Neutral Citation Number: [2025] EWHC 1346 (Ch)

Case No: BL-2023-001547

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06/06/2025

Before:

MR JUSTICE RICHARD SMITH

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Between:

CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK

Claimant

and
(In respect of the items identified in rows 1 to 13 of the Schedule to the Claim Form (the "Schedule"))

PERSONS WITH AN IMMEDIATE RIGHT (OR WHO MIGHT CLAIM AN IMMEDIATE RIGHT) TO POSSESS GOODS CONTAINED IN SAFETY DEPOSIT BOXES HELD BY CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK AT ITS BRANCH AT 5 APPOLD STREET, LONDON EC2A 2DA AND DEPOSITED BY THE PERSONS IDENTIFIED IN THE PART 8 CLAIM

Defendants

and
(In respect of the items identified in row 14 of the Schedule)

Claim issued without naming a Defendant

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TOM DE VECCHI (instructed by **Watson Farley & Williams LLP**) for the **Claimant**

Hearing dates: 28 February and 27 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6 June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE RICHARD SMITH

Mr Justice Richard Smith:

A. INTRODUCTION

1. On 28 February 2025, I oversaw the disposal hearing of the Part 8 claim issued on 22 November 2023 by Crédit Agricole Corporate and Investment Bank, a bank organised and existing under the laws of France, with a branch in London (**Bank**).

2. The Bank seeks the Court's assistance in resolving a novel problem, namely its possession at its London branch of 14 safety deposit boxes (**SDBs**) which it (and relevant predecessor entities) appear to have held for between 44 and 122 years and, in relation to which, it is unable to trace, or communicate with, the owners or their successors in title.

3. The SDBs and their contents (**Items**) are presently being held at the Bank's cost. The Bank does not wish to continue to do so indefinitely but it does wish to proceed in a responsible manner and establish a route for their disposal, albeit one which protects the rights of the owners and/ or their successors in title.

4. The Bank seeks relief permitting the sale of the Items, for that purpose dividing them into two categories depending on the date of deposit, whether before or after 1 January 1978. The significance of that day is that it marks the commencement of the statutory regime for the sale of bailed goods pursuant to ss.12-13 of the Torts (Interference with Goods) Act 1977 (**1977 Act**).

5. Whether the modern statutory or prior common law regime applies gives rise to different legal considerations, both substantive and procedural, as discussed below.

B. BACKGROUND

6. The claim is supported by the witness statements of Deborah Francis, Philip Walker and Abolade Abiola. These explain that the Bank is the successor entity of two French banking groups created in the nineteenth century, namely Crédit Lyonnais and Banque de l'Indochine. From 1900 onwards, the banks and their successor entities allowed customers to deposit items within their safety deposit boxes.

7. In 1994, Crédit Lyonnais closed its UK retail branches, with no further deposits being made after this date. At the time, clients who had deposited Items were contacted to empty their boxes but a number of clients did not respond and/ or could not be reached. Separately, Banque de l'Indochine's successor entity, Crédit Agricole Indosuez, also held a number of items in safekeeping for which they could not locate the owners after attempting to contact them. In 2004, following a merger which created the Bank, the boxes were moved together and stored with a third party storage provider. In June 2016, the Bank took re-delivery of the boxes at its London premises, where they remain.

8. At that time, there were over 100 boxes for which the owners could not be traced or contacted, including the 14 SDBs the subject of these proceedings. From 2019, various steps were taken by the Bank's staff and solicitors to attempt to identify and locate the owners of their contents. Although the Bank had been able to establish that

the contents of the boxes had been deposited between 1900 and 1994, the contents themselves were unknown, the Bank not considering itself entitled to open them. With one or two exceptions, the Bank knew the names of the original depositors, but did not hold contact details, many of them likely having died some time earlier.

C. THE INTERIM APPLICATION BEFORE MORGAN J IN 2021

9. In 2020, the Bank took advice and decided to seek assistance from the Court, the first step being to seek the Court's permission to open the boxes and examine their contents. The Bank was concerned that this would constitute technical conversion even though the contents would not be physically damaged. In June 2021, following the Bank's application for interim relief, Morgan J gave permission for the Bank to open and inspect their contents pursuant to CPR Part 25.1(1)(c)(ii) and 25.1(1)(i) (*Re Credit Agricole Corporate and Investment Bank* [2021] 1 WLR 3834).

10. Morgan J also decided issues relating to the nomenclature of the defendants and service of that application and order. In determining these issues, the Court also considered the nature of these anticipated future proceedings and how they might be constituted and served. In summary, Morgan J decided in relation to the items deposited **after** 1 January 1978 that (i) the 1977 Act does not lay down any procedure for applications under s.13; (ii) there were no related regulations; and (iii) the Civil Procedure Rules (**CPR**) were silent as to how such applications should be dealt with. The Court having jurisdiction by s.13 to make an order authorising sale, it was therefore for the Court to evolve a suitable procedure to deal with such an application. That was consistent with *In re Robertson's application* [1969] 1 WLR 109 concerning a tenant's right to acquire the freehold of a house under s.27 of the Leasehold Reform Act 1967 where the requisite statutory notice could not be given because the landlord could not be found or identity ascertained.

11. Morgan J also considered in this context *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (at [19]), including how Lord Sumption had noted, and not disapproved of, the decisions in which the Court had made exceptions to the requirement that a defendant be named in a claim form in the absence of a specific practice direction to that end, Morgan J concluding (at [19]) that:-

> "Therefore, in connection with a future application to be made by the Bank pursuant to section 13 of the 1977 Act for an order of the court authorising a sale of relevant items, I hold that it is open to the Bank in principle to make such an application by a Part 8 claim form to which there is no defendant."

12. In relation to goods deposited **before** 1 January 1978, Morgan J decided that there was an important difference between (i) the Court granting a declaration and (ii) the court exercising a power vested in the Court to authorise a sale. If the Court were asked to make a declaration that the Bank has a common law power of sale, that declaration would not be binding on anyone in a case where there was no defendant to the proceedings. To obtain a binding declaration, there must therefore be a defendant to the proceedings. However, it was possible to join a party to proceedings by using appropriate words of description without using their name. There was no particular difficulty here selecting words of description for the persons who would be appropriate defendants to the Bank's proposed claim for a declaration.

13. Morgan J also considered the requirement in *Cameron* that a method of (alternative) service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant(s). The difficulty here was that the Bank could not locate or contact the individuals falling within the description. However, this case was very much atypical. Here, the proposed defendants had not shown any interest in the goods for many decades, leaving the Bank with a problem without any means of contact to resolve it. Moreover, the proposed proceedings were not a common form of adverse proceeding in which a defendant might be expected to oppose the relief sought. In many ways, the proceedings could be seen as of potential benefit to the defendants. It would also be very odd if an application under s.13 of the 1977 Act could fairly be disposed of with no defendant but procedurally inappropriate to deal with a claim for a declaration in respect of goods deposited before 1 January 1978 without the defendants being identified and made aware of the existence of the proceedings. Were the Court to take that course, it would be giving effect to procedure over substance. In light of these considerations, Morgan J concluded (at [42]) that:-

> "In view of what was said in *Cameron*, I have naturally hesitated before reaching my conclusion in this case but in the end I have decided that the course of action which is procedurally appropriate in this case is to permit the Bank to bring proceedings against defendants as described above; I will direct that the notice of the proceedings is to be posted in the room where the safety deposit boxes are stored and if anyone contacts the Bank in relation to the boxes, that person is to be served with the proceedings. I need not decide whether an order in those terms should be regarded as an order under CPR r.6.15 or r.6.16 but, whichever it is, I consider that it is an appropriate order to make."

14. In relation to the specific interim relief then being sought, Morgan J also decided (at [43]) that the Bank be permitted to inspect the goods contained within the boxes, including by opening any box, parcel, envelope or other container of which those goods consist and to record all information as may be necessary for the purpose of tracing or communicating with the defendants. The Bank was to post notice of the interim application and order in the Bank's premises and, if contacted by any person claiming an immediate right to possess any of the goods, to serve these on that person.

15. Having inspected the 100 or so boxes, the Bank and its solicitors then spent the next two years investigating further, including taking further steps to trace the individuals with a right to possess the contents. The 14 SDBs the subject of these proceedings were identified as containing goods of some material intrinsic value, albeit the Bank had no further success in tracing any person with a right to possess them. Details of the Items and their value were provided to the Court for the purpose of the hearing of this claim, albeit subject to the terms of an existing confidentiality order. It is not necessary for me to go into those matters here and, given the obvious risk of fraud, I do not do so.

D. THE PRESENT PROCEEDINGS

16. On 22 November 2023, the Bank commenced these proceedings by Part 8 claim form, seeking various forms of final relief in respect of the contents of the 14 SDBs. On 8

January 2024, Master Brightwell determined how the 13 defendants in relation to the pre-1978 SDB deposits were to be described in these proceedings such that they could be properly constituted. He did so essentially following the approach indicated by Morgan J. The claim in respect of the single post-1978 SDB deposit had been issued without identifying a defendant, again consistent with that approach. The Master also directed that the claim be listed before a judge for directions, including as to how the claim form was to be served and for other directions leading to the disposal of the claim. On 6 March 2024, Mark Anderson KC (sitting as a Deputy High Court Judge) gave such directions, expressly reserving any remaining issues as to the appropriate method for service of the claim form, or whether such service could be dispensed with, to the judge overseeing the disposal hearing.

17. Numerous steps have been taken by the Bank to attempt to bring these proceedings to the attention of potential defendants. On 30 July 2024, the Bank placed a notice in the "news" section of its website, referring to these proceedings and their subject matter and inviting potential defendants to contact the Bank using the details supplied. That notice remains on the website. On 1 August 2024, consistent with the approach identified in Morgan J's order, the Bank placed a notice in the room at its London premises in which the SDBs are stored. That notice also remains in place. On 31 July, 30 August and 16 October 2024, the Bank placed a notice in the "other notices" section of the London Gazette. On 2 and 30 August and 16 October 2024, the Bank placed a notice in the "legal notices" section of the Times. To date, the only response has been from a genealogist offering tracing services.

E. SERVICE ISSUES

18. As a preliminary matter, although the Bank quite properly took me through the issues concerning the proper constitution of these proceedings, including the related question of service as they relate to the Items deposited before 1978, I accept the Bank's submission that these matters have, in fact, already been decided in principle at least. Indeed, Morgan J did not merely address the immediate application before him but his conclusions (at [19] and [42], cited above) explicitly foreshadowed these substantive proceedings, as did his order dated 21 June 2021. I therefore need not re-visit those conclusions save to note that Morgan J's understandable concerns as to the limits of party joinder using appropriate words of description for the defendants concerned and, relatedly, the limits of the reach of CPR, Parts 6.15 and 6.16 indicated by *Cameron*, might have been tempered somewhat had the appeal in *Wolverhampton City Council and ors v London Gypsies and Travellers and ors* [2024] 2 WLR 45 been decided earlier. The Supreme Court in *Wolverhampton* did not question the decision in, and essential reasoning of, *Cameron* that proceedings should be brought (by way of service) to the notice of a person against whom damages are sought so that they have the opportunity to be heard. However, it did encounter difficulties with some of the analysis in *Cameron* to the extent it was suggested to apply 'newcomer injunctions', such orders operating inherently *contra mundum*. Although the declarations sought here in respect of the pre-1978 Items are not the equivalent of such injunctions, I accept that there are some similarities in the sense, for example, that the defendants can be identified by description but, on present information, the Bank cannot distinguish them from anyone else in the world.

19. Indeed, it is perhaps notable that the very object of the proceedings before me is the property rights of those who cannot be traced or communicated with, as against which, s.12(3) of the 1977 Act affords a bailee a statutory right of sale in the circumstances stipulated, including if "all reasonable steps" have been taken for the purpose of such tracing or communication, not dissimilarly from one of the procedural protections identified in *Wolverhampton* for 'newcomer injunctions' as the "obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it". As Morgan J noted, it is not open to this Court to change the substantive law but, given the limited practical difference between an order authorising such a sale under s.13 of the 1977 Act for the post-1978 Items and a declaration as to any common law power of sale as might subsist with respect to the pre-1978 Items, I agree with his statement (at [41]) that a declination of the latter on the basis of an inability to communicate would seem to "give effect to matters of procedure over matters of substance".

20. Finally, as noted, the Court's Order of 6 March 2024 held over any remaining issues as to the appropriate method of service for the Judge at the disposal hearing. The Bank therefore requested the Court to validate its approach to service of the claim form pursuant to CPR, Part 6.15(2) by approving one or more of the methods of service indicated above as was used to give notice of these proceedings. The Bank says that each is capable of standing alone as an appropriate method of service in this unusual case but, collectively, they clearly amount to reasonable steps aimed at drawing the claim to the attention of all those likely to be affected by it as *Wolverhampton* indicated was appropriate in a newcomer injunction context.

21. As to those methods of service, the Bank has posted notice of these proceedings at the Bank's Appold Street branch consistent with the approach indicated by Morgan J in his judgment and order dated 21 June 2021. This is said to be a not dissimilar approach from service of certain claims *in rem* or as in the (persons unknown) trespasser or protestor cases. The Bank has additionally advertised the proceedings on its website, in the Gazette and in the Times. I agree that each of these methods has the advantage that they are at least capable of reaching all the potential defendants and, in light of modern communication methods, with the potential for global reach. Indeed, a potential defendant seeking information as to the existence or whereabouts of items deposited with the Bank to which he or she may be entitled may well visit the internet as the first port of call but, if not active in that sense, there remains nevertheless a reasonable prospect that notice of the proceedings might reach him or her in any event. Service by advertisement is also said to be a common method of alternative service in the trespasser or protester cases. An analogy can also be drawn with insolvency proceedings for notification of creditors.

22. The Bank seeks in the alternative an order dispensing with service pursuant to CPR, Part 6.16 on the basis that this is a sufficiently exceptional case justifying such an order, that exceptionality arising from the age of the deposits, the absence of information as to the depositors' whereabouts and of contact from them and the inability to trace them, with many likely dead and no way of identifying those in whom any immediate right to possession may now vest instead. The Bank also stressed the apparent lack of interest of the owners of the goods for many decades who have left the Bank with a problem but no means by which they can be contacted to resolve it. Nor, it says, are the proceedings themselves the common form of

adverse proceedings in which a defendant can be expected to oppose the relief sought. If anything, the proceedings can be seen as potentially beneficial to the defendants. Moreover, default judgment is not being sought rather than declaratory relief, as to which, the Court will have to be persuaded that it is appropriate. Finally, the Bank relies in this context as well on the position for the pre-1978 Items being akin to that under CPR, Part 8.2A for the post-1978 Items, as Morgan J in effect identified (at [38(iv)]-[39]). An equivalent approach is appropriate.

23. Given the particular idiosyncrasies of this case, as articulated by the Bank with respect to both CPR, Part 6.15 and 6.16, I am satisfied that the correct approach is retrospectively to validate service by the alternative means that have, in fact, been deployed in this case, not limited to that already endorsed by Morgan J of posting notice at the Bank's premises, but to the different methods of advertisement as well. In my view, the Bank has taken all reasonable steps to bring the proceedings to the attention of the defendants. Considering separately the questions of whether to (i) permit these methods of alternative service and (ii) grant such permission retrospectively, I am satisfied that the Bank has established good reason for the Court to do both in this case.

F. SUBSTANTIVE ISSUES

24. Turning to the substantive claim, despite the extensive searches of the Bank's records described by Ms Francis, the evidence of the Bank was also that it has no record of the terms of deposit of the Items. As for the pre-1978 position, the earliest known date of deposit is 1903, the latest 1970. For these Items, there is no statutory basis upon which the Court could authorise a sale by the Bank, s.12(9) of the 1977 Act expressly providing that s.12 does not apply where goods were bailed before its commencement. As such, the Bank must fall back on the common law position, as to which, I agree that there is no equivalent general common law right to dispose of goods which a bailor has refused or is unable to collect (*Sachs v Miklos* [1948] 2 KB 23; *Palmer* on Bailment, 3rd ed., 2009 at [13-050]).

25. Despite this, the Bank said that, on the facts of this case, there are five alternative common law bases (of which, four are canvassed in *Palmer* at [13-031]-[13-045]), any one of which, would allow it to sell or otherwise dispose of the goods, namely:-

    (i) Repudiatory breach by the bailor;
    (ii) Bailment of indefinite duration (or other implied terms);
    (iii) Abandonment;
    (iv) Bailment of necessity; and
    (v) Deemed acceptance of notice of intention to dispose.

26. In the course of preparing this judgment, and reviewing the authorities relied upon, a number of which arose in the context of the defence to a claim in conversion, it occurred to me that some of these scenarios might not, in fact, envisage a positive power or right of sale as such rather than the loss of the ability of the bailor to object to such a sale. I asked the Bank if it could address me further on this (and a separate point on the post-1978 statutory position, discussed below). I heard further brief submissions on those points on 27 March 2025, the Bank accepting that it was perhaps more appropriate to say that bases (i) and (ii) above envisaged an immunity

or exoneration in respect of the proposed sale of the Items owned by the original bailors or, more likely by now, their successors.

27. In the course of further consideration of the evidence, it also occurred to me that one of the documentary Items in one of the SDBs might, in fact, shed some light on the terms of that deposit at least. On the basis of further enquiries undertaken by the Bank, it transpires that my instincts were correct, the relevant document recording an agreement for the letting of a safe in the following terms:-

> "By this agreement, the Credit Lyonnais (hereinafter called the Bank) agrees to let, and [withheld] (hereinafter called the Lessee), agrees to rent, subject to the Conditions endorsed hereon, the Bank's Safe No [withheld] and Class [withheld] at the above address for one year from the date hereof at the yearly rental of [withheld], payable in advance. The receipt of the first year's rent is hereby acknowledged by the Bank.
>
> The said agreement shall continue from year to year but either party shall have the right to terminate the same by giving one calendar month's notice in writing prior to the termination of any year of the tenancy.
>
> The Lessee hereby acknowledges receipt of the two keys of the above-mentioned Safe."

28. As for the "Conditions", these provided, amongst other things for:-

(i) The Lessee's access to the safe at any time during the week (Sundays and bank and public holidays excepted) between 10am and 3.30pm (noon on Saturdays);

(ii) A prohibition against the assignment or underletting of the safe (or any part thereof);

(iii) The Lessee's permission, on demand, for the Bank to inspect the contents of the safe to establish if the stipulated conditions for the use of the safe have been complied with;

(iv) Notwithstanding such inspection right, no responsibility attaching to the Bank as regards the nature, condition, quantity or value of the contents of the property placed in the safe by the Lessee and no liability for accidents and/ or cases of force majeure;

(v) The Lessee, at his own risk, having the ability to authorise in writing and unconditionally a deputy to have access to the safe, with any person so authorised and producing a key, deemed to have full authority to access the safe and remove or otherwise deal with the contents thereof;

(vi) The forfeiture at the option of the Bank of the Lessee's right to use the safe in the event of the Lessee's non-payment of rent when due or non-observance of any conditions of the agreement; and

(vii) In the event of the Lessee's failure to pay the rent or perform the relevant condition(s) after a lapse of more than one month after written notice requiring the same, the right for the Bank to break open the safe and retain and keep the contents in such other safe or place as it thinks fit at a half-yearly rent equal to the annual rent payable under the agreement or, at the Bank's option, to forward (by registered post or other reasonable means at the Lessee's risk) the contents to the last known address notified to the Bank.

29. I discuss this agreement below in the context of the different bases posited by the Bank as to its potential ability to sell the Items.

G. RELEVANT LEGAL PRINCIPLES

30. Before doing so, it is helpful to set out certain important principles of bailment. For that purpose, I draw on the summary of Sir Anthony Clarke MR in *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37. Although perhaps more widely discussed in a medico-legal or ethical context, and despite the focus there being on gratuitous bailment, I nevertheless consider the summary (at [48]) useful in this context, including the following:-

(i) A bailment arises when, albeit on a limited or temporary basis, the bailee acquires exclusive possession of the chattel or a right thereto;

(ii) A bailment can exist even though no consideration passes from the bailor to the bailee;

(iii) The obligation therefore arises because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods;

(iv) A gratuitous bailee assumes a duty to take reasonable care of the chattel. Although high, this standard may be a less exacting one than that which the common law requires of a bailee for reward but the line between the two is very fine, difficult to discern and impossible to define;

(v) Although eroded somewhat by principles developed later in relation to 'involuntary' bailment, the basic justification for casting duties upon such a 'gratuitous' bailee has always been that a person is not obliged to take possession of a chattel in relation to which another person has rights and that, if he chooses to do so, he assumes duties;

(vi) If a gratuitous bailee holds himself out to the bailor as able to deploy some special skill in relation to the chattel, his duty is to take such care of it as is reasonably to be expected of a person with such skill; and

(vii) It does not follow from the fact that the bailment is not contractual that the liability of the gratuitous bailee must lie in tort. Liability has been said to be *sui generis* and the measure of damages for breach of bailment by a gratuitous bailee may be more akin to that for breach of contract rather than in tort.

31. As for the principles of involuntary bailment alluded to in *Yearworth*, *Palmer* says (at [13-001]) that an involuntary bailee may be defined as "a person whose possession of a chattel, although known to him and the result of circumstances of which he is aware, occurs through events over which he has no proper control and to which he has given no effective prior consent." Many of the cases involving involuntary bailment concern the initial reception of goods taking place contrary to the bailee's wishes and without his consent, albeit *Palmer* posits (at [13-030]) the different situation of a bailee originally consenting to the possession of the goods being compelled by circumstances to retain possession longer than he desires.

32. In such cases, *Palmer* suggests (at [13-039]) that the period of the bailee's consent to possession may be measured by reference to the agreed or ascertainable span of the bailment itself. Upon the expiry of that term, the original bailee may be classed as an involuntary possessor, owing whatever obligations are appropriate to that person. Such cessation of obligations might seem more appropriate to gratuitous bailments than to professional bailments for reward, extensions to the period of bailment (and a continuing measure of care by the bailee) being more readily envisaged in the latter case. However, *Palmer* also canvasses that there may be no reason in principle why the character of the bailment for reward might not descend, in suitable circumstances, from a bailment for reward to a gratuitous bailment and from that to an involuntary bailment "as time passes and the bailee's patience becomes progressively thinner."

33. I also return to this in the context of some of the different bases posited by the Bank for the sale of the Items. In the meantime, it is helpful to note some more modern authority on the liability entailed by an involuntary bailee. *Da Rocha-Afodu and another v Mortgage Express Limited and another* [2014] EWCA Civ 454 concerned the not uncommon context of a mortgagee in possession also coming (involuntarily) into possession of chattels left by the repossessed borrower. The Court of Appeal noted in that case the "classic statement of the liability of an involuntary bailee" set out in *Elvin & Powell Ltd v Plummer Roddis Ltd* [1933] Solicitors Journal 48, namely that "[a]n involuntary bailee has an obligation to do what was right and reasonable", a statement of the law relied on by Mr David Kitchin QC (as he then was), sitting as a Deputy High Court Judge, in *Scotland v Solomon* [2002] EWHC 1886. Addressing the submissions in *Da Rocha-Afodu* that the pre-existing mortgage relationship meant that a more exacting duty would be imposed on the mortgagee/ bailee of the chattels, Arden LJ held that, in considering whether the involuntary bailee had done what was right and reasonable, the Court had to be alert to all the particular circumstances in the case. That reasoning was later applied by Mr Andrew Sutcliffe QC, sitting as a Judge of the High Court, in *Campbell v Redstone Mortgages Limited* [2014] EWHC 3081 (Ch), another mortgagee in possession/ chattel bailee case.

34. Despite its limited knowledge of the terms on which its predecessor entities provided safety deposit services to customers, the Bank accepts that it did so for reward, either for a fee under such an agreement or as a gratuitous element of the wider range of private client banking services provided. The Bank also accepts that it was originally a bailee of the Items held in the SDBs. It could perhaps be said that the relationship of the Bank and depositing customer was formerly at least one of, respectively, lessor and lessee (or licensor and licensee) of space within the Bank's premises for storage and safekeeping and that it did not give rise to a bailment. That argument might find some support in the terms of the letting agreement, on the basis of which, it might be

said that the customer enjoyed exclusive possession of the SDB (and its contents) rather than the Bank enjoying exclusive possession of the Items, an argument perhaps reinforced by the customer in that case having both keys to the SDB and the Bank only a limited right of inspection. I did not hear argument on this point. However, even if there were scope for such an argument in this case, it would not, ultimately, be decisive (for any of the 14 SDBs) since the Bank clearly did have exclusive possession of the Items at the latest when it moved them into third party storage and, in all probability, earlier than that.

35. Finally, in terms of the evidential position, as noted, the letting agreement for the single SDB with one of the Bank's predecessor entities is the only record of the terms upon which the customers deposited their Items with the Bank. There may have been other, different such agreements in respect of other SDBs but these are not before the Court. Moreover, if there were standard market terms or practices concerning such deposits over the long period during which the various deposits were made, there is no evidence as to what these might have been. More generally, there is very limited evidence as to the circumstances in which the Items were deposited and, as far as I can see, none as to why they have gone unclaimed for so long. Although this does not prevent the Court making factual findings, it will be circumspect as to what inferences can properly and safely be drawn (see *Leeson v McPherson* [2024] EWHC 2277 (Ch) at [177]; *DPP v Krasniqi and Krasniqi* [2025] EWHC 130 (KB) at [60(x)]). That said, the fact that there has apparently been no communication with any of the depositors for at least 30 years, is itself not without some significance here. Moreover, the letting agreement that has been found, concluded around the mid-point of the long period of deposits in this case, does provide some useful evidence, not only as to the terms of deposit for the relevant SDB, but also as to the type of terms which might be expected in agreements of that nature. As such, I have found it a useful cross-check for the conclusions I had already reached with respect to likely deposit terms before that agreement came to light.

H. PRE-1978 DEPOSITS

(a) Repudiatory breach

36. Turning to the different bases posited by the Bank with respect to the 13 pre-1978 deposits, I start with the suggestion that it may be possible to derive from a bailment transaction an express or implied term that the bailor will collect the goods by a certain date such that a breach of that undertaking may thereafter entitle the bailee to regard his custodial obligations as extinguished. I accept that this draws support from some of the authorities. In *Pedrick v Morning Star Motors* (unrep., 14 February 1979, CA), for example, the defendant vehicle repairer completed repairs to the car, asked the owner to collect it and, when he failed to do so, notified the owner approximately two months later that it would be removing the vehicle to a nearby public car park from which it was then stolen after about six months. The Court of Appeal held that the repairer was not liable to the owner of the car, the owner being in breach of the implied term of the repair contract to take away the vehicle when requested.

37. A not dissimilar outcome was reached in the Canadian case of *Davis v Henry Birks & Sons Ltd* (1983) 142 DLR (3d) 356 in which the majority of the Court of Appeal of British Columbia held that the customer could not recover from the jewellers for the

loss of her diamond brooch which had been left with them for almost 7 years after they had provided by letter the requested valuation but which disappeared in the meantime. The Court found that there was an implied obligation on the owner to retake possession of the brooch within a reasonable time (in that case, a month after notification of the appraisal), an obligation which she had broken.

38. Finally, in *Ridyard v Roberts and Roberts* (unrep., 16 May 1980, CA), the defendants had deposited two horses with the plaintiff farmer for a period of one month, later extended by agreement for a further month. At the end of this period, despite repeated requests to the defendants, the horses remained uncollected. After an additional two months, the plaintiff sold them and sued for the grazing costs over the period. The defendants denied liability and counterclaimed for conversion. Megaw LJ held that the plaintiff was entitled to sell the animals as bailee of necessity but he also found that:-

> "The plain and simple position is that the defendants by their conduct had broken the contract, whether it was a contract of agistment or a contract that was not a contract of agistment. They had broken it and they continued to be in breach of it and of their duty to remove the animals; and their breach of it was such that the plaintiff was plainly entitled to treat them as having lawfully repudiated the contract."

39. *Palmer* suggests (at [13-036]) that the resultant power of sale and the defendant's inability to object to it may be seen as one of the secondary rights or obligations arising from the defendant's breach of his primary duty to collect the ponies. Despite these authorities, I was not persuaded that the Bank's duties as bailee in this case can be said to have ceased by reason of its acceptance of a repudiatory breach. I come to that view for a number of reasons: first, as to the existence of such a term, one can more readily see how, in the case of a short term bailment for repair or valuation, it might be obvious that the owner has a duty to collect the goods, the bailment being incidental to the main object of the parties' agreement. In this case, unlike *Pedrick* and *Davis*, the very purpose of the safe deposit arrangements was the custodianship of the Items. Although the bailment in *Ridyard* was a key aspect of the parties' arrangement, that was expressly undertaken for a short duration only. In this case, the Bank was a dedicated provider of long term deposit facilities. In these circumstances, I consider less compelling the potential for a duty on the part of customers to collect their Items, let alone one of sufficient importance such as to give rise to possible repudiatory breach.

40. Second, in the absence of express agreement for collection of the Items (of which there is no evidence in this case), a term would have to be implied to that effect, specifying when such a duty might arise. It is unclear how this would be determined other than by reference to a reasonable period, an uncertain concept in the long term deposit arrangements that subsisted, militating against the implication suggested.

41. Third, even if the failure of its customers to collect their Items from safe deposit by a particular time could be said to amount to a repudiatory breach of contract, it could also be said that, by continuing to retain custody of the Items for as long as it has, the Bank has failed to accept that repudiation or has affirmed its agreement with the customers. Given the limited evidence as to the circumstances of the deposits, and the

very long history of this matter, it would not be possible for the Court safely to draw inferences about this.

42. Finally, I am reinforced in my view by the express terms of the letting agreement, there being no suggestion of a duty to collect on the part of the customer. I therefore do not accede to this argument as a basis for the Bank being able to sell the Items.

(b) **Implied terms**

43. It is fair to say that the Bank placed rather more emphasis at the disposal hearing on the second basis posited, namely that the safety deposit arrangements and the correlative obligations may be deemed to end when the parties can be reasonably assumed to have intended them to determine (also canvassed by *Palmer* at [13-043]). In this case, the duration of those arrangements is said not to be referable to any breach of primary obligation rather than their simple expiry by natural effluxion of time.

44. So, for example, the Bank referred me to *Maritime Coastal Containers Ltd v Shelburne Marine Ltd* (1982) 52 NSR (2d) 51 in which Hallett J of the Nova Scotia Supreme Court held that a gratuitous bailment of indefinite duration expired after a reasonable time. The plaintiff stored 40 tons of steel in a vessel which the defendant agreed to unload, moving the steel onto a piece of land owned by the local Public Works Authority. The steel was left there for 3½ years, following which, the plaintiffs demanded its redelivery, but it had disappeared. The plaintiffs sued for damages. Hallett J's principal conclusion was that there was no bailment as the defendants had not reduced the steel into their possession, but *obiter* (at [69]), had there been a bailment, there must have come a point at which the obligations owed by the bailee ceased to be owed: "*a bailment of an indefinite duration expires after a reasonable time*". *Palmer* notes that the definition of a reasonable time naturally depends on the nature of the goods and all the attendant circumstances, but in that case, the Court considered that the proper period would have been six months.

45. *Palmer* also suggests that the decision in *Griffin v George Hammond plc* (unrep., 16 March 1999, CA) on an application for permission to appeal out of time is best explained as a case in which the bailee's consent to possession expired through the effluxion of time, in that case, ten hours, the period the claimant employee of the defendant petrol station had left her skiing equipment with the latter for safekeeping.

46. In this case, the Bank accepts that an organisation in the business of safeguarding goods for extended periods would necessarily be subject to the obligations it assumes as bailee for a much longer period than the gratuitous bailees in *Maritime* (6 months) or *Griffin* (under 10 hours). However, it also suggests that the parties to the original bailment here can still be reasonably be assumed to have intended that it would be determined after some reasonable period of time, no commercial organisation being expected to retain items truly indefinitely and significantly beyond the natural lifetimes of the original bailors.

47. As to what that reasonable period of time might be, that would depend on the circumstances but, in this case, the Bank is bearing the costs of storage of the Items itself, the bailors have not furnished the Bank with updated contact details for

themselves or their successors in title, and it therefore appears impossible now for the Bank to contact them, in the case of the former, many likely or certain to be dead. Since there has been no contact for at least 47 years (and in some cases much longer), the Bank says that a reasonable time in these circumstances would be a lesser period such that the bailments in this case have already all expired.

48. Alternatively, the Bank suggests that a term could also be implied in the original bailment contracts as a matter of obvious inference that they would determine at any time the bailors or their successors in title became uncontactable or untraceable, subject to the Bank taking reasonable steps to trace or communicate with the bailors or their successors in title. It could not have been the intention of the parties at the time of the original bailment that the Bank would be obliged to keep the goods truly indefinitely, even well beyond the lifespan of the original bailors and even if it could not contact the bailors or their successors in title after having taken reasonable steps to do so.

49. Notwithstanding the very limited evidence as to any express terms that might have been agreed between the Bank and its depositing customers, I am satisfied that certain inferences can safely and reasonably be drawn in this case. First, I consider it unlikely that any of the deposits were agreed to be for a fixed term, the nature of the bailments here being the long term safekeeping of personal effects and valuables, it not likely being known at the outset when the bailor might wish to resume possession. Much more likely in my view is that the Items were placed into the Bank's custody on a rolling periodic basis or without any period being stated at all. The former is supported by the terms of the letting agreement.

50. I also consider it unlikely that the parties would expressly agree that the deposit arrangements would terminate after a reasonable period of time. Nor would I imply a general term to the same end. One can well understand why the gratuitous bailment in *Maritime* was found to have determined after a reasonable period. In my view, this would not be obvious in the case of the deposit of valuables into the custody of the Bank, and might, again, lead to not insignificant uncertainty as to the subsistence or otherwise of any bailment contract in circumstances in which the Bank had expressly undertaken their long term safekeeping for reward.

51. That said, if express terms had been agreed in this case, I consider it likely that these would have provided for the deposit arrangements to come to an end at the instigation of either party upon giving notice. Indeed, both parties would recognise at the outset that the customer may well wish to be reunited with their possessions at some point in the future and that the Bank may not wish or be able indefinitely to offer a safety deposit facility. I therefore consider it likely that any such agreement would have provided for termination on a reasonable period of notice which, given the possible value of some of the Items deposited, would likely have been agreed as a period of no less than one month, sufficient to allow alternative arrangements on both sides to be put in place. My view in this regard is reinforced by the terms of the letting agreement which itself contains such notice provisions. In the absence of express agreement, I would imply a term to the same end, it also being obvious in my view, and for essentially the same reasons, that the parties' arrangement could not endure in perpetuity.

52. Without more, such terms would not, however, assist in this case, the Bank's predecessor entities having attempted unsuccessfully to bring the safety deposit arrangements to an end from as early as 1994, its further investigations after 2019 confirming that the holders of the SDBs or their successors in title were not traceable such that effective notice could not be given. Although the position presented by the 14 untraced SDBs is unlikely to have been at the front of the parties' minds at the outset, let alone the subject of an express term, I do agree, however, that the officious bystander would consider it obvious that the Bank would not assume responsibility indefinitely for items stored. However, particularly given the possible personal and/ or economic value of such items, I also agree that such bystander would expect the Bank wanting to bring the arrangements with the customer to an end to have undertaken all reasonable efforts to trace them before it could consider the custody arrangements to have been determined. I therefore accept that it would be appropriate to imply a term that the Bank's obligations as custodian of the Items would, in those circumstances, and subject to such reasonable tracing efforts being taken, cease.

53. I am again reinforced in my view by the express terms of the letting agreement. Although these do not contemplate customers being untraceable, they do permit the Bank, in the event of the customer's breach, to retain the contents of the box and charge a higher rent, alternatively to return the contents to the customer by registered post or some other means, in effect, bringing the parties' relationship to an end. However, neither option could be practically or feasibly exercised if the customer was no longer traceable, reinforcing the implication of the suggested term in that situation. I consider further below whether reasonable efforts have been taken by the Bank in this case to trace those entitled to possession of the Items and, if they have, the further question of whether the course proposed by the Bank in terms of the sale of the Items is open to it.

(c) **Bailment of necessity**

54. The Bank also says that the Court of Appeal decision in *Ridyard* (discussed above in the context of repudiatory breach) raises the prospect of a yet another analysis of the Bank's rights in respect of the goods it holds, namely that the Bank, like the plaintiff in *Ridyard*:-

> " … was left in the position of what is called an agent of necessity or bailee of necessity. ….. He was in the same position as is any other bailee of goods who, through the conduct of the bailor, has been put in a position of necessity or emergency which involves him in a decision as to what to do with the goods. His duty then is to do that which is fair and reasonable in the interests of the parties concerned, not only his own interest but the interest of the owner of the goods…
>
> His reasonable entitlement and his reasonable duty was what he did: to sell them. It was his duty to act reasonably and that included to get what, in the circumstances of the emergency, was a reasonable price."

55. In this case, the Bank accepts that there is no urgency compared to the keeper of livestock needing to make a decision with the animals' welfare in mind but says that the situation has persisted for a very long time and, at some point, it must be brought

to a conclusion, the Bank not being realistically expected to continue to hold the Items indefinitely, expending its own resources for that purpose (as did the plaintiff in *Ridyard*). Indeed, given the steps taken by the Bank to contact the bailors and others with an interest in the Items, including public advertisement, it is clear that there is no real prospect of the position being resolved other than by the actions of the Bank itself (with the assistance of the Court). As such, the Bank is in a position of necessity, requiring it to make a decision as to what to do with the goods. Although it accepts that it has a duty to do what is fair and reasonable in the interests of the parties concerned, its proposed course of selling the goods after taking expert advice as to their value and appropriate routes to market, and then bringing about the retention of the proceeds (less its own expenses) by payment into Court for the benefit of the bailors or their successors, would satisfy that duty.

56. Although I agree that the Bank finds itself in an invidious position, I do not accept that an agency of necessity is present here. The Bank clearly has been unable to communicate with the owners of the Items but, in my view, the circumstances are removed from those in the nature of a real emergency compelling the sale of the Items as authorities such as *Sachs* or *Ridyard* indicate would be required for such an agency relationship to arise. This is not a case, for example, in which goods might perish or livestock suffer through the failure of the principal to provide instructions as to their disposal. To the contrary, the Bank has applied to the Court for assistance, its investigations to reach this point (including earlier Court assistance) having appropriately taken a number of years to that end. In my view, this reflects the real difficulty in which the Bank finds itself, the seriousness with which it treats the ownership rights of its former customers and the careful and reasonable course it has adopted to attempt to resolve the situation, but it does not reflect the position of an agent of necessity.

(d) **Abandonment**

57. The leading case in relation to abandonment is the House of Lords decision in *Arrow Shipping Co Ltd v Tyne Improvement Commissioners (The Crystal)* [1894] AC 508, the owners of a wrecked vessel in that case held (at [519]) not to be liable for the expense of removing the wreck as they had divested themselves of all proprietary interest before removal operations commenced by giving notice of total loss to the vessel's insurers and by communicating the abandonment to the harbour authorities. Much more recently, Colin Edelman QC, sitting as a Deputy Judge of the Queen's Bench Division, held in a bailment context in *Robot Arenas Limited v Waterfield* [2010] EWHC 115 (QB) (at [13] to [14]) that the test for ascertaining if there has been a "divesting abandonment" is whether there has been both (i) an intention to abandon and (ii) some physical act of relinquishment.

58. The Bank says that, in this case, abandonment of the Items in the SDBs can be inferred given the absence of any attempt by the original bailors, their successors in title or anyone else to recover the Items since they were placed in the Bank's possession between 47 and 122 years ago. Although the original act of relinquishment took place in circumstances in which the Items were already in the Bank's custody, they have remained with the Bank throughout and have not apparently been physically possessed by the bailors at any time since deposit. Given the passage of time, together with the failure by the bailors to provide to the Bank any

updated contact details for them or their successors, an intention to relinquish can reasonably be inferred.

59. Although I found the Bank's arguments on abandonment, particularly as to the physical relinquishment of the Items, more compelling than those for a bailment of necessity, I was unable to accede to them in the circumstances of this case. First, there is no evidence before the Court as to why and in what circumstances the original depositors or their successors have failed to come forward, either to take possession of the Items or to provide the Bank with their contact details. Second, given the value of some of the Items, an inference of an intention to abandon seems problematical. With the paucity of the evidence, I do not consider it possible safely to draw such an inference. I come to that view notwithstanding the very long period of time that has elapsed since the Items were deposited and the absence of contact from the customers in the meantime.

(e) **Deemed acceptance of notice of intention to dispose of the Items**

60. Finally, the Bank says that its recent public notices to the effect that it proposes to dispose of the goods contained in the SDBs, and the absence of any response to them, gives rise to a yet further basis on which it can be said that the Bank is entitled to dispose of the goods.

61. So, for example, in *Sachs*, the involuntary bailee wrote to the bailor saying that he was no longer willing to hold the goods and wanted them removed, but the bailor did nothing even after receiving a second letter which stated that the goods would be sold unless removed. In such circumstances, Lord Goddard CJ suggested (at [37]) that "*a court may possibly infer that the bailor was so disinterested in it that he was impliedly assenting to the sale*." However, he went on to note that there are "*certain difficulties in the way of such a finding because of the doctrine, applicable at any rate with regard to offer and acceptance, particularly in respect of contract, that silence does not give consent*."

62. Despite this, the Bank says that, more recently, the Court of Appeal appears to have endorsed Lord Goddard's suggestion that silence may lead to acceptance of a notice of intention to dispose being deemed to have taken place. *Nottingham CC v Infolines Ltd* [2010] PTSR 594 concerned (amongst other things) the disposal by a local authority of two telephone kiosks, their owner contending that this amounted to an unlawful interference with goods. Keene LJ concluded otherwise, stating (at [11]) that:-

> "I would emphasise that none of what I have said means the street authority is obliged or expected to store removed apparatus indefinitely after exercising its section 52 powers in circumstances such as the present. Storage itself is likely to place a financial burden on the street authority and may cause other problems for it. What the authority should do in such a case is to give notice to the owner that it has removed the apparatus and will dispose of it by a specified and reasonable date if the apparatus is not collected by then. If, in that situation, the owner fails to collect the apparatus, any loss resulting from its disposal will have been caused by the owner's inaction and could not be recovered by him: see per Lord Goddard CJ in Sachs v Miklos [1948] 2 KB

> 23, 40 - a case of bailment, but one sufficiently analogous, in my view, to provide a practical guide in the present circumstances."

63. It seems to me Keene LJ's reference there to *Sachs*, in fact, concerned causation of loss rather than implied assent. In any event, whether or not silence might be sufficient, it does seem to me that knowledge of the intention to sell would be required before such consent, even implied, could be found. Although, consistent with Morgan J's earlier order on the interim application, the Bank has posted notice of its intention to dispose of the Items, I am unable to infer that such notice has, in fact, reached the depositors or their successors in title. To the contrary, the safer inference may well be that it has not. As such, I decline to find a power to sell the Items on this basis.

I. CONCLUSION ON THE PRE-1978 ITEMS

64. I now return to the one substantive argument which I have found might assist the Bank in this case in respect of the pre-1978 Items. As noted, I consider that the Bank is entitled to say that there was an implied term that the arrangements with its customers would cease if they or their successors in title were or became uncontactable and, despite reasonable efforts, could not be traced. Moreover, in my view, the steps taken by the Bank (noted at paragraph [9] above) were more than reasonable in the circumstances to attempt to trace its customers. As such, their contractual arrangement came to an end in accordance with the implied term discussed above by 2019 at the latest when the Bank took steps in earnest to trace its former customers. Thereafter, the Bank stood in the position of involuntary bailee with respect to the Items.

65. Although, as the Bank accepted, this would not give rise to a right as such to sell the Items, I do agree that it would afford the Bank (and those involved in the sale process, including any buyers) potential relief from liability if ever suit were to be brought on account of such sale. Indeed, applying *Da Rocha-Afodu*, I am more than satisfied that the Bank (and its predecessors) have done all that is right and reasonable and that it should now be permitted to sell the Items without comeback from SDB holders. As noted, the Bank and its predecessor entities have been in possession of the Items for at least 44 years, in many cases considerably longer. When it became apparent by 1994 at least that the relevant customers of those predecessor entities were uncontactable or unresponsive, they continued to hold the Items, even moving them into third party storage at its own cost in 2004. Following the return of the Items, the Bank continued to hold them at its premises before starting in earnest from 2019 to trace those entitled to them, culminating in the application before Morgan J. The effect of that application was to whittle down the untraceable boxes to 14 in number, advertising the Bank's intentions to sell the Items, seeking final relief from the Court to that end, doing so with the benefit of professional advice as to value and the most appropriate method of sale. In these circumstances, I am more than satisfied that the Bank has taken the right and reasonable course and that, subject to the appropriateness of declaratory relief (discussed below), the Bank (and those involved in the sale process) should not attract potential liability that might otherwise attach from the sale of the pre-1978 Items.

J. POST-1978 ITEMS – THE 1977 ACT

66. Before moving to the question of declaratory relief, I consider more briefly the position with respect to the contents of the single post-1978 SDB. As to this, s.12 of the 1977 Act provides that:-

> **"12. Bailee's power of sale.**
>
> (1) This section applies to goods in the possession or under the control of a bailee where:-
>
> (a) the bailor is in breach of an obligation to take delivery of the goods or, if the terms of the bailment so provide, to give directions as to their delivery, or
>
> (b) the bailee could impose such an obligation by giving notice to the bailor, but is unable to trace or communicate with the bailor, or
>
> (c) the bailee can reasonably expect to be relieved of any duty to safeguard the goods on giving notice to the bailor, but is unable to trace or communicate with the bailor.
>
> (2) In the cases of Part I of Schedule 1 to this Act a bailee may, for the purposes of subsection (1), impose an obligation on the bailor to take delivery of the goods, or as the case may be to give directions as to their delivery, and in those cases the said Part I sets out the method of notification.
>
> (3) If the bailee:-
>
> (a) has in accordance with Part II of Schedule 1 to this Act given notice to the bailor of his intention to sell the goods under this subsection, or
>
> (b) has failed to trace or communicate with the bailor with a view to giving him such a notice, after having taken reasonable steps for the purpose,
>
> and is reasonably satisfied that the bailor owns the goods, he shall be entitled, as against the bailor, to sell the goods.
>
> (4) Where subsection (3) applies but the bailor did not in fact own the goods, a sale under this section, or under section 13, shall not give a good title as against the owner, or as against a person claiming under the owner.
>
> (5) A bailee exercising his powers under subsection (3) shall be liable to account to the bailor for the proceeds of sale, less any costs of sale, and:-
>
> (a) the account shall be taken on the footing that the bailee should have adopted the best method of sale reasonably available in the circumstances, and
>
> (b) where subsection (3)(a) applies, any sum payable in respect of the goods by the bailor to the bailee which accrued due before the bailee gave notice of intention to sell the goods shall be deductible from the proceeds of sale.
>
> (6) A sale duly made under this section gives a good title to the purchaser as against the bailor.
>
> (7) In this section, section 13, and Schedule 1 to this Act,
>
> (a) "bailor" and "bailee" include their respective successors in title, and

(b) references to what is payable, paid or due to the bailee in respect of the goods include references to what would be payable by the bailor to the bailee as a condition of delivery of the goods at the relevant time.

(8) This section, and Schedule 1 to this Act, have effect subject to the terms of the bailment.

(9) This section shall not apply where the goods were bailed before the commencement of this Act."

67. Schedule 1 explains the ability of the bailee of uncollected goods to give notice requiring the bailor to take delivery thereof and the requirements of any such notice. In the case of storage or warehousing, Part I, paragraph 4 to Schedule 1 provides that "[i]f a bailee is in possession of goods which he has held as custodian, and his obligation as custodian has come to an end, the notice may be given at any time after the ending of the obligation, or may be combined with any notice terminating his obligation as custodian."

68. S.13 of the 1977 Act provides that the Court may authorise the sale of goods on appropriate terms if satisfied that the bailee is entitled under s.12 to sell them.

69. In this case, the Bank relies on the powers of sale conferred by s.12 of the 1977 Act on the basis that (i) the Bank could impose an obligation to take delivery of the Items by giving notice to the depositor(s) (or their successor(s) in title) (s.12(1)(b)) and/ or (ii) the Bank could reasonably be expected to be relieved of any duty to safeguard the Items on giving notice to the depositors (s.12(1)(c)). Moreover, since the Bank is unable to trace or communicate with them, and having taken reasonable steps for that purpose, it is therefore entitled as against the bailor to sell the goods (s.12(3)(b)).

70. One of the further questions I posed of the Bank following the initial hearing was the effect of the parties' contractual position on the operation of ss.12-13 and Schedule 1 in this case. The Bank pointed out that the 1977 Act applies to both contractual and non-contractual bailments. Indeed, Part I, paragraph 5 to Schedule 1 makes clear that, where a bailee is in possession of goods held as custodian, paragraph 4 applies whether or not the bailment is for reward. Moreover, s.12(1)(c) is framed, not by reference to the terms of any bailment, but by the bailee's reasonable expectation of relief of any duty to safeguard the goods.

71. I accept that ss.12-13 of, and Schedule 1 to, the 1977 Act are not limited to bailments of a contractual nature. However, it did seem to me, particularly from Schedule 1, that the terms of any contractual bailment were relevant to the operation of some of these provisions. As I have found, the Bank's contract with its customers has, in fact, already come to an end by reason of its inability to trace the depositors after taking reasonable steps to that end, a finding that applies equally to the post-1978 Items. Accordingly, by operation of s.12(1)(b), s.12(2) and Schedule 1, the Bank would have been entitled to impose an obligation on its customers to retake delivery of the Items even though it could not contact or trace them. Additionally, I am satisfied that the Bank could reasonably expect to be relieved of any duty to safeguard them rather than bear the burden and cost of having to store them indefinitely (s.12(1)(c)).

72. Accordingly, it also being clear on the evidence that the Bank (i) has taken reasonable steps to trace or communicate with the SDB holders or their successors and (ii) is

satisfied that they own the Items, the Court, in turn, is satisfied that the Bank is entitled as against the original depositors (and their successors in title) to sell the post-1978 Items (s.12(3)(b)). As such, the Court may exercise the power under s.13 to authorise such sale. Not least given the history of this matter, without any SDB holder coming forward, and increasingly slim chance of that occurring, I consider it appropriate to do so in this case.

K. DECLARATORY RELIEF FOR THE PRE-1978 ITEMS

73. Assuming that the Court is satisfied as to service and the substantive basis for the claim which, for the reasons already given, it is, the Bank invites the Court to grant appropriate declaratory relief with respect to the pre-1978 Items. At the original hearing, the Bank submitted that the declaration should be framed in terms of the Bank's *entitlement* to sell the Items. At the later, shorter hearing at which I sought the clarifications indicated, the Bank accepted that the engagement of the implied term it asserted with respect to the pre-1978 Items would not confer an *entitlement* to sell as such, rather than the potential immunity from claim on account of such a sale. I agree that any declaration I might make would more properly be framed in that way.

74. The Court's jurisdiction to grant declaratory relief derives from s.19 of the Senior Courts Act 1981 which preserves the jurisdiction of the High Court to exercise "all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision)". By CPR, Part 40.20, the Court may grant declaratory relief, whether or not any other remedy is claimed. The power to make declarations is a discretionary power "*only to be used where there is a real dilemma which requires* [the Court's] *intervention*" (*Governor and Company of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52) (at [46])). As between the parties to a claim, the Court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law (*Financial Services Authority v Rourke* [2002] CP Rep 14 (at [p.10])).

75. In the context of negative declaratory relief, which would be the basis of any declaration I might make for the pre-1978 Items, the Bank directed me to the principles discussed in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm) (at [58]-[78]) and, in particular, the following distillation (at [78]):-

> "Overall I conclude that the interesting argument which I have heard on the authorities has been in danger of over-refining an exercise which is essentially discretionary. The overarching issues relevant to this case which can be taken away from the authorities and which I apply when coming to consider the individual declarations sought are as follows:-
>
> i) The touchstone is utility;
>
> ii) The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose;

iii) The prime purpose is to do justice in the particular case: see *TQ Delta, LLC v ZyXEL Communications UK Limited, ZyXEL Communications A/S* [2019] EWCA Civ 1277 at [37]. "Justice" includes justice not only to the claimant, but also to the defendant: see *Fujifilm Kyowa Kirin Biologics Co., Ltd. v Abb Vie Biotechnology Limited* [2017] EWCA Civ 1; [2018] Bus LR 228 ("Fujifilm") at [60];

iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised: see *Rolls Royce v Unite the Union* at [2010] 1 WLR 318 at [120]. In answering that question, the Court should consider what other options are available to resolve the issue;

v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus:

a) The court will not entertain purely hypothetical questions. It will not pronounce upon legal situations which may arise, but generally upon those which have arisen: *Zamir & Woolf* at 4-036 & *Regina (Al Rawi) v Sec State Foreign & Commonwealth Affairs* [2008] QB 289 at 344.

b) There must in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them: *Rolls Royce* at [120].

c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical. This can be characterised as "the missing element which makes a case hypothetical": see *Zamir & Woolf* at 4-59.

vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative; *Zamir and Woolf* note that the latter "can take different forms and can be lacking to differing degrees". However, where there is such a lack in whole or in part the court will wish to be particularly alert to the dangers of producing something which is not only not utile, but may create confusion."

76. The Bank also fairly pointed out that the Court will be cautious in exercising its discretion to grant declaratory relief where the arguments have not been fully ventilated before the Court. So, for example, in *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), Marcus Smith J noted (at [21(5)] that:-

> "The court must be satisfied that all sides of the argument will be fully and properly put. It must, therefore, ensure that all those affected are either before it or will have their arguments put before the court. For this reason, the court ought not to make declarations without trial. In *Wallersteiner v. Moir*, Buckley LJ said this:
>
> > "It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of

> respectable antiquity is to be found in *Williams v. Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, *a fortiori* they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently …"

77. To a similar end, Simon Salzedo QC (sitting as a Deputy High Court Judge), in his elaboration in *Montlake Qiaif Platform Icav v Tiber Capital LLP* [2021] EWHC 202 (Comm) of the exercise of the power to grant declaratory relief, stated (at [44(4)]) that the grant of declaratory relief is a strong and perhaps dangerous step to take in the absence of adversarial argument, if a party obviously affected is not before the Court or if there is a risk that other persons obviously affected by it are not before the Court. Hence the indication in the authorities of the need for caution on a Court considering declaratory relief which is not opposed or in default of pleadings and which will affect parties not identified or not joined to the proceedings.

78. The Bank also notes, however, that the Court does admit of the possibility of the grant of declaratory relief without trial, including in default of a defence or without the attendance of the defendant, albeit a power that " … should be exercised only in cases in which to deny it would be to impose injustice on the claimant" (*Wallersteiner* at [p.1030]). Examples of this include the grant of declaratory relief as to the determination of an agreement conferring the exclusive right to print and publish the author and copyright owner's book. As Millett J held in *Patten v Burke Publishing Co Ltd* [1991] 1 WLR 541 (at [544A-B)]:-

> "The court ought not to declare as fact that which might not have proved to be such had the facts been investigated. Quite apart from this, however, it is clear from *Wallersteiner v. Moir* that the rule is a rule of practice only a rule of practice only. It is not a rule of law. It is a salutary rule and should normally be followed, but it should be followed only where the claimant can obtain the fullest justice to which he is entitled without such a declaration."

79. In concluding that a declaration should be granted, Millet J stated (at [544D-F):-

> "In the present case it is my view that the fullest justice cannot be done to the claimant by omitting the declaration sought. His right to publish the work by offering it to a new publisher, and his right to offer to such new publisher any similar book which he may write in the future, would be seriously prejudiced by any contention that the present agreement with the defendants was still subsisting. After judgment in this action it will no longer be open to the defendants to argue that that agreement is still subsisting without having the judgment set aside, but in the meantime the omission of any declaration to that effect from the judgment could seriously inhibit the plaintiff in any attempt to negotiate terms for the publication of the work throughout the world. Foreign publishers cannot be expected to understand the subtleties which underlie the court's reluctance to grant a declaration of right and to substitute a statement of the footing on which

the judgment is given. Such a statement, on the contrary, might appear positively to invite challenge."

80. *Patten* has since been applied in *Aramco Trading Fujairah FZE v Gulf Petrochem FZC* [2022] EWHC 288 (Comm) (at [31]-[33]) where the defendant attended but its defence had been struck out and *Day v Bryant* [2018] EWHC 158 (QB) (at [38]) where the defendant in an action for damages for alleged sexual abuse counterclaimed for factual declarations. These were granted even though the main claim had been struck out and the claimant did not appear.

81. Finally, the Bank properly drew my attention to the recent case of *Hughes Family Property Co Ltd v No Defendant* [2024] EWHC 2288 (Ch) in which HHJ Paul Matthews (sitting as a Judge of the High Court) refused permission to issue a Part 8 claim form (for declaratory relief) without naming a defendant (under CPR, Part 8.2A) in relation to the effect of a restrictive covenant on the ground that the owners and occupiers of adjoining and potentially affected properties had not even been approached. The Judge observed (at [23]-[24]) that, if the owners and occupiers of the adjoining properties were not made parties, only the claimant would be bound by any decision of the court. Moreover, "not telling some of the people who may have something to say about the matter" appeared to be relevant on the authorities to whether the Court might grant a declaration at trial.

82. The Bank sought to distinguish the position in *Hughes* from that obtaining here: for the post-1978 Items, the Bank asks the Court to proceed under a specific statutory jurisdiction which permits the Court to make orders which (expressly on the terms of the statute) bind defendants that have not been located and therefore served, and are not parties in the usual sense. Permission to issue the claim form under CPR, Part 8.2A in respect of those goods has (on that basis) already been granted. In relation to the pre-1978 Items, subject to the Court being satisfied on the question of service, the defendants are joined to the proceedings in the sense that they are named by description. In such circumstances, they have been 'notified' of the proceedings to the extent required by the rules and will be bound to the extent they fall within the description. By contrast, in *Hughes*, no attempt had been made to name or serve the non-parties that had an interest in the relevant covenants despite there apparently being little difficulty in identifying or locating them.

83. In this case, the Bank says that the fullest justice can only be done by the grant of declaratory relief:-

(i) The Bank wishes to sell the Items but is in a real dilemma because these were placed into its custody for safekeeping but an enormous amount of time has passed, the prospects of the owners claiming them are very small and the Bank is incurring storage costs;

(ii) The Bank's ability to sell the Items would be seriously prejudiced by any contention that it was not entitled to do so or would not be relieved from liability in that event (not dissimilarly from the position with respect to copyright in *Patten*). The declarations sought would therefore serve a useful and proper purpose;

(iii) Although there is no present dispute, the prospect of a future dispute if any legitimate claimant to the Items comes forward is real (even if only a slim likelihood);

(iv) Granting the declarations now would bring resolution and finality to an issue which might otherwise persist indefinitely;

(v) That course would also have potential wider public interest in clarifying the law of bailment in a manner which may prove useful to other institutions (such as other banks, or museums) in possession of uncollected goods once deposited by others; and

(vi) Although the Court will be cautious before granting declaratory relief in the absence of adversarial argument and with no other affected parties in attendance before it:-

(a) The Bank has sought to present the arguments fairly, including pointing out the limited compelling authority on some of the points of substance;

(b) Without the relief sought, the fullest justice cannot be done since the Bank may be inhibited in the exercise of its rights; and

(c) A very long time has passed since there has been any contact with any of the potentially affected parties - at a minimum, 47 years, in many cases, much longer. This is despite extensive public advertisement of the issue.

84. As a preliminary matter, I am satisfied that the Bank has done its best to present the arguments to me in a balanced and fair manner. It is true that there has been no adversarial argument in this case but, had it been possible to trace the original depositors or their successors in title, I doubt that there would have been any adversarial argument at all, the Bank then being in the position, subject to appropriate proof of their entitlement, to unite them with the Items. Indeed, as already noted, these proceedings are caused by, and directed to, the very problem of the inability to trace those entitled to the contents of the SDBs, itself causing the current and real (and in that sense the non-hypothetical) problem of what the Bank can or cannot legitimately do with the Items which have gone unclaimed for so long despite the steps taken by the Bank to advertise that fact. As Morgan J said (at [38]), it is "far from the typical case".

85. In considering the justice of the case, I am satisfied that it is appropriate for the Court to exercise its discretion in the Bank's favour. The Bank has expended not inconsiderable effort in attempting to trace the owners of the Items, incurring ongoing cost in their storage in the meantime. The prospect of the owners of the Items coming forward seems increasingly remote every day they remain with the Bank. In circumstances in which I have found that the Bank has a statutory right to sell the post-1978 Items, that the steps taken by the Bank as involuntary bailees were right and reasonable and that it should enjoy immunity from liability in respect of the sale of the earlier deposited Items, I am satisfied that the declaratory relief sought is appropriate. Although proposed in negative terms by reference to potential liability not yet crystallised, I also accept that, without such relief, potential buyers are likely

to be cautious about purchasing the items and the Bank may be prevented from realising the maximum value for the Items. That would be detrimental to the interests of their owners. Finally, although the proceedings have not been conducted on an adversarial basis, this has not prevented me from properly testing the Bank's case and seeking further clarification, including calling for a further hearing and drilling further into the evidence. Subject to discussing the precise terms, I therefore accede to the Bank's request for declaratory relief.

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86. Finally, the Bank seeks to recover from the proceeds of sale of the Items certain of its own costs. However, as the Bank confirmed at the hearing, it did not seek such costs in respect of those SDBs containing Items valued at less than £1,000. As to the specific costs or expenses the Bank seeks to recover, these comprise:-

    (i) an annual fee of £360 for the last six years for each SDB, the Bank having stored the Items (without charge) for much longer. The precise period the Bank has gone unpaid is not known but it exceeds 25 years. The figure sought represents the average annual charge by institutions offering safe deposit services;

    (ii) investigation costs in the total sum of £834.97 for all SDBs, representing 13.5 hours of Mr Walker's time attempting to identify the holders;

    (iii) valuation expenses in the total sum of £2,244, including VAT, for all Items; and

    (iv) sale costs, including auction fees and commission.

87. The sale proceeds after deduction of these costs are then proposed to be paid into Court. It seems to me that the Bank's ability to deduct these costs without recourse from the SDB holders depends, again, on whether it would be right and reasonable for it to do so in all the circumstances of the case (*Da Rocha-Afodu*). Having considered the relevant facts here, including the nature of the expenses, the actual or likely amount of those expenses, the significant period (measured in decades) during which the Bank has had possession of the Items at its own cost and the other significant costs incurred by the Bank over that period which are not claimed, I am satisfied (subject to the £1,000 *de minimis* threshold indicated) that it would be right and reasonable for the Bank to deduct these sums, with the balance then being paid into Court.

88. I will discuss the form of order, including the form of declaration, at a further hearing. However, I add here that it seems to me that, once made, that order too should be advertised for a sufficient period of time prior to the sale (to be discussed) so that those entitled to the Items are afforded one last chance to come forward to make and establish their *in specie* claim.