender held and holds the funds and fruit thereof, including the shares in Randin, as a constructive trustee for the pursuers as assignees of Mathon; and that the contested sum, or its surrogate, vests with them. In short, this was a proprietary claim, the defender having refused to make restitution to the pursuers in respect of the value of the relevant funds.

[15] While senior counsel was not at this stage prepared to jettison his averments of lack of good faith, maintaining that an inference thereof could be properly drawn after probation, for the purposes of the debate on the defender's preliminary pleas the pursuers proposed to rely upon their position, accepted by the defender, that the relevant money was received by the defender gratuitously. This position was sufficient for the pursuers to pass the stage of debate and to enter the stage of enquiry. The pursuers sought declarator that the shares in Randin were held by the defender in constructive trust for the pursuers, and insofar as LZP owned the house in Marbella, Randin owned LZP and the shares in Randin were owned by the defender, it was clear that the ultimate reservoir of the funds lay in the Randin shares.

The pursuers' case turned on Mr King having acted in breach of fiduciary duty by abstracting funds in Mathon, and the pursuers accepted for the purposes of debate that they required to show that this breach of fiduciary duty by Mr King had affected the defender in some way. Senior counsel for the pursuers emphasised that the pursuers did not seek at this stage to make a "knowing receipt" case, but that their case for the purposes of the discussion of their pleadings at debate was that the transfer was gratuitous. Senior counsel referred to Menzies, *The Law of Scotland Affecting Trustees* (2nd ed, 1913), para 1271, as it was cited by the Lord President in *Commonwealth Oil & Gas Co Ltd*, *supra*, at paragraph 16, in the following passage dealing with the requisites of liability for knowing receipt:

> "It is, however, clear that its foundation lies in the law of trusts, under which a stranger to a trust may in certain circumstances become liable to the trustees (or the beneficiaries) in respect of trust property. Menzies, *Trustees* (para 1271) in a section headed 'Following Trust Estate' identifies the second situation where a constructive trust may arise as 'where funds affected with a trust come into the hands of another than the beneficiary, either gratuitously or with knowledge of a breach of trust, the transferee is a constructive trustee'."

[16] On this authority senior counsel submitted that it was plain that a constructive trust can come into existence either gratuitously or where there is knowledge of a breach of trust, and in each the transferee was properly to be regarded as a constructive trustee. The same passage in Menzies, *Trustees*, had been cited by Lord Nimmo Smith in the same case at paragraph 85. From these *dicta* in this leading authority there was no suggestion that knowledge was an absolute prerequisite for the creation of a constructive trust. Senior counsel submitted that in the present case all that the pursuers required to establish was gratuitous receipt, and it was of note that this was not disputed by the defender. The pursuers accordingly contended that their case was one of the gratuitous transfer of trust funds taken in breach of fiduciary duties, and that, while there were indeed averments concerning lack of good faith in the pursuers' pleadings, these averments were not required

for the purposes of surviving the challenge advanced at debate on behalf of the defender. These averments may in due course allow consideration after enquiry of matters of bad faith and knowledge, but it could not be said for the purposes of the present discussion of the pleadings that the pursuers' case was bound to fail.

[17] The pursuers were accordingly seeking to assert their title to trace funds abstracted from them, and their claim could properly be regarded as a proprietary one. Senior counsel submitted that where assets abstracted in breach of trust, in this case from Mathon, could be traced, this amounted to a proprietary claim. Senior counsel referred at this stage in his submission to *dicta* concerning the availability of a proprietary tracing claim in *Style Financial Services Ltd* v *Bank of Scotland* 1996 SLT 421 at 425B-F.

[18] Addressing the criticisms advanced on behalf of the defender, senior counsel observed that there was no suggestion in *Commonwealth Oil & Gas Co Ltd*, or in *Ted Jacob Engineering Group Incorporated*, *supra*, that gratuitous receipt was not a case which could come under the umbrella of a constructive trust. While it was accepted by the pursuers that their claim was restitutionary in nature, it was properly more fully characterised as a proprietary restitutionary claim. The concept of gratuitous receipt had also been recognised by Lord Hodge in *Macadam*, *supra*, at paragraph 35, and in *Bank of Scotland* v *MacLeod Paxton Woolard & Co* 1998 SLT 258, *per* Lord Coulsfield at 274D-G, in which latter passage Lord Coulsfield referred to Paget, *Banking* (10th ed) at 231 to 232, for the proposition that the form of liability may be either proprietary or personal.

[19] Senior counsel conceded that the pursuers' case could not get off the ground if there were no averments of breach of fiduciary duty on the part of Mr King. Having said that, his position was that Mr King did not require to be a director in order for Mr King to have been a fiduciary in this sense. The pursuers had averred that Mr King had controlled the

activities of Mathon at all material times. The position of a director was simply an example or subset of a wider category of person able to control or direct the affairs of others and in this case the title or hat that Mr King happened to have or to be wearing at the material time was irrelevant. It could not be said that the pursuers would necessarily fail in their contention that Mr King's intromissions with Mathon were essentially fiduciary in nature. In *Commonwealth Oil & Gas Co Ltd*, the Lord President at paragraph 10 had cited Brooke LJ in *In Plus Group Ltd* v *Pyke* [2002] EWCA Civ 370 at para 75 for his observation that "the facts and circumstances of each case must be carefully examined to see whether a fiduciary relationship exists in relation to the matter of which complaint is made". Senior counsel submitted that the pursuers' averments about Mr King being able to direct Mathon were amply sufficient to entitle them to enquiry on the existence of fiduciary duties on his part.

[20] Turning finally to the topic of prescription, senior counsel made it plain that while the pursuers' remedy was restitutionary in nature, he could not on their behalf accept that such a remedy could not also be proprietary in nature: see *Style Financial Services* and *Bank of Scotland*, *supra*. The present case involved an identifiable fund taken in breach of fiduciary duty in the hands of the defender. On the matter of the location of such a proprietary restitutionary claim within the scope of the 1973 Act, senior counsel made plain that he was not relying on schedule 3(f) for the purposes of the present debate. Electing not to argue the bad faith point at debate, he submitted that it was open to argument that after proof the pursuers' claim could fall to be treated as an imprescriptible obligation in terms of schedule 3(e)(iii), namely any obligation of a trustee to make furthcoming to any person entitled thereto any trust property, or the proceeds of any such property, in the possession of the trustee, or to make good the value of any such property previously received by the trustee and appropriated to his own use.

[21] Addressing the contention advanced for the defender to the effect that in this context a constructive trustee was not a trustee at all, senior counsel submitted that the exercise being embarked upon was to identify such circumstances as the drafter of the 1973 Act had in mind in respect of the position of a trustee in terms of schedule 3(e), and argued that it was unlikely that parliament would have been seeking to exclude constructive trustees from that category. A constructive trust was a real trust, albeit that it was not created by the voluntary acts of those intending to create a trust. In the event that the defender in this case was somehow not a trustee under the Act, he nevertheless properly fell to be treated as one. In this regard senior counsel referred to *Williams*, *supra*, and in particular to the dissenting speech of Lord Mance at paragraphs 156 and 157, submitting on behalf of the pursuers that the Supreme Court in *Williams* was dealing with English law provisions which themselves perhaps ought not to be regarded as matters of settled law. Senior counsel's short submission on prescription was accordingly to the effect that the reference in Schedule 3(e) to "trustee" could not be said to exclude the variety of trustee founded upon in the present case, namely the constructive trustee. In such circumstances it was arguable that the pursuers' case would not therefore be subject to the short negative prescription.

**Discussion and decision**

[22] Having considered the pleadings in the present case and listened with care to the clear and concise submissions of senior counsel at debate, I have concluded that it cannot be said that the pursuers' case must necessarily fail. Further, standing the developing nature of this rather niche area of private law, I find myself inclining to the view that the present case is a paradigm one for the appointment of proof before answer with all parties' pleas-in-law left *extant*, standing the intimate relationship between matters of fact and law potentially

arising. Such a determination would allow a final disposal of the cause to be properly made on a mature consideration of the applicable law once an established set of facts emerges in due course following probation.

[23] The *de quo* of the pursuers' case is based on the gratuitous receipt by the defender of the sum of £6 million belonging to Mathon which he in turn used to purchase a Spanish villa through the mechanism of LZP and Randin and on the consequent proposition that in such circumstances the defender is obliged to account for that sum to the pursuers, as assignees of Mathon, as their constructive trustee. As such, therefore, the pursuers' case is not one of knowing receipt but is instead one of gratuitous receipt, in terms of which no averments of knowledge on the part of the defender of any breach of fiduciary duty by Mr King are required. This alternative route, namely by way of gratuitous receipt, to the creation of a constructive trusteeship is expressly envisaged in Menzies, *Trustees*, *supra*, at para 1271 and by the citation thereof, without demur, of the Lord President and Lord Nimmo Smith in *Commonwealth Gas & Oil Co Ltd* at paragraphs 16 and 85 respectively. The relevant passage in Menzies (para 1271) bears repeating at this juncture: "[W]here funds affected with a trust come into the hand of another than the beneficiary, either gratuitously or with knowledge of a breach of the trust, the transferee is a constructive trustee."

[24] On the basis therefore of the case averred on behalf of the pursuers as so outlined, in order to establish the constructive trusteeship on the part of the defender which they contend for I am satisfied that all that the pursuers require to establish is gratuitous receipt. It is notable that, under a particular explanation of course, the defender in his pleadings accepts that Mr King gifted to him the sum of £6 million. Insofar as the sum sought to be recovered by the pursuers represents a trust fund, it is plain that, following the flow of transfer of that fund as set out with care in the pursuers' pleadings it remains in a very

readily identifiable form in the hands of the defender, being the villa in Marbella purchased by the defender through LZP and Randin. I am further satisfied that the pursuers' claim can potentially be characterised properly as a proprietary tracing claim, albeit one which is restitutionary in its nature, under reference to the passages cited, *supra*, in St*yle Financial Services Ltd* and *Bank of Scotland*.

[25] Turning to the further challenge faced in the relevancy chapter of the defender's contentions at debate, namely whether relevant averments of breach of fiduciary duty by Mr King can be found on record, while the pursuers' pleading in this matter is relatively sparse and amounts in effect to an assertion that Mr King controlled the activities of Mathon at all material times, and indeed that he was not a director of Mathon at the time of the relevant transfer in April 2008, I have nevertheless reached the view that there is a sufficiency pled on this matter by the pursuers to allow the court at this stage to conclude that it cannot be said that their case must necessarily fail by an omission of pleading on the point. The averment of control at all material times is sufficient to merit enquiry into whether a fiduciary relationship existed and indeed into related matters of its scope and scale: see *Commonwealth Oil and Gas Co Ltd*, per the Lord President at para 10 citing Brooke LJ at para 75 in *In Plus Group Ltd*, *supra*. The determination of any fiduciary relationship may require to be a fact-sensitive exercise. Although the pursuers' averments on this issue are somewhat brief, notice of the point has in my view been relevantly stated in the pleadings.

[26] Before leaving the first chapter of the defender's critique of the pursuers' case on record, I wish to deal with the position adopted at debate by senior counsel for the pursuers to the effect that for the purposes of testing the pleadings he proposed to make nothing of his case that the sum was not received in good faith but at the same time did not wish to

jettison this case on the basis that an inference to that effect could be drawn properly on the facts established after proof. Senior counsel for the defender had of course for his part on this point contended that the assertion that the sum had not been received in good faith ought properly to be regarded as a conclusion to be drawn from the establishment of an averred primary fact or set of facts. I see the force in the submissions advanced for the defender on this matter but have concluded, albeit with some hesitation, that the sentence containing the pursuers' averments to that effect need not be excluded from probation. The defender has expressly in his own pleadings accepted that Mr King gifted him the sum of £6 million, albeit under a particular circumstantial explanation. At a pragmatic level the pursuers would not perhaps be expected to know the details averred upon in relation to this matter by the defender. In such circumstances, the pursuers' clear case of gratuitous receipt being sufficient to pass the test of relevancy, in my opinion it would not on balance be necessary or right to exclude the issue of good or bad faith prior to establishment of what could well be a nuanced series of facts after enquiry.

[27] Turning to the shorter but important chapter of the defender's submissions on prescription, on the face of matters an essentially restitutionary claim ought rightly to be captured by the short negative prescription applicable under section 6 of the 1973 Act by virtue of schedule 1 paragraph 1(b). Senior counsel for the pursuers, of course, instead sought to locate his case within the list of imprescriptible obligations set out in schedule 3 of the Act. In considering whether the pursuers' claim on record can potentially be so located in schedule 3, and located in particular in schedule 3(e) as contended for on behalf of the pursuers, I have reached the view that, the pursuers having presented an arguable case that the defender is a constructive trustee on the basis of gratuitous receipt, it cannot be said without enquiry that a constructive trustee is not a trustee for the purposes of schedule 3(e).

I have reached that conclusion notwithstanding the *dicta* referred to by senior counsel for the defender in *Williams*, *supra*. No Scottish authority on the point was placed into the discussion by either senior counsel, and, there being no obvious policy or practical argument against it, I can at this stage see no reason why the reference to trustee in schedule 3(e) must necessarily exclude the variety of trustee featuring in the present case, namely the constructive trustee. It may well be in addition or alternatively in due course arguable that, *esto* the said *dicta* in *Williams* related to the 1980 English limitation provision dealt with therein are indeed to be applied to the scheme set out in the 1973 Act, nevertheless a constructive trustee, even if not strictly a trustee for the purposes of the 1973 Act, should in any event be regarded as a person who falls properly to be treated for such purposes as a trustee, and this approach would give the pursuers another potential route into the protective territory of schedule 3(e).

[28] For all of these reasons I have concluded that the proper disposal in this case is to allow parties a proof before answer with all their averments and pleas standing, having regard to the mixed and complex issues of fact and law arising. I consider that there is a range of possibilities of fact which could arise on the parties' pleadings, and it is further very apparent that the law in this area is one of particular complexity and indeed, on one view, fluidity.

**Disposal**

[29] The court will accordingly allow parties a diet of proof before answer with all averments and pleas standing. Any issues related to expenses are meantime reserved.