Neutral Citation Number: [2019] EWHC 2858 (Ch)

Claim No. FL-2017-000001
Claim No. FL-2016-000019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (Ch D)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 28th October 2019

Before:

THE HONOURABLE MR JUSTICE HILDYARD

- -

Between:

THE PERSONS IDENTIFIED IN SCHEDULE 1 OF THE CLAIM FORM (the "SL Claimants")	**Claimants**
- and –	
TESCO PLC	**Defendant**

And Between:

(1) MANNING & NAPIER FUND, INC. (a company incorporated in the United States of America) (2) EXETER TRUST COMPANY (a company incorporated in the United States of America) (the "MLB Claimants")	**Claimants**

-and-

TESCO PLC **Defendant**

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- -

NEIL KITCHENER QC and RICHARD MOTT and SIMON GILSON (instructed by **Stewarts**) appeared on behalf of the SL Claimants

PETER DE VERNEUIL SMITH QC, PHILIP HINKS and DOMINIC KENNELLY (instructed by **Morgan Lewis & Bockius UK LLP**) appeared on behalf of the MLB Claimants

DAVID MUMFORD QC, MICHAEL WATKINS and NIRANJAN VENKATESAN (instructed by **Freshfields Bruckhaus Deringer LLP**) appeared on behalf of the Defendant.

Hearing dates: 25th - 27th September 2019

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE HILDYARD

MR JUSTICE HILDYARD:

Introduction

1. In these two actions, the Claimants in FL-2017-00001 ("the SL Claimants") and the Claimants in FL-2016-000019 ("the MLB Claimants") claim against the Defendant company ("Tesco") under section 90A and Schedule 10A of the Financial Services and Markets Act 2000 ("section 90A", "Schedule 10A" and "FSMA" respectively) to recover substantial losses in respect of their investment decisions in relation to shares in Tesco which they made in alleged reliance on information published by Tesco and falling within Schedule 10A.

2. The shares in Tesco to which the investment decisions for which the Claimants now seek compensation relate were all held in what has come to be known as "dematerialised form" through a computer-based system called CREST (which stands for "Certificateless Registry for Electronic Share Transfer") using custodians (which in turn used sub-custodians) to acquire, hold or dispose of those shares (as the case may be).

3. The Uncertificated Securities Regulations 2001 [2001 No. 3755] ("the USR"), which have enabled and prescribed the basis for title to securities to be evidenced otherwise than by a certificate and transferred other than by written instrument through CREST as the "relevant system" make clear that the legal owner is the person whose name appears on the CREST register (who must be a member of CREST). It is not the CREST member's client or anyone else in the chain of intermediaries.[1]

4. None of the Claimants held shares in Tesco as a registered member of CREST. In the case of every Claimant in these two sets of proceedings, the shares held through CREST were registered in the name of a bank or financial institution providing custodian services, as is almost invariable in the dematerialised market. None of the Claimants, therefore, ever directly acquired, held or disposed of a legal interest in any of the shares.

5. Further, and again as is entirely usual, most of the shares in Tesco held by custodians are held by them, not for a claimant, but for another intermediary in what is commonly referred to as a 'custody chain'.

6. In a custody chain containing only one intermediary, that is, where the custodian is the trustee of the legal title for the relevant claimant and there are no further intermediaries between the custodian and the claimant, that claimant may have a direct beneficial or equitable interest. But, as (and with the consequences) I shall come on to explain at greater length, if the custody chain is longer, the claimant at the end of it is a beneficiary not of the trust of the legal title, but of a sub-trust.

7. Tesco has applied to strike out both claims on the basis that in such circumstances none of the claimants in a custody chain with more than one intermediary is a person to whom as an issuer it could be liable for any untrue or misleading statement in its published information under the relevant provisions of FSMA.

8. More particularly, Tesco's position is that the consequence of this is that the interests of claimants in such a custody chain is not an '*interest in securities*' within the meaning of paragraph 8(3) of Schedule 10A. Further, Tesco contends that, in any event, none of such claimants can properly be said to have '*acquired, continued to hold or disposed of"* any interest in securities (even if, contrary to Tesco's first submission, they had one).

9. The question as to the nature of the interests held in a dematerialised market thus raised is a systemic one of considerable importance. Most transactions in publicly held shares in companies listed in an exchange in the UK are in dematerialised form through CREST. The position of the Claimants is entirely typical of the dematerialised securities market. The market is very considerable indeed. The availability of remedies for untrue or misleading statements which have been the reason for investment decisions is obviously of great importance.

10. If Tesco is correct in its submissions as to the true construction of the relevant provisions there is a fundamental hole in FSMA: the provisions enabling investors to

[1] Which is why it has been said that the language of '*custodian*', which belongs to the era of certificated securities, is '*inaccurate and can be confusing*' because it tends to suggest that the custodian's title to the shares derives from that of its client, whereas the true position is the opposite: see L Gullifer and J Payne, Intermediation and Beyond (2019) 7; M Yates, 'Global Custody' in M Blair QC et al (eds), Financial Markets and Exchanges Law (2nd edn), para 18.02.

vindicate their rights are unfit for purpose. The SL Claimants and the MLB Claimants submit that Tesco's submissions are misconceived.

Facts

11. For the purpose of this strike-out application, it is common ground that the Court must assume that (a) Tesco's published information was false (b) Tesco knew that the information was false (c) the SL Claimants and the MLB Claimants acted in reasonable reliance on that information and (d) they have suffered loss as a result. The evidence has gone to the workings of the market in dematerialised securities, and the manner in which the various Claimants held their investments in Tesco. It may be helpful to summarise key aspects of the CREST system.

CREST in greater detail

12. CREST went live in July 1996. Until then, most transfers of interests in registered securities in the UK were effected by transfers of paper certificates. This system came under increasing pressure as trading volumes rose and brokers and transfer agents were unable to keep pace with the administration required.

13. A system for title to shares and transfers of such title in a computer-based system (a 'central securities depository' or 'CSD') became essential. CREST is the only CSD in the UK approved by HM Treasury. CREST is operated by Euroclear UK & Ireland Ltd which is the "Operator" for the purposes of the USR. The shares of most listed companies in the UK are now held in dematerialised (sometimes referred to as 'uncertificated') form through CREST.

14. The operation of CREST is regulated by statute. Only securities registered in the UK, Republic of Ireland, Isle of Man, Jersey and Guernsey are eligible for registration on CREST. Since 1997 the Listing Rules have required listed securities to be eligible for electronic settlement, and thus in practice all UK-listed securities are capable of settlement via CREST. An issuer can elect to make its securities wholly dematerialised; and paper shares are due to be phased out by 2025 at the latest.

15. Under the CREST system, shares are registered in the name of the CREST member. There are "system-members" and "personal members". It is possible for an investor itself to become a CREST member, and some investors do so, but that is very expensive, and so it is more usual to use a "system-member". Thus, the principal members of CREST are custodian banks and other large financial institutions.

16. Every system-member must nominate a bank to be its settlement bank. It is, therefore, usual for the ownership structure to include a chain of intermediaries (as in this case), with the CREST member at one end of the chain (referred to as a custodian) holding for another intermediary (e.g. another custodian) and so on until the ultimate investor at the other end of the chain.

17. The chain of ownership is in another sense indirect because fungible securities such as the Tesco Shares are typically pooled at each stage/link of a custodianship chain. Each CREST member has an omnibus account with CREST in which all securities of a particular issuer (such as Tesco) are held. Those securities are allocated in the books and records of the CREST member (but not of CREST itself) to its clients.

18. Where the CREST member is a sub-custodian, the custodian it holds for will typically have only an omnibus account with the sub-custodian which is operated in the same

way. These omnibus accounts are segregated from the custodian's own assets and the client has the right to call for the delivery up of the legal title to the securities to it or its order. The legal analysis apparent from the case law is that where the intermediary holds the securities for its account holders in a common pool the individual investor is co-owner in equity with other investors.[2]

19. The key feature of intermediated securities held in a custody chain is that the ultimate investor (meaning the person for whose account the securities are ultimately held) is given the benefit of a right without holding the right itself.[3] It has a "right to a right". An investor in intermediated securities cannot enforce the rights attached to the shares (or other securities) against the issuer, although it is entitled to expect that those rights will be exercised in accordance with its wishes as expressed through the chain of interests.

20. Dematerialised securities are transferred by way of computerised book-entry transfers in the accounts of different CREST members. A useful summary of the working of the CREST system may be found in paragraphs 5 and 6 of the judgment of Lewison J (as he then was) in *Mills v SportsDirect* [2010] EWHC 1072 (Ch)[4].

21. The custodian is not a party to, or involved in, the purchase contract. It is not an actor in the investment decision. The custodian will usually only find out about the purchase contract after it has been entered into. The custodian's role is typically limited to settlement of the trades.

22. Settlement is the performance of the trade. The buyer nominates a custodian to which it wishes its legal title to pass. The seller will usually pass legal title from its pre-existing custodian, although that is not inevitably the case. Settlement on CREST involves matching instructions being given and received by the seller's and buyer's respective custodians.

23. Where a seller and buyer have the same custodian, the custodian / sub-custodian may settle the trade by an internal book transfer, without any need to issue instructions to or inform CREST at all. This is called "internalised settlement" and legal title will (nominally at least) not change.

24. Clearing occurs after trading but prior to settlement: -

    (1) A clearing house will aggregate the delivery and payment obligations of the participants in the clearing system, in order to establish each participant's net balance in relation to each type of obligation or asset (e.g. Tesco shares).

    (2) Given the high degree of consolidation of trades amongst a few large custodian participants, netting dramatically reduces the number of book-entry transfers between different CREST participants each day.

    (3) This is another reason why a securities trade may not correspond to a change in legal ownership. For example, if HSBC Plc had to clear a large number of trades

[2] See FMLC, 'Property Interests in Investment Securities' (2004) at para. 6.1(4); also *Hunter v Moss* [1994] 1 WLR 452 (CA).
[3] See Ben McFarlane and Robert Stevens, 'Interests in Securities: Practical Problems and Conceptual Solutions' in chapter 2 of L Gullifer and J Payne 'Intermediated Securities: Legal Problems and Practical Issues (2010).
[4] See also M Yates and G Montagu, The Law of Global Custody (4th edn), paras 9.1-9.41.

in Tesco shares for different clients in a day, but the aggregate number of purchases and sales those clients had entered into was equal and opposite, there would be no need for the number of Tesco shares it held at CREST to change.

25. It follows that whether or not legal title to shares changes as the result of a share purchase or sale is largely a matter of mathematical fortuity.

How the Claimants' shares were held in this case

26. Turning to the particular case, the way in which the Tesco shares were held in the case of the SL Claimants exemplifies the "custody chains" whereby dematerialised securities are held. The 11th witness statement of Sean Norman Upson (made on 20 September 2019), who has responsibility for the conduct of these proceedings on behalf of the SL Claimants, he explains that in the SL Claim, the SL Claimants are all institutional investors but clarifies that there is a range of investment structures in the claimant group. Quoting from that witness statement:

> "In some cases, the Tesco share purchases and retentions that are the subject of the claim were made by in-house investment management teams of large pension funds. In other cases, the purchases and retentions were made by an independent investment manager pursuant to an investment mandate from an institutional client, or by independent investment managers on behalf of collective investment vehicles marketed to individual and institutional investors in the US, Europe and Asia."

27. Mr Upson continues:

> "As is now common across international securities markets, the Tesco shares purchased and retained on behalf of most of the SL Claimants were not held directly by the institutional client or investment vehicle but held indirectly on their behalf by a nominee shareholder or an independent custodian. Where the SL Claimants engaged independent custodians, these custodians sometimes themselves held the shares for the SL Claimants' account indirectly by using local sub-custodians and/or nominees. The indirect holding structure via a custodian and sub-custodian gives rise to the so-called 'custody chains', which are a common feature of institutional investment in UK listed securities.
> …
> In most cases, the custodian was a third-party custodian bank, such as State Street Bank and Trust Company, JPMorgan Chase and BNY Mellon. In the case of Claimant 9, Rathbone, the shares were held by a nominee within the same corporate group, Rathbones Nominees Limited."

28. In the MLB Claim, the position of the MLB Claimants is explained in a skeleton argument on their behalf as follows:

    (1) The First Claimant, Manning & Napier Fund, Inc ("Fund"), appointed The Bank of New York Mellon ("BNYM") to act as custodian of the Shares pursuant to a custody agreement that is governed by Massachusetts law ("the Fund Custody Agreement"). BNYM in turn used The Bank of New York (Nominees) Limited ("BNY Nominees") to hold the Shares as sub-custodian.

(2) The Second Claimant, Exeter Trust Company ("ETC"), appointed State Street Bank and Trust Company ("State Street") to act as custodian of the Shares pursuant to a custody agreement that is governed by New York law ("the ETC Custody Agreement"). State Street in turn used State Street Nominees Limited ("SS Nominees") to hold the Shares as sub-custodian.

29. Further, by assignments dated 13 and 20 September 2019, BNY Nominees and SS Nominees as Sub-Custodians assigned their rights with respect to the Shares (including any claims they may have arising from the transactions pursuant to which they were acquired or disposed of) to the MLB Claimants ("the Assignments"). Notice of the Assignments was given to Tesco by letters dated 16 and 20 September 2019.

30. The question is whether in the above circumstances, the SL Claimants and the MLB Claimants are persons who have acquired, continued to hold or disposed of Tesco Shares so as to have standing to sue for compensation under section 90A and Schedule 10A of FSMA.

Sections 90A and Schedule 10A FSMA

31. Section 90A of FSMA (as in force since 2010) states that Schedule 10A makes provision about the liability of issuers of securities to pay compensation to:

> "*persons who have suffered loss as a result of (a) a misleading statement or dishonest omission in certain published information relating to the securities*."

32. Para 3(1) of Schedule 10A (introduced in 2010) provides for compensation to be paid:

> *"to a person who acquires, continues to hold or disposes of securities in reliance on published information to which this Schedule applies"*

and who has suffered loss as a result of any untrue or misleading statement in it (or omission of any matter required to be included in it).

33. Paragraph 8 contains rules of interpretation which apply to Schedule 10A. Of central importance to the present application is the definition given in paragraph 8(3):

> *"References in this Schedule to the acquisition or disposal of securities include:*
>
> *(a) acquisition or disposal of any interest in securities, or*
>
> *(b) contracting to acquire or dispose of securities or of any interest in securities,*
>
> *except where what is acquired or disposed of (or contracted to be acquired or disposed of) is a depositary receipt, derivative instrument or other financial instrument representing securities."*

34. The provisions of s.90A and Schedule 10A quoted above have been in force since 2010. Prior to then, the first version of s.90A (enacted in 2006) was in force. For present

purposes it suffices to note that the earlier iteration of s.90A provided (in s.90A(9)(b)) that:

> "*references to the acquisition by a person of securities include his contracting to acquire them or any interest in them*."

Tesco's two arguments based on statutory construction

35. Initially, Tesco sought to contend that absent proof of "special circumstances" only the legal owner would have a claim. Tesco quickly had to accept, however, that the effect of paragraph 8(3) in Schedule 10A is to extend the statutory cause of action to a person with an equitable proprietary interest as well as the legal owner of the securities.

36. There are two limbs of Tesco's case as to the construction of paragraph 8(3) in Schedule 10A:

    (1) The first limb of Tesco's case is that none of the Claimants had an *"interest in securities"* within the meaning of that paragraph because none ever acquired an equitable interest in Tesco shares;

    (2) The second limb is that, in any event, and even if any had a qualifying interest, none of the Claimants can be said to have *"acquired"* or *"disposed"* of an interest in securities, or *"contracted to acquire or dispose of securities or of any interest in securities"* pursuant to the transfer of legal ownership in the CREST register and the creation or extinction of such interest as they acquired or disposed thereby.

37. I shall elaborate on these limbs later by reference to the case law cited in respect of them; but it may assist to summarise now Tesco's principal submissions:

    (1) As to the first limb, Tesco submits that the investor at the end of the chain of intermediation, though it has an obvious economic interest in the Shares, has no proprietary interest in them because the legal rights it has can be asserted only against the person immediately preceding it in the 'custody' chain, and not against the holder of the legal title, still less against the Shares in specie. It submits that such an economic interest does not suffice.

    (2) As to the second limb, Tesco submits that there can be a relevant *"acquisition"* or *"disposal"* of securities or an interest in securities (relevant in the sense of bringing the acquirer or disponor within the ambit of Schedule 10A) only if there is a dealing in <u>that</u> interest by the disponor; whereas the very most that the ultimate investor has (and even then, only if Tesco is wrong on its first limb) is a beneficial interest which upon a transfer may be created or extinguished but is not acquired or disposed of.

38. Tesco accepts that its construction would render Schedule 10A ineffective in relation to claims by intermediated securities; but it contends that these consequences flow from a failure of the law in this regard to keep pace with developments in the market, and a failure in the legislative drafting to address properly the legal ramifications of the chains of intermediation and of the change from dealings by certified transfer in certificated securities, with a single intermediary at most, and where the ultimate investor was in law the undoubted owner of the relevant securities. Mr David Mumford QC, leading Mr Michael Watkins and Mr Niranjan Venkatesan, submitted on behalf of Tesco that

there was a gap which could not and should not be bridged by what Lord Collins of Mapesbury JSC called in *Enviroco Ltd v Farstad Supply A/S* [2001] Bus LR 110, at para. 49:

> *"an impermissible form of judicial legislation."*

39. Lest at first blush it be thought that these arguments are over-technical, regrettably, the possible mismatch between the market practice of intermediation and the legal rules governing it is widely recognised.[5]

40. As far back as 2004 the Financial Markets Law Committee ("the FMLC") recommended legislative intervention[6]. In 2014, the Law Commission observed that '*the law may have been left behind by the speed of recent changes*'; and it has just in August 2019 issued a call for evidence pursuant to a direction by the Government to conduct a '*scoping study of investor rights in a system of intermediated securities*'[7], noting that there is '*uncertainty as to the legal redress available to investors in certain situations*.'[8]

41. Academic commentators have expressed specific concern too: Professors Benjamin and Gullifer, for example, have recently noted that a claim under section 90 FSMA "*is likely to run into difficulties in practice"* because "*it only applies where the claimant has 'acquired securities'"* and '*it is not at all clear that this would include the situation where the claimant acquired intermediated securities*."[9]

42. In short, the issues raised are serious ones of obvious systemic importance. The question whether ordinary principles of equity are sufficient to enable a comfortable co-existence between legislation originally devised for certificated securities and the special features inherent in the now preponderant market in intermediated securities is of continuing interest.

Summary of Claimants' arguments

43. As in the case of the arguments raised by Tesco, I shall need to elaborate on the arguments on behalf of the Claimants that even if serious, the concerns as to the inadequacy of the drafting to cater for intermediated securities are misplaced, and certainly any difficulties are well within the jurisdiction of the court to cure, especially given the legislative purpose and the antecedents of the legislation in an extended process of consultation and in the need to comply with European legislation. In summary, however, these arguments are:

    (1) On behalf of the SL Claimants, Mr Neil Kitchener QC, leading Mr Richard Mott and Mr Simon Gilson, submits that Tesco's suggestion that the ultimate investor

[5] See, eg, Benjamin/Gullifer (above), 231 ('*the cases merely confirm what has been known by specialists*…'); and L Gullifer, 'Ownership of Securities: The Problems Caused by Intermediation' in L Gullifer and J Payne, Intermediated Securities: Legal Problems and Practical Issues (2010), 32.
[6] FMLC, 'Property Interests in Investment Securities: Analysis of the Need for and nature of Legislation relating to Property Interests in Indirectly held Investment Securities' (July 2004)
[7] Law Commission, 'Fiduciary Duties of Investment Intermediaries' (Law Com No 350, 2014), para 11.120; Law Commission Consultation (above), Appendix 1.
[8] Law Commission, 'Intermediated Securities: Call for Evidence' (August 2019).
[9] J Benjamin and L Gullifer, 'Stewardship and Collateral: The Advantages and Disadvantages of the No Look Through System' in L Gullifer and J Payne, Intermediation and Beyond (2019), 237. See also A Hudson, Securities Law (2nd edn 2013), para 23-13.

has only economic or contractual rights is wrong. The ultimate investor has the right to call for legal title in the securities to be vested in him or to his order. The securities are not available to any nominee in the custody chain to use in any way other than at the direction of the ultimate investor. The position as to property in the Shares is illustrated by what would occur on an insolvency. Critically, the securities are not available for distribution to the creditors of any nominee in the custody chain; they are protected in the event of insolvency and will be delivered up to the ultimate investor. Whether or not it is correct that the ultimate investor cannot enforce his proprietary rights directly against each participant in the chain (which will depend upon the precise terms of the trust) is not to the point. It does not mean that the interest is not properly characterised as proprietary. In any event, the words in Schedule 10A are apt to include the interest of the ultimate investor; to quote from the SL Claimants' skeleton argument:

> "Parliament would **not** have used the words "***any*** *interest in"* had it intended to exclude sub-nomineeship. No reason has been identified for excluding investors who hold shares through sub-nominees (who will necessarily include most non-UK based equity investors and virtually all investors in corporate bonds)." [Emphasis as in the skeleton argument]

(2) As to the second limb of Tesco's case, the SL Claimants submit that the word "*acquire*" is capable of the broadest interpretation, such as to extend in its natural meaning to include any situation where an investor has acquired a security, whatever the length of the custody chain in which, having directed that legal title be transferred to his nominee, he has directed or agreed the shares in which he invested are held; and that the word "*dispose*", must be seen in the context of the words "*acquires, continues to hold or disposes"*, so that its natural meaning in context includes any dealing by which the investor no longer "*continues to hold*" what he had previously acquired.

(3) On behalf of the MLB Claimants, Mr Peter de Verneuil Smith QC, leading Mr Philip Hinks and Mr Dominic Kennelly, adopted these submissions but adapted them to clarify that he accepted that a claimant under Schedule 10A did have to have acquired or disposed of a proprietary interest in the securities, but that the natural meaning of *"any interest in securities"* is wide enough to include what he described as "any interest of a proprietary nature", including an "indirect" proprietary interest, being an entitlement in the investor, exercisable through a chain of specifically enforceable contracts, to require the securities to be conveyed to it or otherwise held to its order.

(4) It was also submitted on behalf of the MLB Claimants that it was sufficient that they would be treated under the laws applicable to the 'custody' arrangements in its case as having a direct proprietary interest, and that the expert evidence to the effect that they did have such interests under such laws had not been challenged or contradicted.

(5) Mr de Verneuil Smith described Tesco's second limb as "unsustainable" on the basis that (a) it is incontrovertible that whereas before a given claimant's investment it had no interest in the Shares in which it invested, after that, it had (at least) an interest of some kind in respect of such shares that it had not had previously; and that (b) it is equally incontrovertible that when the custodian sells the securities, full ownership (i.e. including both legal and beneficial title) passes to the purchaser, and the investor can no longer be said to be interested in the securities: using the natural meaning of the word "disposed" (namely, to cease to hold or to remove), the investor must have "*disposed of*" its beneficial interest in the securities.

44. I turn to address these competing submissions, which were considerably elaborated, in greater detail.

Elaboration of Tesco's submissions: first limb

45. As indicated above in summarising the first limb of Tesco's case, its foundation is that the words *"interest in securities"* are a reference to a proprietary, as distinct from a purely contractual or economic, interest in the securities themselves. Mr Mumford elaborated on this as follows:

(1) First, he relied on the natural construction of the words. He acknowledged that there is no authority directly in point, but suggested that an analogy may be drawn from authorities as to the expression "interest in land". He submitted that in that context, the courts have consistently held that such a reference is to a legal or equitable interest in land, not to contractual or personal rights or economic interests.[10] He drew my attention to *Stevens v Bromley LBC* [1972] 1 Ch 400, 410A, where Salmon LJ observed that this expression:

> "does not include an interest in the loose or colloquial sense of someone being interested in the land."

(2) Second, he submitted that the natural construction of the words is fortified by the particular context in which they appear, that is in Schedule 10A, which is essentially concerned with the sale or purchase of property, not the sale or purchase of economic interests.

(3) Third, he cited the academic uncertainty expressed by, amongst others, Professors Benjamin and Gullifer (see references above) as to the nature of the interest which is acquired by an investor in intermediated securities.

(4) Fourth, he drew attention to the provision in paragraph 1(1) of Schedule 10A, which states that the Schedule applies only to securities that are admitted to trading in a relevant market '*with the consent of the issuer*'. Paragraph 8(2) reinforces this by clarifying that where the security is, for example, a depositary receipt, '*the issuer*' is to be understood as the issuer of the underlying securities only if it consented to the admission to trading of the depositary receipt itself. This, he submitted, is also the purpose of what he referred to as 'the tailpiece' to paragraph 8(3), which makes it clear that the holder of a depositary receipt (or other secondary security) cannot sue the issuer of the primary security

[10] See, eg, *Flynn v Secretary of State for Communities* [2014] EWHC 390 (Admin), paras 32-35 (Lewis J).

without establishing that it consented to the trading of the depositary receipt itself. He submitted that this provision established what he termed "the consent principle"; and that "to extend the words '*interest in securities*' to non-proprietary interests would represent a substantial infringement of the consent principle that underlies Schedule 10A" by enabling it to apply to transactions involving contracts that the issuer knows nothing about and which may not be directly related to the issuer's shares. He submitted that by contrast, if, as Tesco contends, the expression is limited to a legal or equitable interest in the issuer's shares, the infringement of the consent principle is modest because only someone with a direct, proprietary interest in the securities to the trading of which the issuer has consented would be able to sue under Schedule 10A.

(5) Fifth, Mr Mumford cautioned that the Claimants' approach would introduce uncertainty as to the scope of the sections such as would also increase the risk of multiple claims in respect of the same share transactions. He gave the example of a person interested in shares in a company which in turn held securities in Tesco where the value of the former shares could be affected by movements in Tesco's share price, and posed the question whether such a person would have standing to sue under Schedule 10A, and if so, how (for instance) that claim would be dealt with if the other company also sued.

(6) He also pointed out that section 90 FSMA (which provides for the payment of compensation for untrue or misleading statements in, or omissions of required particulars in, listing particulars) also extends to any person who has acquired or contracted to acquire the shares the subject of the particulars *"or any interest on them"*, but does not require proof of reliance. That, Mr Mumford suggested, throws wide open the pool of claimants if the italicised expression in the context of sections 90 and 90A is given a broad construction. He added that one of the defences to a section 90 claim is that the person responsible published a correction of the misstated prospectus "*in a manner calculated to bring it to the attention of persons likely to acquire the securities"* (Schedule 10, para 3(2)(a)), and that if the words '*acquire the securities*' extend to non-proprietary interests, or to interests acquired without a dealing in them, then the range of persons '*likely to acquire*' them is likely to be so wide as to neuter this defence or at any rate make it less effective. He submitted that neither difficulty would arise on Tesco's construction because the legal owner would have a claim in respect of an acquisition of the legal interest and the beneficial owner in respect of an independent acquisition of the equitable interest.

46. Most of all, however, he emphasised that it is clear from the words '*in the securities*' that the proprietary interest he submitted was necessary must be in the securities themselves, and not in some other property. He gave, as a simple example from the facts of this case, the following: suppose that X, a sub-custodian, is the registered holder and therefore the legal owner of the Tesco shares, and holds those shares on trust for Y, a custodian, and that Y in turn holds its beneficial interest on trust for Z, the ultimate investor. In such a case, Y has an equitable interest '*in the securities*' but Z does not. In support of the proposition that, in line with this example, the ultimate investor at the end of the chain of intermediaries has no equitable or other proprietary interest in the shares held by the 'custodian' in the first link of the chain, Mr Mumford relied especially on the decision of Briggs J (as he then was) in *re Lehman Brothers*

International (Europe) [2010] EWHC 2914 (Ch) (often, and below, referred to as 'the *Lehman Rascals* case') and *re Lehman Brothers International (Europe)* [2011] EWCA Civ 1544.

47. In the *Lehman Rascals* case, Briggs J observed at para 226 that (emphasis added):

> "…a trust may exist not merely between legal owner and ultimate beneficial owner, but at each stage of a chain between them, so that, for example, A may hold on trust for X, X on trust for Y and Y on trust for B. The only true trust of the property itself (i.e. of the legal rights) is that of A for X. At each lower stage in the chain, the intermediate trustee holds on trust only his interest in the property held on trust for him. That is how the holding of intermediated securities works under English law, wherever a proprietary interest is to be conferred on the ultimate investor." [Mr Mumford's emphasis]

48. As to the last phrase, Mr Mumford acknowledged that Briggs J recognised that '*a proprietary interest*' is conferred on the ultimate investor (B, in Briggs J's example); but he submitted that this is to miss the point, which is that though the ultimate investor does of course have a proprietary interest, it is not a proprietary interest '*in the securities*': it is a proprietary interest in the trust property which its own trustee (Y, in Briggs J's example) holds on trust for it. That, he submitted, is why Briggs J emphasised that the only true trust of '*the property itself*' is that of the legal owner for its immediate client; and while that immediate client may well hold its own interest on a sub-trust for the ultimate investor, the sub-trust is not of the Tesco shares themselves.

49. Mr Mumford referred to what he described as the basic principle that an equitable interest is a proprietary interest '*in the trust property*': *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 705F (Lord Browne-Wilkinson), and relied on that as meaning that there can be a proprietary interest '*in the securities*' only if the trust property consists of the Tesco shares themselves, rather than an interest in Tesco shares.

50. The lesson, he submitted, is that it is crucial to identify what as a legal matter is the trust property. In a case where the legal owner acted as custodian for the claimant directly, the legal owner/custodian is the trustee of the shares of which it is legal owner and (assuming the application of English principles of law and equity) the claimant would have the equitable proprietary interest in such shares. But where there is a chain of intermediaries, so that there is at least one intermediary between the legal owner and the claimant, the trust property held by each intermediary after the custodian is not in the shares but in the trust of the trust. Mr Mumford submitted that once the trust property held at each stage of the chain is properly appreciated, it is clear that any claimant in a custody chain involving more than one intermediary had neither a legal nor an equitable interest in the Shares, only a right to performance of the trust. Mr Mumford also cited Sir Roy Goode QC's statement that in a custody chain "*[t]he subject matter of the sub-*

trust is the beneficial interest that the intermediary has, rather than the underlying securities themselves."[11]

51. More particularly as regards the facts in the two proceedings, he emphasised that not only is none of the Claimants in either claim the legal owner of relevant shares; but also that:

    (1) In the SL Claim, the details so far provided do not enable a comprehensive statement of the nominee arrangements or custody chains in which each Claimant's shares were held. In the case of the 'Rathbone Claimants', Rathbones Nominee Limited ("RNL"), the legal owner, acted directly as custodian or nominee for Claimant 9 in the SL Claim, Rathbone Investment Management Limited ("RIML"). But it appears that many, if not most, other SL Claimants held their interests in Shares through custody chains involving one or more intermediary. A typical example is the claim by Claimant 29, BBH Trust, where the Tesco shares in respect of which BBH Trust sues were registered in the name of BBHISL Nominees Ltd, which was a nominee of HSBC plc, which acted as sub-custodian to BBH & Co, which acted as custodian to the Claimant, BBH Trust.

    (2) In the MLB Claim (in which a useful structure chart was appended, which I also append to this judgment marked 'A') the evidence provided on behalf of the MLB Claimants confirmed that all the Tesco Shares in respect of which the MLB Claimants purport to sue were registered in the name of third-party custodians, with at least one sub-custodian in a custody chain where the last link is the Claimant (investor).

52. Accordingly, Mr Mumford submitted that, except in the case of SL Claimants in a like position as RIML, none of the Claimants in either claim could have had any legal or equitable interest in the Tesco Shares.

53. As to the argument raised by the MLB Claimants that some of its 'custodian' arrangements were governed by (in some cases) New York law and (in other cases) Massachusetts law and that under such laws the MLB Claimants would be treated as having a "property interest" in the Shares, Mr Mumford submitted that English law governs the issue of standing and that the question whether the package of rights which each person in a custody chain has is to be categorised as proprietary or not is to be determined by English law. Mr de Verneuil Smith appeared to accept this, since he agreed that I should not be troubled at this stage of the proceedings with any issue as to the application of foreign law for the purpose of this application and making my determination as to what interest would suffice for the purposes of a claim.

Claimants' arguments to rebut first limb of Tesco's case

54. On behalf of the SL Claimants, Mr Kitchener sought to dismiss as misconceived Tesco's analysis to the effect that the statutory remedy is not available where the shares

[11] R Goode and L Gullifer, Legal Problems of Credit and Security (6th edn), para 6-18. See also M Bridge et al, The Law of Personal Property (2nd edn), para 6-051 ('*Apart from the first-tier intermediary, who can be said to have an equitable interest in "the securities", all other holds in the chain have an equitable interest in the equitable interest held by the intermediary directly above them*'); and Yates (above), para 18.09 ('*The use of a custodian of itself changes the nature of the asset held by a custody client…Instead of holding legal title to the securities, the custody client holds various rights against the custodian*').

are held through a structure including at least one sub-nominee. He submitted that this would flout the intention of the statute without any good reason; and that the words "any interest" are words of broad import, not requiring the interest to be proprietary and easily capable of extending to the interests of the ultimate investor.

55. As indicated above, Mr Kitchener submitted in that regard that Schedule 90A "extends beyond proprietary interests"; but that even if it did not, Tesco is wrong to suggest that the ultimate investor in intermediated securities has only economic or contractual rights. Rather, their interests have the hallmarks of, and are, proprietary interests.

56. The true legal analysis, according to Mr Kitchener (supported by Mr de Verneuil Smith for the MLB Claimants) is that:

(1) An investor has a beneficial interest in securities held for it by its custodian, and the right to enjoy and direct all the rights in the bundle of rights which a share represents.

(2) where there is more than one link in the custody chain, the investor's interest in the securities remains a beneficial proprietary interest: the investor is entitled to the same enjoyment and direction of the bundle of rights as it previously had, and that is so even if an intermediary up the chain goes into an insolvency process since the rights are in no sense the property of that intermediary: no-one but the investor can be said in any meaningful sense to own and enjoy those rights.

57. This, Mr Kitchener submitted, entirely accords with the analysis of the Law Commission in the "*Intermediated Securities: Call for evidence*" paper relied upon by Tesco:

(a) in para. 1.31 the Law Commission describes the ultimate investor in a chain including sub-nominees as "*own[ing] a beneficial interest in the securities*";

(b) in para. 2.45, the Law Commission refers to, "*the ultimate investor having a beneficial interest in the securities*";

(c) in para. 2.46 the Law Commission refers to the "*ultimate investor*" and the "*beneficial owner*".

This also reflects the words used by Briggs J in *Re Lehman Bros*[12] at para 163, where he refers to the ultimate investor as the "*ultimate beneficial owner*".

58. Mr Kitchener further submitted that Parliament would not have used the words "***any** interest in*" (a change from the word "an" in previous legislation) had it intended to exclude sub-nomineeship: and that Tesco had identified no reason for excluding investors who hold shares through sub-nominees (and thus most non-UK based equity investors and virtually all investors in corporate bonds).

59. Mr de Verneuil Smith, effectively on behalf of all the Claimants (since there was sensible co-operation between the Claimants in the presentation of different aspects of submissions to which both subscribed, which I much welcomed), added to these

[12] [2012] EWHC 2997 (Ch.)

submissions the contention that the provisions in question are part of a legislative scheme intended to transpose into or at least reflect in domestic law the (European) Transparency Directive [Directive 2004/109/EC of 15 December 2004] and must be interpreted in conformity with its objectives. Mr de Verneuil Smith drew my attention to parts of the Explanatory Notes to the Companies Act 2006, and especially to note 1636, which states that the insertion of

> "sections 90A and 90B into FSMA…establishes a regime for civil liability to third parties by issuers admitted to trading on a regulated market in respect of disclosures made public in response to provisions implementing obligations imposed by the Transparency Directive."

60. He reminded me that 'Hansard' is admissible (as Mr Mumford and Mr Kitchener agreed it was) for the purposes of establishing the context in which a statutory provision has been introduced: and it is clear from the debate in Parliament when section 90A was enacted in its original form that (a) the Transparency Directive required Member States to ensure that an appropriate liability regime was in place in respect of disclosures required by the Directive, with a view to encouraging accurate and timely disclosure by issuers and promoting investor protection;[13] and (b) HM Government concluded that the uncertainty about the scope of issuer liability at common law was such that a statutory regime was required to ensure that the UK had fulfilled its obligation to implement the Transparency Directive.[14]

61. Mr de Verneuil Smith also put weight on the fact that the amendment of s.90A in 2010 followed a comprehensive review (by Professor Davies and HM Treasury) of the statutory issuer liability regime, and a process of consultation which included submissions from market practitioners, city law firms and, for example, the FMLC. That process and the objectives and concerns expressed may illuminate further the purpose and intention of the legislation.

62. With this as the background, Mr de Verneuil Smith submitted that the '*Marleasing* principle' (see the ECJ case of *Marleasing SA v La Commercial Internacional de Alimentacion SA* [61989CJ0106 (1990)] required this court,

> "with a view to making such safeguards equivalent throughout the Community…to interpret its national law in the light of the purpose and the wording of that directive…"

63. To that end, Mr de Verneuil Smith submitted, I should, if necessary, (a) not be constrained by conventional rules of construction and (b) adopt as broad an interpretation as the words could allow, even if that involved departure from the strict and literal application of words or expressions in the provision which the legislature has elected to use, and (c) imply any words necessary to comply with Community law: see a summary of the application of the *Marleasing* principle in the judgment of Sir Andrew

13 Transparency Directive, recital (17) and Article 7.
14 Hansard 6 July 2006.

Morritt C in *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch 77 at [37] (citing also *Pickstone v Freemans plc* [1989] AC 66).

64. Accordingly, Mr de Verneuil Smith submitted that any doubt as to the ambit of the meaning of the expression *"any interest in securities"* should be resolved in favour of a construction giving effect to the intention of the Directive and the domestic legislation enacted to implement it which would ensure that those entitled to vindicate their right to compensation in respect of untrue or misleading statements in published information should include persons having the entire economic interest in shares acquired or disposed of on the faith of the statement, albeit that such shares might (at their direction) be held by custodians and sub-custodians in accordance with developing market norms.

65. As to whether such a facilitative or teleological approach was indeed necessary, Mr de Verneuil Smith emphasised that his primary case was that even adopting a stricter approach the expression was still broad enough to cover the derivative interests of his clients in respect of the Shares. He submitted that the expression *"interest in shares"* is not a term of art; but the prefix *"any"* makes clear the intention of the legislature that it should be of broad embrace; and even if (as he, though not Mr Kitchener, was content that it should be) it was limited to an interest which is proprietary in nature, still it was satisfied in the case of his clients. He submitted orally that the "pretty classic conventional understanding of what a proprietary interest is…is that it is an ability to call for and possess and enjoy the thing." In answer to my questioning, he acknowledged that the investor at the end of the custody chain would not have the right to give instructions in respect of the thing to its legal owner; he had no such "direct right"; but by instructions, as it were, up the line it could indirectly convey such instructions and that would suffice as *"any interest in securities"*. He drew that distinction between a right and an interest: and the latter would, he submitted, suffice.

66. He bolstered this submission by reliance, in effect by analogy, with cases referred to in *Spry 'The Principles of Equitable Remedies'* 9th ed. at page 89 on the position of a sub-purchaser with a specifically enforceable interest in the purchase, and especially *Shaw v Foster* (1872) LR 5 HL 321 at 338-339; and also with a New Zealand case, *McDonald v Isaac Construction Co Ltd* [1995] 3 NZLR 612, where at a preliminary hearing to determine whether to maintain a caveat until a full hearing Tipping J, after a review of authority, determined at page 619 that:

> "there is no reason in principle why a sub-purchaser, whether by sub-sale or assignment, should not be regarded as acquiring an equitable interest in the land."

67. Mr de Verneuil Smith also tackled the *Rascals* case, submitting that it had been "mischaracterised and misunderstood". I fear I may not thereby do full justice to his quite expansive reasons for so stating; but I think that the burden of them was that all Briggs J was explaining (at the relevant part of his judgment for these purposes, being [226]) was that the only "true trust of the property itself (i.e. of the legal rights) is that of the legal holder for the immediate custodian'', which is, of course, obviously correct, but does not signify that therefore the investor has no qualifying "interest" in the securities under the series of sub-trusts which the rest of the custody chain represents. Although Mr Mumford in reply described this as merely a "convenient shorthand", Mr

de Verneuil Smith highlighted also that Briggs J (in the same paragraph) went on to explain that:

> "That is how the holding of intermediated securities works under English law, wherever a proprietary interest is to be conferred on the ultimate investor."

[Emphasis supplied]

68. Mr de Verneuil Smith relied also on the decision of the Court of Appeal in the *Rascals* case (neutral citation: [2011] EWCA Civ 1544) as indicating (at [49]) that

> "when one speaks of acquiring or disposing of securities in the context, one means dealing with rights as against a depositary (directly or indirectly) who holds the relevant securities of the same type, it makes no difference to the legal analysis."

69. On that basis, Mr de Verneuil Smith, with a slightly different perspective in this regard to that of Mr Kitchener, was content to restrict the scope of *"any interest in securities"* to any form of proprietary interest, provided that what he termed an "indirect" proprietary interest was included within that concept. As to the notion of an "indirect" proprietary interest, he explained that what he meant was "*the right to put another person in their shoes as the holder of their exclusive rights as owner*" of the securities[15]. Even if that right could only be exercised via instructions repeated along the chain, or by "collapsing" the sub-trusts pursuant to the principle in *Saunders v Vautier* (1841) Cr. & Ph. 240, he submitted that it should be treated as proprietary, citing the major trust text books (including *Lewin on Trusts* 19th ed. at 1-046, Underhill and Hayton, *'Law of Trusts and Trustees'* 19th ed (2006) at 2-10) and Spry, *'Equitable Remedies'*. 9th ed. (2014) at pp.89 to 90).

70. Mr de Verneuil Smith submitted that further support for this approach could also be obtained from a consideration of the definition of the expression "*interest in a security*" in the Uncertificated Securities Regulations 2001 (SI 2001/3755) ("the USR"), the enactment of which predated the coming into force of s.90A and Schedule 10A. The USR share a very similar context with s.90A: they have as their purpose the evidencing of title to uncertificated securities, and they make provision for transactions pursuant to which such securities are acquired and disposed of. By Article 3(1) of the USR, "*interest in a security*" is defined to mean:

> "any legal or equitable interest or right in relation to a security, including –
>
> (a) an absolute or contingent right to acquire a security created, allotted or issued or to be created, allotted or issued; and

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15 Underhill and Hayton at 2.15.

(b) the interests or rights of a person for whom a security is held on trust or by a custodian or depositary."

71. Mr de Verneuil Smith submitted that where the same expression is used in two similar contexts, a statutory definition in one context may be persuasive in the other: '*Craies On Legislation',* 11th ed. (2017) at 20.1.38; and *M v Advocate General for Scotland* [2013] CSOH 169; and that accordingly it may properly be inferred that the legislature had this definition in mind when the expression "*any interest in securities*" was used with respect to section 90A. If the USR definition were applied by the Court here, it would enable investors with proprietary rights in securities such as the MLB Claimants to bring claims for compensation under s.90A. Such persons would satisfy the statutory requirements by virtue of their falling within the opening words of the definition, or within sub-para (b). Given the breadth of the definition (particularly the words "*in relation to*" a security), it would be unrealistic to suppose that Parliament intended it to be confined to intermediated holding structures consisting of a single custodian.

72. However, and although Mr de Verneuil Smith thus focused on the sufficiency of any form of proprietary interest, and was plainly reticent in suggesting any wider meaning, primarily (as it seemed to me) for fear of increasing the risk of so broadening the scope as to increase the risk of multiple and possibly conflicting claimants, he did in the alternative submit that even if the language was strictly inapt, its intention to give a remedy to acquirers or disponors of interests held through sub-trust in the intermediated securities market was clear and if necessary a sufficiently expansive meaning should be supplied to give the words meaning to achieve that objective accordingly.

My conclusions as to the first limb

73. It is unsettling that the expression providing the touchstone of standing to make a claim for compensation in respect of untrue or misleading statements or omissions in listing particulars or a prospectus should be open to such legitimate disputation and doubt in its application to market norms. The intermediated securities market is of great practical importance and huge significance to the financial strength of UK plc: uncertainty is the enemy of stability and reliability in financial markets. It may be regretted that legislation intended to modernise should adopt expressions derived from a now almost defunct way of doing business. It is quite plain that intermediated securities held through CREST, as most are and all shortly will be in the UK market, are not the same as securities held directly in certificated form, even though economically they are the same. It is in some way surprising that this was not expressly recognised and provided for in FSMA. It appears that the FMLC recognised the potential issue and recommended a clarifying provision[16]; but this recommendation was not adopted.[17]

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[16] "[I]t would be helpful to embody a specific rule in the statute that unless otherwise agreed an investor enjoys a bundle of co-proprietary and personal rights in and to securities held by his intermediary, including income and other benefits associated with the securities" [July 2004]

[17] It may also be noted that some academic comment has been in favour of the flexibility provided by sticking with equitable principles to resolve the matter rather than resorting to an inflexible statutory definition: see, for example, Ben McFarlane and Robert Stevens, '<u>Interests in Securities: Practical Problems and Conceptual Solutions'</u> [2010], where they concluded that "…the practical needs recognised by the FMLC can be met without the need for any…statutory rule…paradoxically, perhaps, and in England at least, it is general legal concepts that can best solve the practical problems posed by intermediated securities."

74. The problem is compounded by what I regard as mixed messages from previous legislation. I have found it as much ground for concern as ground for comfort that in the USR 2001 a very similar expression (*"interest in a security"*) to that in issue in respect of sections 90 and 90A and Schedule 10A of FSMA is carefully defined. Whereas the Claimants fastened on this as a guide to the intended meaning of the expression used in FSMA, Tesco quite logically relied on the conspicuous absence in FSMA of a definition already crafted in the USR as a signal that the extended meaning was not intended to be adopted in FSMA, and that there was not intended to be parity of meaning between them. Although the genius of the common law is in working and fashioning answers to the interstices in legislation, the gap in this case is an uncomfortable one. To plug the gap with too broad a definition exposes the issuer, contrary to the invariable practice of the court, to indeterminate liability to an indeterminate class and/or uncertainty as to which of multiple claimants has the better claim. Against that, a deficient plug exposes the market to abuse and inadequate vindication of commercial wrongs.

75. I agree with Mr Mumford on a number of steps in his helpful analysis. As will already be apparent, I readily accept that where there is a chain of intermediaries, the investor at the end of the chain does not have any direct proprietary interest in the underlying security, nor can it enforce any rights held in the chain of sub-trusts directly against the issuer. As Briggs J explained in the *Rascals* case, the subject-matter of each sub-trust in the custody chain is the beneficial interest that the intermediary has and holds on trust, rather than the underlying securities themselves.

76. I also accept that the concept of an or any *"interest in securities"* must denote something more than a contractual right or economic interest in such securities if the 'custody chains', which by the time of the enactment of FSMA in its latest form had become the market norm and must have been taken to have been in the contemplation of the draftsman, are to have any legal sustainability. There are a number of reasons for this: two seem to me to be paramount. First, the custody chain would be a frail thing, liable to be broken by the insolvency of any intermediary, if the rights had not some other quality which took them out of the 'property' of such intermediary for insolvency purposes. Secondly, and also as indicated previously (as in argument), if any personal right or economic interest were to be sufficient to satisfy the expression *"any interest in securities*", the class of complainants would be quite indeterminate, and almost inevitably competing and conflicted.

77. I also accept Mr Mumford's insistent warning, especially by reference to the *Westdeutsche* case, that it is essential not to bandy around the notion of equitable interest or proprietary right without carefully identifying its real subject matter; and that it is similarly wrong to treat sub-trusts as if they were contrivances which could be looked through for the purposes of identifying the true interest held by the ultimate investor.[18]

78. Lastly, in this list of areas of agreement with Mr Mumford's analysis, I accept his argument that the 'tailpiece' to paragraph 8(3) of Schedule 10A does not suggest any widening of the meaning of either *"Securities"* or *"any interest in securities"*. I agree with Mr Mumford that the 'tail-piece' or 'carve out' is there to ensure that the issuer should not be liable in respect of separately traded derivative instruments, which might otherwise loosely be treated as conferring an interest in the underlying securities

[18] See C.H. Tam, 'Exploding the myth that bare sub-trustees "drop out" Tru. L.I. 2017, 31(2), 76-92

represented by the derivative instrument, but which have not been admitted to trading on the securities market with its consent (and see paragraph 1 of Schedule 10A). I do not agree with Mr Kitchener that the carve-out of "*a depositary receipt, derivative instrument or other financial instrument representing securities*" signifies that something less than a proprietary interest would suffice since otherwise (to quote his skeleton argument) "if "*any interest*" was as narrow as Tesco contends, the interests carved out would not come close to qualifying under paragraph 8(3)." That would be to load too broad a significance on the 'tailpiece'.

79. Where I part company with Mr Mumford is in the conclusion to be drawn from the above analysis. Mr Mumford submits that the interest of the investor, not being a directly enforceable trust interest in the securities, must therefore be personal or economic and not equitable and proprietary, and thus insufficient. In my judgment, the 'right to the right' which the investor has via the custody chain is, or can be equated to, an equitable property right in respect of the securities, and this is sufficient.

80. Mr Mumford, when I questioned him, chose to depict Briggs J's description of the investor as the "ultimate beneficial owner" as being simply a "convenient shorthand", which should not be taken to signify any view as to whether the investor in law had a proprietary interest in the securities. But I think Briggs J meant what he said, and (as one might expect) used the term advisedly to denote the proprietary interest vested in the investor through the custody chain; whether that is more properly characterised as an interest in relation to the underlying securities, rather than an interest in them, does not appear to me to matter: it is still capable of being within the embrace of the expression *"any interest in the securities"* within the meaning of Schedule 10A.

81. To my mind the analysis, and a further explanation of what Briggs J meant by describing the investor as the "ultimate beneficial owner", is to be found in another case arising out of the Lehman administration, *In the matter of Lehman Brothers International (Europe)* [2012] EWHC 2997 (Ch). There at [163] Briggs J said this:

> "It is an essential part of the English law analysis of the ownership of dematerialised securities that the interests of the ultimate beneficial owner is an equitable interest, held under a series of trusts and sub-trusts between it, any intermediaries and the depository in which the legal title is vested: see paragraph [226] of my judgment in the *RASCALS* case."

82. Put another way, there seems to me to be semantically no real doubt that the investor has an "interest" in the securities; and similarly, there is legally no doubt that such interest is equitable/proprietary; those are the hallmarks of beneficial ownership, as Briggs J terms the interest of the investor; and their presence suffices to qualify as *"any interest in securities"* for the purpose of Schedule 10A.

83. It would, to my mind, be odd to deny that the ultimate investor has such an interest. No one but the investor can claim any right of ownership beneficially, nor is the property in the share available in the event of the bankruptcy of any intermediary to any of its creditors: only to the investor whose 'property' in reality it is.

84. In the result, I have concluded that the expression *"any interest in securities"* can, by application of established distinctions between rights which are merely economic, contractual or personal, and rights which are in equity at least 'proprietary', be given sufficiently certain meaning to confine the class of potential claimants so as not to

expose the issuer to indeterminate liability to an indeterminate class whilst also ensuring proper vindication consistently with the admitted objectives of both the domestic legislature and the Transparency Directive.

85. In my judgment, the expression denotes something more than a mere personal or contractual right; the expression "ultimate beneficial owner" captures the position of the investor as the owner of "a right to a right" held through a waterfall or chain of equitable relationships which is unaffected by the insolvency of his intermediary, and enables it ultimately, even if indirectly, to enjoy the benefit of the bundle of rights which the securities represent to the exclusion of others (unless the ultimate beneficial owner has transferred them away, for example to a chargee).

86. In any event, in my judgment, even if the above analysis requires review, restriction or other refinement, the rights of persons holding intermediated securities through CREST, such as I understand all the Claimants to be, comprise an *"interest in securities"* such as to confer standing to sue under FSMA for compensation in respect of any untrue or misleading statement or omission in Tesco's published information if they can show that they did *"acquire, continue to hold or dispose"* of the securities in question in reliance upon that statement or omission.

87. I am fortified in that conclusion by the consideration that the adoption of this available interpretation as a matter of semantics is necessary to fulfil the purposes of the legislation. That consideration is the stronger given that, although Mr Mumford disputed this, it seems to me that these provisions were intended also to ensure a proper statutory regime of investor remedies for false statements or omissions required by the Transparency Directive in order to give teeth to the disclosure regime it requires, and compensation for breach of its rules.

88. Further, having regard to the long and detailed review of the legislation, and the process of commentary and debate which preceded its enactment in its present form, I cannot agree with Mr Mumford that the draftsman and legislature simply overlooked or misunderstood the process of intermediation or its legal attributes, and unwittingly deployed language which cannot conform to it. In my view, I must proceed on the basis that the draftsman and legislature did understand the market in intermediated securities, did not intend to strip away the rights of investors who chose that mode of holding their investment, and must have been persuaded that the words they used were appropriate to preserve and enhance such rights. Unless the words cannot be made to bear the meaning intended, then they should be made to do so. That seems to me a conventional approach to statutory interpretation: I do not need to determine whether the *Marleasing* principle applies, although it is a further consideration and comfort that the same objective is apparent in the Transparency Directive.

89. In short, whilst personally I might query whether the adoption of some suitably altered form of definition such as is in the USR might have been wiser, I do not see such mismatch between the plain practical objectives of the statutory provisions in question and the legal concepts which bind me that they cannot be reconciled.

90. I consider that the risk of multiple claimants, whilst important, is likely to prove more theoretical than real on the approach which I favour; and in any event, in my judgment, it is not sufficient to justify confining the application of the section so as to render it practically of no use or purpose in the context of the main market for shares. It is dangerous, and often foolish, to seek to extrapolate a general rule or proposition from a particular circumstance, and I would not wish to be thought to be doing so; but my

conclusion that the ultimate investor, as ultimate beneficial owner, does have standing, does not connote that anyone else than (probably) the legal owner does also.

91. The possibility of the legal owner also having standing is a risk inherent in any situation where equitable ownership and legal title are separate. Even in a certificated market, with no custody chain but where the securities are held (as was very usual) in a nominee or 'street name', there could be two claimants: the legal and the beneficial owner. In my view, however, the risk is unlikely to eventuate or cause a substantial problem. The custodian, though the holder of the legal interest, is (as previously noted) unlikely to have been more than a passive recipient, who will thus not have made any investment decision in reliance on published information, and so will have no claim under section 90A and Schedule 10A. The possibility of a claim under section 90 FSMA, in which context proof of reliance is not necessary, cannot be excluded; but it is not at all clear why a legal owner would wish to bring a claim in competition with the ultimate beneficiary; and if it did so, it should not be beyond the power of the Court to insist on a single claimant to vindicate the same right.

92. For the avoidance of doubt, I should not be taken to be deciding that persons having a lesser or more indirect interest, such as beneficiaries under a trust entirely separate from the intermediary chain in which relevant shares were held by the ultimate investor is trustee, or a company holding the shares in the ultimate investor (both being possibilities canvassed by Mr Mumford), would have standing under otherwise applicable provisions of FSMA.

93. All I am deciding is that for the reasons I have given, the Claimants have in each case an *"interest in securities"* sufficient to enable them to maintain proceedings for the purposes of section 90A and Schedule 10A FSMA, and these claims should not be struck out unless Tesco can establish its second limb of argument.

Tesco's submissions: second limb

94. The second limb of Tesco's case is intended to cover the position of Claimants which do have an *"Interest in securities",* either because of being in a direct relationship with the only custodian or because it is to be assumed that (contrary to the first limb of Tesco's case) all the Claimants have such an interest. Tesco's second limb of argument is that, even in those circumstances none of the Claimants can sue because none can be said to have *"acquired"* or *"disposed of"* their interest in Tesco shares within the meaning of paragraph 8(3).

95. In Tesco's skeleton argument, Mr Mumford illustrated his argument by reference to the Rathbone Claimants (see paragraph [51(1)] above), they being examples of claimants with a direct relationship with the legal owner. He accepted that a transfer by the legal owner (RNL) to someone else would plainly be a *"disposition"* of that legal title covered by paragraph 8(3). Equally, if RIML had assigned or sold its equitable interest, that would also have been covered. But, he submitted, that is not the Claimants' case. Their case is that each acquisition or disposal of Tesco shares by RNL as legal owner itself constitutes, as a matter of law, an acquisition or disposal of <u>RIML's</u> equitable interest and that RIML is therefore entitled to sue under Schedule 10A.

96. Mr Mumford's point is that the Claimants' construction of paragraph 8(3) therefore depends upon the proposition that it is possible to '*acquire*' or '*dispose of*' an interest without any dealing in <u>that</u> interest; which he submitted could not be so, on the basis

that properly construed, there can be an '*acquisition*' or '*disposal*' of an interest in securities only if there is a transfer of, or dealing in, that interest (as distinct from some other interest) by the disponor. If that is right, Mr Mumford submitted, it necessarily follows that a purchase or sale by the legal owner of legal title does not constitute a purchase or sale of the beneficial interest: the beneficial interest may be created or extinguished, but it is not *'acquired'* or *'disposed'* of for the purposes of the paragraph and Schedule 10A.[19]

97. Mr Mumford elaborated on this argument as follows:

(1) He submitted that, simply as a matter of language, the natural meaning of the '*disposal*' of an interest in securities is that it is a reference to a dealing in that interest as a result of which it is transferred or ceases to exist, not to a dealing in a different interest. Thus, if RIML instructs RNL to transfer legal title to the Tesco shares, and RNL does so, it may be that RIML's equitable interest has been extinguished, but there has been no dealing in that interest and it would be an unusual use of language to say that it has been '*disposed of*' if there has been no dealing in the relevant interest itself.[20]

(2) He relied on two authorities, namely *Akers v Samba Financial Group* [2017] AC 424 and *Vandervell v IRC* [1967] 2 AC 291 (both at the highest appellate level):

(i) In the *Akers* case, Mr Al-Sanea, the legal owner of certain shares in Saudi Arabian banks, held them on trust for a company called SICL. Six weeks after SICL went into liquidation, Mr Al-Sanea, in breach of trust, transferred legal title to the shares to Samba in purported discharge of personal liabilities that he owed them. SICL brought a claim against Samba under section 127 of the Insolvency Act 1986, which provides that '*any disposition of the company's property*' is in certain circumstances void. Section 127 applies only to the property of '*the company*' (here SICL); the claim therefore turned on whether the sale of the shares by Mr Al-Sanea constituted a '*disposition*' of SICL's equitable interest. The Supreme Court held unanimously that it did not. Mr Mumford contended that this was because there was no dealing in the equitable interest itself; and he relied on the case accordingly as authority for the proposition that a transfer of legal title to shares by X does not amount to a disposition of Y's equitable interest in them, even if Y's equitable interest is extinguished by, or ceases to exist as a result of, that transfer. He relied on the judgment of Lord Mance JSC (at [51]), stating

[19] Mr Mumford contends that the same points apply *a fortiori* to '*acquisition*': in the context of Schedule 10A, the one is the mirror image of the other. Put another way, if there can be no '*disposition*' of an interest absent a transfer of, or a dealing in, the interest itself, it follows that there can be no '*acquisition*' of it either.

[20] Mr Mumford cited the way Professor Nolan puts it, '*it is perfectly comprehensible to call some dealing with an asset a "disposition", even if the result of that dealing is the destruction of that asset. But it is hard (as the Supreme Court appreciated) to see how some dealing with one item of property, that causes the determination of another, distinct, item of property, can be described as a "disposition" of the latter. The word "disposition" surely connotes at least some dealing with the property in question, rather than the occurrence of an extrinsic event which triggered determination of the right*': see RC Nolan, 'Dispositions and equitable property' (2017) 133 *LQR* 353, 357-58 (emphasis added).

> "What is clear, on any analysis, is that, where a trust exists, the legal and beneficial interests are distinct, and what affects the former does not necessarily affect the latter."

(ii) In the *Vandervell* case, Mr Vandervell had an equitable interest in 100,000 shares in a company held on a bare trust for him by the National Provincial Bank. He instructed the Bank to transfer the shares (i.e. legal title) to the Royal College of Surgeons. The Bank did so; and this extinguished Mr Vandervell's equitable interest. (That was suggested to be similar to the facts of this case in that it is an example of Mr Vandervell as equitable owner (e.g. RIML) directing the Bank as nominee or bare trustee (e.g. RNL) to transfer legal title to the shares to a third party.) One of the issues that arose in the House of Lords was whether the transfer of legal title by the Bank to the RCS constituted a '*disposition*' of Mr Vandervell's equitable interest within the meaning of section 53(1)(c) of the Law of Property Act 1925: if it did, the transfer was void because it was not in writing. Their Lordships held (unanimously on this point) that it did not. Both Lord Upjohn (with whom Lord Pearce agreed) and Lord Donovan explained that in that case there was no dealing in the equitable interest itself: it ceased to exist as a consequence of a dealing in a different interest, namely the Bank's legal interest: see pp 312, 318. Lord Donovan added that there must be a dealing in '*the equitable interest as such*'. Mr Mumford relied upon *Vandervell*, like *Akers v Samba*, as authority for the proposition that a transfer of legal title by the legal owner does not of itself constitute a '*disposition*' of the equitable interest, even if the equitable interest would be extinguished by the transfer: extinguishment of an interest by virtue of a dealing with another interest is not to be equated with its disposition.[21]

(3) Mr Mumford's third submission in support of the second limb of his argument was that Tesco's construction is consistent with the scheme of Schedule 10A, whereas the Claimants' would undermine it. Given his earlier and repeated acceptance that the overall effect of Tesco's construction would be to render section 90A and Schedule 10A largely unworkable in relation to claims by the holders of intermediated securities, this was a bold submission; but it has its logic as follows:

(a) If it were possible for an interest to be disposed of without any dealing in that interest itself by the disponor, a very wide range of transactions would fall within paragraph 8(3): for example, the exercise by a third party of a special power of appointment

[21] He relied also on *Re Vandervell's Trusts (No 2)* [1974] Ch 269 as also being authority for that proposition, because the Court of Appeal held in that case that a subsisting equitable interest in an option was extinguished, but not '*disposed of*', when the option was exercised by the trustee: see 320C-D (Lord Denning MR) and 326C (Lawton LJ).

which terminates a subsisting equitable interest in Tesco shares held by someone else, or the extinguishment of an equitable interest by the acquisition of legal title by a *bona fide* purchaser for value without notice. Such transactions are far removed from the standard purchase or sale of shares to which Schedule 10A is intended to be applicable and are unlikely to have been in the contemplation of the draftsman as being within the object of section 90A.

(b) Instructions to custodians to buy and sell shares are sometimes given orally. If, contrary to Tesco's case, the extinguishment of an interest even without any dealing in it is a '*disposition*', it would, at least in some cases, not be possible for custodians to act on such instructions, because section 53(1)(c) of the 1925 Act would be applicable and the disposition would be void unless in writing.[22] As Harman LJ observed in the Court of Appeal in *Vandervell*,[23] this would lead to the '*exceedingly inconvenient conclusion*' that '*an owner…of shares registered in the names of bank nominees*' could not instruct the nominee to execute a transfer '*unless he accompanied it by a written instrument operating as an equitable assignment*.' The question would also arise as to the validity, in the absence of writing, of at least some of the transactions in respect of the Claimants purport to sue. None of these difficulties arise on Tesco's approach, which limits the concept of dispositions to dealings in the relevant interest that result in its extinction.

(c) More generally, the Claimants' construction leads to uncertainty as to the ambit of the provisions, and what transactions should qualify as acquisitions or disposals for the purposes of the relevant provisions.

98. Then the question is whether any, and if so what, extension to the ambit of potential liability and the pool of potential claimants was and is intended by paragraph 8(3)(b) of Schedule 10A and the extension of the notion of acquiring or disposing of any interest in securities to *"contracting to acquire or dispose"* of securities or any such interest.

99. As to this, Tesco submits that paragraph 8(3)(b) was and is addressing the particular problem arising where a claimant has contracted to take shares but has never actually acquired or disposed of them *in specie* because at the date of the relevant transaction they were not in issue but had been allotted to the claimant on provisional letters of allotment (acquisition) or had been disposed of by the claimant by renunciation of the right thus acquired (disposal).[24] It has nothing to do with intermediation: when it was

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[22] Section 53(1)(c) is disapplied to transfers within the CREST system: see regulation 38(5) of the 2001 Regulations. But Mr Mumford submitted that this disapplication is not exhaustive and is not engaged where a transfer is made without using the system (e.g. a transfer by an internal book-entry): see Law Commission Consultation (above), para 2.78.

[23] *Vandervell v IRC* [1966] Ch 261, 298.

[24] This, it is said, is consistent with contemporaneous commentary, which suggests that the purpose of introducing section 150(5) was largely to enable those with a right to acquire the shares themselves (e.g. following a rights issue) to sue if, for some reason, the shares were not actually acquired (e.g. because the company went into

introduced CREST did not exist and the practice of intermediation and computerised transfers of derivative interests was not yet operational. There is no justification for reading into a special definition a different meaning in subsequent Acts or iterations than the meaning it was intended to have when it was introduced.

100. Recognizing that a court is bound to be sceptical about a construction which, even though its individual steps may appear to be logical, renders a statutory provision ineffective in relation to claims by those whom the legislature seems likely to have wished to protect, and at least, not to discriminate against, Mr Mumford sought to bolster his argument that even so this would not provide any legitimate basis for rewriting the legislation in this case with the following two submissions:

(1) First, that if Schedule 10A is not capable of accommodating claims by holders of intermediated securities, that is a symptom of a more widespread gap or defect in the legal system that the courts have grappled with in recent years, namely that legislation enacted on the assumption that the ultimate investor is also the owner of the securities (which used to be the case) has not been amended in the light of the prevalence of the practice of intermediation. The consequence of this is that claimants are sometimes deprived of a remedy which one would expect them to have and which they would have had if their shares had not been intermediated. But the courts have consistently taken the view that addressing this gap or defect in the law is a matter for Parliament, not the courts: and he cited

(a) *re DNick Holding plc* [2014] Ch 196, where Norris J held, with regret, that the ambit of section 98 of the Companies Act 2006 could not legitimately be extended to enable three individual investors holding through intermediaries in aggregate some 7.2% of a company's shareholding to challenge a resolution to re-register as a private company since it was inaccurate as a matter of law to describe them as shareholders or as having acquired any 'shares': what they owned was no more than '*ultimate economic interests in underlying securities*';

(b) *Secure Capital v Credit Suisse* [2017] 2 CLC 428, where the decision of Hamblen J (as he then was) to strike out a claim by the investor (Secure Capital) in respect of misrepresentations in an information memorandum by the issuer (Credit Suisse) of intermediated bearer bonds on the ground that the investor was not Credit Suisse's contractual counterparty, had only an ultimate economic interests in the notes and no title to sue upon them was upheld in the Court of Appeal. Mr Mumford referred particularly to David Richards LJ's observation at paragraph [10] that "*the system operates on the basis of a "no look through" principle, whereby each party has rights only against their own counterparty*."

liquidation): E Lomnicka and J Powell QC (eds), Encyclopedia of Financial Services Law (September 1987), para 2-536.

(2) Secondly, that these authorities illustrate that the mere fact that Schedule 10A may be rendered ineffective for intermediated securities is not a reason for giving it the construction for which the Claimants contend. What the Claimants must do is demonstrate that there is language in Schedule 10A which, construed in the usual way, enables holders of intermediated securities to sue. In that regard,

(a) Mr Mumford pressed me to reject the Claimants' suggestion (and see further below) that paragraph 8(3) of Schedule 10A is language with just that effect and entirely apt to enable the holders of intermediated securities to sue. He submitted that (a) what is now paragraph 8(3) was derived from section 90A(9)(b), which came into force in November 2006, which in turn was in the same terms as section 90(7), which was itself derived from section 150(5) of the now repealed Financial Services Act 1986. All the sections must in logic be construed consistently. When the original provision, section 150(5) of the FSA, was enacted the CREST system did not exist, and it cannot have been intended to enable holders of intermediated securities to sue; and

(b) Thus, according to Mr Mumford, paragraph 8(3) does not have and was not intended to have anything to do with intermediated securities: it is concerned with a different problem altogether, namely dealings in equitable interests themselves (whether intermediated or otherwise).

Claimants' arguments to rebut second limb of Tesco's case

101. As may already be apparent, the SL Claimants offer an entirely different perspective on paragraph 8(3), on which for their part they rely as demonstrating an intention on the part of the legislature to attribute a broad scope to the application of section 90A. They submit that its purpose is plain and is to ensure that it is the fact of the acquisition or disposal of a security or any interest in a security (or any contract for such acquisition or disposal) made in reliance on false information, rather than the exact mode (or legal characteristics of the mode) in which the security or interest is held at the time of the claim, which is the touchstone of standing.

102. Mr Kitchener thus submitted that, whatever may be the strict legal meaning of *"interest in securities"*, sub-paragraph 8(3)(b) informs the process of construction and extends the protection afforded by section 90A to persons who have entered into a contract for the acquisition or disposal of shares in reliance on published information, whether or not at the time of claim they have an equitable or proprietary interest, and whether or not the right under the contract is characterised as equitable, proprietary or purely economic.

103. Mr Kitchener, in his oral address, elaborated on this in submitting that the provision "shows that the draftsman of FSMA was not concerned exclusively with the protection of proprietary rights, because here he is showing that he is concerned to protect purely economic rights; rights under executory or executed contracts." (Mr Kitchener allowed that the generality of this was specifically cut down by the exception for the acquisition or disposal of depositary receipts, derivative instruments or other financial instruments

representing securities in what the parties referred to as the "tailpiece" of paragraph 8(3), but submitted that this in no way undermined his point.)

104. In response to Mr Mumford's contention of a more limited meaning, Mr Kitchener submitted that the words "acquisition" and "disposal" covered any process whereby the investor obtains or ceases to have any sort of interest in the relevant thing, citing in further support the broad meaning accorded in dictionaries and in such cases as *Congreve & Congreve v IRC* [1946] 2 All ER 170 at 183,[25] where Wrottesley J commented:

> "As used by lawyers the word 'acquired' has long covered transactions of a purely passive nature and means little more than receiving"

and *Duke of Northumberland v Attorney-General* [1905] AC 406 at 410-11 where Lord Macnaghten commented on the meaning of 'disposition' and 'devolution' in the Succession Duty Act 1853 that:

> "…it is clear that the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of the law."

105. Mr Kitchener submitted accordingly that (a) the natural meaning of the word "*acquire*" would include a situation where an investor has acquired a security, obtaining a beneficial interest himself and directing that legal title be transferred to his nominee; (b) that the words "*continues to hold*" take meaning from their context. A remedy in the case of a person who "*continues to hold*" securities and interests in securities was first introduced following the Davies Review. The words simply mean that the investor has retained what had been previously acquired; and that (c) the word "*dispose*" must likewise be seen in the context of the words "*acquires, continues to hold or disposes*", and that in that context its natural meaning includes any dealing by which the investor no longer "*continues to hold*" what he had previously acquired.

106. As to Tesco's submissions based on *Akers v Samba* and *Vandervell* (see paragraph [96] above), Mr Kitchener sought to distinguish both as confined to their particular contexts, as follows:

(1) *Akers v Samba* was distinguished as being a case under section 127 Insolvency Act 1986 decided expressly on the basis of construing that particular statutory provision. Mr Kitchener cited in particular paragraphs [42], [47] and [53] to [55] in the judgment of Lord Mance. He also cited that judgment for the fact that the Supreme Court recognised that in other contexts the word "*disposition*" was capable of encompassing the destruction or termination of an interest: see paragraphs 66 to 69 *per* Lord Neuberger, who cited also Wynn-Parry J's statement to the same effect in *In re Earl Leven and Melville, decd* [1954] 1 WLR 1228, 1233.

(2) *Vandervell* was distinguished as being concerned only with the scope of section 53(1)(c) LPA 1925, and in particular whether it applied to a transfer of legal title intended by the disponor also to pass his equitable title (the House of Lords

[25] Reversed on other grounds [1947] 1 All ER 168.

held that it did not). Mr Kitchener submitted that this "tells one nothing about the true meaning and effect of Schedule 10A FSMA."

107. Mr Kitchener concluded that the permissible broad range of the expressions "acquisition" and "disposal" in other contexts should be adopted in this case.

108. Further or alternatively, he submitted that the SL Claimants had plainly *"contract[ed] to acquire securities or any interest in securities"* in that:

(1) the SL Claimants entered into contracts as principals to purchase Tesco shares and performed those purchase contracts by calling for legal title to be delivered to their nominee / custodian and held to their order. That falls within the natural meaning of "*contracting to acquire securities*".

(2) Furthermore, on the facts, the SL Claimants bought shares pursuant to contracts that entitled them (or their nominee) to take legal title, so there is no basis on which those contracts do not qualify.

109. Lastly, Mr Kitchener returned to the combined effect of paragraphs 8(3)(a) and 8(3)(b) and submitted that "It cannot sensibly be suggested that a contract to acquire legal title attracts protection but that paragraph 8(3)(a) excludes a case in which the contracting party performs that contract by directing the seller to deliver legal title to the investor's nominee."

110. The MLB Claimants largely shared this perspective and adopted this construction, although (as explained previously) their focus was more upon the meaning of *"any interest in securities",* which they contended must include a proprietary interest, which they state under US law governing the intermediation chain they plainly have. Certainly, they shared the view that Tesco's argument is unsustainable, and in their skeleton argument suggested the following example where an investor instructs its custodian (as trustee) to purchase and then sell securities as a demonstration of this:

(1) Prior to the securities being purchased by the custodian, the investor obviously has no interest of any kind in those securities.

(2) Once the custodian purchases the securities, they are held on trust for the investor. The investor therefore obtains a beneficial interest in the securities which he did not have previously. It is entirely in accordance with the natural meaning of "acquired" (namely, to obtain or get hold of) to say the investor has "acquired" a beneficial interest in the securities.

(3) When the custodian sells the securities, full ownership (i.e. including both legal and beneficial title) passes to the purchaser, and the investor can no longer be said to be interested in the securities. Again, using the natural meaning of the word "disposed" (namely, to cease to hold or to remove), the investor has "*disposed of*" its beneficial interest in the securities.

(4) Moreover, both the "acquisition" and "disposal" in this example takes place on the instructions of the investor and is therefore an acquisition/disposal "by" the investor.

111. In agreement with Mr Kitchener that the authorities relied on by Mr Mumford (*Akers v Samba* and *Vandervell*) to seek to demonstrate that there could be no qualifying *"acquisition"* or *"disposition"* of the investor's equitable interest under the sub-trust of which it is beneficiary by reason of the acquisition or disposition of legal title by the custodian at the beginning of the custody chain were applicable only in their specific contexts and not, in any event, in this context, Mr de Verneuil Smith concluded that paragraph 8(3)(b) gave his clients standing whether or not their interest could legally be characterised as *"any interest in the securities".*

My conclusions as to the second limb

112. Mr Mumford's argument that none of the Claimants ever did anything that can legitimately be characterised in law as an acquisition or disposal of the Tesco shares or any interest in them depends upon a narrow interpretation of the expressions *'acquisition'* and *'disposal'* as used in Schedule 10A, and in particular, their confinement to a dealing in the very interest which such Claimant has or had (otherwise than by extinguishment effected by a dealing in some other interest).

113. I must admit to having found this second limb of Tesco's argument somewhat counter-intuitive in light of my decision on the first limb (and possibly in any event), and given that the draftsman must be taken to have known that this was the way of the market; but I accept that intuition will not suffice. More analytically, I cannot see that either *Akers v Samba* or the *Vandervell* case has any application or provides any prescription for the restrictive construction of the relevant provisions for which Mr Mumford presses.

114. As Mr Kitchener submitted, in *Akers v Samba*, the question was whether a transfer of the legal interest in shares held by Mr Al-Sanea constituted a disposition of the company's equitable interest in those shares so as to trigger the application of section 127 Insolvency Act 1986 (which renders void any disposition of the company's property after the commencement of a winding-up). The answer given by the UK Supreme Court that it did not was given in circumstances where the company (SICL) had no input into the transaction of any kind, still less was it instigated by it: indeed it was the foundation of its Liquidators' case that the transfer of the legal estate was in breach of trust and made without its consent and against its interests. There was no intention to dispose, or anything like it; the equitable interest was simply extinguished by reason of the basic equitable principle that the purchaser of a legal estate for value without notice takes free of any equities; and there was no or no sufficient basis for overriding that equitable rule. In this case, by contrast, any dealing (or the holding) of shares is instigated by the claimant.

115. In the *Vandervell* case, the position was in a sense the converse of *Akers v Samba,* because the transaction in question was instigated by the beneficiary and the issue was whether the passing of legal title by the legal owner at the instigation of the beneficiary was to be treated as passing the entire interest without the need for writing to satisfy section 53(1)(c) LPA 1925. The decision of the House of Lords, as expressed in a nutshell by Lord Upjohn at 311 F was that "the greater includes the less". I agree with Mr Kitchener that this "tells one nothing about the true meaning and effect of Schedule 10A of FSMA."

116. Further, in *Vandervell,* Lord Upjohn explained (at 311) that section 52(1)(c) LPA 1925 was derived from the Statute of Frauds, and that

> "the object of the section, as was the object of the old Statute of Frauds, is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustees to ascertain who are in truth his beneficiaries. But when the beneficial owner owns the whole beneficial estate and is in a position to give directions to his bare trustee with regard to the legal as well as the equitable estate there can be no possible ground for invoking the section where the beneficial owner wants to deal with the legal estate as well as the equitable estate."

I do not see in that case any suggestion that where a person (X) enters into a transaction pursuant to which, at X's direction and for value, shares previously held on trust by a custodian and then through a series of sub-trusts ultimately for X become held by the custodian and then through a series of sub-trusts ultimately for Y, would not constitute a disposal by X and an acquisition by Y of an interest in the relevant shares. Nor do I see in that case any basis for a suggestion that separate writing would be necessary for the transfer of the ultimate interest in equity thereby effected. There is no question of any untoward or secret dealing such as to trigger section 53(1)(c): no person in the chain would have any right to object or dispute the transaction, nor would any person be in doubt as to their beneficiary.

117. The fallacy of Mr Mumford's approach, as I see it, is to treat as irrelevant that it is the transaction which caused the vesting or ceasing to vest in the claimant of the interest in shares (however to be characterised) which, if made in reliance on an untrue or misleading statement or omission in qualifying information from the issuer, is the relevant trigger for liability. That transaction will have been instigated by the claimant, allegedly to its detriment, on the faith of the allegedly untrue or misleading statement or omission. The whole purpose of the relevant provisions of FSMA is to confer a statutory cause of action in respect of a transaction entered into in such circumstances. Unless the wording was without any semantic doubt entirely deficient to apply in such circumstances, ordinary principles of statutory construction require the court to ensure that the statutory purpose is not thwarted. As Lord Neuberger of Abbotsbury PSC expressly acknowledged at [66], the expressions *"disposal"* or "disposition" are plainly semantically capable of extending to a transaction which involves the destruction or termination of an interest; and it seems to me to be plain and obvious that the expressions *"holding"* and "*acquisition"* must in logic be given broad corresponding remit. There is every reason to give the expressions such meaning here, to ensure the achievement, rather than the negation, of the statutory purpose.

118. I do not consider that the *Secure Capital* case assists Tesco either. That case concerned only the contractual rights of account holders in respect of immobilised bearer notes held by a custodian in the Clearstream system. In such a system or arrangement, it is not the bearer note, but interests in the note, that are traded through Clearstream. In a "Programme Memorandum" it was stipulated that the bearer/holder of the notes "would be deemed to be and may be treated as its absolute owner for all purposes"; and the system operates on a "no look through principle" so that each participant in the chain of interests under a custodian only has rights against their immediate counterparty. The question was whether, by reason of a provision of Luxembourg law which, it was said and for the purposes of the application only accepted, conferred a direct right of action on Secure

Capital as an Account Holder, Secure Capital could sue Credit Suisse in contract for alleged misstatement in the issuing material. The decision, upheld on appeal, was that it could not, and the "no look through principle" which was well understood to be the basis of trading on the market, prevailed. But here the claim is not in contract but under a statutory cause of action. Except in the sense explained below, which assists not Tesco but the Claimants, the decision in *Secure Capital* seems to me to have no application to this case.

119. Indeed, and as was pointed out in the SL Claimants' skeleton argument, the judgment of David Richards LJ in the appeal in part undermines, rather than supports, Tesco's case. David Richards LJ specifically said at [56],

> "I emphasise 'in contract' because it is not suggested that a claim in tort, if sustainable, would be similarly barred".

Academic commentary largely supports the proposition that investors would have a non-contractual claim. For example, Ms Gullifer and Ms Payne make clear when discussing the *Secure Capital* case that the ultimate investor would have claims against an issuer under FSMA ss.90 or 90A (as appropriate) notwithstanding the existence of an intermediated securities structure.[26]

120. Accordingly, I consider that any process whereby, in a transaction or transactions on CREST, the ultimate beneficial ownership of securities that are, with the consent of the issuer, admitted to trading on a securities market in accordance with paragraph 1 of Schedule 10A, comes to be vested in or ceases to be vested in a person constitutes (respectively) *"the acquisition or disposal of any interest in securities"*.

121. For comprehensiveness I should confirm that I do not regard this approach as invalidated or undermined in any way by the point made by Mr Mumford as to the derivation of paragraph 8(3) from a time before the existence of CREST and the development of the market in intermediated securities. The analysis I have adopted depends on the width of the expressions *"acquire"* and *"dispose"* and *"acquisition"* and *"disposal"* and their potential application to any process whereby the potential claimants came to be or cease to be entitled to the ultimate beneficial ownership of the shares, whether that process is undertaken through CREST and a chain of intermediation or not. The concepts are adaptable for all seasons, even if (as I think) a statutory definition would have been the clearer thought, given existing controversy.

122. On that basis, in my view, paragraph 8(3)(b) applies only where the acquisition or disposal is the subject of a contract that has not yet been completed, or where the securities are not yet in issue but the entire right to them when issued is acquired or disposed of (such as is or may be the position in the case of securities allotted on renounceable letters of allotment).

123. Lastly, and for comprehensiveness, I accept that the adoption of Mr Mumford's argument would further have reduced any risk of multiple claims. But, for the reasons I

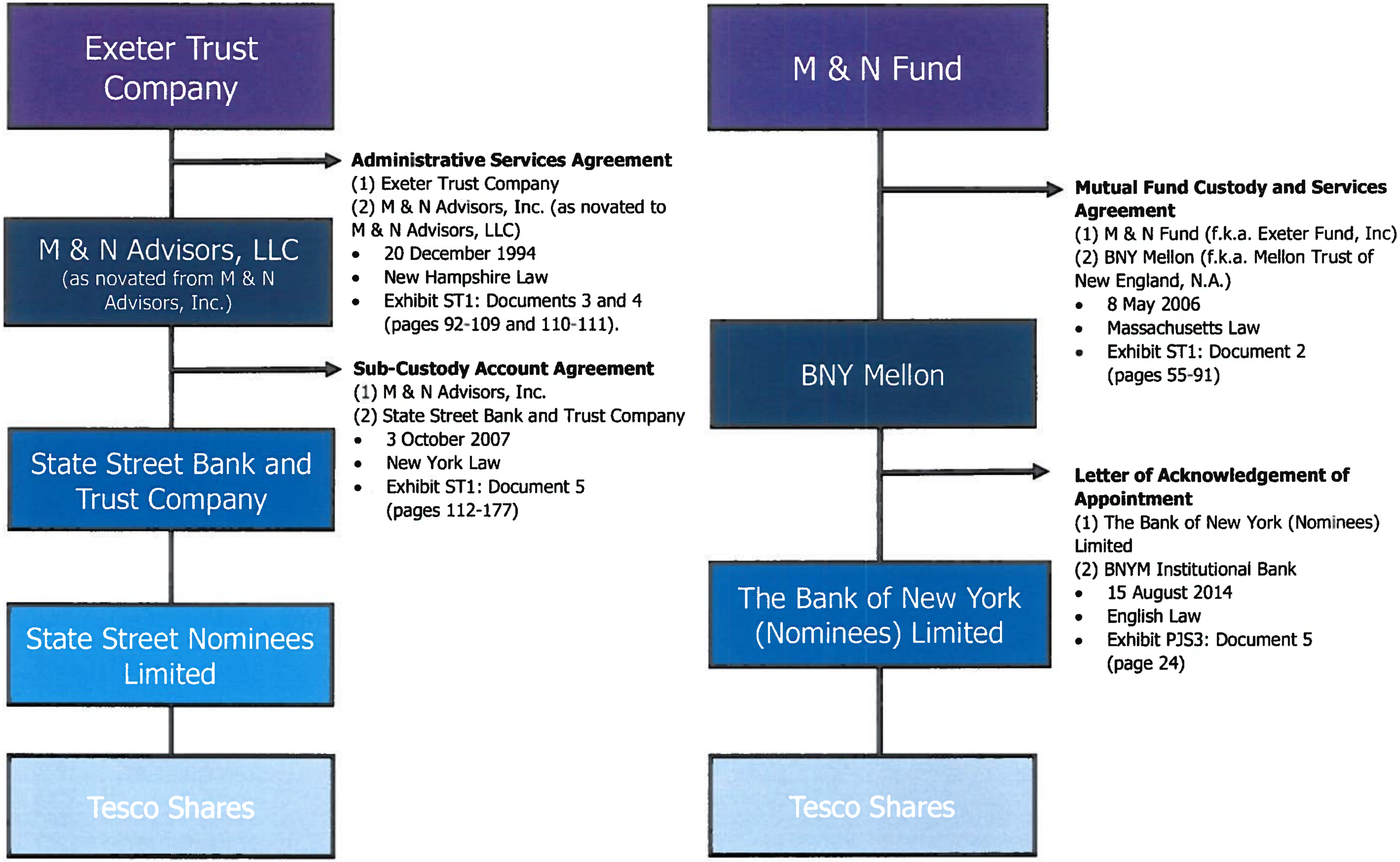
[26] Gullifer & Payne eds, *Intermediation & Beyond* (2019), page 381. The only problem they identify is that the issuance of securities in *Secure Capital* was a private placement, to which the prospectus rules in s.90 does not apply.

have given in the context of limb I, I do not myself consider that to be more than a limited theoretical risk on the construction I favour.

Conclusion

124. In my judgment, therefore, neither of the two limbs of Tesco's argument is sustainable. It follows that Tesco's strike-out application must be dismissed.

125. The parties intimated that they might seek declaratory relief, as might certainly have been appropriate had I reached the opposite conclusion. It may be that in light of the conclusion I have reached, that is not necessary; and I would require convincing that any such relief would in the circumstances be appropriate. However, if any of the parties wish to contend to the contrary, they should notify me as soon as possible. Subject to that, I would invite Counsel to agree and provide me with a draft form of order. Any consequential matters can be dealt with after formal hand-down or at a convenient moment later.



Exeter Trust Company
Administrative Services Agreement
(1) Exeter Trust Company
(2) M & N Advisors, Inc. (as novated to M & N Advisors, LLC)
• 20 December 1994
• New Hampshire Law
• Exhibit ST1: Documents 3 and 4 (pages 92-109 and 110-111).
M & N Advisors, LLC (as novated from M & N Advisors, Inc.)
Sub-Custody Account Agreement
(1) M & N Advisors, Inc.
(2) State Street Bank and Trust Company
• 3 October 2007
• New York Law
• Exhibit ST1: Document 5 (pages 112-177)
State Street Bank and Trust Company
State Street Nominees Limited
Tesco Shares
M & N Fund
Mutual Fund Custody and Services Agreement
(1) M & N Fund (f.k.a. Exeter Fund, Inc)
(2) BNY Mellon (f.k.a. Mellon Trust of New England, N.A.)
• 8 May 2006
• Massachusetts Law
• Exhibit ST1: Document 2 (pages 55-91)
BNY Mellon
Letter of Acknowledgement of Appointment
(1) The Bank of New York (Nominees) Limited
(2) BNYM Institutional Bank
• 15 August 2014
• English Law
• Exhibit PJS3: Document 5 (page 24)
The Bank of New York (Nominees) Limited
Tesco Shares

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