Neutral Citation Number: [2020] EWHC 3501 (Comm)

Case No: CL-2019-000723

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 18/12/2020

Before :

MR JUSTICE ANDREW BAKER

Between :

(1) VALE SA **Claimants**
(2) VALE HOLDINGS BV
(3) VALE INTERNATIONAL SA
- and -
(1) BENJAMIN STEINMETZ **Defendants**
(2) DAG LARS CRAMER
(3) MARCUS STRUIK
(4) ASHER AVIDAN
(5) JOSEPH TCHELET
(6) DAVID CLARK
(7) BALDA FOUNDATION
(8) NYSCO MANAGEMENT CORPORATION

- -

Sonia Tolaney QC & Christopher Lloyd (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimants**
Paul Stanley QC & Anton Dudnikov (instructed by **Byrne & Partners LLP**) for the **Seventh and Eighth Defendants**
The other Defendants did not appear and were not represented

Hearing date: 8 December 2020

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Approved Judgment

Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 2.00 pm on 18 December 2020.

Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. In this Claim, the claimants allege that a joint venture agreement ("the JVA") dated 30 April 2010, between the first claimant ("Vale") and BSG Resources Ltd ("BSGR"), was procured by fraud. Pursuant to the JVA, BSGR sold 51% of its subsidiary, BSG Resources (Guinea) Ltd, to Vale International Holdings GmbH ("Vale GmbH"), a wholly owned subsidiary of Vale. Part of the price was Initial Consideration of US$500 million, payable by Vale to BSGR. Upon Vale's instructions, the Initial Consideration was in fact paid on 30 April 2010 by the third claimant ("Vale International"), another wholly owned subsidiary of Vale, although exactly what that means as a matter of law may need to be considered a little more carefully. BSG Resources (Guinea) Ltd was renamed VBG-Vale BSGR Ltd ("VBG").

2. A wholly owned subsidiary of VBG, BSG Resources (Guinea) SARL, held mining licences from the Republic of Guinea entitling it to exploit substantial iron ore deposits. BSG Resources (Guinea) SARL was later stripped of those licences by the Government of Guinea, on a claim they had been procured by corrupt means, including bribery. The essence of the fraud alleged is that the mining licences *were*, the claimants say, tainted by bribery and corruption, so as to render dishonestly false various representations they say were made to Vale to the effect, stated broadly, that the licences had been obtained cleanly.

3. The seventh defendant ("Balda") owned the eighth defendant ("Nysco"), which in turn owned BSGR. Balda is a Liechtenstein Foundation, Nysco is a BVI company. The beneficiaries of Balda are the first defendant, Mr Steinmetz, and his family. ('BSGR' stands for 'Beny Steinmetz Group Resources'.)

4. Vale pursued an arbitration against BSGR in London under LCIA Rules, LCIA Arbitration No.142683 ("the LCIA Arbitration"), claiming *inter alia* rescission of the JVA (and of a related shareholders' agreement ("the SHA")), and damages. By their Award dated 4 April 2019 ("the LCIA Award"), the arbitrators (Sir David A R Williams QC, Dr Michael Hwang QC and Prof Filip De Ly (Chairman)) upheld Vale's claim that it had been induced to enter into the JVA by fraud on the part of BSGR. The primary relief granted, together with awards of interest and costs, was as follows:

> "*1005. As a consequence of its finding in paragraph 1004 [viz. that Vale had established its case alleging fraudulent misrepresentation], the Tribunal hereby* ***ORDERS AND AWARDS*** *the following relief:*
>
> *1005.1 The Tribunal hereby rescinds the Framework Agreement [i.e. the JVA] and the SHA on account of fraudulent misrepresentation … .*
>
> *1005.2 The Tribunal orders BSGR to pay forthwith to Vale damages of USD 1,246,580,846 on account of fraudulent misrepresentation … .*"

5. BSGR has paid nothing towards what it owes under the LCIA Award.

6. The claimants now pursue in this court causes of action alleging involvement in the fraud (as alleged) or the receipt of the direct or indirect proceeds of the fraud (as

alleged), including in particular the traceable proceeds of the Initial Consideration payment. In respect of the latter, the claimants make a trust claim, i.e. a proprietary claim asserting that beneficial ownership of assets held by recipients of traceable proceeds of the Initial Consideration payment vested in Vale International, alternatively Vale, upon the rescission of the JVA.

7. Both types of claim are made against Balda and Nysco; and as regards the trust claim they accept that the claimants have a properly arguable case that they each received substantial sums that will be shown to have been derived from the Initial Consideration payment. Balda and Nysco say, however, that the trust claim is unsustainable in law, and by an Application Notice dated 18 May 2020 seek summary judgment dismissing it. One of the motivations for the application appears to be a view that the summary dismissal of the trust claim against Balda and Nysco would have a substantial impact on the factual scope of any trial. It is not as clear to me as that may assume that what proceeds of any fraud Balda and Nysco received, if any, when and why, and what they did with them, when and why, will not be a significant and relevant area of inquiry in the claimants' tort claims against them. But I shall not need to take that any further in this judgment.

8. For present purposes, Balda and Nysco accept that the claimants have a properly arguable case that the JVA was procured by fraud. Their summary judgment application therefore invited it to be assumed that the claimants will establish that case at trial, and I make that assumption. For the avoidance of doubt, but so that I only need say this once, wherever below I refer to 'the fraud' or similar, or set out analysis that depends upon there having been a fraud as alleged by the claimants, its existence is a matter of assumption only in this judgment. I am not asked to and have not reached any conclusion, and I am not making any findings of fact about that at this stage.

Basic Analysis

9. Mr Stanley QC for Balda and Nysco conceded for summary judgment purposes, without prejudice to whether any of this might be challenged at a trial, that other things being equal:

   (i) the fact that the JVA was voidable on the ground of fraud vitiating Vale's consent created, as the case-law has described it, an equity (a "rescission equity") affecting the Initial Consideration payment, such that upon rescission it became impressed with a constructive trust (a "rescission trust");

   (ii) the rescission equity may be asserted against a third party subsequent transferee who is not a *bona fide* purchaser for value without notice ('equity's darling') – it is sometimes referred to as a 'mere equity' to emphasise that it does not prevent full ownership (legal and equitable) being vested in the initial recipient by an asset transfer under a voidable transaction or in subsequent transferees by further transfers prior to rescission that are otherwise apt to transfer such ownership (see, e.g., *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 at [119], *National Crime Agency et al v Robb* [2014] EWHC 4384 (Ch), [2015] Ch 520 at [44]);

(iii) the rescission equity may affect further or different assets than the asset(s) originally transferred under the voidable transaction, subject to tracing rules the detail of which there is no need to rehearse here;

(iv) the above analysis applies in respect of payments by bank transfer, even though strictly they do not involve a transfer of ownership of any kind in any property owned by the payor, but rather the discharge of a debt owed to the payor by its bank and the creation of a debt owed to the payee by its bank, via intermediate 'transfers' in the inter-bank payment system; and

(v) Balda and Nysco were not equity's darlings.

10. Thus – again, other things being equal – if BSGR had, upon receipt of the Initial Consideration payment into a bank account with a nil balance, 'paid it away' to Nysco, i.e. made a payment of US$500 million from that account to an account of Nysco's that was not overdrawn prior to that receipt, and the JVA had then been rescinded before Nysco did anything further 'with the money', then upon rescission Nysco's bank balance, i.e. the debt owed to it by its bank in the amount of that balance, would be impressed with a rescission trust for an amount of US$500 million.

11. Mr Stanley QC averred that the beneficiary of that trust would be Vale even though the Initial Consideration payment was made by Vale International. The claimants' primary case is, rather, that the beneficiary would be Vale International, since it made the payment; their alternative case is that if that is wrong, it must be because Mr Stanley QC's proposition is right so that Vale would be the rescission trust beneficiary.

12. The application for summary judgment, therefore, required Balda and Nysco to persuade the court that other things are not equal, in such a way as to overcome that basic analysis and prevent the rescission trust claim from succeeding, and sufficiently clearly so that the claim can be said to have no real prospect of success at trial. Although the submissions ranged somewhat more widely at times, and a number of interesting points were touched on, Mr Stanley QC's argument boiled down to this, namely that:

(i) Vale International has no claim because the rescission equity was Vale's alone, Vale having been the party to the JVA with the equitable right to have it rescinded;

(ii) Clauses 6.1 to 6.3 of a Share Purchase Deed ("the SPD") dated 13 March 2015 between Vale, BSGR and VBG, by which Vale agreed to procure the sale back by Vale GmbH to BSGR of the 51% stake in VBG for nominal consideration of US$1 deemed by the SPD to have been paid, defeat any rescission trust claim against Balda or Nysco; or

(iii) paragraphs 921 to 922 of the LCIA Award defeat any such rescission trust claim, the arbitrators having there concluded that rescission of the JVA did not entitle Vale to an order that BSGR pay US$500 million to Vale as part of the tribunal's decree of rescission, since the Initial Consideration was paid by Vale International rather than by Vale.

13. I have stated those lines of argument in what might be thought a logical order, and at all events a chronological order, in that the first question (whose equity is it anyway?)

will turn on the original facts as they stood at the end of April 2010, the SPD came in March 2015, and the LCIA Award came last, in April 2019. I prefer however to take them in reverse order. Before doing so, I should add this, namely that Mr Stanley QC acknowledged that the second and third questions ask what is the effect in law of the relevant parts of the SPD and the LCIA Award respectively, so that if he did not persuade me that Balda and Nysco are right on those questions, it would be appropriate to consider whether to go beyond just a dismissal of the summary judgment application and make a final determination that the SPD and LCIA Award respectively do not give Balda or Nysco any defence. I did not understand Ms Tolaney QC for the claimants to resist my doing so.

The LCIA Award

14. So far as material, the relief sought by Vale in the LCIA Arbitration was rescission of the JVA and SHA, and damages. Vale sought, ancillary to any award of rescission of the JVA and SHA, "*restitution of all sums paid and disbursements made to or on behalf of BSGR*", on the basis that BSGR's restitution to Vale of all such amounts would constitute *restitutio in integrum*. One of the payments, the amount of which Vale said BSGR should be ordered to pay to it as a restitutionary remedy consequent upon rescission, was of course the Initial Consideration payment.

15. The LCIA Award granted rescission. It did not order payment to Vale of the amount of the Initial Consideration on a restitutionary basis, but included that amount in the calculation of the damages awarded. That made no difference to the outcome, namely an award requiring payment by BSGR to Vale of just under US$1.25 billion, the full amount of the Initial Consideration having been included in the damages calculation. If the tribunal had reasoned that BSGR was obliged, as a personal restitutionary liability, to pay US$500 million to Vale, they would have had to allow for that in the damages calculation, and the end result would have been the same, an award requiring payment by BSGR to Vale of the same total amount.

16. With respect, I do not see how the arbitrators' analysis can be correct on this particular point; and it seems to me to be internally inconsistent. If the Initial Consideration payment resulted in loss of US$500 million to Vale though it was paid by Vale International – and that must have been the arbitrators' conclusion – then by operation of the now-rescinded JVA, BSGR was unjustly enriched at Vale's expense and a personal restitutionary remedy analysis was straightforwardly available. The payment by Vale International was made, and accepted, as a payment for and on behalf of Vale, else it would not have discharged Vale's obligation to pay the Initial Consideration. In law it was a benefit conferred on BSGR by Vale under the voidable transaction. Why Vale International accepted its parent's instruction to pay that debt on its behalf, and in consequence the nature of any rights and liabilities of Vale and Vale International *inter se* upon the subsequent rescission *ab initio* of the JVA, should be just that, so far as the law of restitution (unjust enrichment) is concerned – a matter between them and nothing to do with BSGR, let alone Balda and Nysco.

17. The internal inconsistency I identify in the LCIA Award is apparent from its treatment of an argument by BSGR that the losses claimed by Vale were not caused by its fraudulent misrepresentations but by the Government of Guinea's cancellation of the mining licences, which BSGR argued would have occurred irrespective of any bribery in obtaining them, or by the slump in the value of iron ore, rendering the joint venture

unprofitable. Rejecting that argument (I would say correctly, with respect), at paragraphs 942 to 944 of the LCIA Award the arbitrators applied a 'reliance loss' analysis, characterising the Initial Consideration payment as expenditure incurred by Vale in reliance on the representations by BSGR they had held were fraudulent.

18. Thus, a restitutionary analysis was rejected (at paragraphs 921 to 922 of the LCIA Award) on the basis that the Initial Consideration payment was not expenditure by Vale; and then damages were awarded in respect of the Initial Consideration payment on the basis (set out in paragraph 944) that it was expenditure by Vale. Moreover, paragraphs 921 to 922 are themselves odd, in that the arbitrators took as their limiting principle (stated in paragraph 921) that "*rescission only envisages the return of benefits which one party transferred to the other party, and does not envisage the return of benefits that one party originally transferred to a third party*" (which may be questionable in itself), but then (in paragraph 922) rejected a restitutionary analysis for the order to pay Vale the amount of the Initial Consideration, not on the basis that it had been transferred to a third party, but because it had been paid to BSGR by Vale International rather than by Vale.

19. It is not obvious how the classification by the arbitrators of the legal basis for their monetary award could affect the creation by operation of law of a rescission trust over BSGR's then current assets, if any, that represented the traceable proceeds of the fraud, no claim or question of proprietary interests consequent upon rescission having been raised or considered, let alone how it could affect the creation by operation of law of a rescission trust over Balda's or Nysco's assets, they not being party to the LCIA Award.

20. Mr Stanley QC argued that although Balda and Nysco are not bound by the LCIA Award, so that (for example) it is open to them to defend this Claim on a denial or refusal to admit that there was a fraud in the first place, the decree of rescission was both a decision determining a dispute between Vale and BSGR and also a legal act with effective consequences that could not be disputed even by third parties. In the way that a final decree of divorce after contested proceedings would mean, as a legal fact, that the marriage had come to an end even while findings made by the court in any judgment, on its way to pronouncing that decree, would not be binding on non-parties, so here the JVA was rescinded by the arbitrators' decree and the LCIA Award therefore establishes, as a legal fact, that on 4 April 2019 the JVA was rescinded *ab initio*, even though non-parties are not bound by the arbitrators' findings on their way to pronouncing that rescission.

21. That argument does not assist Balda and Nysco on this application, however, so I shall not lengthen this judgment by pausing to consider whether it is correct at all, so far as it goes. The flaw in the application is that it seeks to take the argument further than it can go:

    (i) The application seeks to apply that argument not to the legal fact of rescission but to one of its consequences in law considered by the arbitrators as between Vale and BSGR, namely whether BSGR had a personal restitutionary liability in respect of the Initial Consideration.

    (ii) The contention then is that the arbitrators' conclusion on that question (a) somehow binds the claimants as against Balda and Nysco and (b) is inconsistent with the existence of any rescission trust.

(iii) But, as Ms Tolaney QC submitted, the rescission of the JVA is by nature an 'all or nothing' remedy, the JVA was either rescinded or not, and it was sufficient to trigger, by operation of law (not by exercise of arbitral judgment), the rescission trust now relied upon.

(iv) Of course, *as between Vale and BSGR*, if a rescission trust claim had been made and disputed, the arbitrators would have had to decide whether, in their view, the rescission of the JVA indeed triggered such a trust, and go on to consider what, if any, assets of BSGR were traceable proceeds of the Initial Consideration payment so as to be subject to that trust if they decided that it was triggered. Were Vale now to make such a claim against BSGR, there might be argument whether, as a matter of issue estoppel between Vale and BSGR, that claim was open to Vale in the face of paragraphs 921 to 922 of the LCIA Award, or indeed whether it amounted to an abuse of the (arbitral) process on a *Henderson v Henderson* basis not to have brought that claim forward in the LCIA Arbitration that ran for some 5 years and concluded over 1½ years ago.

(v) But none of that would have anything to do with Balda and Nysco. Vale is no more bound, as against them, to accept the view expressed in paragraphs 921 to 922 of the LCIA Award that the Initial Consideration payment was not, in law, the conferring of benefit on BSGR by Vale, than Balda and Nysco are bound, as against Vale, to accept the inconsistent view expressed in paragraph 944 that the Initial Consideration payment was, in law, expenditure incurred by Vale.

22. It is not the case, as Mr Stanley QC submitted in his skeleton argument, that the arbitrators had a jurisdiction "*to decide how far and on what terms the JVA and SHA were rescinded*". That submission was withdrawn in oral argument, having been answered by Ms Tolaney QC in writing thus:

(i) "*As Millett LJ put it in El Ajou* [i.e. *El Ajou v Dollar Land Holdings plc et al.* [1993] 3 All ER 717], *at 734, "… They can rescind the purchases for fraud …; and each can then invoke the assistance of equity to follow property of which he is the equitable owner." That last point is the key error in D7-8's approach. The distinction between rescission and the grant of proprietary relief is an important one, both in principle and practice.* ***In principle****, the 'rescission trust' arises … upon rescission. It is not dependent upon a court 'creating' a trust when it adjudicates upon the claim between the contracting parties. …* ***In practice****, there are any number of reasons why a victim might decide not to seek proprietary remedies against the representor …, or the Court may refuse to make proprietary orders against [him]. … If the victim doesn't pursue or establish a proprietary entitlement to property held by the … representor, it doesn't mean it has no proprietary rights against third parties.*"; and

(ii) "*Rescission is an all-or-nothing remedy. The Tribunal does not decide "how far" to rescind the JVA. The proprietary consequences of rescission of a contract and, in particular, the creation of a 'rescission trust', are automatic.*"

23. I agree with those submissions by Ms Tolaney QC in response. The incorrect proposition in Mr Stanley QC's skeleton argument, as to the nature and extent of the rescission decision, was necessary for there to be an argument for Balda and Nysco that the LCIA Award defeats the rescission trust claim now made against them. There is

therefore no such argument. If (despite the internal inconsistencies to which I have referred) the LCIA Award amounts to or includes a decision about the Initial Consideration that would preclude Vale from pursuing a rescission trust claim against BSGR in respect of assets of its, *ex hypothesi* not any of the assets of Balda or Nysco in respect of which a rescission trust claim is made in these proceedings, that would be an effect in law of the doctrine of *res judicata* applied between Vale and BSGR by reference to the LCIA Award, and not something that determined anything between Vale (let alone Vale International) and Balda or Nysco.

24. It is correct, as Mr Stanley QC submitted, that it is "*the function of a court in which proceedings for rescission are taken to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction ab initio, and, if it is valid, to give effect to it and make appropriate consequential orders*" (*Independent Trustee Services Ltd v GP Noble Trustees Ltd et al* [2012] EWCA Civ 195, [2013] Ch 91, at [55], quoting *Alati v Kruger* (1955) 94 CLR 216 (HCA) at 223). But what this application overlooked, to the extent it was founded on the LCIA Award, is that in the latter respect (giving effect to the rescission and making appropriate consequential orders) self-evidently the court decreeing rescission (here the LCIA arbitration tribunal) deals only with the defendants (respondents) in front of it and their assets (if proprietary claims are made in those same proceedings, asserting a rescission trust).

25. I agree with Mr Stanley QC that there is no basis for supposing that this point on the LCIA Award will be any different at trial than it is now. Or at all events, there is no basis for supposing that, Balda and Nysco having failed to persuade the court at this stage that it is a good point upon which summary judgment should be granted, it might turn out to be a good point after all. Subject to the assistance of counsel as to the precise form in which to grant relief, there should be a declaration that the LCIA Award does not give Balda or Nysco any defence in this Claim and an order striking out appropriate parts of their Defence.

The SPD

26. Since the rescission equity generates a rescission trust only if and when the voidable transaction is rescinded, the loss of the equitable right to rescind can defeat the rescission trust, preventing it from ever being created. The equitable right to rescind can be lost by an election to affirm the voidable transaction. It follows that the representee can by unilateral act prevent any rescission trust from ever arising. He can so communicate, through words said only to or conduct visible only to the representor, as to prevent himself from ever having proprietary claims against third parties, such as in this case Balda and Nysco.

27. A share purchaser who has come to believe that he was induced to purchase by misrepresentations made by or on behalf of his seller, if well advised, will wish to take great care before dealing with the shares. In the present case, there was the significant problem for the Vale group that they had come to consider that the mining licences were or may have been obtained corruptly. Not only did that view found their consequent belief that the JVA had been induced by misrepresentation, it meant they wanted nothing further to do with the BSGR group generally, and VBG in particular. The Vale group therefore had reason to return the 51% shareholding in VBG to BSGR without more ado, rather than only if and when rescission was decreed. Furthermore, the BSGR group was keen, but the Vale group was not, to pursue the Republic of

Guinea through ICSID arbitration in respect of the cancellation of the mining licences. None of these matters, as background against which the SPD was entered into, was materially in dispute.

28. Clause 6 of the SPD, then, was in these terms:

> "***6. CLAIMS BETWEEN VALE AND BSGR***
>
> ***Termination of Agreements***
>
> *6.1 Subject to Clause 6.2 and 6.3, the Vale Investment Agreements [which included the JVA] (and all rights and obligations thereunder, including, for the avoidance of doubt, any rights which are stated as surviving termination) shall terminate with immediate effect upon Completion [i.e. of the sale back by Vale GmbH to BSGR of 51% of VBG]; provided, however, that (as contemplated by Section 6.2) nothing in this Section 6.1 shall be deemed to affect any claims between Vale and BSGR that have been or may be brought in the LCIA Arbitration in relation to events that occurred prior to the Completion Date.*
>
> ***Claims between Vale and BSGR***
>
> *6.2 The provisions of the Vale Exit Agreements [which included the SPD itself] shall not affect, shall be without prejudice to and shall be without restriction on the assertion or prosecution of any claims or counter-claims that have been or may in the future be made in the LCIA Arbitration between Vale and BSGR and in particular, shall not preclude Vale from making any claim in the LCIA Arbitration, including but not limited to any claim based on:*
>
> *(a) the VBG Debt …;*
>
> *(b) the Vale Expenditures; and*
>
> *(c) the payment made by Vale to BSGR pursuant to the Vale Investment Agreements.*
>
> *[It is not necessary for my purposes to explain the VBG Debt or the Vale Expenditures]*
>
> *6.3 For the avoidance of doubt, following Completion: (i) none of the fact or content of the parties' negotiations, nor the transactions contemplated by the Vale Exit Agreements shall be used as a defence (whether by way of an alleged affirmation, waiver, release or otherwise) by BSGR to any claim against BSGR and its Affiliates in the LCIA Arbitration or to bar, limit or affect in any way such claim in the LCIA Arbitration (including, without limitation any claim for damages, rescission or the Vale Investment Agreements or any other claim whatsoever); and (ii) Vale and its Affiliates shall not be entitled to make any claim whatsoever against BSGR and/or any of its Affiliates in respect of the VBG Debt other than as part of the LCIA Arbitration, in which case the reservation of rights set*

> *forth in Clause 6.2 shall be applicable, or based on the terms of the Vale Debt Amendment Agreement.*."

29. The short but sufficient answer to the reliance by Balda and Nysco on those provisions is that they do not arguably purport to limit or exclude Vale's (let alone Vale International's) rights, if any, against them consequent upon the rescission of the JVA, if established in the LCIA Arbitration, the claim for which was acknowledged and agreed not to be touched. Mr Stanley QC may be right to submit that without the qualifications created by Clauses 6.2 and 6.3, the agreement to procure the sale back of the 51% stake in VBG and to terminate the JVA with prospective effect would have affirmed the JVA, releasing any rescission equity and preventing any possible rescission trust affecting *inter alia* Balda and Nysco from ever coming into existence. But with those qualifications, there was no affirmation, release or prevention.

30. There is a particular focus on the LCIA Arbitration in the detailed wording of Clauses 6.2 and 6.3, but that is readily explicable because it had commenced and the parties to it were parties to the SPD. There is no language that says in terms or that can only sensibly be read as meaning that Vale (let alone Vale International) was not to be entitled to sue Balda or Nysco, or any other entity or individual not privy to the SPD, upon claims such as have been brought in this Claim (including claims generated by the rescission of the JVA, if decreed by the arbitrators). Again, it is natural that Clause 6.3 says in particular that Vale's claim for rescission of the JVA *as brought in the LCIA Arbitration* was not to be prejudiced, since that claim had to be brought, and had already been brought, in that forum. Acknowledging that the LCIA Arbitration would be where claims between Vale and BSGR would be determined, including Vale's claim for rescission, and drafting Clauses 6.2 and 6.3 accordingly, says nothing about claims by Vale (or Vale International) against other parties, that were outside the jurisdiction of the LCIA Arbitration.

31. This is a short point on the language of the SPD. Balda and Nysco are in my judgment plainly wrong on it. There is no reason to suppose the position might appear any different after a trial. As with the point taken on the LCIA Award, therefore, in my judgment not only should the summary judgment application be dismissed, so far as it relied on the SPD as giving rise to a clear defence, there should be some appropriate declaration and/or striking out of parts of Balda and Nysco's Defence, so as finally to determine against them that there is no such defence.

Whose Equity Is It Anyway?

32. Balda and Nysco say the rescission equity was Vale's, and that therefore Vale is the beneficiary of any rescission trust, even though the Initial Consideration payment was made by Vale International. There is an echo of the point noted in paragraph 9(iv) above. The essential logic in the claimants' proposition that the beneficiary of the rescission trust is Vale International is that 'its money' was transferred to BSGR pursuant to the JVA, so that if there is a re-vesting of equitable title upon rescission, that should be a re-vesting in Vale International. But Vale International did not, in truth, transfer any title in anything to BSGR (see paragraph 9(iv) above).

33. If the roles in the transaction had been reversed, so that the Vale group had been selling Vale GmbH's stake in VBG to BSGR pursuant to a contract between Vale (not Vale GmbH) and BSGR, meaning that the primary promise by Vale was to procure a share

transfer by its subsidiary, and if Vale was induced to enter into that contract by fraud on the part of BSGR, but Vale GmbH had dealings only with Vale pursuant to which it was content to comply with Vale's request to effect that transfer, what then? The rescission equity would be Vale's, not Vale GmbH's, consisting of its equitable right to rescind the contract pursuant to which the transfer was effected.

34. The question whether the rescission trust that would arise would be in favour of Vale (the party to the contract whose equity justified the rescission), or Vale GmbH (the party whose property was transferred under the now-rescinded contract), seems to be novel. Certainly, no authority on it was cited to me. If the answer would be Vale, not Vale GmbH, then *a fortiori* in the present case Vale, not Vale International, is the beneficiary of any rescission trust. If the answer would be Vale GmbH, then it would need to be decided whether it made a difference that in the present case the 'transfer' was a 'cash' payment (bank transfer) that, strictly speaking, involved no transfer of ownership interests at all. Equity's willingness, else there would never be tracing through bank accounts at all, not to speak so strictly in this context, suggests to me that it is properly arguable that that should not make a difference.

35. The basic, novel question of law arising generalises to this: if a contract between A and B obliging B to procure a transfer of property by C to A is rescinded at the instance of B because it was induced to enter into the contract by a misrepresentation by A, and A has in the meantime transferred the property to D who is not equity's darling, does D hold the property on trust for B or on trust for C? Mr Stanley QC's argument was that D would hold the property on trust for B, his logic being that C was not party to the voidable contract, *therefore* C had no rescission equity, *therefore* C had no equity capable of binding any third party.

36. Ms Tolaney QC argued that the third step in that logic is a *non sequitur*, and as a matter of first principle I agree. That is to say, there is no *a priori* reason why the fact that it is B's equitable right, not C's, to have the voidable contract rescinded, has to mean that the exercise of the right creates equitable interests only in B, not in C. Why in principle, it might be asked, should B's unilateral act of disaffirmation, once validated, not have the same effect as a unilateral declaration of trust by B, in the circumstances posited? That issue arising as a substantial question to address does not mean that Mr Stanley QC's conclusion, that B would be the beneficiary of the rescission trust, is necessarily wrong; but it means that rather more work is needed to show why it is right than merely pointing to the fact that the rescission equity was B's rather than C's.

37. Mr Stanley QC also emphasised that this is not a question about remedies for fraud. Fraud is neither necessary (doubly so) nor sufficient. It is not sufficient in that procuring by fraud the conclusion of a contract, and thereby the making of a payment or the transfer of some asset, does not without more result in any trust over the proceeds as received or the asset as transferred. It is not necessary, firstly, in that a rescission trust, other things being equal, also arises upon rescission of a voidable transaction on the ground of non-fraudulent misrepresentation and, secondly, in that the third party subsequent recipient or transferee of proceeds or assets derived from the initial payment or transfer need not have been in any way complicit in any fraud (if there was one) to have the trust imposed on his relevant assets.

38. This emphasis was not only to temper Ms Tolaney QC's enthusiasm for stressing that the claimants, it was to be assumed for present purposes, were the victims of a huge

fraud. It was also to caution that in considering whether Vale International (rather than Vale) obtained any proprietary claim, it would be wrong to be specially influenced by the fact that this was a fraud case. Mr Stanley QC suggested that the answer to my question, 'B or C?', had to have careful regard to the legitimate interests of third party transferees whose relevant liability turned on their not being equity's darlings rather than on any question of complicity in the original fraud. I can agree with all of that, so far as it goes, but I do not see that it creates any particular incentive for the law to answer the question in favour of B rather than C. Either way, the existence of the trust can depend, doubly so, on events and circumstances remote from D – the original transaction and the misrepresentations inducing it, and the later discovery by B that it had been misled and its decision, communicated to A, to disown the transaction as a result. Realistically, D cannot be confronted with the possibility of having a liability as trustee without being told enough about why for a question whether such liability was owed to C rather than B to arise, if on the facts it could arise; and the law has long managed to deal entirely satisfactorily with situations in which there is or may be a dispute over the beneficiary of some obligation asserted against a defendant. At least as I presently see it, therefore, the need to be careful not to take too far the desire to give effective remedies to the victims of fraud does not have anything to say on whether the rescission trust beneficiary should be B or C.

39. Meanwhile, Ms Tolaney QC's affirmative argument for C being the rescission trust beneficiary was that:

(i) It would be contrary to the policy of equity if no proprietary claim could be made because the contracting parties chose to contract for the transfer of property directly to one of them by a subsidiary of the other rather than requiring the subsidiary first to transfer the property to its parent merely so it could then be transferred on.

BUT that wrongly assumes that Mr Stanley QC's relevant argument denied the existence of any trust. In the present case, of course Balda and Nysco's argument *as a whole* sought to deny the existence of any trust, but that is a different point, arising because the argument as a whole operated in two stages: (a) any trust would be in favour of Vale; (b) Vale is defeated, on the specific facts of the present case, by the SPD and/or the LCIA Award.

(ii) *Sanctuary Housing Association v Baker* (1997) 30 HLR 809 (CA), an authority on which Mr Stanley QC relied, is authority only for the proposition that a stranger to a voidable contract cannot rescind the contract, and not for the proposition that if the contract is rescinded, a third party who transferred property (or made a payment) at the request of a party to the contract, so as to discharge that party's obligation to the other party to the contract, does not acquire the equitable title that vests under the rescission trust.

BUT though Ms Tolaney QC is right about that (indeed, I did not understand Mr Stanley QC to contend otherwise), that says only that the *Sanctuary Housing Association* case is not against her argument, it does not explain why that argument is correct or mean that the case is authority for it.

(iii) The voidable contract induced C to part with its property; it is therefore logical that any equitable title created by the avoidance of the contract should be vested in C.

BUT a little like Ms Tolaney QC's response of *non sequitur* to the logic put forward by Mr Stanley QC, I do not think it can be said that *has* to be the result adopted by the law. There is some use in the case law of the language of 're-vesting', and it may be said that in the situation now posited that more naturally points to C rather than B as the rescission trust beneficiary. But then, *ex hypothesi* given that the present question is novel, the use of the language of 're-vesting' will not have related to the situation now posited but to facts in which B and C were the same individual or entity. So it may not indicate even an *obiter* view as regards the case now at hand.

40. This being a summary judgment application only, and the arguments founded upon the LCIA Award and the SPD having failed, to my mind what matters is that *prima facie* a rescission trust did arise in respect of the traceable proceeds of BSGR's receipt of the Initial Consideration, in favour of either Vale or Vale International. Balda and Nysco's argument that Vale International was not the beneficiary would not avoid any liability, it would only determine to which of two claimants, one a wholly owned subsidiary of the other, the liability was owed. It will have no impact that I can identify on the nature, scope or burden of the pre-trial processes required to get the case ready for trial if I leave it to the trial to determine, if it then arises on the facts found, the question of which claimant is entitled to any relevant judgment founded upon the rescission trust claim. I suspect the point was taken now, as part of this summary judgment application, only because Balda and Nysco wished to say that Vale's rescission trust claim failed for other reasons (i.e. because of the SPD or the LCIA Award) that, if they worked for Balda and Nysco against Vale, nonetheless might not have worked against Vale International. Challenging outright whether Vale International could ever be the rescission trust beneficiary was only a means of seeking to ensure that the summary judgment arguments on the SPD and the LCIA Award were capable of being dispositive.

41. I am not comfortable that this hearing was the occasion, or that the arguments were adequately developed, to attempt to answer, on assumed facts, a novel and important point of law of general application. If I could identify some practical utility to deciding the point now, that might make it a finer judgment whether to do so, depending on the nature of that practical utility and therefore the magnitude of the benefit to be gained by grasping the nettle. As it is, in my judgment there is no practical reason why Balda and Nysco need to know now whether, if they hold assets on trust, they do so for Vale International rather than for Vale as beneficiary. It seems to me that there is room sensibly to argue for either conclusion, therefore Vale International has a real prospect of succeeding at trial, and that it is better to leave to trial a final decision on the point, if it then arises, by reference to the final and definitive set of facts that shall then have been established.

Conclusion

42. For the reasons set out above, the summary judgment application fails and is dismissed, and with counsel's assistance as to the precise form of order to make there will be final

relief giving effect to the conclusion that neither the SPD nor the LCIA Award affords Balda or Nysco any defence to the rescission trust claim herein.