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IN THE HIGH COURT OF JUSTICE **Nos 5738& 5739/2011**

CHANCERY DIVISION

COMPANIES COURT

Before: Mr M H Rosen QC, sitting as a deputy High Court Judge

IN THE MATTER OF CROWN HOLDINGS (LONDON) LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF CROWN CURRENCY EXCHANGE LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Mr Jonathan Brettler (instructed by **Edwin Coe LLP**) for the **Representatives**

Ms Abra Bompas (instructed by **Kennedys**) for the **Liquidators**

Hearing dates: 16 and 17 June 2015 Date of Judgment: 29 June 2015

Approved Judgment

Mr M H Rosen QC, sitting as a deputy High Court Judge:

INTRODUCTION

1. Crown Holdings (London) Limited and Crown Currency Exchange Limited (together 'the Companies') entered administration on 4 October 2010 and were placed in creditors' voluntary liquidation on 31 March 2011. They had been incorporated in 2004 and had operated a currency exchange business, mainly for customers changing relatively small sums for holiday and similar use, delivered to their home addresses in cash.

2. At all material times the Companies' directors and shareholders (with respectively 78% and 22% of the issued shareholding) were Mr Peter Benstead and Mr Edward James. Mr Benstead set the Companies' exchange rates, and his son-in-law Mr Roderick Schmidt was their Operations Manager until 30 April 2010, with day-to-day control of the business.

3. The Companies fell into insolvency by 2008 and eventually ceased to trade after their bankers, Barclays, stopped all payments out of their accounts shortly after 1 pm on 29 September 2010 and payments into the accounts similarly on 1 October 2010, when the Companies had only some £2.8 million in their 12 Barclays bank accounts but owed close to £22 million, nearly all of it (98%) to some 12,400 customers.

4. Messrs Benstead, James and Schmidt were prosecuted for fraudulent trading and false accounting, together with other charges and other defendants including the Companies' accountant Mr Stephen Matthews. Mr James, Mr Schmidt, Mr

Matthews and others were convicted variously after a lengthy criminal trial on 7 May 2015; Mr Benstead took his own life while the jury was deliberating.

5. In the meantime, on 1 July 2011 the Liquidators made applications under section 112 of the Insolvency Act 1986 for the Court to determine whether the Companies held certain sums of monies in their possession on trust, in particular:

   (a) whether sums totalling some £1.1 million which were paid into the Companies' bank accounts with Barclays on or after 29 September 2010 ('the Barclays Monies' as defined under an Order dated 9 December 2011) are held on trust for those customers who paid in those sums, purportedly in exchange for foreign currency which they did not receive; and

   (b) whether sums which on administration were found in envelopes in the Companies' counting house totalling nearly £360,000 ('the Completed Order Monies') belong to and/or are held on trust for the customers to whom they were addressed.

6. As regards the Barclays Monies, the grounds put forward for customers' proprietary claims are based on (i) rescission of the relevant contracts for fraudulent misrepresentation; (ii) unconscionable receipt in circumstances of total failure of consideration and/or mistake known to the payee; and (iii) express trust on the part of Barclays Bank. As regards the first ground, the Liquidators argue that the right to rescind was lost by affirmation or delay, and was ineffective after the commencement of the Companies' liquidation to revest any property in the monies paid by customers.

7. There is an additional question regarding the Completed Monies Order, namely (iv) whether legal title passed to the identified customers when the envelopes were sealed and addressed to them; if not, similar questions as to the nature and traceability of equitable proprietary claims by those customers in the Barclays Monies also arise, unless the making of claims in the Completed Order Monies constitutes a further bar.

8. By the Order made on 9 December 2011, Briggs J appointed a Mr and Mrs Jones and a Mrs Jenkins (together 'the Representatives') to act as representatives respectively on behalf of those who claim proprietary interests in the Barclays Monies and the Completed Order Monies, and required the Liquidators to argue against the existence of any trusts. Since then there have been a series of adjournments to await the conclusion of the criminal proceedings.

9. The Representatives' solicitors Edwin Coe LLP act for other customers claiming proprietary interests in funds paid into the Barclays accounts *before* 29 September 2010: I will explain the timing issues a little more below. Both they and the Liquidators have invited the Court to determine these claims as well, and to amend the representation orders and to deal with tracing aspects, once the questions of principle as to the subsistence and nature of customers' proprietary claims in respect of the sums left in the Barclays accounts have been determined.

10. For that purpose, despite the many bundles of documents filed with the Court for this hearing, the key facts are not in dispute as between the present parties. Apart from unchallenged witness statements in these proceedings, the convictions stand as evidence - creating a rebuttable presumption which no-one before the present Court has sought to rebut - that the relevant offences were committed, under section 11 of the Civil Evidence Act 1968; and their factual basis is apparent from the particulars of offence in the (amended) indictment and the directions and summing up of the learned judge (HHJ Gledhill QC), admissible under the principles enunciated in *Brinks Ltd v Abu-Saleh (No.2)* [1995] 4 All ER 74.

11. The Representatives were represented by Mr Jonathan Brettler of Counsel and the Liquidators by Ms Abra Bompas of Counsel. I am grateful to both for their able submissions and take the facts largely from their written skeleton arguments.

THE COMPANIES' FRAUDULENT TRADING

12. The convictions entered on 7 May 2015 included fraudulent trading contrary to section 993(1) of the Companies Act 2006 as regards each of the Companies on

the part of (a) Mr Schmidt, in respect of the period 1 December 2006 to 31 October 2010 and (b) Mr James, in respect of the period 22 September to 31 October 2010. The directions to the jury stated that in order to convict a defendant of fraudulent trading the jury had to be sure that '*the business of [the company] in the period set out was carried out for a fraudulent purpose, namely, with intent to defraud the creditors of the company and by dishonestly causing or permitting the creditors to enter into contracts for the provision of foreign currency on the understanding that those contracts would be honoured*'.

13. In addition, Mr Matthews was convicted of false accounting contrary to section 17(1) of the Theft Act 1968 as regards each of the Companies' audited accounts for the financial years ending 30 November 2008 and 2009, filed at Companies House on 14 September 2009 and 30 August 2010 respectively. Mr Matthews had admitted creating false accounts for these years at Mr Benstead's request, when interviewed by the police, using a second set of figures on the 'Goldmine' software used to record the Companies' liabilities in respect of advanced orders.

14. The forensic accountant engaged by the prosecution, a Mr Walbridge, produced schedules setting out the Companies' true liabilities in respect of advanced orders at various times, which were agreed in the criminal proceedings, showing (a) increases in the Companies' liabilities to customers in respect of advanced orders – some £2.86 million as at 30 November 2007; £7.46 million as at 30 November 2008 and £13.90 million as at 30 November 2009 (compared with prepayments and accrued income of only £3 million increasing to £4.9 million) and £21.74 million as at 29 September 2010; and (b) combined deficits standing at £5.83 million as at 30 November 2008 and £10.51 million as at 30 November 2009, compared with the figures of only £241,040 and £102,590 respectively according to the falsified filed accounts.

15. The Companies continued trading by attracting increasing amounts of cash in respect of more advanced orders, by offering uncommercial exchange rates which worsened their financial position, unprotected by hedging. Customers were told that monies were available at a favourable rates because contracts had been

cancelled; because the Companies were able to bank payments and earn interest; or because they entered into forward purchase or swap arrangements. The Companies' dire financial position was further compounded by thefts, including nearly £230,000 taken by Mr Schmidt in 2009 and £900,000 by Mr Benstead and his wife (who was convicted of converting criminal property) in July and August 2010.

16. By the summer of 2010, Barclays were pressing for answers on various questions, including how rates were set, what hedging strategy was in place and how the Companies would ensure that they could meet future obligations. It seems that they attended for a meeting at the Companies' premises on 22 July 2010, but Mr Benstead did not appear and no real answers were provided. Barclays made it clear (there was an email to that effect dated 10 August to Mr James from the Relationship Director) that they reserved the right to close the Companies' accounts if, by the end of the next meeting, proposed for late September, these questions were not answered to their satisfaction.

17. On Thursday 23 September 2010 Mr Benstead telephoned Mr James, on the latter's return from holiday, and told him that the Companies were in crisis. On the same day there was a substantial payment on account of fees to a Mr Gilchrist of Saunders Law Partnership LLP, the solicitor who attended subsequent meetings, including that with insolvency practitioners, which Mr Benstead was presumably then arranging.

18. That meeting took place on Monday 27 September 2010, Mr Benstead told the insolvency practitioners, Ms Davis and Mr Sorsky, that the Companies had a deficit of £18.25 million and Ms Davis stated that the Companies should cease trading because they were insolvent; but Mr Benstead would not agree and the Companies apparently continued to trade until some time after the following meeting with Barclays, also attended by Ms Davis and Mr Sorsky, on Wednesday 29 September, when Mr Benstead was again told – this time by Barclays as well as the insolvency practitioners – that the Companies should stop trading with immediate effect.

19. Mr Benstead apparently told that meeting that the Companies had been insolvent for over a year and that he had responded to losses by setting higher exchange rates, which had attracted large amounts into the Companies' bank accounts, but their financial position had worsened. He appears to have wished, fruitlessly, to pressurise Barclays into compensating customers, by deploying bank documents which had been surreptitiously removed from a bank employee's briefcase and copied during the 22 July visit.

20. In any event, Barclays stopped payments out of the Companies' accounts shortly after 1 pm on the same day 29 September 2010 (insofar as their payment cycle was not too advanced) and telephoned the Companies to so inform them. Despite being told of this call, Mr Benstead instructed staff to continue to take customer orders and they did so until the administration supervened. In interview, when asked why he had not telephoned the office in order to make sure that no further orders for currency were taken and no more money was taken he said simply: "*I did not bother, okay.*"

21. The Companies entered into administration on Monday 4 October 2010. According to the Representatives: (a) during the period 24 to 26 September 2010, nearly 1,100 customer orders were taken with a value of some £1.5 million, of which some £1.3 million was received into the Companies' bank accounts; and (b) during the period 27 to 30 September 2010, some 1360 customer orders were taken with a value of nearly £2.39 million, of which some £992,000 was received into the Companies' bank accounts; and (c) over those periods arrangements were made by the Companies for early payments to customers in Cornwall/Devon and for 3 months' worth of staff salaries.

22. From the meeting on 29 September until at least Friday 1 October payments from customers (and others) continued to be received into two of the Companies' accounts. Barclays finally put a block on incoming payments into the Companies' accounts at about 1 pm on 1 October 2010. As at that date, the Companies had some £2.84 million in 12 accounts with Barclays including in their foreign

denominated accounts; of this approximately £1.1 million had been paid in on or after 29 September 2010, by over 600 customers.

23. Following the Companies' administration, Barclays raised concerns that the funds which were received into the Companies' accounts between 29 September and 1 October 2010 were potentially held on trust for those who paid the monies. Mr Benstead later told the Liquidators that the Companies ceased trading on 30 September 2010, although there were no formal resolutions in this regard, and no steps were taken by the Companies to prevent customers paying money to the Companies, or to ring-fence customer monies.

24. According to the Liquidators, the funds in the Barclays accounts into which the customers paid over those periods, as previously, were mixed with payments from previous customers, and with other company money. Whilst they have not yet been able to reconcile all the payment details, their preliminary analysis as to the flow of funds into and out of the accounts from 22 September 2010 suggests among other things that:
    (a) some 3,000 customer payments were received into the Companies' various accounts with Barclays up to 1 October 2010;
    (b) as regards the Companies' main accounts, some £7.25 million was paid in and some £7.55 million paid out;
    (c) as regards Crown Holdings' main account, the closing balance on 28 September 2010 was some £208,000, and on 29 September 2010 some £1.17 million was paid out, leaving a closing balance of some £575,000.

MONIES AT BARCLAYS - Ground (1) Fraudulent misrepresentation

25. Whilst it is convenient to set out and address in turn each of the Representatives' grounds for asserting proprietary claims, it must be borne in mind that each formulation relies on essentially the same or closely related factual components in order to achieve the same result, and to guard against inconsistencies and anomalies which might result from too isolated an approach to each separate analysis.

26. The Representatives' first ground for proprietary interests in the monies which remained in the Barclays account on 4 October 2010 is based on the contentions that the contracts entered into by the customers were induced by the Companies' fraudulent misrepresentations as to their solvency and ability and intention to perform, that they were therefore voidable, and that they were duly avoided by the relevant customers when they made their proprietary claims, probably when they applied for the Representatives to be joined to these applications in early December 2011.

27. The particulars of the offences of fraudulent trading of which Mr Schmidt and (in respect of the period from 22 September 2010) Mr James were convicted on 7 May 2015 expressed their intent as *'to defraud the creditors of the company by dishonestly causing or permitting the said creditors to enter into contracts for the provision of foreign currency on the understanding that those contracts would be honoured*'. HHJ Gledhill QC's directions to the jury stated that: "*A company which is carrying on business and incurring debts when, to the knowledge of the directors, there is no reasonable prospect of the debts being paid may be inferred to be carrying on the business of the company with intent to defraud creditors'*.

28. The Representatives contend that by entering into currency exchange contracts with customers, the Companies impliedly represented (reformulating the Representatives' analysis into three groups) that:

    (a) they were not insolvent, but were trading properly and legitimately;

    (b) they had the capacity to perform the contracts, and there was a reasonable prospect that they would do so; and

    (c) they believed and intended that they would perform the contracts:

    see eg *Contex Drouzhba v Wiseman* [2008] BCC 301 and *Lindsay v O'Loughnane* [2012] BCC 153.

29. It is said that that the Companies also expressly represented falsely to various customers that they were able to offer a favourable currency exchange rates because currency contracts had been cancelled by customers; because they earned

interest on the monies paid under advanced contracts; and because they made forward currency purchases and/or used swaps. Whilst it cannot be contended that these express representations were always made to all customers, it is said that many were told of the (sham) 'cancellations'.

30. The Representatives argue that in the light of the convictions and the facts on which they were based, the Companies must have made these representations knowing by Mr Benstead, Mr James and Mr Schmidt that they were false or without believing that they were true, or recklessly, not caring whether they were true or false. Apart from the convictions of Mr Schmidt and (in respect of the period from 22 September 2010) Mr James, Mr Benstead, majority shareholder and director of the Companies, gave instructions for the falsification of the 2008 and 2009 accounts and to Mr Schmidt as Operations Manager and must also have known of the false representations at all material times, including after Mr Schmidt's departure on 30 April 2010.

31. Whilst the Liquidators dispute that representations by the Companies as to their intention and belief as regards honouring the contracts (at least for some customers, even if from further fraudulently obtained customer monies) – and Mr Benstead was apparently still seeking facilities from Barclays to nearly the end – they do accept at least that in light of the convictions, the Companies' implied representations to their customers as to their solvency was false from at least 22 September 2010, and probably before that date.

32. These representations or some of them were material – they would be likely to play a part in the decision of a reasonable person to enter into the transaction. It will accordingly be presumed that they did so: *Dadourian Group International Inc v Simms (Damages)* [2009] 1 Ll Rep 601, at paragraphs 99 and 101. There is an example of this in evidence, from one of the customers, Mr Wood in his witness statement dated 3 February 2012 (paragraph 12).

33. It is however well established as a matter of law that where a contract has been entered into as a result of fraudulent misrepresentation, it is voidable subject to

rescission by or in favour of the victim and title to assets transferred to the fraudster pursuant to the contract, passes, subject to the innocent party's right to rescind: see for example *Shalson v Russo* [2005] Ch 281 at paragraphs 109 to 119 and *Box v Barclays Bank* [1998] Ll Rep 185.

34. Thus the customers' first ground for seeking to trace into the Barclays Monies (and any other funds left in the Barclays accounts) depends on rescission of their contracts, which turns on a choice to affirm or disaffirm under established contractual principles. I ought to add in that regard that:

(a) the *obiter* remarks of Lord Browne-Wilkinson in *Westdeutsche v Islington* [1996] AC 699, to the effect that as a matter of equity where property is obtained by fraud, it is held by the recipient on a constructive trust do not refer to a situation where the result of the fraud is to induce a party to enter into a contract, as is the first ground put forward in this case.

(b) the unreported case of *Halley v Law Society* [2003] EWCA Civ 97 in the Court of Appeal (to be treated with caution, according to *Goff & Jones, The Law on Unjust Enrichment*, 8th edition 2011 paragraph 40-24), in which it was found that the contracts were an "instrument of fraud", is by the same token not (to my mind) to be categorised as one of fraudulent misrepresentation and rescission but rather as if the contracts were void *ab initio*, or closer to non-contractual restitution, the Representatives' second ground for a proprietary claim in respect of the Barclays Monies, addressed below.

35. For their part the Liquidators argue first that rescission is now too late because the customers have had knowledge of the relevant matters which gave rise to their right to rescind for a number of years (see the witness statements made by Mr Amirfezy dated 3 February 2012 paragraph 14 and by Mr Jones dated 6 February 2012 paragraphs 14 and 33) but failed to rescind; and by delaying their rescission for a number of years, the customers have lost the right to rescind: *Chitty on*

Contracts (31st edition 2014) paragraph 6-132, *Clough v London & North Western Railway* (1871) LR 7 Ex 26, 35.

36. I reject the contention that delay alone, or equitable *laches*, would debar the proprietary claims in this case. The claimants represented under Briggs J's order dated 9 December 2011 have not delayed culpably or to the prejudice of the Liquidators and creditors of the Companies, given the pending criminal proceedings and the adjournments of the present proceedings to allow for their conclusion, as endorsed by the Court. In any event, the Representatives made it clear by the end of 2011 (as supported by the witness statements which I have mentioned) that those customers, and potentially earlier customers if there were convictions for fraudulent trading and the like, were pursuing or wished to pursue proprietary claims and that seems to me to signify a disaffirmation of the contracts sufficient for rescission.

37. More persuasively, the Liquidators next contend that the customers lost the right to rescind and thereby regain title in equity to the sums transferred by them under the contracts, on the Companies' going into administration and/or liquidation. The Representatives point to some old bankruptcy cases (still cited in *Goff & Jones*), namely *Re Eastgate* [1905] 1 KB 465 as followed in *Tilley v Bowman* [1910] 1 KB 745, for the proposition that rescission is available so as to regain equitable title in assets transferred under a voidable contract as against a trustee in bankruptcy after the act of bankruptcy to which his title dates back, and contend that it is available a fortiori against administrators or liquidators who acquire no new title but act only as agents of the transferee company.

38. The primary answer to that, in my judgment, is that the 'equity' to rescind a fraudulently induced contract does not give the innocent party any proprietary rights in property which is transferred pursuant to that contract. The equity to rescind is a personal right against the fraudster. It is established law that a party with an equity to rescind a contract does not have any proprietary interest in property transferred under that contract:

(a) in *Bristol and West Building Society v Mothew* [1998] Ch 1, 22, Millet LJ held that '*The right to rescind for misrepresentation is an equity. Until it is exercised the beneficial interest in any property transferred in reliance on the representation remains vested in the transferee';*

(b) in *Barclays Bank v Boulter* [1999] 1 WLR 1919, 1925 Lord Hoffmann considered the position of a purchaser of a chattel where the vendor's title was vitiated by fraud: '*In such a case the defrauded owner retains no proprietary interest in the chattel…*';

(c) in *Twinsectra v Yardley* [1999] Ll Rep Bank 436, 461 the Court of Appeal noted in relation to a voidable contract: '*The result, so far as third parties are concerned, is that, before rescission, the owner has no proprietary interest in the original property; all he has is the 'mere equity' of his right to set aside the voidable contract. That equity binds volunteers and those taking with notice of the equity, but not purchasers for value without notice'; and*

(d) in *Shalson v Russo* [2005] Ch 281, 323 Rimer J explained that '*Until rescission, the property [transferred under a voidable contract] is vested in the representor;*" and that "*it is no part of the philosophy of the revesting theory that all intermediate transactions occurring prior to the rescission can be undone'*.

39. Thus, further:-

(a) *Chitty* paragraph 6-135 describes the accepted view as being that prior to rescission, a misrepresentee has no proprietary interest in the property transferred to the misrepresentor.

(b) Similarly, *O'Sullivan & Others, The Law of Rescission* (2nd edition 2014) paragraph 16-12 states that: "*it is now settled law that title to property passes at law and in equity under a voidable contract, and that a claim to recover title upon equitable rescission is properly described as an "equity"*

or "mere equity". This is said to not be an interest in that property, or a chose in action, but a personal right to recover title when rescission occurs. The principle is that "before rescission, the owner has no proprietary interest in the original property; all he has is the "mere equity" of his right to set aside the voidable contract".

(c) *Worthington, The Proprietary Consequences of Rescission* RLR 2002 (10) 28, 35-38 regards the English law model as to the consequences of rescission (the '*classical model*') as being that, although once exercised an equity to rescind gives rise to a proprietary interest in property previously transferred under the rescindable contract, prior to its exercise an equity to rescind is a 'mere equity' or personal right as against the counter party to the rescindable contract, and is a '*fragile right*'.

40. Against this, *Re Eastgate* is still cited for the proposition that the equity of rescission may be enforceable even if only exercised after the commencement of the transferee's insolvency: see (a) *Calnan, Proprietary Rights and Insolvency* (2010) paragraphs 4.84, 4.85; (b) *Goode, Principles of Corporate Insolvency Law* (4th edition 2011) paragraph 6.17; and (c) *Goff & Jones* paragraph 40-23. The issue is whether that equity is itself a proprietary right. The brief reasoning in a bankruptcy context, in *Re Eastgate* (which was in any event summarily said to be wrong by Lord Mustill in *Re Goldcorp Exchange* [1995] 1 AC 74, 102-3) did not address this issue explicitly, although it does appear to have been raised in argument by reference to corporate insolvency cases (see 466).

41. In fact, the statutory scheme for corporate insolvency should not necessarily be elided (despite Professor Goode's views) with personal bankruptcy. In *Ayerst v C&K (Construction) Ltd* [1976] AC 167, 177 the House of Lords stated that on liquidation the property and choses in action of a company are held by the liquidator in accordance with the statutory scheme; and *MK Airlines v Katz* [2013] Bus LR 169 confirmed that a similar scheme applies at the date of administration.

42. When a company goes into voluntary liquidation, its property becomes subject to the statutory scheme imposed by the Insolvency Act 1986, to be applied (see section 107) '*in satisfaction of the company's liabilities pari passu and, subject to that… (unless the articles otherwise provide) … distributed among the members according to their rights and interests in the company'*. The provisions of the Insolvency Act apply to all property that is beneficially owned by the company at the date of liquidation: it is only where the property held legally by the company is subject to the present (rather than contingent) *proprietary* rights of a third party that it will fall outside the statutory trusts imposed by the Insolvency Act. (In re *Hull & County Bank* [1880] 15 Ch D 507, cited by the Liquidators, applies to a different aspect of the corporate insolvency, a member's liability to contribute.)

43. The Insolvency Act may, however, operate differently as between a corporate and a personal insolvency, with the consequence that a 'mere equity' might be capable of assertion against the estate of a bankrupt, even though it may not be asserted against the estate of a company in liquidation. Under section 283(5) of the Insolvency Act 1986, a bankrupt's estate expressly remains subject to third party rights, so that the personal equity to rescind may still be exercised.

44. Accordingly, in my judgment, at the time of the Companies going into liquidation therefore, the sums paid by their customers were sums to which the Companies had full legal and beneficial title. The customers' equity to rescind as the result of any fraudulent misrepresentation was a personal right against the Companies, and did not encumber the sums which had been paid by the customers as against the general body of its creditors.

45. Accordingly, the sums in the Barclays accounts paid in by customers were the Companies' property as at the date which they went into administration (on 4 October 2010) and liquidation (on 31 March 2011) and accordingly fall to be dealt with under section 107 of the Insolvency Act for the benefit of all the Companies' creditors. To find otherwise, to the detriment of those creditors, would be contrary not just to accepted law, but to basic contract and property principles under established law.

MONIES AT BARCLAYS - Ground (2) Unconscionable receipt

46. The Representatives' non-contractual restitutionary grounds for constructive trust are based on what they say may seem a 'kitchen-sink' approach comprising several distinct elements namely (a) total failure of consideration and/or known mistake by the payer resulting in (c) unconscionable receipt on the part of the payee. A convenient starting point for summarising the law on some at least of these elements is the decision of Bingham J as he then was in *Neste Oy v Lloyds Bank plc* [1983] 2 Ll Rep 658.

47. In that case shortly after instructions were given for a payment to a shipping agent, the payee resolved to cease trading and at the time the payment was received there was, in all the circumstances, bound to be a total failure of consideration: it was held (at p 666) that '*any reasonable and honest directors of that company (or the actual directors had they known of it) would, I feel sure, have arranged for the repayment of that sum to the plaintiffs without hesitation or delay. It would have seemed little short of sharp practice for [the payee] to take any benefit from the payment and it would have seemed contrary to any notion of fairness that the general body of creditors should profit from the accident of a payment made at a time when there was bound to be a total failure of consideration*.'

48. In the present case, it is said that any reasonable and honest directors of the Companies would not have continued to take orders or payments given that (a) they knew by 23 September 2010 if not long before that they were massively insolvent and at best highly unlikely to honour their obligations and provide consideration for monies received; (b) on 27 September 2010 they were told by insolvency practitioners that they should cease trading, so that the end was looming and only a matter of hours away; and (c) on 29 September 2010 they were told that they should cease trading both by the insolvency practitioners (again) and by their bank, which stopped payments out of the Companies' accounts and told the Companies so.

49. In *Re Farepak Foods & Gifts Ltd (in administration)* [2007] 2 BCLC 1, Mann J (at paragraphs 37 to 44) considered that *Neste Oy* was correctly decided but, having

reviewed other authorities including *Westdeutsche*, was minded to rationalise that decision on the basis of mistake and was also concerned, if that was right, about the circumstances resulting in the mistake arising between (i) payment (or payment instruction) by the payor and (ii) receipt. (The position was complicated by the involvement of agents, to whom payments were made and he did not regard the position as sufficiently clear, either on the law or on the facts, for the purpose of directing any immediate distributions.)

50. *Neste Oy* was also regarded as correctly decided by the Court of Appeal in *Re D & D Wines International Ltd* [2014] EWCA Civ 215 (particularly at paragraph 41): the money would not have been paid to the payee had the payor (a ship owner) been put on notice that its agent, the payee, could not carry out the purpose for which the money was paid. A distinction was drawn between (i) a payment which the payee is entitled to collect, payment having been contractually earned (such as that in *Re Japan Leasing Europe plc* [1999] BPIR (which the Court of Appeal said was wrongly decided) so that receipt was not unconscionable but simply the product of the contractual arrangements into which the parties had entered before insolvency struck; and (ii) a payment which can be regarded as voluntary or essentially gratuitous (not a gift but to meet certain costs and the agency fee, rather than having been contractually earned) such as that in *Neste Oy,* which is held on trust.

51. Leaving aside Mann J's refinement of *Neste Oy* as a case of *mistake* I accept the Liquidators' submission that key to that decision was the fact (see 666/1) that as at the date on which the payment by the ship owner was made, there was '*bound to be'* a total *failure of consideration* on the part of the shipping agent. It was the *inevitability* of the failure of consideration which (as Bingham J found) made retention of the funds unconscionable. In the present case, it was not until Barclays decided to prevent payments being made out of the Barclays accounts that there was or would be an inevitable failure of consideration.

52. For this sub-ground, in my judgment, the fact that the contracts were made in circumstances where the Companies could not honestly assume payment

obligations and/or where a failure of consideration was merely probable, might not be enough. The earlier in time from 29 September 2010 one goes, the more difficult it becomes for the customers to show that it was inevitable that there would be a failure of consideration on the part of the Companies. Indeed, some of the despatch notes for the Completed Order Monies related to contracts made after 20 September and even after 23 September 2010; and there is evidence of contracts made as late as 28 September 2010 being honoured by the Companies.

53. However, as demonstrated in *Re Farepak* there can be overlap between the relevant circumstances for total failure of consideration and mistake and it is clear that a payment made as a result of a mistake may give rise to a proprietary claim by the payor: *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105). (Whilst in *Westdeutsche,* Lord Browne-Wilkinson suggested that the proprietary interest only arises after the recipient has knowledge of the mistaken payment, the Court of Appeal explained unconscionable receipt in *D&D Wines* in terms of the objective situation at the time of receipt, rather than focussing on the payee's subjective knowledge of receipt of the mistaken payment. The approach in *Neste Oy* itself might also not have been restricted to the mind of the payee in relation to the particular payment , given its reference '… *the actual directors had they known of it'*. But this question is not decisive in the present case, where the Companies must have known of the relevant mistakes as I find them.)

54. The Representatives submit (a) that insofar as payments into the Companies' bank accounts were made as result of mistaken belief by customers in the Companies' implied misrepresentations as set out above, regarding their solvency and their ability and prospect of performance, the Companies must have known of such mistakes and the customers have proprietary claims in respect of their payments insofar as traceable in the sums remaining in the Barclays accounts; and (b) that a payment is not properly to be regarded as made in this context, unless and until it is irrevocable. (The Representatives' banking expert Mr Palette deals in his reports with the question of revocation of payments in transit.)

55. The Liquidators submit on the other hand that

(a) the relevant mistake for the purposes of the doctrine must be, as in *Re Farepak* (see paragraph 40) whether the party providing consideration were continuing to trade, and in the present case, the Companies continued to trade until 30 September 2010, so that only customer payments received on or after that date could be subject to a constructive trust as a result of mistake;

(b) the relevant mistake cannot be of any matter which would render the contract voidable for fraudulent misrepresentation for if that were the case, title could never pass under a contract which would be voidable for fraudulent misrepresentation, as the fraudster will almost certainly know that the other party has made a mistake as to the matters which have been misrepresented to it, so would always hold assets received by him under the contract from the other party on constructive trust;

(c) as Mann J held in *Re Farepak* (and see also the application of this decision reported at [2010] BCC 735), in order for there to be an operative mistake, the mistake needs to subsist at both the date of payment and as the date of receipt (In *Neste Oy* Bingham J referred only to the date of receipt, but on the facts of that case – see 662/1 – the date of receipt was the date of payment, as there was no delay in the payment being processed);

(d) whilst Mr Palette's evidence is that BACS payments can be stopped any time before 2pm on the day before payment, the relevant date for payment by the customer must be the date on which the payment was actioned by the customer; and the dates on which cheques which were credited to the Barclays account on or after 30 September 2010, were (i) written and (ii) deposited by the Companies with the bank may be difficult if not impossible to establish.

56. Some of these are powerful arguments to which there was no real rebuttal. Taking them in turn, as regards (a) I see no reason to regard the operative mistake in the

present case, as necessarily being the Companies' final cessation in trade on 30 September 2010, rather than their ability to provide the consideration which ceased on 29 September 2010, as previously discussed.

57. As regards (b), it may be thought initially:

(i) that in general there seems no need to confine the relevant mistake for unconscionable receipt to the question whether the payee, obliged to provide the consideration, is continuing to trade (albeit fraudulently and on borrowed time);

(ii) that the nature and importance of the mistake which might render receipt unconscionable might well relate to the likelihood of reciprocal performance but a misrepresentation or mistake may be fundamental without rending the consideration bound to fail;

(iii) that, as it happened, the present misrepresentations and mistakes went to the strong likelihood that the Companies would cease to perform their contracts (which were throughout part of their fraudulent trading) and provide foreign currency after and in exchange for English currency they received, in the sense that the 'music was bound to stop' sooner or later, and probably sooner once the bank roused itself in the summer of 2010.

58. However, the forensic structure of the arguments in this militates against that solution, because of the intrinsic anomaly, relying on the *same* factual circumstances, of postulating a test for a (regained) proprietary interest resulting from known mistake which is inconsistent with the requirements of both rescission of a voidable contract, and restitution for total failure of consideration.

59. It would be unacceptable in principle and unworkable if the same or closely related matters of factual importance (going to solvency, inability to perform, cessation of performance) the subject of both fraudulent representations inducing a (voidable) contract, and mistake inducing a payment, known to the recipient, were on the

contract analysis to produce one result (against a proprietary interest) but on the restitutionary analysis, produce the opposite result. Unless the contracts were void *ab initio* (which was not argued), the contract analysis should in my judgment take priority, leaving no room for the alternative restitutionary analysis to produce the opposite legal result.

60. So too as regards total failure of consideration and mistake. If the sub-ground based on the former analysis of the same facts produces one result, limited to payments received on or after 29 September 2010, it would be illogical if earlier payments were, analysed as mistaken, nonetheless treated as unconscionably received.

61. However the same reasoning does not apply to support the Liquidators' points (c) and (d). The customers who made payments received after 1.10 pm 29 September 2010 were mistaken as to the Companies' ability to provide consideration later in exchange.

62. Accordingly, I find that there is a constructive trust arising from unconscionable receipt, confined to payments received into the Barclays account after 1.10 pm 29 September 2010, when the Companies stopped paying out money and had to cease their fraudulent trade as they acknowledged they did as of the next day. These are the Barclays Monies as defined by reference to various witness statements under the Order of Briggs J dated 9 December 2011. (I ought to add that left to myself I might have been tempted not to divide 29 September 2010 as before and after 1.10 pm when Barclays stopped any further payments out: the shutters were coming down on that day, which was overdue). Questions of tracing to which this may give rise will have to be dealt with hereafter, as mentioned below.

MONIES AT BARCLAYS - Ground (3) Express trust

63. The Representatives have not only relied on Barclays Bank's alleged knowledge of customers' mistake in making their payments to the Companies towards the end of their (fraudulent) trading – which adds nothing to the previous analysis – but also contended that as agent for the Companies it expressed a trust in respect of monies

received after 1.10 pm on 29 September 2010, not by any written declaration of trust, but by informally manifesting an intention that monies under its and the Companies' control should be held for the benefit of payor-customers.

64. The Representatives rely in particular on paragraph 16 of a witness statement dated 8 June 2011 by Mr Gayle (Barclays' legal counsel) in which he said that '*While it would be going too far to say that it was the Bank's intention to create a trust, the word trust was certainly mentioned and the possibility of a trust being created was considered.*' They submit that the conduct of the bank as the Companies' alleged agent was such that the monies were held available for a particular purpose - return to identified customers - for their benefit, and would not be freely available for the Companies' use.

65. This contention it seems to me is misconceived. The bank was a third party, acting to protect its own position and the opposite of either (a) the Companies' agent, there being no grounds for express or implied or ostensible authority; or (b) an express trustee, the bank saying in terms that it was concerned as to claims, not as to whether it accepted and acted to give effect to them. In *Re Kayford* [1975] 1 WLR 279, on which the Representatives said they would rely, was a case in which it was the *company* which sought to establish a trust, and the only question was whether its actions were sufficient.

COMPLETED ORDER MONIES

66. Separately from monies at Barclays, customers identified as allocated cash in exchange by the Companies, but undespatched to them, claim that legal title therein passed to them before the administration on 4 October 2010. As described in paragraph 32 of the witness statement of Mr Bond dated 30 June 2011, sealed envelopes containing foreign cash and travellers cheques were found at the Companies' counting house awaiting Royal Mail special delivery. Despatch notes wrapped around the bundles identified the customer's name and address, the currency amount and breakdown, and the delivery date, stated as 1 October 2010.

67. The question of when title passes depends on the intention of the parties. The currency contract terms contain no express provision dealing with the passing of title. Both parties however relied on Clause 8, which states among other things:

> *'All orders are despatched using Royal Mail Special Delivery, which guarantees next working day delivery before 1.00pm. A signature will be required on delivery of all orders. Any person at the delivery address can sign for the package.*
>
> *Where the delivery date falls on a Monday, your package will be despatched on the Friday prior as Royal Mail do not collect from the Company on a Saturday/Sunday, therefore you may receive your package on the Saturday prior to your delivery date. This is dependant on the local Royal Mail delivery office's services where the package is being delivered to. In instances where the package does not arrive on the Saturday, your package will be delivered on the Monday you specified on your order. Royal Mail cannot guarantee delivery on a Saturday.*
>
> *It is important that you are present to sign and accept delivery for your order. We cannot accept responsibility for fraudulent acts committed by a third party. We will not be liable for any losses or expenses arising from late or non-delivery. Delivery dates must not be placed 2 working days prior to your departure for your travels….*
>
> *Where delivery is made at customer's request, Crown Currency Exchange can accept no direct responsibly or liability for safe delivery beyond ensuring the secure handover of payment to the chosen delivery address.*
>
> *If the delivery address is to a location with a centralised reception or any kind of multiple occupancy building, be aware that Royal Mail will deliver to the reception or other delivery point only and not to the customer. Therefore, anyone at the reception can sign for and take receipt of the delivery. We are not responsible for deliveries which Royal Mail have obtained a signature for at your delivery address but which you have not received. …*
>
> *Customers must refuse to accept any damaged package delivered by Royal Mail. We will not accept responsibility for damaged packages…. Any losses incurred by you, which are caused as a result of us delivering your order to a delivery address supplied by you in error, will be borne by you."* (emphases variously added by parties)

68. The Representatives argue that:

(a) by the use of the phrase '*your package'* clause 8 treats the cash package as not just the package to be delivered to the customer (as in say 'your order') but as already belonging to the customer prior to despatch;

(b) this is consistent with, and reinforced by, the conduct of the parties: specific cash was allocated to the customer's contract and the Companies did everything within their power to appropriate specific cash to the contract – 'nothing was left outstanding';

(c) the Companies' conduct in this regard was not unilateral or private in nature, since the contract terms expressly contemplated the customer's ownership of the package; and

(d) whilst section 61(1) of the Sale of Goods Act 1979 defines goods so as to exclude money, if its default rules in section 18 were applied, placing the allocated cash in the sealed Royal Mail envelopes was an unconditional appropriation by the seller with the customer's assent or authority under rule 5.

69. Against this, the Liquidators argue:

(a) it is clear as a matter of construction of the terms that title passes from the Companies to the customer not at the date of packaging the sums, but at the date of delivery of the package to the customers;

(b) the packaging of the currency was not an irrevocable action which rendered the currency the subject of the sale and the property of the buyer: it was an allocation but not an appropriation, the packaging of the currencies was preparation for such appropriation: *Carlos Federspiel v Charles Twigg* [1957] 1 Ll Rep 240 at 255. The currency (and travellers cheques) being supplied by the Companies were non-specific goods, and the fact that they

had been allocated to a contract does not mean that they had been appropriated to the same;

(c) the envelopes had not been despatched, and they (and the currency within them) remained entirely within the control of the Companies, to be dealt with as the Companies determined (including not despatching them on 30 September 2010);

(d) it would not be commercially sensible for title to pass to the customers before the goods have been delivered to the customers when they had no control over despatch. Thus if the un-despatched envelopes had been lost or destroyed on the Companies' premises, it would be surprising that the Companies would have a defence to any claim by the customers to perform the contract that they had already done so simply by placing cash in a sealed envelope so that title to the currency had already passed.

70. I have no doubt that in this case, title in the Completed Order Monies did not pass prior to the administration to the customers identified by reason of the Companies' preparing them for despatch, but would have passed only on delivery. The reference in clause 8 to 'your package' did not mean that title passed as soon as a package was assembled under the Companies control prior to despatch; and it would have made no sense for the customers to have been at risk of non-delivery from that time. There was no unconditional appropriation (nor more than preparation towards delivery) nor consent (nor even knowledge) to the same by customers. Clause 8 and the circumstances as a whole make that result, that title did not pass, entirely clear.

71. The Representatives may contend in those circumstances, it now being found that title in the Completed Order Monies did not pass to them, they nonetheless have proprietary claims. It is not clear to me whether those claims would be in respect of the Completed Order Monies or in respect of the Barclays Monies. The Liquidators suggest that tracing is unlikely to be possible given the fund flows

between the Companies' bank accounts and the fact for some of the Completed Order Monies customers, that they placed their orders as early as March 2010.

72. I cannot determine those matters at this stage. However, in case it matters, I reject the Liquidators' objection in principle that by claiming title to the Completed Order Monies those customers unequivocally and irrevocably affirmed their contracts with the Companies in respect of those orders. The customers were entitled to join issue in respect of the Liquidators' declaratory claims regarding title, turning on the historic position, and sought no specific remedy themselves by way of pursuing any title found to have passed to them under the contracts. If title had passed before the administration, it may have been before they had the knowledge and to choice as regards rescission or otherwise. Their other proprietary claims, if any, could be treated as contingent on the answer to the question of passing of legal title.

FURTHER DIRECTIONS

73. In conclusion, for the reasons set out above I find in principle that the Barclays Monies were unconscionably received by the Companies and so held on trust for those customers making payments received after 1.10 pm on 29 September 2010 and reject the other proprietary claims put forward by the Representatives, subject to (a) the consequences of my findings as to legal title to the Completed Order Monies and (b) tracing into the monies still held in the Companies' accounts at Barclays.

74. There is outstanding first, the formalisation of a further representation order (or amendment to that Order of 9 December 2011) in order to bind earlier customers to the Court's decisions on the issues raised by the Liquidators or the Representatives to date or in future. Save for the £1.1 million which was paid in by customers after 1.10 pm on 29 September 2010, the Representatives have not clearly articulated which of the £2.8 million held in the Companies' accounts with Barclays they contend is held on trust for any customers. The parties should draft

and put before the Court such formal order as is required (and complies with the rules) for that purpose.

75. Secondly there may be tracing questions. The Representatives' claim to a proprietary interest in the Barclays Monies (and monies still held in the Barclays account) seem to depend on them identifying that the sums they paid into the relevant account remained there at the start of the administration. Whilst the Liquidators accept that funds paid on and after 30 September 2010 remained in the Barclays' account on 4 October 2010, they say that it is not possible to tell from the bank statements, which are available the time when particular customer's funds were received into the account on 29 September 2010.

76. The Liquidators point to a number of relevant calculations to date, in particular:

(a) of the £2.8 million which was held in the Companies accounts with Barclays on 4 October 2010, some £71,320.66 was held in accounts other that those paid into by the customers: the records available to the Liquidators do not permit them to match these sums to particular transactions by customers;

(b) on 29 September 2010, £620,142 was paid into CHL's main account from the Companies' other accounts; again it is understood that it is not possible to trace the original source of these funds: the liquidators submit that as there is no way for the customers to trace the sums that they paid to the Companies into these amounts, such sums must be part of the Companies' general assets, available for distribution to their creditors generally;

(c) some £11,104.41 of the sums paid in on or after 29 September 2010 are from non-identifiable sources and to the extent that the trust period extends further back from 29 September 2010, there are likely to be other sums where the customers cannot be traced.

77. The parties should formulate and put before the Court proposed directions to address and determine the timetable and any issues which are likely to arise on tracing. The Liquidators have asked how the funds, which were paid in by customers who cannot now be traced, should be dealt with and whether they form part of the Companies' general assets. They have also asked ask the Court to take into account of the potential cost consequences of any directions that it gives as to how any sums found to be held on trust are to be distributed. Mr Bouchier stated in his second statement that the potential costs involved in ascertaining the claims of and distributing to certain classes of customer creditors may result in large proportions of the trust fund being expended in distribution process.

78. In that regard, the Liquidators have already raised the question of whether the so-called rule in *Clayton's case* (1816) 1 Mer 572 to show that funds which were received into the Companies' account on 29 September 2010 remained within the account on 4 October 2010. This may only have mattered if the Court had found that all those customers subject to fraudulent representations from an earlier time, perhaps earlier in 2010 or even before then, had effectively rescinded so as to regain proprietary interests in sums paid. But if the question is still live given my findings against rescission effective in the insolvency, the Liquidators will ask the Court to exercise its discretion not to apply *Clayton's Case*, mentioned in *Barlow Clowes v Vaughan* [1992] 4 All ER 22, 46 since the rule would otherwise result in payment out in full the last customers to pay in, and nothing to the other customers who are victims of the same fraud, which might be unjust, when customers cannot have expected that their funds would be paid out of the Barclays accounts in the order in which they paid them in, rather than allowing all of the customers of the Companies who are creditors to claim a *pari passu* interest in the funds held on trust by the Companies.

79. Thirdly and lastly, the parties should include in their draft order the appropriate declarations following my findings as regards the proprietary claims in the Barclays Monies and title in the Completed Order Monies as above and any submissions as to costs at this stage. Under paragraph 3 of the Order of Briggs J dated 9 December 2011 and paragraphs 3 and 4 of the order of Henderson J dated

29 May 2015, there remain various costs issues following the Court's determination as to what, if any, sums are held on trust by the Companies especially if the general assets of the Companies are not sufficient to meet the Liquidators' general costs.