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Whose money is it anyway? - A whistle stop tour of proprietary trusts in fraud

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Introduction

It is often said that 'fraud unravels all'. English law certainly allows a party who is induced to enter into a contract by a fraudulent misrepresentation to rescind the agreement and claim damages for the loss suffered as a result of the fraud. Where a contract is rescinded, the innocent party has a further remedy, in addition to a claim for damages. As a matter of principle, the innocent party is entitled to bring a proprietary trust claim to recover payments made or assets transferred under the fraudulent agreement. It should be noted that fraudsters tend not to keep their ill-gotten gains within easy reach of their victims. Monies may be transferred to other companies under their apparent control. The innocent party may seek to bring a personal claim against such third parties, on the basis that they committed an equitable wrong such as 'knowing receipt' or 'dishonest assistance'. But it is also open to a victim of fraud to bring a proprietary trust claim against third parties who have received monies or assets from the fraudster. This article considers that remedy.

The decision in *Vale* v *Steinmetz*

In *Vale SA* v *Steinmetz* [2020] EWHC 3501, the Commercial Court looked at a proprietary trust claim against third parties, arising out of a sale of valuable mining rights that had been acquired by bribery.

The claimants were companies in the Brazilian Vale mining group, the world's second largest mining concern. They had secured an LCIA arbitration award setting aside a share purchase and joint venture agreement on the basis of fraudulent misrepresentation. The arbitrators found that Vale had been misled into acquiring the mining rights by assurances that the relevant licenses had been obtained legitimately.

The LCIA tribunal awarded Vale damages of US$ 1.25 billion. In the Commercial Court, Vale sought to recover an initial payment of US$ 500 million it had made to the (dishonest) seller in the acquisition before learning of the bribes. However, the seller had already paid these monies on to its parent companies, and it was those companies up the chain that Vale was claiming against in the Commercial Court.

Vale was met by a bold defence. The parent companies sought summary judgment asserting that they could rely on a defect in the arbitrator's reasoning to defeat any proprietary claim by Vale, even though they had not themselves been a party to the arbitration. The parent companies also alleged that, following rescission of the agreement, Vale could not claim a trust over the initial consideration because that money had belonged to one of its subsidiaries. The second point, whether a claimant can assert a rescission trust over property belonging to a third party but transferred to a fraudster at the claimant's direction, has yet to be decided by an English court.

The billion dollar mountain

The dispute leading to the LCIA award arose out of the acquisition by Vale of a company holding mining licences issued by the Republic of Guinea for iron ore deposits in the Simandou area, located in a mountainous region in southern Guinea. Simandou holds one of the largest iron ore deposits in the world – it is sometimes referred to as the billion dollar mountain. However, exploration of these vast resources has proven to be slow and marred by allegations of corruption. Rio Tinto previously held a substantial concession for Simandou. In 2008, Rio Tinto was stripped of its rights to the northern Simandou blocks by an executive decree issued by the then President of Guinea, Lansana Conté, an ex-army general who ruled Guinea for 24 years until his death in late 2008, without any true democratic elections being held.

The Lansana Conté administration awarded Rio Tinto's Simandou mining rights to a company called BSG Resources (Guinea) Limited ("**BSG Guinea**"). 'BSG' stands for 'Beny Steinmetz Group': Mr Steinmetz is a businessman and a billionaire who has made most of his fortune in diamond mining. According to media reports, when acquiring the interest in Simandou, BSG pledged to invest US$ 165 million for the development of mining operations. The Guinean Government of the day was untroubled by the fact that BSG's experience in mining related to diamonds and not iron ore and it also hugely undervalued the rights that it gave to BSG.

BSG almost immediately decided to sell half of the mining rights. Vale agreed to pay a total of US$ 2.5 billion for 51% of the northern Simandou concession – about 3,000 per cent more than the amount pledged by BSG as an investment. In April 2010, Vale SA entered into a sale and purchase and joint venture agreement with BSG Resources Limited ("**BSG**"). BSG was a holding company in Mr Steinmetz's group. Under the joint venture agreement, BSG sold the Vale group 51% of BSG's shares in its subsidiary BSG Guinea (the corporate vehicle holding the mining right). The shares in BSG Guinea were transferred to another Vale group subsidiary. The purchase price included an initial consideration of US$ 500 million. That sum was duly paid. On 30 April 2010, Vale SA instructed a subsidiary company, Vale International Holdings GmbH, to make that payment to BSG as the seller.

Corruption and clandestine coffee shop meetings

By then, democracy had returned to Guinea. Under the new President, Alpha Condé, a number of past mining deals – including BSG's – were investigated by a specially appointed anti-corruption committee. In October 2012, the Guinean committee put allegations of bribery to BSG, who denied them. The Simandou project also attracted the attention of the prosecutorial authorities in the United States. In 2013, the US Department of Justice commenced a grand jury investigation under the Foreign Corrupt Practices Act ("**FCPA**") in relation to BSG's activities in Guinea. Those criminal proceedings led to the arrest and subsequent conviction of Frederic Cilins. The Department of Justice considered that M. Cilins had acted as agent for BSG in Guinea and had been involved in the payment of bribes to one of the four wives of President Lansana Conté, thus enabling BSG to obtain the Simandou licenses at a knock-down cost.

In April 2013, M. Cilins was arrested at Jacksonville airport in Florida following a meeting at a coffee shop. It is not known what coffee he ordered. The person he had been meeting there was Mamadie Touré, the youngest wife of Lansana Conté. During her late husband's presidency, Ms Touré was from time to time approached by counterparties who wished to ensure that their project received 'presidential attention'. Following her husband's death, Ms Touré moved to Florida, but she remained on the Department of Justice's radar in the FCPA probe.

Unbeknownst to M. Cilins, Ms Touré agreed to co-operate with the investigation into BSG and the award of the Simandou mining rights. When she sat down for a coffee with M. Cilins (it could have been a cappuccino), she was wearing a wire. M. Cilins was recorded as insisting that Ms Touré destroy documents that would be incriminating in the FCPA investigation. To ensure that there was no misunderstanding, M. Cilins told Ms Touré that "*we need to destroy* … *everything, everything, everything*" and that this had to be done "… *urgently, urgently, urgently*." As an added incentive, M. Cilins offered to pay her US$ 6 million to get on with the shredding. It transpired that the documents which M. Cilins wanted to see destroyed showed BSG paying bribes to Ms Touré herself (allegedly at least US$ 8.5 million), in return for which she would 'pull strings' and ensure that the newly-expropriated Simandou rights would go to BSG. Media reports suggest that among these papers were contracts that detailed precisely what would be done in return for the bribe. Perhaps unsurprisingly, once confronted with the recording, M. Cilins subsequently pleaded guilty to obstructing a federal investigation. He was sentenced to 24 months in prison.

As the Guinean investigation began to cast doubt on the legitimacy of BSG's licenses and following the arrest of M. Cilins, Vale suspended any further payments to BSG under the sale and purchase agreement. In April 2014, the Guinean anti-corruption committee published its findings. It concluded that BSG had unlawfully obtained the mining rights through bribery and corruption. The Republic of Guinea then stripped BSG of these rights.

Legal proceedings in multiple jurisdictions followed. Rio Tinto filed a claim in the US, asserting that BSG and Vale had conspired with corrupt elements in the previous Guinean government to obtain Rio Tinto's Simandou rights. BSG commenced an investment treaty arbitration against Guinea, asserting that the anti-corruption probe was in fact a breach of Guinea's treaty obligations under public international law to protect BSG's investment. Lastly, Vale commenced the LCIA arbitration against BSG. The Vale claimants asserted that BSG had induced them to enter into the joint venture agreement through fraudulent misrepresentations and warranties, to the effect that the Simandou mining rights had been properly and lawfully obtained.

Vale pursues BSG

The arbitral tribunal found that BSG had made false statements leading Vale to believe that the licenses had been obtained cleanly, and that this induced Vale to enter into the contract. By an award dated 4 April 2019, the arbitrators found that the contract had been properly rescinded by Vale. They awarded damages for fraudulent misrepresentation in the total sum of US$ 1.25 billion, an amount which included the initial consideration of US$ 500 million that the Vale group had paid in April 2010.

BSG failed to pay anything towards settling the LCIA award and subsequently went into administration. Vale took a number of steps in the English courts to enforce the LCIA award, including obtaining freezing orders. Vale also launched the Commercial Court claim against the parent companies of BSG, Balda Foundation ("**Balda**"), a Liechtenstein foundation, and Nysco Management Corporation ("**Nysco**"), a BVI company (as well as claiming against Mr Steinmetz personally, together with certain other individuals that Vale considered were connected with the fraud). Before Andrew Baker J, both sides relied on the LCIA award, and Balda and Nysco argued that Vale could not bring a proprietary claim for essentially someone else's money. Before turning to what the judge decided, it is helpful to consider the equitable principles that he had to apply.

The principles governing rescission trusts

It seems eminently just that the innocent party should be able to reclaim any of its property that was transferred away under a fraudulent scheme. Equity will lend its hand and create a constructive trust over such assets. Under such a trust, the innocent party retains beneficial ownership of the assets even though legal title may have passed to the fraudster. However, as will be seen, the victim's right to claim beneficial ownership can be lost, and the constructive trust does not come into existence immediately upon the occurrence of the fraud.

When does the trust arise?

At one point, the House of Lords had lent some support to the proposition that stolen property immediately became the subject of a constructive trust in favour of the fraud victim. In *Westdeutsche Landesbank Girozentrale* v *Islington London Borough Council* [1996] AC 669, Lord Browne-Wilkinson discussed the legal consequences of a theft on title to stolen goods by using the example of a stolen bag of coins:

"*The argument for a resulting trust was said to be supported by the case of a thief who steals a bag of coins. At law those coins remain traceable only so long as they are kept separate: as soon as they are mixed with other coins or paid into a mixed bank account they cease to be traceable at law. Can it really be the case, it is asked, that in such circumstances the thief cannot be required to disgorge the property which, in equity, represents the stolen coins? Moneys can only be traced in equity if there has at some stage been a breach of fiduciary duty, i.e. if either before the theft there was an equitable proprietary interest (eg. the coins were stolen trust moneys) or such interest arises under a resulting trust at the time of the theft or the mixing of the moneys. Therefore, it is said, a resulting trust must arise either at the time of the theft or when the moneys are subsequently mixed. Unless this is the law, there will be no right to recover the assets representing the stolen moneys once the moneys have become mixed.*

I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises – under a constructive, not a resulting, trust."

For present purposes, the (fine) distinction between a constructive and a resulting trust referred to by Lord Browne-Wilkinson does not matter overmuch, but the timing of when such a trust arises does matter: if a trust is created immediately at the time of the wrongdoing, the victim is in a better position. This is because the right of rescission can be lost by the innocent party affirming the fraudulent contract.

Don't lose the right to rescind by affirming the contract

A contract is rescinded when the innocent party makes it clear that it does not consider itself bound by the agreement. This can be done by writing to the counterparty, or by commencing legal proceedings. But even in cases of fraud, the innocent party can lose the right to rescind the contract. In *Motortrak Ltd* v *FCA Australia Pty Ltd* [2018] EWHC 990, the Commercial Court noted that:

"*… where a right of rescission exists, it will be lost if the person entitled to rescind elects to waive that right and affirm the contract after the material facts conferring the right have come to their notice … Examples are where, with full knowledge of a fraud upon him, a person nevertheless takes a benefit under a contract or claims damages for its breach* [i.e. damages because the fraudulent contract is not performed according to its terms – but not damages for losses caused by the fraud]*. Both the facts which gave rise to the right of rescission and the existence of that right must be fully known to the entitled party before they can be considered to have waived the right. Affirmation requires express words or unequivocal conduct, but an intention to affirm is not required.*"

In *Motortrak*, the innocent party chose to adopt a 'business as usual' approach and continued with a contract which it knew had been procured by bribes, and which it could have rescinded, because it wanted to prevent disruption to its business. The Commercial Court found that by continuing with the contract for commercial reasons, the innocent party had affirmed it.

Rescind first, claim a trust later

In *Shalson* v *Russo* [2003] EWHC 1637 (Ch), the High Court considered the question of when a trust arises in a case of banking fraud. Counsel for the innocent party argued that since the fraudster in that case had practiced lie after lie and had deliberately swindled the victim out of his money, the fraudster's conscience was affected from the very moment he received the monies. It was argued that since equity operates on the conscience of a party, a binding constructive trust arose immediately in favour of the victim. In advancing this proposition, the claimant relied on Lord Browne-Wilkinson's statements in *Westdeutsche Landesbank*.

Rimer J disagreed with that approach. He concluded that even extreme cases had to be decided based on ordinary principles. Those principles did not, he felt, support the creation of an immediate constructive trust. The victim had been induced by fraudulent misrepresentations to agree disadvantageous contracts, and had then parted with his money under those agreements. On ordinary principles, such contracts are voidable, rather than being void automatically (or 'ab initio'). Contracts induced by fraud do pass title to property and give rise to enforceable obligations. They can - and must - be rescinded by the innocent party: only then will their consequences be undone if that is still possible applying the rules relating to rescission (itself an equitable remedy). Rimer J illustrated the legal position by using a different example:

> "*A typical case of a voidable contract induced by deceit is one in which C overpays for a house as the result of a fraudulent misrepresentation by D as to its physical condition. In such a case, when C pays over the purchase price he intends D to become the legal and beneficial owner of it, as D does; and D has a like intention in relation to the house when he assures it to C on completion. The contract remains voidable despite completion; but until it is avoided those respective beneficial entitlements to price and house remain the same.*"

If it were otherwise, and a constructive trust arose immediately on completion, then (in this example) D would become trustee of the purchase monies for C, and C would become a trustee of the house for D – as C cannot be entitled to both the price and the house. That was both counterintuitive and, the judge felt, wrong in law and equity.

Equity's darling

As Rimer J noted, the position had in fact seemed settled one hundred years ago, when the Court of Appeal decided the case of *Banque Belge pour l'Etranger* v *Hambrouck* [1921] 1 KB 321. M. Hambrouck was a fraudulent clerk employed by the claimant bank. He forged cheques enabling him to withdraw £6,000 (then a considerable sum) out of his employer's bank account, and pay it into his own account with a different bank. He then withdrew all the money and gave it to his mistress, Mlle. Spanoghe (who gave no consideration). Mlle. Spanoghe in turn paid the money into her own account with a third bank. The Court of Appeal held that the claimant was able to trace its money into Mlle. Spanoghe's account, because she – while evidently having the fraudster's affection – was not equity's darling, having simply been given the stolen monies. The Court of Appeal held:

> "… *that in the case of a voidable transaction a property interest only revests in the victim of fraud when the transaction is rescinded. Prior to that event, the victim's power to rescind constitutes a "mere equity"*".

Upon rescission, the innocent party may therefore re-acquire the beneficial ownership to any property that may have passed under the fraudulent contract before it was rescinded. That beneficial ownership is sufficient to trace the proceeds of the property into the hands of anyone else who may subsequently have acquired it – with the exclusion of a bona fide purchaser for value without notice of the innocent party's rights, usually referred to as 'equity's darling'.

In gold we trust (or not!)

These equitable principles have given much food for judicial and academic thought. While Lord Browne-Wilkinson in *Westdeutsche Landesbank* seemed to be willing to create an immediate trust, thus further assisting the innocent party, the Privy Council's decision *In re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 then seemed to veer the other way.

This case arose out of the collapse of Goldcorp Exchange, a gold and precious metals trading business whose customers had bought bullion which, according to the company's promotional literature, would be carefully allocated to them and kept safe pending delivery. When Goldcorp Exchange fell into financial difficulties, it transpired that the company's actual stock of bullion was woefully inadequate to satisfy all the claims by customers who had already paid over the price, yet received nothing. To make matters worse for the customers, the Bank of New Zealand, a secured creditor of the company, exercised its rights under floating charge, thereby securing a debt far greater than the entire value of Goldcorp Exchange's remaining bullion through the charge once crystallised. This led the customers to assert a number of proprietary claims in court, namely that they had title to some of the company's bullion even before any of it was specifically acquired for, or allocated to, them, or that they had trust claims to the company's general assets. None of these claims succeeded on the terms of the sales contracts or on the facts.

The claimant customers tried another argument, because they had also paid the purchase price to the company. Before the Privy Council, they argued (in the alternative) that they had retained a proprietary interest in those monies, because they had effectively been misled by the company as to how it would run its business. They were thus entitled to rescind the contracts and claim a trust over the purchase price.

Lord Mustill noted that there had been no such rescission. Instead, throughout the litigation, the customers had in fact affirmed and relied on the sales contracts, by positively arguing that these agreements conferred on them title to some of the bullion. That was inconsistent with a claim for rescission. The customers could not change tack halfway through the litigation and claim rescission instead. The remedy of rescission would, as Lord Mustill said, in any event have "… *come too late to affect the secured rights of the bank under its previously crystallised floating charge*." In the case of affirmation or rescission, it is not possible for claimants to sit on the fence indefinitely, throughout litigation, and then argue in the alternative.

Lord Mustill then went on to suggest that even if there had been rescission, the customers might not have had a proprietary claim at all:

> "… *whilst it is convenient to speak of the customers "getting their money back" this expression is misleading. Upon payment by the customers the purchase moneys became, and rescission or no rescission remained, the unencumbered property of the company. What the customers would recover on rescission would not be "their" money but an equivalent sum. Leaving aside for the moment the creation by the court of a new remedial proprietary right, to which totally different considerations would apply, the claimants would have to contend that in every case where a purchaser is misled into buying goods he is automatically entitled upon rescinding the contract to a proprietary right superior to those of all the vendor's other creditors, exercisable against the whole of the vendor's assets. It is not surprising that no authority could be cited for such an extreme proposition.*"

Proprietary rights following rescission reaffirmed

In *Shalson* v *Russo*, Rimer J considered that Lord Mustill's comments did not truly change the position. In his view, a proprietary right did come into existence when a contract was rescinded for misrepresentation. He considered that any statements to the contrary would have been merely *obiter*, as there had been no rescission of any of the sales contracts in *Re Goldcorp Exchange*. Rimer J also noted that, on the facts of *Goldcorp*, the purchase price would have fallen under the bank's floating charge immediately upon the company receiving the monies. Once that charge crystallised, the bank would be in the same position as a *bona fide* purchaser for value of all of the company's assets. Title acquired by the bank over the purchase monies held by the company, following enforcement of the bank's security, could not be undone by any subsequent rescission. Lord Mustill had not, Rimer J found, been advocating a curtailment of proprietary rights arising after rescission. It follows, however, that by rescinding the contract before a secured creditor enforced their security, a claimant could defeat any floating charge and recover its property ahead of a secured creditor:

> "*Such a* [proprietary] *claim would not involve giving* [the claimant] *any preferential rights over creditors, it would merely assert his right to recover property in which* [the secured creditor] *can have no interest.*"

That is another reason why timing matters: a claimant might not know what secured creditors there might be, and the sooner the contract is rescinded, the sooner the property that the claimant wishes to recover cease to be part of the general assets of the recipient.

Fraud unravels all - and so does supervening fraud

Rimer J's decision was followed by the High Court in *National Crime Agency* v *Robb* [2014] EWHC 4384 (Ch), a decision of the Chancellor, Sir Terence Etherton. The defendant had a long criminal track record. In 1997, he stood trial at Teesside Crown Court in connection with drugs charges. During the trial, he fled the country to the Turkish Republic of Northern Cyprus, which had no extradition arrangements with the United Kingdom. Mr Robb then set up a property development business for which he solicited investors. The monies invested into Mr Robb's 'fund' were, he asserted, to be used to fund the construction of major residential projects in Northern Cyprus, allegedly comprising more than 300 private residences. He obtained more than £3 million from over 150 investors before starting to make substantial withdrawals from the fund to his own private bank account in Thailand. Eventually, Mr Robb was repatriated into the criminal justice system in the United Kingdom, and the National Crime Agency pursued him for civil recovery under the Proceeds of Crime Act 2002.

The Chancellor followed the analysis adopted in *Bank Belge* v *Hambrouck* and *Shalson* v *Russo*. He concluded that the victim's power to rescind a fraudulent contract was a 'mere equity' until such time as it was exercised. He then turned to a new point that had not yet been decided: he considered whether victims of fraud who transferred monies over under contracts that were valid, and not tainted by dishonesty, but who were subsequently defrauded, could also benefit from this equity and bring a proprietary claim at that later stage. The Chancellor decided that this remedy ought to be available in cases of supervening fraud, too:

> "*… fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that fraud unravels all: fraus omnia corrumpit. It also reflects the practical basis of commercial intercourse. Once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever'. …*
>
> *I consider that there are good policy reasons for enabling a victim of fraud, which supervenes in a transaction, to set aside the transaction so as to pursue a proprietary claim even though that will have priority over other unsecured creditors of the fraudster or of any other person who has received traceable proceeds.*"

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Bars to rescission

In *National Crime Agency* v *Robb*, Sir Terence Etherton also identified the main circumstances in which rescission would not be granted, noting that these were more likely to arise in a case of supervening fraud. Rescission, being an equitable remedy, is not available where:

- it would prejudice the interests of innocent third parties;
- it is not possible to return the parties substantially to the position they were in at the outset; and
- a constructive trust cannot arise following rescission where it is impossible to identify the property transferred, or its proceeds, in the hands of the wrongdoer.

The decision of the Commercial Court in *Vale* v *Steinmetz*

In line with these principles, in Vale's claim against BSG's parent companies Balda and Nysco, Andrew Baker J proceeded on the basis that the joint venture agreement between Vale and BSG was voidable because fraud had vitiated Vale's consent, such that upon a rescission of that contract, Vale could assert the so-called equity of rescission against third parties who were not equity's darling, and bring a proprietary claim for assets that had been transferred pursuant to that contract.

Vale sought to recover the initial payment of US$ 500 million, made at Vale's direction by its subsidiary, Vale International Holdings GmbH, to BSG, from Balda and/or Nysco who were said to have received it from BSG as the initial payee (and who were not equity's darling since they had given nothing in return). Faced with this claim, Balda and Nysco went on the offensive. They applied for summary judgment in their favour on the proprietary claim. Ultimately, the Commercial Court refused to grant summary judgment. In order to reach that conclusion, Andrew Baker J had to consider a number of issues.

Did the LCIA award preclude Vale's proprietary claim?

As a preliminary point, the Commercial Court had to decide the effect on the parties of the LCIA arbitration award. The award declared that Vale had a right to rescind the agreement, but it also contained certain findings about Vale's entitlement. Balda and Nysco advanced an argument arising from (as the Commercial Court noted) internally inconsistent reasoning by the arbitral tribunal. The arbitrators had found that Vale was not entitled to recover the US$ 500 million on a restitutionary basis, because the payment had in fact been made by its subsidiary: they found that this money was not expenditure incurred by Vale itself. The tribunal then nevertheless included that same US$ 500 million in Vale's damages, which presupposed that this was loss suffered by Vale (not the subsidiary). The Commercial Court considered that the tribunal's reasoning was flawed:

> "*… 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, [BSG] 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 [BSG] by Vale under the voidable transaction.*"

Balda and Nysco sought to rely on that flawed reasoning by the tribunal. They argued that the LCIA award, by establishing that Vale had no proprietary rights to the initial consideration, now precluded Vale from advancing a trust claim against them. They said that the LCIA award was binding on Balda and Nysco – or rather, that they could rely on it for their benefit. Counsel for Balda and Nysco compared the LCIA to a divorce decree, which could not be disputed by third parties.

The difficulty with that argument, noted Andrew Baker J, was that it sought to apply a specific determination made in an arbitral award to third parties who were strangers to the arbitration. The correct analysis was that rescission operates as an 'all or nothing' remedy. Upon rescission of the joint venture agreement, a rescission trust would arise by operation of law, and not through the exercise of any arbitral judgment in the dispute between the parties to the joint venture agreement. As against Balda and Nysco, Vale could therefore argue that rescinding the joint venture agreement did give rise to a trust in Vale's favour over the monies paid as initial consideration by its subsidiary, notwithstanding anything said to the contrary by the arbitral tribunal. Equally, Balda and Nysco, not being bound by the award, would also remain free to assert that Vale had no right to rescind the joint venture agreement after all – but any such argument would be difficult to say the least, considering the findings of fact made in the arbitration and sheer weight of the evidence, including the findings by the Guinean anti-corruption committee.

Can a claimant bring a trust claim in respect of someone else's property?

Balda and Nysco's second argument rested on the fact that the initial payment of US$ 500 million had not been made by Vale, the party induced to enter into the contract by BSG's deceit. They argued that since the money belonged to Vale's subsidiary, it could only be held on trust for that company, but not Vale. The position was complicated by the fact that a transfer of money through the banking system does not, strictly speaking:

> "*… 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.*"

The question was therefore whether a victim of fraud who had procured a transfer of property belonging to someone else to the fraudster would have a right to claim a trust over that property (which he or she never owned), or whether following rescission, the fraudster would hold the property on trust for the original owner, who was not involved in the rescission. In the present situation, this might not matter much because Vale, the victim of fraud claiming rescission, would be able to effectively control the original owner of the assets, its subsidiary. However, that may not always be the case: separate contractual arrangements between the two 'innocent parties' could well exist. It is also the case that a stranger to a voidable contract does not have the right to rescind it (*Sanctuary Housing Association* v *Baker* (1997) 30 HLR 809), such that the original owner of the assets transferred to the fraudster will have to depend on the party to the fraudulent contract taking action before there could be any remedy for them.

Here we must end on a cliff hanger. The point remains to be decided: Andrew Baker J rejected Balda and Nysco's application for summary judgment on this point, meaning that Vale had sufficient prospects of establishing at trial that it was entitled to assert a trust claim over monies paid over by its subsidiary, but leaving the ultimate decision over for trial. The discussion in the judgment shows that this was not an easy issue to grapple with. In principle, the judge did not think that the fact that the rescission equity lay with one party, and the original ownership of the assets with someone else, necessarily meant that equity could never impose a constructive trust on the third party holding the assets in favour of the original owner of the assets. However, more work had to be done to establish that this really was the right outcome.

Conclusion

While equity is keen to assist victims of fraud wherever it can, there are circumstances in which an innocent party can lose its right to bring a trust claim to try and recover assets handed over as a result of fraud. An innocent party might lose its right of rescission by affirming the contract: refraining from rescinding a contract that is tainted by fraud or corruption in order to avoid business disruption or protect one's own reputation is no excuse. The rescission trust will not arise unless and until the contract has been positively set aside, and this despite a number of judicial suggestions to the contrary over the years.

Vale v *Steinmetz* itself illustrates the difficulties that can arise if contracts and payments are made between different group companies. Pending a final determination of whether a parent company can claim a trust over the assets of a subsidiary, it would make sense to include the company that is going to make the payment or transfer the assets as a party to the original contract in its own right. This may very well ensure that the subsidiary itself also benefits from the rescission equity, and avoids the fraudster, or any third party recipients of the assets who are not equity's darling, from driving a wedge between claimants on the basis that it is not clear in whose favour a trust ought to arise.

By way of postscript, in late January 2021, Mr Steinmetz was sentenced to five years imprisonment by a Geneva court. The Swiss prosecutors had brought criminal charges against him as he was resident in Geneva until 2016 and had conducted his business from there. He was also ordered to pay compensation to the State of Geneva in the amount of $56 million. It appears that Mr Steinmetz will appeal the conviction, and that he may be spared jail while appeal is pending.