Neutral Citation Number: [2010] EWHC 3275 (Ch)

Case No: HC08C03132

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

14/12/2010

B e f o r e :

MR JUSTICE PETER SMITH

Between:

Independent Trustee Services Ltd	**Claimant**
- and -	
(1) GP Noble Trustees Ltd **(2) BDC Trustees Ltd** **(3) Graham Pitcher** **(4) Gary Cordell** **(5) Peter Malmstrom** **(6) Anthony James Morris** **(7) Alexander Starkey** **(8) Christopher Webb** **(9) Aspect Invest & Finance Ltd** **(10) Whitepoint Ltd** **(11) South East Asia Real Estate (Thailand) Co Ltd** **(12) Amac Asset Management & Consultants Ltd** **(13) Number Thirty One SA** **(14) La Matze Consultants SA** **(15) La Matze Real Estates SA** **(16) Multiple & Unilateral Financial Futures (Thai Investments) Ltd** **(17) Mutual Financial Futures (Australia) Pty Ltd** **(18) Multiple & Unilateral Financial Futures Ltd** **(19) Morris Family Holdings Ltd** **(20) Newdale Investments Ltd** **(21) Edgerbury Investments Ltd** **(22) Caprio International Ltd** **(23) Davidia Global Ltd** **(24) Line Trust Corporation Ltd** **(25) Glencalvie Ltd** **(26) Benessia Global Ltd** **(27) Shellwind Holdings Ltd**	**Defendants**

- and -

Susan Morris — **Appellant/ Respondent**

Mr Spearman QC (instructed by Taylor Wessing LLP) for the Claimant
James Lewis QC, Thomas Brudenell & Anna Dilnot (instructed by Blick & Co) for the Appellant/Respondent
Hearing dates: 23rd July 2010

HTML VERSION OF JUDGMENT

Peter Smith J :

INTRODUCTION

1. This judgment arises out of my reserved judgment in the main action handed down on 1st July 2010. It relates to the claims against the Sixth Defendant Anthony James Morris ("Mr Morris").

2. In that judgment I determined that he had dishonestly procured the transfer of £52m out of the Impacted Schemes. I also determined that he had in addition directly received three sums of £1.4m, £1.6m and £1.8m.

3. I accordingly determined he was liable for (a) £52m plus interest by way of equitable compensation for dishonest assistance and (b) £4.89m plus interest as liability for knowing receipt.

4. The detail of the claim and how that liability was determined can be discerned from the judgment in the main action ***Independent Trustees Services Ltd v GP Noble Trustees Ltd & Ors [2010] EWHC 1653 (Ch)***.

THE RESPONDENT

5. The Respondent is the former wife of Mr Morris. He played no part in the proceedings. Mrs Morris did not appear although she was aware of the existence of the proceedings and the trial.

6. At the conclusion of the trial on 24th May 2010 I reserved judgment. However I indicated at the close of ITS' closing submissions that I could see no defence to a claim for £31m held pursuant to freezing injunctions that had been previously granted. I therefore directed that those monies could be paid out of court immediately to ITS' solicitors.

7. Mrs Morris by her application notice dated 30th June 2010 sought a variation of paragraph 2 of my order of 24th May 2010 ("the Order") pursuant to CPR rule 40.9 and/or rule 3.1 (7) and sought an order that the Claimant pay to her the sums of £1,978,162.66 and $330,699.98 or such other order as was appropriate.

8. The application came initially before me on 1st July 2010 and I directed that it be heard substantively before me on 23rd July 2010.

ITS' APPLICATION

9. ITS had issued their own application dated 25th June 2010 ("ITS' application") pursuant to the liberty to apply provision at paragraph 5 of the order of Mr Justice Holman dated 13th January 2010 in the

Family Division ("the order of Holman J"). They sought an order that they were beneficially entitled to the Lump Sum Payment as defined in the order of Holman J.

10. That requires a little elaboration. Mrs Morris had brought divorce proceedings against Mr Morris. She was divorced from him on 21st February 2007. On 16th January 2007 District Judge Black sitting in the Family Division made a Consent Order (inter alia) that Mr Morris would pay Mrs Morris £300,000 by 31st March 2007 and a further £900,000 by 31st December 2007.

11. Those sums were not initially paid in compliance with that order. Further in mid 2007 it came to Mrs Morris' attention that Mr Morris had not declared very substantial assets which he owned when the Consent Order was made. These assets included funds belonging to him (and not ITS) held in accounts with Credit Suisse Geneva.

12. Accordingly on 1st February 2008 Mrs Morris applied to set aside the Consent Order on the basis of Mr Morris' failure to disclose his true asset position. This was on the premise that if he had been truthful the court would have ordered substantially more in ancillary relief.

13. Pending the hearing of that application Hedley J sitting in the Family Division on 14th July 2008 granted Mrs Morris a worldwide freezing injunction in respect of Mr Morris' assets of up to a value of £25m including all ***"monies and/or investments held or administered by the Royal Bank of Canada, Geneva and/or Credit Suisse, Geneva on behalf of [Mr Morris] in his sole name or through any company or other entity in which [Mr Morris had] an interest".***

14. That freezing order remains in place.

PAYMENT BY MR MORRIS

15. On 14th July 2008 Mr Morris paid Mrs Morris the sum of £1,481,920.53. This was apparently the amount (plus costs and interest) due under the Consent Order.

16. The source of this money has been identified by ITS and was the subject matter of a determination by me. I refer to paragraphs 89 and following of the judgment in the action. One of the companies in the group, Newdale, had received funds from the Impacted Schemes. It transferred £1,400,000 to Glencalvie (the Twenty Fifth Defendant) a BVI company. It provided no legal justification for receiving those funds.

17. On 27th March 2009 Mann J made an order requiring an Officer of Glencalvie to make an affidavit setting out its assets. That affidavit was sworn by Mr Picardo a partner in Hassans (the Gibraltar lawyers) and director of Glencalvie. He explained that monies were received by Glencalvie and on 14th July 2008 £1,494,078.15 was transferred to Mr Morris' solicitors (Alexiou Philips). They in turn on 14th July 2008 transferred them to the client account of Mrs Morris' matrimonial solicitors (and her current solicitors) Blick & Co.

18. Thus it was established that the Glencalvie monies was in effect used by Mr Morris to satisfy his obligations to Mrs Morris under the terms of the Consent Order.

19. At the same time the Serious Fraud Office has been investigating all of the pensions. I understand that it is not said that Mrs Morris is in any way involved in the allegations arising out of the dissipation of the Impacted Schemes' Funds.

20. ITS seek the return of that money transferred to Mrs Morris contending that it represents funds wrongfully removed from the Impacted Schemes. It is important to appreciate that ITS do not allege that Mrs Morris received those funds knowing that they had been obtained by Mr Morris by dishonest assistance or by dishonestly receiving trust property. In addition ITS acknowledge that Mrs Morris was a bona fide purchaser for value in respect of the monies that were paid to her as they were paid in satisfaction of the Consent Order.

MRS MORRIS' SUBSEQUENT ACTIONS

21. Mrs Morris' application to set aside the Consent Order came before Moylan J and he made an order on 29th April 2009 setting it aside partially. He found that Mr Morris had failed to disclose in the negotiations leading to the Consent Order that he had received some £5.1m from a Richard Craven. In addition Mr Craven stated he paid a further sum of £9.8m on 23rd April 2007 to Mr Morris. In total Moylan J found that Mr Morris had received some £14.9m of which he had made no disclosure.

22. Having set aside the Consent Order Mrs Morris' claim for ancillary relief was re-fixed for 13th January 2010. Both ITS and the SFO were served with those proceedings and given permission to intervene.

23. In the interim Holman J made an order on 26th November 2009 which was merged into the order he made on 13th January 2010. Mr Morris once again did not attend although solicitors Finers Stephens Innocent were given permission to attend on a watching brief if they were instructed to go on the record in the Chancery proceedings by Mr Morris.

24. A number of consent terms were agreed. First it was agreed (by all parties save Mr Morris) that as between Mrs Morris and Mr Morris he was not entitled to a credit for the payment to Mrs Morris of the Lump Sum Payment paid to her on 14th July 2008 as set out above pursuant to the order of District Judge Black (paragraph 2 (a)). Second Mrs Morris agreed that she would not seek to contend that any of the assets to which to ITS asserted proprietary claims formed any part of the financial resources of Mr Morris for the purposes of the ancillary claim. She limited her claim to a lump sum based on the above monies received by Mr Morris from Mr Craven (clause 2 (b)). Third as between Mrs Morris and ITS the ancillary relief order would be made without prejudice to the contentions of either of those parties as to who was beneficially entitled to the Lump Sum Payment.

25. Each of Mrs Morris and ITS were given liberty to apply either to the Chancery Division or the Family Division in relation to the determination of which of them was beneficially entitled to the Lump Sum Payment (i.e. the above mentioned sum received by her) (paragraph 5).

26. Mrs Morris was given liberty to enforce the ancillary relief order and ITS were given liberty to enforce any judgment made in their favour in the Chancery proceedings against Mr Morris (subject to interim protection provisions) (paragraph 7). ITS acknowledged that they had no beneficial entitlement to monies or other assets recovered by Mrs Morris which did not constitute the assets of the Pension Schemes or traceable products of such assets.

27. On the substantive application heard by Mr Justice Holman from 13th January 2010 to 19th January 2010 he ordered Mr Morris to pay a lump sum of £6m to Mrs Morris by 1st April 2010. He also ordered a continuation of the freezing injunction obtained by her. Mrs Morris had given an undertaking not to diminish the Lump Sum Payment save by a payment of reasonable living expenses and reasonable costs. That undertaking was expressed to expire on 30th June 2010. ITS' solicitors wrote to Blick & Co asking her to extend it to 30th November 2010. They did not receive a response so they issued the application on 25th June 2010. The undertaking was subsequently extended and has been continued pending the delivery of this judgment.

ITS' APPLICATION

28. ITS accepts that Mrs Morris was a bona fide recipient of the monies for value without notice of the source paid to her under the Consent Order. However it contends that the order having been set aside for non disclosure she no longer has any entitlement to those monies. It contends that she is no longer a bona fide recipient as above defined and having established that the monies were obtained by Mr Morris in breach of trust as set out above she can no longer assert a right to retain them.

MRS MORRIS' APPLICATION

29. In order to understand this I need to set out the effect of the freezing order that Mrs Morris obtained. When it was served on Credit Suisse it had a number of accounts containing monies which belonged to the Impacted Schemes. The detail is set out in the second witness statement of Mr Moser dated 9th July 2010 on behalf of ITS. On 4th November 2008 Mr Justice Blackburne had granted ITS a

without notice proprietary and freezing injunction against various Defendants including Mr Morris. On 25th November 2008 Blackburne J continued the order on the same terms until trial or further order in the meantime. ITS became aware that the Eighteenth Defendant Multiple and Unilateral Financial Futures Ltd ("MUFF") held various sums from the Impacted Schemes in a bank account at Credit Suisse in Geneva. They became aware that MUF Thailand also had an account with Credit Suisse. They therefore took steps to enforce the freezing order by way of a Civil Attachment Order dated 19th January 2009 from the Court of Geneva against Credit Suisse. MUF applied to vary the freezing order to permit it to pay legal costs and expenses but Lewison J dismissed that for reasons given in his judgment of 26th January 2009. During the course of disclosure ITS became aware that other companies may also have received sums from the Impacted Schemes and that those monies were also held in accounts at Credit Suisse. They obtained a further proprietary injunction freezing order on 27th March 2009. This was enforced by a further order against Credit Suisse by way of Civil Attachment Order in Geneva on 22nd July 2009.

30. Separately criminal restraint orders had been obtained by the Serious Fraud Office on 7th October 2008. This was in addition of course to Mrs Morris' earlier restraint orders.

31. On 9th January 2009 HH Judge Thornton QC made an order directing that all cash or credit in a financial institution must be paid in to an interest bearing account in the High Court of Justice Chancery Division subject to any further order it might make.

32. Mr Moser in paragraph 21 of his witness statement on behalf of ITS set out the monies that were received. The vast bulk of the monies were in accounts in the name of the various Defendants in the action and represented funds from the Impacted Schemes.

33. However £1,978,162.66 was held in an account in the name of Mr Morris by Credit Suisse. ITS do not contend that those monies represent any part of the funds of the Impacted Schemes. Mr Morris had a further account in which there was $330,699.98. This account too ITS do not seek to contend that it forms any part of the Impacted Schemes' assets.

34. On 25th May 2010 at the conclusion of the trial prior to the handing down of the judgment I directed that all the monies then being held in court be paid out to ITS. This included the above mentioned monies which were not trust funds but were available for execution as assets that apparently belonged beneficially to Mr Morris and could be utilised to discharge his overriding liability to £52m.

THE TWO APPLICATIONS

35. Thus ITS claim repayment of the monies paid to Mrs Morris pursuant to the Consent Order. Mrs Morris in turn contends that the monies received by ITS pursuant to my order of 24th May 2010 should be paid out to her in part satisfaction of the Lump Sum Order made by Holman J as set out above.

36. The applications came on to be heard by me on 23rd July 2010. At the conclusion of the hearing I indicated to the parties that I considered both applications failed so that ITS could retain the monies obtained pursuant to my order of 24th May 2010 and Mrs Morris was not obliged to repay the monies received by her under the terms of the Consent Order. Due to the proximity of the end of term I indicated that I would give reasons in a later judgment. This is that judgment. I apologise for the length it has taken but there have been various matters which have intervened between 23rd July 2010 and now which made it impossible for me to deliver the judgment any earlier. I regret that but there were circumstances beyond my control. I set out now reasons for the conclusions that I expressed on 23rd July 2010.

ITS' APPLICATION

37. ITS contend that the monies that were paid to Mrs Morris were trust monies belonging to the Impacted Schemes wrongfully removed pursuant to dishonest actions to which Mr Morris was a party both by providing dishonest assistance and in the case of these monies being a knowing recipient as regards those trust funds. That was my determination in the action before me. Although Mrs Morris did not participate in the action she was at liberty so to do and by paragraph 11 (b) of the

consent order leading to the hearing before Holman J on 13th January 2010 Mrs Morris agreed to be bound by any findings of fact or rulings of law made in the Chancery proceedings other than in relation to the Lump Sum Payment made to her as set out above. That precludes ITS from challenging the original payment (which it does not seek to do as I have set out above). However ITS contends that it ***does*** permit it to raise all the other matters surrounding that payment.

38. In essence therefore ITS contend that the flow of money from the Impacted Schemes into Mrs Morris' hands can now be traced as being tainted monies and that ITS (a) can trace the flow of the money from the schemes into her hands in equity and bring an equitable proprietary claim or (b) they assert a claim for money had and received having followed and/or traced at law (as set out in ***Lipkin Gorman v Karpnale*** ***[1991] 2 AC 548*** and ***Jones v Jones*** ***[1997] Ch 159***).

39. As I have said ITS accept that Mrs Morris was a bona fide purchaser when she received the Lump Sum Payment. However they contend that she has unwittingly ceased in someway to be a bona fide purchaser having set aside the Consent Order with the result that the monies re-vested in Mr Morris and are regarded in equity as never having ceased to be his property. They contend that that the effect of such re-vesting is the Lump Sum Payment or its traceable product is subject to ITS' proprietary claim against Mr Morris which has been upheld in the judgment I delivered. They also contend that the title having re-vested into Mr Morris it is available for them to claim as money had and received under the ***Lipkin Gorman*** case.

STATUS OF MONIES RECEIVED UNDER CONSENT ORDER

40. It is clear in my view that Mrs Morris in giving up any of the rights she had in exchange for the payment of the lump sum is a purchaser for value. If she has no notice of any other claim to the monies she has received she is also a purchaser for value without notice. That appears clear from the decision of the Court of Appeal in ***Hill & Anr v Haines [2008] Ch 412***.

41. ITS accept that.

42. Thus the monies that were transferred became Mrs Morris' ***absolutely*** both as against Mr Morris and as against any claims that ITS might bring. She became free to deal with them in any way that she thought fit and ITS could make no claim against them.

EFFECT OF MRS MORRIS' APPLICATION

43. She issued her application on 1st February 2008. She sought an order that the consent order be set aside, there be a re-hearing of her application for periodical payments, lump sum and property adjustment and other pension sharing order. She obtained a freezing injunction before Hedley J on 14th July 2008. As I have said this effectively froze Mr Morris' accounts in Credit Suisse and any other accounts to which he was involved to the knowledge of Credit Suisse. Although ITS and the SFO caught up later it was initially Mrs Morris' actions which preserved £32m for ITS. Mr Morris had made the payments at virtually the same time.

44. Moylan J, having granted Mrs Morris permission to apply out of time to set aside the consent order, on 28th April 2009 set aside the order save for the periodical payments of maintenance. The order was drawn up on 9th June 2009 having been amended under the slip rule by the direction of Moylan J on 8th June 2009. He set a timetable for the hearing of Mrs Morris' application for a lump sum payment.

45. Significantly he did not order Mrs Morris to return the lump sum order payment to Mr Morris. This is hardly surprising. Mrs Morris was going to be no worse off (save for costs presumably) on the re-hearing. There would be therefore no prospect of Mr Morris having that money returned back to him.

46. It is the effect of this order and the legal consequences that flow from it which is crucial to the determination of ITS' claim to the Lump Sum Payment.

ITS' SUBMISSION IN RESPECT OF LUMP SUM PAYMENT

47. ITS' primary claim is that whilst Mrs Morris received the monies pursuant to the Consent Order she could only retain them as long as she remained a purchaser for value without notice of its claim in respect of the monies that were transferred pursuant to that order. Once that order is set aside (especially for fraud) the order is deemed never to have been made and the court puts the parties into the position they were before it was made. Thus ITS contends the title to the monies re-vested in Mr Morris. His title is subject to ITS' claim as the money was trust monies which were paid to him in the circumstances set out in the main judgment.

48. ITS submit that fraud unravels contracts and judgments alike and the effect of the fraud on both is the same namely to vitiate the judgment, contract or transaction and to re-vest any beneficial title which otherwise had been acquired under the judgment, contract or transaction. They rely upon the observation of Denning LJ in ***Lazarus Estates Ltd v Beasley [1956] 1 QB 702*** at page 712-3:-

"No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and al transactions whatsoever: see as to deeds, Collins v Blantern as to judgments, Duchess of Kingston's case; and as to contracts, Master v Miller. So here I am of opinion that if this declaration is proved to have been false and fraudulent, it is a nullity and void and the landlords cannot recover any increase of rent by virtue of it".

49. Thus ITS contends there is a giving and a taking back on both sides which necessarily involves a re-vesting of any beneficial interest which is passed in a rescinded transaction which by virtue of such re-vesting can be regarded in equity as never having ceased to be the property of the party from whom it emanated. ITS relies upon the extensive judgment of Rimer J in ***Shalson v Russo [2005] Ch 281***:-

"The question then arises as to the consequence of such rescission. I had virtually no argument on this, Mr Smith devoting the bulk of his effort to his primary argument and Mr Trace asserting that there was no question of there having been a rescission. However, I did understand Mr Smith's secondary position to be that, if it was necessary for him to rely on rescission, then rescission there had indeed been and its effect was to revest in Mr Mimran the title to the money he had been induced to advance to Westland, carrying with it a right to trace it onwards. "

Rescission is an act of the parties which, when validly effected, entitles the party rescinding to be put in the position he would have been in if no contract had been entered into in the first place. It involves a giving and taking back on both sides. If it is necessary to have recourse to an action in order to implement the rescission, the court will make such orders as are necessary to put both contracting parties into the position they were in before the contract was made. There is, however, also a line of authority supporting the proposition that, upon rescission of a contract for fraudulent misrepresentation, the beneficial title which passed to the representor under the contract revests in the representee. The representee then enjoys a sufficient proprietary title to enable him to trace, follow and recover what, by virtue of such revesting, can be regarded as having always been in equity his own property. This may be an essential means of achieving a proper restoration of the original position if the representor has in the meantime parted with the property and is ostensibly a man of straw unable to satisfy the court's orders for restoration of the original position.

Early support for this is to be found in Small and Others v Attwood and Others You 407, 533 to 538; 159 ER 1051, at 1102 to 1104. Moving to the last century, in Banque Belge, supra, Atkin LJ said, at 332:

"I will assume therefore that this is a case not of a void but of a voidable transaction by which Hambrouck obtained a title to the money until the plaintiffs elected to avoid his title, which they did when they made their claim in this action. The title would then revest in the plaintiffs subject to any title acquired in the meantime by any transferee for value without notice of the fraud."

Bankes LJ also assumed that Hambrouck obtained a voidable title to the money (see 325). The Court of Appeal held that the bank was entitled to trace the money into an account in the name of Hambrouck's mistress and to recover it in Lonrho Plc Fayed (No 2) [1992] 1 WLR 1, at 12, Millett J said that:

"It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim."

Millett J said much the same, this time with more confidence, in El Ajou v Dollar Land Holdings plc and another [1993] 3 All ER 717, at 734:

"But if the other victims of the fraud can trace their money in equity it must be because, having been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim: see Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371 at 387-390 per Brennan J. There is thus no distinction between their case and the plaintiff's. They can rescind the purchases for fraud, and he for the bribery of his agent; and each can then invoke the assistance of equity to follow property of which he is the equitable owner. But, if this- is correct, as I- think it is, then the trust which is operating in these cases is not some new model remedial constructive trust, but an old-fashioned institutional resulting trust."

Tuckey J recognised the same principle in Bank Tejerat v Hong Kong and Shanghai Banking Corp (CI) Ltd [1995] 1 Lloyd's Reports 239, at 248; and Millett LJ reverted to it in Bristol and West Building Society v Mothew [[1998] Ch 1], at 23, when he referred to his earlier quoted observations in El Ajou and said that, in making the suggestion he did, he was:

concerned to circumvent the supposed rule that there must be a fiduciary relationship or retained beneficial interest before resort may be had to the equitable tracing rules. Until the equitable tracing rules are made available in support of the ordinary common law claim for money had and received some problems will remain incapable of sensible resolution."

These authorities support the view that, upon the implied rescission of the loan contracts, Mr Mimran became entitled to assert a proprietary interest in the money he advanced to Westland, being an interest which would then entitle him to trace the money further. I should, however, mention certain obiter views of the Privy Council in In re Goldcorp Exchange Ltd (in receivership) [[1995] 1 AC 74]. The judgment of the board was delivered by Lord Mustill who, at 102 to 104, expressed the view that the consequence of any rescission by the purchasers of their purchase contracts for misrepresentation (there had in fact been no such rescissions) would be to entitle the purchasers merely to personal rights to recover the money paid under the contracts, but would not entitle them to any sort of proprietary right in respect of such money. Lord Mustill said, at 102:

"Upon payment by the customers the purchase money 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. The only possible exception is In re Eastgate, Ex parte Ward [1905] 1 KB 465. Their Lordships doubt whether, correctly understood, the case so decides, but if it does they decline to follow it."

The report of the argument in Goldcorp (see 80) shows that the Board was referred to El Ajou, but to none of the other authorities to which I have referred on the proprietary consequences of a rescission. Taken in isolation Lord Mustill's observations might be read as suggesting

that the approach they favoured is wrong, and that upon rescission of a voidable contract induced by misrepresentation the representee has at most a personal claim for the repayment of money paid under it. If so, that would appear to impose serious limitations on the remedies available to those who have been induced into such contracts. In particular, I cannot see how the bank in Banque Belge could have achieved the recovery it did from the fraudster's mistress, since unless the rescission operated retrospectively to revest in the bank a proprietary title to the money sufficient to justify a tracing claim, the mistress's plea that the fraudster had given her the money ought to have been an answer to the bank's claim. Similarly, I do not follow on what basis the court could have considered it appropriate to give the bank in the Bankers Trust case the assistance it did with regard to tracing the whereabouts of the money of which it had been defrauded.

I doubt, however, if in fact there is any difference of approach between the views expressed in Goldcorp and those expressed in the other cases. Lord Millett is a judge whose views in this area of the law command the very highest respect. First, he was careful to qualify his observations by saying that the effect of the revesting was "at least" to entitle the claimant to set up a tracing claim. Secondly, he was not focusing on the type of situation to which the Privy Council was directing its comments in Goldcorp, namely one in which the representee's purchase price, when paid over, became subject to a floating charge granted by the representor, and the assumed rescission followed its crystallisation. It is no part of the philosophy of the revesting theory that all intermediate transactions occurring prior to the rescission can be undone. Until rescission, the property is vested in the representor; and if it is disposed of to a good faith purchaser, that purchaser will obtain a title which will be unimpeachable after any rescission. Such purchasers would include the representor's chargees. I read Lord Mustill's observations in Goldcorp as saying no more than this. Similarly, if a representor company were to go into compulsory liquidation before any rescission, its assets would cease to be beneficially part of its property and would become subject to the statutory scheme in favour of creditors of the nature discussed in Ayerst (Inspector of Taxes) v C & K (Construction) Ltd [1976] AC 167; and I should be surprised if any subsequent rescission entitled the representee to say that the property transferred to the company under the voidable contract must be regarded as having at all time been his property so as to fall outside that scheme. But in cases in which third party rights such as this have not accrued, I would not wish to exclude the possibility that the representor might be able to assert the proprietary rights arising on rescission which the line of authority to which I have referred supports. Such a claim would not involve giving him any preferential rights over creditors it would merely assert his right to recover property in which they can have no interest.

I propose, therefore, to follow the guidance given in Banque Belge line of authorities. I hold, therefore, that upon the implied rescission of the loan contracts effected by the bringing of his Part 20 claim, Mr Mimran had revested in him the property in the money he advanced to Westland entitling him at least to trace it into assets into which it was subsequently applied".

50. It must be appreciated that in the ***Shalson*** case Rimer J was addressing the rights of an innocent party who had been induced to part with money by a fraudulent representation. The question therefore was if the innocent party elected to rescind ***a contract*** for fraudulent representation what impact did that have on property which had changed hands as a result of the contract. Rimer J correctly in my view analysed this at paragraph 108 where he said this:-

"It is no different in kind from any other case in which a representee is induced to enter into a disadvantageous contract by a dishonest deceit. It is well established that any such contract is voidable, not void, and that it is and remains a valid contract until set aside by the representee: see Reese River Silver Mining Company Limited v Smith (1869) 4 LRHL 64, at 73,74, per Lord Hatherley LC; and Newbigging v Adam (1886) 34 Ch D 582, at 592, per Bowen LJ. 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. Mr Smith's submission involves a reversal of that ordinary principle. On his argument, as from

the moment of completion D becomes a trustee of the purchase money for C - and presumably C becomes a trustee of the house for D, since C cannot at the same time be beneficially entitled to both house and price. Mr Smith's submission to the effect that D becomes a trustee of the money for C at the moment it is paid over - and that in the present case Westland or WIB became a trustee of the money for Mr Mimran immediately the money was advanced — is, in my judgment, incorrect. What the position is when and if, on discovery of the fraud, C elects to rescind the contract of course raises a different question."

51. In the present case the claim for repayment of the monies is in effect being made by the fraudster although it is ITS via the fraudster. What Mrs Morris is giving up and seeks to restore by her later application is her right to seek a further Lump Sum Payment from Mr Morris based on the position that ought to have been put before the court the first time. However it is not in my view that Rimer J was intending that the parts of his judgment referred to above applied to the representee and assets or monies which they had received in exchange for the assets which they were seeking to recover by electing to rescind the contract whereby they transferred the assets to the representor.

52. As the authorities referred to in those paragraphs show the position is that the court re-vests the property in the representee ***to give him a sufficient proprietary title to enable him to trace, follow and recover what by virtue of such re-vesting can be regarded as having always been in equity his own property.*** This may be an essential means of achieving a proper restoration of the original position if the representor had in the meantime parted with the property and is ostensibly a man of straw unable to satisfy the court's orders for restoration of the original position.

53. Thus it is addressing the possibility of the victim being enabled by a tracing claim to recover partially or in whole the monies which he has parted with by allowing him to recover assets which were purchased using those monies.

54. I do not consider that it was intended by those observations to suggest that title to assets received by the innocent party from the wrongdoer re-vested in the wrongdoer. Take the present case. If one supposes that ITS was not involved and the claim was against Mr Morris but he was made bankrupt I would find the idea that Mrs Morris would have to disgorge the Lump Sum Order to the trustee because of a proposition that she had rescinded the Consent Order untenable.

55. The reality is in my view that upon seeking rescission of a contract for fraudulent misrepresentation the victim may have a right to assert some kind of proprietary right in the assets he transferred to the wrongdoer for the purpose of a tracing or other proprietary claim but as regards benefits he received it seems to me that they have to be brought into account only when the court has finally adjudicated on the claim to rescind the contract. By that time there may be other intervening events. Bankruptcy is an example as I have set out above. There are other examples. As Rimer J pointed out in paragraph 126 of his judgment (when dealing with the case of ***in re Goldcorp Exchange Ltd*** ***[1995] 1 AC 74***) :-

    "it is no part of the philosophy of the re-vesting theory that all intermediate transactions occurring prior to the rescission can be undone. Until rescission the property is vested in the representor and if it is disposed of to a good faith purchaser that purchaser will obtain a title which will be unimpeachable after any rescissions."

56. Mrs Morris' position is entirely the same in my view. All Moylan J did was to set aside the order for the Lump Sum Payment. He was exercising his powers as a matrimonial Judge in that behalf given to him under the Matrimonial Causes Act 1973 (to which I will refer further in this judgment). In my judgment the final reckoning on a claim for rescission of the contract would only take place when the reconstituted hearing of Mrs Morris' claim for financial provision was heard. This is the right which she seeks to reassert by reason of the fraudulent misrepresentation.

57. At that hearing the question of the Lump Sum Payment will have to be considered. Mrs Morris will have to give a credit for it one way or another. I fully accept that she could not obtain ***both*** the benefit of the Lump Sum Payment under the Consent Order and seek a larger payment on a reconsideration. What would happen in effect is that if Mr Morris was not ordered to pay any larger sum then she would retain it. Alternatively it is possible that she might be given a larger sum and be required to repay the Lump Sum Payment in exchange for the larger sum. That is in my view

unlikely. If she obtained a larger sum it is inevitable that Mr Morris would be able to appropriate that sum in partial discharge of his greater liability on the reconsideration. All of this is in the future in my view.

58. Equally when the matter is finally resolved by the order of Holman J on 13th January 2010 Mrs Morris is able to appropriate for herself in satisfaction of the greater liability the Lump Sum Payment which she has retained.

59. I do not intend to attempt to deal with the observations of Rimer J on the correctness of ***Goldcorp Exchange Ltd*** as it is not necessary for the purposes of this judgment. It does seem to me however that when one looks at the position of Mrs Morris she received a sum of money which now belongs to her. It remained hers despite the fact that the monies were sums misappropriated from the Claimant. That is because she obtained title to those bona fide without notice of any adverse claim against Mr Morris. There is no specific sum of money in my view which can be said to be trust monies. I cannot see that upon her seeking rescission she becomes divested of any property. She received a sum of money. If the claim for rescission is successful at the end she may be required to pay a sum depending on the ultimate settling of the dispute by the court. In this case she has not been ordered to pay any sum in the family proceedings. As I have said however I accept that she cannot have both payments.

60. All that happens if the claim for rescission is finally established and determined is that she may be required to return the money to Mr Morris. It becomes his property then but subject to a claim by ITS. I do not see how with respect to ITS' argument the supposed rescission of the contract between Mr and Mrs Morris goes one step further and re-vests title in to ITS.

61. The ***Shalson*** decision is looking at the position of the ***victim*** and the creation in the victim of a sufficient equity in property he handed over so as to enable him to trace into other assets. It has nothing to do with the present situation.

62. Even if it did it requires a further leap in logic then to decide that the monies automatically vest in ITS. I do not see that that is the case. ITS has its separate claims against Mr Morris for knowing receipt and dishonest assistance. That enables it to claim against him. It is not an absolute right. Even if the monies were paid back to Mr Morris any right on the part of ITS to claim those monies might be lost. For example Mr Morris might have charged any funds to a third party. When he received them they could become subject to the charge immediately which would operate (assuming the chargee has no notice of ITS' claims) in priority to the ITS claim.

63. Therefore in conclusion I find no assistance from these authorities. In my view the effect of Moylan J's order was to set aside the Consent Order. It did not address the full implications of that. The order was not set aside in toto because the periodical payments order remained. Mrs Morris obtained title to the monies. I do not see that she lost title subsequently by reason of her seeking to rescind the Consent Order by reason of Mr Morris' fraudulent representations. She might for the reasons that I have set out above become under a personal obligation to return those monies if she is ordered so to do. No such order has been made.

64. If such an order were made it seems to me that Mrs Morris would be entitled to set off against any such personal obligation the amounts ordered in her favour by Holman J on 13th January 2010. ITS cannot in my view circumvent that by bringing a direct claim. Its claim must be ***through*** Mr Morris and thus subject to any rights that Mrs Morris can assert against him.

65. There is a further fatal flaw in ITS' argument. It seeks to bypass Mr Morris and make a direct claim against the monies. I do not see that it can do so. Any claim must be brought through Mr Morris. If the Lump Sum Order had not been set aside any claim would have had to come through him and it would have failed as ITS acknowledges because Mrs Morris acquired the monies under the Lump Sum Order bona fide and without notice of any ITS claim. If the Lump Sum Order is set aside nevertheless ITS cannot ignore intervening events that have occurred. It must still assert a claim via Mr Morris. Thus to be able to seek the payment of the monies of £1.4m back from Mrs Morris it must be subject to rights that have accrued by the time that claim is made. The most important right is the financial adjustment order made by Holman J on 13th January 2010 which awarded Mrs Morris a lump sum of £6m. Any claim to the £1.4m (whether by Mr Morris or by ITS claiming through Mr

Morris) must be subject to Mrs Morris being able to raise a set off of £6m. That fatally flawed ITS' claim in any event in my view.

66. Alternatively Mrs Morris impliedly might acknowledge she is under some obligation to restore the fruits of the Consent Order if she seeks to enforce the Holman J Order in full. She can simply do that by appropriating the money notionally repayable to Mr Morris in part satisfaction of his liability to her.

67. I conclude therefore that Mrs Morris became the beneficial owner of the monies paid over to her by the Consent Order and she did not cease to be the beneficial owner merely because she applied to set aside the Consent Order and obtained further relief by virtue of the order by Holman J on 13th January 2010. For the reasons I have set out above this will not enable her to obtain benefits under both the Consent Order and the Holman J order but that is not the point. I do not see she ceased to be the beneficial owner of these monies free from any claim by ITS.

68. I therefore determine that ITS' application should fail and I dismiss it.

FAMILY LAW CONSIDERATIONS

69. My rejection of ITS' claims to title for the monies based on contractual provisions is the end of its claim.

70. However Mrs Morris has an additional argument. It is submitted on behalf of Mrs Morris that Moylan J was exercising discretionary powers given under statute. As such it is not setting aside a contract and that the doctrine of rescission has no application.

71. This is reinforced by the fact that the court made no actual order for rescission (beyond setting aside the Consent Order partially) nor did it transfer the £1.4m back to Mr Morris or even order it to be paid back. It is contended that it was simply re-opening the ancillary relief issue to increase the amount to be paid to Mrs Morris to correct the wrong done to her.

72. This is reinforced it is submitted by the fact that other provisions in relation to the matrimonial home do not appear to have been interfered with.

73. In support of this argument Mrs Morris referred to the House of Lords decision in ***Jenkins v Livesey [1985] 1 AC 424*** at pages 435 and 437.

74. At page 435 Lord Brandon of Oakbrook said this:-

"My Lords, there can be no doubt that this appeal raises important questions of principle in family law. None of the authorities which have any bearing on those questions are binding on your Lordships' House, and I propose, therefore, to consider the questions first from the point of view of principle, and to examine and comment on some of the relevant authorities later.

In considering the questions from the point of view of principle, there are four matters which I think that it is necessary to state and emphasise from the beginning. The first matter is that the powers of a judge of the Family Division of the High Court, or of a judge of a divorce county court, to make orders for financial provision and property adjustment following a divorce are conferred on them, and conferred on them solely, by statute, the relevant statute at the time of the proceedings out of which this appeal arises being the Matrimonial Causes Act 1973. The second matter is that there is no difference in this respect between a judge's powers to make such orders after a disputed hearing involving evidence on both sides, and his powers to make such orders by the consent of the parties without having heard any evidence at all. The third matter is that the powers of registrars to make such orders, when delegated to them by rules of court, are exactly the same as those of judges, whether the proceedings concerned are in the principal registry of the Family Division, or in the registry of a divorce county court. The fourth matter is that, when parties agree the provisions of a consent order, and the court subsequently gives effect to such agreement by approving the

**provisions concerned and embodying them in an order of the court,
the legal effect of those provisions is derived from the court order itself, and does not depend any longer on the agreement between the parties: de Lasala v. de Lasala [1980] A.C. 546, 560G-H per Lord Diplock."**

75. He reverted to this at page 437 as follows:-

***"The situation with regard to consent orders, especially where
no affidavits are filed at all and reliance is placed entirely on the exchange of information between the solicitors of the parties, was at the material time less satisfactory. There were at the time of the proceedings out of which this appeal arises no statutory provisions or rules of court relating specifically to the making of consent orders. It was, as I indicated earlier, common practice for registrars to make such orders without making any inquiries themselves, but relying simply on the fact that both parties were represented by solicitors, and that these could be relied on to have inquired adequately into all the matters to which regard has to be had under section 25(1) before advising their respective clients to agree to the making of consent orders by the court. In this way the court considered that it was indirectly, through the medium of
the solicitors concerned, having regard to ail such matters before making the consent orders sought. I do not suggest that this practice was wholly satisfactory, and, as I shall show later, it has since been improved."***

76. Further it is submitted on behalf of Mrs Morris that it has been held by the Court of Appeal in ***Xydhias v Xydhias*** ***[1999] 1 FLR 683*** that the ordinary contractual principles do not apply to compromises of ancillary relief applications because they do not give rise to a contract enforceable at law. In that case the Court of Appeal held that ordinary contractual principles do not apply. The purpose of negotiation was to reach heads of agreement signed by the parties to be put to the court to exercise a discretion in determining whether accord had been reached which was satisfactory to the court.

77. Thus it is contended that that is all that happened in the Family Court. In my view this is correct. Had it been necessary for me to reach this stage of the argument I would have accepted the submissions on behalf of Mrs Morris. This is not a case involving rescission of a contract; it is a question of the Family Court reviewing their decision. On that analysis as the Family Court never made any order in respect of the Lump Sum Payment it cannot be said to be re-vested in some way in favour of Mr Morris so as to enable ITS to make a claim against it. I accept that there would have to be an accounting at some stage because Mrs Morris cannot have the benefit of both adjudications as to her entitlement to the Lump Sum Orders. However that does not in my view involve an automatic re-vesting of the title to the monies in favour of Mr Morris.

78. Therefore applying the Family Law principles in my view leads to the same conclusion namely that the Lump Sum Payment remains Mrs Morris' and is not available to claim by ITS.

79. I therefore dismiss ITS' application on that basis above.

MRS MORRIS' APPLICATION

80. My order of 24th May 2010 provided for payment of the two sums which were formerly in accounts with Credit Suisse in the name of Mr Morris but which were paid into court in the Chancery Division as a result of an order of HH Judge Thornton QC sitting at the Central Criminal Court on 9th January 2009. This was as a result of an application made by the SFO for a variation of a restraint order granted by the same Judge on 7th October 2008. It was only when funds were credited that ITS were able to realise that the accounts were in the name of Mr Morris.

81. On 24th May 2010 at the conclusion of the trial I directed that the monies being £1,978,162.66 and $330,699.98 be paid out in full to ITS. The reason for that is that I had concluded at that stage Mr Morris had no defence to the claim brought against him by ITS and there was no reason therefore why any of the monies should not be released to ITS immediately.

82. Mrs Morris was not informed of the order at the time but she was given notice of its effect by ITS' solicitors as required by paragraph 7 (a) of the order of Holman J dated 13th January 2010. That order provided (inter alia) "***the wife shall be at liberty to enforce the ancillary relief order and ITS shall be at liberty to enforce any judgment or other order made in its favour in the Chancery proceedings against the husband [there then followed provisos]."***

83. This seems to me to preserve both ITS and Mrs Morris' right to seek execution of any orders in their favour. There were provisions dealing with the assertion of proprietary claims but neither ITS nor Mrs Morris can assert any proprietary order in their favour as against these funds. ITS can seek execution of them because I determined I would make a final order in respect of the monies in part satisfaction of Mr Morris' liability which I declared at the conclusion of the evidence. Mrs Morris is a judgment creditor of Mr Morris by virtue of the order of Holman J dated 19th January 2010 when he ordered him to pay (inter alia) a lump sum of £6m by 1st April 2010. He continued the freezing order in her favour until the monies had been paid. That to my mind is an irrelevancy. First the freezing order binds Mr Morris; it does not restrain ITS from seeking to enforce its rights. Second a freezing order only operates in personam; it creates no proprietary rights and is subject to any other creditor obtaining execution over assets which were formerly subject to the freezing order. ITS contend that is what happened here. It simply obtained the monies in execution of Mr Morris' liability before Mrs Morris was able to seek them in execution of his liability to her to pay £6m.

BASIS FOR MRS MORRIS' APPLICATION

84. As a platform for the application Mrs Morris relies upon CPR 40.9 and/or rule 3.1 (7). She seeks that the order I made be set aside as regards paragraph 2 and that ***ITS*** pay to her the sums or such other order or further consequential relief as the court should see fit. She complains that the effect of my order is to give ITS a priority over her as a judgment creditor and is therefore unfair.

85. I accept it gives priority over her as another unsecured creditor of Mr Morris but that is not necessarily unfair.

IS MRS MORRIS DIRECTLY AFFECTED BY THE JUDGMENT OR ORDER?

86. Mrs Morris is only affected in the sense that if she does not have the order set aside she will herself be unable to seek to execute Holman J's order against the monies. The claim then is based on a proposition that as a prospectively unsatisfied judgment creditor she is directly affected by the order.

87. There is slender authority addressing CPR 40.9. I was referred to the decision of Judge Behrens in ***Hepworth Group v Stockley [2007] 2 All ER (Comm) 82.*** In that case he concluded that in respect of a dispute concerning title to a Spanish property the interveners as they had no direct right to claim a transfer of the property (they were motivated solely to stay there), were not ***"directly affected"*** by the order.

88. Mr Spearman QC for ITS submits in his written submission on its behalf that as Mrs Morris does not have any direct claim in respect of the monies she cannot be regarded as directly affected. To do so merely at the behest of a judgment creditor would be ***"a novel, far reaching, and indeed extravagant result"***.

89. I can see some force in that but I do not accept it in the context of this present case. Given the position of Mrs Morris and the proceedings brought by her and ITS to recover assets against Mr Morris the obtaining of the successful execution by ITS does in my view directly affect Mrs Morris because otherwise she would have been able to obtain execution against these particular funds which were transferred from Switzerland pending the resolution of the numerous conflicts which involve Mr Morris. I would therefore conclude that she is within CPR 40.9.

ALTERNATIVE ARGUMENT APPLICATION UNDER RULE 3.1 (7)

90. This rule deals with the court's case management powers to ensure that cases are properly and efficiently conducted. CPR 3.1 lists powers of the court to make orders. Sub rule (7) provides ***"(7) A***

power of the court under these rules to make an order includes the power to vary or revoke the order".

91. ITS submit that as my order was a final order (subject only to appeal) there is no jurisdiction under the rule for me to set it aside. To do so it is submitted (and has been regularly submitted in a series of cases) means a Judge (or possibly a different Judge at the same tier) sits in an appellate capacity.

92. This was considered by the Court of Appeal in ***Collier v Williams*** ***[2006] EWCA Civ 20*** at paragraph 39 and 40 as follows:-

"We now turn to the third argument. CPR 3.1(7) gives a very general power to vary or revoke an order. Consideration was given to the circumstances in which that power might be used by Patten J in Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen [2003] EWHC 1740 (Ch). He said at paragraph 7:-

The Deputy Judge exercised a discretion under CPR Part 13.3. It is not open to me as a judge exercising a parallel jurisdiction in the same division of the High Court to entertain what would in effect be an appeal from that order. If the Defendant wished to challenge whether the order made by Mr Berry was disproportionate and wrong in principle, then he should have applied for permission to appeal to the Court of Appeal. I have been given no real reasons why this was not done. That course remains open to him even today, although he will have to persuade the Court of Appeal of the reasons why he should have what, on any view, is a very considerable extension of time. It seems to me that the only power available to me on this application is that contained in CPR Part 3.1(7), which enables the Court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ. It is therefore clear that I am not entitled to entertain this application on the basis of the Defendant's first main submission, that Mr Berry's order was in any event disproportionate and wrong in principle, although I am bound to say that I have some reservations as to whether he was right to impose a condition of this kind without in terms enquiring whether the Defendant had any realistic prospects of being able to comply with the condition.

We endorse that approach. We agree that the power given by CPR 3.1(7) cannot be used simply as an equivalent to an appeal against an order with which the applicant is dissatisfied. The circumstances outlined by Patten J are the only ones in which the power to revoke or vary an order already made should be exercised under 3.1(7)."

93. They endorsed the judgment of Patten J in ***Lloyds Investment (Scandinavia) Ltd v Christian Ager-Hanssen*** ***[2003] EWHC 1740 (Ch)*** where he said:-

"[CPR 3.1 (7)] is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. ….. it seemed to me that for the High Court to revisit one of its early orders the applicant must either show some material change of circumstances or that the Judge who made the earlier order was mislead in some way whether innocently or otherwise as to the correct factual position before him. …. If all is sought is a reconsideration of the order on the basis of the same material then that can only be done in my judgment in the context of an appeal….. "

94. The Court of appeal in ***Edwards v Golding & Ors*** ***[2007] EWCA Civ 416*** once again adopted that approach. Finally in ***Forcelux v Binnie*** ***[2009] EWCA Civ 854*** the Court of Appeal considered the rule again. There was no argument about the extent of the rules save that it appears from Warren J's judgment (with which the other Judges agreed) that the provision could be relied upon to set aside a possession order which had already been made as a final order.

95. In ***Paragon Finance v Pender*** ***[2003] EWHC 2834 (Ch)*** I expressed the view that a possession order could be set aside under CPR 3.1 (7). In so doing I made the following observations:-

"74. Her Honour Judge Mayer (paragraph 33) accepted Mr Wulwik's submissions that she had no jurisdiction to entertain an application under order 37. Nevertheless, she quite properly went on to consider the merits in case she was wrong. Regrettably, I have come to the conclusion that she was wrong in respect of CCR order 37. I suspect that this does not actually matter, because it seems to me that the court had a power to revoke the order under CPR 3.1(7) "A power of the court under these rules to make an order includes a power to vary or revoke the order". In my judgment this gives the court an exceptional power to revoke an order. It is not limited as to the type of particular orders and it is strongly analogous to judgments of the Court of Appeal in re RS and M Engineering to which I have already made reference above. It should not generally be used as a back door appeal. However, it does confer on the court a power in appropriate circumstances to revoke an order.

75. I conclude therefore, that Her Honour Judge Mayer had a power under CPR order 37 and CPR 3.1(7) to consider revoking the possession order 5th January 1995."

96. My reference to ***RS and M Engineering [1999] 2 BCLC 485 CA*** was a case where the Court of Appeal (inter alia) held that a Judge hearing an insolvency matter could review an order of a Judge of the same tier under rule 7.47 (1) Insolvency Rules Act 1986 which provides:-

"7.47 (1) every court having jurisdiction under the Act to wind up companies may review, rescind or vary any order made by it in the exercise of that jurisdiction".

97. There is a similar power conferred to Bankruptcy Courts in the case of individual bankruptcy.

98. One can also in my view foresee other circumstances when a final order might be varied see for example the argument in ***CIS v Argyll*** ***[1998] AC 1*** at page 7.

99. My decision in ***Paragon Finance*** was referred to doubtingly in various editions of the White Book (ultimately disappearing as regards this rule in 2010).

100. It seems to me that with respect to the authors of the White Book and the submissions of Mr Spearman QC there is nothing in the Court of Appeal decisions which suggests that the rule should be cut down so as to be completely inapplicable to ***any final order***. The wording of the rule is very wide. It seems to me it was intended by the draftsman to confer the extremely wide supervisory powers in the Civil Procedure regime that existed elsewhere in insolvency courts as set out above. That is not to say that a final order can be set aside by a Judge willy nilly. It is a matter of discretion to be exercised according to the particular circumstances of the case. That in my mind is all that the Court of Appeal Judges to which I have referred say when they support Patten J's judgment. They say in effect as regards final orders it would be ***hardly ever*** appropriate to set aside a final order. They do not say ***"never".***

101. Accordingly I am of the opinion that I can entertain Mrs Morris' application to set aside my order under this rule in addition to CPR 40.9. It would be quite wrong to import in to the CPR words which are not there so as to limit the type of orders that are covered by it. One of the main purposes of the CPR was to give the courts complete flexibility over the proceedings before them and this is an important ancillary tool. I can see nothing in the rule which justifies it not applying to final orders if appropriate according to the facts of the case.

102. In the present situation where Mrs Morris just as ITS was a victim of the fraud of Mr Morris and that she had obtained (as had the SFO and ITS) freezing orders over Mr Morris' assets she

clearly has an interest in any recoveries. My order was a final order but it was made when Mrs Morris' potential interest was overlooked. She was not present and was not aware in advance of the possibility of making the order. I accept that that is my mistake. Had she been forewarned of the possibility of the making of the order she might well have appeared and made representations against making any order which gave the sum to ITS at all or in its entirety. Accordingly this in my view is a good example of why exceptionally the court should retain a power to review a final order. I have concluded for those reasons therefore that there is locus to entertain Mrs Morris' application despite the fact that the order is a final one. There remains however the question of whether I ***ought*** to entertain her application.

DISCRETION

103. I can see no basis for setting aside the order and ordering a transfer of the funds to Mrs Morris which is her primary relief. As I have set out above ITS (as a result of my determination that day) were judgment creditors in the sum of some £50m as against Mr Morris. Mrs Morris was a judgment creditor in the sum of £6m by reason of the order of 13th January 2010.

104. She is not a secured creditor as regards these sums. She submits that ITS is also unsecured. Accordingly she submits Mr Morris is most likely to be made bankrupt and that therefore to award all of the monies to ITS is a breach of the parri passu rule that applies when an individual or a company is insolvent or is about to become insolvent or go bankrupt see for example ***Roberts Petroleum Ltd v Bernard Kennedy Ltd [1983] 2 AC 192.***

105. If that was the position I would undoubtedly have directed that these funds be shared between ITS and Mrs Morris on a parri passu basis (assuming Mr Morris has no other creditors). That would do justice as between 2 innocent victims of Mr Morris.

106. However the argument is based on a supposition that the bankruptcy of Mr Morris is imminent. I do not see that. He cannot be made bankrupt in England and Wales as he is not resident here and no bankruptcy petition can be issued against him. Whether or not he can be made bankrupt in Australia will depend on proceedings brought there for enforcement of the respective judgments.

107. Whether or not he can be made bankrupt in Australia is something for the future. When I reserved the judgment no proceedings had been commenced in Australia as I understand it either by ITS or by Mrs Morris to enforce their judgments. I do not know whether that is still the position but the question of the future insolvency of Mr Morris seems a long way off. I do not therefore think that there is sufficient proximity at the moment for Mrs Morris to envoke the parri passu rule as against the judgment in ITS' favour.

108. In any event the monies were paid into court pursuant to the order of HH Judge Thornton QC sitting at the Central Criminal Court on 9th January 2009. In so doing the Judge varied a restraint order that he granted on 7th October 2008 obtained by the director of the Serious Fraud Office against Mr Morris. It was not a variation of a freezing injunction obtained either by Mrs Morris or by ITS. Therefore the effect of the payment, in that way, seems to me to constitute the payment when received into court as security for claims. In this context I refer to ***Sherrett v Bromley [1985] 2 WLR 742 C.A.*** In that case the payment in was voluntary but the principle applies to (for example) conditional orders: see ***re Ford [1900] 2 QB 211.*** This is to be contrasted where there is not actually an intent to create security but a variation of a freezing order see ***Flightline v Edwards [2002] 1 WLR 2535***. I come to the conclusion that this was a payment to secure the funds for the Claimants in the Chancery action.

109. It has always been open to Mrs Morris to intervene to seek to attach any funds which were not the subject matter of a proprietary claim. However the parties agreed in paragraph 7 of Holman J's order dated 13th January 2010 that both ITS and Mrs Morris were free to enforce judgments made in their favour but subject to provisos as set out there. The only proviso in question applicable to ITS was to give the 28 days notice required by paragraph 7 (a) which it duly did.

110. It seems to me the effect of that order was to preserve either party's rights as a judgment creditor to seek to attach against any assets of Mr Morris which were not subject to proprietary claims.

111. Therefore ITS has done precisely what it was open to either party to do. Mrs Morris equally if she had found some assets that were not subject to proprietary claims could have done precisely the same. The parties never agreed expressly by or indication to share execution proceeds where there were no proprietary claims.

112. Therefore bearing in mind that the monies were secured and the effect of paragraph 7 of Holman J's order I see no reason to revisit the decision I made in favour of ITS. I accordingly dismiss Mrs Morris' application.
