



Neutral Citation Number: [2019] EWHC 2496 (Comm)

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/09/2019

Case no: CL-2017-0000759

**Before :**

**MRS JUSTICE COCKERILL DBE**

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**Between :**

<b>SAS INSTITUTE INC.</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>WORLD PROGRAMMING LTD.</b>	<b><u>Defendant</u></b>

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**Ms Monica Carss-Frisk QC and Mr Andrew Scott** (instructed by **Macfarlanes LLP**) for the  
**Claimant**

**Mr Paul Lowenstein QC, Miss Josephine Davies and Mr John Bethell** (instructed by  
**Keystone Law Ltd**) for the **Defendant**

Hearing dates: 31 July 2019  
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**Approved Judgment**

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

## **MRS JUSTICE COCKERILL:**

### **Introduction**

1. This judgment deals with a discrete point which arose in the context of the consequential submissions following on from my judgment in this matter (“the Enforcement Judgment”).
2. In that judgment I determined that a judgment of the US Courts (“the US Liability Judgment”) was not enforceable by this Court, for a variety of reasons. One of these was that it was contrary to the Protection of Trading Interests Act (“PTIA”). Following on from that argument I then determined – the final point in a lengthy judgment - that as a result of the application of the PTIA, World Programming Ltd (“WPL”) had a counterclaim, pursuant to s. 6 of the Act: *“unless there is a payment attributable specifically to one element of the judgment or another – at the time of payment ....”*
3. The nature of that counterclaim is dictated by the PTIA s. 6(3), which states:

“the ... defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party.”

In other words, the Act enables the defendant to recover such part of the foreign judgment as is not compensatory.

4. The focus of this dispute is paragraph 270 of the Enforcement Judgment. That states:

“Nor do I find an answer in SAS’s case that it could as a matter of English Law allocate the payments to the compensatory elements (by reference to Chitty paragraph 21-064) and has done so by its Notice of Partial Satisfaction. Absent another appropriation (e.g. by the debtor at the time of payment) a creditor can as a matter of English law make such an appropriation. However, the point of the argument is that the statute operates as a deemed appropriation unless the payment is not one within the section. Thus, unless the appropriation were made at the time of payment, (which occurred in February and May 2018) so as to make the payment one in respect of the compensatory element only, the statute operates so as to create the entitlement. Even if an appropriation could be made later, it would seem inequitable to permit

it to be made defensively: SAS's Notice came in response to the amendment in September 2018 to plead s. 6."

5. At that time there was only one payment in issue, amounting to a counterclaim of \$2,867,922.67. That was a payment where the alleged appropriation occurred at some point after payment. By the time of the consequential hearing there were others (triggering a claim for at least \$1,668,653.11), with alleged appropriations occurring much closer in time to the payment. I was asked to determine the issue of appropriation in relation to those payments. The factual basis on which this arose was different, in that "*SAS appropriated such further recoveries as it has received to the interest and compensatory damages ... as set out in Notices of Partial Satisfaction filed with the US Court dated 19 February, 1 March, and 1 April 2019.*" The alleged appropriations were on any analysis much closer in time to the payment, but insofar as they depended on the Notices of Partial Satisfaction, they came sometime after the payment.
6. However, it was apparent that further sums would be received by SAS Institute Inc ("SAS") in respect of the US Liability Judgment and that these would give rise to further liabilities under s.6 PTIA. It was also likely that there would be uncertainty about precisely what SAS had been paid and when.
7. It was therefore clear that, depending on the basis upon which I reached a decision on those payments, yet further issues might arise. I accordingly required the parties to serve written submissions "*in relation to current and future relief arising from WPL's counterclaim*", in order that I could make a determination which would prevent further reference(s) to the Court becoming necessary in future cases.
8. As I had anticipated, the issues proved to be not entirely straightforward and detailed submissions were served: 24 pages by WPL and 14 pages by SAS followed by a 12-page reply from WPL. A further oral hearing was sought.
9. The issues therefore arise against a backdrop of what I have already found. The parties were divided on what that was. Both contended that my judgment favoured them. WPL contended that I had by the Enforcement Judgment rejected SAS's case on appropriation. SAS disagreed, contending that my judgment recognised that despite the PTIA it was in principle open to SAS to appropriate any recoveries in respect of the US Judgment to the compensatory damages provided for in the US judgment and that this is what SAS had done.
10. Inevitably on revisiting the judgment the paragraph in question seems imperfectly expressed, looked at through the prism of the issues which now arise. My judgment refers to the time of payment and does not focus specifically on by whom the payment is made, although the authorities which refer to appropriation on payment tend to be those referring to appropriation by the debtor. That approach has, it seems, introduced a regrettable ambiguity. However, as I read the paragraphs to which I have been referred they do reflect my intention: namely to hold that the particular alleged appropriation relied on was not apt to act as an appropriation.

11. I did not by paragraph 270 decide the major point of principle: namely whether an appropriation can arise at all in the context of the PTIA. That much is clear from the disjunction between the first sentence and the second two sentences in the following passage:

"Absent another appropriation (e.g. by the debtor at the time of payment) a creditor can as a matter of English law make such an appropriation.

However, the point of the argument is that the statute operates as a deemed appropriation unless the payment is not one within the section. Thus, unless the appropriation were made at the time of payment, (which occurred in February and May 2018) so as to make the payment one in respect of the compensatory element only, the statute operates so as to create the entitlement."

12. What I therefore decided was that:

- i) Normally appropriation can occur either (a) before payment, by the debtor or (b) after payment, by the creditor;
- ii) Here there was no such appropriation.

13. That left undecided two elements:

- i) Whether an appropriation made at the time of payment could defeat the PTIA. My judgment assumes but does not find this;
- ii) *Quaere* whether an appropriation made defensively could be permitted.

14. This judgment therefore deals with a number of issues relevant to the question of appropriation:

- (1) Whether SAS can never appropriate, because immediately SAS receives payment on account of the US Judgment, the statutory appropriation under s.6 PTIA operates.
- (2) If SAS could appropriate, whether SAS cannot rely on the Notices of Partial Satisfaction filed on 19 February, 1 March, 1 April 2019 and 3 June 2019 or any future purported appropriation because:
  - (a) WPL has/would already have appropriated the relevant sums;
  - (b) SAS's appropriations were (and would be) manifestly defensive; and
  - (c) (as regards the Notices of Partial Satisfaction filed to date) these do not and, where SAS has addressed them, are not even said to, evidence or effect an appropriation at the time of payment.

- (3) Whether interest which has accrued on the US Liability Judgment debt under US law should be apportioned *pro rata* in the same manner as the principal.

### **The effect of the statutory scheme**

15. The backdrop to this point is that I have concluded that any payment received by SAS in respect of the US Liability Judgment at large will automatically *prima facie* fall within the scheme of the statute.
16. One then has to grapple with whether, and if so how, the common law rules as to appropriation operate in that context. Logically, as I have indicated in paragraph 270, if a payment is to be removed from the statutory scheme, this must be done at the latest at the time of payment. It is only in that way that the appropriation precedes the trigger for the statutory scheme, which is when “*an amount on account of the damages has been paid ... to the party in whose favour the judgment was given*”.
17. This may suggest that an appropriation before payment by a debtor, i.e by WPL, could be one which was contrary to the statutory scheme. At the other end of the spectrum, after payment is received by the judgment creditor, the operation of s.6 is triggered by the words of the statute, and no appropriation can be made.
18. That, however, leaves two questions hanging:
  - (1) What is the position as regards an appropriation by a third party on behalf of WPL, or by WPL in respect of a payment to be made by a third party?
  - (2) What is the position as regards an appropriation made by the creditor effectively contemporaneously with the payment – what one might term “appropriation on payment”? (I note here that it is now apparent that such an appropriation could be a defensive one, a point which was not in focus in the Enforcement Judgment.)
19. I will deal with this second question first.

### **Appropriation on payment**

20. The creditor’s “right” to appropriate is, as I noted by reference to Chitty, a contingent one. I have now been referred to more authority on this point. For example, Lord Macnaghten held in *The Mecca* [1897] AC 286, 293:

“When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor.”

21. Thus, it is a right which arises only if the debtor makes no appropriation. Logically this means that it can occur no earlier than payment. WPL argued that

the creditor's 'right' may only be exercised after moneys have been received - by reference to *Thomas v Ken Thomas* [2006] EWCA Civ 1504, [2007] Bus LR 429 [22] and [28] *per* Neuberger LJ. However, I do not see that case as extending quite that far. That was a case concerned with whether a creditor can defeat the debtor's right to appropriation *before* payment; the conclusion being that it cannot and that a debtor has a right to appropriate right up until payment, regardless of the expressed preferences of the creditor.

22. It seems conceptually possible that a contingent appropriation could be made by a creditor; that is one to operate if the debtor made none before payment. That would not impede the debtor's own exercise of his right, but could then operate simultaneously with payment if the debtor made no appropriation.
23. I would therefore consider that, absent a policy preventing appropriation by a creditor in a PTIA case, an appropriation could be made on (i.e. with) payment or contingently before to take effect on payment, which appropriation might be effective against a rule operating after payment.
24. This also brings into focus the question of the *scintilla temporis*. If this approach is correct, and there is a right before but no right after, it follows that the operation of the appropriation rules may turn on just such fractions of time. There may be questions as to when exactly payment is made. There may well be questions, such as those raised by SAS in its submissions, as to the need for a meaningful opportunity to exercise a right and the factors which then come into focus, such as the interplay with "on the ground" arrangements to deal with confidentiality concerns.
25. In this context SAS reminded me of the need for practicality by reference to the dictum of Neuberger LJ (as he then was) in *Thomas v Ken Thomas* at [29] (in the context of appropriation by the debtor):

"... As to practice, the facts of the present case show how impractical it would be if, as the judge appears to have thought, the law required a debtor to appropriate, or communicate his appropriation, at the precise moment the payment is made by the bank, which almost inevitably he will not know."
26. This shows clearly that I should be cautious about adopting an approach which arrives at a result which turns on the question of the precise moment of payment.
27. In the event, that caution harmonises with the fact that I do conclude that the creditor's right to appropriate may be barred by the operation of law, and is so barred in the case of the PTIA.
28. There is not much authority on this point. However, I was referred to *A Smith & Son Ltd v Walker* [1952] 2 QB 319, 327 *per* Somervell LJ, 328 *per* Denning LJ, 328 *per* Romer LJ. That was a case concerning a contract for demolition and construction. The demolition was performed illegally (without the requisite licence). The contractor claimed it had appropriated payments to the demolition

works so as to make a claim for the whole of the lawfully performed part of the works. The (notably eminent) Court of Appeal said without hesitation that this was not permissible.

29. This strikes me as a closely analogous situation. The payment here *prima facie* gives rise to a counterclaim under the PTIA precisely because I have concluded that the payment would be contrary to the PTIA. To permit appropriation would be to defeat that counterclaim in significant part.
30. The basis for the preclusion was alluded to in argument before me at the trial, though it was not explored in any detail; it is an approach which rests on the equity of the situation. *Seymour v Pickett* [1905] 1 KB 715, 727 *per* Stirling LJ, confirms that the creditor is not at liberty to exercise his right of appropriation after “*something has happened which would render it inequitable for [him] ... to do so*”. SAS argued that this case supported its argument because of its result, but I am not persuaded that it does. In that case, on the facts, there was nothing which reached this hurdle, and the conclusion was that the claimant was entitled to perform a very late allocation even during the course of his evidence. But that does not affect the principle. There the irrecoverability of charges for materials under the Dentists’ Act cannot be said to be akin to the policy issues which underpin the PTIA.
31. I was also referred to *Euro Pools plc (in administration) v Royal and Sun Alliance Insurance plc* [2018] EWHC 46 (Comm) where Moulder J at [154] held that it would be inequitable for a claimant to make an appropriation after the commencement of proceedings to a time-barred debt, since this would circumvent the rules on limitation. This seems to me also to be consistent with the approach indicated by the other authorities, and in particular with the broad approach of Stirling LJ in *Seymour v Pickett*.
32. SAS argued – in a new argument which was not in play at the time of the Enforcement Judgment - that the effect of appropriation is not to directly allow the enforcement of multiple damages, because it can appropriate payments only to its compensatory damages claim. However, as WPL contended, this overlooks the fact that the claim under UDTPA is indivisible from the breach of contract and fraud judgments – the same US\$26,376,635 is recoverable under all three awards. Any payment which reduces the breach of contract judgment necessarily also operates as a payment in respect of the UDTPA claim. But in any event, there can be no doubt that the appropriation cuts across the statutory scheme, which is predicated on the default position. It might not in the long term enable a creditor in the position of SAS to avoid the PTIA result, but it certainly would involve a conflicting mechanism.
33. I therefore conclude that any appropriation by SAS is barred as a matter of law as being contrary to the PTIA. There is therefore no question of a creditor’s appropriation taking effect on payment.
34. This conclusion throws into focus the question of whether it is correct that it is permissible for the debtor to appropriate payments other than as provided for by the default rule in law – essentially to waive his rights to a specific appropriation; in a situation where the appropriation is illegal or contrary to a

statutory regime, such as that of the PTIA, and appropriation is not open to the creditor.

35. Obviously at the moment this is not a question I have to decide, since it is not alleged that any of the payments so far were appropriated by this means. One might say that it is inequitable to allow the creditor to take steps which are designed to or have the effect of undercutting the statutory regime, but that there is however nothing inequitable about the debtor taking steps which will have such an effect. However, it might equally be said that such an appropriation could run contrary to the statutory scheme and should logically be equally impermissible.

### **Inequitable/defensive**

36. A very closely related argument was that WPL contended that SAS's alleged appropriations were manifestly defensive and it would be inequitable to permit SAS to rely on these appropriations. SAS did not dispute that the appropriations were defensive; it would probably have been hard to do so. The reality is that SAS's communication of what it claimed were appropriations by the Notices of Partial Satisfaction only began after WPL had brought its s.6 PTIA counterclaim (on 13 September 2018), with the First Notice of Partial Satisfaction being filed in North Carolina on 5 October 2018.
37. I expressed a provisional view in the judgment that a defensive appropriation would fall foul of the inequity line and would not be allowed. I have seen nothing in the more detailed submissions which have now been lodged to persuade me that that initial indication was wrong. The principle appears, on the limited authorities, to be a broad one. Clearly that counterclaim was an event which then made it inequitable for SAS to seek to subvert the statutory scheme by an appropriation.
38. Whether the reason why the inequity rule bites is because of the defensiveness or because of the statutory scheme, or both, might well be a question for another case. I do not need to decide it here. However, I would provisionally take the view that either the statutory scheme or defensiveness alone would suffice to render the appropriation by SAS impermissible.

### **Has WPL appropriated the payments and SAS therefore has no right of appropriation?**

39. It was WPL's contention that it had, in any event, appropriated the relevant payments to the judgment at large, such that the PTIA does bite.
40. WPL referred me to a number of authorities on how appropriation by a debtor can occur. In particular, I was referred to Chitty 33<sup>rd</sup> edn at paragraph 21-062, *Thomas v Ken Thomas* at [19] and *Khandpour v Chambers* [2019] EWCA Civ 570.
41. The question in issue here is a rather different one – whether WPL has expressly and/or by implication intended that all direct or indirect (i.e. obtained from third



parties) payments on account of the US Judgment should be applied to the US Judgment for damages at large and appropriated in accordance with the statutory scheme.

42. There are two types of payment in focus. The first, and likely to be the greater issue going forward, are payments made by customers of WPL – for example, those who were notified of the 5 September Assignment Order made by the US Court<sup>1</sup>. A number of the payments made are payments made by such customers who were notified of that Order, whose natural reading is that it is itself effective to assign such debts to SAS.
43. The second is a payment made on 22 February 2019 from WPL to SAS's US lawyers, as ordered by the US Court, and representing sums which WPL had received from US-based customers invoiced after the First Assignment Order.
44. Although SAS argued that both of these represented sums received on account of its rights against WPL's customers, that seems to be an artificial analysis on the facts. In both cases what is relied on is the Assignment Order; and as I have had cause to ascertain in the course of the injunction hearing, that Order was made pursuant to a rule which permits only the making of a personal order against WPL. It does not therefore grant *in personam* rights against WPL's customers, nor even *in rem* rights over the debts. It might be that other measures might be available which would give an *in personam* right against WPL's customers. However, that is not what is in issue here. Nor, however, at this stage has there been an assignment by WPL to SAS. It may be that if an *in personam* assignment order is made in future that will eventually come to pass, but as matters stand there is no extant assignment; just an order which cannot itself grant rights against any third-party debtors.
45. I am therefore looking at the ability of WPL to appropriate (i) a payment made by itself as a debtor and (ii) payments made by WPL's customers of sums owed to WPL.
46. The first can be briefly dealt with. As SAS tacitly acknowledged at paragraph 5 of its submissions, there can be no objection to this. SAS made clear that the focus of its argument was on "*where SAS has made recoveries from third party debtors*".
47. As for the position of such sums owed by third-party debtors, I am not persuaded that WPL is unable to make an appropriation in respect of such sums. The logic underpinning such a distinction is hard to discern. It would, as WPL noted, mean that a judgment creditor could get round the PTIA regime, or an illegal contract, by proceeding instead against third parties.
48. SAS sought to support its argument by analogies with the position of secured creditors and of appropriation in cases of partially overlapping damages claims. Both of these are rather different legal scenarios; secured creditors have property rights, overlapping damages claims concern two defendants, each of whom has a liability to the claimant.

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<sup>1</sup> See my judgment in the injunction proceedings [2019] EWHC 2481 (Comm)

49. The high-water mark of SAS's case was a reliance on some Canadian authorities. It noted that in *Crescent Petroleum Ltd v Portserv Ltd* (1997) 37 BLR (2d) 118; 1997 CanLII 4402 (BC SC) at [26] the Supreme Court of British Columbia held that a debtor was not entitled to make an appropriation of funds obtained in attachment proceedings from a third party, “*because it did not pay those funds out itself, and they were not within its control.*”
50. However, that authority is not of such weight or obvious relevance that I consider that I should regard it as being persuasive; it is a first instance decision and the passage relied upon is contained in a section which deals with subsidiary issues. It also appears to proceed at least somewhat uncomfortably from the Canadian Supreme Court authority on which it relies. The case is the less persuasive absent anything to similar effect from the courts of this jurisdiction, and in circumstances where the position which would result appears to run contrary to the system of Third Party Debt Orders encapsulated in CPR 72.
51. I can quite see that an appropriation may not be possible by the debtor over something over which it has no power, or ability to deal; but here we are looking at a debt with which (on SAS’s own case as advanced in the US Proceedings) WPL has the ability to deal by assignment.
52. I am therefore persuaded that, subject to an appropriation having been made in fact, WPL is able to appropriate payments by third parties to the judgment at large so as to engage with the PTIA counterclaim.
53. That leaves the question of whether such an appropriation had been made. WPL argues that its intention as to appropriation may be derived from its Amended Counterclaim and/or Rejoinder:
- (1) By its Amended Counterclaim dated 13 September 2018, WPL stated its position that sums paid to SAS were, as to “*one third of all sums paid...on account of the compensatory element of the US Judgment*” and counterclaimed under s.6 PTIA, including in respect of all sums which would in the future be paid to SAS in relation to the US Judgment on the basis that one third of those sums was attributable to the compensatory element (and interest thereon) of the US Judgment.
  - (2) In its Rejoinder WPL reiterated its position on appropriation on 28 September 2018 at paragraph 5.2.
54. SAS contends that this does not meet the test, set out in *The Mecca*, of sufficiently indicating WPL’s intention, in circumstances where appropriation was not in issue and all that was being dealt with was historic sums. SAS pointed to the fact that, when the issue did arise in the US proceedings, it was WPL’s case that neither side could appropriate and said that WPL first sought to make an appropriation only at the hearing, which was too late.
55. In my judgment the language in the pleadings is sufficient to amount to such an appropriation. What matters, as Lord Macnaghten makes clear in *The Mecca*, is the intention. Although the focus in that case is on an appropriation by a creditor not a debtor, there seems no good reason why a different principle should

prevail as regards a debtor. The question is: has the person with a right to appropriate made an election, when one looks at “*his intention expressed or implied or presumed*”. There is no need therefore for an express, focussed appropriation in terms.

56. Looking at the pleadings, although this precise context for appropriation was not in issue at that time, it was very clear what WPL was saying should happen as regards any moneys which SAS acquired in satisfaction of the US Liability Judgment. The fact that appropriation was resisted generally in the US Proceedings is not relevant; there are a myriad of different aspects in play in those proceedings. What matters is that a clear statement was made in these proceedings of what WPL said should be the position if appropriation were possible.

### **SAS’s purported appropriations have been made too late**

57. The final point, which is very much academic in the light of the conclusions I have reached above, is whether, if SAS could appropriate, and if the appropriation did not otherwise fail, the appropriations were “*at the right time*”. WPL says they need to be, and are not, at the time of payment. SAS argues that some realistic context must be given to this.
58. It explains that the situation arises against a background where Notices of Partial Satisfaction were filed shortly after transfer to SAS under a system where funds are received into dedicated trust accounts operated by SAS’s lawyers and transferred to SAS at the end of the month in which the payment is “*properly credited*” as “*good funds*” pursuant to US law requirements.
59. In those circumstances it contends that appropriation coincides with:
- (1) The dates of receipt of recoveries by SAS itself, which are also the dates of allocation as between interest and compensatory damages referred to in the Notices of Partial Satisfaction.
  - (2) Alternatively, if the money is treated as having been received by SAS when it is received by its US lawyers, then appropriation occurs at that point.
  - (3) In the further alternative, appropriation was effected through the Notices.
60. SAS says, even on its tertiary case, that the Notices in focus here were good enough given the constraints of the confidentiality regime and other considerations.
61. The starting point here is that we proceed in the alternate universe – i.e on the basis (contrary to my finding above) that SAS did have a right to appropriate despite the PTIA scheme. On that basis it is not irrelevant to bear in mind the point raised by SAS that the creditor must be allowed a meaningful opportunity to exercise its right to elect, just as the victim of a repudiatory breach of contract is given a period of time to decide whether to accept the repudiation or affirm

the contract: *Stocznia Gdanska SA v Latvian Shipping Co (No.2)* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [87].

62. Again, here the dictum of Neuberger J referred to above as to the importance of practicality, becomes relevant.
63. It then becomes relevant to consider whether a communication of appropriation is needed. SAS says not, by reference to *Capital Home Loans Ltd v Countrywide Surveyors Ltd* [2011] 3 E.G.L.R. 153 and also a Canadian authority to the effect that an uncommunicated book entry can suffice as an appropriation: *Walters v. Meiner* [2004] BCWLD 601; [2004] BCTC 393; 2004 BCSC 393 (CanLII). WPL disputes this proposition saying that the authorities relied on are not truly supportive of the case advanced. It points also to *Waisman v Crown Trust* as providing further support for the argument that it is necessary for the creditor to make his meaning plain.
64. In my judgment WPL's argument is, in essence, to be preferred. The authorities do not appear to support the proposition that an appropriation can be made by some means secret to the recipient. They deal with the distinction between a formal communication of appropriation and a visible, but non-specific, treatment of it – such as its entry in a running account between the parties. The authorities support the proposition that if there is such an account – visible to both parties – an inclusion of a sum in that account can operate as an appropriation and can be sufficient communication for that purpose. However, if the account is a private account, that appropriation would be ineffective unless and until accompanied by some form of communication.
65. This seems to be inherent in the following passages:
- (1) *Waisman v Crown Trust*: if a creditor had “*merely entered in their own books an account ... it would not have amounted to any appropriation by them.*” Later there is also reference to “*making his meaning and intention plain.*”
  - (2) In *Walters v Meiner* at [18] Macaulay J says: “*Although Brenher could have specified the note or notes to which payment ... was to be appropriated it did not do so. Nor was there any evidence from which I could properly infer such an intention.*”
  - (3) Lord Macnaghten in *The Mecca* at p.294 that, “*The presumed intention of the creditor may no doubt be gathered from a statement of account or anything else which indicates an intention one way or the other and is communicated to the debtor.*”
66. This conclusion would also, I note, be consistent with the “reasonable time” authorities, allowing the recipient to communicate by, for example, a monthly running account or *bordereau* which crossed the line, so as to operate as evidence from which intention could be inferred.
67. Accordingly, I conclude that there could be no appropriation prior to a communication of some form to WPL. It was not suggested that there was any

such communication until the Notices were sent. The first such notice was plainly too late. As to the more recent ones, even allowing for time to consider and so forth, I would still have been minded to find that the Notices came too late, given the timeline from payment.

68. I therefore conclude that (1) some form of communication is required, albeit that it need not be express and (2) there was no timely communication for any payment received by SAS and stated in any of the Notices of Partial Satisfaction, with the consequence that - even on SAS's own case - there was not, and cannot have been, any appropriation in the manner for which SAS contends.

### **The treatment of interest on the US Judgment debt**

69. SAS raises a number of points on the Judgments Act element of the interest. The first is that Judgments Act interest only begins to run where the judgment itself quantifies the sum which the judgment debtor owes to the judgment creditor, not where it merely establishes the defendant's liability, by reference to White Book paragraph 16AI.16 and *Thomas v Bunn* [1991] 1 A.C. 362, 380. It therefore contends that the interest should run only from the date of the order in each case, or alternatively from the date of receipt by its lawyers of the sum in question.
70. I am not persuaded by this argument. It is certainly the fact that CPR r.40.8 gives the Court the power to order that Judgments Act interest should run from a different date (including a date before judgment is given). However, I do not perceive any good reason for taking that course in this case.
71. I accept WPL's submission that the case relied on establishes no more than that interest should run only from the date when the party knew how much it had to pay. I do not read *Thomas v Bunn* as establishing a requirement for a sealed order; that would be excessive formalism. Logically, absent some good reason for a deviation from the normal course the interest must run from the date when the party knows how much it has to pay.
72. This means that for the payment dealt with in the original judgment that the date from which interest runs is the date of the judgment, for the later payments it will be from the date of my decision in this matter. For future payments, however, it will be from the date of receipt.
73. SAS also argues that the court should vary the rate of Judgments Act interest to base +2%. It argues that s.17 of the Judgments Act 1838 applies to non-sterling judgments subject to the Administration of Justice Act 1970 s.44A and that I can and should vary the rate when giving a non-sterling judgment. It prays in aid the dictum from *Novoship (UK) Ltd v Mikhayluk* [2014] EWCA Civ 908; [2015] Q.B. 499 saying that the compensatory principle provides "*sufficient (we might even say compelling) grounds for departing from the prescribed rate applicable to sterling judgments.*"
74. On that basis it suggests that since the rate for pre-judgment interest is base + 2% that would also be an appropriate rate for post-judgment interest.

75. WPL contends that this argument comes too late – it is not pleaded and SAS agreed 8% in relation to the 13 December Order as well as indicating no opposition to the usual rate in earlier comments on the draft.
76. This, it seems to me, is correct. I would add that even if the point had still been open, I would have held that the variation was not appropriate in a case where the loss is not actually felt in dollars by reason of the injured party being a UK-based company whose accounts are in sterling.