SHERIFF APPEAL COURT

[2026] SAC (Civ) 66
EDI-CA11-25

Sheriff Principal G Wade KC
Sheriff Principal C Dowdalls KC
Sheriff Principal N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

by

BIBBY FACTORS LIMITED

Pursuer and Respondent

against

BANK OF SCOTLAND PLC

Defender and Appellant

Pursuer and Respondent: Watt, advocate; Mitchells Roberton
Defender and Appellant: Reid, advocate; Pinsent Masons LLP

14 October 2026

[1] The appellant ("the Bank"), a clearing bank, provided facilities to a business, including a business bank account. The respondent ("Bibby") was not a customer of the Bank, but averred that it informed the Bank that the account held trust funds, and that Bibby was a beneficiary. The present action founded on the alleged creation of a fiduciary duty owed by the Bank to Bibby.

[2] Bibby's business included the provision of debt-factoring services, which involved providing funding facilities to customers who in turn assigned to Bibby the right to recover

outstanding debts. Bibby would then pursue those outstanding debts in its own name and retain payment of sums recovered. In the event that a debtor made payment of an assigned debt directly to the customer, the customer undertook to pay the sum to Bibby and not retain it. Bibby concluded such a contract on about 8 April 2022 with Lumos Telecom Limited ("Lumos"). The contract included provision that Lumos would inform debtors of the notice of assignation, and that debt repayment should be made direct to Bibby and not to Lumos. Lumos renounced its rights to the collection of those debts, including any entitlement to receive payment. If a debtor made payment to Lumos, those funds were to be held in trust by Lumos for Bibby. Lumos operated a bank account with the Bank.

[3] The arrangement proceeded. On averment, in about July 2024 Bibby became aware that Lumos had wrongfully arranged for direct payment to its own bank account by a debtor. It suspended factoring services. Following correspondence, the payment was remitted to Bibby, the bank account details was changed back, and the service resumed. On 31 October 2024 Bibby became aware that another debtor was due to pay assigned sums direct to Lumos. The payment date was scheduled to be 31 October 2024, to the account operated by Lumos with the Bank.

[4] As a matter of urgency, Bibby wrote a letter to the Bank. It informed the Bank of the debt factoring agreement with Lumos, of the trust thereby created for assigned sums, and of Lumos' account details. It informed the Bank that payment of a sum was about to be received by Lumos into its account, that the sum represented funds due to Bibby, and that Lumos was obliged to hold it in trust for Bibby. It warned the Bank that to

> "allow [Lumos] either to withdraw or pay out funds that relate to assigned debts otherwise than to us, you will be assisting [Lumos] in a breach of trust and, in circumstances where you have full knowledge of the trust, you will be liable to us for dishonest assistance".

It sought assurances about not making payment and threatened legal action if assurances were not forthcoming. The letter was received and receipt acknowledged by the Bank.

[5] On 21 November 2024 Lumos entered into administration. Following enquiries, Bibby discovered that the sum had been received into Lumos' account with the Bank, that the funds had been disbursed to Lumos almost immediately following receipt and prior to the administration, and Lumos' account with the Bank had been almost wholly emptied. Bibby raised the present action seeking reparation for loss suffered as a result of the breach of a fiduciary duty which the Bank owed to Bibby. The Bank challenged the relevancy of the claim. The action called for debate.

[6] Following debate, the sheriff noted there were two broad issues in dispute. The first was what duties, if any, the Bank owed to Bibby. The second was whether Bibby's averments were sufficient to instruct a case that the Bank was on notice of the trust. The sheriff found that in principle where the Bank was placed on enquiry about funds in an account being subject to a trust, it was obliged not to transfer funds in breach of that trust, notwithstanding a general duty to make payment according to the client's mandate. There was no requirement to establish dishonesty or benefit. He appointed the action to proof before answer.

[7] At appeal, Bibby moved to amend to add a single new plea-in-law, that the Bank, having received the sum sued for in the knowledge that the funds were transferred to it in breach of trust, was liable to make payment to Bibby. This was in addition to the existing plea which was based on breach of fiduciary duty. The motion and minute were tendered late, were both opposed, and the court continued consideration of the motion to be addressed within this decision.

Submissions for the appellant

[8] Counsel for the Bank submitted that the action should be dismissed. The giving of notice by Bibby did not create a fiduciary duty owed by the Bank. The authorities relied upon by the sheriff did not support that conclusion. The broad statement of duty in Grier: *Banking Law in Scotland* (2001) was not supported by authority and not well founded. A fiduciary duty was one of undivided loyalty and was inherently unlikely in a commercial context and in direct contrast to the absence of any fiduciary duty to a bank customer. *Thomson* v *Clydesdale Bank* (1893) 20R (HL) 59 did not assist the Bank, as it involved a bank receiving funds into an overdrawn account, and thereby directly benefiting, which was distinct from holding funds for a client. It involved restoring funds to a beneficiary, not the recognition of liability in damages to a third party.

[9] In any event, the matter was resolved by an authority not placed before the sheriff. *JP SPC4* v *Royal Bank of Scotland International Ltd* [2023] AC 461 was a Privy Council case which rejected the proposition that a duty of care would generally be owed by a bank to a party other than its customer. It disapproved a passage of authority which was markedly similar to the passage in Grier, above.

[10] Liability for a third party's breach of trust could arise under Scots law but was restricted to well-recognised situations of knowing receipt of trust funds or dishonest assistance in a breach, all as discussed in *Ted Jacob Engineering Group Inc* v *Robert Matthew, Johnson-Marshall and Partners* 2014 SC 579 (at paras [98] to [100]). The case on record went far beyond these principles and should be rejected. In relation to the doctrines of knowing receipt or dishonest assistance, neither the current nor the amended pleadings served to bring the case into their ambit. The claim was irrelevant and fell to be dismissed.

Submissions for the respondent

[11] Counsel for Bibby moved the minute of amendment, and for receipt of adjusted written submissions and adjusted answers. He submitted that a bank could owe various fiduciary duties, including to third parties where funds had been wrongly applied by the bank's customer, or where the customer had intromitted with them contrary to a duty as agent, trustee or other such capacity. Liability on the part of a bank would arise where there was knowledge of such wrongful intromission (*Thomson* v *Clydesdale Bank*, above). The sheriff correctly held that liability may arise, and that the case should proceed to proof.

[12] *JP SPC4* (above) had not been cited to the sheriff but was consistent with earlier authorities. The Privy Council were not considering funds held on trust, which were recognised as engaging duties. There were sufficient averments here to show that Lumos held funds on trust.

[13] In the event that beneficial receipt was necessary, that was satisfied where credit was received into the account, as a retail bank benefited from and had use of such a deposit. Other possibilities, such as where the account was overdrawn, or where the funds were transferred to another overdrawn account, did not apply here.

[14] It was not necessary to aver dishonesty. Knowledge was sufficient. Alternatively dishonesty might be proved by wilful blindness, a wilful or reckless failure to ask questions, commercially unacceptable conduct or the like. Here, the Bank had been placed on notice in time for these duties to arise.

Decision

[15] Two issues arose for consideration at appeal. These were whether the sheriff erred in holding that there were relevant averments that the Bank owed a fiduciary duty to Bibby

and had breached that duty, and separately whether the sheriff erred in holding Bibby had pled a relevant case in the absence of any averments about knowing receipt or dishonest assistance.

[16] Some preliminary issues need to be addressed. First, the law is far from settled. The legal concepts known as "knowing receipt" and "dishonest assistance" are principally drawn from English equity and there is legal and academic uncertainty regarding these concepts in both English equity and Scots law. These issues were discussed *obiter* in *Ted Jacob Engineering Group Inc* v *Robert Matthew, Johnston-Marshall and Partners and others* 2014 SC 579 at para [97] onwards. Academic writers have identified an unresolved dissonance between these two concepts originating from equitable principles in English law, and the restitutionary principles of Scots law. Lord Drummond Young acknowledged, but found unnecessary to resolve, the criticism of the English approach in *"The 'No Profit from Another's Fraud' Rule and the 'Knowing Receipt' Muddle"* article by Professor Whitty in (2013) 17(1) Edin LR 37, to which he referred. In this appeal neither party made submissions on this jurisprudential conflict, and the Bank's submission was made on the basis that these two concepts were authoritatively accepted as part of Scots law. We proceed on that basis.

[17] The second preliminary issue is that this was a decision following debate. The focus was therefore on the analysis identified and advanced by the parties in the pleadings, not whether the underlying facts might otherwise lend themselves to analysis in a way which would create a relevant claim. The requirement for clear pleading and fair notice is particularly exacting in a case such as this, where fine differences of analysis of fact or authority may be the difference between relevancy and failure. We have placed emphasis on what fair notice requires in this case.

[18] The third preliminary issue is that this appeal was rendered more complicated by Bibby moving, very shortly before the appeal hearing, a minute of amendment which sought to introduce an additional basis of claim not presented to the sheriff. We indicated that, due to the lateness of the motion and the need to avoid repetition of complex submission, we would consider *in cumulo* the merits of the appeal and of the proposed amendment, in addition to the wider interests of justice considerations in allowing late amendment.

[19] The relevant plea-in-law presented to the sheriff read:

> "The pursuer, having suffered loss from the defender's breach of fiduciary duties by it disbursing funds to a third party in breach of trust all as condescended upon, is entitled to reparation from the defender."

[20] The respondent's case was therefore not based on restitution, or any contractual duty or delictual duty of reasonable care, but on the imposition of a fiduciary duty to a third party. On appeal, the minute of amendment sought solely to add a further plea-in-law:

> "The defender having received the sum sued for in the knowledge the funds were transferred to it in breach of trust is liable to make payment thereof to the pursuer".

That new plea raised the concept of knowing receipt. We discuss this below.

The existence of a fiduciary duty

[21] Bibby's starting point was an unequivocal general statement of the law in Grier: *Banking Law in Scotland* (2001, at paragraphs 6-32 to 35) that:

> "Once a bank is aware that there is a trust, the bank has to recognise its fiduciary duty, and simultaneously to have in mind the interests of the trust, the beneficiaries, the bank's own interests and the trustee's interest…"

[22] We will consider this further below. At the outset, however, the nature of a fiduciary duty was recently considered in detail and at the highest level, albeit in the context of equity in English law, in *Hopcraft* v *Close Brothers* [2025] 3 WLR 423 (at paragraphs 82 to 110.) The

Supreme Court's discussion covered recognised examples of trust and agency and also that a fiduciary duty may arise outside such established relationships on an *ad hoc* basis. Central to the discussion, however, was the need for a voluntary act. This was variously described as the fiduciary undertaking, acting, taking on a role, exercising a power, or self-appointing. Even if the person had never applied their mind, and a fiduciary duty were imposed upon them by law, the duty was "founded on the acceptance by one party of a role…" (at paragraph 97). The court went on to underline that the key principle was that a fiduciary acts for and only for another. It was a duty of "single-minded loyalty to his principal" (at paragraph 90). It was a necessary element that: "There must be an assumption of responsibility by the fiduciary to act exclusively on behalf of the other in the conduct of the other's affairs." (at paragraph 100).

[23] While this might be implied by law, it still required that the court could "identify such an undertaking in the acts of the fiduciary" (at paragraph 100). It was typically inappropriate to imply fiduciary duties in the context of commercial relationships outside the well-known situations in which such duties arise (at paragraph 110).

[24] Accordingly the imposition of a fiduciary duty depends on some element of voluntary conduct. In the present case it was difficult to identify by what actions the Bank could be said to have undertaken or been fixed with a fiduciary duty towards a party who was not a customer, who conveyed no payment or other benefit to the Bank, whose identity and affairs were unknown except by assertion, and whose demands were both unsolicited and conflicted with the Bank's contractual duties to their own customer. The Bank did not expect, invite or benefit from any relationship with Bibby or its affairs. *Hopcraft* would indicate that a fiduciary duty was not created. If Bibby's case were to be established, it would need to be found in the authorities relied upon. These are now addressed.

The authorities at debate

[25] Apart from Grier, outlined above, which we consider below, Bibby relied on *Thomson* v *Clydesdale Ban*k (1893) 20R (HL) 59. In *Thomson*, a stockbroker held instructions to sell shares and to distribute the proceeds to his client. He sold the shares. The proceeds were paid, in keeping with professional practice at the time, into his own account with the defender bank. The account was considerably overdrawn. The stockbroker subsequently absconded. The clients sought to recover the money from the bank and failed. It was held that it was not enough that the bank knew that the funds did not belong to the account holder, or that they might have acted negligently. The transaction was consistent with legitimate practice. It would need proof of knowledge that the account holder had no authority to pay the funds into his own account. The court did not discuss or consider fiduciary duty. The court also discussed the claim in terms of "following" or "tracing" the money, terms which do not normally reflect a claim for damages, and without discussing the underlying principle for doing so. The bank was convened as a beneficiary of the funds, not just as holder, having applied the sum towards paying off the stockbroker's indebtedness. As such, *Thomson* was of limited assistance in supporting Bibby's plea-in-law. The Bank was not a beneficiary (in the sense of paying off debt). *Thomson* turned on the absence of knowledge but did not assert that knowledge would create a fiduciary duty.

[26] Some reliance was placed on *Philipp* v *Barclays Bank* [2024] AC 346, a recent Supreme Court case concerning payment instructions given by a customer to a bank which thereafter carried out those instructions. The bank made payment to a fraudster on a genuine customer's instruction, the instruction having been induced by fraud. The customer claimed the bank owed a duty not to pay where it had reasonable grounds to suspect fraud. The

Supreme Court rejected that proposition as inconsistent with the primary duty of a bank to make payment to its customer's instructions. The only duty was to check that authorisation had been given. It was not one of investigation. It was a basic duty of a bank under its contract with a customer who had a current account in credit to make payments from the account in compliance with the customer's instructions. That duty was strict and therefore where a customer had authorised and instructed a bank to make a payment, the bank had to carry out the instruction. The relationship between bank and customer is governed by their contract. *Philipp* did not turn on fiduciary duty, or negligence. It reaffirmed that a bank was not in ordinary circumstances a trustee or fiduciary of money deposited, but simply a debtor (at paragraph 28). The court observed that where a bank was instructed to make a payment which would be a breach of trust, the bank had no right to refuse, unless this would amount to "dishonest assistance" (at paragraph 31).

[27] *Philipp* accordingly did not relate to fiduciary duties or other non-contractual duties. It dealt only with the content of the contract with the customer. The sheriff found support in *Philipp* for the propositions in *Thomson*. We do not find the same support.

[28] The respondent also relied on *Barclays Bank* v *Quistclose Investments Ltd* [1970] AC 567. *Quistclose* involved a claim in respect of funds deposited by the bank's customer which had advised the bank that the funds were for a specific purpose, namely the payment of a dividend. The bank, however, applied the funds to meeting the customer's existing liabilities to the bank. The claimant, the party which had provided the funds to meet the dividend, successfully recovered the funds. They did so because a trust had been created, and the bank had express notice of that trust. The appellant submitted that *Quistclose* was of no assistance, because in the present case there was no knowledge that the funds were trust funds. The respondent's submission at appeal did not found on *Quistclose*, save for the

proposition that it was not necessary to prove dishonest dealing. We consider *Quistclose* must be distinguished, as that account was specifically created for the purpose of depositing funds to pay the dividend. The bank had been specifically informed of that purpose by the customer. The court found that the bank had accepted the funds on notice that they were trust funds. The court opined that any other outcome would be giving a complete windfall to the bank. The distinction between *Quistclose* and the present action is that the bank was party to the deposit arrangement, and the knowledge came from the customer making the deposit, not an unknown third party. By contrast, the knowledge in the present case amounted to no more than unresolved assertion.

[29] We accordingly do not find assistance in the cases cited to the sheriff. That leaves Bibby's starting point from Grier: *Banking Law in Scotland* (2001, at paragraphs 6-32 to 35) mentioned above. A longer quotation of the general statement of the law in Grier states:

> "Once a bank is aware that there is a trust, the bank has to recognise its fiduciary duty, and simultaneously to have in mind the interests of the trust, the beneficiaries, the bank's own interests and the trustee's interest…a bank would be failing in its duty if it actively noticed that that (sic) the trustee was misusing his position by transferring trust funds to an overdrawn private account…"

[30] Despite the apparently unequivocal nature of that statement, we are unable to agree that it accurately states a case for a fiduciary duty. It is settled that a bank does not owe a fiduciary duty to its own customer (*Style Financial Services* v *Bank of Scotland* 1996 SLT 421 per Lord Justice-Clerk Ross at paragraph 424). A fiduciary is bound to prefer the interests of the other party, the principal, to its own.

[31] The foregoing quote leaves opaque to whom and on what basis the fiduciary duty might be owned. Grier relies upon *Foxton* v *Manchester and Liverpool District Banking Co* (1881) 44 LT 406, which we have located. *Foxton* was the decision of a single judge in the Chancery Division, and did not cite authority. It was nonetheless referred to in

Attorney-General v *De Winton* (1906) 2 Ch 106, also a decision of a single judge in the Chancery Division. Both of these cases were decided decades before the law recognised, and regulated, a duty of care for unintentional wrongs. In our view the foundation for Grier's statement of principle was of very limited authority or explanation. By contrast the decision of the Supreme Court in *Hopcraft* comprehensively and recently regulated what brings a fiduciary duty into being. We cannot regard *Foxton* or *De Winton* as accurate statements of the current law, even in England. It is difficult to see how a bank, even in knowingly providing a private banking facility for trust funds, could assume a fiduciary duty towards the beneficial owner of the funds when a necessary element of such a duty is that "There must be an assumption of responsibility by the fiduciary to act exclusively on behalf of the other in the conduct of the other's affairs." (*Hopcraft*, above). The obligation to act "exclusively" would be immediately in conflict, to the point of nullification, with the contractual duty to the trustee customer. The central requirement of a voluntary act would not be met in a case where liability was said to attach as a result of a demand by an unknown third party. The doctrine of knowing receipt, discussed below, would only apply if the Bank knew the funds were tainted by breach of duty. Merely setting up an account for a trustee would not by itself create any fiduciary duty.

[32] Bibby placed emphasis on the existence of a trust. Counsel submitted that trusts were particular, and the duties were higher than for ordinary claims based on negligence. That submission did not explain why a fiduciary duty would be imposed on a party not in a trust relationship and which had not attempted to create any relationship with, or assume any duty to, an unknown third party.

[33] For these reasons, we considered Bibby's reliance on the passage in Grier to be unsound. We have not been able to identify support for Bibby's case based on fiduciary duty.

[34] For completeness, no averment was made that the Bank became a trustee, constructive or otherwise, of the funds. The case on record related to the creation of a fiduciary duty owed by the Bank to a third party, the genesis of which was not further analysed. It was left to the reader to deduce which elements of the averments led to the alleged fiduciary duty. It is difficult to regard such a paucity of averment of law as giving fair notice of the basis of the claim.

Further authorities not before the sheriff

[35] On appeal two further authorities were referred to. The Bank made reference to *JP SPC4* v *Royal Bank of Scotland* [2023] AC 461 and Bibby to *Rowlandson and Others* v *National Westminster Bank Ltd* [1978] 1 WLR 798.

[36] Before considering these, the current position in Scots law was most recently discussed by Lord Drummond Young in *Ted Jacob Engineering Group Inc* v *Robert Matthew, Johnson-Marshall and Partners* 2014 SC 579, albeit in the context of an agency relationship which gave rise to a fiduciary duty. The agent required to put the principal's interests first and a breach of duty was clearly pled. In such circumstances the court accepted that Scots law recognised that a recipient who took the funds in the knowledge that they had been transferred to him in breach of fiduciary duty would be liable to pay those funds to the person truly entitled to them. He would also be a constructive trustee of those funds (at para [98]). Taking property in bad faith meant it was held on constructive trust. Lord Drummond Young approved in principle a remedy arising where funds had been

received by a fiduciary in the knowledge of breach of duty, although he acknowledged the unresolved tension between the English doctrine of knowing receipt and an alternative Scots law approach based on restitution. He approved the principle behind the English doctrine of dishonest assistance, again without resolving whether it or a restitutionary remedy would apply in Scots law, where a third party dishonestly assisted a trustee to commit a breach of trust.

[37] On that basis, counsel for the Bank accepted that knowing receipt and dishonest assistance were capable of providing a remedy under Scots law. In relation to the latter, it was sufficient for present purposes to note the absence of any averment of dishonesty. In relation to knowing receipt, counsel relied upon the present situation being a case of distribution, not receipt, which served to exclude the principle.

[38] He referred to *JP SPC4* v *Royal Bank of Scotland* [2023] AC 461 which was cited on appeal but not to the sheriff. A Privy Council case, it dealt with a similar situation to the present. A bank held funds beneficially owned by a third party. The funds were deposited by a company and paid out to that company. The claimants averred that a reasonable banker would have had grounds for considering there was a real possibility of fraud.

[39] While *JP SPC4* relied on a purported duty of care in negligence, and not on fiduciary duty, there was some discussion of the relationship between a bank and a third party beneficiary. The court rejected the existence of any duty of care in negligence to a person known to be the beneficial owner of funds held in an account. The court noted that such a case engaged two "problematic" elements, namely liability for pure economic loss, and liability for failure to prevent the actings of another. In these circumstances the existence of a duty of care, said to be a duty of reasonable enquiry before releasing funds, could not just depend on reasonable foreseeability. While the case dealt with a general duty of care, rather

than simply a fiduciary duty, the Privy Council disapproved the following statement from the *Encyclopedia of Banking Law*:

> "Where a paying bank is on notice that its customer is a fiduciary in respect of moneys in an account with it, the paying bank owes a duty of care to the beneficiary of such monies, as soon as the bank is put on such notice… Such duty includes making such inquiries as may, in the circumstances, be appropriate and practical if the bank has, or a reasonable banker would have, grounds for believing that the customer or its authorised signatories are misapplying, or acting fraudulently, in respect of, the trust moneys in the account."

[40] The court noted the statement was not supported by authority but was reflected in the ratio of *Baden* v *Societe Generale* [1993] 1 WLR 509, a case relating to dishonest assistance. The Privy Council disapproved *Baden* as "bad law" for reasons discussed at length. While we note that the reasons had roots in the history of economic loss, rather than fiduciary duty which *Baden* discussed separately, the dismissal of the case as bad law must at the very least render unreliable any statement, such as the foregoing, which reflects the ratio of *Baden*. The disapproved statement of law bears a close resemblance to the passage in Grier which we have not followed. It is a further reason not to apply Grier, which bore to rely on English authority.

[41] Counsel for Bibby lodged and placed considerable reliance on *Rowlandson and Others* v *National Westminster Bank Ltd* [1978] 1 WLR 798. A decision of a single deputy judge, it bore to affirm an unsupported passage in *Paget: Law of Banking* (8th Edition, 1972) that:

> "Where once the banker is fixed with the fiduciary nature of the account he has to bear in mind two somewhat conflicting influences. He has to consider the interests of the persons beneficially entitled, indirectly involving his own, and he has to recognise the right of his customer to draw cheques on the account and have them honoured."

[42] That passage bore echoes of both the *Encyclopedia of Banking* and Grier. It is of considerable age. Cross-checking with the current (16th) Edition of *Paget*, the passage

remains but with *Rowlandson* cited as an authority, a somewhat self-approving process. The disapproved case of *Baden* referred to *Rowlandson*, albeit only on the subject of knowledge. In light of the modern case law we are unable to accept, for these reasons, that *Rowlandson* is an authoritative statement of the law in either jurisdiction.

[43] Counsel for Bibby sought to distinguish *JP SPC4* on the basis that it did not involve a trust. We accept that *JP SPC4* does fall to be distinguished (although it did involve a trust) on the basis it dealt with a duty of care, and dishonest assistance, neither of which are relevant to the present case. It discussed fiduciary duty only in the context of assisting another to breach their fiduciary duty. We consider it significant however that the plaintiff in *JP SPC4*, an otherwise fully-argued case, did not advance any proposition that the bank itself had any direct fiduciary duty to the beneficiary. Tellingly, the court quoted (at paragraph 89) a passage from *Royal Brunei Airlines Sdn Bhd* v *Tan* [1995] 2 AC 378 that:

> "There may be cases where, in the light of the particular facts, a third party will owe a duty of care to the beneficiaries. As a general proposition, however, beneficiaries cannot reasonably expect that all the world dealing with their trustees should owe them a duty to take care lest the trustees are behaving dishonestly."

[44] If that is true for a duty of care in negligence, it must be more profoundly so in a case founded on fiduciary duty.

Decision on fiduciary duty case

[45] We do not find support in the authorities for a case based on fiduciary duty. While the case founded on the cited passage from Grier, we do not consider that to be a sound statement of principle, whether upon analysis or upon the basis that similar statements in England had been authoritatively disapproved. There was no support from *Hopcraft* for the proposition that a fiduciary duty could be forced upon a party in the absence of some

voluntary act. Bibby's case did not identify any point at which the Bank assumed such a duty, and none suggested itself. On ordinary principles the Bank did not owe a fiduciary duty to their own customer (*Style Financial Services* v *Bank of Scotland* 1996 SLT 421), and there was no principled basis for creating such a duty to an unknown third party, particularly on the basis of no more than a unilateral demand. A bank's customary relationship with its customer is of debtor and creditor. The Bank's sole involvement was to receive an unsolicited letter from a stranger. The letter purported to give directions which were in direct opposition to the Bank's own contractual duties to its customer. The Bank took no action to assume or create an express duty, or to create any relationship where a fiduciary duty would be implied.

[46] In these circumstances, there was no relevant case on the current unamended pleadings. We consider that, were it otherwise, there was force in the appellant's submission that the practical effect of Bibby's letter would be to achieve arrestment of funds in the Bank's hands but without any of the safeguards. An arrestment would involve detailed consideration of fact and principle, require judicial oversight and decision, and create provision for appeal if unsound. By contrast the receipt of a letter from a stranger would amount to no more than untested assertion. Bibby could not, in the words of *Royal Brunei Airlines*, above, assume that all the world owed them a duty to take care.

[47] Accordingly, unless Bibby introduced a relevant case in its proposed minute of amendment, the appeal must be allowed and the action dismissed. We turn to consider Bibby's motion for leave to amend the pleadings.

The proposed case of knowing receipt

[48] The Bank acknowledged, based on the discussion of the law in *Ted Jacobs Engineering* (above), that Scots law would recognise liability for a third party's breach of trust in cases of either dishonest assistance or knowing receipt. Neither was pled, but Bibby's minute of amendment sought to introduce a case of knowing receipt. The amendment was presented not as a damages claim but as a restitutionary claim.

[49] A preliminary pleading point arises. Bibby submitted that the amendment served to introduce a claim either of knowing receipt or of dishonest assistance. We do not accept that argument is made out. On a plain reading, the plea ("The defender having received the sum sued for in the knowledge the funds were transferred to it in breach of trust is liable to make payment thereof to the pursuer") is apt to cover the former but not the latter. We refer again to the principles of pleading set out above. It is not enough that such a claim might be identified upon analysis. It requires plain pleading. For a case based on dishonest assistance to be introduced, there would require to be a plain and overt statement of both dishonesty and assistance, amounting to fair notice, in the amended pleadings. That requirement is amplified where new lines of argument turn on fine analysis. Counsel submitted that any commercially unacceptable conduct, or other form of doubtful behaviour, would be enough. However, the minute does not, on a plain reading, introduce any claim based on either dishonesty or assistance, and these cannot be left to inference. The current averments do not make such a case. A plea-in-law must explain the core principles to both the court and the other parties. It must contain all of the constituent elements in law necessary to succeed. Here, the plea in law does not make a case of dishonest assistance notwithstanding the terms of the letter of 31 October 2024. It is a plea of knowing receipt.

[50] Knowing receipt is described in *Ted Jacobs Engineering* as arising where:

> "If funds have been transferred in breach of fiduciary duty, it is now established in Scots law that a recipient who takes the funds in the knowledge that they have been transferred to him in breach of fiduciary duty is not only liable to pay those funds to the person truly entitled to them but is also a constructive trustee of those funds" (per Lord Drummond Young at paragraph 98).

[51] Bibby presently avers that the letter of 31 October 2024 advised the Bank of the existence of the factoring agreement, the trust provisions, and that funds were about to be received into Lumos' account. The letter advised that the funds were actually due to Bibby under the trust and would be held by Lumos in trust for Bibby.

[52] Counsel for the Bank submitted that the intended new case was odd, because the averments related to receipt of the sum following notice, but the claim for restitution (as proposed) arose only on payment out of the fund. There was also no averment as to beneficial receipt, as opposed to merely holding the funds. There was a fundamental difference between funds held as an asset in overdraft, and funds held as a liability in a credit balance (*N Joachimson (A Firm)* v *Swiss Bank Corporation* [1921] 3 KB 110).

[53] Counsel for Bibby submitted, under reference to *Philipp* v *Barclays Bank plc* (above) and *Uzinterimpex JSC* v *Standard Bank plc* [2008] EWCA Civ 819, that there was no sound reason in principle to recognise a distinction between funds merely held and funds applied to the benefit to the bank. All funds held by the bank became the bank's property, and funds held were always a benefit for the bank's business. The case of *Thomson* supported such a case.

Decision on amendment

[54] We will refuse the amendment.

[55] In our view, the Bank's position is correct. For a case of knowing receipt to succeed, it would be necessary to plead that there was beneficial receipt of the funds. There are no such averments. Bibby's submission, that there was no basis in principle for such a distinction, does not assist. The task is to discern whether the law presently makes such a distinction.

[56] Bibby placed reliance *Thomson* v *Clydesdale Bank* (above). Each of the judgments in *Thomson* identified the nature of the payment. The account holder, who was acting in breach of trust, transferred the funds to the bank in part-discharge of an overdraft facility. The bank benefited from the money, in that it was paid towards reducing the debt. It was not merely holding the money. The money was being "misapplied", not merely held. As Lord Shand said:

> "the only rule that can be applied in practice, and which, as I think, rests on sound principle, is that liability for repayment of funds which can be traced or followed into the banker's hands, and which has been applied in payment of the agent's debt, shall arise only where it can be shewn that there was knowledge on the banker's part, not merely that the fund was received from the broker's principal, but knowledge also that the payment was a misapplication of the fund, made in violation of the agent's duty and obligation" (at page 63).

[57] The reference to application in payment of the agent's debt was central to that analysis. Even the passage in Grier, discussed above, referred to transfer to an "overdrawn" private account, not merely a transfer. In our view, the submission for the Bank is correct and beneficial ownership is required. It is not pled.

[58] We also do not accept Bibby's submission to the effect that all possession by a bank is beneficial. Counsel submitted that all funds held by any bank in any context became the bank's property, and funds held were always a benefit for the bank's business. In our view that submission identifies only benefit, but not beneficial interest. Were it otherwise, that submission would undermine the authorities which turn and rely upon beneficial interest.

It would render redundant those statements of principle. On Bibby's analysis, all possession would create a beneficial interest. We do not accept that proposition. Further, the submission did not recognise that funds held as property in a credit balance nonetheless remain a liability, not an asset, and the bank remains a debtor for a credit balance.

[59] Quite apart from issues of principle, the minute would not resolve issues with the pleadings. Even following amendment the averments would not support a plea of knowing receipt. The remedy now sought would be payment of the sums, which on averment have already been paid elsewhere. The existing averments continue to make out a case of loss and damage caused by breach. They do not advance a restitutionary claim. The pleadings do not support the new plea.

[60] There is a further question relating to knowledge which was not discussed at appeal. Parties proceeded on the basis that there were sufficient averments to prove knowledge of the breach of trust, based on receipt of the letter of 31 October 2024. However, in our view knowledge of breach of trust was not proved by mere assertion of breach of trust. That remained the case even if the letter was accompanied by full explanation and vouching. The assertion was untested. The situation was not the same as in *Quistclose* where the bank had knowledge as party to the arrangement for the funds to be deposited. Where an unexpected and unsolicited letter was sent by a stranger, it is not clear what the Bank were to do – did they require to investigate, or merely to refuse to allow movement of funds? The latter was not a solution in the face of a direct conflict with their contractual duty to make prompt payment to their customer's order (*Joachimson*, above). A claim based on restitutionary principles would normally require wrongful or unfair dealing of some kind. It is difficult on the simple facts of this claim to find wrongful conduct in the observance of a contractual

duty to a customer. Were this claim to proceed the question of knowledge would become a core question.

[61] We will refuse the respondent's motion to amend the pleadings in terms of the minute of amendment.

Disposal

[62] For the foregoing reasons we shall refuse the respondent's minute of amendment. We shall allow the appeal. We shall recall the sheriff's interlocutor of 12 January 2026 and thereafter sustain the appellant's first plea-in-law and dismiss the action. Parties indicated they wished to be heard on expenses. They should please attempt to agree a joint position, failing which within 21 days the clerk will arrange for a hearing by written submissions.