Neutral Citation Number: [2021] EWCA Civ 1087

Case No: A4/2021/0222

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Andrew Baker
[2020] EWHC 3501 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2021

Before:

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LORD JUSTICE LEWIS

- -

Between:

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

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Stephen Houseman QC & Frederick Wilmot-Smith (instructed by **PCB Byrne LLP**) for the **Appellants**
Sonia Tolaney QC & James Ruddell (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Respondents**
The **1st to 6th Defendants** took no part in the appeal

Hearing date: 29th June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 16th July 2021.

Lord Justice Males:

1. This appeal is concerned with the impact, if any, of an arbitration award rescinding a contract for fraud on a proprietary claim against a stranger to the arbitration.

2. For the purpose of the appeal it is common ground that, upon such rescission, a constructive trust may arise which enables the rescinding party to make a proprietary claim to recover the proceeds of a payment made pursuant to the contract, and that such a claim can be made to recover traceable trust property in the hands of a third party who is not a good faith purchaser for value without notice of the fraud. So if A pays money to B under a contract between them which is then rescinded for fraud, B may hold the money on trust for A. Similarly, if B has transferred the money to C who is not a good faith purchaser for value without notice, it may be held by C on trust for A.

3. But the question is whether such a proprietary claim against the third party (C) is barred as a result of an arbitration award between the contracting parties in which it is held, perhaps wrongly, that the rescinding party (A) does not have a personal restitutionary claim to recover the payment in question from its contractual counterparty (B).

4. Depending on the answer to that question, a further question may arise from the fact that the payment in question was not made by the contracting party but by another company within the same group. Who then is entitled to make any proprietary claim? Is it the contracting party whose obligation was discharged by the payment made by its subsidiary? Or is it the subsidiary who actually made the payment?

The factual background

5. The context in which these issues arise is a joint venture agreement dated 30th April 2010 between Vale S.A. (the first claimant in the action and the first respondent to the appeal, or A in the illustration above) ("Vale") and a company called BSG Resources Ltd ("BSGR" or B in the illustration above), pursuant to which BSGR sold 51% of a subsidiary company, BSG Resources (Guinea) Ltd, to a wholly owned subsidiary of Vale. The price included an Initial Consideration of US $500 million payable by Vale. In fact the payment was not made by Vale itself but was made, upon Vale's instructions, by Vale International S.A. (the third claimant in the action and the third respondent to the appeal) ("Vale International").

6. BSGR was owned by Nysco Management Corporation, a BVI company which is the eighth defendant in the action and the second appellant ("Nysco"). Nysco was owned by Balda Foundation, a Liechtenstein Foundation which is the seventh defendant in the action and the first appellant ("Balda"). The beneficiaries of Balda are the first defendant, Mr Benjamin Steinmetz, and members of his family. It is common ground for the purpose of this appeal that at least some part of the Initial Consideration received by BSGR was transferred to Balda and Nysco (together "the appellants", or C in the illustration above). It must be assumed, although this will if necessary be a matter for investigation at trial, that the payments thus made to the appellants can be traced into their accounts in accordance with standard principles of tracing in equity.

7. The joint venture agreement was concluded because a wholly owned subsidiary of BSG Resources (Guinea) Ltd held valuable mining licences from the Republic of Guinea entitling it to exploit substantial deposits of iron ore. Unfortunately, however, the

Government of Guinea revoked those licences after the joint venture had been concluded on the ground that they had been procured by bribery.

The LCIA award

8. Revocation of the licences gave rise to a claim by Vale against BSGR for (among other things) rescission of the joint venture agreement for fraudulent misrepresentation. Because the joint venture agreement provided for arbitration in London under LCIA Rules, that claim was pursued in arbitration before a tribunal consisting of Sir David A R Williams QC, Dr Michael Hwang and Professor Filip de Ly (Chairman), all well-known international arbitrators. It was evidently a substantial arbitration, lasting over five years and resulting in an award running to 280 pages and 1005 paragraphs. Some further indication of the scale of the arbitration can be seen from the fact that Vale's lawyers charged a total of US $20 million, while the arbitrators' fees amounted to over £1.5 million.

9. In their award, dated 4th April 2019, the arbitrators upheld Vale's claim for fraudulent misrepresentation and, as a result, made an order rescinding the joint venture agreement. However, they rejected Vale's claim in restitution for the return of the Initial Consideration. Mr Stephen Houseman QC for the appellants subjected the arbitrators' reasoning to a close analysis and I therefore set out the relevant paragraphs of the award (the emphasis is the arbitrators'):

> "920. The Tribunal holds that BSGR has not fulfilled its burden to establish the bar of *restitutio in integrum* impossible [*sic*.], and that Vale is entitled to equitable rescission of the Joint Venture Agreements.
>
> 921. In considering the orders to make to achieve *restitutio in integrum*, the Tribunal recalls that the objective of rescission is to place the Parties in their original positions as far as possible by ordering each side to return the benefits it has received from the other side. In this connection, the Tribunal notes 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.
>
> 922. In this case, Vale claims the return of (1) the Initial Consideration; (2) the Outstanding Loan Amount; (3) the Feasibility Study Funding; and (4) Internal Costs. The Tribunal considers that the first three heads cannot be claimed under rescission, and the Tribunal cannot order BSGR to pay these sums to Vale as part of its rescission order, because they do not involve transfers of money *from Vale* but involve transfers of money *from Vale's subsidiaries*:
>
> > 922.1. The Initial Consideration was paid by *Vale International* to BSGR. …
>
> 923. The Tribunal also considers that the fourth head of Internal Costs cannot be claimed under rescission because, although the

> Internal Costs were paid by Vale, the recipient of these payments was *not BSGR*.
>
> 924. Accordingly the Tribunal must next consider if these sums can be claimed as damages for fraudulent misrepresentation."

10. The arbitrators went on to consider whether Vale could recover the same sums (including the Initial Consideration) as damages for fraudulent misrepresentation. They concluded at paragraph 944 that it could (again, the emphasis is in the award):

> "944. As the Tribunal has explained at paragraph 926 of this Award, the claimant is entitled to all expenditures which he had incurred *in reliance* on the defendant's representation. So when the question arises as to the causative link between the tort of deceit and the losses suffered, the law only asks one question: did the claimant incur those losses *in reliance* on the defendant's representation? Once it is shown that the claimant did so rely, the causative link is established, and the loss is taken to have directly flowed from the deceit. BSGR may claim that there was a slump in iron ore value, or an intervening act in the form of the [Government of Guinea's] revocation of the mining rights, but these arguments are wholly immaterial. All that matters is whether Vale incurred these losses *in reliance* on BSGR's deceit for the purpose of establishing the causative link. Framed as such, this must be answered in the affirmative. The Tribunal has found at paragraph 724 above that Vale relied on BSGR's deceit to enter into the Framework Agreement [i.e. the joint venture agreement] and the SHA and suffered loss as a result."

11. Accordingly the arbitrators awarded damages to Vale which included US $500 million in respect of the Initial Consideration. The material parts of their formal award, which they called the "Dispositif", were as follows:

> "1004. For all of the foregoing reasons and rejecting all submissions to the contrary, the Tribunal hereby **FINDS** (paragraph 676) that the Claimant has established its case alleging fraudulent misrepresentation. All other causes of action by Vale are hereby dismissed.
>
> 1005. As a consequence of its finding in paragraph 1004, the Tribunal hereby **ORDERS AND AWARDS** the following relief.
>
> > 1005.1 The Tribunal hereby rescinds the Framework Agreement and the SHA on account of fraudulent misrepresentation (paragraph 920).
> >
> > 1005.2 The Tribunal orders BSGR to pay forthwith to Vale damages of USD 1,246,580,846 on account of fraudulent misrepresentation (paragraph 980)."

12. The arbitrators' further award of interest and costs need not be set out.

13. BSGR has not paid any part of the sum awarded.

The proprietary claim in this action

14. In the present action the claimants make various claims against Mr Steinmetz, his companies and others, including the appellants, who are alleged either to have been involved in the fraud or to have received its proceeds, directly or indirectly. The appellants, who were not parties to the arbitration, deny any fraudulent conduct. However, they accept for the purpose of this appeal that the claimants have a properly arguable case that the joint venture agreement was procured by fraud.

15. One such claim is a proprietary claim over assets held by the appellants as the recipients of traceable proceeds of the Initial Consideration.

16. It was common ground for the purpose of the application before the judge and the appeal before this court that, if a contract is voidable for fraud, the innocent party's right to rescind the contract gives rise to an equity (referred to in argument as a "rescission equity"), such that upon rescission a payment made by the rescinding party is impressed with a constructive trust (a "rescission trust") (see the discussion at *Goff & Jones, The Law of Unjust Enrishment*, 9th Ed (2016), paras 40-18 to 40-28 and *Snell's Equity*, 34th Ed (2019), paras 2-006 and 2-007). It was also common ground for the purpose of the appeal that this rescission equity can in principle be asserted against a third party transferee of the payment who is not a good faith purchaser for value without notice of the fraud; and that the appellants were not such good faith purchasers for value.

17. Accordingly, on the basis that some or all of the Initial Consideration of US $500 million was transferred to the appellants, the claimants' case is that upon rescission of the joint venture agreement the money in the appellants' hands was impressed with a rescission trust in favour of either Vale or Vale International so as to give rise to a proprietary claim against them.

18. However, the appellants contend that no such rescission trust arose against BSGR in this case because of the way in which the arbitrators dealt with the issue of rescission in the arbitration and that, as a result, no proprietary claim is available against either of them as transferees of the Initial Consideration from BSGR. By an application notice dated 18th May 2020 the appellants sought summary judgment dismissing the proprietary claim against them. They accepted that the claims as a whole would have to go to trial, but submitted that this proprietary claim is bad in law as a result of the award in the arbitration between Vale and BSGR (and for other reasons rejected in the court below with which we are not now concerned) and that its summary dismissal would reduce the scope of the issues to be determined at trial.

The judgment

19. The judge, Mr Justice Andrew Baker, was sceptical whether the summary dismissal of the proprietary claim would make much difference to the scope of the trial, but nevertheless determined the application. He held that the award did not afford the appellants any defence to the proprietary claim made against them and that nothing was

likely to emerge at trial to change this position. Accordingly he not only dismissed the application for summary judgment, but made a declaration that the award did not afford the appellants any defence to the proprietary claim pleaded against them.

20. Mr Justice Andrew Baker held that, although the arbitration award was binding for what it decided as between Vale and BSGR, and even though it might now be too late for Vale to assert a proprietary claim against BSGR, the award did not affect Vale's claim against the appellants. Just as the appellants as non-parties were not bound by the arbitrators' findings (it has not been suggested that they should be regarded as privies of BSGR for the purpose of any *res judicata* argument), neither was Vale bound by the arbitrators' view expressed in paragraphs 921 and 922 of the award that the Initial Consideration payment was not in law the conferring of a benefit on BSGR by Vale. In any event the creation of a rescission trust upon rescission of the joint venture agreement did not depend on any determination by the arbitrators; rather, such a trust arose by operation of law.

21. This conclusion made it unnecessary for the judge to decide whether the beneficiary of any rescission trust was Vale or Vale International. The appellants contended that any claim could only be vested in Vale as the party to the joint venture agreement and was barred by the arbitration award. The claimants contended that the claim was vested in Vale International, or at any rate that Vale International had its own proprietary claim; and that even if the award constituted a bar to any claim by Vale, it did not affect Vale International which was not a party to the joint venture agreement or the arbitration. The judge considered that because this issue gave rise to a novel question of law whose answer might depend on a closer analysis of the facts than was possible on the evidence before him, it was best left, if it arose, for determination at trial.

Submissions on appeal

22. For the appellants Mr Stephen Houseman QC (who did not appear below and who was instructed a few weeks before the hearing when counsel previously instructed became unavailable) submitted, in outline, as follows:

(1) Rescission in equity (which is all that Vale claimed in the arbitration) does not depend on any election by the rescinding party, but is effected by court order (or arbitral award) (*Goff & Jones*, para 40-28); the order or award granting rescission is itself an act with legal consequences; the court's (or tribunal's) decision whether or on what terms to order *restitutio in integrum* is part of and inextricably connected with the order for rescission itself (as Lord Wright put it in *Spence v Crawford* [1939] 3 All ER 271, 288, "where the remedy [of rescission] is applied, it must be moulded in accordance with the exigencies of the particular case") and is also, therefore, an act with legal consequences.

(2) Vale did not make any claim in the arbitration for restitution of the Initial Consideration independently of its claim for rescission of the joint venture agreement and the arbitrators therefore had no jurisdiction to determine any such claim. Accordingly paragraphs 920 to 923 of the award must be read together as a determination by the arbitrators that rescission would be ordered, but only on the basis that BSGR had no obligation to return the Initial Consideration by way of *restitutio in integrum*. The two aspects of this determination (rescission but no restitution) were indivisible.

(3) There can be no proprietary claim by way of a rescission trust against the original contracting party unless that party is also liable to a personal restitutionary claim. That is because the rationale for a rescission trust is that the defendant has been unjustly enriched (*Goff & Jones*, para 40-17: "a proprietary remedy for unjust enrichment"; *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 102E per Lord Mustill: "… any such proprietary right must have as its starting point a personal claim by the purchaser to the return of the price"; and *National Crime Agency v Robb* [2015] Ch 520 per Sir Terence Etherton C at [48] referring, albeit in passing, to "a proprietary restitutionary remedy for unjust enrichment").

(4) Although in principle a rescission trust can be asserted against a third party transferee of the contractual payment (C), subject to equitable tracing principles, such a proprietary claim depends upon the availability of a proprietary claim against the original contracting party (B). If the rescission equity never crystallises into a rescission trust available against the original contracting party, there is no trust which can be asserted against third parties whose liability is parasitic on the liability of the original party.

(5) Accordingly the arbitrators' determination that rescission would be ordered on the basis that BSGR (B) had no obligation to return the Initial Consideration by way of *restitutio in integrum* means that Vale (A) had no personal claim against BSGR for restitution of the Initial Consideration; therefore no rescission trust against BSGR ever came into existence (or to put it another way, Vale's rescission equity never crystallised into a rescission trust); and as BSGR (B) never became subject to a rescission trust, transferees of the Initial Consideration from Vale such as the appellants (C) never became subject to such a trust either.

(6) The arbitrators' determination that BSGR had no obligation to return the Initial Consideration by way of *restitutio in integrum* constitutes a legal fact ("a fact in the world"), binding Vale for all purposes, with the consequences set out in (5) above.

(7) For Vale to assert otherwise amounts to an abuse of process as a collateral attack on the arbitrators' award.

(8) Any rescission equity could only belong to Vale as the contracting party with a right to rescind the contract (*Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 at [52] and [53]); it is logically impossible for Vale International, which never had the equity on which the rescission trust is founded to be the beneficiary of such a trust.

23. We did not find it necessary to call upon Ms Sonia Tolaney QC for the respondents, although we have the benefit of her written submissions, in which she took issue root and branch with Mr Houseman's analysis.

The scope of the appeal

24. It is important to keep in mind that we are not concerned on this appeal with whether the claimants or either of them have a viable proprietary claim against the appellants on the basis of a rescission trust. Nor are we concerned with whether it is an essential element of a rescission trust claim by A against a third party transferee of a contractual payment (C) that there should be a personal claim in restitution against the original

contracting party (B), a point on which it appears that there is no direct authority. Although Mr Houseman developed a powerful argument why that should be necessary, as outlined above, there are arguments to the contrary: as Lord Millett pointed out in *Foskett v McKeown* [2001] 1 AC 102, proprietary claims to the beneficial ownership of property and restitutionary claims based on unjust enrichment are different, being concerned to enforce different interests and with different defences available to a defendant. These, however, are not issues suitable for summary determination. They should be determined, to the extent they arise, at trial.

25. The narrow issue with which we are concerned is whether Vale is bound by (or, to the same effect, whether the appellants can take the benefit of) the arbitrators' award in these proceedings between Vale and the appellants. For this purpose I propose to consider first what the arbitrators actually decided and then to consider the extent to which, if at all, Vale is bound by that in the present proceedings. I will then deal with the argument about abuse of process.

What did the arbitrators decide?

26. Mr Justice Andrew Baker observed that the arbitrators' reasoning is internally inconsistent. They rejected a claim for restitution at paragraphs 921 to 923 of the award on the ground that payment of the Initial Consideration had not been made by Vale but by its subsidiary Vale International, but then awarded damages to Vale at paragraph 944 on the basis that the Initial Consideration was a loss which Vale had suffered. I share the judge's view (and Mr Houseman expressly accepted) that it is impossible to reconcile these paragraphs of the award. As the judge put it:

> "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. …"

27. It would appear, therefore, that the award must be wrong, at least to some extent. Either the Initial Consideration payment was not expenditure by Vale even though it had the effect of discharging Vale's liability for the Initial Consideration, in which case the arbitrators were right to reject the restitutionary claim but wrong to award damages on the basis that Vale had suffered the loss of this expenditure; or it was expenditure by Vale, in which case the restitutionary claim ought to have succeeded and the damages awarded ought to have been correspondingly reduced.

28. Undaunted, Mr Houseman submitted that the arbitrators' treatment of the claim for rescission at paragraphs 922 to 923 could be "ring fenced", and that it is on these paragraphs that it is necessary to concentrate to see what the arbitrators decided about that claim. He submitted that the arbitrators' decision not to make an order for restitution by BSGR of the Initial Consideration was part of and inextricably connected with the order for rescission itself; and that this is a legal fact binding on Vale against all the world.

Is Vale bound by the award in these proceedings?

29. However, even if the effect of the award is that, as between Vale and BSGR, rescission was ordered on terms which meant that no personal restitutionary claim or rescission trust arose against BSGR, it does not follow that Vale is bound by that determination in these proceedings.

30. Arbitration is a consensual process by which the parties agree to resolve disputes between them by accepting the decision of a tribunal chosen by them or in accordance with a procedure which they have agreed. An award thus produced is final and binding on them: section 58 of the Arbitration Act 1996. For this purpose it makes no difference whether the arbitrators' decision is right or wrong. Although section 69 of the 1996 Act permits an appeal to the court on a question of law arising out of an award, it is open to the parties to exclude any such appeal and the LCIA Rules contain such an exclusion agreement. Accordingly, when parties agree to arbitrate their differences under LCIA Rules, they agree to be bound by the arbitrators' decision even if the arbitrators get the law or the facts wrong. The only bases on which such an award can be challenged are that the arbitrators acted without jurisdiction (section 67) or that a serious irregularity of the limited kind listed in section 68 resulted in substantial injustice. In the present case the arbitrators' award may have been wrong in the sense indicated above, but there was no scope for Vale to challenge the dismissal of its restitutionary claim.

31. However, while the award is final and binding as between Vale and BSGR, it is not binding on third parties. It is elementary that an arbitrator cannot make an award which is binding on third parties who have not agreed to be bound by his decision (*Mustill & Boyd, Commercial Arbitration*, 2nd Ed (1989), pages 149-150; *Russell on Arbitration*, 24th Ed (2015), para 6-183). The position is different if the third party can be regarded as a privy of one of the parties for the purpose of the doctrine of *res judicata*, but that is not suggested here. Accordingly, it is common ground that as third parties the appellants are not bound by the arbitrators' decision that Vale was the victim of a fraud. Indeed, until the hearing before us the appellants even challenged in these proceedings the fact that the joint venture agreement has been rescinded and the respondents accepted that they are entitled to do so.

32. On this last point, the appellants' position changed in the course of Mr Houseman's oral submissions. He accepted that the joint venture agreement has been rescinded by the decision of the arbitrators and that it is not open to the appellants in these proceedings to contend otherwise.[1] As we did not call on Ms Tolaney, and as this apparent concession appears to have been somewhat tactical, as I shall explain, I prefer to reserve my position on whether it is correct, not least as the appellants continue to challenge the finding of fraud on which the rescission was premised.

33. If the appellants are not bound by the award, what is the principle which enables them to rely on parts of it, and specifically its determination that Vale was not entitled to a restitutionary claim against BSGR, as binding Vale? As I understood it, Mr Houseman puts his case in two ways. The first is that Vale's proprietary claim depends on establishing the fact that the joint venture agreement has been rescinded, for which purpose Vale needs to invoke the award which contains the order granting rescission;

[1] Mr Houseman submitted that this concession, departing from the appellants' pleaded case, had already been made in the skeleton argument seeking permission to appeal which was settled by counsel then instructed, Mr Paul Stanley QC. That is not, however, how I read the relevant paragraphs. Nor did the respondents understand them in this way.

and that it is an intrinsic part of the order for rescission that Vale had no personal claim for restitution by BSGR of the Initial Consideration. The second is an argument of abuse of process.

34. I would reject the first way of putting the case. Save for limited purposes not applicable here an award between A and B has no binding effect in proceedings between A and C. The essential reason why this is so derives from the consensual nature of arbitration. Just as C has not agreed to be bound by the decision of arbitrators in an arbitration between A and B, neither has A agreed to be bound by any such decision in any dispute he may have with C. While it may be good business sense in the interests of certainty and finality for A and B to agree to accept the decision of an arbitral tribunal (and in some cases to exclude rights of appeal) even if that decision is wrong, in order to resolve disputes between them, it is quite another thing to say that A agrees to accept the (potentially erroneous and in practice virtually unchallengeable) decision of that tribunal in a subsequent dispute with a stranger.

35. In this connection I would refer to two authorities. *Ward v Savill* [2021] EWCA Civ 1378 was not an arbitration case, but it concerned the effect in later proceedings of a declaration in earlier proceedings as to the existence of a constructive trust following rescission of a contract. In the earlier proceedings against the promoters of film development schemes the claimants obtained declarations that they had been induced to invest in the schemes by fraud and that the promoters and LLPs in which they had invested held the funds invested on trust for them. The claimants then brought further proceedings against the wife of one of the promoters, alleging that a property held by her represented the traceable proceeds of sums beneficially owned by them as a result. They sought to rely on the declarations made in the earlier proceedings to establish their beneficial ownership of the funds invested in the schemes. The question arose whether the declaratory judgements obtained by the claimants in the earlier proceedings had legal effect so as to enable them to found their proprietary claim in the second action without having to re-plead and prove the underlying facts. They argued that the effect of the order made by Mr Justice Butcher in the first action was that the contracts in question were rescinded *ab initio* with the consequence in law that the beneficial interest never passed to the LLPs. Sir Julian Flaux C (with whom Lady Justice Elisabeth Laing and Lord Justice Warby agreed) rejected this argument on the ground that it would be unjust for a party to be bound by a judgment without an opportunity to be heard, and that this was so even though the first judgment involved declarations as to proprietary rights. He referred to the statement of principle in the well-known case of *Hollington v Hewthorn & Co Ltd* [1943] 1 KB 587, 596-7:

> "A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the *Duchess of Kingston's Case* (1776) 2 Sm LC 13th ed. 644, 'it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore …the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers'. This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not

> a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay *xl* . to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see *Green v New River Co* (1792) 4 Term Rep. 589, and B can show, if he can, that the amount recovered was not the true measure of damage."

36. The Chancellor continued:

> "81. … It is quite clear from that passage that the appellants' purported distinction between factual findings in a judgment which are not binding on a stranger to it and the legal effect of a judgment, which the appellants contend is binding on a stranger, is not a distinction recognised by the rule. The citation with approval from the *Duchess of Kingston's* case refers to 'the judgment of the court upon facts found' distinguishing between the facts and the judgment and, as Mr Mather correctly pointed out, the circumstances of the *Duchess of Kingston's* case itself demonstrate that the rule is not limited to findings of fact but extends to the legal consequences of those findings, as determined by a court in its judgment."

37. His conclusion was that the claimants had to plead and prove in the second action all the elements of their proprietary case, which included the existence of the fraud and the fact of rescission:

> "92. The appellants should be required to plead and prove all the elements of their case against the respondent that they have a beneficial interest in her property, in the same way as the claimants in *Calyon* were required to establish against the bank their title to the collection. Nothing in Patten LJ's analysis of the legal effect of rescission in his judgment in *Independent Trustee Services* supports the appellants' case that they can rely upon the Butcher Declarations against the respondent without having to plead and prove all the elements of their case against her that they have a beneficial interest in her property.
>
> 93. Accordingly, applying both the rule in *Hollington v Hewthorn* and the wider principle enunciated in *Gleeson v Wippell*, I consider that the respondent is entitled to require the appellants to plead and prove all the elements of their case against her and that they cannot simply rely upon the Butcher Declarations against her."

38. This case has obvious parallels with the present case, although there are also some differences. Like the present case, it was concerned with whether a decision about rescission and its effect in earlier proceedings between A and B had legal effect in later proceedings between A and C. It holds firmly that the rescission established in the earlier proceedings is not a legal fact binding on C in the later proceedings, but requires to be proved. On the other hand, in *Ward v Savill* it was A who was seeking to take the benefit of the earlier judgment. In the present case it is C who is seeking to do so.

39. The second case, *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2005] 2 CLC 664, was an arbitration case. In the first arbitration, between Sun Life and a reinsurer, Cigna, the arbitrators held that Cigna was entitled to avoid the reinsurance for misrepresentation and non-disclosure. They added that, if the reinsurance had not been avoided, certain risks ("the Unicover book") would have been covered under the Cigna reinsurance. The issue in the second arbitration, which was between Sun Life and another reinsurer, Lincoln, was whether the Unicover book would have been covered by the Cigna reinsurance if that had not been avoided. The issue mattered because, if it would have been, the relevant losses could not be recovered from Lincoln; if it would not have been, they could. Lincoln sought to rely on the decision in the first arbitration (to which they were not a party) that the Unicover book would have been covered. They relied on an *obiter dictum* by Mr Justice Saville in *George Moundreas & Co SA v Navimpex Centrala Navala* [1985] 2 Lloyd's Rep 515:

> "It seems to me that where the rights and obligations of the parties to a contract are determined by the contractual machinery of arbitration under that contract there is something to be said for the view that the result that the arbitrators reach can (in the absence of special circumstances) be treated in effect as part of the contract and thus established by third parties in the same way as any contract can be proved. Thus in the present case the arbitrators have concluded that the sellers [*sic*.] had a right to cancel the contract and to claim damages as the result of the failure of the buyers [*sic*.] to perform their obligations under the contract. As between the parties that is now the contractual position as determined by the contractual machinery of arbitration -- and it is difficult to see why a stranger to the contract cannot prove that contractual position by simply producing the award as he can prove other contractual rights and obligations by simply producing the contract."

40. This court disapproved this statement of principle by Mr Justice Saville, although it is right to say that the discussion of this issue was itself *obiter*. Nevertheless, the issue was fully considered. Indeed, Lord Justice Longmore and Lord Justice Jacob went to the trouble of giving concurring judgements on this issue while recognising that strictly it did not arise.

41. Giving the leading judgment, Lord Justice Mance pointed out that a feature of the case was that it was the stranger to the first arbitration who was seeking to rely in the second arbitration on the award in the first arbitration. He held that there was no legal principle which would enable it to do so:

"63. … The new principle which Mr Hunter seeks to develop from Saville J's dicta must, therefore, seek some foundation in legal principle other than the simple considerations of abuse of process which may apply in relation to the administration of justice in court.

64. However, as I see it, there is no foundation in legal principle for Mr Hunter's suggested new principle. First, as I have observed, Saville J's dicta are open to criticism for failing to distinguish between the relevance in relation to third parties of (on the one hand) the main obligations of a contract and (on the other hand) a judgment or arbitration award regarding such obligations.

65. Second, Mr Hunter's attempt to qualify Saville J's dicta so as to make them operate only one-way is contrary to ordinary principle. The principles of *res judicata* and issue estoppel commonly operate mutually. Saville J's dicta in *Moundreas* were themselves couched in terms suggesting an extended mutual principle. …

66. Thirdly, I do not consider that the arguments based on general justice have the force in the present context which Mr Hunter suggests and which Toulson J accepted. I do not think that it is obviously just, or even convenient, to allow a stranger to enjoy a one-sided entitlement to hold a party to the award or judgment to its terms, with a concomitant right to challenge its correctness whenever it appeared favourable to do so. …

67. Fourthly, and linked with the third point, there is a strong element of fortuity about the one-sided benefit for which Mr Hunter contends. Why should Lincoln gain any benefit from an award to which they were not party, particularly in the present context? Sun/Phoenix could not be said to have gained any benefit against anyone — let alone as against Lincoln — from any conclusion by the Cigna tribunal that, but for the avoidance, the Unicover book was protected. Further, if Sun/Phoenix had realised the hopelessness of their case on avoidance and had conceded avoidance or compromised their claim, without any award ever being issued by the Cigna tribunal, Lincoln would have had to arbitrate the scope of the Cigna reinsurances in relation to the Unicover book with Sun/Phoenix without the benefit of any of the present submissions based on the Cigna award. …

68. Fifthly, and more fundamentally, the solution for which Mr Hunter contends appears to me to overlook or obscure important differences between arbitration and litigation. In the context of litigation, problems of potentially conflicting judgments arrived at between different parties to the same overall complex of disputes are met by provisions for joinder of parties or

> proceedings or for trial together, if necessary on a mandatory basis using the courts' compulsive powers. Even in circumstances in which there has been no such joinder, and where neither res judicata nor issue estoppel has any application, the court may intervene to prevent abuse of its process, as stated in paragraphs 63 and 65 above. All this is facilitated by the public nature of litigation, the public interest in the efficient administration of justice and the courts' coercive powers. Considerations of general justice of the sort to which Toulson J referred thus have relevance and can be given effect in the context of litigation. Arbitration is in contrast a consensual, private affair between the particular parties to a particular arbitration agreement. The resulting inability to enforce the solutions of joinder of parties or proceedings in arbitration, or to try connected arbitrations together other than by consent, is well-recognised — though the popularity of arbitration may indicate that this inability is not often inconvenient or that perceived advantages of arbitration, including confidentiality and privacy are seen as outweighing any inconvenience. Different arbitrations on closely inter-linked issues may as a result lead to different results, even where, as in the present case, the evidence before one tribunal is very largely the same as that before the other. The arbitrators in each arbitration are appointed to decide the disputes in that arbitration between the particular parties to that arbitration. The privacy and confidentiality attaching to arbitration underline this; and, even if they do not lead to non-parties remaining ignorant of an earlier arbitration award, they are calculated to lead to difficulties in obtaining access, and about the scope of any access, to material relating to that award.
>
> 69. The conclusion that I would reach is that Mr Hunter's suggested principle has no sound basis, and that the dicta of Saville J in *Moudreas* cannot be regarded as reflecting or as based on any general principle of law in the arbitral context to which they were directed."

42. Lord Justice Longmore also identified a number of difficulties with Mr Justice Saville's dictum. These included that a stranger to the arbitration may not in practice be able to produce a private and confidential award, and that there was a lack of mutuality if a party to the arbitration was bound but a stranger was not. He concluded:

> "84. All the above is not to deny that there may be cases in which an award can be evidence in subsequent proceedings even though it will not necessarily be conclusive evidence. It may, to use Rix LJ's expression in *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, be a 'fact in the world'. A good example of this is to be found in *The Sargasso* [1994] 1 Lloyds Rep. 412 where a charterer had been held liable by an award in favour of a sub-charterer who had sued to recover damages for damage to cargo. The charterer then sued the

> shipowner and proved breach of contract; the measure of damages to which he was entitled was governed by the award pursuant to which he had been held liable to the sub-charterer. It quantified the loss which he had actually suffered; he was entitled to put it in evidence for that purpose and say he should be able to recover not less than the amount of the award; the shipowner would also be entitled to say that the charterer should not recover more than the amount of [the] award. That would not have prevented the shipowner from arguing that the charterer had not taken the right points and that he had thus failed to mitigate his damages or, indeed, that the award against him had been made by reason of some fact which was not a breach of contract on the owners' part.
>
> 85. In *The Sargasso* Clarke J referred to the observations of Saville J in the *Moundreas* case and in that context they are uncontroversial. But I do not consider that they form a safe basis on which to found any extension of the existing law of issue estoppel, and they should not be followed in future for that purpose."

43. Lord Justice Jacob reached the same conclusion:

> "86. I agree with both judgments. It is worth standing back from the detail. What Lincoln seek to do is to rely upon a non-operative (in the sense that no actual consequences flow from it), opinion expressed by the Cigna arbitrators. The opinion is in its nature private. Moreover it was unappealable. Lincoln seek more than just to rely upon the opinion —they say it is conclusive for all purposes and so conclusive in the later arbitration.
>
> 87. I think such a result would be obviously wrong for the following reasons:
>
> (a) An arbitration is an essentially private matter between the parties to it. Only some consequence of an award (e.g. that A should pay B money) can go further and extend beyond the privacy of the arbitration itself — so as to become a 'fact in the world.' (Rix LJ's phrase).
>
> (b) Because the determination of arbitrators is itself a private matter it is in its nature not intended to be available to third parties for any purpose. A third party's rights against one of the parties to an earlier arbitration cannot depend on the happenstance of the availability of the details of that arbitration in a later arbitration involving that third party. In this connection I note that the position may be different if the earlier decision is that of a court. In particular a decision of a court as to the construction of a contract is a matter of law — with the consequence that the further principle of judicial precedent on such a question may come into play.

> 88. Where a party seeks to re-litigate in subsequent proceedings against Y a point he fought fully in earlier proceedings against X, it may be that, notwithstanding a lack of mutuality, he can be prevented from doing so on the grounds of abuse of process. As to that I express no concluded opinion for, for the reasons given by Mance LJ, there is no question of abuse of process here."

44. Mr Houseman sought to distinguish *Sun Life v Lincoln* on various grounds. He pointed out that it was the claimants who had introduced the arbitrators' award into the present proceedings, referring to it in their pleadings and obtaining permission to refer to it for the purpose of obtaining a worldwide freezing order, thereby removing any difficulty arising out of the confidentiality of the arbitration. He submitted that the element of mutuality was present in this case, because the arbitrators' decision on rescission was binding on the appellants as well as the claimants. This was the apparently tactical concession, to which I have referred, on which I prefer to express no concluded view. He submitted that the problem that strangers to the contract cannot be joined in an arbitration, to which both Lord Justice Mance and Lord Justice Longmore referred, did not arise in an arbitration under the LCIA Rules where the arbitrators have a power to order joinder if the stranger consents to be joined.

45. I would accept that some of the reasons given in the judgments in *Sun Life v Lincoln* do not apply with the same force, or at all, on the facts of the present case. I accept also that we are not bound by this decision. Nevertheless, it contains a clear and considered statement of principle, with which I agree. That principle, founded on the consensual nature of arbitration, is that save for limited purposes not applicable here an award between A and B has no binding effect in proceedings between A and C. The consensual nature of arbitration explains also why the analogy with a decree of divorce on which Mr Houseman relied is not valid. A decree of divorce, made in court, affects the status of the divorcing parties against all the world and may affect third parties, for example because of its effect on inheritance rights. Rescission is a purely contractual matter.

Abuse of process

46. The second way in which Mr Houseman puts his case is that it is an abuse of process for Vale to seek to rely on the arbitrators' rescission of the joint venture agreement without also accepting the burden of their decision that it has no restitutionary claim against BSGR. The first difficulty with this way of putting the case is that no point on abuse of process was taken before the judge and no such argument is advanced in the appellants' notice. Accordingly the appellants would need permission to amend their appellants' notice to advance such an argument in this court. They have made no such application. Nevertheless there is a more fundamental difficulty, which I consider we ought to address because Mr Houseman indicated that an application to dismiss the claim on abuse of process grounds may be made in future.

47. The applicable principles were summarised by Lord Justice Simon (with whom Lord Justice Patten and Lord Justice Ryder agreed) in *Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ 3, [2017] 1 WLR 2646:

> "48. The following themes emerge from these cases that are relevant to the present appeal.

> (1) In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter's* case [1982] AC 529, Lord Hoffmann in the *Arthur J S Hall* case [2002] 1 AC 615 and Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter's* case. Both or either interest may be engaged.
>
> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no *prima facie* assumption that such proceedings amount to an abuse, see *Bragg v. Oceanus* [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur J S Hall* case.
>
> (3) To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v Gore Wood* and Buxton LJ in *Laing v Taylor Walton* [2008] PNLR 11.
>
> (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the *Arthur J S Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the *Bairstow* case [2004] Ch 1; or, as Lord Hobhouse put it in the *Arthur J S Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.
>
> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris*."

48. Lord Justice Simon added at [54] that "there are good reasons why a court should be cautious before accepting that later court proceedings are an abuse of its process because it involves a collateral attack on an earlier arbitration award" and at [68] that,

while accepting the possibility in principle, "it will probably be a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process".

49. I agree with Ms Tolaney's written submissions on this point that in the present case there is no viable basis on which to allege that the present proceedings are an abuse of process. There is no question here of the claimants making any collateral attack on the award. On the contrary they seek to establish that its factual findings as to the existence of the fraud are correct, that the joint venture agreement was validly rescinded, and that the basis on which the arbitrators awarded damages (namely that the Initial Consideration represented a loss suffered by Vale) was also correct notwithstanding the arbitrators' contradictory reasoning on this point when they dealt with the restitutionary claim. Moreover, for the purpose of any argument about abuse of process it must be assumed that the appellants have received some or all of the Initial Consideration with (at least) notice of the fraud. In those circumstances any submission that the claimants are guilty of an abuse of process by bringing their claims in these proceedings is far-fetched. A "close 'merits based' analysis of the facts" can yield only one answer.

Whose equity?

50. The conclusions which I have read so far mean that it is open to Vale to seek to prove its proprietary claim against the appellants in these proceedings and that the award does not afford the appellants any defence. This means that it will be open to Vale to demonstrate, if it can, and if it needs to in order to make good its proprietary claim against the appellants, that contrary to the arbitrators' view it did have a valid personal claim in restitution against BSGR.

51. It means also that the question whether the beneficiary of any rescission trust is Vale or Vale International need not be decided at this stage or, perhaps, at all. The judge considered that this question was a novel question of law which was better decided, if it arose, at trial on the basis of full findings of fact. That is a case management decision with which this court should not lightly interfere but, in any event, I agree with the judge's view.

Disposal

52. I would dismiss the appeal. The LCIA award does not afford the appellants any defence to the proprietary claim made against them.

Lord Justice Lewis:

53. I agree.

Lord Justice Bean:

54. I also agree.