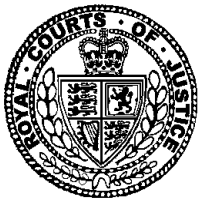

Neutral Citation Number: [2021] EWCA Civ 1378

Case No: A3/2020/1378

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR ROBIN VOS SITTING AS A DEPUTY HIGH COURT JUDGE
[2020] EWHC 1534 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2021

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

Between :

MICHAEL WARD AND OTHERS	**Appellants**
- and -	
KATHARINE ANNE SAVILL	**Respondent**

- -
- -

Alan Steinfeld QC and Hugh Miall (instructed by **Morgan Rose Solicitors**) for the **Appellants**
James Mather (instructed by **Kingsley Napley LLP**) for the **Respondent**

Hearing dates: 23 and 24 March 2021

- -

Approved Judgment

Sir Julian Flaux C:

Factual and procedural background

1. The issue on this appeal is whether the appellants can rely upon a declaratory judgment granted to them in earlier proceedings ("the 2015 proceedings"), to which the respondent was not a party, to found claims against her in the present proceedings. The appellants appeal, with the permission of the judge, against the order dated 6 July 2020 of Mr Robin Vos, sitting as a Deputy High Court Judge, made upon the trial of a preliminary issue determining that preliminary issue in favour of the respondent defendant.

2. The appellant claimants are 65 individuals who invested in total £18,429,009 in film development schemes each of which operated through an English limited liability partnership (LLP). The investment in each case involved paying a sum of money to the relevant LLP. The promoters of the schemes were the respondent's husband Charlie Savill and two other individuals.

3. The appellants allege that they were fraudulently induced to transfer the funds on the basis that they would be used as part of legitimate film development schemes, whereas the funds were not so used, but were diverted through a complex network of offshore entities for the benefit of the three promoters.

4. In 2015, therefore, the appellants and other investors in two other film schemes operated by separate LLPs but promoted by the same individuals, brought the 2015 proceedings in the Commercial Court against the three promoters and the four LLPs ("the original seven defendants"). The appellants and the other claimants in those proceedings are referred to hereafter as "the 2015 claimants". In those proceedings, the 2015 claimants claimed damages in deceit and unlawful means conspiracy, as well as declarations relating to their beneficial ownership of the funds invested in the LLPs and their right to trace into property held by the original seven defendants.

5. The 2015 proceedings were delayed because of the criminal prosecution of the three promoters. They were convicted of conspiracy to cheat the public revenue in May 2016 and were sentenced to 9 years' imprisonment. Extensions of time were granted to serve the 2015 proceedings on the original seven defendants and the proceedings were eventually served on 3 January 2017. Defences were due by 13 March 2017 but none of the original seven defendants served a defence.

6. In June 2017, the 2015 claimants made an application in the 2015 proceedings, amongst other things, to join additional corporate entities and various individuals (including the current respondent) as defendants and to amend the particulars of claim. The case which the 2015 claimants sought to advance against the respondent was the same case as advanced against her in the present proceedings, namely that her London property, 118 Elgin Crescent, of which the respondent is the sole registered proprietor, represents the traceable proceeds of sums beneficially owned by the appellants by reason of the alleged fraud. The 2015 claimants proposed to seek against the proposed additional defendants the same declaratory relief as was already sought against the original seven defendants.

7. In July 2017, the 2015 claimants applied for a worldwide freezing order against, amongst others, the respondent, to prevent her dealing with her London property.

8. On 16 February 2018, the 2015 claimants issued an application in the 2015 proceedings for default judgment against the original seven defendants. That application and the applications for joinder of defendants and amendment of the particulars and for a worldwide freezing order were all listed to be heard by Butcher J on 26 and 27 March 2018.

9. On 19 March 2018, the respondent served brief evidence in opposition to the two applications being made against her, namely the application for a worldwide freezing order and the application to join her as a defendant to the 2015 proceedings. The respondent accepted, in the light of her husband's conviction, that a fraud had been committed, but said she had no knowledge of the matters alleged and still did not properly understand what it was that her husband and others were alleged to have done. The respondent did not know or suspect that the monies used to purchase the London property were monies to which she or her husband may not have been entitled. She indicated that she opposed joinder on the basis that it would unfairly deprive her of a defence under section 21(3) of the Limitation Act 1980 to which she contended that the proposed claim against her in respect of her London property was subject.

10. The 2015 claimants evidently did not wish to fight out the issue of limitation at that stage, so on 26 March 2018, a consent order was entered into between them and the respondent in relation to the two applications to which she was a party, which provided that permission to add her as a defendant was refused and no order was made against her in respect of the application for the worldwide freezing order. The respondent agreed to provide certain information to the 2015 claimants and gave undertakings not to deal with the London property. The 2015 claimants gave cross-undertakings, including:

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

11. That consent order was approved by Butcher J at the hearing on 26 March 2018 and, in consequence, he heard only from counsel for the 2015 claimants at the hearing, the additional corporate defendants who were joined being neither present nor represented.

12. At the outset of his ex tempore judgment ([2018] EWHC 995 (Comm)), Butcher J noted that the 2015 claimants had served voluminous evidence in support of their case that they had been defrauded. He then summarised that case. The judge then allowed the joinder of defendants (other than the respondent) and amendments to the particulars of claim which sought against the proposed new defendants the same declaratory relief as regards beneficial ownership and tracing as already sought against the original seven defendants.

13. Butcher J went on to deal with the default judgment application at [53] to [59] of his judgment, where he stated, so far as presently relevant:

> "53. The next application which is made is for default judgment against the First to Seventh Defendants. Specifically, the Claimants make two applications, first in respect of their money claim for unlawful means conspiracy in the sum of £33,049,495, as well as a claim for interest and costs. Secondly, they make an application for default judgment for declaratory relief in respect of the Claimants' proprietary claim.
>
> …
>
> 55. In relation to the default judgment on the damages claim, this raises no difficulties. This is the type of claim in respect of which default judgment may be obtained by request. Accordingly, there must be default judgment for the principal sum of £33,049,495…
>
> 56. The other claim in respect of which a default judgment is sought is the Claimants' claim for declaratory relief. What is sought against the First to Seventh Defendants is a default judgment for declarations in the terms set out in the application…
>
> 57. I was reminded that the Courts have traditionally been cautious about granting declarations of right on admissions or in default of the pleadings. However, the Courts have been prepared to grant declarations where not to do so would deny a claimant the fullest justice to which he or she is entitled...
>
> 58. I consider that the declaratory relief sought in respect of their asserted equitable rights is necessary in order to allow the Claimants to trace into property in the hands of the Defendants or which represent the Claimants' property or proceeds. Without a declaration, the Claimants could not pursue proprietary relief. Therefore, it seems to me a declaration is needed in order to do the Claimants the fullest justice to which they are, on their unopposed case, entitled. Furthermore, in the present case, and where it appears that the principal Defendants will not participate and will not defend the proceedings, there seems to be no good reason for not proceeding to make the declarations sought now. It is unclear what purpose will be served by waiting, as the non-participation of the First to Seventh Defendants seems unlikely to change.
>
> 59. The nature of the declarations sought is such that they do not seek to specify particular property into which the Claimants are entitled to trace. The questions of whether there is property into which the Claimants can trace and, if so what it is, remain at large."

14. Butcher J made an Order granting the following declarations (hereafter referred to as "the Butcher Declarations"):

> "IT IS DECLARED THAT:
>
> 1. Each of the Claimants was induced to invest into the Schemes (as defined in the Particulars of Claim dated 10 February 2017) by reason of the fraudulent misrepresentation of one or more of the Defendants.
>
> 2. Each of the Claimants has or retains a beneficial interest in the monies paid to one or more of the Fourth to Seventh Defendants during the commission of the Schemes as described in the Particulars of Claim, and in the amounts as set out in Annex A to the Particulars of Claim.
>
> 3. The Claimants are entitled to trace into property in the First to Seventh Defendants' hands which represents monies invested into the Schemes and subsequently paid away and the traceable proceeds thereof."

15. The appellants issued the present claim against the respondent on 3 April 2019 asserting a proprietary claim against the London property. At [14] of the particulars of claim, they refer to the 2015 proceedings and plead that they asserted in those proceedings that their investment in the LLPs was procured by fraudulent misrepresentation and that, by those proceedings, they had rescinded the contracts and transactions pursuant to which the investments were made and sought proprietary relief consequential on that rescission. At [15] the appellants plead the Butcher Declarations and at [16] they plead: *"Accordingly, the Claimants have or retain a beneficial interest in the monies transferred by them to [the LLPs] and are entitled to trace into property that represents the traceable proceeds of those monies."*

16. In her defence, the respondent pleads that, as she was not a party to the 2015 proceedings, she is not bound by the judgment in those proceedings or the Butcher Declarations. She contends that, in so far as the appellants wish, for the purposes of any claim against her, to rely upon the assertion that they had or have a beneficial interest in monies transferred by them to the LLPs and are entitled to trace into property that represents the traceable proceeds of those monies, they are required to plead and prove against the respondent the factual and legal basis for that assertion, which they had not done in the particulars of claim.

17. On 20 January 2020, Deputy Master Henderson approved a consent order in which it was agreed that the Court would decide this issue as a preliminary issue:

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

The judgment below

18. Having identified that this was the sole issue for him to determine, at [22] the judge set out the two reasons put forward by the appellants why the Butcher Declarations were sufficient to found their proprietary claim against the respondent:

> "(a) The 2018 Judgment is a judgment in rem and so binds the whole world.
>
> (b) Even if the 2018 Judgment is not a judgment in rem, the effects and consequences of the declarations contained in the 2018 Order continue to have effect unless and until they are challenged by someone who has standing to do so by way of an application as part of the 2015 Proceedings to set aside the relevant part of the 2018 Judgment/Order."

19. The judge first considered the effects and consequences of the judgment and Order of Butcher J on the basis that they were not decisions *in rem*. At [24] of his judgment, the judge set out the distinction which the appellants sought to draw between whether a judgment is binding on someone who is not a party to the proceedings (through the rules of *res judicata*) and whether the judgment has some legal effect or consequence in relation to a stranger to the proceedings, in the absence of any challenge to the judgment. The appellants contended that although the respondent was not prevented by *res judicata* from challenging the judgment, in the absence of such a challenge, she could not simply ignore the legal effects and consequences of Butcher J's judgment and Order.

20. Having analysed the various authorities relied upon by the parties (which I will consider in detail later in this judgment) the judge's conclusions on this issue are set out at [80]-[82] of his judgment:

> 80. On a proper understanding of the principle derived from the *Duchess of Kingston's case* [(1776) 2 Sm LC 13th edition 644] and further explained in *Hollington* [the decision of the Court of Appeal in *Hollington v Hewthorn & Co Ltd* [1943] 1 KB 587] and in *Calyon* [the decision of the Privy Council in *Calyon v Michailaidis* [2009] UKPC 34], no distinction should be drawn between the situation where a fact or matter is determined as part of the court's process of reasoning leading to the grant (or refusal) of some other form of relief and a situation where the determination of the fact or matter itself forms part of a declaration comprised in the relief granted. Given the reasons for the existence of the principle, it would make no sense for the ability of a claimant to rely on the previous judgment to depend on this distinction.
>
> 81. This does not of course mean that a judgment or order cannot affect a third party in some way. Clearly it can and, no doubt, will do so in many cases. *Behbehani* [the decision of the Court of Appeal in *Behbehani v Al Sahoud* [2019] EWCA Civ 2301, upon which the appellants relied] demonstrates this. That is however very different to extending the effect of the judgment or order so that it amounts to proof of a fact which is fundamental

> to a claim against somebody who was not a party to the previous proceedings.
>
> 82. It is true that Mrs Savill will have taken the monies used to purchase her property subject to any equities affecting those funds. She is however entitled to require the Claimants to prove each element of their claim rather than relying on a declaration made in proceedings to which she was not a party."

21. The judge then considered the second issue, whether the judgment/Order of Butcher J was a judgment *in rem*. He cited two passages from the judgment of Lord Mance in the Privy Council in *Pattni v Ali* [2006] UKPC 51; [2007] 2 AC 85:

> "21. …a judgment *in rem* … is thus a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it).
>
> 23…The fact that a judicial determination determines or relates to the existence of property rights between parties does not in itself mean that it is *in rem*."

22. He noted that Mr Mather (who appeared for the respondent in this Court and below) did not take the position that a declaration as to ownership cannot ever take effect *in rem*, but that he submitted that would be very much the exception rather than the rule for such a declaration to take effect *in rem*, citing what Hickinbottom J said in *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin); [2011] PTSR 269 at [41] and [51]:

> "41... For obvious reasons, the grant of such jurisdiction is rare: it is a potentially severe jurisdiction, binding everyone without those who might be interested in the issue necessarily being given notice or an opportunity to be heard. Other than in exceptional cases, it would have the clear hallmark of injustice."
>
> "51... Claims before the courts generally involve the rights and obligations of those –and only those, privy to the proceedings. It is usually contrary to the interests of justice to determine rights and obligations of those who are not parties, and who may not have been given any notice or opportunity to make submissions on the issues."

23. The judge noted that these principles were not really in issue, saying at [99]-[100]:

> "99. In reality, there is little difference between the parties as to the principles to be applied in determining whether the 2018 Order takes effect in rem.
>
> 100. Both parties ultimately accepted that a declaration as to be beneficial ownership is capable of taking effect in rem and that whether it does so is to be ascertained by an analysis of the

> judgment or order in question. They also agree that it is uncommon for a judgment to take effect in rem given the potential for injustice in that the judgment will bind the whole world. In my view, these principles are clear from the authorities to which I have been referred. The real difference between the parties is in the application of these principles to the 2018 Judgment/Order."

24. Having considered the parties' submissions, the judge said at [112] that he was very far from being satisfied that the judgment/Order took effect *in rem*. He considered at [114] that the fact that, after the application for default judgment against the original seven defendants had been made, the particulars of claim were further amended without changing the relief claimed against the new defendants the 2015 claimants sought to join was strong evidence that the Order Butcher J made was not intended to take effect *in rem*.

25. He rejected the submission that the reference in [58] of Butcher J's judgment to property "which represents the Claimants' property or proceeds" was compelling evidence that the judgment was to take effect *in rem.* He said at [115]:

> "The more likely explanation is that this was a loose use of language, particularly when set against the actual terms of paragraph 3 of the 2018 Order, which is clearly limited to property in the hands of the original seven defendants. The reference to "the traceable proceeds thereof" in paragraph 3 of the 2018 Order does not, as I read that paragraph, refer to property held by anybody other than the original seven defendants. Instead, it refers to the traceable proceeds of the funds invested in the LLPs which may now be represented by property in the hands of any of the first seven defendants."

26. He held at [116] that, given the limited terms of paragraph 3 of the Order of Butcher J, it could not be the case that paragraph 2 of the Order bound the whole world. He concluded at [117] that the Order and judgment did not take effect *in rem* and could therefore not be relied upon by the appellants as against the respondent to establish their beneficial interest in the funds invested by them in the LLPs.

The grounds of appeal

27. In summary the two grounds of appeal are:

(1) That the judge was wrong to conclude that the judgment and Order of Butcher J did not have such legal effect or consequences to enable the appellants to establish their proprietary claim against the respondent and/or

(2) That the judge was wrong to conclude that the judgment and Order of Butcher J, in so far as it declared that the appellants were the beneficial owners of certain monies paid to identified parties, was not a judgment *in rem.*

The submissions of the parties

28. On behalf of the appellants, Mr Alan Steinfeld QC submitted in relation to the first ground of appeal that the effect of the Butcher Declarations, in conjunction with the plea in the particulars of claim in the 2015 proceedings that the contracts and transactions had been rescinded for fraudulent misrepresentation, was that the judge had made a finding that the contracts and transactions had been rescinded or avoided and were void *ab initio*, which resulted in the money paid pursuant to the contracts or transactions being deemed to revert to the appellants as transferors, so that they retained their beneficial interest in the money. The reference in the third declaration to "and the traceable proceeds thereof" enabled the appellants to exercise the right to recover their money as against, in the present instance, the respondent.

29. Although the respondent was not bound in a strict sense by the Order made by Butcher J, it did not mean she was unaffected by it. The effect of the Order made by Butcher J was that it was determined that the contracts and transactions were rescinded *ab initio* with the consequence in law that the beneficial interest never passed to the LLPs. That was not something which could be ignored by the respondent. He submitted that the rule in *Hollington v Hewthorn* was only designed to prevent reliance against someone on factual findings made in proceedings to which that person was not a party. It did not have any impact on the legal effect of any Order made.

30. Mr Steinfeld QC submitted that the respondent was a complete stranger to those contracts and transactions. The money lent to her to buy the London property came from her husband via his corporate entities, but it was not money to which he was beneficially entitled. The beneficial interest in that money was deemed never to have passed from the appellants. Mr Steinfeld QC went so far as to submit that, even if the respondent had been joined to the 2015 proceedings, she would have had no right to challenge the appellants' case, as between themselves and the promoters, that the contracts and transactions had been rescinded *ab initio* because the respondent was not a party to them and had nothing to do with them. The judge would have said to the respondent that she was not entitled to interfere in a contractual relationship to which she was not a party where the other parties to the contracts had the opportunity to defend the claim but chose not to do so.

31. Mr Steinfeld QC submitted that the starting point in considering whether someone in the position of the respondent was affected by the judgment or Order was the passage in *Phipson on Evidence* 19th edition at [43-02]:

> "Judgments being public transactions of a solemn nature are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. In other words, the law attributes unerring verity to the substantive, as opposed to the judicial, portions of the record."

32. The footnote to the second sentence cites a passage in *Stephen's Digest* adopted by the Court of Appeal in *Hollington v Hewthorn* at 596. This passage about the effect of a judgment was particularly relied upon by the appellants. It is convenient to consider that case in more detail at this stage. Where particular authorities were relied upon by either party, I propose to set out most of the passages relied upon in this section of the judgment to put the submissions in context and to avoid repetition later in the judgment.

33. In *Hollington v Hewthorn*, as is well known, the plaintiff sought to rely in civil proceedings upon the defendant driver's criminal conviction for careless driving as evidence of his negligence. The Court of Appeal (Lord Greene MR, Goddard and Du Parcq LJJ) held that evidence of the conviction was inadmissible. That specific conclusion was repealed by section 11 of the Civil Evidence Act 1968 but, for reasons which I will develop later in this judgment, the general statement of principle as to the effect of a judgment on someone who is not a party remains good law and has been cited with approval in a number of subsequent cases.

34. For present purposes, it is only necessary to cite the statement of principle at 596-7 of the judgment of the Court delivered by Goddard LJ:

> "A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the *Duchess of Kingston's Case* (1776) 2 Sm LC 13th ed. 644, "it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore .... the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay *xl*. to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see *Green v. New River Co* (1792) 4 Term Rep. 589, and B can show, if he can, that the amount recovered was not the true measure of damage."

35. Mr Steinfeld QC relied in particular on the penultimate sentence: "A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue." He submitted that, applying this statement, it was not open to the respondent to challenge that the contracts or transactions had been rescinded and that, as a consequence, the beneficial interest in the money invested by the appellants had not passed but remained with the appellants. As I will set out in more detail hereafter, that sentence does not bear the wide interpretation which Mr Steinfeld QC sought to put upon it. It is clearly qualified by the last sentence of the passage which follows it and which makes it clear that what the Court of Appeal had in mind was fairly narrow.

36. Mr Steinfeld QC also placed particular reliance on the decision of the House of Lords in *Mulkerrins v PricewaterhouseCoopers* [2003] UKHL 41; [2003] 1 WLR 1937. The

claimant alleged that her bankruptcy and the loss of her business had been caused by the negligence of the defendant, PwC, insolvency practitioners who acted for her. A dispute arose between her and her trustee in bankruptcy as to whether the cause of action against PwC vested in her or in the trustee for the benefit of her creditors. She obtained an Order from a district judge sitting in bankruptcy declaring that the trustee had no interest in the claimant's claim against PwC. The trustee did not appeal that Order.

37. PwC, which had been unaware of that Order, applied in the proceedings against it to strike out the claimant's action on the ground that the cause of action vested in the trustee and had not been assigned to the claimant, who therefore had no title to bring the action. The judge's decision in favour of the claimant was reversed by the Court of Appeal which held that PwC was not estopped from asserting the true position which was that the claimant had no title to bring the action. That decision was reversed by the House of Lords, which held that the issue as to the right of action was one between the claimant and her trustee in bankruptcy, decided by the district judge in the exercise of the court's supervisory jurisdiction over the bankruptcy process, and that PwC, being strangers to that process, had no right to be heard on that issue or to challenge the district judge's Order.

38. Mr Steinfeld QC submitted that there was an analogy with the present case. Just as PwC did not have *locus* to challenge the district judge's Order, so the respondent had no *locus* to challenge the Order of Butcher J. He relied upon the speech of Lord Walker at [45]:

> "45. If (as I think) PwC had no right to be heard on the question of entitlement to the right of action, it is irrelevant that PwC was not bound by the district judge's order in such a way as to create an estoppel per rem judicatam. There is a statement in *Spencer Bower, Turner & Handley, Res Judicata* 3rd ed (1996), p 130, para 251, that "An English judicial decision which operates upon a thing by effecting a disposition of it determines its status and may be set up by, or against, any member of the English public, as conclusive in rem." But it is simply not necessary to explore this difficult area. In relation to the points raised in Mr Krolick's respondent's notice in the Court of Appeal it may be accepted that the order of 3 February 1999 was erroneous, and that it does not bind PwC by estoppel per rem judicatam or indeed by any other form of estoppel. But as the deputy judge said, the order certainly did bind the trustee in bankruptcy who was the only other possible contender for title to the right of action. The substantial effect of the order was not to assign the right of action, but to declare that it had not been affected by the bankruptcy. From the moment that the right of action arose, it was at all material times in the legal and beneficial ownership of Ms Mulkerrins. If the trustee in bankruptcy, as the only possible rival claimant, was bound by the order, its practical effect was not open to challenge by PwC."

39. He also relied upon what Lord Millett said at [11]-[12] of his speech:

> "11. The district judge's order, therefore, bound the trustee and through him the creditors. As between Ms Mulkerrins and the creditors, her claim against PwC and its proceeds belonged to her and did not form part of the bankrupt estate available to them. The Court of Appeal, with respect, overlooked the fact that, whatever world PwC inhabited, the trustee and the creditors lived in the world created by the district judge's order.
>
> 12. PwC, of course, were not parties to the proceedings in the bankruptcy court. They were not given notice of the proceedings and took no part in them. They are not, therefore, bound by the order of the district judge. But this does not mean that they can simply ignore it or that they are unaffected by it. It means only that they cannot be prejudiced by it. They cannot relitigate the issue, not because it is res judicata as against them, but because they have no legitimate interest in doing so."

40. Mr Steinfeld QC submitted that the position of the respondent was exactly the same as that of PwC. The district judge's Order in relation to title to the cause of action had substantive effect and PwC could not contend that the Order was of no effect. Here the respondent had no legitimate interest in challenging the conclusion, which followed from the Butcher Declarations, that the contracts and transactions had been rescinded. He submitted that *Mulkerrins* was stating a general principle and there was nothing to indicate that it was restricted to a rule in bankruptcy proceedings.

41. He also relied upon the decision of the Court of Appeal in *Behbehani v Al Sahoud.* In that case, in divorce proceedings in 2008 Mr Behbehani was ordered to pay his wife a lump sum, the judge finding that he was the beneficial owner of most of the shares in a Spanish company, Setubal. Nearly ten years later, in 2017, an Order was made appointing receivers in respect of those shares with a view to enforcing payment by him of the lump sum. A Mr Al Sahoud asserted that he had a beneficial interest in the shares and applied to set aside the receivership Order, on the grounds, *inter alia*, that, as he was not a party to the proceedings in 2008, he was not bound by the court's decision that the shares were beneficially owned by Mr Behbehani. Mr Steinfeld QC referred to [70] and [79]-[80] in the judgment of Baker LJ:

> "70. Eleven years on from the 2008 judgment in this case, it is impossible for this court to review the decision whether or not any third parties should have been joined. But the fact that they were not joined does not prevent the wife seeking to enforce her judgment against assets, the legal title to which is vested in third parties but which Parker J found to be beneficially owned by the husband.
>
> …
>
> 79. In my judgment, this appeal succeeds for the principal reason advanced by Mr Pickering. The judge was wrong to set aside the receivership order on the mere assertion by Mr Al Sahoud and Saltai that they were the owners of the shares in the Irish

> companies. None of the arguments advanced by Mr Shaw is sufficient to defeat Mr Pickering's principal argument.
>
> 80. Where a judge has found that assets, the legal title to which is held by a third party, are beneficially owned by a party to matrimonial financial remedies proceedings, the other party to the proceedings is not precluded from seeking to enforce a lump sum order made in the proceedings against the assets merely because the third party was not joined to the proceedings before the order was made. Unless and until it is established that the basis on which the court awarded the lump sum to the wife in 2008 – that the husband is the beneficial owner of Setubal 97 – was incorrect, the court is entitled, indeed obliged, to do what it fairly can to assist the wife to enforce the order, provided the rights of third parties not bound by the order are respected. In order to be respected, however, those rights must be established. A third party cannot expect to receive the protection of the court if not prepared for those rights to be scrutinised. Mr Shaw's submission that the wife's application for the appointment of a receiver of the Irish companies' shares in Setubal 97 is an abuse of process because she should have joined his clients to the proceedings before the 2008 order was made is therefore misconceived."

42. He also relied upon [88]-[89] in the concurring judgment of Longmore LJ:

> "88. I would only add that, in my view, the application by Mr Al-Sahoud and Saltai to set aside the receivership order was misconceived from the start. The order appointing receivers of shares in Setubal SL, which were owned by Viveca and Areish, was made in the context of enforcing the 2008 judgment of Parker J. Since the shares are shares in Irish companies, it would have been open to those Irish companies to apply to set aside the order. I do not know what the prospects of any such application would have been. But any such application would have to be made by those companies, and no such application has ever been before the court.
>
> 89. If Mr Al-Sahoud and Saltai wanted to assert that they were the owners of the shares in Viveca and Areish, and therefore the beneficial owners of Setubal, they could intervene in the proceedings, assert their ownership and ask for an issue as to that ownership to be tried. They have not done that."

43. Mr Steinfeld QC submitted that this case demonstrated that the Order could not just be ignored as if it did not exist and that its legal effect stands unless and until the Order is set aside, reiterating that the respondent would not have been able to challenge the rescission of the contracts and transactions in the proceedings before Butcher J. In support of that submission he relied upon the analysis of the effect of rescission by Patten LJ in *Independent Trustee Services v Noble Trustees Ltd* [2012] EWCA Civ

195; [2013] Ch 91 at [53]-[55], particularly his citation with approval of the judgment of Dixon CJ in *Alati v Kruger* (1955) 94 CLR 216 at 223:

> "equity has always regarded as valid the disaffirmance of a contract induced by fraud even though precise restitutio in integrum is not possible, if the situation is such that, by the exercise of its powers, including the power to take accounts of profits and to direct inquiries as to allowances proper to be made for deterioration, it can do what is practically just between the parties, and by so doing restore them substantially to the status quo ….. It is not that equity asserts a power by its decree to avoid a contract which the defrauded party himself has no right to disaffirm, and to revest property the title to which the party cannot affect. Rescission for misrepresentation is always the act of the party himself ….. The function of a court in which proceedings for rescission are taken is to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction ab initio, and, if it is valid, to give effect to it and make appropriate consequential orders ….. The difference between the legal and the equitable rules on the subject simply was that equity, having means which the common law lacked to ascertain and provide for the adjustments necessary to be made between the parties in cases where a simple handing back of property or repayment of money would not put them in as good a position as before they entered into their transaction, was able to see the possibility of restitutio in integrum, and therefore to concede the right of a defrauded party to rescind, in a much wider variety of cases than those which the common law could recognize as admitting of rescission. Of course, a rescission which the common law courts would not accept as valid cannot of its own force revest the legal title to property which had passed, but if a court of equity would treat it as effectual the equitable title to such property revests upon the rescission."

44. Mr Steinfeld QC relied upon this case in support of his submission that rescission was a matter between the contracting parties and that the respondent was no more entitled to challenge the effect of rescission in these proceedings than she would have been in the proceedings before Butcher J.

45. Mr Steinfeld QC sought to distinguish the decision of the Privy Council in *Calyon v Michailidis*. That was an appeal from a decision of the Court of Appeal of Gibraltar concerning a dispute as to ownership of a valuable collection of Art Deco furniture between members of the Michailidis family and a Mr Symes who had lived with the deceased Christo Michailidis. Mr Symes had sold the collection in Switzerland. The family discovered that part of the proceeds of sale had been deposited by Mr Symes in an account in Gibraltar with Calyon, a French bank. The family claimed in the Gibraltar proceedings that they had purchased the collection, given it to Christo, and that it had been misappropriated by Mr Symes, so that the proceeds of sale were held on trust for them. The family had commenced earlier proceedings in Greece against Mr Symes to determine ownership of the collection. Judgment in the Greek proceedings was

delivered shortly after the Gibraltar proceedings were commenced, the Greek court determining that the collection belonged to the family and awarding them a sum of money representing its value. Calyon was not a party to the Greek proceedings and was unaware of them until after that judgment.

46. The family applied for summary judgment in the Gibraltar proceedings for a declaration that they were the owners of the collection, based upon the decision of the Greek court. The Privy Council held, applying the principles set out in *Hollington v Hewthorn* which I cited above, that the family could not rely, as against Calyon, on the decision of the Greek court to prove in the Gibraltar proceedings that they were the owners of the collection. Lord Rodger, giving the judgment of the Privy Council, said that the position would have been no different if the previous decision had been one of the Gibraltar courts, saying at [23]:

> "Suppose, then, that a judge of the Gibraltar Supreme Court had held, in proceedings between Christo's heirs and Mr Symes and RSL, that Christo had been the owner of the Collection and that the title to the Collection had passed to his heirs on his death. What effect would such a judgment have as evidence in the present proceedings in which Mrs Michailidis and the administrators sue Calyon? The answer to be derived from the approach of the law as exemplified by the decision in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 is: None."

47. Mr Steinfeld QC argued that the difference between *Calyon* and the present case is that there, the only evidence of the family's ownership of the collection was the determination by the Greek court in proceedings to which the bank was not a party, so the bank could say that they had to prove ownership, whereas here the position was different because the appellants' claim was founded on the fact that their money had been invested in the scheme, which they will prove. The Butcher Declarations establish that their money had not been lost from that investment in the scheme, but they could trace it into the respondent's property.

48. Mr Steinfeld QC had referred to the existence of the provision which is now CPR40.9 (but which had predecessors in the Rules of the Supreme Court going back to 1883) which provides:

> "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

He submitted that this provision supported the appellants' case that a non-party such as the respondent could be affected by a judgment and, were this not so, the provision would be unnecessary.

49. In relation to the second ground of appeal, Mr Steinfeld QC accepted that the law on judgments *in rem* was not very clear. He relied upon a passage in *Graveson: Conflict of Laws* (7th ed. 1984):

> "An action *in rem* is one in which the judgment of the court determines the title to property and the rights of the parties, not

> merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated."

50. He also relied upon the description of a judgment *in rem* in *Halsbury's Laws of England* vol. 12A para 1597: "A judgment *in rem* may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation". This passage cites the opinion of the majority of the judges given by Blackburn J to the House of Lords in *Castrique v Imrie* (1870) LR 4HL 414 at 427-9 in particular, citing *Story* on Conflict of Laws:

> "We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from *Story*. We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."

51. In support of his submission that the *res* here was the appellants' beneficial interest in the money they had invested which had been misappropriated, Mr Steinfeld QC relied upon a passage from the judgment of Lord Sumption JSC in *Akers v Samba Financial Group* [2017] UKSC 6; [2017] AC 424 at [82]:

> "The proprietary character of an equitable interest in property has sometimes been doubted, but in English law (which is in this respect the same as Cayman Islands law), the position must be regarded as settled. An equitable interest possesses the essential hallmark of any right *in rem*, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice…"

Mr Steinfeld QC submitted that the appellants' beneficial interest in the money was a right *in rem* in the way described by Lord Sumption.

52. He also relied upon the definition by Lord Mance in *Pattni v Ali*. Having cited what Blackburn J said in *Castrique v Imrie*, Lord Mance said at [21]:

> "For present purposes, a judgment *in rem*… is thus a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it). The distinction is shortly and accurately put in *Stroud's Judicial*

> *Dictionary*, 7th ed (2006) at p 2029, cited (in an earlier edition) by Deemster Kerruish:
>
> 'A judgment in *personam* binds only the parties to the proceedings as distinguished from one *in rem* which fixes the status of the matter in litigation once for all, and concludes all persons…'".

Mr Steinfeld QC submitted that the Butcher Declarations, to the effect that the money invested by the appellants remained vested in them, were as much a declaration of title as if the money had been a thing which was being transferred.

53. He contended, citing the passages in the judgment of Butcher J which I have set out above, that Butcher J was clearly intending that his Order would be binding on everyone. The Butcher Declarations were made in order to enable the applicants to trace the money into the hands of persons who were not party to the 2015 proceedings. He submitted that, accordingly, the Butcher J judgment and Order were *in rem* on the issue of who was the beneficial owner of this money.

54. On behalf of the respondent, the overriding submission of Mr James Mather on the first ground was that Mr Steinfeld QC's approach drove a coach and horses through a fundamental legal principle established since the *Duchess of Kingston's case* in the eighteenth century. Mr Mather referred to the case as pleaded against the respondent in the particulars of claim and in particular [16], which I quoted at [15] above. The suggestion by Mr Steinfeld QC that the respondent was a stranger to the issue of rescission of the contracts and transactions and so not entitled to dispute that issue did not work as a matter of legal analysis and was belied by what was pleaded against her in [14] to [16] of the particulars of claim. As a matter of Court procedure she was entitled to require the appellants to prove what they alleged. Whether what was relied upon was the factual findings in the Butcher J judgment or his legal determination on the basis of those factual findings, the rule in *Hollington v Hewthorn* was squarely engaged.

55. The distinction which the appellants sought to draw between the factual determinations in a judgment which were not binding on a stranger and the legal effect of a judgment which, on the appellants' case, was binding on a stranger, was not a distinction recognised in any authority. The *Duchess of Kingston's case* itself demonstrated that the distinction was fallacious. The question there was whether the earlier judgment of the Spiritual Court as to the status of a marriage bound the Crown in subsequent proceedings in the Temporal Courts for polygamy, in circumstances where the Crown had not been a party to the earlier proceedings, to which the answer was in the negative. Mr Mather submitted that the principle laid down in that case, as cited by the Court of Appeal in *Hollington v Hewthorn* [in the passage cited at [34] above], was a wide one extending to findings of fact and the judgments of courts on the facts as found.

56. Mr Mather relied upon the discussion by Lord Rodger in *Calyon* of the genesis and nature of the rule in *Hollington v Hewthorn* at [23] to [33] of his judgment, in particular his emphasis on the Fifteenth Report of the Law Reform Committee (1967), in relation to which he said at [30] and [31]:

> "30. Having dealt with the particular situations where they recommended reform, the Committee went on to consider the status of previous decisions by civil courts on matters of fact. At para 38 of the Report, the Committee said this:
>
> > "With the exceptions with which we have already dealt, an issue of fact in one civil action is seldom the same as an issue of fact in another civil action between different parties. In practice it is only likely to arise where a number of different persons are injured in the same accident by the same acts of negligence. Such cases are most conveniently dealt with by all the injured parties joining in the same action, by consolidation, or by agreeing to treat one action as a test action. It is, however, theoretically possible (and has occasionally happened) that separate actions brought by different passengers in the same vehicle have been tried at different times by different courts with different results. This is undesirable and should be avoided by one or other of the means referred to above. But we do not think that, where there are two civil actions between different plaintiffs against the same defendant or by the same plaintiff against different defendants which do raise the same issue of fact, the finding of the court should be admissible in the second action. As we have already pointed out, in civil proceedings the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve upon it in the second."
>
> 31. The Committee's reasoning develops the reasoning in the first of the passages which the Board has quoted from Lord Goddard's judgment in *Hollington*. Their Lordships find that reasoning compelling. What is more significant, perhaps, is that Parliament must have found the reasoning convincing since the Civil Evidence Act and its Scottish counterpart made no change to this aspect of the law…"

57. Mr Mather submitted that the principle for which the appellants contend, that the legal effects of a judgment may affect a stranger to it, offends principles of natural justice. He cited the well-known passage in the judgment of Sir Robert Megarry V-C in *Gleeson v Wippell* [1977] 1 WLR 510 at 516B-D:

> "Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence

> in his own way, and to call his own evidence. He ought not to be [pre]cluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely in terrorem of other and more stalwart possible defendants, but as a decisive weapon against them."

58. Mr Mather submitted that the appellants mischaracterised the Butcher Declarations. A judgment *in personam* such as that of Butcher J only determined the issues between the parties to it and the same was the case with a declaratory judgment. He relied upon the statement in *Woolf; The Declaratory Judgment* at 6-02: "a declaration will only bind the parties to the proceedings". Accordingly, the appellants' case as to the effect of the Butcher Declarations was misconceived. They only pronounced on the legal state of affairs between the parties to the 2015 proceedings; they did not create that legal state of affairs.

59. The appellants' contention that the Butcher Declarations had some substantive proprietary effect was not only contrary to the principle that a declaration only took effect between the parties to the proceedings in which it was made. It was also contrary to the law on rescission of contracts, which was that rescission was brought about by the innocent party itself, not by the Order of the court. Mr Mather relied upon a passage from [99] of the judgment of Potter LJ giving the judgment of the Court of Appeal in *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep. Bank 438, cited with approval by Patten LJ in *Independent Trustee Services* at [53]:

> "It seems to me that, whatever the legal distinctions between "theft" and "fraud" in other areas of the law, the distinction of importance here is that between non-consensual transfers and transfers pursuant to contracts which are voidable for misrepresentation. In the latter case, the transferor may elect whether to avoid or affirm the transaction and, until he elects to avoid it, there is no constructive (resulting) trust; in the former case, the constructive trust arises upon the moment of transfer. The result, so far as third parties are concerned, is that, before rescission, the owner has no proprietary interest in the original property; all he has is the "mere equity" of his right to set aside the voidable contract. That equity binds volunteers and those taking with notice of the equity, but not purchasers for value without notice…"

60. The Butcher Declarations had been sought in the 2015 proceedings, the particulars of claim in which made it clear that the declaratory relief was sought against the defendants to those proceedings, not anyone else. The Butcher Declarations determined the position as between the appellants and those defendants, against whom there was a judgment estoppel, but did not create proprietary rights. Accordingly, Mr Mather

submitted that it was not the case that, by the Butcher Declarations, the Court was making Orders which could bind third parties outside the ordinary rules of evidence.

61. Mr Mather submitted that even if the Butcher Declarations had some wider effect, it would still not follow that they could be relied upon against the respondent. To seek to do so was contrary to the rule in *Hollington v Hewthorn* and to procedural fairness. In addition to that case and *Calyon,* he relied upon the decision of the Court of Appeal in *Powell v Wiltshire* [2004] EWCA Civ 534; [2005] QB 117, a case in which a declaratory judgment as to the ownership of an aircraft was held to raise an estoppel only against the parties to the proceedings in which the judgment was given and did not preclude a stranger to the proceedings from claiming good title to the aircraft. The essential facts were helpfully summarised by Arden LJ at [29] of her judgment:

> "Stripped of inessential detail, the material facts of this case and the order in which they occur are as follows: A claims ownership of an aeroplane held by B. B sells the aeroplane to C. C sells the aeroplane to D. In action brought by B against A, A obtains a declaration against B that he owns the aeroplane. C and D are not parties to this litigation. A contends that the judgment which he has obtained against B is binding on D."

62. Mr Mather relied in particular on what Arden LJ said at [37]:

> "Mr Keith submits that there is a danger of multiplicity of proceedings as a result of the proposition referred to above [the proposition set out at [31] of her judgment that estoppel per rem judicatam cannot bind a person who claims under the person against whom a judgment was obtained, unless he obtained his interest from that person after the judgment was given]. In my judgment, the more compelling interest is that, using the letters given in my summary of the problem above, C and D should not have their right to contest A's claim to ownership of the property taken away without their knowledge or consent save in exceptional circumstances. I have already explained why, in my judgment, those exceptional circumstances, namely that they acquire their title after judgment against B, are justified."

63. Mr Mather noted that both Latham LJ at [20] and Holman J at [49] relied upon the principle enunciated by Sir Robert Megarry V-C in *Gleeson v Wippell* set out at [57] above.

64. In relation to the authorities relied upon by Mr Steinfeld QC, Mr Mather submitted that the sentence in the judgment of the Court of Appeal in *Hollington v Hewthorn* relied upon was a fairly narrow carve-out from the rule, as the next sentence in the judgment makes clear. It draws an express distinction between the amount of damages awarded and whether a stranger to the judgment was negligent. Mr Mather submitted that the amount of damages was an incontrovertible fact, so that its conclusiveness did not involve a tension with the rule that a stranger to a judgment should not be prejudiced by it.

65. Mr Mather submitted that *Mulkerrins* did have to be understood in the context of the special nature of bankruptcy jurisdiction. The decision of the district judge concerned internal relations between the trustee, the bankrupt and her creditors as opposed to relations with third parties such as PwC. This was clear from what Lord Walker said at [44] of his judgment:

> "The hearing was an exercise of the court's supervisory jurisdiction over the bankruptcy process, and PwC was a stranger to that process, with interests directly opposed to those of both the creditors and the bankrupt herself."

66. Mr Mather submitted that, in practical terms, PwC was not prejudiced by the judgment of the district judge, which was not relied upon in the claim by the bankrupt against PwC, in contrast with the position here, where the appellants rely upon the Butcher Declarations and judgment in their claim against the respondent in a manner which seeks to short-circuit what they would otherwise have to prove against her.

67. Mr Mather submitted that the decision of this Court in *Behbehani* was a complete red herring. It concerned the practical effect of injunctions and receivership Orders. All the Court was saying was that it would not act in response to the alleged interest of Mr Al Sahoud on the basis of the assertion alone of that interest. There was no suggestion that if two affected parties had come to court and sought to establish their rights in relation to the shares, the earlier judgment between the husband and wife would have prejudiced them. The case was not concerned with the position of third parties in subsequent proceedings.

68. In relation to the appellants' reliance on CPR 40.9, Mr Mather accepted that a third party could be affected by an Order or judgment in practical terms, the obvious example being the third party served with a freezing injunction. He submitted that the judge had been right to conclude as he did at [77] of the judgment: "…it does not follow from this that a judgment which is embodied by a declaration as to ownership can be relied on in subsequent proceedings as proof of that ownership unless the person affected by it applies under CPR Rule 40.9 to set aside the order." The decision of HHJ Cotter QC in the Bristol County Court in *Ageas Insurance v Stoodley* [2019] Lloyd's Rep IR 1, upon which Mr Steinfeld QC had relied, was not authority for the proposition that non-parties were bound by declarations the court had made.

69. Mr Mather submitted that, although there were two issues on this appeal, there was a considerable overlap between them and considerations of procedural justice equally underpinned the second issue, whether the Butcher Declarations and judgment were *in rem*. The decision of Hickinbottom J in *R(PM) v Hertfordshire CC* demonstrated that statutory provisions granting jurisdiction to make judgments *in rem* were rare, given the risk of injustice: see the passages from that judgment referred to by the judge in the present case and cited at [22] above. Mr Mather submitted that the same principles applied at common law and resort to the argument that a judgment was *in rem* could not be used as an escape route from the rule in *Hollington v Hewthorn*.

70. Mr Mather submitted that it was well-established that, merely because a judgment made a declaration as to proprietary rights, it did not follow that it took effect *in rem*: see the passage from [23] of the judgment of Lord Mance in *Pattni v Ali* referred to by the judge and cited at [21] above. The appellants could not point to any authority that

declarations as in the present case as to beneficial interest took effect *in rem*. If they did, other procedures under the CPR would be rendered otiose, in particular CPR 19.8A. That provides that in claims regarding a trust, the court can make a judgment binding on a non-party by notice or advertisement. A recent example of the exercise of this jurisdiction is the judgment of Foxton J in *The Serious Fraud Office v Litigation Capital Ltd* [2020] EWHC 1280 (Comm) at [68]-[77]. All of that would be entirely unnecessary if, in cases where a declaration was made as to beneficial interest, that took effect *in rem*.

71. He also submitted that if it had been intended that the Butcher Declarations should take effect *in rem*, one would expect some clear statement or indication to that effect in the wording of the Order. That was completely absent. On the contrary the Butcher Declarations and Order were made against the original seven defendants only and were made at the same time as Butcher J gave permission to join other defendants against whom the same declaratory relief was sought in the amended pleading, which would have been unnecessary if the Butcher Declarations took effect *in rem* against the world.

Discussion

72. I agree with Mr Mather that there is considerable overlap between the two grounds of appeal. I propose to consider the second ground first, whether the Butcher Declarations and judgment took effect *in rem*, since, if they did not, that provides strong support for the respondent's case on the first ground that the rule in *Hollington v Hewthorn* should apply in the present case, so that neither the Butcher Declarations nor the judgment of Butcher J have any legal effect against her.

73. As Lord Mance said in *Pattni v Ali* at [21], quoting *Stroud's Judicial Dictionary*: " a judgment *in rem…*fixes the status of the matter in litigation once and for all" and is conclusive against the world. It is precisely because a judgment *in rem* is conclusive against the world, that the circumstances in which Parliament grants jurisdiction to make such judgments are rare. As Hickinbottom J said in *R(PM) v Hertfordshire CC* at [42]:

> "Given the overriding nature of judgments *in rem*, the circumstances in which a court or tribunal is given such a power or jurisdiction are understandably rare, and usually granted in the clearest of terms."

74. Of course, the present case does not involve consideration of whether Parliament has conferred statutory jurisdiction to grant a judgment *in rem*, but the same concern as Hickinbottom J identified, to avoid procedural injustice through a party being bound by a judgment without an opportunity to be heard, should dictate a similarly cautious approach to the question whether, as a matter of common law or in equity, a judgment takes effect *in rem*.

75. The mere fact that the judgment involves declarations as to proprietary rights or as to a party's beneficial interest cannot without more make it *in rem*, as Lord Mance made clear in *Pattni v Ali* at [23]. Were it otherwise, as Mr Mather correctly submitted, the procedure under CPR 19.8A for making judgments on claims in respect of a trust or the estate of a deceased person binding on third parties would be totally unnecessary.

76. In my judgment, there are a number of compelling reasons why the Butcher Declarations and judgment do not take effect *in rem*. First, if they were intended to have such effect, one would expect that to be stated or indicated in clear terms in the judgment or Order, but it is not. On the contrary, both the terms of the Butcher Declarations themselves and [53] to [59] of the judgment of Butcher J (which I quoted at [13] above) make it clear that the Order was only being made against the original seven defendants, not against the world. Like the judge below, I do not regard the reference in [58] of Butcher J's judgment to property: "which represents the Claimants' property or proceeds" as evidence that the judgment was to take effect *in rem*. The terms of the third of the Butcher Declarations (paragraph 3 of the Order) are clearly limited to property in the hands of the original seven defendants and the reference to "the traceable proceeds thereof" refers to traceable proceeds of the funds invested in the LLPs which may now be represented by property in the hands of any of the original seven defendants.

77. That the Order was only intended to take effect against the original seven defendants and not against any prospective defendants (let alone the respondent whom it had been agreed would not be joined as a defendant) is made clear by paragraph 7 of the Order which provides:

> "The Claimants have liberty to apply for such further accounts and inquiries as may be necessary for the purposes of enforcing their proprietary interests against the First to Seventh Defendants."

Thus, in the context of the Order actually made, [58] of the judgment was clearly not intended to go beyond property in the hands of the original seven defendants.

78. Second, the granting by Butcher J, at the same time as he granted the Butcher Declarations, of permission to join additional defendants against whom the amended pleading sought the same declaratory relief as had been sought against the original seven defendants, is completely inconsistent with the Butcher Declarations taking effect *in rem*. If they had taken effect *in rem*, the joinder would have been completely unnecessary, as the Butcher Declarations would have bound those additional defendants in any event without any need to join them to the proceedings. Once again, paragraph 7 of the Order makes clear that the Order is only intended to affect the 2015 claimants' proprietary interests against the original seven defendants.

79. Third, the Butcher Declarations taking effect *in rem* is also completely inconsistent with the consent Order made by Butcher J between the 2015 claimants (including the appellants) and the respondent and, in particular, with the terms of the undertaking given by the 2015 claimants quoted at [10] above. If, as the appellants contend, the Butcher Declarations were intended to take effect *in rem*, that undertaking was deprived of considerable substantive effect, if not rendered completely meaningless, since, on their case, given that the Butcher Declarations were binding on the respondent because they were *in rem*, she cannot in fact run arguments in the present proceedings requiring the appellants to prove their case as to their alleged entitlement to trace the monies they had invested into her property, even though, had she been joined to the 2015 proceedings, those arguments would have been open to her. The argument pursued strenuously on this appeal by Mr Steinfeld QC that, even if the respondent had been joined to the 2015 proceedings, she would have had no *locus* to challenge the

conclusion that the contracts or transactions had been rescinded, because she was a stranger to them (an argument with which I will deal in more detail below) seems to me to be a misconceived attempt to give the Butcher Declarations an *in rem* effect against the respondent which they do not have.

80. Fourth, there is nothing in the opinion of the majority of the judges given by Blackburn J in *Castrique v Imrie* which supports the appellants' case that the Butcher Declarations and judgment take effect *in rem.* The principle enunciated in that case will still only apply if the court is determining the status or disposition of a *res* as against the world, as opposed to determining the interest of one party to litigation as against the other party to the litigation. For all the reasons I have already given, Butcher J was determining the interest of the 2015 claimants as against the original seven defendants and was not determining the status of the 2015 claimants' interest in the money they invested as against the world.

81. Turning to the first ground of appeal, the starting point is the scope of the rule in *Hollington v Hewthorn*. The relevant passage in the judgment of the Court of Appeal is that at pp 596-7 of the Law Report as set out at [34] above. It is quite clear from that passage that the appellants' purported distinction between factual findings in a judgment which are not binding on a stranger to it and the legal effect of a judgment, which the appellants contend is binding on a stranger, is not a distinction recognised by the rule. The citation with approval from the *Duchess of Kingston's* case refers to "the judgment of the court upon facts found" distinguishing between the facts and the judgment and, as Mr Mather correctly pointed out, the circumstances of the *Duchess of Kingston's* case itself demonstrate that the rule is not limited to findings of fact but extends to the legal consequences of those findings, as determined by a court in its judgment.

82. The penultimate sentence in the passage in the judgment of the Court of Appeal upon which the appellants rely does not support their purported distinction. As the sentence which follows makes clear, the "carve-out" to which that sentence is referring is a narrow one. As Mr Mather said, the amount of damages awarded in the first proceedings would be an incontrovertible fact in the second proceedings which could not prejudice a party to the second proceedings who had been a stranger to the first proceedings. However, if the appellants were right that this "carve-out" applied to the present case, the respondent would undoubtedly be prejudiced. I consider that the judge was correct when he said in [76] of his judgment: "It is clear from this example that Lord Goddard did not have in mind the consequences of a declaration of ownership and, in particular, whether such a declaration could be relied on in subsequent proceedings against another party."

83. That the rule in *Hollington v Hewthorn* is not limited to findings of fact, but extends to the legal consequences or effects of those findings, is borne out by the decision of the Privy Council in *Calyon*. The argument of Mrs Michailidis (Christo's mother) and the administrators, the claimants in that case, was that the Greek judgment had conclusively determined that they owned the collection at all material times and that title to the collection had passed to them as Christo's heirs on his death: see [15], [18] and [23] of the judgment of Lord Rodger. In other words, in that case, the application of the rule concerned not just the facts as found by the Greek court (in fact in [32] Lord Rodger says that the Greek judgment does not indicate the substance of the evidence on which

the court relied), but also the legal effect of the judgment, there that title in the collection passed to the claimants.

84. Mr Steinfeld QC's attempt to distinguish *Calyon* (to which I referred in [47] above) was not convincing. Contrary to his submission, the Butcher Declarations do not establish that the appellants can trace their money into the respondent's property. Rather, as I have held, in agreement with the judge, the Butcher Declarations are limited to traceable proceeds in the hands of the original seven defendants as paragraphs 3 and 7 of the Order make clear.

85. In *Calyon* Mr Steinfeld QC, who also appeared for the claimants in that case, sought to persuade the Privy Council to depart from the established principles underlying *Hollington v Hewthorn*, but they declined to do so. In [28] of the judgment, the Privy Council recognised that, whilst the actual decision in *Hollington v Hewthorn* had been criticised, it continued to embody the common law as to the effect of previous decisions. It was in that context that they referred at [30] to [31] to the Report of the Law Reform Committee and concluded, not just that the reasoning of the Court of Appeal in *Hollington v Hewthorn* on this aspect of the law was compelling, but that it was significant that, in passing the Civil Evidence Act 1968, Parliament made no change to this aspect of the law. In other words, the rule in *Hollington v Hewthorn* represents a well-established principle of law which this Court should follow.

86. That the rule in *Hollington v Hewthorn* is not limited to the inadmissibility of findings of fact in an earlier judgment against a stranger to it, but encompasses also the legal effect of that earlier judgment, is consistent with the wider principle of procedural fairness enunciated in *Gleeson v Wippell* (as set out in [57] above) and applied by this Court in *Powell v Wiltshire*, that the suggestion that a stranger to an earlier judgment is bound by it is contrary to fundamental principles of natural justice. That wider principle is not limited to factual findings in the earlier judgment, but extends to the legal effect of the earlier judgment, hence the conclusion in *Powell v Wiltshire* that Mr Powell was not bound by declarations as to title in the aircraft in the earlier judgment: see per Latham LJ at [26] and Arden LJ at [37]. The wider principle was also succinctly summarised by Sales J (as he then was) in *Seven Arts Entertainment Limited v Content Media Corporation Plc* [2013] EWHC 588 (Ch) at [73]:

> "…the basic rule is that, before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it. This includes the opportunity to call any evidence he can to defend himself, to challenge any evidence called by the claimant and to make any submissions of law he thinks may assist his case. Although there are examples of cases in which a person may be found to be bound by the judgment of a court in litigation in relation to which he stood by without intervening, in my judgment those cases are illustrations of a very narrow exception to the general rule. The importance of the general rule and fundamental importance of the principle of fair treatment to which it gives expression indicate the narrowness of the exception to that rule."

87. In my judgment, none of the other cases relied upon by Mr Steinfeld QC supports his proposition that the respondent is bound by the legal effect of the Butcher Declarations and judgment. In *Mulkerrins*, the decision of the district judge concerned the determination within the supervisory bankruptcy jurisdiction of the issue as to who could bring the cause of action. That issue was one between the bankrupt and her trustee in bankruptcy on which PwC had no right to be heard: see per Lord Millett at [12] and Lord Walker at [45]. Once that internal issue within the bankruptcy had been determined, it had no effect on the claim against PwC and did not need to be pleaded against it by the bankrupt. I agree with the judge that *Mulkerrins* is not authority for the wider proposition, advanced by the appellants, that the declaration of beneficial ownership of the funds in the Butcher Declarations, in proceedings to which the respondent was not a party, should be binding upon her. The allegation that the appellants are beneficially interested in the funds and can trace them into the respondent's property are critical ingredients of the appellants' cause of action against her and, if they cannot prove it, their claim will fail. *Mulkerrins* does not support the proposition that the appellants can bypass the requirement to prove those critical ingredients of their case by relying on the Butcher Declarations to which she was not a party.

88. Likewise, the decision of this Court in *Behbehani* does not assist the appellants. The question as to whether the husband was the beneficial owner of the shares was not an essential aspect of some cause of action the wife had against Mr Al Sahoud. Rather, it had been relied upon by the wife in obtaining the receivership order as part of her attempt to enforce the judgment she had obtained against the husband. The decision, to the effect that the receivership order should stand unless and until Mr Al Sahoud established any beneficial interest to the satisfaction of the Court (see per Baker LJ at [85] and Longmore LJ at [89]), is in a narrow compass. It does not begin to support the appellants' proposition in the present case.

89. I agree with the judge that it does not follow from the existence of CPR 40.9 that a judgment or order can be relied on in subsequent proceedings against a stranger to the judgment or Order as conclusive proof of the matter to which the judgment or Order relates, unless and until that person successfully applies under CPR 40.9 to set aside the judgment or order. Furthermore, nothing in the *Stoodley* case relied upon by the appellants supports their proposition that the respondent, as a stranger to the 2015 proceedings, is bound by the Butcher Declarations.

90. One striking consequence of the appellants' proposition, if it were correct, would be that, contrary to the undertaking which the appellants gave the Court in the consent Order, the respondent was not able to raise in these proceedings the argument she would have been able to raise in the 2015 proceedings, had she been joined, that the appellants had to prove against her their alleged entitlement to trace the monies they had invested into her property. Mr Steinfeld QC sought to address this point by contending that, even if the respondent had been joined to the 2015 proceedings, she would have had no *locus* to challenge the appellants' case that the transactions and contracts had been rescinded and that the beneficial interest in the monies remained with the appellants, so that they could trace them into the respondent's property.

91. In my judgment, this rather extreme submission is misconceived. If the respondent had been joined to the 2015 proceedings, she would have been entitled to require the appellants to prove their case against her in the same way as she requires them to prove

their case in her defence to the present proceedings. She clearly has *locus* to require them to prove all the elements of their case against her rather than using the Butcher Declarations as a short-cut. The respondent is the legal owner of her London property and, where it is alleged against her that the appellants have a beneficial interest in that property, because they paid away their monies as a consequence of fraud and can trace those monies into her property, they must plead and prove against her all the elements of the claim against her and cannot simply pray in aid the Butcher Declarations, which as Mr Mather correctly submitted do not create any proprietary rights. Furthermore, as I have already held, the third of the Butcher Declarations does not provide that the appellants are entitled to trace proceeds into the respondent's property but is limited to traceable proceeds in the hands of the original seven defendants.

92. The appellants should be required to plead and prove all the elements of their case against the respondent that they have a beneficial interest in her property, in the same way as the claimants in *Calyon* were required to establish against the bank their title to the collection. Nothing in Patten LJ's analysis of the legal effect of rescission in his judgment in *Independent Trustee Services* supports the appellants' case that they can rely upon the Butcher Declarations against the respondent without having to plead and prove all the elements of their case against her that they have a beneficial interest in her property.

93. Accordingly, applying both the rule in *Hollington v Hewthorn* and the wider principle enunciated in *Gleeson v Wippell,* I consider that the respondent is entitled to require the appellants to plead and prove all the elements of their case against her and that they cannot simply rely upon the Butcher Declarations against her.

94. I consider that both grounds of appeal should be dismissed.

Lady Justice Elisabeth Laing

95. I agree.

Lord Justice Warby

96. I also agree.