

JERSEY / JUDGMENT

Dubai Islamic Bank PJSC v Charles Ridley

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Striking out – appeal against a decision of the Master [2017]JRC204 Royal Court (Samedi) 5 December 2017 Before : T. J. Le Cocq, Esq., Deputy Bailiff, sitting alone Between Dubai Islamic Bank PJSC Plaintiff/Respondent And Charles Ridley Defendant/Appellant And Cititrust (Jersey) Limited Party Cited Advocate J. C. Turnbull for the Defendant/Appellant. Advocate D. R. Wilson for the Plaintiff/Respondent.

judgment

the deputy bailiff:

Introduction

1. This is an appeal from a decision of the Master of 7th June, 2016, in which the Master granted parts of a summons brought by Dubai Islamic Bank PJSC, the Plaintiff/Respondent, (“the Bank”) seeking to strike out certain parts of an amended answer filed on the part of Mr Charles Ridley, the Defendant/Appellant (“Mr Ridley”). Legal Tests 2. In considering an appeal from the Master in a matter such as this the court’s duty is to consider the matter afresh and reach its own conclusion whilst taking into account the decision of the Master and the reasons for his decisions (see *Café de Lecq Limited–v- R A Rossborough (Insurance Brokers) Limited* [2011] JRC 011). 3. The principle applicable to an application to strike out is that the court should only strike out pleadings in plain and obvious cases. In *Re Esteem Settlement* [2000] JLR 119 Birt, Deputy Bailiff, (as he then was) said this:- “It is only where it is plain and obvious that the case cannot succeed that recourse should be had to the summary jurisdiction to strike out.” 4. In that case the court also recognised that such a cautious approach to striking out is even more applicable in “an uncertain and developing field of law”. The court cited with approval Chadwick LJ’s paraphrase of Lord Browne Wilkinson’s judgment in *Barrett-v-L B Islington* [1999] 3WLR 83 in which the court said:- “... in an area of law which was uncertain or developing, it would not normally be appropriate to strike out ... the development of the law should be on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed (perhaps wrongly) to be true on the hearing of the application to strike out. ...”. 5. The Master himself acknowledged that this was the correct way to approach this matter where, at paragraph 43 of his judgment *Dubai Islamic Bank-v-Ridley*

- [2016] JRC 102, he says:- "... if there is no basis to strike out the relevant parts of the defendant's answer, it follows there is no basis to grant summary judgment in this case. The arguments advanced before me are not whether or not the defence raised is improbable or shadowy. In this case the issues before me are questions of law or construction. If the answer to the issues I have to determine is plain and obvious then any applications will succeed. If the answer is not plain and obvious and is complex ... then any application will fail." 6. I agree with the characterisation by the Master of his function and I must consider this appeal not only against whether I take the view that the Master may or may not have been correct but whether, which is in issue in this appeal before me, he should have assumed the jurisdiction to determine these matters in the first place. 7. It cannot be said that the Master's judgment is anything less than thorough and detailed in its close argument comprising as it does some 73 sides and 174 paragraphs. 8. After a full exchange of written submissions the Master heard oral submissions in connection with the strikeout application on the 8th February,
2016. At the conclusion of the hearing the Master reserved judgment but gave further directions for the filing of further submissions including submissions as to what system of law applied to the proprietary claim underpinning the tracing claim brought by the Bank; what the creditor/debtor relationship was that underlined the Bank's Pauline action; submissions relating to Sharia law; and specific legal authority. 9. Those further written submissions were received and the Master then determined that he wished an oral hearing to take place in order that he could be addressed on limits relating to the tracing claim, the basis of the Pauline action by reference to the RSA (defined below), whether the claim in the tort of deceit had been compromised by a provision of the RSA, whether the lack of rights or remedies available under Sharia law is a question of construction of the Agency Agreements (defined below) and whether an argument that Jersey Private International Law provides that Sharia law is capable as operating as part of the law of the Agency Agreements has given rise to an issue estoppel or an abuse of process. A second hearing took place on the 21st April, 2016.
10. I go into this small detail relating to the procedure before the Master because clearly when the Master first heard argument this gave rise to issues on which he required further assistance both written and by way of oral submission. These things to my mind suggest, without more, that this was a matter of some complexity.

Background

11. The essence of the claim before the Court is an application by the Bank for assets worth approximately US\$7 million which, it is alleged, have been contributed to a Jersey Law Trust known as the Natang Trust by Mr Ridley between 2005 and 2007. The basis of the claim is that they represent monies obtained by Mr Ridley as a result of a fraud on the Bank and are the Bank's property. The claim is accordingly proprietary in its nature, the Bank claiming that it can trace monies into the Natang Trust. The Bank claims that the monies were subject

to an immediate constructive trust in its favour on receipt by Mr Ridley.

12. The fraud was perpetrated using the mechanism explained below through a number of agreements entered into between the Bank and CCH (as hereinafter explained) between November 2002 and February
2007. These agreements were known as the Agency Agreements (“the Agency Agreements”).
13. In his answer, amongst other things, Mr Ridley disputes that the monies transferred into the trust were the product of any fraud, he denies that such a fraud took place, and claims that in any event he has defences available to him under Sharia law because the Bank’s claim had in effect been discharged when the Bank took possession of certain property (known as Plantation) used as security. He asserts that the Bank cannot assert a constructive trust and that to succeed in a proprietary claim the Bank must rescind the Agency Agreements and meet the double-actionability criteria which, under UAE/Sharia law, it cannot do because the claim has been satisfied by the Bank taking Plantation.
14. I am conscious that in characterising the claims and the defences in this way I have oversimplified them but I believe that this is sufficient general statement for dealing with the instant appeal before me.
15. The application by the Bank to strike out parts of Mr Ridley’s amended answer follows on from proceedings in England brought by the Bank in which the Bank claimed as a debt US\$432 million from five defendants including Mr Ridley (“the English Proceedings”). In addition, the Bank claimed that certain shares held by another defendant (PSI Energy Holding Company BSC (PSI)) were in equity the Bank’s property.
16. The claims in the English proceedings were brought in reliance on an agreement called the re-structuring agreement dated 17th August, 2007, (“the RSA”). Insofar as this is material, the RSA provides as follows (and I quote from the relevant parts of the Master’s judgment):- “8. The RSA is lengthy The material parts are: “(1). Definitions In the Restructuring Agreement, except where a different interpretation is necessary in the context. “Proceeds Asset any asset with a realisable market value of £10,000 (or any other currency), whether held by the CCH Corporate Guarantors, the CCH Individual Guarantors or otherwise, materially funded by the Advances whether directly or indirectly and whether or not in accordance with the terms of the Agency Agreements.”
9. The Agency Agreements are those defined in Schedule 1 of the RSA. I refer to the relevant terms of the Agency Agreements later in this judgment.
10. ‘Advances’ is defined as meaning funds advanced under the Agency Agreements. The definition of ‘CCH individual guarantors’ included the defendant to the present proceedings.
11. Clause 12.4 of the RSA provided as follows:- “In consideration of the CCH Corporate Guarantees, the CCH individual Guarantees and the covenants to enter into the Security Documents the Bank hereby agrees, to irrevocably waive and compromise any and all

claims, whether existing or future, known or unknown, it has or may have against each of the Guarantors arising from or in connection with the Agency Agreements and the transactions contemplated by the Agency Agreement whether or not funds were appropriated in accordance with the terms of the Agency Agreement, provided that any claims in respect of Proceeds assets shall not be waived or compromised unless expressly done so in writing by the bank.”

12. The definition of Guarantor also included the defendant to the present proceedings.
13. Clause 27 defined the parties’ agreement on the governing law of the RSA and on jurisdiction as follows:- “This Restructuring Agreement is governed by and shall be construed in accordance with English Law, save insofar as inconsistent with the principles of Sharia law. Jurisdiction The parties submit to the exclusive jurisdiction of the English Courts with respect to all disputes arising out of or in connection with the terms of this Restructuring Agreement. The parties agree that the courts of England are the most appropriate and convenient courts to settle disputes and accordingly no party to this Restructuring Agreement will argue to the contrary.”
14. According to the plaintiff, the RSA was entered into following the uncovering of a serious fraud on the plaintiff including by the defendant. The plaintiff alleges that the fraud related to a series of trade finance transactions entered into pursuant to the Agency Agreements referred to above.”
17. It is central to the argument on this appeal, as indeed it was in the argument before the Master, that each of the Agency Agreements were also expressed as being subject to Sharia law. Sharia law is central to the operations of the Bank. Indeed the preamble to each of the Agency Agreements provide that various purchases and sales of commodities were to be “based on the tenets and precepts of Islamic Sharia”. Furthermore, each of the Agency Agreements had a governing law provision that provided that each of the Agency Agreements would only be governed by English law (or in the case of one of them, German law) “insofar as not contradicting with the tenets and precepts of Islamic Sharia”.
18. The Bank succeeded in the English proceedings for the reasons set out in the judgment of Flaux J dated 6th December, 2013, reported as Dubai Islamic Bank PJSC –v- PSI Energy Holding Company BSC [2013] EWHC 3781 (Com) and in the judgment of the Master and herein referred to as “the December judgment”. There were earlier judgments in the English Proceedings, one by Flaux J (“the October judgment”)[1], and one by Hamblen J (“Hamblen J’s judgment”)[2]. Some reference shall be made to these other judgments later in this judgment.

19. It is the Bank's contention that in the December judgment the Court dealt with, as one of the issues, the question as to whether or not Mr Ridley was a party to the fraud perpetrated against the Bank as a result of which the RSA was created. The question of whether or not the issue of fraud was determined in the December judgment is one that is contested in this appeal as it was before the Master in the application to strike out. Issues/questions before the Master
20. At paragraph 44 of his judgment the Master listed the issues that in his view he needed to determine in the form of the following questions:- (i) What is the governing law of the Plaintiff's tracing claim? (ii) To the extent that the law underlying the tracing claim is English law, as a matter of Jersey Private International Law should Jersey have regard to English private international law as the law underlying the tracing claim? (iii) Should Jersey Private International Law have regard to Sharia law a) as choice of law, b) by way of incorporation or c) as a matter of construction? (iv) What is the effect of Clause 12(4) of the RSA in respect of the tracing claims?
- (v) What did Flaux J decide in relation to Sharia law? (vi) What are the Jersey law principles on cause of action and issue estoppel and how do these interrelate with the contention that parts of the amended answer amount to an abuse of process? (vii) Do the defences raised or any of them by reference to Sharia law amount to cause of action estoppel, issue estoppel or abuse of process? (viii) What approach should be taken in respect of the Agency Agreement governed by German law? (ix) What did Flaux J decide in relation to fraud?
- (x) What is the effect of any finding of fraud? (xi) Does the Defendant's challenge to the Plaintiff's claim in fraud amount to a cause of action estoppel, an issue estoppel or an abuse of process? (xii) What is the nature of the Plaintiff's Pauline action? (xiii) What is the effect of Clause 12(4) of the RSA on the Pauline action? (xiv) Is the Plaintiff's Pauline action sufficiently pleaded? (xv) What is the Plaintiff's claim in deceit? (xvi) Is the Plaintiff entitled to bring a claim in deceit? (xvii) Should paragraph 22.7 of the amended answer be struck out?"
21. I do not consider it necessary to address each of the questions and indeed the Master himself addressed these various issues under general headings of Sharia law, estoppel, fraud, the Pauline action and deceit and then set out his conclusions.
22. At paragraph 22 of his judgment The Master recited certain passages from the December judgment (in which Mr Ridley was the third defendant) as follows:- "10. The defences live at the end of the trial and thus the issues in dispute in relation to which the court needs to make findings and reach conclusions can be summarised as follows:-
- (1) The second and third defendants formally still deny the underlying fraud. For reasons which are set out at the end of the next section of the judgment, to the extent that that defence is persisted in, it is not open to the second and third defendants.

- (5) The second and third defendants contend that because the Bank took steps to enforce its security over the lease owned by Plantation in circumstances where there was no Plantation Enforcement Event within the meaning of the RSA, the second and third defendants were discharged from their liability as guarantors and from their liability to indemnify the Bank under the RSA.
- (7) The first and second defendants contend that the Bank is not entitled to trace monies into the Afren shares. The fraud on the Bank and its discovery.
12. From November 2002 onwards the Structured Finance Department of the Bank entered into a series of Agency Agreements with the fifth defendant and its associated company, CCH plc (referred to collectively as “CCH”) as the means by which short-term trade finance would be provided to exporters. It is not in accordance with Islamic principles for the Bank to provide trade finance by way of short-term interest bearing loans. Accordingly the model used was so-called Murabaha agreements whereby the Bank itself (through CCH as its agent) would buy the goods from the exporter, then, again through CCH as its agent, would sell the goods to the purchaser. The difference between the purchase price and the sale price represented the Bank’s profit on the transaction. The Agency Agreements with CCH succeeded similar arrangements dating back to the 1980s under which the third defendant (who had long-standing business interests in the Gulf) and his then business partner, Guvan Nil, the fourth defendant’s father, did Murabaha deals with the Bank. After Mr Nil senior died in 2000, the fourth defendant became the third defendant’s business partner and they did Murabaha deals with the Bank through CCH, which they incorporated at around that time.
13. Under the Agency Agreements, once CCH had put the contractual arrangements in place, the Bank was to remit the funds required into an account in the name of CCH. The fact that funds flowed through CCH, rather than directly between the Bank and the exporter and purchaser respectively, enabled the fraud to be perpetrated. The third defendant admitted the fraud and his part in it at meetings with Mr Hugh Lyons and Mr Neil Dooley of the Bank’s solicitors, Lovells (to whom I will refer as Hogan Lovells, the name by which they are now known), on 26 and 28 November 2007. He admitted that the fraud on the Bank had started in about 2003. It was very simple; the third defendant had arranged with the second defendant for one of the second defendant’s companies to generate fictitious requests for trade finance for ostensible but in fact non-existent supply contracts which were submitted to CCH’s office in Germany. False documentation in respect of the transaction would be drawn up by CCH in Germany and submitted to the Bank for financing. The third defendant said he and the fourth defendant had agreed to divide the proceeds of the fraud between themselves equally.
- ...
14. Following those meetings with the second and third defendants, Mr Dooley prepared detailed meeting notes. Both Mr Lyons and Mr Dooley gave evidence at trial. In their respective witness statements they summarised the admissions made and confirmed the accuracy of the meeting notes. Both were impressive and honest witnesses. It is striking that, although both were cross-examined by Mr Mallin and Mr Mills on behalf of the second

and third defendants respectively, neither was challenged in any way about their evidence as to the admissions of fraud made by those defendants at the meetings or as to the accuracy of the meeting notes. In the circumstances, although both defendants formally deny participation in the fraud, that position is untenable and it is clear that they were both fully implicated. ...

16. I found the fourth defendant a most unsatisfactory witness, mendacious and evasive and I reject his evidence that he was not party to and was unaware of the fraud. Mr Lyons and Mr Dooley were not challenged in cross-examination that, as recorded in the meeting note, at their meeting the third defendant had told them in terms that the fourth defendant was fully aware of the fraud. Furthermore, the fourth defendant clearly received a substantial part of the Bank's money pursuant to the fraud. The third defendant's disclosure pursuant to the RSA (which the fourth defendant adopted) was that the fourth defendant received US\$857,000.
17. Irrespective of the admissions made, even a cursory examination of the documentation created by the second defendant's companies and CCH demonstrates that it cannot relate to genuine transactions. The range of goods ostensibly sold by PSI Middle East is staggering: jetting pumps, bunker fuel, packing machines, chiller plants together with vast quantities of aluminium sheet and steel beams. There are discrepancies in price both between different transactions and in comparison with market prices. For example PSI sold aluminium sheet at some US\$500 per metric ton and Seymour also sold aluminium sheet for settlement the same day at over US\$2,700 per metric ton, both "sales" at a time when the LME spot price was about US\$2,400 per metric ton.
18. Furthermore, as Mr Anderson QC rightly submitted, the fact that these were not genuine transactions is demonstrated by the complete absence of the sort of shipping documentation which could and would be readily produced for genuine international trade: bills of lading, letters of credit, evidence of payment by the buyers and so forth. That there was a fraud and that the second, third and fourth defendants actively participated in it, is irrefutable. ... The Conditional Assignment
34. As provided by clause 8.2(a) of the RSA Plantation was obliged to provide the Bank as security a first ranking charge by way of conditional assignment of the Lease. The Conditional Assignment which was also dated 19 August 2007 was made between Plantation, the Bank and DTDC. Under clause 2.1, the Lease was to be assigned to the Bank if, in the reasonable opinion of the Bank, a Plantation Enforcement Event had occurred and a written notice to that effect was served upon DTDC by the Bank. That Conditional Assignment was governed by UAE and Dubai law and subject to the exclusive jurisdiction of the Dubai courts. This led to the contention by the defendants that the effect of the Bank giving such notice and perfecting the assignment was to extinguish the debt as a matter of UAE/Dubai law. I held that contention was unsustainable in the judgment I handed down on 23 October 2013, essentially on the ground that UAE/Dubai law was irrelevant because the debt and its recoverability are governed by English law under the RSA and, as a matter of English law,

the Conditional Assignment was a charge or mortgage as the opening words of clause 8.2(a) make clear. Accordingly, the giving of notice and the subsequent taking of possession of the land by the Bank has not extinguished or reduced the debt because the Bank has not realised the value of the security by a sale or otherwise. ... The claim against the first defendant

194. The Bank's case is that monies advanced by the Bank were misappropriated by the second defendant, through his company the first defendant, to make an investment of US\$750,000 in a British Virgin Islands company called Black Merlin Energy Limited, leading to a holding of 3.75 million shares in that company and to make a loan of US\$4 million to that company. By an agreement dated 20 September 2007 (so after the date of the RSA) an agreement was entered into between the first defendant and Black Merlin for the debt (which with interest was just over US\$4 million) to be extinguished and the first defendant issued with 13,333,333 shares in Black Merlin. In a corporate restructuring, all 17,083,333 of the first defendant's shares in Black Merlin were converted into a holding of 6,230,291 in Afren, an English registered company. As Mr Anderson QC pointed out, none of those facts were challenged at trial by the first or second defendants.
195. The Bank advances its claim to those shares in Afren as the traceable proceeds of the fraud in two ways. First on the basis that since they represent monies originally subject to a fiduciary duty in favour of the Bank, which were misapplied in breach of that fiduciary duty, they are in equity the Bank's property. Second, by receiving and/or assisting the dissipation of the Bank's money which is trust property, the first defendant is liable both in dishonest assistance and knowing receipt and is under an obligation to pay equitable compensation to the Bank equivalent to the value of those shares."
23. Before the trial which led to the October and December judgments the Bank had started the present proceedings seeking to assert a proprietary claim for assets held in the Natang Trust on the basis that they were the traceable proceeds of the fraud. Secondly, since 2015, the Bank has sought to set aside assets transferred into the Trust by Mr Ridley by means of a Pauline action.
24. The judgment of the Master, at paragraph 24 et seq, explains part of the application before him in the following terms:- "24. The proceedings in Jersey, when first issued in 2012, contained injunctions. Following amendments concerning the injunctive relief granted, the proceedings did not progress until after determination of the English proceedings and the issue of the December judgment and also because of difficulties the defendant faced in finding representation and giving instructions due to his imprisonment in Dubai.
25. The first group of paragraphs of the amended answer the plaintiff seeks to strike out relates to a series of pleadings based on Sharia law. This is because all of the Agency Agreements (bar one) were governed by English Law but subject to a qualification "to the extent that they were compatible with Sharia law" or similar wording to the same effect. The defendant therefore claims that Sharia law is capable of operating as part of the proper law of the Agency Agreements (see amended answer paragraphs 16.2, 22.3.2 and 22.3.3), that Sharia

law restricts the remedies available to the plaintiff (see amended answer paragraph 22.3.6), and that there is a Sharia law defence to the plaintiff's proprietary claims (see answer paragraph 22.3.8).

26. In argument Mr Turnbull made it clear that the defendant was not arguing by reference to Sharia law that trust or fiduciary duties could not be owed. Rather the defendant was contending that the plaintiff was not entitled to pursue any proprietary tracing claims on the basis of breaches of trust or fiduciary duties alleged to be owed. Paragraph 22.3.8 of the amended answer stated as follows:- "From discussions with Sharia lawyers held on a pro-bono basis (in which privilege resides and is no way waived), it is Mr Ridley's understanding that under Sharia law principles:- The Bank is not entitled to pursue any proprietary tracing claims on the basis of the breaches of trust or fiduciary duties that are alleged if and to the extent that any loss occasioned by such breaches has been compensated as a matter of Sharia law; The Bank was so compensated as at the date it took title to Plantation with the result that it now has no entitlement to pursue any proprietary tracing claim against the Trust, or the companies or accounts to which the Trust holds its assets, to the extent they are based on the fiduciary or trust relationships allegedly created by the Agency Agreements."
27. The reference to Plantation is a reference to a special purpose vehicle Plantation Holdings (FZ) LLC ("Plantation") described in paragraph 6 of the October judgment as follows:-
"According to the account provided to the Bank and its solicitors by the third defendant at the time the fraud was discovered, the costs of the Refinery Project escalated and CCH attempted to trade out of its difficulties by investing more of the Bank's monies in other unauthorised but shorter term projects. These included the Plantation Project under which in January 2004, Mr Arthur Fitzwilliam had obtained a lease (hereafter referred to as "the Lease") of 1.86 square kilometres of desert land on the outskirts of Dubai (forming part of Dubailand) from the Dubai Development and Investment Authority. A special purpose vehicle, Plantation Holdings (FZ) LLC ("Plantation"), was incorporated (in which Mr Fitzwilliam held a 70% shareholding and the second defendant held a 30% shareholding on behalf of himself and the third defendant, in equal shares) to carry out the Plantation Project, which was to be a world class polo and equestrian centre, with a hotel and luxury residential villas and apartments. It is clear that several million dollars of the Bank's monies were absorbed into the Plantation Project in an unauthorised fashion, notwithstanding which, at the time the RSA was entered in August 2007 (and indeed a year later when the Bank enforced its security) the Project was still in its early stages and construction had barely started, with only some road infrastructure completed and polo fields laid out."
28. In other words the defendant argues:-
 - (i) The remedies sought in the present proceedings are contrary to Sharia law; (ii) The Plaintiff has already been compensated as a matter of Sharia law at the date it took title to Plantation."

25. It is the paragraphs in the amended answer that reflect that defence that the Bank sought to strike out and to which the Master acceded. Furthermore, the Bank sought to strike out a further paragraph of the amended answer in which Mr Ridley asserted that any outstanding balance under the RSA had been extinguished by virtue of the Bank taking title to Plantation. The Master considered that that further request fell to be considered on the same basis as the matters generally relating to the defences in Sharia law. That was, in my view, clearly the case.
26. As I have already stated, the other part of the Bank's application to strike out parts of Mr Ridley's amended answer in the main relates to those parts in which Mr Ridley challenges the conclusions in the December judgment that there was a fraud and that he was a party to it. I have quoted the relevant part of the December judgment above.
27. In addition to the December judgment (already cited) the Hamblen J's judgment at paragraph 4 states:- "4. In the seven witness statements to David Mills made with the authority of Mr Ridley it is stated as follows:- "Mr Ridley, whose career has been predominately in trade finance in the Middle East, was party to a receivables fraud pursuant to trade financing arrangements made by the Bank with the Fifth Defendant, CCH (Europe) GMBH, and its parent company in
2002. That fraud involved the presentation to the Bank of false documentation. The fraud was brought to the attention of the Bank in 2007 by Mr Ridley himself, who recognised the failure of the genuine business schemes in which the Bank's funds had been invested to generate the revenues necessary to repay the bank. The fraud forms the background to the two agreements of the summer of 2007, but the Bank in comprehensive terms ... waived and compromised all its claims against Mr Ridley and the other parties. The purpose of the RSA was to ensure the Bank was repaid all that was owed." The Grounds of Appeal
28. Mr Ridley raises a number of grounds of appeal against the judgment of the Master and they may be summarised as follows:- (i) The Master erred in fact or in law in concluding that English private law principles determined the efficacy of the Sharia law qualification to the governing law of the Agency Agreements. As a result the Master held, in error, that that qualification had no effect or gave insufficient reasons for his conclusions; (ii) The Master erred in fact or in law in concluding that the Sharia law principle on which Mr Ridley relies was not capable of being incorporated by reference into the Agency Agreements or that the Master failed to give sufficient reason for his conclusion; (iii) The Master erred in fact or in law in concluding that the principle of Sharia law did not fall to be taken into account in construing the Agency Agreements; (iv) The Master exceeded his jurisdiction in determining a point of law and a point of construction in the context of an application to strike out and/or summary judgment;
- (v) The Master fell into error of law and/or fact in concluding that Mr Ridley was precluded by res judicata and/or abuse of process principles from relying upon the relevant Sharia law principle in connection with the claims advanced under the Agency Agreements; (vi) The

Master erred in law and/or was procedurally irregular in taking judicial notice of his understanding of the content of German law rather than assuming German law to be the same as Jersey law; (vii) The Master erred in law by holding the constructive trust could arise without the plaintiff satisfying the requirements of the tort of deceit and rescinding the Agency Agreements; (viii) The Master erred in law by holding that the double-actionability test did not need to be satisfied in respect of a fraud relied upon for the existence of a constructive trust in its favour. (ix) Some of the paragraphs struck-out were not justified by the reasons contained in the Master's judgment.

29. These grounds of appeal, or at least the more substantial ones, come down to the consideration of three primary issues:- (i) What the rule of Jersey law is as to the extent to which a contract may have more than one proper law and the extent to which a non-municipal law can be the (or a) proper law; (ii) Whether UAE Law can have any relevance to a tracing claim which relies on an allegation of deceit; (iii) The extent to which Mr Ridley is prevented from making arguments by reason of issue estoppel by the fact of the findings in the English proceedings.
30. It does not appear to be Mr Ridley's case that he is not liable under the RSA as such. Rather, his defence is that the RSA is unenforceable against him because the Bank took title to Plantation and he is no longer liable to the Bank under the RSA because of that. Sharia Law/ Proper Law
31. In dealing with the governing law provisions of the Agency Agreements and specifically the effect of the Sharia law qualification it is first necessary to identify the system of private international law that applies to this question.
32. Before the Master it had been accepted by the parties that the operation of the governing laws of the Agency Agreement would be determined by reference to the private international law principles of Jersey law as the *lex fori*. In Mr Ridley's view the Bank's agreement over this principle is unsurprising. As is argued on his behalf, conflict of law questions, including questions as to the proper law, are procedural matters which under Rule 19 of Dicey, Morris and Collins on The Conflict of Laws (15th Edition) at 7R – 001:- “are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*).” Were the position to be different, so it is argued, the courts of Jersey would be having to apply, in a situation such as this, conflict of law rules of a foreign state including, potentially, those imposed by conventions to which Jersey is not a party.
33. This latter point is said by Mr Ridley to be important because it would mean, in this case, applying the provisions of the Rome Convention on contractual obligations to which Jersey is not a party. The Rome Convention requires contracting states to apply certain convention rules in certain circumstances but in other circumstances the conflicts of law rules of the convention state remains unaltered. In Dicey (above) 7 - 010 the authors state:- “The common law principles will apply in respect of matters that are not the subject of

harmonisation at EU level.” Thus, it is argued by Mr Ridley, the Rome Convention can never affect the private international law principles to be applied by a court of a non-convention jurisdiction.

34. Although the parties agreed on the relevance of Jersey Private International Law, the Master determined that the appropriate conflict of law rules were in fact those of England and Germany. In paragraphs 57 to 65 of the Master’s judgment the Master appeared to consider the conflict of law principles in so much as they relate to restitutionary claims.
35. At paragraph 65 of his judgment the Master identified the following as having emerged from his consideration of the authorities:- (i) The existence of an obligation to restore the benefit is agreed as being determined by the law of the Agency Agreements; (ii) The law of the Agency Agreements will provide the legal concept by which the obligation to restore the benefit is secured; (iii) In this case where English is the law of the Agency Agreement, English law provides for the imposition of a constructive trust and/or tracing and therefore the Jersey court should in principle apply English law as the proper law of those Agency Agreements governed by English law. English law recognises a right to trace to enforce an equitable proprietary interest. (iv) The Royal Court should recognise and give effect to a tracing claim based on a constructive trust, if permitted by English law, even where neither possibility would exist as a matter of Jersey law. In this case the ability to trace in fact under Jersey law goes further than English law which supports why the Jersey court should recognise and give effect to any tracing claim permitted under English law as the proper law of the obligation. This may lead to the conclusion that the English tracing law rules would have to be applied, but that is a matter argument of trial.
- (v) As noted at the conclusion of paragraph 34 – 049 of the 14th Edition of Dicey the appropriate analysis for the Agency Agreements governed by English law is to ask whether English law would impose on the defendant in the present proceedings a liability to disgorge a benefit. If so the Royal Court may hold the defendant liable as constructive trustee by giving effect to a substantive right arising under English law.
36. It is argued for Mr Ridley that the Master fell into error in applying English private law international rules to determine the proper law of the Agency Agreement and/or proprietary claims arising therefrom when it was common ground between the parties and “a rule of general application which is universally admitted” (see Dicey 15th Edition) that it is the private international law rules of the lex fori which must be applied in determining such proper law, whether or not the question is identified as being one of the proper law of the Agency Agreements as contracts or the proper law of restitutionary and/or proprietary claims arising from the Agency Agreements. Mr Ridley also argues that as a consequence the Master wrongly applied English private international law rules derived from the Rome Convention which prevented the Sharia law qualification from having effect because, pursuant to that convention, it is expressly stipulated that a contract shall be governed by one singular system of law chosen by the parties while a reference to a choice of law must be to a law of a country. He further argues that there is strong support in English common

law for the proposition that a system of law which is not that of any given state, and specifically Sharia law, may form part of a governing law clause.

37. For the reasons that I refer to hereinunder I do not think it is necessary to explore at length the English common law position in the way that it was done before the Master. One example cited by Mr Ridley suffices. In the case of *Al Midani –v- Al Midani* [1999] 1 Lloyds Rep 923 where Rix J, under the heading “the proper law of the arbitration agreement” made the following statement:- “The arbitration agreement does not provide expressly for a proper law. ... In these circumstances it seems to me very likely that the proper law of the agreement is either Sharia law or such law as modified by Saudi law. I accept Mr Saleh’s evidence of foreign law. For these purposes I regard Islamic or Sharia law as a branch of foreign law.”
38. The Master was addressed at length on this and other authorities both on the part of Mr Ridley and on the part of the Bank in the former case seeking to show that English common law (and by extension the law of Jersey) permits the incorporation of Sharia law into contracts as part of the proper law or otherwise and, in the latter case, that it does not. As I have said, I do not need to go into this in detail.
39. The parties having agreed that it is for Jersey, as the *lex fori*, to apply its own system of private international law in determining what the governing law of the contract is and whether that is a permissible choice of law, why then did the Master depart from the parties agreed positions?
40. At paragraph 71 of his judgment the Master says:- “The commentary in the 15th Edition of Dicey therefore follows on and develops from the commentary in the 14th Edition, leading to the conclusion that the law of the claim or the applicable law (referred to as the *lex causae*) should determine whether a party can trace and that tracing should not be subject to an independent choice of law rule of Jersey law applied by the Royal Court as the law of the forum or court where the dispute is to be resolved.”
41. At paragraph 77 of his judgment the Master stated:- “However, I have also concluded this argument [the parties agreement that Jersey Private International Law applied] is based on a series of cases relating to ascertaining the law of a contract. If the Plaintiff’s claim had been in respect of a Jersey law contract which was said to be the subject of the principles of Sharia law what such provision might mean, by reference to English cases cited above, would be an arguable matter for trial. That is not however the issue before me. What I have to consider is what law underpins the Plaintiff’s claim to require the Defendant to account for property and whether or not the courts in Jersey should recognise and give effect of that law. That law, save in one respect, was agreed as being English law. The disagreement related to the reference to Sharia law as qualifying the choice of English law in the choice of law clause.”
42. In paragraph 78 of his judgment the Master states:- “In this case it is clear that English law recognises that the plaintiff has a right to trace and ignores Sharia law.”

43. This approach seemed less complex to the Master than the approach based on the agreement of the applicable law by the parties. In paragraph 81 of his judgment he states:-
“81. In my judgment the analysis contained in Dicey, Morris and Collins 15th Edition at paragraph 36 that the right to trace should not be subject to the choice of law rules of a forum court (i.e. Jersey law in this case), is the obvious conclusion to the complexities of the arguments put before me otherwise create. In other words the plaintiff has a right to trace because the law of the contracts, which it is agreed is the basis of the plaintiff’s equitable proprietary interest, grants the plaintiff such a right. It is not for the Royal Court, as the forum hearing the dispute, to review whether or not there is such a right by applying its own private international law to import a system of law, i.e. Sharia law in this case, which English law would not recognise. There may be public policy exceptions to this approach but no such issue was raised in the context of this application.”
44. This appears to be the basis on which the Master reached his view that it was the Law of England including its Private International Law, that should apply in this case.
45. That does not, however, seem to me to be obviously the case. Indeed, as I have already said, it was and is common ground between the parties that it is Jersey Private International Law that falls to be considered when determining the rights of the parties before this Court.
46. It is put by Mr Ridley, as I have stated, that in effect conflict of law questions, including as to proper law, are in essence procedural matters. I have already cited above the section from Rule 19 of Dicey and Morris on the Conflict of Laws (15th Edition). In a document filed by the Bank before the Master entitled ‘Plaintiff’s written submissions in relation to applicable law’ at paragraph 14, the Bank says:- “The question of remedy, however, is classically for the *lex fori*; see Lord Hoffmann’s speech in *Harding v Wealands* [2006] UKHL [2007] 2 AC1. Once it is accepted that remedies are for Jersey Law as the *lex fori*, and no other law, it necessarily follows that Sharia can have no role to play whatever.” This position was in effect repeated before me in submissions on behalf of the Bank.
47. In *Harding v Wealands* [2017] 2 A.C. 1, in the leading judgment, Lord Hoffman surveyed a number of prior authorities in which the English Courts had treated the remedies sought in connection with the foreign claim as a matter for the Law of England as being the ‘*lex fori*’ and considered judgments of the Australian Courts which appeared to give a more restrictive interpretation of matters of procedure. At paragraph 32 of his judgment his Lordship said:- “It will be noticed that whereas the older cases spoke of questions of ‘remedy’ being governed by the *lex fori* and Willes J in *Philips v Eyre*....spoke of ‘remedy or procedure’, section 14(3)(b) refers only to ‘procedure’. Does that mean that the old rule that remedies were a matter for the *lex fori* was to be abolished and the rule preserved only insofar as it related to questions which could strictly speaking be regarded as procedure? In my opinion this would be absurd. In this context, the terms ‘remedy’ and ‘procedure’ have been regularly used interchangeably. Thus in *Boys v Chaplin* [1971] AC 356, 378 Lord Hodson said: ‘The nature of a plaintiff’s remedy is a matter of procedure to be determined by the *lex fori*. This includes the quantification of damages...’”

48. With respect to the careful judgment of the Master it is in my view at least arguable that the applicable law relating to remedy is the Private International Law of Jersey as the *lex fori*. It does not seem to me to be plain and obvious that this is not the case and, as I have said, it is and was the common position of the parties. There is persuasive authority from the House of Lords that the *lex fori* applies.
49. The Bank goes on to argue that, this notwithstanding, the Law of Jersey renders irrelevant Sharia law. However in paragraphs 72 to 75 inclusive the Master in his judgment reflects the agreement between the Bank and Mr Ridley on the applicable law and referred to their respective arguments that under the Private International Law of Jersey either Sharia law could not apply (as the Bank argued) or that it could and provided a defence (as Mr Ridley argued). There was some reference to authority as I have touched on above but I think it at this point unnecessary to do more than reflect the fact that the Master then said, at paragraph 76 of his judgment:- “In relation to these arguments, I have concluded that they are not appropriate matters that can be resolved on a strike out or a summary judgment application. They are clearly arguable and competing points of view which can only be resolved following a full trial and by appropriate expert evidence on English Law being put before the Royal Court.”
50. With that observation I agree and in my view the Master was correct when he said that a determination of Jersey Private International Law on this point was not for a striking out application. Not only is there an absence of evidence on the Law of England as the Master indicates but there is also no expert evidence whatsoever on Sharia law and issues as to its applicability, ambit and certainty may well be relevant to any decision as to Jersey Private International Law on this point. Moreover not only is it complex, potentially, but the point has not previously been decided in Jersey and it could also therefore be said, insofar as Jersey Law is concerned, to be a developing area of law. For these reasons I do not think that a determination of the Private International Law of Jersey on this issue is a matter for a strikeout application.
51. The Master consistent with his view at paragraph 76 of his judgment does not, quite appropriately in my view, make any finding of the proper law based on the application of Jersey Private International Law principles. It would be wrong for me to do so in this appeal. This is a matter that should be left over for the trial court.
52. In light of the view I have expressed it seems to me that, unless it is clear the Court should not apply the Private International Law of Jersey to the issue, then insofar as it relates to the Master’s orders for striking out issues of Sharia law I should allow that part of the appeal. In my view it is more than simply arguable that all matters of remedy, including the Bank’s claims for relief in the present proceedings, are matters for the *lex fori*, namely the Law of Jersey, and it may be necessary for a determination to be made as to the effect of the Sharia law qualifications in the Agency Agreements.

53. Having found that, in my view, the Master was wrong to determine in the application before him that it is the law of England in its entirety that determines the proper law of the Agency Agreements for the purposes of the proceedings before this Court, and in determining that, in my view, it is the law of Jersey Private International Law that applies to that determination then this part of the appeal must succeed. Incorporation
54. The Master also went on to consider the question as to whether the references in the Agency Agreement to the principles of Sharia law are sufficient to incorporate Sharia law into the contract. He rejected that argument.
55. He did so in substantial reliance on the judgment of the English Court of Appeal in *Beximco Pharmaceuticals Limited –v- Shamil Bank of Bahrain EC* [2004] 1 WLR 1784 and the statement of Potter LJ where at paragraph 51 he states:- “51. ... The doctrine of incorporation can only sensibly operate where the parties have by the terms of their contract sufficiently identified specific “black letter” provisions of a foreign law or an international code or set of rules apt to be incorporated as terms of the relevant contract such as a particular article or articles of the French Civil Code or The Hague Rules. By that method, English law is applied as the governing law to a contract into which the foreign rules have been incorporated.
52. The general reference to principles of Sharia in this case affords no reference to, or identification of those aspects of Sharia law which are intended to be incorporated into the contract, let alone the terms in which they are framed. It is plainly insufficient for the defendants to contend that the basic rules of the Sharia applicable in this case are not controversial. Such “basic rules” are neither referred to or identified. Thus the reference to the “principles of ... Sharia” stands unqualified as a reference to the body of Sharia law generally. As such, there are inevitably repugnant to the choice of English law as the law of the contract and render the clause self-contradictory and therefore meaningless.”
56. At paragraph 87 of his judgment, the Master says:- “While therefore a choice of Sharia law as forming part of the law of a contract (but not a restitutionary claim) is arguable under Jersey Private International Law principles (but irrelevant for the reason set out above), the alternative argument that Sharia law is incorporated by reference is not arguable. The observations of Potter L J on incorporation do not depend upon the wording of any English statute or convention.”
57. In the subsequent case of *Halpern-v-Halpern*
- [2008] QB 195 the judgment of Potter LJ in *Beximco* was clarified by Waller LJ at paragraph 33 where he said: “*Shamil Bank of Bahrain EC –v- Beximco Pharmaceuticals Limited* [2004] ... was a case in which, as the paragraphs prior to the passages I have quoted show, the court was striving to find the true intentions of the parties, and what it was not prepared to accept was a construction of a clause “subject to the principles of the glorious Sharia, this agreement shall be governed by and construed in accordance with the laws of England” in a way which by introducing some selective terms from Sharia law would or might defeat the commercial purposes of the contract. It may be that for actual

incorporation it is necessary to identify “black letter” provisions, but that seems to me to be another way of saying there must be certainty about what is being incorporated. If one is dealing with foreign law that would require evidence as to that law and evidence as to how clear it is. “The principles of the glorious Sharia law” would seem to be a very uncertain phrase when, as I understand it, there can be different schools of thought as to what Sharia law lays down I cannot for my part see why, in a context such as exists in this case, compromising disputes between Orthodox Jews under Jewish law, where it seems to be common ground there is a distinct body of law, Jewish law may not be relied on as part of the contractual framework.”

58. Without in any way deciding this point definitively it seems to me that it is possible to argue that the Sharia law provisions do not defeat the commercial purposes of the contract. Indeed, in one sense, it is one of the bases of the Agency Agreements. It is arguable that they go to the fundamental nature of the agreements themselves although that is an argument to be resolved if necessary on another day.
59. Nor is it clear to me, nor I respectfully suggest could it have been clear to the Master, that Sharia law was incapable on the relevant points of being expressed with sufficient certainty or clarity as to what that law might provide. In my view it is not possible to conclude with certainty that Sharia law cannot be incorporated by reference into the Agency Agreements and certainly not to the extent necessary to strike out any pleading to that effect. It may be that Sharia is not certain enough but there would need to be evidence about it before the Court to reach that conclusion.
60. It seems to me that what is important in considering whether or not a non-municipal law might be incorporated into the proper law of a contract depends upon how certain it is. Upon that point there was no sufficient evidence before the Master or indeed before this Court relating to the certainty, clarity or ambit of Sharia law in this context. Accordingly, I do not think that it is possible to determine at this stage, and without further information, whether Sharia law is capable of incorporation. Construction
61. Lastly, under this area, the Master determined that Sharia law could not be used as an aide to construction of the Agency Agreements. The Master’s response to the argument that it could be used as an aide to construction is to be found at paragraph 94 of his judgment in which he says:- “The flaw in this argument is that, assuming that the right to trace is not a remedy but is part of the law of the claim, the law governing the proprietary claim is English law as *Flaux J* has already determined, applying *Beximco* and *Halpern*. The arguments advanced by Advocate *Turnbull* again therefore require me to apply English law but to ignore the approach the English court would take applying its private international law rules. ...”

62. It appears, therefore, that the Master formed the view that the position was unarguable as a result of the conclusion he had already reached that English private international law prevented Sharia law from having any effect at all. For the reasons that I have set out above, it seems to me that this is not clearly the case and that it may be necessary, in the context of a fiduciary or proprietary claim to construe the Agency Agreements as a whole.
63. It appears to me I should allow the appeal in this respect also. In my view all matters of Sharia law should fall for determination by the trial court given that it is at least arguable that Sharia law can be used as an aid to construction should on further argument such prove necessary. The question of the effect of Sharia law is to my mind still alive within these proceedings. German Law
64. In paragraph 115 of his judgment the Master considered the Agency Agreement that was governed by German law (with the Sharia law qualification expressed within it). There was no evidence before the Master relating to German law nor indeed was German law pleaded within the pleadings before him. The Master made reference to the fact that he could not “ignore that Germany is subject to the same European law as the United Kingdom” and he therefore proceeded to approach the matter on the basis that German law was the same as English law. It seems to me that the relevance of German law would depend upon in part the conclusion of the Master that Jersey Private International Law did not apply in determining the effect of the Agency Agreements and, if it does not, then German law would fall to deal with the proper law of the Agency Agreements without reference to Jersey Private International Law principles. It seems to me that further directions will need to be given for determining relevant aspects of German law. Res Judicata
65. Res Judicata falls to be examined in this appeal in two contexts. The first is whether or not the question of Sharia law has effectively been settled during the course of the English proceedings such as to give rise to a res judicata in one or more of its forms. The second is whether or not the question of whether Mr Ridley was a party to the fraud referred to in the English proceedings has been similarly determined.
66. At paragraph 108 of his judgment the Master set out an extensive extract from the judgment of Lord Sumption in *Virgin Atlantic Airlines Limited v Zodiac Seats UK Limited* (formerly *Contour Aerospace Limited*) [2013] UKSC 46 [2014] AC 160. I do not propose to repeat that extract within this judgment although undoubtedly Lord Sumption gives a comprehensive treatment of res judicata and in particular the doctrines of cause of action estoppel and issue estoppel which fall within it.
67. In paragraph 17 of *Virgin Atlantic* Lord Sumption defines cause of action estoppel in the following terms:- “The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is ‘cause of action estoppel’”.

68. In paragraph 20 of the judgment in Virgin Atlantic his Lordship cites with approval the analysis by Lord Keith of Kinkel in *Arnold v National Westminster Bank plc* [1991] 2AC 93 in the following terms:- “Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter..... Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is a relevant one the parties seeks to reopen that issue.”
69. At paragraph 22 of Virgin Atlantic the following extract occurs:- “(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
- (2) Cause of action estoppel also bars the raising and subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.....” *Res Judicata: Sharia Law*
70. The basis for the Master’s determination that the Sharia law points have been dealt with within the English proceedings is the judgment of Flaux J in the October judgment. At paragraph 78 of his judgment the Master quotes from the October judgment as follows:- “11. Finally, under clause 27 of the RSA, that Agreement was governed by and construed in accordance with English Law “save in so far as inconsistent with the principles of Sharia law”. As a matter of English Law, that proviso is of no effect, as a religious law can never apply as the applicable law, so that in construing the RSA, Sharia law is irrelevant: see the decisions of the Court of Appeal in *Beximco Pharmaceuticals Limited v Shamil Bank of Bahrain*.... By clause 27, all disputes under the RSA were also subject to the exclusive jurisdiction of the English courts.”
71. Further, in dealing with the question of estoppel, in paragraph 105 of this judgment the Master quoted the following paragraphs from the October judgment:- “38. The first principle is that where a debt is governed by English Law, as in the present case, the question of whether the debt has been discharged is also a matter for English Law. Where English Law would not regard the bank as having taken possession of the Plantation land without having in any sense realised its value by a sale as discharging the debt, the fact that a foreign law (whether as the *lex loci situs* of the land constituting the security or otherwise) would regard the debt as discharged does not provide the debtor with a defence.
39. Thus, it is well established that an obligation to pay under a contract governed by English Law is not extinguished by the fact that a foreign bankruptcy law (which is not the applicable law of the relevant debt or contractual obligation) would regard the obligation as discharged:.....”

72. As is clear from the quote set out in paragraph 22 above Flaux J in the December judgment characterised the nature of the October judgment. The argument considered UAE/Dubai law and the position with regard to the security provided by Plantation. I repeat what Flaux J said:- “This led to the contention by the defendants that the effect of the Bank giving such notice and perfecting the assignment was to extinguish the debt as a matter of UAE/Dubai law. I held that contention was unsustainable in the judgment I handed down on 23rd October 2013, essentially on the ground that UAE/Dubai law was irrelevant because the debt and its recoverability are governed by English law under the RSA and, as a matter of English law, the conditional assignment was a charge or mortgage as the opening words of Clause 8.2(a) make clear. Accordingly, the giving of notice and the subsequent taking of possession of the land by the Bank has not extinguished or reduced the debt because the Bank has not realised the value of the security by a sale or otherwise.”
73. The context of the October judgment was a consideration by Flaux J of a proposed amendment on the part of Mr Ridley to plead aspects of UAE/Dubai law. At paragraph 30 of the October judgment the issue that remained before Flaux J in considering that application was whether ‘the bank’s appropriation..... by taking possession was a usurpation under UAE Law, the effect of which was that the value of..... at the time of the usurpation must be applied in diminution of the rescheduling amount’. It appears that Flaux J did not allow the amendment because it was late and it lacked prospects of success in the light of English conflict of law principles that obtained to the specific debt claim brought pursuant to the RSA in the English proceedings.
74. In light of the principles set out in *Virgin Atlantic*, it seems to me there are differences between the defence on which Mr Ridley sought to rely (but was unable to do so) in the English proceedings and the defence on which he seeks to rely in these proceedings and no cause of action estoppel has arisen. In the English proceedings the Bank was making a debt claim under the RSA and UAE/Dubai law fell to be considered. In the present proceedings we are concerned with fiduciary or trust type obligations arising, so it is alleged, under the Agency Agreements and the effect of Sharia law (which may or may not be identical to UAE/Dubai law).
75. It seems to me also the position is similar where issue estoppel is concerned. The context of the October judgment is an application for an amendment. It seems to me the issue of the availability of the defence under Sharia law against a claim brought under the Agency Agreements has not been determined in the October judgment.
76. It seems to me it would not be safe to conclude that issues of Sharia law or indeed its applicability insofar as is relied upon in these proceedings have been determined definitively in the English Proceedings and accordingly in my view no *res judicata* arises.
77. In summary, on this aspect of the appeal, matters of Sharia law, its extent and applicability and effect on the remedy claimed remain live in this case at this point. *Res Judicata*: Fraud

78. The Master dealt with his assessment of the findings of fraud in the December judgment between paragraphs 116 and 140 of his judgment.
79. He carried out a detailed review of the pleadings in the English Proceedings and it was clear it was alleged that Mr Ridley was party to a fraud against the Bank and that the Bank was pleading that at all material times it retained equitable title to certain monies. Mr Ridley for his part pleaded to specific allegations and denied he had acted as party to a fraud. I do not need to repeat at length the extracts of the pleadings referred to in the Master's judgment which, from in his own words, he put in "because they put in context the observation recorded at paragraph 10 of Flaux J's December judgment". The Master repeated the assertion contained in the December judgment to the effect that evidence was before the Court that Mr Ridley had admitted fraud, that that evidence was not challenged at trial and that, as is concluded in the December judgment:- "In the circumstances, although both defendants formally deny participation in the fraud, that position is untenable and it is clear that they were both fully implicated."
80. In the present proceedings Mr Ridley denies that he ever made any admissions as to fraud but in the December judgment consideration was given by Flaux J of the position irrespective of the admissions made and the learned judge there concluded 'that there was a fraud and that the second, third and fourth defendants actively participated in it, is irrefutable'.
81. The Master's analysis of the findings by Flaux J are in essence set out at paragraph 133 of the Master's judgment in which he said this:- "In reaching my conclusion, again, my starting point is clause 12.4 of the RSA. This provision preserved a right in favour of the Plaintiff to bring any claims in respect of the Proceeds Assets as defined in the RSA. Such claims still had to be proved. An essential element of the Plaintiff's ability to trace against the First Defendant was therefore dependent upon a finding of fraud. Without a finding of fraud and therefore a finding that the Plaintiff held equitable title over the shares as a proceeds asset, the Plaintiff could not trace or recover the shares. The Defendant in the present proceedings was therefore clearly on notice that Flaux J was going to be invited to make findings of fraud by reference to what was set out at paragraphs 89 and 90 of the Plaintiff's opening skeleton argument. The evidence relied on for a finding of fraud was also known to the Defendant in part to include admissions made by him. Despite knowing about how the case was going to be presented, the Defendant in the present proceedings, in the English Proceedings chose not to challenge the evidence of his admissions."
82. The Master went on to conclude that cause of action estoppel did not apply in this case but that issue estoppel did apply. At paragraph 136 of his judgment the Master says:- "However it is clear that the doctrine of issue estoppel does apply to the defendant's present pleading in response to the allegations of fraud. The definition of Lord Keith of issue estoppel also cited in the Virgin Atlantic case bears repetition. He defined the issue estoppel as follows: "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action and has been litigated and decided and in subsequent proceedings between the same

parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to reopen the issue.””

83. It seems clear that at no stage had Mr Ridley in any meaningful sense contested the question of fraud or challenged any of the evidence that implicates him in the fraud. The question of fraud was clearly pleaded in the English proceedings, it was denied and evidence was given and there was cross-examination (although not, as I understand it, on the specific issues relating to Mr Ridley’s involvement although it was open to Mr Ridley to do so). It is clear that fraud must have been anticipated by him as being a live issue in the proceedings in England. Naturally whether or not the monies in respect of which the bank makes a claim in Jersey are or could be said to be the proceeds of such a fraud is a different question but to argue that a fraud did not take place and that he was not a party to it no longer seems to me to be an argument available to Mr Ridley.
84. I also respectfully agree with the learned Master’s determination that to allow the issue of fraud to be litigated before the Royal Court would be an abuse of process. He sets out his reasoning at paragraph 138-140 and I agree. Pauline Action/Constructive Trust/Deceit/Double-Actionability
85. In his judgment the Master dealt with the Pauline action brought by the Bank. At paragraph 142 of his judgment he identified the nature of the Pauline action by reference to the case of *In re Esteem Settlement* [2002] JLR 53 and in particular the headnote which states:- “Jersey law recognised that a transfer undertaken in fraud of creditors could be set aside if the creditor could prove (a) that the intention of the debtor was to defeat his creditor; and (b) their actual defeat, as the debtor was insolvent as a result of the act which was challenged, if he were not ready insolvent before the act.”
86. The Master then went on to analyse how the Pauline action was pleaded.
87. For Mr Ridley it was argued that, irrespective of whether he could challenge the assertions of fraud, it was a live issue as to when the Bank became his creditor and in respect of how much. The contributions made by Mr Ridley to the Trust were done between June 2005 and 2007. At paragraph 150 of his judgment the Master says:- “In my judgment for the same reason that the defendant cannot challenge the finding of fraud by *Flaux J*, the defendant cannot challenge the finding that he admitted that the fraud took place in 2003. Such challenge is prevented because an issue estoppel arises or it is alternatively an abuse of process for the reasons I have given.”
88. With that assessment I agree. At paragraph 151 of his judgment the Master goes on to say:- “However that is as far as *Flaux J*’s December judgment goes. It did not decide how much was due to the plaintiff from the defendant at the time of the transfer to the Trust the subject of this action and at what point in time any sum fell due as a result of the fraud.”

89. It is clear that to proceed with the Pauline action the Bank will need to prove what was due from Mr Ridley and by when as a result of the fraud. It will also have to establish that Mr Ridley was insolvent at the material time in the way suggested in *In re Esteem*. Were this Court to make a finding that he was insolvent it would of course need to determine how much money was owed by Mr Ridley to the Bank.
90. The Bank alleges there was an immediate proprietary interest or constructive trust in its favour over any monies drawn down under the Agency Agreements in respect of any fictitious contract or purchase and, by extension, any transfer of assets that Mr Ridley had made to the Natang Trust. It is Mr Ridley's case that no such constructive trust or proprietary interest immediately arose and that one would only have been possible were the Bank to have rescinded the Agency Agreements which because of the RSA and the fact that it had taken title to Plantation it could no longer do. By reason of the same Sharia law arguments that have been referred to earlier, Mr Ridley asserts the Bank can no longer mount a proprietary claim against him because the Bank could not meet the double-actionability requirement of the claim in deceit on which the Bank relies.
91. It is common ground that a significant number of the transactions conducted under the Agency Agreements were legitimate and it is alleged that a number of them were in respect of the fictitious trade finance agreements. In the evidence before the Master it was accepted by the Bank that approximately US\$150,000,000 was used for the legitimate purposes of trade financing. Some of the monies advanced under the Agency Agreements were not as a result of fraudulent transactions at all. As the Master says, at paragraph 159 of his judgment:- "In the light of [these facts] it is difficult to conclude that the fraud found by Flaux J went to the entirety of the Agency Agreements so that they had no legal effect at all when ... accepts ... that they had effect for some transactions."
92. Although, therefore, I agree it is not open to Mr Ridley to say that fraud did not take place in 2003 equally it cannot be said, as the Master confirmed, that every transaction under the Agency Agreements was fraudulent. That is far from being the case.
93. This is in my view of some significance. As I understand it, the claim by the Bank appears to be to the effect that as soon as fraud arose then the Bank had a binding constructive trust in its favour over Mr Ridley's assets and, by extension, any transfer of assets that Mr Ridley had made to the Trust.
94. However the Master had cited to him the case of *Shalson -v- Russo* [2003] EWHC 1637(Ch) where at paragraph 108 and 109 Rimer J says:- "108 Cogently though he argued the point, Mr Smith's proposition that the moneys advanced by Mr Mimran to Westland became subject to an immediately binding constructive trust in his favour is in my view contrary to principle. The facts of the case are extreme, but the resolution of its problems must be governed by ordinary principles. The case is one in which Mr Mimran was induced to make his various loans to Westland by fraudulent misrepresentations made by Mr Russo. It is no different in kind from any other case in which a representee is induced to enter into a disadvantageous

contract by a dishonest deceit. It is well established that any such contract is voidable, not void, and that it is and remains a valid contract until set aside by the representee: see *Directors of the Reese River Silver Mining Co Ltd –v- Smith*

(1869) LR 4 HL 64, 73, 74, per Lord Hatherley LC and Adam –v- Newbigging

(1886) 34 Ch D 582, 592, per Bowen LJ. A typical case of a voidable contract induced by deceit is one in which C overpays for a house as the result of a fraudulent misrepresentation by D as to its physical condition. In such a case, when C pays over the purchase price he intends D to become the legal and beneficial owner of it, as D does; and D has a like intention in relation to the house when he assures it to C on completion. The contract remains voidable despite completion; but until it is avoided those respective beneficial entitlements to price and house remain the same. Mr Smith's submission involves a reversal of that ordinary principle. On his argument, as from the moment of completion D becomes a trustee of the purchase money for C – and presumably C becomes a trustee of the house for D, since C cannot at the same time be beneficially entitled to both house and price. Mr Smith's submission to the effect that D becomes a trustee of the money for C at the moment it is paid over – and that in the present case Westland or WIB became a trustee of the money for Mr Mimran immediately the money was advanced – is, in my judgment, incorrect. What the position is when and if, on discovery of the fraud, C elects to rescind the contract of course raises a different question. 109 For authority in support of his primary proposition, Mr Smith relied on these obiter observations of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale –v- Islington London Borough Council* [1996] AC 669, 715-716: "The stolen bag of coins "The argument for a resulting trust was said to be supported by the case of a thief who steals a bag of coins. At law those coins remain traceable only so long as they are kept separate: as soon as they are mixed with other coins or paid into a mixed bank account they cease to be traceable at law. Can it really be the case, it is asked, that in such circumstances the thief cannot be required to disgorge the property which, in equity, represents the stolen coins? Moneys can only be traced in equity if there has at some stage been a breach of fiduciary duty, i.e. if either before the theft there was an equitable proprietary interest (e.g. the coins were stolen trust moneys) or such interest arises under a resulting trust at the time of the theft or the mixing of the moneys. Therefore, it is said, a resulting trust must arise either at the time of the theft or when the moneys are subsequently mixed. Unless this is the law, there will be no right to recover the assets representing the stolen moneys once the moneys have become mixed. "I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient; the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it; *Stocks –v- Wilson* [1913] 2 KB 235, 244, *R Leslie Ltd –v- Sheill* [1914] 3 KB 607. Moneys stolen from a bank account can be traced in equity: *Bankers Trust Co –v- Shapira* [1980] 1 WLR 1274, 1282C-E: see also

McCormick –v- Grogan (1860) LR 4 HL 82,97.””

95. And, at paragraph 111 of the judgment Rimer J states:- “As to Lord Browne-Wilkinson’s more general proposition in the second paragraph that property obtained by fraud is automatically held by the recipient on a constructive trust for the person defrauded, I respectfully regard the authorities he cites as providing less than full support for it. At any rate, they do not in my view support the proposition that property transferred under a voidable contract induced by fraud will immediately (and prior to any rescission) be held on trust for the transferor.”
96. The last extract above was cited by the Master in his judgment then, at paragraph 156, he went on to refer to Jersey authority in the case of Nolan –v- Minerva Trust and others [2014] JRC 078A where, at paragraph 151 Commissioner Hunt states:- “In our view it is not the law of Jersey that a constructive trust arises immediately if a contract has been procured by fraudulent misrepresentation. On the contrary, the law of Jersey is, we conclude, the same as English law so that (save in the case of Halley Trust) a constructive trust will not arise out of a contract which has been procured by fraudulent misrepresentation unless and until the contract has been rescinded.”
97. The Master then considered the learned Commissioner’s review of Halley Trust –v- The Law Society
- [2003] EWCA Civ 97 in which Commissioner Hunt agreed that Halley also represented the law of Jersey. He went on to say “the key question, therefore, is whether the arrangement in question between Joan and Mr Walsh can properly be described as, in the words of Carnwath LJ, “the instrument of fraud, and nothing else””.
98. The Master went on to analyse the Agency Agreements against these tests. I have already cited that part of his judgment in which he stated it would be difficult to conclude that the entirety of the Agency Agreements had no legal effect. It might therefore be reasonable to conclude that they fell within the principles of Shalson –v- Russo and not those in Halley.
99. The Master went on, however, to analyse the Agency Agreements as being the basis for CCH Europe as agents to enter into a series of individual contracts for the sale and purchase by the agent on behalf of the Bank. The Master goes on to say, at paragraph 161:- “Where any such contract was fictitious, what was stated to the Plaintiff to be genuine contracts to sell and purchase a particular commodity, these contracts can only be described as an instrument of fraud.”
100. He went on to conclude, at paragraph 162:- “The consequence of this finding is that such contracts have no legal effect at all. As it was put in Halley, the contracts to buy and sell commodities were “in reality no more than devices to extract money by fraud.”

101. The Master then went on to conclude that an immediate equitable proprietary claim arose in favour of the Plaintiff over monies drawn down under the Agency Agreement in respect of any fictitious contract or purchase.
102. But for this further analysis by the Master, it appears, from paragraph 159 of his judgment quoted above, he accepted that any fraud based upon the Agency Agreements themselves would render those agreements voidable and not void. The fact that US\$150,000,000 of business was conducted under the Agency Agreements but was not part of the fraud seems to me to make it clear that those agreements as such were other than a nullity.
103. The Bank's skeleton argument suggests that the Master's analysis to the effect that *Shalson – v- Russo* does not apply was not the subject of submissions to him by either party. In answer to the Master's analysis Mr Ridley argued that title to the monies passed not under the underlying trade finance agreements but under the Agency Agreements and therefore by the time that the monies were re-advanced by CCH in furtherance of such trade finance agreements it, CCH, already had title to the monies pursuant to the Agency Agreements. In the circumstances, so it is argued, an immediate constructive trust in favour of the Bank could not have come into being.
104. It seems to me these, too, are complex matters and should be for consideration by the trial court in the light of the facts as there established. It seems to me it is for that court to consider whether the Agency Agreements are the agreements in play for the purposes of considering whether or not a constructive trust arises or whether, as the Master analysed, it is rather the trade financing agreements.
105. As I have said, it is argued by Mr Ridley that because an immediate constructive trust does not arise there is a requirement for rescission of the Agency Agreements to further the Bank's claim. This, so it is argued, gives to Mr Ridley a defence based on the principle of double actionability. In other words, under UAE/Sharia law the Bank has already been satisfied in taking Plantation, and cannot therefore pursue a claim against Mr Ridley there. If that is so, he cannot do so in Jersey.
106. Having concluded that an analysis of which of the contractual arrangements (the Agency Agreements or the trade financing agreements) are relevant for the purposes of determining whether an immediate constructive trust has arisen is a matter for the trial court, it is equally the case that the question of whether or not double-actionability is available of a defence to Mr Ridley is for that court as well.
107. Accordingly, and in summary, I allow Mr Ridley's appeal against the judgment of the Master save and insofar as that judgment found there was an issue estoppel in connection with the findings of Flaux J relating to fraud. The limitation of that finding is as expressed by the Master himself.

108. I have of course not touched on all of the arguments advanced before me in this appeal either in oral submissions or in the written material. They have been comprehensive and I have sought at this interlocutory stage to deal with what I believe to be the essential points.
109. It is clear that in the light of this finding the Master will need to give further detailed directions as to the ongoing conduct of this case. I do not make any findings or give directions in connection with what further information the Bank might need to produce to plead or vindicate its Pauline action or claim generally or indeed what either party need do to deal with those parts of the claim that I have held still to be live. I expect that the Master will also need to give directions as to the filing of expert evidence, possibly as to German law but certainly as to Sharia/UAE law. I expect that an application will need to be made to the Master seeking the necessary orders which will in part cover that material referred to in paragraph 173(iv), (v), (vi), (vii) and (viii) of his judgment.
110. For the reasons set out by the learned Master I agree with his conclusions set out at paragraph 165 of his judgment.
111. I will leave it to the parties to find a time to deal with any ancillary or consequential matters arising out of the

judgment.

Authorities *Café de Lecq Limited-v-R A Rossborough (Insurance Brokers) Limited* [2011] JRC 011. *In re Esteem Settlement* [2000] JLR 119. *Barrett -v- L B Islington*

[1999] 3WLR 83. *Dubai Islamic Bank-v-Ridley* [2016] JRC 102. *Dubai Islamic Bank PJSC -v- PSI Energy Holding Company BSC* [2013] EWHC 3781. *Dicey, Morris and Collins on The Conflict of Laws* (15th Edition). *Al Midani -v- Al Midani* [1999] 1 Lloyd's Rep 923. *Harding v Wealands* [2017] 2 A.C. 1. *Beximco Pharmaceuticals Limited -v- Shamil Bank of Bahrain* EC [2004] 1 WLR 1784. *Halpern-v-Halpern*

[2008] QB 195. *Virgin Atlantic Airlines Limited-v-Zodiac Seats UK Limited (formerly Contour Aerospace Limited)* [2013] UKSC 46 [2014] AC 160. *Arnold v National Westminster Bank plc* [1991] 2AC 93. *In re Esteem Settlement* [2002] JLR 53. *Shalson -v- Russo* [2003] EWHC 1637(Ch). *Nolan -v- Minerva Trust and others* [2014] JRC 078A. *Halley Trust -v- The Law Society* [2003] EWCA Civ 97 *Dubai Islamic Bank PJSC-v-PSJ Energy Holding Company BSC* [2013] EWHC 3186 *Dubai Islamic Bank PJSC-v-PSJ Energy Holding Company BSC* [2011] EWHC 2788

[1] *Dubai Islamic Bank PJSC -v- PSJ Energy Holding Company BSC*

[2013] EWHC 3186 Com

[2] *Dubai Islamic Bank PJSC -v- PSJ Energy Holding Company BSC*

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