

The Latent Uncertainties and Difficulties Surrounding Knowing Receipt

Nicolò Gaggero¹

Abstract— This article examines the Court of Appeal’s judgment in *Byers v Saudi National Bank*. It argues that there are two different understandings of the relationship between a beneficiary’s equitable interest and the relevant trust, and that both are compatible with the Court of Appeal’s account of liability for knowing receipt of trust assets; it is submitted that the Court of Appeal’s treatment of authorities is anomalous, regardless of one’s theoretical stance on the nature of beneficial interest. The article also analyses the two principal requirements set out by the Court of Appeal for a successful claim in knowing receipt – a continuing proprietary interest and unconscionability of retention – and notes some troublesome practical implications of the law laid down. Finally, it reflects on why the Court of Appeal would affirm such inconvenient rules, especially when its handling of case law is so irregular. The article concludes that *Byers* is the result of a broader trend of acritical reliance, on part of courts, on the concept of the trust.

¹ Trinity College, Oxford. I am grateful to the OUULJ editorial team for their helpful comments. The usual disclaimers apply.

Introduction

‘Nobody with any experience of legal teaching can doubt the power which legal concepts exercise over the minds of law students,’ says Atiyah.² But what happens when law students graduate and, say, are appointed Lord Justices of Appeal?

In *Byers v Saudi National Bank*, the Court of Appeal found itself dealing with a claim in knowing receipt brought by Saad Investments Company Ltd (SICL) and its liquidators against the respondents, to whom shares held on trust for SICL had been unlawfully transferred.³ The Court of Appeal’s judgment discussed only one conceptual question of general significance – that is, whether the claimant must prove a continuing proprietary interest in the asset knowingly retained by the defendant – and unanimously upheld Fancourt J’s affirmative answer.⁴ In isolation, this judicial concurrence appears to be a reassuring sign of the coherence and normative merits of the judgment. However, the concerns already expressed by commentators suggest that the law might not be as tidy as the courts make it out to be.

² P Atiyah, *The Rise and Fall of Freedom of Contract* (1st edn, OUP 1979) 685.

³ [2022] EWCA Civ 43, [2022] 4 WLR 22.

⁴ The ‘Saudi Arabian Law Issue’ and the ‘Valuation Issue’ were highly fact-specific and, in the latter case, also an obiter dictum: see *Byers* (n 2) [6], [114]. cf *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, in which the Supreme Court expressly assessed not only the meaning of ‘disposition’ in s 127 Insolvency Act 1986, but also the nature of equitable beneficial interest; the Supreme Court reversed the decision of the Court of Appeal, which had in turn reversed the Chancellor’s order to stay proceedings.

The first part of this article attempts to defend the internal coherence of the Court of Appeal's reasoning. As a matter of theory, there are two possible interpretations of the judgment – each reflecting a different understanding of the relationship between equitable interest and trust. Although each has difficulties, both remain plausible. As a matter of authority, the Court of Appeal's treatment of precedent and commentary is objectionable, but can be understood as an understandable, albeit misguided, effort to avoid acknowledging that there is uncertainty in the law and avoid engaging with what the law should be. The second part of this article will address two troublesome implications of the judgment. One pertains to the awkward scope of the continuing proprietary interest requirement, oblivious to purpose trusts while unduly generous towards those who hold remote proprietary interests. The other concerns the requirement of unconscionability and, in particular, its practical shortcomings. The reason for the Court of Appeal's affirmation of such inconvenient requirements seems to lie not in Newey LJ's whim, but in a more general judicial trend of acritical reliance on the concept of trust. *Byers*, the latest manifestation of this mischievous trend, demonstrates that courts should reconsider their approach.

1. Internal coherence

The judgment's internal logic is defensible, twice over. The Court of Appeal's ratio decidendi is that, first, the knowing recipient is a constructive trustee and that, second, the claimant must prove a continuing proprietary interest in the subject-matter knowingly

received.⁵ There are two alternative interpretations which explain the connection between one point of law and the other.

One interpretation of *Byers* posits that the trust structure runs with its subject-matter: every successor in title to a trustee is himself a trustee unless transfer of the subject-matter extinguishes the beneficiary's equitable interest; proving a continuing equitable interest is therefore essential to proving the knowing recipient's status as trustee.⁶ The principal difficulty with this interpretation is that case law tends to suggest that the trust structure is not itself persistent. In *Re Montagu's Settlement Trusts*, Megarry V-C emphatically distinguished between a successor in title being bound by 'some equity' – that is, liable to the beneficiary's specific (or 'proprietary') claim – and him also bearing 'the personal burdens and obligations of trusteeship'. The implication is that, defences aside, what persists against successors in title is the equitable interest alone, divorced from the trust, and that only some successors in title are, additionally, and on a personal basis, trustees.⁷ This arrangement has since been confirmed by the

⁵ *Byers* (n 2) [13], [47], [56], [75]-[76]; *ED&F Man Capital Markets Ltd v Wong* [2022] EWHC 229 (Comm) [635]-[642].

⁶ A Georgiou, 'Knowing Receipt: Continuing Trusts and Unconscionability in *Byers v Saudi National Bank*' (2023) 86(1) MLR 276, 281-82. See also B Au-Yeung and S Y C Leung, 'In Search of a Laundry Receipt' (2022) 5 *Trusts & Trustees* 360, 363.

⁷ [1987] Ch 264, 272-73, 285, 271, 276. In support of this interpretation of *Montagu*, P Birks, 'Knowing Receipt: *Re Montagu's Settlement Trusts* Revisited' (2001) 2 *Global Jurist Advances* 1: Birks envisions the equitable 'proprietary' claim as an equitable form of *vindicatio rei*, and, therefore, necessarily distinct from a claim in knowing receipt, which protects the equitable interest through the law of obligations, based either on wrongdoing or unjust enrichment.

House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*.⁸ An obiter dictum of Lloyd LJ in *Independent Trustee Services Ltd v GP Noble Trustees*, suggesting the contrary, casts some doubt on *Montagu*, but falls short of authoritatively departing from it. Indeed, other commentators, including the very practitioners' textbook cited by Lloyd LJ, maintain a distinction between liability under the specific claim and under a constructive trust,⁹ and Lloyd LJ himself admitted that 'one [should not be] misled into thinking that to call the relationship one of trustee and beneficiary tells you, of itself, what the duties and liabilities of the trustee are'.¹⁰

Nonetheless, to envision the trust itself as persistent is not mere 'semantics',¹¹ but a meaningful choice with significant practical implications. First, in the context of the beneficiary's specific claim, the defendant's state of mind is relevant only for the purposes of the equity's darling defence. Equating liability for knowing receipt to liability to the specific claim would therefore

Whether the 'proprietary' claim is actually analogous to *vindicatio* is another question.

⁸ [1996] AC 669 (HL) 706-7.

⁹ C Mitchell et al, *Underhill and Hayton Law of Trusts and Trustees* (20th edn, LexisNexis 2022) para 103.12; C Mitchell and S Watterson, 'Remedies for Knowing Receipt', in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010) 129; W Swadling, 'The Nature of "Knowing Receipt"' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 309-10.

¹⁰ [2012] EWCA Civ 95; [2013] Ch 91 [80], cited in S Agnew and B McFarlane, 'The Paradox of the Equitable Proprietary Claim' in S Agnew and B McFarlane (eds), *Modern Studies in Property Law* (Hart Publishing 2019) 304; Georgiou (n 5) 283-84.

¹¹ Suggested, tentatively, in *Westdeutsche* (n 7) 707. The view ultimately taken by the House of Lords in that judgment was that the trust structure is not persistent.

reduce the 'knowledge' element to the actual, constructive, or imputed notice necessary to rebut the equity's darling defence.¹² Second, if the recipient's liability is derived from the original trust, the content of the duties which he owes must necessarily be found in the terms of that trust. The knowing recipient could not plausibly be subjected to the same duties as the original trustee, so his duties can only be ascertained through a difficult exercise of implication. One could argue, for example, that the restrictions imposed on trustees' power to delegate reflect a broader principle that every trust imposes duties on the original trustee personally, and that the duties affecting knowing recipients are hence to restore the misappropriated assets to the original trustee and, in the meantime, to keep them in safe custody.¹³ However, the restrictions on delegation might simply be prophylactic measures intended to prevent dereliction of the duties of trusteeship, calling into question the proposed implication.

An alternative interpretation of Newey LJ's judgment starts not from the continuing proprietary interest requirement, but from unconscionability. Accepting that a trustee's successors in title need not be trustees themselves, it posits that knowing recipients are trustees under a new constructive trust arising, like all constructive trusts, from the unconscionability of the recipient's conduct.¹⁴ The reason for requiring a continuing interest lies in the particular unconscionable conduct required:

¹² Georgiou (n 5) 284: 'in order to be liable for breach of trust, a trustee must know (or be reasonably expected to know) of the facts which make them a trustee'.

¹³ *ibid* 282-83.

¹⁴ On the general requirement of unconscionability, *Westdeutsche* (n 7) 705; see the emphasis placed on unconscionability in *Byers* (n 2) [18], [61].

unconscionability is of retention and, as a matter of moral reasoning, requires that the assets retained actually be affected by a proprietary interest. Otherwise, retention is not unconscionable, and liability is not morally justified.¹⁵ The merit of this interpretation is that it allows the doctrine of knowing receipt to develop its own identity, distinct from the specific claim. The degree of knowledge required for unconscionability could – and should – exceed the level of notice required to rebut the equity’s darling defence. Thus, liability for knowing receipt would have a unique scope.¹⁶ At the same time, recognising an entirely new trust would afford courts greater freedom in shaping its substance, unaffected by the constraints of implication and instead guided by the general principles of equity and the particular function performed by liability for knowing receipt.¹⁷ In this light, knowing recipients could – and should – be subject

¹⁵ *Byers* (n 2) [18]-[19], [76]; in support of this interpretation, see Mitchell and Watterson (n 8) 129-30 and, since the Court of Appeal’s judgment, Oliver Humphrey et al, ‘Knowing Receipt in the Court of Appeal: a Decision on the Necessity of a Continuing Proprietary Interest in the Trust Property’ (2022) 3 BJIB&FL 208.

¹⁶ *Montagu* (n 6) 285, conclusions (1) and (3); Swadling (n 8) 311, 314, who distinguishes between knowledge and notice, and dismisses as confused and unauthoritative the occasional use of the language of notice in the context of knowing receipt (eg, *Papadimitriou v Crédit Agricole Corp & Investment Bank* [2015] UKPC 13 [33]); R Chambers, ‘The End of Knowing Receipt’ (2016) 2 Canadian Journal of Comparative and Contemporary Law 1, 11-14. On constructive and imputed notice, *Pilcher v Rawlins* (1871-72) LR 7 Ch App 259, 273-74 and *Hunt v Luck* [1902] 1 Ch 428 (CA); cf Georgiou (n 5) 282, 286.

¹⁷ As done, for example, by Collins J in *Englewood Properties Ltd v Patel* [2005] 1 WLR 1961 (Ch D), allowing vendor-trustees under *Lysaght v Edwards* (1876) 2 Ch D 499 to use the subject-matter for their own benefit, provided they also preserve the subject-matter in the state in which it was when the agreement took effect.

to obligations ‘over and above [their] core restorative duty’, possibly including duties ‘to take reasonable steps to preserve [the assets] value’, to ‘get in the trust property’, and fiduciary duties such as that to account for improper gains.¹⁸ Thus, liability for knowing receipt would have a unique content, informed by its unique scope: the ulterior burdens of trusteeship would be justified by the greater blameworthiness of those affected,¹⁹ explaining why a claimant would go to the trouble of bringing an action in knowing receipt as opposed to the specific claim.²⁰

The ‘new trust’ interpretation encounters some specific difficulties too. Firstly, emphasis on unconscionability of retention entails that ‘liability for knowing receipt’ is a misnomer. Untidiness is exacerbated by Newey LJ occasionally characterising knowing-receipt liability as a form of equitable wrongdoing²¹ and equating liability for knowing receipt to liability for dishonest assistance as instances of constructive trusts, given

¹⁸ Mitchell and Watterson (n 8) 139-42.

¹⁹ cf Swadling (n 8), 324, 326-27.

²⁰ cf S Agnew and B McFarlane, ‘The Nature of Trusts and the Conflict of Laws’ (2021) 137 LQR 405, 422-24, who treat the claim in knowing receipt as the alter ego of the specific proprietary claim. To the same effect, M Dixon, ‘Knowing Receipt, Constructive Trusts and Registered Title’ [2012] 76 Conv 439, cited in *Byers* (n 2) [65]; N Hopkins, ‘Recipient liability in the Privy Council: *Arthur v Attorney General of the Turks & Caicos Islands*’ [2013] 77 Conv 61, cited in *Byers* (n 2) [65], and Au-Yeung and Leung (n 5), 365.

²¹ *Byers* (n 2) [69] and, it seems, [76]. Swadling (n 8), 327-30. cf the more prevalent use of the language of trusts: *Byers* (n 2) [13], [39], [47]-[48], [54], [76].

that the status of dishonest assistants is still controversial.²² Secondly, whereas one of the benefits of the ‘new trust’ interpretation is that it affords courts greater freedom to shape its requirements and consequences, the Court of Appeal has foregone the opportunity to clearly address those issues, deferring to *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* on the necessary knowledge²³ and remaining virtually silent on the nature and content of the knowing recipient’s duties.²⁴ The failure to provide much-needed clarity on important ancillary questions may be taken to denote a lack of confidence in the law laid down. Thirdly, trust law insists that constructive trusts can only be institutional, arising as the relevant facts occur.²⁵ Because ascertaining unconscionability involves judgement on part of courts, an institutional account of the *Byers* trust looks contrived.²⁶ Nevertheless, other constructive trusts have been recognised as valid despite involving similar value judgments – the best example is Arden LJ’s trust in *Pennington v Waine*.²⁷ By the same token, the

²² *Byers* (n 2) [13]; *Royal Brunei Airlines v Tan* [1995] 2 AC 378 (HL); *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189; *Group Seven Limited v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129; Elliott & Mitchell, ‘Remedies for Dishonest Assistance’ (2004) 67 MLR 16; Mitchell and Watterson (n 8) 134, 146-48.

²³ [2001] Ch 437 (CA).

²⁴ On the debate on whether the liability for knowing receipt is the primary restorative duty or a secondary, remedial duty arising from breach of the reparative obligation, see Mitchell and Watterson (n 8) 131, 135, 137-38; cf S Gardner, ‘The Moment of Truth for Knowing Receipt?’ (2009) 1 LQR 20, 22; Chambers (n 15) 5-8.

²⁵ *Westdeutsche* (n 7) 714, 716.

²⁶ Swadling (n 8) 325.

²⁷ [2002] 1 WLR 2075 (CA). See also Clarke LJ’s trust, which requires that the donor did all which she thought was necessary to perfect the gift. Likewise, see the trust arising from cooperative acquisitions:

trust in *Byers* should be recognised as institutional, notwithstanding the role of courts determining when it arises. Instead, criticism should be addressed at courts' broader reliance on fictional analyses.²⁸ The more serious obstacle to an institutional account of *Byers* is *Williams v Central Bank of Nigeria*, in which Lord Sumption expressly described the liability in question as 'purely remedial'.²⁹

The inconsistency between *Byers* and *Williams* regarding the remedial character of liability provides insight into a broader flaw in the Court of Appeal's judgment – its highly questionable treatment of authority. As has already been noted, the judgment 'overlooks other significant statements in *Williams*' and 'showed perhaps too much deference to academic commentary', while 'the cases on which the Court of Appeal relied to show the existence of the "continuing trust" [or "continuing interest"] requirement do not quite establish the point'.³⁰ Criticism might be even bolder. More puzzling than simply ignoring several crucial passages in *Williams*,³¹ the very passages of *Williams* cited in the judgment

Banner Homes Group plc v Luff Developments Ltd [2000] Ch 372 (CA), but cf *Generator Developments v Lidl UK GmbH* [2018] EWCA Civ 396, [2018] 2 P&CR 7. Finally, see the trust arising from the fraudulent taking outright of land: *Nasrullah v Rashid* [2018] EWCA Civ 2685, [2019] 2 WLR 1310.

²⁸ The issue transcends constructive trusts. On express trustees' duty to account, Swadling (n 8) 325-26. On proprietary estoppel, S Bright and B McFarlane, 'Proprietary Estoppel and Property Rights' (2005) 2 C JL 449. In contract, S Smith, 'Remedies for Breach of Contract' in G Klass, G Letsas, and P Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014) 341, 347, 355-56.

²⁹ *Williams* (n 21) [9].

³⁰ Georgiou (n 5), 279-81.

³¹ For example, *Williams* (n 21) [6], [9], [13], [90], [161], [165].

appear to contradict the view that knowing receipt generates a trust. For instance:

The essence of a liability to account on the footing of knowing receipt is that the defendant has accepted trust assets knowing that they were transferred to him in breach of trust and that he had no right to receive them. His possession is therefore at all times wrongful and adverse to the rights of both the true trustees and the beneficiaries. No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. His sole obligation of any practical significance is to restore the assets immediately.³²

While the quote could be reconciled with the law laid down in *Byers* – the ‘trust’ reposed might be understood in the colloquial, non-legal sense – the Court of Appeal made no effort to do so. Other cases were cited with similar clumsiness.³³ Turning to the Court of Appeal’s treatment of commentary, one could argue that ‘it is undoubtedly good to see this level of dialogue between courts and commentators’.³⁴ However, the Court of Appeal’s

³² *Williams* (n 21) [31], cited in *Byers* (n 2) [51]. Emphasis moved.

³³ *Akindele* (22) [69]-[70], cited in *Haque v Raja* [2016] EWHC 1950 (Ch D) [46], cited in *Byers* (n 2) [67]. In addition, the emphasis placed on *Akindele* is not accompanied by a proper discussion – or even a mention – of *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846 [4], which severely undermined the authority of *Akindele*: see Georgiou (n 5), 285 and Swadling (n 8) 306-7. See also n 22.

³⁴ Georgiou (n 5), 279.

discussion of Mitchell and Watterson's work was exceptionally reverential, and came at the cost of disregarding similarly credible and comparably influential views.³⁵ It is thus difficult to find any meaningful dialogue. It is especially anomalous for the Court of Appeal to map the evolution of the co-Authors' opinions in relation to case law, treating them as if authorities.³⁶ Pragmatically, there is the issue of determining on which matters the Court of Appeal gave legal effect to the co-Authors' views: is it only on the nature of the cause in action, or also on the content of the duties imposed on knowing recipients, or perhaps even affirming *Montagu*? Although the ambiguities and discrepancies within the available case law placed the Court of Appeal in a thorny situation, the clumsy treatment of authority undermines the persuasiveness of the Court of Appeal's judgment in its entirety, regardless of one's preferred theoretical rationalisation, and exposes the law laid down to being overturned.³⁷ Ultimately, both the decision itself and the rule of law would have benefitted from the regulatory gap being more openly noted and the Court engaging in transparent normative reasoning.

³⁵ Swadling (n 8); P Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 296; A Burrows, *The Law of Restitution* (2nd edn, Sweet & Maxwell 2005) 202-6

³⁶ *Byers* (n 2) [49], [54]

³⁷ However, *Byers* would not be the only rule of equity established through a liberal attitude towards authorities: see A Televantos, 'Losing the Fiduciary Requirement for Equitable Tracing Claims' (2017) 133 *LQR* 492. It is therefore impossible to reliably predict the future of *Byers*.

2. Implications

The more worrying aspect of *Byers* is not why, with reference to doctrine and precedent, it lays down certain points of law, but what those points of law, going forward, entail.

A. Suitable continuing interests

As a preliminary point, debate is still very much alive on whether the beneficiary's equitable interest – the only interest contemplated by the Court of Appeal – is proprietary.³⁸ The language of the judgment hence rests on a hefty conceptual assumption. Making that assumption, the 'continuing proprietary interest' remains problematic, being at the same time under-inclusive and over-inclusive. The primary problem is that, by presupposing that there is an intelligible equitable interest in every trust arrangement, the Court of Appeal draws too narrow a scope for liability. In purpose trusts, some of which are valid under English law,³⁹ there is no figure who can be said to hold an equitable interest. There is an argument that an equitable interest, despite not being held by anyone, still exists in the abstract. Such an arrangement seems, however, awkward. Regardless, there is nobody concretely capable of suing the knowing recipient of misappropriated assets. It might be argued that beneficiaries-in-

³⁸ cf *Akers* (n 3) [14]-[18], [82] and Case C-294/92 *Webb v Webb* [1994] ECR I-1717, as well as the vast commentary, amongst which McFarlane and Stevens, 'What's special about Equity?', in Klimchuk, Smith, and Samet (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) and S Douglas, *Liability for Wrongful Interference with Chattels* (Hart Publishing 2011) 39-47.

³⁹ Charities Act 2011, s 2(1); *Re Endacott* [1960] Ch 232 (CA).

fact⁴⁰ and enforcers⁴¹ hold, or should hold, a continuing proprietary interest capable of grounding a claim in knowing receipt, but such an arrangement would be unprincipled. Firstly, proprietary interests must be relatively certain,⁴² while the identity of beneficiaries-in-fact and enforcers, as well as their ability and willingness to exercise their entitlements, is unpredictable. Secondly, conferring proprietary interests on enforcers erodes the distinction between enforcers and beneficiaries-in-law, undermining the distinct notion of a purpose trust. It must follow that, under *Byers*, knowing recipients are afforded an immunity from liability on the basis of the structure of the trust breached. Yet, such a conclusion is difficult to justify – if a purpose trust is a valid trust, it deserves the same protection as any other valid trust, including the protection offered by liability for knowing receipt.

Perhaps, courts have already realised the under-inclusivity, and have attempted to counteract it by focusing, rather than on the claimant's continuing interest, on the trustee's misappropriation. In *Courtwood Holdings SA v Woodley Properties Ltd*, for example, Nugee J argued that 'the foundation [of liability for knowing receipt] is that the assets do not belong in equity to the recipient; and the foundation of the fact that the assets do not

⁴⁰ Who, as opposed to 'beneficiaries-in-law', merely stand to incidentally benefit from the pursuit of the trust's purpose. *Re Astor* [1952] Ch 534 (Ch D); *Re Denley* [1969] 1 Ch 373 (Ch D) 382-84.

⁴¹ *Re Thompson* [1934] Ch 342 (Ch D); Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 LQR 96; Parkinson, 'Reconceptualising the Express Trust' [2002] CLJ 657.

⁴² *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1247-48; *Bailey v Angove's PTY Ltd* [2016] UKSC 47, [2016] 1 WLR 3179 [28].

belong to the recipient in equity is that the transfer by which the assets were transferred is a flawed transfer.⁴³ Crucially, there is no requirement that the assets ‘belong in equity’ to the claimant. To the same effect, Fancourt J maintained that ‘the reason for liability is that the transferee has knowingly dealt with (or retained) property that belongs to the trust inconsistently with his duty’.⁴⁴ The recurrent implication, it seems, is that breach of a purpose trust is sufficient to vitiate the unlawful transaction and allow enforcers – without a continuing interest – to assert a constructive trust for the original purpose. However, this solution assumes that the trust itself can, if breached, produce third-party effects. Instead, *Montagu* and *Westdeutsche* suggest that, in the absence of a continuing equitable interest capable of binding third parties, the unlawful transfer of purpose-trust assets remains valid, but gives rise to personal liability on the transferor-trustee’s part. Thus, the solution proposed is conceptually defensible, but at odds with a significant portion of case law.

A secondary problem with the continuing proprietary interest requirement is that it impliedly admits that a person can bring a claim in knowing receipt even if he does not hold an equitable beneficial interest under the trust breached, provided he has some other proprietary interest in the misappropriated assets. The expansive attitude might appear reasonable – even desirable – to rescue a beneficiary who loses his equitable interest but, still holding some other proprietary interest enforceable against the recipient, can nonetheless bring about a constructive trust. Nevertheless, one could also argue that, when compared to the

⁴³ [2018] EWHC 2163 (Ch D), cited in *Byers* (n 2) [61].

⁴⁴ [2021] EWHC 60 (Ch D) [110], cited in *Byers* (n 2) [27]. Emphasis added.

equitable beneficial interest lost, the interest asserted – hypothetically, a modest easement derived from the fee simple misappropriated – would have only a loose connection to the recipient’s knowing retention, and the benefits and burdens imposed by the constructive trust would be disproportionate. From a systemic perspective, to allow the former beneficiary to assert a trust would undermine whichever operation of law extinguished his equitable interest: for instance, when a beneficiary’s equitable interest over a registered estate is postponed by the registrable disposition of the estate,⁴⁵ *Byers* risks undermining the dynamic security which registration promotes. More alarmingly, there is nothing in *Byers* limiting the claim in knowing receipt to disappointed beneficiaries, and strangers to the original trust may well have standing. Even if the constructive trust were adjusted to benefit the original beneficiary rather than the stranger-claimant, the result would remain incoherent: first, the continuing interest requirement would be undermined; second, the protection of beneficiaries would be largely random, depending on whether some third party happens to hold a suitable interest and to be willing to bring an action. It would therefore have been much more convenient for the Court of Appeal to require a continuing equitable beneficial interest, curing the over-inclusivity (but not the under-inclusivity).

B. The difficulty with unconscionability

Unconscionability is a notoriously troublesome requirement. Many commentators who disagree as to the nature of liability for knowing receipt are unified by their aversion towards the use of unconscionability in adjudication, describing it as ‘too imprecise

⁴⁵ Land Registration Act 2002, s 29.

and open-textured',⁴⁶ 'hopeless',⁴⁷ and 'obfuscatory language' which 'gives no guidance' and is 'no more than a fifth wheel on the coach'.⁴⁸ Earlier, Arden LJ's reasoning in *Pennington*, which appeals to the same concept, was met with the same criticism.⁴⁹ Although unconscionability is habitually employed throughout equity⁵⁰ – indeed, even portrayed as a something of a unifying concept⁵¹ – it appears to be consistently rejected in practice. In particular, unconscionability plays no role in the application of most constructive trusts: when trusts arise from breach of fiduciary duty,⁵² specifically enforceable agreements,⁵³ want of formality,⁵⁴ mistaken payments,⁵⁵ fraudulent acquisition of property,⁵⁶ the principle in *Re Rose*,⁵⁷ or common intention,⁵⁸ courts do not mention unconscionability at all. Even the constructive trust under *Ashburn Anstalt v Arnold*, originally aimed at avoiding inequitable results upon the disposition of an estate

⁴⁶ Georgiou (n 5), 285-86.

⁴⁷ Swadling (n 8) 313-14.

⁴⁸ P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 226; Mitchell and Watterson (n 8), hardly mention unconscionability.

⁴⁹ H Tjio and T M Yeo, 'Re Rose Revisited: The Shorn Lamb's Equity' [2002] LMCLQ 296; P Luxton, 'In Search of Perfection: The *Re Rose* Rule Rationale' [2012] Conv 70.

⁵⁰ M Halliwell, 'Perfecting Imperfect Gifts and Trusts: Have We Reached the End of the Chancellor's Foot?' [2003] Conv 192.

⁵¹ *Westdeutsche* (n 7) 705; H Delany and D Ryan, 'Unconscionability: A Unifying Theme in Equity' [2008] Conv 401.

⁵² *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [2015] AC 250.

⁵³ Such as in *Englewood* (n 16).

⁵⁴ *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA); *Bannister v Bannister* [1948] 2 All ER 133 (CA).

⁵⁵ *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105 (Ch D). The trust seems to still exist after *Westdeutsche*, albeit greatly restricted.

⁵⁶ For example, *Nasrullah* (n 28).

⁵⁷ [1952] Ch 499 (CA).

⁵⁸ *Stack v Dowden* [2007] UKHL 432, [2007] 2 AC 432.

by a licensor,⁵⁹ has been pragmatically developed to require, in place of an ‘affected conscience’, an undertaking on the transferee’s part.⁶⁰ The constructive trust arising from cooperative acquisition, by contrast, is still based on unconscionability and – perhaps not wholly incidentally – is an area of uncertainty.⁶¹ Lastly, the Privy Council has been reluctant to employ unconscionability in *Royal Brunei Airlines*, with Lord Nicholls expressly noting its volatile, context-dependent meaning.⁶² The general aversion to unconscionability can be explained most straightforwardly by the threat posed to the rule of law by such a vague concept. An ulterior explanation is that ‘unconscionability’ seems to have a remedial connotation, and is therefore at tension with the rule that constructive trusts must be institutional: it does not seem a coincidence that, in *Westdeutsche*, Lord Browne-Wilkinson affirmed the role of unconscionability while also tentatively suggesting that English law might recognise remedial constructive trusts; the same correlation is visible in commentary.⁶³ Thus, the greater flexibility offered by unconscionability appears to be dwarfed by its drawbacks.

There are two reasons why courts should develop *Byers* by replacing the requirement of unconscionability. One reason is the inherent shortcomings of unconscionability: courts may want to supplant unconscionability with a clearer test capable of being applied prospectively, à la *Ashburn Anstalt*. Another reason pertains to the scope of liability for knowing receipt more broadly. On the one hand, there is pressure to loosen the continuing interest requirement in the interest of properly upholding purpose trusts; loosening that requirement would

⁵⁹ [1989] Ch 1 (CA).

⁶⁰ *Chaudhary v Yavuz* [2011] EWCA Civ 1314, [2013] Ch 249.

⁶¹ See n 28.

⁶² *Royal Brunei Airlines* (n 21) 392.

⁶³ Delany and Ryan (n 50), 417-25.

demand tightening unconscionability to retain the scope of liability within reasonable bounds. On the other hand, there is an inverse pressure to loosen unconscionability so as to prevent the law from lending its agency to schemes of asset laundering, whereby knowing recipients escape liability by exploiting jurisdictions which do not recognise equitable beneficial interests.⁶⁴ Ultimately, the only solution is to depart from, or at least radically rethink, unconscionability. One option is to accept that the trust structure itself is proprietary, reducing knowing receipt to the specific claim and replacing unconscionability with the actual, constructive, or imputed notice required to negate the equity's darling defence. Alternatively, one may adopt the personal account of knowing receipt and, to distinguish it from the specific claim, set a higher bar for liability. From this perspective, economic analysis has been proposed as a guide to the courts' application of unconscionability. The benefit of this reform lies in its ability to reconcile flexibility – distinguishing, for example, between transactions concerning shares and land – with reliable, objective criteria.⁶⁵ From a fully normative perspective, the proposal might be improved by shedding the label of unconscionability, conferring greater transparency to the requirement and greater legitimacy to the doctrine of knowing receipt. A more moderate alternative, which preserves the focus on the defendant's mental state, is to require dishonesty. Albeit a somewhat slippery notion too, dishonesty has been more carefully developed by case law, and – if balanced by appropriately

⁶⁴ See Au-Yeung and Leung (n 5) 366-67.

⁶⁵ S Barkehall Thomas, "Goodbye" Knowing Receipt. "Hello" Unconscientious Receipt' (2001) 2 OJLS 239.

burdensome duties – would therefore be an improvement.⁶⁶ One could even require a conspiracy between the defendant and the trustee in default, restricting the scope of liability significantly but also justifying especially burdensome duties. Conversely, both dishonesty and conspiracy give rise to concerns for the integrity of the broader legal landscape: both tests narrow the scope of liability for knowing receipt significantly, disregarding recipients who, while not deserving egregiously burdensome duties, would be treated unduly leniently by the specific claim alone. Therefore, the better attitude towards reform is cautious and incremental. Nevertheless, the flaws of the current arrangement operate very strongly in favour of some reform. Indeed, considering the ambiguities and discrepancies in authority which, effectively, granted the Court of Appeal regulatory carte blanche, the affirmation of such inconvenient requirements begs for an explanation.

C. The concept of trust

Newey LJ's account of knowing receipt was not plucked out of thin air. Quite to the contrary, its central elements – constructive trust, proprietary interest, and unconscionability – have a pre-eminent role in contemporary case law and are connoted by a sense of solemnity and authority. Therein lies the problem.

The awkward implications of *Byers* depend, at least in part, on underlying anomalies in the concept of trust. For instance, while the continuing proprietary interest is under-

⁶⁶ *Re McArdle* [1951] Ch. 669 (CA) 677; *Wheatley v Commissioner of Police of the BVI* [2006] UKPC 24, [2006] 1 WLR 1683; *Ivey v Genting* [2017] UKSC 67, [2018] AC 391; *R v Barton* [2020] EWCA Crim 575, [2021] Q.B. 685. See also *Royal Brunei Airlines* (n 23) 392 and *Birks* (n 47) 226.

inclusive with respect to purpose trusts, the law on such trusts is far from coherent. On the one hand, equity habitually protects those who reasonably rely on others' acts⁶⁷ and seeks to avoid disappointing the intentions of settlors,⁶⁸ suggesting that trust-like arrangements set up for the benefit of a purpose should be faithfully upheld. On the other hand, recognising purpose trusts would suppress the beneficiary principle; that principle is desirable not because the trust would otherwise be unworkable – it need not be⁶⁹ – but because the principle draws neat conceptual boundaries for the notion of trust, and its removal risks collapsing the notion into an unintelligible mass. The normative uncertainty manifests itself as a checkerboard solution, which seems to validate private purpose trusts according to judicial caprice.⁷⁰ Considering that the issue of purpose trusts was far removed from the facts of *Byers*, it is hardly surprising that the Court of Appeal did not review that area of law, ignoring the risk of a troublesome interaction between its judgment and the checkerboard rules. Courts' recognition of some purpose trusts speaks to a broader tendency to widen the scope of the concept of trust tout court. One egregious example is the rise of massively

⁶⁷ See the doctrines of estoppel: for example, *Collier v Wright (Holdings) Ltd* [2007] EWCA 1329, [2008] 1 WLR 643 and *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P & CR 10.

⁶⁸ See the mechanisms which except, or circumvent, formality requirements: *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA); *Bannister v Bannister* [1948] 2 All ER 133 (CA); *Solomon v McCarthy* [2020] 1 WLUK 130 (CC); *Re Gardner (No 2)* [1923] 2 Ch 230 (Ch D). See also McFarlane, 'Constructive Trusts Arising on a Receipt of Property Sub Conditione' (2004) 120 LQR 667; Gardner, 'Reliance-Based Constructive Trusts' in Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010).

⁶⁹ See nn 39-41.

⁷⁰ *Endacott* (n 38); *Denley* (n 39).

discretionary trusts, ‘in which trustees’ dispositive discretions do not merely qualify the beneficial interests but effectively displace them, one might even say overwhelm them’; although such a trust ‘has a certain logic to it’, it is ‘a kind of deformation of the trust device’.⁷¹ A more mundane example is the proliferation of constructive trusts, each arising in different circumstances and (quite rightly) producing different legal consequences.⁷² Unconscionability and the institutional account of constructive trusts can thus be understood as attempts to restrain the expansion of the constructive trust; like the checkerboard solution in *Endacott*, they are reactions to the gradual dilution of the concept of trust, the boundaries of which are moving further and further from the stereotypical express trust for beneficiaries. Nevertheless, unconscionability and the institutional account failed in their objective long before Newey LJ lifted his pen: courts seem to have impliedly recognised that unconscionability is a threat to the rule of law, but have not yet rejected it openly and generally, and have mangled the institutional account with fictional analyses. The root cause of these uncomfortable developments seems to be the courts’ failure to resolve the critical controversies that lie at the core of the concept of trust – that is, the relationship between trusts and equitable interests, as well as

⁷¹ L Smith, ‘Massively Discretionary Trusts’ (2017) 1 CLP 17, 27-28

⁷² *Englewood* (n 16); *FHR* (n 51); *Stack* (n 57); *Nasrullah* (n 28). For a critical account, portraying constructive trusts as a façade for equitable or restitutionary relief, see W Swadling, ‘The Fiction of the Constructive Trust’ (2011) 64 CLP 1; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch D) 1579-82. cf a more moderate view, which accepts that some constructive trusts are ‘true trusts’ while guarding against the risk of improperly extending the label, see *Paragon Finance v Thakrar* [1999] 1 All ER 400 (CA) 408-9; *Williams* (n 21) [9].

the proprietary status of each. This deprives the law of trusts of a stable foundation. In this sense, trusts sit in stark contrast to contract – an intuitive concept, openly examined through the lens of legal theory, which has retained a relatively narrow scope despite profound conceptual development.⁷³

Byers itself is a manifestation of the acritical attitude generally employed by courts towards the concept of trust, relying on trusts to resolve the dispute at hand but failing to properly engage with the nature of trusts and equitable interests. The Court of Appeal inherited, and then applied, powerful doctrines – constructive trust and unconscionability – tailored to appease both sides of the *Montagu* debate, while turning a blind eye to the latent anomalies revealed. Reinterpreting knowing receipt as wrongdoing or unjust enrichment is likely hence to circumvent the troublesome anomalies. However, one would have to examine and tinker with the concepts of equitable wrongdoing and unjust enrichment so as to ensure conceptual coherence going forward and avoid exporting the sort of conceptual disorder which afflicts trusts. One should also realise that repudiating trusts, out of fear of inconvenient implications, is no solution: the trust remains a valuable conceptual device, and this fearful attitude, taken to a logical conclusion, would gradually empty the concept of meaning. The ideal solution, which transcends the claim in *Byers*, is instead to commit to the concept

⁷³ Atiyah (n 1), chapters 17-22; P Atiyah, 'Freedom of Contract and the New Right' in *Essays on Contract* (OUP 1990). See also, for example, G Gilmore, *The Death of Contract* (2nd edn, Ohio UP 1995); C Fried, *Contract as Promise* (2nd edn, 2015 OUP); P Atiyah, 'The Practice of Promising' in *Promises, Morals, and Law* (OUP 1982); S Smith, *Contract Theory* (OUP 2004); D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Bloomsbury 2003).

of trust and harness it by resolving underlying uncertainties, policing conceptual boundaries from the inside to the outside.

Conclusion

Blame for the shortcomings of *Byers* is borne as much by the Court of Appeal as by past courts. The judgment lends itself to interpretations consistent with radically different understandings of the nature of trusts, but has problematic implications for future cases. In refusing to take a side in the debates – still unresolved – which underlie the concept of trust, *Byers* amounts to the latest acritical expansion of the concept. The judgment provides insight into two competing concerns affecting senior courts – first, their peculiar task of authoritatively furnishing legal concepts for the benefit of certainty and, second, the default adjudicative obligation – and the difficulty of mediating between the two. The judgment, as with the generality of cases dealing with trusts, seems to be too biased in favour of adjudicative convenience. Nonetheless, the statement that courts should think more carefully about the conceptual issues lurking behind disputes must be qualified, in that courts must not get lost in abstract puzzles to the detriment of litigants.