"part of a mixed fund of units" that had already included enough allocated units to fund life cover for the years at issue, which units from this fund were actually cancelled to pay for life cover?

Foskett v. *McKeown* contains an important discussion of the nature of tracing. However, despite the majority's description of it as "a case of hard-nosed property rights" (p. 1305 *per* Lord Browne-Wilkinson), it remains unclear how the premiums in question could be traced into the insurance component of the policy.

CRAIG ROTHERHAM

EQUITIES TO RESCIND AND INTERESTS UNDER RESULTING TRUSTS

TWINSECTRA Ltd. v. *Yardley* [1999] Lloyd's Rep. Bank. 438, a unanimous decision of the Court of Appeal, illustrates the various liabilities of a fiduciary who obtains money by a fraudulent misrepresentation. Apart from liability at law for deceit, he may be liable in equity as a resulting trustee or the claimant may rescind the transaction for fraud. This note asks how real the differences are between these two equitable means of reversing the unjust enrichment of the fiduciary.

Twinsectra lent £1 million to Yardley to enable him to purchase properties. Twinsectra insisted on an undertaking from a solicitor to secure repayment of the loan. Yardley called upon Sims. Sims was a solicitor but he had also done some nefarious business deals with Yardley which left him heavily in Yardley's debt. The two men agreed that in return for Twinsectra's advance to Yardley, Sims would undertake to Twinsectra (i) personally to repay the loan with interest; and (ii) to retain the proceeds in his client account and apply them solely towards the property purchases.

In breach of his undertaking, Sims paid most of the loan monies to Leach, Yardley's solicitor. Leach applied only about half towards the property purchases. He transferred much of the balance to subsidiary companies of Yardley's and applied some in payment of his own fees. Sims never repaid the loan and went bankrupt. Yardley's companies went into administration and it must be assumed that Yardley's own solvency was in doubt.

Disagreeing with Carnwath J., the Court of Appeal held that Yardley was liable in tort for deceit in respect of the fraudulent misrepresentations made by Sims in obtaining the loan. Sims had impliedly represented to Twinsectra that he was Yardley's solicitor and that he intended to apply the money according to his

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undertaking. But Twinsectra's real motivation for establishing Sims' fraud was that it could thereby rescind the loan and sue the third parties implicated in the transaction, such as Yardley's companies and his solicitor, Leach. Twinsectra would therefore improve its chances of recovery.

The Court of Appeal gave a standard explanation of the equity to rescind a transaction for fraud. "[T]he transferor may elect whether to avoid or affirm the transaction and, until he elects to avoid it, there is no ... trust ... [B]efore rescission, the owner has no proprietary interest in the original property; all he has is a mere equity of his right to set aside the voidable contract" (p. 461). Only when he positively avoids the transaction would his right crystallise as a vested equitable interest.

That said, Twinsectra got the same result against the third parties through its parallel argument that it had an equitable interest in the proceeds under a resulting trust. Sims' undertaking to hold the money separately and solely for the agreed purposes imposed a primary purpose trust on him, by analogy with *Barclays Bank Ltd.* v. *Quistclose Investments Ltd.* [1970] A.C. 567. By misapplying the money, he caused a secondary, resulting trust to arise of which Twinsectra was the beneficiary.

These alternative claims to the loan proceeds provided the foundation for Twinsectra's successful actions against the third parties:

(i) Leach, Yardley's solicitor, was liable for dishonest assistance in Sims' breach of his duties as a fiduciary (*Royal Brunei Airlines Sdn. Bhd.* v. *Tan* [1995] 2 A.C. 378). When Sims gave his undertaking he assumed fiduciary duties to Twinsectra. In obtaining the money by a fraudulent misrepresentation, he breached those duties. Equally, the misapplication of the money, which was the very fact that created the secondary resulting trust, amounted to a breach of his duties as trustee of the primary purpose trust;

(ii) Having an equitable interest in the loan proceeds, Twinsectra could sue Leach for knowing receipt of the proceeds which he accepted in payment of Yardley's debt to him. Twinsectra's equity to rescind for fraud would also have given it a sufficient title to sue even though the solicitor received the proceeds before Twinsectra actually elected to rescind the transaction (see *El Ajou* v. *Dollar Land Holdings plc* [1993] 3 All E.R. 717 (Millett J.);

(iii) Either Twinsectra's interest under the resulting trust or its equity to rescind would have given it a sufficient title to

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trace the loan proceeds into the assets of Yardley's companies and assert a proprietary claim to them: see *Lonrho plc* v. *Fayed (No. 2)* [1992] 1 W.L.R. 1, 11–12 *per* Millett J., and *El Ajou* v. *Dollar Land Holdings plc* (above).

The similarities go further. Like the interest under the resulting trust, the equity to rescind has obvious proprietary characteristics. The election to revest title which it confers can be enforced only against the original asset or its specifically traceable proceeds. It binds third parties who derive their title to those assets from the representor, such as donees or those taking with notice of the fraud. The claimant can assign the equity *inter vivos* or devise it by will, even before he has rescinded: *Stump* v. *Gaby* (1852) 2 De G.M. & G. 623. It does not bind a bona fide purchaser of a legal interest in the proceeds.

There is the difference, however, that an equity to rescind for fraud does not bind a bona fide purchaser of a later equitable interest, whereas a vested equitable interest can: *Phillips* v. *Phillips* (1861) 4 De G.F. & J. 208, 218 *per* Lord Westbury L.C. However, this need not undermine the essentially proprietary character of an equity to rescind. It simply demonstrates that different property rights vary in the extent to which they can be enforced in conflict with competing interests: *cf. Blacklocks* v. *J.B. Developments (Godalming) Ltd.* [1982] Ch. 183, 196 *per* Judge Mervyn Davies. Granted, a distinctive feature of rescission is that the claimant must make counter-restitution of the benefits that he received from the representor. But in many instances this condition may not make much practical difference. In cases like *Twinsectra* where the claimant receives a purely executory consideration, he may have nothing to restore. Besides, the wrongful conduct of the representor in procuring the transaction may disentitle him from insisting on strict counter-restitution from the claimant: *Berridge* v. *Public Trustee* (1914) 33 N.Z.L.R. 865 (Edwards J.). It is true that a claimant who affirms a voidable contract may bar his right to rescind it. But as *Twinsectra* itself holds, a claimant who runs alternative claims for rescission and breach of contract does not necessarily affirm the contract.

All in all, where a fiduciary is guilty of fraudulent misrepresentation, it is only in rare instances that a claimant has any real advantage in relying on the defendant's status as a resulting trustee, rather than as a person with a voidable title.

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