

Kamlesh Mansukhal Damji Pattni

Appellant

v.

(1) Nasir Ibrahim Ali

(2) Dinky International SA

Respondents

FROM

**THE HIGH COURT OF JUSTICE
OF THE ISLE OF MAN STAFF OF GOVERNMENT DIVISION**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 20th November 2006

Present at the hearing:-

Lord Bingham of Cornhill
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell
Lord Mance

[Delivered by Lord Mance]

1. This appeal is brought by special leave against the judgment dated 19th February 2004 of the Staff of Government Division (consisting of Mr G. Tattersall QC and Mr D. Allen QC) of the High Court of Justice of the Isle of Man, dismissing an appeal against the judgment dated 14th November 2003 of His Honour the Deemster Kerruish. Their Lordships will refer to the appellant, Kamlesh Mansukhal Pattni, as Mr Pattni and the respondents, Nasir Ibrahim Ali and Dinky International SA, as, respectively, Mr Ali and Dinky.

2. The events giving rise to these proceedings go back to early 1992. They concern an agreement alleged to have been made, in a document dated 10th April 1992, for the sale and purchase of shares in World Duty Free Company Limited (“World Duty”). World Duty is an Isle of Man company, now in receivership, which traded under the name Kenya Duty Free Complex. Under an agreement dated 27th April 1989 and amended 11th May 1990 made with the Republic of Kenya, World Duty had the exclusive right to operate duty free complexes at Jomo Kenyatta International Airport, Nairobi, and Moi International Airport, Mombasa. Mr Ali, a Dubai-based business-man with Kenyan interests, owned one of World Duty’s shares and was one of its three directors. Dinky (a Panamanian corporation, the shares in which were owned by Mr Ali and his wife) owned the remaining 99,999 shares. Mr Pattni, a Kenyan businessman, maintains that by the alleged sale agreement Mr Ali and Dinky (through Mr Ali signing as its director) agreed to sell to him their shares in World Duty and that he paid the stipulated price, but that the shares were never transferred into or registered in his name in accordance with the alleged agreement.

3. The alleged sale agreement was expressed to be subject to Kenyan law, and to contain a submission to the Kenyan jurisdiction by its parties. The issue whether it was genuine or a forgery gave rise in 1998 to Kenyan proceedings between Mr Pattni as plaintiff and Mr Ali, Dinky and World Duty as defendants in the High Court of Kenya at Nairobi Milmani Commercial Courts. In circumstances to which their Lordships will come, these culminated in a judgment given by Mr Justice Mbaluto on 25th September 2001, which in turn led to an order in a decree issued by the Court’s Deputy Registrar on 27th September 2001, by paragraph 2 of which it was, *inter alia*, adjudged that Mr Ali and Dinky “do transfer all the 100% shares in the 3rd defendant [World Duty] to the plaintiff as per the said sale and purchase agreement

.....”. The terms and effect of the judgment and decree are central to the present appeal, and their Lordships will set them out more fully in due course.

4. The current proceedings were begun on 14th September 2001 by the issue by Mr Ali and Dinky of two petitions (later consolidated) “in the matter of” World Duty in the Chancery Division of the High Court of Justice of the Isle of Man, claiming *inter alia* an order declaring them to be the beneficial owners of the share capital in World Duty, and seeking a direction as to the notice to be given of the petitions. Notice was evidently given to Mr Pattni, who is the sole effective respondent to the proceedings and the appellant in the present appeal. Mr Pattni in response to the petitions relied on the Kenyan judgment and decree dated 25th and 27th September 2001.

5. An order was thus made on 14th August 2003 in Mr Ali's and Dinky's petitions for the hearing on 16th and 17th October 2003 of a preliminary point whether the Kenyan court's judgment "relating to the issued shares in World Duty can be enforced in the Isle of Man being a judgment in rem". By its latter phrase the order begged an issue. The skeletons prepared for the preliminary hearing showed that Mr Ali and Dinky were relying on the lack of any formal steps by Mr Pattni to establish his alleged case in the Isle of Man. Mr Pattni therefore issued his own petition dated 14th October 2003 in the Chancery Division of the Isle of Man seeking, in summary, (a) rectification of World Duty's register of members kept in the Isle of Man by the insertion of his name in replacement of those of Mr Ali and Dinky as shareholders in World Duty (an application evidently intended to be pursued in accordance with principles and procedure similar to those discussed in *Buckley on the Companies Acts* paragraphs 359.16-18A and in *Re Hoicrest Ltd., Keene v. Martin* [2000] 1 BCLC 194) and/or (b) declarations that Mr Ali and Dinky submitted to the Kenyan proceedings, that they are estopped from making assertions as to their contractual position contrary to the Kenyan court's findings and that Mr Pattni is the legal and beneficial owner of the shares in World Duty.

6. At the commencement of the hearing before Deemster Kerruish on 16th October 2003 it was agreed that (in lieu of the previous single question) five questions fell to be determined as preliminary points. In the event, only the first two arise presently for consideration. They are, as formulated before Deemster Kerruish:

(a) Is the Judgment a judgment in rem or in personam?

(b) Did the Kenyan court have jurisdiction to make the Judgment?

Both the courts below have held in answer to question (a) that the judgment was in rem and in answer to question (b) that the Kenyan court had no jurisdiction to make it. It is common ground that the answer given to question (b) follows if the answer to question (a) is correct. It is not however common ground, at least before their Lordships, that an affirmative answer to question (b) necessarily follows if the judgment was a judgment in personam.

7. To understand the nature of the Kenyan judgment and decree, it is necessary to examine their terms and background more closely. Mr Pattni's case in the Kenyan proceedings was that there had been first a memorandum of understanding made 27th March 1992 between Mr Ali (referred to as the "First Party") and himself (referred to as the "Second Party") and then the sale and purchase agreement dated 10th April 1992

signed by Mr Ali (referred to as “Nasir”), Dinky and himself (referred to as the “Purchaser”). The alleged memorandum of understanding read as follows:

“IT IS HEREBY AGREED as follows:-

- 1) That the First Party agrees to sell to the Second Party 100,000 shares (100%) of World Duty Free Company Limited for a price of US \$13,750,000 (Thirteen Million Seven Hundred and Fifty Thousand United States Dollars).
 - 2) As a token of the Second Party’s commitment of fulfilling his obligation, the Second Party has today paid Kshs. 90,000,000 (Ninety Million Kenya Shillings) equivalent to US \$3,000,000 (Three Million US Dollars) receipt of which the First party hereby acknowledges.
 - 3) Furthermore both parties have agreed to formalise a Sale/Purchase Agreement of the shares of World Duty Free Company Limited to be signed by both parties upon the First Party’s arrival in Nairobi, Kenya in early April, 1992.
 - 4) The First Party shall sign the Sale/Purchase Agreement on his own behalf and shall cause the agreement to be signed by DINKY INTERNATIONAL SA of WD – 3, Roundabout 3, P.O. Box 16892, United Arab Emirates as shareholder in World Duty Free Company Limited.
 - 5) The First Party agrees to transfer his shares and will make Dinky International SA to transfer its shares to the Second Party within a period of twelve months from the date of signing the Sale/Purchase agreement.
 - 6) It is also agreed between both parties that the exchange rate applicable would be Ksh. 30/= (Thirty Kenya Shillings) to a US Dollar.
 - 7) The Second Party agrees that the First Party will remain as the Chairman and CEO of World Duty Free Company Limited up to 10.01.1994 when the Second Party will appoint his own directors and run the operations of World Duty Free Company Limited.”
8. The alleged sale and purchase agreement read:

“WHEREAS

- (A) Nasir and Dinky as existing shareholders desire to sell and the Purchaser desires to purchase 100% of all issued and outstanding shares owned by Nasir and Dinky in the Company known as WORLD DUTY FREE COMPANY LIMITED a company incorporated in the Isle of Man with its registered office at Third Floor, Exchange House, 54-58 Athol Street, Douglas, Isle of Man and whose operational Head Office address is at P.O. Box 8222, Dubai, United Arab Emirates (hereinafter referred to as the “Company”), in accordance with the terms set out in this Agreement(the “Sale Shares”)
- (B) The parties desire to provide for certain procedures concerning the said sale and purchase of the Sale Shares.
- (C) The Company has been granted the exclusive right to operate duty free complexes in Kenya, trading as Kenya Duty Free Complex under the terms of an agreement dated 27th April, 1989 by the Republic of Kenya for its International airports in Nairobi and Mombasa as amended on 11th May, 1990.

NOW THIS AGREEMENT WITNESSETH as follows: -

- 1) That Nasir and Dinky agree to sell and the Purchaser agrees to purchase the Sale Shares at a total price of US \$13,750,000 (Thirteen Million Seven Hundred and Fifty Thousand United States Dollars).
- 2) The Purchaser has paid to Nasir and Dinky through Trade Bank Ltd a down payment amounting to US \$5,125,000 (Five Million One Hundred and Twenty Five Thousand United States Dollars) equivalent to Kshs 153,750,000 (One Hundred and Fifty Three Million Seven Hundred and Fifty Thousand Kenya Shillings) calculated at the agreed exchange rate of Kshs 30/= for each United States Dollar, the receipt of which is hereby acknowledged by Nasir and Dinky.
.....
- 3) That the balance of the said purchase price shall be paid by instalments to Nasir or to such other party as he may appoint provided that the entire balance is paid in full on or before 10th April, 1993. The receipt by the said Nasir of the said instalment

payments shall be good and valid receipt of the said payments as between Dinky and the Purchaser.

- 4) That the exchange rate between Kenyan Shillings and United states Dollars for the purposes of this Agreement is fixed for the duration of the Agreement at Kshs 30/= for each United States Dollar.
- 5) That the said Nasir and Dinky shall transfer all the Sales Shares totalling 100,000 shares in the Company free of all liens, encumbrances or third party interests to the Purchaser on or before 31st December,1993 and shall cause the Purchaser to be registered as the sole shareholder in the Company.
- 6) That Nasir shall remain as perform (sic) the functions of Chairman of the present Board of Directors of the Company until 10th January 1994 on which date he shall resign together with the entire Board of Directors and new Directors appointed in accordance with the instructions of the Purchaser and who shall have sole and exclusive management of all businesses owned and/or operated by the Company.
- 7) The existing Board Directors of the Company shall provide such financial and other information as the Purchaser may request for the period 30th April 1993 to 10th January, 1994 and shall at all times supply the Purchaser with full information relating to the businesses of the Company.
- 8) Nasir, Dinky and the existing Board of Directors shall be liable for and indemnify the Purchaser against all losses (including economic and consequential losses), costs and expenses incurred by the Purchaser as a result of any breach of the terms of this Agreement by all or any of them.
- 9) As from 31st December, 1993 the purchaser shall be entitled to receive all dividends paid or payable by the Company in respect of the Sale Shares.
- 10) This Agreement shall all in respect (sic) be governed by and be construed and interpreted and take effect in accordance with the laws of Kenya and the parties hereto agree to submit to the non-exclusive jurisdiction of the Courts of Kenya.
- 11) The failure on the part of any of the Parties hereto to exercise or enforce any right conferred upon them by this Agreement shall

not be deemed to be a waiver of any such right or operate so as to bar the exercise or enforcement thereof at any time or times thereafter.

- 12) The Purchaser shall pay all legal fees and expenses incurred in connection with the preparation of this Agreement.”

9. In the Kenyan proceedings, Mr Pattni maintained that he had duly paid the balance of the purchase price by 4th May 1992, but that Mr Ali and Dinky had failed to transfer to him their shares as agreed. He also maintained that they had at the time of the agreement assured him that World Duty’s assets included certain warehouse premises, but that these had been “fraudulently” transferred by Mr Ali into his own name on 29th January 1994. Mr Pattni in his plaint therefore claimed in summary: (a) a permanent injunction restraining Mr Ali and Dinky from disposing of the shares, (b) a permanent injunction restraining Mr Ali from interfering with World Duty’s peaceful occupation of the warehouses and from selling or otherwise dealing with the warehouses, and (c) an order appointing an interim receiver/manager to manage “all the day to day operations of [World Duty] including the Duty Free Complexes in [the two airports] and the warehouses in Nairobi till the final determination of this suit”, and further orders as follows:

“(d) An order directing the 1st and 2nd defendants to transfer all the 100% shares in the 3rd defendant to the plaintiff as per the said sale and purchase agreement, and possession of both the premises upon which the business is carried on in Nairobi and Mombasa and including the warehouses together with all the stock in trade and all moveable and fixed assets to the plaintiff.

(e) An order that accounts be furnished to the plaintiff by the defendants of all income, profits and losses so far received and/or incurred by the defendants in respect of the Duty Free Complexes in Jomo Kenyatta International Airport Nairobi, Moi International Airport Mombasa and all the warehouse [sic] owned by the defendants from thirty first of December, 1993 to date.

(f) An order that the Board of Management of the 3rd defendant do resign forthwith and the plaintiff be allowed to appoint his own Board of Management to run the affairs and operations of the 3rd defendant.

(g) An order directing that the 1st defendant do forthwith surrender the title documents for L.R. No 209/10882/15 and L.R. No 209/10882/16, Nairobi to the Plaintiff on behalf of 3rd Defendant and that it be further ordered that the said parcels of Land be registered in the name

of Kenya Duty Free Complex as their sole owner and that this court do direct the Commissioner of Lands to effect the necessary changes.

(h) An order that the defendants do pay to the plaintiff all outstanding dividends and or emoluments from the thirty first of December, 1993 to date.

(i) Costs of this suit.”

10. Mr Ali and Dinky appeared and initially defended the Kenyan proceedings, maintaining in their defence and counter-claim that the sale and purchase agreement relied on by Mr Pattni was a fraudulent creation as well as a forgery. But matters took an unusual turn. Mr Justice Mbaluto records events as follows in his judgment. In around July 1999, Mr Ali was deported from Kenya. His counsel applied for an indefinite adjournment of the case. This was opposed, but the Kenyan court was

“of the view that the circumstances of the matter demanded that the proceedings be temporarily halted to afford the defendants and their advocate time to take stock of the situation arising from the deportation. Accordingly, the application for adjournment was allowed and the matter adjourned to a date to be decided later”.

However, the advocate acting for Mr Ali and Dinky then made an application for leave to cease to act, the court was satisfied that this had been served on Mr Ali and Dinky and, in the absence of any opposition, the application was granted. Mr Pattni on 20th December 2000 then applied for and obtained leave to serve a hearing notice on Mr Ali and Dinky out of the jurisdiction. On service of this, Mr Justice Mbaluto records that Mr Ali

“took an extremely hostile posture towards not only the plaintiff and those he perceived to be responsible for his expulsion but also to the court and quite categorically stated that he would have nothing to do with the suit”.

11. Mr Justice Mbaluto said in his judgment that there were provisions in the rules of procedure in Kenya for facilitating the participation of a party/witness in proceedings without having to bring him to the country, but that “regrettably” Mr Ali “did not choose to take advantage of such provisions”. He said that, after a delay of two years which he considered more than adequate to allow Mr Ali and Dinky to decide how to move forward, the matter came on for hearing in July 2001, when Mr Pattni and

two other witnesses testified in support of Mr Pattni's case. In these circumstances Mr Justice Mbaluto made findings and reached conclusions as follows:

“Having regard to the course this matter took, it is not necessary to analyse in any detail the nature and quality of evidence tendered [by] the three witnesses. I will accordingly confine myself to the following observations:-

- a) No evidence whatsoever was tendered to substantiate the allegations made in support of the counter-claim and consequently it must fail.
- b) The evidence tendered by the plaintiff's 3 witnesses have established, on a balance of probabilities, that the plaintiff and the 1st and 2nd defendants entered into the agreements referred to in the plaint for the purchase by the plaintiff of 100 % of the shares owned by the 1st and 2nd defendants in the 3rd defendant at an agreed purchase price of \$13,750,000 and that the plaintiff performed his part of the agreement by paying the purchase price in full. I also find that the two warehouses claimed as part of the assets of the 3rd defendant were indeed the property of the 3rd defendant. Consequently their purported transfer to the 1st defendant subsequent to the payment of the full purchase price was a fraud by the 1st defendant upon the plaintiff.

On the basis of the above findings and conclusions I make the following orders:-

- a) The defendants counter claim be dismissed with costs.
- b) Judgment be entered in favour of the plaintiff against the defendants jointly and severally as prayed in paragraphs (d), (e), (g) and (h) of the Plaint.
- c) The defendants will jointly and severally bear the plaintiff's costs of this suit.”

12. The decree drawn up by the Deputy Registrar two days later followed closely the wording of paragraphs (d) to (h) of Mr Pattni's plaint. It read:

“IT IS ORDERED

1. THAT the defendants counter-claim be and is hereby dismissed with costs.
 2. THAT the 1st and 2nd defendants do transfer all the 100% shares in the 3rd defendant to the plaintiff as per the said sale and purchase agreement and possession of both the premises upon which the business is carried on in Nairobi and Mombasa and including the warehouse (sic) together with all the stock in trade and all moveable and fixed assets to the plaintiff.
 3. THAT an order be and is hereby made that the defendants do jointly and severally furnish accounts to the plaintiff of all incomes profits and losses so far received and/or incurred by the defendants in respect of the Duty Free Complex in Jomo Kenyatta International Airport Nairobi, Moi International Airport Mombasa and all the warehouses owned by the defendants from thirty first December, 1993 to date.
 4. THAT it is ordered that the Board of Management of the 3rd defendant do resign forthwith and the plaintiff be and is hereby allowed to appoint his own Board of Management to run the affairs and operations of the 3rd defendant.
 5. THAT an order be and is hereby made directing the 1st defendant to forthwith surrender the title documents for L.R. No 209/10882/15 and L.R. No 209/10882/16 Nairobi to the plaintiff on behalf of the 3rd defendant and that it is further ordered that the said parcels of Land be registered in the name of Kenya Duty Free Complex as their sole owner and that it is directed that the Commissioner of lands do effect the necessary changes.
 6. THAT it is ordered that the defendants do pay to the plaintiff all the outstanding divides [sic] and or emoluments from the thirty first of December, 1993 to date.
 7. THAT the defendants do jointly and severally pay the plaintiff the costs of this suit to be taxed and certified
13. Some points arise on the wording of the order in the decree drawn up by the Deputy Registrar. First, paragraph 4 granted relief modelled on paragraph (f) of the plaint, which does not appear among the listed paragraphs of the plaint under which Mr Justice Mbaluto recorded that he intended to grant relief. Second, the words "is hereby" were introduced in paragraphs 3, 4 and 5 of the order. But their effect must be viewed in context and in the light of the issues in the case and of the judge's

reasoning. Third, it is difficult to understand the basis of certain orders made apparently against World Duty, which, although a party to the Kenyan proceedings, was not a party to the sale agreement. The provision in the judgment and in paragraph 7 of the order making World Duty liable (on the face of it) jointly and severally for costs of issues fought out regarding its affairs between Mr Pattni and Mr Ali and Dinky appears particularly surprising.

14. The proposition advanced by Mr Haddon-Cave QC (who appeared for Mr Ali and Dinky before their Lordships, but not below) and accepted by both courts below is that the judgment and decree constitute or purport to constitute a judgment *in rem* incapable of recognition in the Isle of Man under a rule of private international law set out in *Dicey, Morris & Collins on Conflict of Law* (14th Ed.) as follows:

“Rule 40—(1) A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country.

(2) A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situate outside that country.”

15. Deemster Kerruish expressed his conclusion as follows:

“35. I find that the judgment is a judgment *in rem*. By paragraph 2 of the Order, made in proceedings to which the Company was party, the learned judge ordered that Mr Ali and Dinky International transfer “all the 100% shares” in the Company to Mr Pattni in accordance with the Agreement. Such part of the Order determines judicially the property, that is the legal, and beneficial ownership, in the shares in the Company to Mr Pattni. To put it another way, the Judgment vests the property in the shares to Mr Pattni. Whilst I accept that a further step requires to be taken to rectify the Register of Members, such part of the Order clearly purports to pass legal and beneficial ownership in the shares to Mr Pattni. This part of the Order is not as suggested a declaratory order, it purports to pass property in the shares to Mr Pattni.”

16. The Staff of Government Division put its conclusion as follows:

“30. We have no doubt that in his judgment Mbaluto J was not merely finding that a sale and purchase agreement had been made

between the parties, defining its terms and upholding that there was a breach, but that he was purporting to transfer at least the beneficial ownership in the shares in the Company to the Appellant. In such circumstances we reject Mr Mann's submission. We reach this conclusion because in our judgment what the judge ordered was only consistent with him having determined that the ownership of Mr Ali and Dinky's shares in the Company now vested in the Appellant and is inconsistent with Mr Mann's concession that further legal formalities in the Isle of Man would need to take place before ownership passed to the Appellant. It was on that basis that the judge directed a transfer of shares in the Company, ordered the production of profit and loss accounts, required the Company's Board of Management to resign and declared that the Appellant be allowed to appoint his own Board of Management to run the affairs and operations of the Company, and ordered the payment of all outstanding dividends and emoluments. Such matters went far beyond a declaration that the Appellant was entitled to performance of the terms of the sale and purchase agreement which the judge had found was made. It follows that we entirely agree with the learned Deemster's analysis of the position as set out in paragraphs 35 to 38 of his judgment."

Both paragraph 35 in Deemster Kerruish's and paragraph 30 in the Staff of Government Division's judgment appear to equate any order determining the property in an asset as between parties before the court with an order *in rem* incapable of recognition in the Isle of Man under rule 40 of *Dicey, Morris & Collins*.

17. The Staff of Government Division went on to reject any submission that the Kenyan judgment and order could be "severed" into different *in rem* and *in personam* parts, expressing the view (at paras 35-36) that "all material parts of the order were founded upon the premise that [Mr Pattni] was entitled, at the very least, to beneficial ownership in the shares of the Company".

18. Their Lordships note at the outset that rule 40(1) in *Dicey, Morris & Collins* is dealing with the circumstances and extent to which an English court will treat a judgment *in rem* given in a foreign state as capable of enforcement or recognition in England, that is, as capable of enforcement or recognition in England as a judgment *in rem*. It is not focusing on the potentially different question whether a foreign judgment purporting either to be given *in rem* or to determine the property in English property, but given nonetheless in proceedings between specific parties, may be capable of recognition in subsequent proceedings between

the same parties in England. Their Lordships revert to this point in paragraph 38 below.

19. Both Deemster Kerruish and the Staff of Government Division cited well-known texts considering the distinction between judgments *in personam* and *in rem*. In paragraph 11-002 in the text to rule 22, Dicey, Morris & Collins state that

“11-002. A claim *in personam* may be defined positively as a claim brought against a person to compel him to do a particular thing, e.g. the payment of a debt or of damages for a breach of contract or for tort, or the specific performance of a contract, or to compel him not to do something, e.g. when an injunction is sought.”

Mr Pattni submits that a judgment ordering a person to do a particular thing is likewise *in personam*. In the text to rule 40 Dicey, Morris & Collins state that:

“14.100. A judgment *in rem* is a judgment whereunder either (1) possession or property in a thing is adjudged to a person, or (2) the sale of a thing is decreed in satisfaction of a claim against the thing itself. The term is used also to describe (3) an adjudication as to status such as a decree of nullity or dissolution or marriage, and (4) a judgment ordering property to be sold by way of administration in bankruptcy or on death. The question whether a foreign judgment is *in personam* or *in rem* is sometimes a difficult one on which English judges have been divided in opinion. But unless the foreign judgment claims to operate *in rem*, it cannot be recognised in England as a judgment *in rem*.”

20. Dicey, Morris & Collins include as examples of cases which divided English judges: *Cammell v. Sewell* (1860) 5 H & N 728 and *Castrique v. Imrie* (1870) L.R. 7 H.L. 414. But, although its application in the light of evidence of foreign law may sometimes be difficult, the relevant principle distinguishing between judgments *in personam* and *in rem* in the sense of rule 40 appears clearly enough, particularly in the House of Lords in the latter case. The joint opinion of five of the six judges advising the House was given by Blackburn J (its force today undiminished by the fact that he and Bramwell B had both sat in the Exchequer Chamber in the case under appeal: cf (1860) 8 CB (NS) 405). Blackburn J described a decision *in rem* as one by a tribunal with “jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing” – in which latter case (he said), where the

subject matter is within the state where the court sits, then “Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer or other act, will be held valid in every other country where the question comes ... before any other foreign tribunal”, and “the adjudication is conclusive against the world” (pp.428-9). Blackburn J also pointed out that there might be a judgment *in rem* without or prior to any actual adjudication on the status of a thing, as e.g. in the case of a sale of perishable goods, the proceeds to abide the outcome of litigation. (As an example of an *in personam* judgment relating only to the property rights *inter se* of the parties before the court, Blackburn J gave a sale in execution under a *feri facias* - in which respect English law was subsequently altered by statute: cf now Courts Act 2003, schedule 7 para. 11.) All the members of this House concurred in Blackburn J’s analysis: cf per Lord Hatherley LC at p.442, Lord Chelmsford at p.448 and Lord Colonsay at p.448.

21. For present purposes, a judgment *in rem* in the sense of rule 40 is thus a judgment by a court where the relevant property is situate adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it). The distinction is shortly and accurately put in *Stroud’s Judicial Dictionary*, 7th ed (2006) at p 2029, cited (in an earlier edition) by Deemster Kerruish:

“A judgment *in personam* binds only the parties to the proceedings as distinguished from one *in rem* which fixes the status of the matter in litigation once for all, and concludes all persons”.

Jowitt’s Dictionary of English Law (2nd Ed.), p.1025-6 contains fuller definitions to the same effect:

“A judgment *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication. Thus the court having in certain cases a right to condemn goods, its judgment is conclusive against all the world that the goods so declared were liable to seizure. So a declaration of legitimacy is in effect a judgment *in rem*. A judgment of divorce pronounced by a foreign court is in certain cases recognised by English courts, and is then a judgment *in rem*.”

.... Judgments *in personam* are those which bind only those who are parties or privies to them; as in an ordinary action of contract or tort, where a judgment given against A cannot be binding on B unless he or someone under whom he claims was party to it”.

Cheshire and North’s Private International Law (13th Ed.) pp. 423-4, *Phipson on Evidence* (16th Ed.) para. 44-10 and *Spencer Bower, Turner and Handley on Res Judicata* (3rd Ed.) paras. 234-5 are to like effect. The last work suggests that “it would have been clearer if decisions *in rem* and *in personam* had been named decisions *inter omnes* and *inter partes*” (para. 234).

22. The authorities give guidance as to some of the factors which can assist to determine whether a judgment has *in rem* effect against the whole world – *inter omnes*. They include the nature and terms of the court’s jurisdiction to make a determination: cf *City of Wakefield v. Cooke* [1904] AC 31, where a statute gave to justices summary jurisdiction for the purpose of determining whether any street in the locality was a highway repairable by the inhabitants of the locality at large, provided that they were to determine “the matter of all objections” and included machinery for giving notice to all who might be affected, together with an opportunity to attend and be heard before the court. (Their Lordships note, however, that the House of Lords contemplated the possibility that a statute might be intended to lead to a judgment of an intermediate character, neither binding against the whole world nor limited in effect to parties and privies, but binding against anyone given notice and the opportunity of appearing: cf paragraph 24 below for the private international law effect of such a judgment.). A second point is that even a judgment which would otherwise be regarded as *in rem* will not have that effect if made simply by consent of the parties who are before the court: cf *Spencer Bower, Turner & Handley* (op. cit.) para. 235, where footnote 8 refers to *Jenkins v. Robertson* (1867) LR 1 Sc & Div 117.

23. In *Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 the Board touched on the concepts of *in personam* and *in rem* proceedings, but held that the bankruptcy order with which it was concerned fell into neither category. Its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established. In paragraph 13 of its opinion the Board referred to judgments *in rem* and *in personam* as “judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person”. However, their Lordships take the present opportunity to emphasise that in the former

case, in order for a judgment to have *in rem* effect in the sense of rule 40 in Dicey, Morris & Collins, the determination must be a determination regarding the status or disposition of property which is to be valid as against the whole world. The fact that a judicial determination determines or relates to the existence of property rights between parties does not in itself mean that it is *in rem*.

24. Their Lordships also note the existence of a more general principle. The actual transfer or disposition of property is, in principle, a matter for the legislature and courts of the jurisdiction where the property is situate (state A), and will be recognised accordingly by courts in any other state (state B): see *Dicey, Morris & Collins* rules 120-124. This was described by Blackburn J in *Castrique v. Imrie* at p.429 as a “more general principle” of which the rule relating to judgments in rem might “very well be said to be a branch”. It does not depend upon the transfer or disposition in and under the law of state A being intended or purporting to bind the whole world. It is enough that it was intended to bind a person in the position of the person who in state B seeks to challenge the transfer or disposition in state A. This principle was applied in *Cammell v. Sewell* 5 H & N 728 and more recently by Gross J in *Air Foyle Ltd. v. Center Capital Ltd.* [2003] 2 Ll R 753, 764. It follows from it, conversely, that in the unlikely event that the courts of state A were to purport actually to transfer or dispose of property in state B, the purported transfer or disposal should not be recognised as effective in courts outside state A.

25. An order purporting actually to transfer or dispose of property is, however, to be distinguished from a judgment determining the contractual rights of parties to property. Courts frequently adjudicate on the rights to property and otherwise of parties before them arising from contractual transactions relating to movables or intangibles situate in other states; in doing so, common law courts apply the governing law of the relevant contract and the *lex situs* of the relevant movable or intangible to the contractual and proprietary aspects of the transaction as appropriate in accordance with principles discussed in the text to rules 120 and 124 in Dicey, Morris & Collins.

26. Immovables fall into a different and special category in private international law: cf *British South Africa Company v. Companhia de Moçambique* [1893] AC 602, *Dicey, Morris & Collins* rule 122(3) and *Cheshire and North* p.424. Even so, it has long been accepted in England that an English court may, as between parties before it, give an *in personam* judgment to enforce contractual or equitable rights in respect of immovable property situate in a foreign country: see *Dicey, Morris & Collins* rule 122(3). The authorities go back to at least the first half of the eighteenth century: cf *Penn v. Lord Baltimore* (1750) 1 Ves. Sen 444,

454. In that case William Penn sought and obtained from the Lord Chancellor in the English courts a decree for specific performance of an agreement made with Lord Baltimore by way of articles settling controversies relating to the boundaries between Maryland and Pennsylvania. Such an order, the Lord Chancellor said referring to a previous order made with reference to land of Lord Anglesey in Ireland, could not be enforced *in rem*, but could be enforced “by process of contempt *in personam* and sequestration, which is the proper jurisdiction of this court”. (Within Europe the jurisdictional position relating to immovables is now affected by Council Regulation (EC) No 44/2001 article 22, the Brussels Convention, so far as still applicable, and the Lugano Convention.) *Dicey, Morris & Collins* in formulating rule 40(2) treat the principle in *Penn v. Baltimore* as a purely domestic principle which cannot justify recognition of a judgment by a foreign court exercising a similar jurisdiction over immovables, although in the text at paragraph 14-105 they add that rule 40(2) “rests on a very slender basis of precedent, and its exact scope is a matter of doubt” and that, although rule 40(2) is stated without exceptions, the position “to put it more precisely, [is that] none have yet been formulated”. Cheshire and North at p. 383 say that whether a foreign judgment based on the same principle as that adopted in *Penn v. Baltimore* will be granted extra-territorial effect is an “interesting question that has never arisen in England”, but are doubtful “whether in this particular context English judges would be imbued with any spirit of reciprocity” (cf also p.424).

27. Their Lordships are not however concerned with immovables, which represent as stated an exceptional case in private international law. For present purposes, it is the converse of the above propositions relating to movables or intangibles that is important. As presently advised, though the arguments did not address the point (or, it may be, need to under the terms of the two preliminary issues presently in issue), their Lordships would think it clear that, where a court in state A makes, as against persons who have submitted to its jurisdiction, an *in personam* judgment regarding contractual rights to either movables or intangible property (whether in the form of a simple chose in action or shares) situate in state B, the courts of state B can and should recognise the foreign court’s *in personam* determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B. The extent to which this was possible might be limited by the law of state B, as the situs or in the case of shares as the place of incorporation of the relevant company (in this case, as both). For example, if a person to whom a court in state A held that shares had been contractually agreed to be transferred was not eligible under the company’s constitution to be registered as their legal owner, there could

be no actual registration in state B - but no such suggestion appears in this case.

28. Their Lordships turn to the relevance and application of these principles to the present circumstances. Whatever else might be in doubt about the course of the Kenyan proceedings, it is clear that they involved contractual issues between parties to the proceedings who are also the parties to the Isle of Man proceedings - Mr Pattni on the one side and Mr Ali and Dinky on the other. Mr Haddon-Cave accepts that, if the order giving effect Mr Justice Mbaluto's judgment had been limited to a declaration that Mr Ali and Dinky were bound by and in breach of the sale agreement, and so obliged to take all necessary steps to transfer shares and otherwise perform thereunder, there would have been a judgment *in personam*. But he submits that the actual order made goes further, that it treats the shares as vested in Mr Pattni by the order and that, on this basis, it amounts to an order *in rem*, no part of which can be severed or treated as having *in personam* effect. In their Lordships' opinion, these submissions are formalistic and unrealistic, and also confuse a judgment *in rem* with a judgment *in personam* determining and aimed at enforcing rights to shares existing contractually between the parties before the Kenyan court.

29. While the Kenyan order may be regarded as irregular in its width in certain respects, their Lordships do not consider that Mr Justice Mbaluto can for a moment have thought that he was determining any issue as against the world at large or any third party in relation to the shares or affairs of World Duty. He had before him on the one side Mr Pattni and on the other side Mr Ali and Dinky. World Duty was also a party. The obvious aim and effect of his orders was to establish and give effect to their rights *inter se* with regard to such shares and affairs. If some third party emerged subsequent to the Kenyan judgment and decree, and claimed that Mr Pattni had, prior to 27th September 2001, agreed to on-sell the World Duty shares to him, nothing in the Kenya judgment and decree could, or could have been intended to, preclude the third party from showing this. Similarly, if some third party emerged and claimed that Mr Ali and Dinky had prior to March 1992 agreed to sell the World Duty shares to him and that Mr Pattni had known this when entering into the memorandum dated 27th March 1992 and sale agreement dated 10th April 1992, the Kenyan judgment and decree could not preclude such a third party from pursuing such a case. The Kenyan judgment and decree do not constitute or involve any form of adjudication or purported adjudication *in rem* relating to the shares in World Duty. Nor were the Kenyan judgment and order even purporting actually to transfer or deal with the shares, as opposed to determining the parties' rights and duties relating to them. (Contrast the position in relation to the registration of

the Kenyan warehouses - immovables within the Kenyan jurisdiction – ordered by the latter part of paragraph 5 of the order.)

30. The first part of paragraph 2 of the order is probably all that matters in the Isle of Man proceedings. It is, their Lordships consider, a classic order *in personam* for specific performance in terms reflecting and predicating the judge's findings of an agreement for sale and of its breach by Mr Ali and Dinky which are findings central to Mr Pattni's claim in the Isle of Man to rectify World Duty's register. In so far as paragraphs 3 and 4 were directed to Mr Ali, these too ordered that he perform what he had as a director contracted to do under paragraphs 7 and 6, respectively, of the sale agreement. In so far as paragraph 3 also directed Dinky to furnish accounts, it went, on its face, beyond any contractual obligation undertaken by Dinky under the sale agreement, but that does not mean that the order was *in rem*, merely that it appears to have been an *in personam* order which the Deputy Registrar was on the face of it, when drawing up the order, wrong to make. (It did not follow from the plaint or the judgment.)

31. If and so far as paragraphs 3 and 6 of the order ordered World Duty to furnish accounts and pay dividends, the order cannot have been based on any contractual obligation owed by World Duty, since World Duty was not, at least expressly, party to the sale agreement although it was made party to the Kenyan proceedings. Mr Haddon-Cave relies upon this as showing that the Kenyan court was treating Mr Pattni as already the shareholder and owner of World Duty. An alternative and perhaps more persuasive view is that, in so far as orders were (following in this respect the plaint) made against World Duty, World Duty's position and the basis for any liability on its part were not clearly analysed or thought through (cf paragraph 13 above). Whatever analysis may be adopted cannot alter the clear effect of paragraph 2, which is to order specific performance on an *in personam* basis of an obligation to transfer shares which remained unperformed at the time of the order.

32. Their Lordships also note that Mr Ali's duty to furnish accounts under paragraph 7 of the agreement (reflected in paragraph 3 of the order), Mr Pattni's right to receive dividends under paragraph 9 of the agreement (paragraph 6 of the order) and Mr Ali's duty to resign as a director under paragraph 6 of the agreement (paragraph 4 of the order) were all duties which, contrary to Mr Haddon-Cave's submission, fell to be performed at or as from past dates specified in the sale agreement which were independent of the date when the shares were or should have been transferred. It was thus not inappropriate in September 2001 to make orders for their performance concurrently with the order in paragraph 2 for specific performance.

33. As to paragraph 4, their Lordships have already observed that the Deputy Registrar may have erred in including the whole of this paragraph, but, assuming that any order for the resignation of any director was to be included, it should have been confined to Mr Ali. The other two directors (a Mr Chandra Mohanlal and a Mr Yousef Mohamed) could not properly be, and should not have been, ordered to resign in Kenyan proceedings to which they were not party. Again, however, the fact that they were not parties does not mean that all or any part of the order was or should be regarded as *in rem*. It is, as regards Mr Mohanal and Mr Mohamed, simply an irregular and probably inadvertent *in personam* order against two non-parties.

34. The second part of paragraph 2 and the first part of paragraph 5 of the order again involve orders *in personam* against Mr Ali, based on his assurance and conduct relating to the Kenyan warehouses. (In so far as the second part of paragraph 2 was, following the terms of the plaint, directed to Dinky as well as Mr Ali, its width may be questionable, in view of Dinky's apparent lack of any involvement, at least in relation to the warehouses, but again this is immaterial to the question whether the order was to be *in rem* or only *in personam*.) Their Lordships have already noted the second part of paragraph 5, ordering registration of the warehouses in World Duty's trading name and directing the Kenyan Commissioner of Lands to effect such registration. It is irrelevant (and there is no information about Kenyan real property law upon which to consider) whether such orders had *in rem* effect or whether it would still be open to some third party to the Kenyan proceedings to come forward even after the registration of warehouses in World Duty's name and assert some better title,.

35. The suggestion in Deemster Kerruish's judgment that the Kenyan judgment purported to pass legal title to the shares has no foundation. As he himself recognised, the transfer of legal title to the shares would depend upon alteration of the shareholder's identity in World Duty's register of members kept in the Isle of Man. The Kenyan judgment did not purport to make any such alteration, but merely to order Mr Ali and Dinky to effect a transfer. Again, there is an obvious difference between paragraphs 2 and 5 of the order. Deemster Kerruish and the Staff of Government Division were also incorrect to suggest that the Kenyan court was purporting to transfer beneficial ownership of the shares. On the judge's findings of a genuine agreement and its breach following payment of the full price in 1992, beneficial ownership of the shares must have long since passed. The judge was simply ordering that Mr Ali and Dinky give effect to his findings of an agreement and its breach by

specifically performing their consequential obligations to transfer their shares to Mr Pattni.

36. The courts below considered that the whole of the judge's order was founded upon the premise that the appellant was entitled to at least beneficial ownership in the shares. Their Lordships have already pointed out that, even this it had been so, that would not have made the orders to perform contractual obligations resulting from that premise orders *in rem*. But in reality the premise upon which the judge founded himself in making his orders was that of his own findings on the evidence that there was an agreement, that the price had been paid in full and that Mr Ali and Dinky had breached their resulting contractual obligations to perform their side of the agreement. The incidental conclusion follows, as a matter of law, that Mr Pattni had the beneficial ownership of the shares from (at very latest) the date of payment in full for the shares.

37. For these reasons, their Lordships conclude without hesitation that all the material parts of the Kenyan court's judgment and order were made *in personam*, and that the appeal on the first preliminary point should be allowed accordingly. Their Lordships make some additional observations. First, there is no reason why an order should be characterised as either wholly *in rem* or wholly *in personam*. It is in their Lordships' view inappropriate to speak in this context of "severance". The extent (if any) to which an order operates in part *in rem* and in part *in personam* is a matter of analysis, not severance.

38. Second, the argument before all the courts in this case has proceeded on the basis that, if the Kenyan order had or purported to have *in rem* effect, then it and the Kenyan proceedings would have to be ignored for all purposes. Their Lordships should not be taken to accept that proposition. The Kenyan proceedings were on any view proceedings between Mr Pattni and Mr Ali and Dinky, the parties to the Isle of Man proceedings. If (contrary to their Lordships' view) the resulting order had purported to have an *in rem* character, or had purported to dispose of or transfer the Isle of Man shares and so cannot to that extent be recognised in the Isle of Man, that appears to their Lordships very probably quite irrelevant for present purposes. The Isle of Man court is not being asked to recognise the Kenyan judgment and decree as having any such effect. What matters in the Isle of Man proceedings is that Mr Ali and Dinky were parties who submitted in the Kenyan proceedings and are, as such and subject to well-established exceptions, bound in the Isle of Man proceedings by the Kenyan court's determination of their contractual rights and duties relating to the shares and company. Whatever its nature, paragraph 2 of the order of the Kenyan court only makes sense on the basis of the judge's finding that there was an agreement for sale of the

World Duty shares of which Mr Ali and Dinky were in breach and which they remained liable to perform by transfer of the shares. Even if paragraph 2 did not (and their Lordships consider that it clearly does) involve precisely this conclusion, such a conclusion must have been a necessary step to paragraph 2, in which case principles of issue estoppel could then, very arguably and subject again to certain exceptions, preclude Mr Ali and Dinky from making any case in the Isle of Man to the contrary. (Their Lordships note in this connection that a judgment *in rem* may also have effect as an ordinary estoppel: cf *Phipson on Evidence* (16th Ed.) paras. 44-10 footnote 78 and 44-23 et seq.; and that a judgment on a matter which, if litigated, would operate *in rem* may still have force *in personam* if the processes of law are short-circuited and judgment is given by consent so that it cannot be recognised as having *in rem* effect: cf *Spencer Bower, Turner and Handley* (op. cit) para. 235.) It is, however, unnecessary to say more about this point on this appeal.

39. The second preliminary point is whether the Kenyan court had jurisdiction to make what their Lordships have held to be in all material respects an *in personam* judgment and order. The answer is straightforward. Mr Ali and Dinky submitted on the merits to the jurisdiction of the court in the Kenyan proceedings and are bound by the final and conclusive judgment and order which resulted, subject only to certain defences such as fraud, failure to comply with natural justice, public policy and inconsistency with any other prior judgment in the Isle of Man: cf the discussion in *Briggs & Rees on Civil Jurisdiction and Judgments* (4th Ed.) paragraphs 7.46 et seq. No suggestion was made in the courts below that, even if the Kenyan judgment and order were *in personam*, the Kenyan court for some reason lacked jurisdiction.

40. Before their Lordships Mr Haddon-Cave for the first time suggested an argument that Mr Ali's and Dinky's submission could be regarded as conditional upon Mr Ali being permitted or able to remain in Kenya and/or effectively to defend the Kenyan proceedings. Leaving aside any factual investigation which such an argument might require, the answer to it is in their Lordships' opinion that, once Mr Ali and Dinky submitted as they did to the Kenyan jurisdiction, they can in the Isle of Man seek to resist recognition of the Kenyan judgment and order on and only on the basis of such defences as those to which their Lordships have already adverted (fraud, failure to comply with natural justice, public policy, etc.). An argument that their submission should be regarded as having been conditional upon Mr Ali being permitted or able to defend the Kenyan proceedings either duplicates or seeks to expand the ambit of the available defences to recognition, and there is no support for it in principle or authority. Their Lordships therefore consider, in the light of their answer to the first preliminary point, that the answer to the second

preliminary point is that the Kenyan court had jurisdiction to make the judgment and order it did as between Mr Pattni on the one hand and Mr Ali and Dinky on the other hand.

41. Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that, in lieu of the answers given by the courts below, the preliminary points should be answered to the effect that: (a) the Kenyan judgment and decree dated respectively 25th and 27th September 2001 were in all material respects *in personam* and (b) the Kenyan court had jurisdiction to make this judgment and decree, and that the orders for costs made against the appellant by Deemster Kerruish on December 2003 and by the Staff of Government Division on 19th February 2004 should be set aside and the respondents ordered to pay the costs before their Lordships and in the courts below.