Neutral Citation Number: [2021] EWHC 1524 (Ch)

Case No: BL-2020-000101

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane,
London EC4A 1NL

14 June 2021
(Judgment handed down remotely
in the absence of the parties)

Before:

DEPUTY MASTER MARSH

- -

Between:

MALCOLM HUNTLEY POTIER	**Claimant**
- and -	
THE SOLICITOR FOR THE AFFAIRS OF HER MAJESTY'S TREASURY CROWN NOMINEE FOR BONA VACANTIA	**Defendant**

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- -

Anthony Pavlovich (instructed by **Advocate**) for the **Claimant**
Richard Fisher QC (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 26 and 27 May 2021

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JUDGMENT

Deputy Master Marsh:

1. Section 654 of the Companies Act 1985 provides that when a company is dissolved:

> "… all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (… but not including property held by the company on trust for any other person) are deemed to be bona vacantia ... and accordingly belong to the Crown".

2. The Solicitor for the Affairs of Her Majesty's Treasury is a corporation sole created by the Treasury Solicitor Act 1876 and is known as the Treasury Solicitor. The Treasury Solicitor is nominated by the Crown to receive property that is bona vacantia. The way in which the defendant is described in the claim (as amended) includes a reference to its role as a nominee for the Crown. The Bona Vacantia Division of the Treasury Solicitor is a separate function of the Treasury Solicitor but not a legally separate entity. Amongst many other functions, the Treasury Solicitor represents the Attorney General who instructs it to deal with contested bona vacantia claims.

3. British Gas plc was privatised in 1986 and the public were invited to subscribe for shares in the newly floated company. The claimant acquired shares in his own name and he also arranged for the Shares to be acquired through six companies of which he was the sole director and the principal shareholder. He says it was lawful at the time for an individual to obtain additional shares on the public offering by using companies as nominees. His case is that:

> (1) He paid for the Shares acquired by the companies.

(2) Each company executed a deed of trust to the effect that the Shares were held in trust for him personally.

(3) The companies were either dissolved or entered administration in the period between 1988 and 1994.

(4) In 1999 an order was made appointing him as the sole trustee of the trusts and directing that the Shares be vested in him.

(5) The defendant was aware of the trusts and the making of the vesting order.

(6) The Shares were later transferred into the name of the defendant without the claimant's knowledge or consent and sold.

(7) The defendant held the Shares upon constructive trusts in light of the defendant's knowledge of the trusts and the vesting order and/or in the absence of consideration for the Shares and acted in breach of the constructive trusts in selling the shares without accounting to him.

4. The claimant seeks declaratory relief and equitable compensation arising from the receipt and sale by the defendant of the Shares. It is common ground that the Shares were received by the defendant at various times and sold and the proceeds were then passed to HM Treasury.

5. The claimant has been assisted in bringing this claim by Advocate and counsel, Anthony Pavlovich, who appeared for the claimant on a pro bono basis. Richard Fisher QC appeared for the defendant.

6. Four of the companies ("the Four Companies"), Tanap Investments Limited, Towerscott Limited, Skewsby Properties Limited and Teakbeam Limited were dissolved on dates between 1988 and 1994. Insolvency procedures were taken in relation to the other two companies ("the Two Companies"). Tanap Investments (UK) Limited went into liquidation in 1992 and was dissolved in 2000. Tanap Investments VK Limited went into receivership in 1991 and into liquidation in 1992. It was dissolved in 2006.

7. Although the Shares were originally held in British Gas plc, as a result of restructuring over the years, they were reissued and the identity of the company in which they were held has changed. Nothing turns on this. If the claimant is right, the Shares were held under the six trusts and remained trust property up to the point of sale by the Defendant.

8. The claim is marked by a number of features including the lengthy period of time that the events cover and the limited amount of evidence both oral and documentary that is available. However, copies of trust deeds dating from 1986 for each of the six companies that the claimant relies upon have survived. They are not admitted but no issue is taken about their authenticity. The claimant is put to proof about every factual aspect of his claim other than receipt and sale of the Shares by the defendant.

Background

9. Following acquisition of the Shares in 1986 by the six companies, the claimant was divorced from his wife Sharon Potier and they entered into a consent order on 1 September 1989 in matrimonial proceedings in Bromley County Court. A sealed copy of the order has not been provided but there is no reason

to suppose that the version in the bundle in these proceedings, which bears the signatures of the claimant (as Petitioner) and Mrs Potier (as Respondent), is not genuine or was not approved by the court. There are two elements of the consent order that are significant:

(1) The provisions of the order are as described as an interim settlement "… with a view to the welfare of the children of the family and that further financial arrangements will be appropriate in due course…". A further order was made in 2006 some 17 years later. The order made in 2006 does not refer to the order made in 1989.

(2) The 1989 order records an acknowledgment by the claimant that all shares held "… in trust for him by others are to be the sole property of the Respondent and that the Petitioner holds the same in Trust for the Respondent." If the six companies held shares in British Gas in favour of the claimant, then this acknowledgement either created new sub-trusts in favour of Mrs Potier or evidenced the existence of such sub-trusts.

10. On 15 October 1996 M W Benney of the defendant, that is the Bona Vacantia division of the Treasury Solicitor, sent a letter to 1996 Keppe Shaw, solicitors acting for Mr Potier. It refers to a letter from Keppe Shaw dated 8 October 1996, but that letter is not available. The letter sent to Keppe Shaw refers to an enclosure and it seems likely that it was a draft witness statement because Mr Benney's letter refers to a draft and provides some pointers about what additional information would be needed in a witness statement in support of an application to appoint a new trustee or trustees. Notably Mr Benney said that

full details of the "matrimonial settlement" would be needed. It is impossible to be certain whether that was a reference to the order made in 1989 or a later order.

11. The second paragraph of the letter is significant. Mr Benney wrote:

> "I am not sure my consent is required, although it may be a matter for the Attorney General, for whom another Division of the Treasury Solicitor acts. Since ex hypothesi there is no bona vacantia interest I would (if appropriate) simply confirm that there is no bona vacantia objection to the proposed appointment. I emphasise it is for you to advise your client since that is not the function of the Treasury Solicitor."

12. It appears that Keppe Shaw had written to the Treasury Solicitor asking for consent to a proposed application under section 41 of the Trustee Act 1925 for a new trustee to replace the dissolved companies. Mr Benney appears to have been saying that if (ex hypothesi) the shares were held in trust they would not be treated as bona vacantia but it would be a matter for the Attorney General (advised by a different division of the Treasury Solicitor) to decide whether the proceedings would be opposed.

13. No formal steps were taken by the claimant in relation to the Shares until 1999. By that date Teakbeam Limited had been dissolved for 11 years. The most recent event prior to 1999 was the dissolution of Tanap Investments Limited in 1994. Whitehead Monckton, instructed by the claimant, wrote to the defendant on 25 March 1999[1]. The letter was clearly written without sight

[1] The letter is correctly addressed to "The Treasury Solicitor (BV)".

of Mr Benney's letter. Whitehead Monckton were aware that a letter had been sent to Keppe Shaw and that the letter "… set out certain comments concerning the necessity for your consent and, assuming this was required, information you wished to have before you." They asked for a copy of the letter which was supplied to them the following day.

14. Whitehead Monckton's letter contains a puzzling observation that "… the Deputy Master required the matter to be submitted to you and your consent to be obtained before dealing with the application in detail." There is no evidence about the nature of the application in early 1999 to a Deputy Master or the reason for it. If there were earlier proceedings than those issued after the letter from Whitehead Monckton, no information about them has survived.

15. On 21 May 1999 a Part 8 claim form was issued naming Mr Potier as the claimant. No defendant was named. This is curious because the date of issue of the claim is very shortly after the CPR came into force and CPR 8.2A was not implemented until later. However, it is clear that the proceedings did not have a defendant when issued and it is not known whether this oversight was corrected later. The claim sought an order appointing Mr Potier as sole trustee of the Four Companies and an order vesting in him the right to transfer the Shares in those companies. The claim form, the draft order produced at the time the claim was issued and the claimant's affidavit dated 5 May 1999 do not make any reference to the matrimonial settlement between the claimant and Mrs Potier, as Mr Benney had proposed, or the order dated 1 September 1989. The affidavit states that the Treasury Solicitor had been "formally notified of the situation" and the Treasury Solicitor "has indicated, in his view,

that he does not have a direct interest in the application." Some correspondence is exhibited that possibly may be the three letters to which I have made reference.

16. The course the claim then followed is uncertain. However, from the documents the claimant has produced, the following can be discerned:

17. The claimant made a further affidavit on 21 June 1999 requesting that Tanap Investments (UK) Limited was added to the claim. There is no sign of the claim form later being consequentially amended. The affidavit contains very similar language to the first affidavit when referring to the Treasury Solicitor.

18. It seems likely the claim came before the court for a hearing on 7 July 1999 because the claimant wrote to Lloyds Bank Registrars on that date referring to a hearing that day. The letter states that the claim was adjourned "… pending me being able to substantiate my claim that I wrote personal cheques for the Applications [for shares]".

19. There is then an unexplained gap of more than 4 months.

20. On 17 November 1999 Whitehead Monckton wrote to Mrs Potier seeking her assistance. There is nothing in the letter to suggest that Mrs Potier was aware of the proceedings when they were issued. She was informed by Whitehead Monckton that: "Should the application be successful, I am instructed, those shares, or their net value, will be transferred to you." The letter also refers to the claimant acting as her trustee.

21. Mrs Potier replied on 18 November 1999 confirming that the claim was brought with her full knowledge and "… if it is successful, the shares or the proceeds will be transferred to me."

22. Mr Potier made a witness statement dated 26 November 1999 that appears to have been settled by counsel. The witness statement provides rather more information than before about the acquisition of the shares and the matrimonial proceedings. So far as the latter is concerned the claimant states that the shares were held by Mrs Potier beneficially after the consent order. The witness statement also sought permission to add Tanap Investments VK Limited to the claim but again there is no sign that the claim form was later amended.

23. Mr Adrian Robbins of Whitehead Monckton made a short statement dated 26 November 1999 referring amongst other matters to his correspondence with Mrs Potier and saying he would, as she requested, inform her of the outcome of the proceedings.

24. The only record of the second hearing of the claim is a letter from Mr Robbins to Mrs Potier dated 30 November 1999 that refers to a hearing the previous day. He says that the application was successful "… in face of opposition from the Treasury Solicitor." He goes on to say that the court indicated it would seal an order but that "… owing to an unusual complexity in the background to the case both counsel (for Mr Potier and for the Treasury Solicitor) should settle a draft before submitting it to the court for sealing. I hope this will be done within the next few days, and once the order has been sealed I shall send a copy to you."

25. No copy of the order, if one was sealed, has been found and there is no evidence that Mrs Potier ever received one. She has not provided any evidence in this claim and there is no indication that the claim was brought with her approval or on her behalf.

26. Shortly after the hearing on 29 November 1999, the claimant left the United Kingdom with his two year-old daughter. He says he planned to return within 3 months but, in the event, he stayed in Australia until December 2015. The reasons for the trip to Australia have not been revealed in the evidence. However, it is clear that the child's mother, Myra Oswald, issued wardship proceedings and obtained a freezing order from Bodey J in the Family Division on 13 December 1999 in those proceedings. The order prevented the claimant from dealing with his assets including his "British Gas shares and/or the proceeds thereof" but provided the claimant with permission to apply to vary or set aside the order. A further order in a similar form relating to the Shares was made by Hogg J on 11 January 2000. In view of the nature of proceedings brought by Ms Oswald it is probable that the claimant is unable to say anything about them or the reasons for his departure from the United Kingdom. It would therefore not be right to reach any adverse conclusions about this evidential gap. However, the claimant remained in Australia for 16 years and there is no reason why he could not have provided some explanation for his circumstances whilst there. In any event, there was no reason why the claimant could not have been in contact with professional advisers in Australia and/or the United Kingdom during this period.

27. The defendant was notified of the existence of the Shares on various dates between 5 December 2005 and 30 August 2011. The defendant then treated the shares as being bona vacantia as at the date of dissolution of the respective companies and, following contact with the Registrars, the defendant received the unpaid dividends, the Shares were sold and the proceeds with the dividends were passed to HM Treasury. In some cases, the Registrar required the Defendant to provide an indemnity.

28. On 5 May 2006 an order was made in the matrimonial proceedings between the claimant and Mrs Potier by Deputy District Judge Elliot. The order records that the claimant did not attend the hearing but he was given notice of the hearing and made written submissions. It appears that by the date of the order the former matrimonial home "Cacketts" had been sold and the net proceeds were held in an account in the name of Mrs Potier's solicitors and Ms Oswald's solicitors. The order is a final order that dismissed the claimant's and Mrs Potier's claims for financial provision and property adjustment orders. £302,619 was ordered to be paid to Mrs Potier and £677,620 to the claimant from the funds held in the point deposit account. The order does not mention the order made in 1989 or the Shares. As a matter of impression, the order solely dealt with the proceeds of sale of Cacketts although the precise circumstance in which the sale came about during the claimant's stay in Australia have not been revealed to the court. There is nothing in the order to suggest that the acknowledgement provided in the 1989 order about the Shares was replaced or overridden.

29. On 26 August 2015 the claimant wrote the defendant. At that stage he was still in Australia. He says he had been in contact with one of the Registrars, Equiniti, and had learned that the shares and the dividends had been transferred to the defendant. He says, when referring to the proceedings in 1999, the claim resolved that the shares were held by the companies as his nominee and were held in trust for him. He goes on to say:

> "Furthermore my application to have the shares transferred from these companies, to myself, was accepted.
>
> In December 1999 I left the United Kingdom to come to Australia and have remained here ever since, at all times my location has been well known. There was an intention that the shares be transferred from myself to my ex wife Sharon Elizabeth Potier as part of a divorce settlement and I am not sure if this was effected but if it did occur it was in the middle of the last decade."

30. In a letter to the defendant dated 14 September 2015, the claimant attempted to provide an explanation about why the court ordered, as he asserted in his previous letter, the shares to be transferred to him. He says:

> "As I had to leave the country, would be unable to receive communications or dividends, and to deal with a financial arrangement with my ex wife, it was appropriate for me to have the shares transferred into my name."

31. In August 2018 the claimant made an application in the 1999 proceedings for an order against the defendant. The application was dismissed on 18

September 2018 on the basis that a fresh claim was required. This claim was then issued on 17 January 2020.

The law

32. Section 41(1) of the Trustee Act 1925 gives the court power to appoint a new trustee where a company has been dissolved. Section 41(3) clearly contemplates that a vesting order under section 51 of the Trustee Act 1925 may be made that is consequential upon the appointment of a new trustee.

33. Section 51(1) of the Trustee Act 1925 gives the court power to make a vesting order in relation to stock and things in action in number of different circumstances. These include:

    (1) Under section 51(1)(i) where the court has appointed a new trustee or where a new trustee has been appointed out of court under any statutory or express power.

    (2) Under section 51(1)(ii)(c) where the trustee is a corporation and has been dissolved.

34. The power is to make an order "… vesting the right to transfer or call for the transfer of stock, or to receive the dividends or income thereof …". There are two provisos to section 51(1) only one of which is relevant in this case, namely:

    "(a) Where the order is consequential on the appointment of a trustee, the right shall be vested in the persons who, on the appointment, are the trustees …".

35. It is relevant to note, although this is not a point that was raised in submissions, that section 58(1) of the Trustee Act 1925 specifies who may apply for an order for the appointment of a new trustee or for an order dealing with trust assets:

> "An order under this Act for the appointment of a new trustee or concerning any interest in land, stock, or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof."

36. The only person who is entitled to apply for an order under section 41 and/or section 51 is a beneficiary under the trust or a trustee.[2]

37. These provisions are of relevance to this claim because:

(1) At the time when the claimant says an order was made in his favour disposing of the 1999 proceedings, and having regard to the documents the claimant has provided, there must be real doubt about whether the court had jurisdiction to make an order on an application made by the claimant either under section 41 or section 51 of the Trustee Act 1925 in light of Mrs Potier's beneficial interest in the Shares. The claimant did not have a beneficial interest in the shares and was not a trustee which would rule out an order under section 41. Equally, a vesting order under section 51 would have been an order concerning an interest in the Shares. The unusual complexity that is

[2] See for example: *London Capital & Finance plc v Global Security Trustees Ltd* [2019] EWHC 3339 (Ch) at [17]

referred to in Whitehead Monckton's letter to Mrs Potier after the hearing may have related to jurisdiction. The difficulty could have been surmounted by making Mrs Potier a party to the claim and making a vesting order in her favour in relation to the Four Companies.

(2) Disregarding that concern, the court was not obliged to make an order appointing the claimant as a trustee of the trusts in place of the dissolved companies. It is not a requirement that the court first appoints a new trustee in order to give it jurisdiction to make a vesting order. The court, as it seems to me, is more likely to choose a direct route, particularly in the case of a bare trust, simply by making a vesting order under section 51(1)(ii)(c). An order appointing the claimant as trustee would have served little purpose. Instead, the court could have made an order vesting the right to call for transfer of the Shares in Mrs Potier under section 51(3).

(3) The jurisdiction the court was asked to exercise in relation to the Two Companies could only have been section 41(1) combined with section 51(1)(i) of the Trustee Act 1925 and not section 51(1)(ii)(c) because the Two Companies had not been dissolved at that point. This difference would have needed to be reflected in the order, if one was made.

38. The jurisdiction under both section 41(1) and section 51(1) will be exercised in a way that is essentially pragmatic. The discretion is a very broad one. The court will make an order vesting shares held by a dissolved company in trust

in the person who is beneficially entitled to them. The existence of a trust prevents the asset from becoming bona vacantia but there is nothing in the section that indicates the court must strive to reinstate as closely as possible the terms of the trust, particularly where the asset is held on a bare trust that is subject to a bare sub-trust. It seems to me the court will usually in those circumstances wish to vest the asset in the person who is beneficially entitled to it.

39. The other issue of law concerns the claimant's case that by virtue of the defendant's knowledge of the trusts and the vesting order, and in the absence of any consideration for the Shares, the defendant held the Shares and the proceeds of sale upon constructive trusts. The claimant does not assert a proprietary claim in respect of the shares or their proceeds.

40. There are two categories of constructive trust. The first have been described as institutional constructive trusts and the second as remedial constructive trusts. Mr Pavlovich submitted that the boundaries between the two categories may sometimes be blurred. It is common ground, however, that if the claimant is unable to establish the constructive trusts he relies upon fall into the first category, the claimant's case would inevitably be statute barred.

41. Lord Sumption's judgment in *Williams v Central Bank of Nigeria* [2014] AC 1189 at [7]-[11] provides a convenient summary of the law. I have also been referred to the discussion in Lewin on Trusts 20th ed. at 8-10 to 8-19.

42. The distinction between the two categories of constructive trust can readily be seen from paragraph 9 of Lord Sumption's judgment where he distinguishes between the two categories of constructive trust in the following way:

> "The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed. Others, such as company directors, are by virtue of their status fiduciaries with very similar obligations. In its second meaning, the phrase "constructive trustee" refers to something else. It comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not. These can conveniently be called cases of ancillary liability. The intervention of equity in such cases does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets. It is purely

> remedial. The distinction between these two categories is not just a matter of the chronology of events leading to liability. It is fundamental. In the words of Millett LJ in Paragon Finance Plc v DB Thakerar & Co (a firm) [1999] 1 All ER 400, at 413, it is "the distinction between an institutional trust and a remedial formula – between a trust and a catch-phrase.""

43. This analysis chimes with the following passage from the judgment of Millett LJ in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 408-409 cited by Lord Sumption:

> "In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust … In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances by which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property."

44. Millett LJ goes on to say that the second class of case arises when the defendant is implicated in a fraud. It is clear, however, that receipt of trust property knowing that the transfer was a breach of trust suffices. It is here that knowledge becomes important.

45. The distinction between the two types of constructive trust, when looked at in the context of this claim, comes down to whether or not it can be said that the

defendant voluntarily assumed fiduciary responsibilities before receiving the shares. The defendant performs a public role as nominee for the Crown pursuant to statute. Under section 654 of the Companies Act 1985 (section 1012(1) of the Companies Act 2006 is in the same terms) the property of a company that is dissolved is deemed to be bona vacantia unless the property is held by the company on trust for another person. The Crown does not take any step or to assert a claim to make the property bona vacantia. It becomes bona vacantia automatically, unless it is subject to a trust.

46. It seems to me that there is nothing in section 654, or in the requirement for the Crown to receive property that is bona vacantia, that is apt to make the Crown, and the defendant as its nominee, a person which has voluntarily assumed fiduciary responsibilities. Section 654 does not require the Crown to do anything or place any obligations upon it to search out property that may be bona vacantia. Property is simply deemed to be bona vacantia as a matter of legal convenience. For institutional constructive trusts to arise in relation to property that prima facie is bona vacantia, it would be necessary to conclude that the Crown acts a fiduciary in every case in which the Treasury Solicitor receives property, such as shares held by a dissolved company. Indeed, it is not obvious why fiduciary obligations should be a consequence of the vesting of property that bear no indication of being held by the dissolved company in trust for someone. Mr Pavlovich was not able to point to any authority that would support the proposition that the Crown acts as a fiduciary and I can see no basis as a matter of policy that might suggest such a responsibility arises from the statute or the general law.

47. The claimant's case is based upon the defendant's knowledge of the trusts and/or the vesting order made in 1999. The extent to which the defendant (that is the Bona Vacantia division of the Treasury Solicitor) had such knowledge is in dispute. I observe, however, that according to the analysis of the law I have summarised, knowledge and/or unconscionability by themselves do not suffice to create what has been termed an institutional constructive trust. It is not the claimant's case that the defendant did not have knowledge of the trusts and/or the 1999 order but should have made reasonable enquiries about such matters, starting with its and the Treasury Solicitor Litigation division's files, either before claiming the shares or before selling them.

48. I would add that even disregarding the distinction between institutional constructive trusts and what has been said to be merely "a formula for equitable relief", the claimant would have to establish more than knowledge on the part of the defendant. The requisite knowledge must be "such knowledge as to make the recipient's conduct unconscionable and to give rise to equitable fraud".[3]

49. The only other legal issue that arises concerns laches. However, in light of the conclusions I have reached it is unnecessary to deal with it.

The Witnesses

50. The claimant did not call any witnesses other than himself. His evidence provides some background to the circumstances in which the declarations of trust were executed, the 1999 proceedings, the divorce proceedings and his

[3] Sir Terence Etherton in *Arthur v AG of Turks and Caicos Islands* [2012] UKPC 30 at [36].

discovery in 2015 that the Shares had been received by the defendant. He also explains why he says he has only limited records of the events prior to his departure for Australia. There are, however, substantial gaps in his evidence and at least in part, as I will explain, the claimant has attempted to stitch together facts and events in order to make a case that is an ill-fitting patchwork. During his cross-examination he was asked about the extent to which he could recall the relevant events and very fairly he said he could not recall all the detail but could clearly remember the main events. He was adamant, for example, that an order was made in 1999 vesting the Shares into his name.

51. The claimant is clearly an individual who has led an eventful life with periods of considerable financial success and periods of financial difficulty. In director disqualification proceedings in 1997 Rimer J made an order disqualifying the claimant from acting as a director for 15 years and recorded in his judgment that the claimant was "a dishonest and unscrupulous man, a liar, a cheat and a forger." My impression of the claimant was somewhat more benign. I concluded that there was a substratum of truth in much of his evidence. However, I am unable to accept that he has anything other than a limited recollection of the detail and his evidence of the relevant events is prompted by the documents he has produced. His evidence adds little or nothing to them and some of his explanations seeking to fill the gaps are simply implausible. The claimant has chosen to provide the court with an edited version of the truth that suited his case. It seems to me it suited him to leave aspects of his business affairs vague.

52. Examples of the claimant's unsatisfactory evidence include:

(1) His explanation that no steps were taken to vest the Shares in Mrs Potier after the 1989 order in their matrimonial proceedings because she received large amounts of money from him at a time when he was at the peak of his success and she did not need the money.

(2) The lack of explanation in his initial evidence in 1999 (the May and June affidavits) about his ex-wife's interest under the order made in 1989. He asserted that the shares were held in trust for him. Even in the letter to Lloyds Bank Registrars in July 1999 he referred to his ultimate ownership of the shares. He accepted that the letter was "economical". He said the affidavits were drafted without mentioning his ex-wife to avoid "unnecessary complication". Mrs Potier was unaware of the proceedings in 1999 until after they were issued. He claimed that she later agreed to the proceedings continuing. I cannot accept he pursued them as he claimed out of a sense of moral obligation to his ex-wife.

(3) He claimed that the court made an order in 1999 vesting the shares in him. I cannot accept that his recollection is accurate. The only document that refers to the hearing says simply that the application was successful in the face of opposition. The claimant accepts that he never saw the order made by the court and clearly he is unable to give evidence about its terms. As I have indicated, the court would have been faced with a claim that lacked merit and if an order was made it seems very unlikely it was an order that benefitted the claimant.

(4) I am unable to accept the assertion that the claimant did nothing about the order he claims was made in 1999 because the freezing orders prevented him from doing anything. His evidence on this point makes no sense at all. First, he was able to apply to vary the order. Secondly, he says that between 1999 and 2015 he was confident the vesting order remained in place, despite having never seen it or making enquiries about it, and so there was nothing he needed to do.

(5) The claimant said that the order made by DDJ Elliott in 2005 somehow overruled the terms of the 1989 consent order.

53. Whitehead Monckton have confirmed that their file was destroyed in 2007. Mr Andrew de la Rosa, who appeared as counsel for the claimant in 1999 said in an email dated 9 November 2020 that he could recall an order being made but could not recall what the outcome was other than that the claim was not dismissed. He indicated that he might be able to locate a draft of the order in old digital records but has not been able to produce a copy of the document.

54. The defendant produced two witnesses. Mr Daron Sykes is the senior lead of the Companies Team in the Bona Vacantia Division of the Government Legal Department. He said that no records from 1999 have been found and any papers would have been destroyed no later than 2010. He explains that the approach adopted by the defendant follows the approach adopted by Mr Benney in his letter sent in 1996. If a prima facie case that the asset is held in trust is made out the applicant will be advised to make an application under section 51 of the Trustee Act 1925 and that the Attorney General will then decide, with the help of advice from a different section of the Treasury

Solicitor's Office, whether the claim should be defended. He points out that the letter from Whitehead Monckton dated 30 November 1999 recording that the claim was opposed by the Treasury Solicitor is inconsistent with the normal approach to such claims because it would be the Attorney General (instructing the Treasury Solicitor) who would defend proceedings and not the Bona Vacantia division. He said when cross-examined that he had never come across an order with the Treasury Solicitor acting as nominee for the Crown with regard to Bona Vacantia as the defendant.

55. Mr Sykes was asked about what steps are taken where the Bona Vacantia Division receives an asset that does refer to a trust. He said investigations are made as far as they can. If they became aware of a possible trust the court would be asked to make a determination about its validity. If a vesting order was produced the shares or the proceeds would be handed over.

56. Mr Antony Nwanodi is a barrister who is employed as a senior lawyer by the Government Legal Department in its Companies and General Private law Litigation Team. He has had conduct of the claim on behalf of the defendant. His enquiries with the court revealed that no court file relating to the 1999 proceedings could be found. He also made enquiries about the existence of the litigation file relating to the 1999 proceedings. He established that the file entitled "the Trustee Act 1925 v Tanap Investments Limited and 4 others" was destroyed in 2011. He says that a vesting order application would not have been handled by the team within the Litigation Division that handled litigation for the Bona Vacantia Division.

57. I accept Mr Sykes' and Mr Nwanodi's evidence. They were both cross-examined but their evidence was not seriously challenged.

Conclusions

58. The principal events that are relied upon by the claimant took place many years ago. British Gas was floated in 1986 some 35 years ago. The 1999 claim was dealt with over 20 years ago and it was not until 2015 the claimant first asserted the claim he makes in these proceedings. None of the relevant files have survived and the court is asked to make findings of fact based upon the limited selection of documents that the claimant has located. During his stay in Australia he says his other files that were stored at his home in Brasted, Kent were taken without his consent and not returned to him. As I have already indicated I am unable to accept that the claimant has anything more than a limited recollection of the key events.

59. The defendant has put the claimant to proof of his case including whether the claimant had any ongoing interest in the Shares as a consequence of the matrimonial settlement in 1989. The only positive case put forward by the defendant is that the claim is statute barred or is barred by laches.

60. The court is required to consider whether the claimant has established his case on the balance of probabilities. In making findings of fact, the passage of time and the limited number of documents that have been produced are important factors along with the cautious view the court takes of the claimant's memory where it is unsupported by documents. I have concluded that:

(1) The six companies executed declarations of trust in respect of the parcels of shares they held in favour of the claimant.

(2) The shares were acquired by the companies using funds that came from the claimant's own resources.

(3) The 1989 order accurately records an agreement that the shares were held beneficially under the trusts for Mrs Potier and that under the trusts created in 1986 the claimant as the beneficiary held the shares under a sub-trust for Mrs Potier.

(4) The claimant has failed to establish that notice of the 1999 proceedings was given to the defendant (the Bona Vacantia division of the Treasury Solicitor) or that the Defendant was a party to the 1999 proceedings. It is much more likely that the claimant dealt with the Attorney General and that he opposed the claim (or at least put the claimant to proof in respect of such matters as use of his money to acquire the shares and whether he had a beneficial interest in them). The reference to the Treasury Solicitor in Whitehead Monckton's letter to Mrs Potier was a reference to the Treasury Solicitor instructed by the Attorney General.

(5) The evidence points to the court having made a determination of the 1999 claim but it is completely unclear about whether an order was sealed by the court or the terms of any such order. If an order was sealed, it is much more likely that it vested the Shares in Mrs Potier than in the claimant. Given the evidence that was before the court, the court would have wished to give effect to the acknowledgement

contained in the 1989 order. It is difficult to see why the court would on making a vesting order wish to make an order in favour of the claimant in light of the fact that the beneficial interest was held by Mrs Potier and it would make much more sense for the court to give effect to the sub-trust, particularly as it arose from matrimonial proceedings.

(6) In this connection it seems to me that if knowledge were to be relevant it would not suffice for the Treasury Solicitor as an entity to be on notice of the trusts and an order made in 1999. It would be necessary for the Bona Vacantia Division section of the Treasury Solicitor to be on notice and there is no, or at least insufficient, evidence to show that this occurred.

(7) It is not disputed that the claimant took no steps whatever to implement such an order. I do not accept his explanation for that failure namely that he was unable to take steps because of the freezing orders. The explanation is both wrong on the facts and implausible. Had he wished to take steps, to protect a beneficial interest in the Shares he could have done so. The most likely explanation for his failure to take steps is that he had no interest in the Shares.

(8) I do not accept that the acknowledgment contained in the 1989 order was ever undone and that the beneficial interest in the shares passed back to the claimant. The order made by DDJ Elliott in 2005 does not relate to the Shares in any way at all. If it were to alter the order made in 1989 it would have had to say so in express terms. Such a fundamental change to an earlier order could not be implicit.

(9) There is no evidence to show that the defendant was aware of the trusts or the 1999 order, if one was made, on the dates it received the Shares or on the dates when it sold them.

(10) The claimant has not provided the court with sufficient evidence that he brings this claim with Mrs Potier's authority and/or for her benefit or their joint benefit.

61. In light of these findings of fact the claim fails on the facts.

62. Even if the claimant were to establish that (a) an order was made in his favour in 1999 vesting in him a right to the Shares and (b) the defendant had notice of the trusts and the 1999 order, the claim would fail because institutional constructive trusts of the Shares in the hands of the defendant would not have come into being. It follows that the claim would be time barred.

63. I will make an order dismissing the claim.