Privy Council Appeal No. 42 of 1993

(1) Bryan Norreys Kensington and John Joseph Cregten (as the receivers of Goldcorp Exchange Limited (in receivership) and
(2) Bank of New Zealand *Appellants*

v.

(1) The unrepresented non-allocated claimants
(2) Steven Paul Liggett and
(3) James William Heppleston *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH MAY 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD MUSTILL
LORD LLOYD OF BERWICK
SIR THOMAS EICHELBAUM

*[Delivered by **Lord Mustill**]*

On 11th July 1988 the Bank of New Zealand Limited (hereafter "the bank") caused receivers to be appointed under the terms of a debenture issued by Goldcorp Exchange Limited (hereafter "the company"), dealer in gold and other precious metals. The company was then and still remains hopelessly insolvent. Amongst its assets is a stock of gold, silver and platinum bullion. Even if the company had not been brought down by dealings unconnected with bullion this stock would have been far short of what was needed to satisfy numerous contracts under which members of the public had purchased precious metals for future delivery. The discovery that not only was there a shortfall in available bullion but also that the stock of bullion had been dealt with internally in a manner quite different from what had been promised by the vendors in their promotional literature has aroused great indignation amongst the members of the public (more than 1000) whose faith in the promises made by the vendors has proved to be misplaced. These feelings were exacerbated

when it was realised that the debt secured by the debenture and the floating charge which it created were in excess of the entire assets of the company, including the stocks of bullion, so that if the secured interest of the bank is satisfied in preference to the claims of the purchasers, the latter will receive nothing at all. This has impelled the private investors (hereafter collectively referred to as "the customers") to assert in the liquidation of the company, not their unanswerable personal claims against the company for damages or for the repayment of sums paid in advance, but claims of a proprietary nature; in the first instance as regards the remaining stock of bullion, and at a later stage of the litigation asserted by reference to the monies paid under the various purchase contracts, or to a proportion of the company's general assets seen as representing the monies so paid.

In response, the receivers applied to the High Court under section 345 of the Companies Act 1955 for directions concerning the disposal of the remaining bullion. They have pursued proceedings of great complexity, very skilfully marshalled by Thorp J. in such a manner as to enable decisions to be given in principle with regard to various categories of customer and thus to minimise the inevitable cost and delay involved in the investigation of so many and diverse claims. The outcome has been the settlement, or disposal by court decisions against which there is no appeal, of claims by several types of customer. There remain three categories, forming the subject matter of the present appeal. The first and largest category comprises those customers who have come to be known as "non-allocated claimants". These were customers who had purchased bullion for future delivery. At the time when the bank's floating charge crystallised upon the appointment of receivers, there had not been any appropriation of specific and segregated parcels of bullion to the individual purchase contracts. The second category of claimant has only one member, namely Mr. S.P. Liggett, whose case resembles that of the non-allocated claimants but has certain additional features upon which he relies to contend that his claim will succeed even if the rights of the non-allocated claimants are subordinated to those of the bank. The third category of claimant consists of those who had made contracts for the purchase of bullion from Walker & Hall Commodities Limited before the business of that company was acquired by the company in 1986.

In the High Court all the claims were founded on the proposition that the customers had, or must be deemed to have, proprietary interests in bullion which could be traced into the stock remaining on liquidation. Thorp J. rejected the claims of the non-allocated claimants and of Mr. Liggett (save in one respect which is not directly before the Board), but allowed the claims of the Walker & Hall claimants. In the case of the latter His Honour limited the amount of the remedy by reference to a question of tracing to which their Lordships must later refer. On appeal [1993] 1 N.Z.L.R. 257, the Court of Appeal agreed with Thorp J.

in holding that the first two categories of customer had no proprietary rights to the bullion. The scope of the debate was, however, enlarged to embrace a new claim to a proprietary remedy related directly or indirectly to the original payments of price by the customers under the purchase contracts. On this part of the appeal the court was divided in opinion. Sir Robin Cooke P. and Gault J. found in favour of the non-allocated claimants and Mr. Liggett, albeit for reasons which were not identical, and went on to hold that the entire amount of the purchase monies could be traced into the general assets of the company. McKay J. rejected this basis of claim. The position as regards the Walker & Hall claimants was the subject of procedural complications which their Lordships must later describe. The receivers and the bank have appealed to the Board in relation to all three categories of customer.

I. Non-allocated claimants

The facts.

Dealings in gold coins and ingots as consumer products are a comparative innovation in New Zealand. In the forefront of developing the market was a predecessor of Goldcorp Exchange Limited. (Details of the alterations in the management and corporate structure of the concerns which acted as vendors in the transactions giving rise to the present litigation are complex, but they are not material to the issues now before the Board, and it is convenient to refer simply to "the company").

Although the course of business between the company and the non-allocated claimants was not wholly consistent, and the documents varied somewhat from time to time, the general shape of the business was always as follows. Sales were promoted in various ways, particularly through glossy, illustrated brochures. So far as presently material the brochures offered two methods of purchasing bullion: "The first is what we call physical delivery and the second is non-allocated metal". After explaining how purchases of granules, ingots and coins could be made for physical delivery a typical brochure described the procedure for purchasing non-allocated metal, which (it was said) was "preferred by the majority of investors and ... recognised as the most convenient and safe way of purchasing metal". According to this brochure:-

> "Basically, you agree to buy metal at the prevailing market rate and a paper transaction takes place. [The company] is responsible for storing and insuring your metal free of charge and you are given a 'Non-Allocated invoice' which verifies your ownership of the metal. In the case of gold or silver, physical delivery can be taken upon seven days notice and payment of nominal delivery charges."

A later version of the brochure said that:-

"Basically, you agree to buy and sell as with physical bullion, but receive a certificate of ownership rather than the metal. The metal is stored in a vault on your behalf.

...

What protection have I that Goldcorp will deliver?

The metal stocks of Goldcorp are audited monthly by Peat Marwick, to ensure there are sufficient stocks to meet all commitments."

If a member of the public decided to make a purchase on the non-allocated basis he or she received a certificate stating:-

"This is a certificate for Non-Allocated Metal stored and insured by [the company]. Delivery may be taken within seven days upon payment of delivery charges."

Later, the certificate was altered so as to read:-

" This is to
Certify that

is the registered
holder of

**** [quantity] FINE GOLD ****

The above metal is stored and insured *free of charge* by Goldcorp Exchange Ltd on a non-allocated basis. Delivery may be taken upon seven days notice and payment of delivery charges. The owner shall be entitled to the collection of the bullion, or funds from the sale of bullion, only upon presentation of this Certificate."

In addition to the documentation there were of course preliminary discussions between the customer and the company. Whilst these varied in detail from one occasion to another the following general description by McKay J. [1993] 1 N.Z.L.R. 257, 296-297, was accepted as correct for the purposes of argument:-

" The wording makes it clear that the investor is not merely depositing money or acquiring a contractual right to be supplied at some later date after giving seven days' notice. The wording describes an actual purchase of gold or silver which will then be stored free of charge and insured by Exchange. Delivery is available on seven days' notice and on payment of a small fee for ingotting. This suggests that although there will be physical bullion held in storage for the investor and insured for him, it will be part of a larger bulk and will require ingotting before he can take

delivery of his specific entitlement. In the meantime, he will have an interest, along with other investors, in the bulk which is being held and stored by Exchange for him and for other investors.

That certainly was the perception of investors. As the Judge said:

> 'No-one could read the claimants' affidavits, still less hear the evidence given by them on cross-examination, without being convinced of the depth and genuineness of their belief that by accepting the invitation to purchase on a non-allocated basis they were not simply buying "gilt edged investments", but gold itself. The speed and strength of their reaction to advice that Exchange had not stored bullion sufficient to cover their "bullion certificates" made that plain.'

In an appendix to his submissions on behalf of the non-allocated claimants Mr. Finnigan collected numerous extracts from the affidavits filed on their behalf. These amply support the Judge's finding. They depose to the various statements made to them on behalf of Exchange, all emphasising the absence of security problems, the fact that their bullion would be stored in safe keeping and would be safer than if they took delivery of it, the risks of storing bullion at one's own home, and the safety and security offered by storage with Exchange. Verbal assurances were also given that not only was the bullion insured, but the metal stocks were audited monthly by a large and respected firm of chartered accountants. Some deponents relied particularly on this factor as a guarantee that there would always be sufficient bullion to cover all the certificates issued by Exchange as was indicated in its brochures. Others refer to correspondence with Exchange which reinforced their belief that their metal was physically stored in vaults on their behalf. A number of investors received letters in connection with Exchange's audit asking them to confirm 'the amount of non-allocated bullion we hold on your behalf as at 31 March'.

Exchange's evidence as to what investors were told is more consistent with Exchange's brochures and with the evidence of investors. Mr. Campbell, who was Bullion Manager from January 1984 until the receivership, said at para. 7.2 that it was invariably explained to the non-allocated investors that the bullion purchased 'was not set aside as that person's metal, but instead was stored as part of the company's overall stock of bullion', that 'the bullion was stored and insured by the company', and as to safe keeping that 'they would not have to worry about security problems of storing the bullion in their own homes'. This suggests that the bullion

would be stored in bulk rather than on an allocated basis, but that it would be physically stored and held safely for the investor."

II: The issues.

As already seen, by the time the judgment in the Court of Appeal had been delivered the proprietary claims of the customers had been widened to comprise not only bullion but also the general assets of the company, to an extent representing the sums originally paid by way of purchase price. The following issues now arise for consideration:-

(i) Did the property in any bullion pass to the customers immediately upon the making of the purchases -

(a) simply by virtue of contract of purchase itself, or

(b) by virtue of the written and oral statements made in the brochures and by the company's employees? (Although these were referred to in argument as representations their Lordships believe them to be more in the nature of contractual undertakings, and therefore call them "the collateral promises").

(ii) Did the property in any bullion subsequently acquired by the company pass to the customer upon acquisition?

(iii) When the customers paid over the purchase monies under the contract of sale, did they retain a beneficial interest in them by virtue of an express or constructive trust?

(iv) Should the court now grant a restitutionary remedy of a proprietary character in respect of the purchase moneys?

If the answer to any of these questions is in the affirmative it will be necessary to consider the extent to which the customer's rights in the relevant subject matter can be applied to the bullion or other assets now in the possession of the company.

III. Title to bullion: the sale contracts

Their Lordships begin with the question whether the customer obtained any form of proprietary interest, legal or equitable, simply by virtue of the contract of sale, independently of the collateral promises. In the opinion of their Lordships the answer is so clearly that he did not that it would be possible simply to quote section 18 of the Sale of Goods Act 1908 (New Zealand) (corresponding to section 16 of the Sale of Goods Act 1893 (UK)) and one reported case, and turn to more difficult issues. It is, however, convenient to pause for a moment to consider why the answer must inevitably be negative, because the reasons for this answer are the same as those which stand in the way of the customers at every point of the case. It is common ground that the contracts in question were for the sale of

unascertained goods. For present purposes, two species of unascertained goods may be distinguished. First, there are "generic goods". These are sold on terms which preserve the seller's freedom to decide for himself how and from what source he will obtain goods answering the contractual description. Secondly, there are "goods sold ex-bulk". By this expression their Lordships denote goods which are by express stipulation to be supplied from a fixed and a pre-determined source, from within which the seller may make his own choice (unless the contract requires it to be made in some other way) but outside which he may not go. For example, "I sell you 60 of the 100 sheep now on my farm".

Approaching these situations *a priori* common sense dictates that the buyer cannot acquire title until it is known to what goods the title relates. Whether the property then passes will depend upon the intention of the parties and in particular on whether there has been a consensual appropriation of particular goods to the contract. On the latter question the law is not straightforward, and if it had been decisive of the present appeal it would have been necessary to examine cases such as *Carlos Federspiel & Co. S.A. v. Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240 and other cases cited in argument. In fact, however, the case turns not on appropriation but on ascertainment, and on the latter the law has never been in doubt. It makes no difference what the parties intended if what they intend is impossible: as is the case with an immediate transfer of title to goods whose identity is not yet known. As Lord Blackburn wrote in his treatise on The Effect of the Contract of Sale, 1st ed. (1845), pages 122-123, a principal inspiration of the Sale of Goods Act 1893,:-

> "The first of the rules that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a bargain and sale, is one that is founded on the very nature of things. Till the parties are agreed on the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold. This rule has existed at all times; it is to be found in the earliest English law books. ...
>
> It makes no difference, although the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. In such a case the reason still applies: the parties did not intend to transfer the property in one portion of

> the stock more than in another, and the law which only gives effect to their intention, does not transfer the property in any individual portion."

Their Lordships have laboured this point, about which there has been no dispute, simply to show that any attempt by the non-allocated claimants to assert that a legal title passed by virtue of the sale would have been defeated, not by some arid legal technicality but by what Lord Blackburn called "the very nature of things". The same conclusion applies, and for the same reason, to any argument that a title in equity was created by the sale, taken in isolation from the collateral promises. It is unnecessary to examine in detail the decision of the Court of Appeal in *In re Wait* [1927] 1 Ch. 606 for the facts were crucially different. There, the contract was for a sale ex-bulk. The 500 tons in question formed part of a larger quantity shipped on board a named vessel; the seller could supply from no other source; and once the entire quantity had been landed and warehoused the buyer could point to the bulk and say that his goods were definitely there, although he could not tell which part they were. It was this feature which prompted the dissenting opinion of Sargant L.J. that the sub-purchasers had a sufficient partial equitable interest in the whole to found a claim for measuring-out and delivery of 500 tons. No such feature exists here. Nevertheless, the reasoning contained in the judgment of Atkin L.J., at pages 625-641, which their Lordships' venture to find irresistible, points unequivocally to the conclusion that under a simple contract for the sale of unascertained goods no equitable title can pass merely by virtue of the sale.

This is not, of course, the end of the matter. As Atkin L.J. himself acknowledged at page 636:-

> "[The rules in the statute] have, of course, no relevance when one is considering rights, legal or equitable, which may come into existence *dehors* the contract for sale. A seller or a purchaser may, of course, create any equity he pleases by way of charge, equitable assignment or any other dealing with or disposition of goods, the subject matter of sale; and he may, of course, create such an equity as one of the terms expressed in the contract of sale."

Their Lordships therefore turn to consider whether there is anything in the collateral promises which enables the customers to overcome the practical objections to an immediate transfer of title. The most direct route would be to treat the collateral promises as containing a declaration of trust by the company in favour of the customer. The question then immediately arises - What was the subject-matter of the trust? The only possible answer, so far as concerns an immediate transfer of title on sale, is that the trust related to the company's current stock of bullion answering the contractual description; for there was no other bullion to which the trust could relate. Their Lordships do not doubt that the vendor of goods sold ex-bulk can effectively declare himself trustee of the bulk in

favour of the buyer, so as to confer *pro tanto* an equitable title. But the present transaction was not of this type. The company cannot have intended to create an interest in its general stock of gold which would have inhibited any dealings with it otherwise than for the purpose of delivery under the non-allocated sale contracts. Conversely the customer, who is presumed to have intended that somewhere in the bullion held by or on behalf of the company there would be stored a quantity representing "his" bullion, cannot have contemplated that his rights would be fixed by reference to a combination of the quantity of bullion of the relevant description which the company happened to have in stock at the relevant time and the number of purchasers who happened to have open contracts at that time for goods of that description. To understand the transaction in this way would be to make it a sale of bullion ex-bulk, which on the documents and findings of fact it plainly was not.

Nor is the argument improved by re-shaping the trust, so as to contemplate that the property in the *res vendita* did pass to the customer, albeit in the absence of delivery, and then merged in a general equitable title to the pooled stock of bullion. Once again the argument contradicts the transaction. The customer purchased for the physical delivery on demand of the precise quantity of bullion fixed by his contract, not a shifting proportion of a shifting bulk, prior to delivery. It is of course true that a vendor may agree to retain physical possession of the goods on behalf of his purchaser after the sale has been completed, and that there may be a constructive delivery and redelivery of possession, so as to transform the vendor into a bailee or pledgee without the goods actually changing hands: see per Lord Atkinson in *Dublin City Distillery Ltd. v. Doherty* [1914] A.C. 823, at page 844. Lord Atkinson was there contemplating a situation, such as existed in the *Dublin City* case itself, where the goods held in the warehouse were already identified (by numbers on the casks: see page 825), so that the contract was one for the sale of specific goods under which the property would pass at once to the vendee. The case is, however, quite different where the sale is of generic goods. Even if the present contract had been a sale ex-bulk, in the sense that the contractual source was the bulk of bullion in the store, section 18 of the 1908 Act would have prevented the property from passing on sale: see *Laurie v. Dudin & Sons* [1926] 1 K.B. 223 and *Whitehouse v. Frost* (1810) 12 East. 614. The present case is even more clear, since the customers contracted to purchase generic goods without any stipulation as to their source.

The next group of arguments for the non-allocated claimants all turn on an estoppel, said to derive from the collateral promises. Their Lordships derive no assistance from cases such as *Waltons Stores (Interstate) Ltd. v. Maher* (1988) 164 CLR 387 and *Commonwealth of Australia v. Verwayen* (1990) 95 ALR 321 which show that on

occasion a party may estop himself from relying on the protection of the statute. No such estoppel could assist the customers here, for the problem facing them at every turn is not section 18, but the practical reality underlying it which Lord Blackburn called "the very nature of things": namely that it is impossible to have a title to goods, when nobody knows to which goods the title relate. The same objection rules out reliance on cases such as *In re Sharpe* [1980] 1 W.L.R. 219 concerning what is called a proprietary estoppel.

A more plausible version of the argument posits that the company, having represented to its customers that they had title to bullion held in the vaults, cannot now be heard to say that they did not. At first sight this argument gains support from a small group of cases, of which *Knights v. Wiffen* (1870) LR 5 Q.B. 660 is the most prominent. Wiffen had a large quantity of barley lying in sacks in his granary, close to a railway station. He agreed to sell 80 quarters of this barley to Maris, without appropriating any particular sacks. Maris sold 60 quarters to Knights, who paid for them and received in exchange a document signed by Maris addressed to the station master, directing him to deliver 60 quarters of barley. This was shown by the station master to Wiffen who told him that when he got the forwarding note the barley would be put on the line. Knights gave a forwarding note to the station master for 60 quarters of barley. Maris became bankrupt, and Wiffen, as unpaid vendor, refused to part with the barley. Knights sued Wiffen in trover, to which Wiffen pleaded that the barley was not the property of the plaintiff. A very strong court of Queen's Bench found in favour of the plaintiff. Blackburn J. explained the matter thus, at pages 655-666:-

> "No doubt the law is that until an appropriation from a bulk is made, so that the vendor has said what portion belongs to him and what portion belongs to the buyer, the goods remain *in solido*, and no property passes. But can Wiffen here be permitted to say, 'I never set aside any quarters?'. ... The defendant knew that, when he assented to the delivery order, the plaintiff, as a reasonable man, would rest satisfied ... The plaintiff may well say, 'I abstained from active measures in consequence of your statement, and I am entitled to hold you precluded from denying that what you stated was true'."

There may perhaps be a shadow over this decision, notwithstanding the high authority of the court: see the observations of Brett L.J. in *Simm v. Anglo-American Telegraph Co.* (1879) 5 QBD 188 at page 212. Assuming that the decision was nevertheless correct the question is whether it applies to the present case. Their Lordships consider that, notwithstanding the apparent similarities, it does not. The agreement for sale in *Knights v. Wiffen (supra)* was a sale ex-bulk, or at least it must have been seen as such, for otherwise Blackburn J.'s judgment would have contradicted his treatise in the passage above quoted.

On this view, the bulk was the whole of the stock in Wiffen's warehouse. This stock was therefore committed to the purchase to the extent that Wiffen could not properly have sold the whole of it without making delivery of part to his buyer. Another and more important aspect of the same point is that the bulk actually existed. The effect of Wiffen's representation was to preclude him from denying to the sub-purchaser, Knights, that he had made a sufficient appropriation from the fixed and identified bulk to give the intermediate purchaser, and hence Knights himself, the proprietary interest sufficient to found a claim in trover. The present case is quite different, for there was no existing bulk and therefore nothing from which a title could be carved out by a deemed appropriation. The reasoning of *Knights v. Wiffen (supra)* does not enable a bulk to be conjured into existence for this purpose simply through the chance that the vendor happens to have some goods answering the description of the *res vendita* in its trading stock at the time of the sale - quite apart, of course, from the fact that if all the purchasers obtained a deemed title by estoppel there would not be enough bullion to go around.

All this aside, there is another reason why the argument founded on estoppel cannot prevail. The answer is given by Mellor J. in *Knights v. Wiffen* itself, at pages 666-667, where quoting from Blackburn's Contract of Sale page 162 he says:-

> "This is a rule [i.e. the estoppel], which, within the limits applied by law, is of great equity; for when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts and not on the truth. The reason of the rule ceases at once when a stranger to the arrangement seeks to avail himself of the statements which were not made as a basis for him to act upon. They are for a stranger evidence against the party making the statement, but no more than evidence which may be rebutted; between the parties they form an estoppel in law."

Later, Brett L.J. was to observe in *Simm v. Anglo-American Telegraph Co. (supra)* at pages 206-207:-

> "It seems to me that an estoppel gives no title to that which is the subject matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances ... A person may be estopped from denying that certain goods belong to another; he may be compelled by a suit in the nature of an action of trover to deliver them up, if he has them in his possession and under his control; but if the goods, in respect of which he has estopped himself, really belonged to someone else, it seems impossible to

> suppose that ... he can be compelled to deliver over another's goods to the person in whose favour the estoppel exists against him ... That person cannot recover the goods, because no property has really passed to him, he can recover only damages. In my view estoppel ... only creates a cause of action between the person in whose favour the estoppel exists and the person who is estopped."

Similar statements can be found in several texts, such as for example N.E. Palmer, "Bailment" 2nd Edn. (1991), page 1374.

To this the customers respond that they are not obliged to assert the same proprietary interest against the bank as they would do if their opponents were strangers to the entire relationship. By taking a floating rather than an immediate fixed charge the bank accepted the risk of adverse dealings by the company with its assets, and when the charge crystallised the bank "stood in the shoes" of the company, taking those assets with all the detrimental features which the company had attached to them. If the estoppel binds the company, then it must bind the bank as well.

Attractive as this argument has been made to seem, their Lordships cannot accept it. The chargee does not become on the crystallisation of the charge the universal successor of the chargor, in the same way as the trustee in bankruptcy or personal representative, who is as much subject to the personal claims of third parties against the insolvent as he is entitled to the benefit of personal claims of which the insolvent is the obligee. Rather, the chargee becomes entitled to a proprietary interest which he asserts adversely to the company, personified by the liquidator and all those general creditors who share in the assets of the company. The freedom of the chargor to deal with its assets pending the crystallisation of the charge does not entail that the chargee's right to the assets is circumscribed by an indebtedness of a purely personal nature. The most that the *Knights v. Wiffen* line of authority can give to the purchaser is the pretence of a title where no title exists. Valuable as it may be where one party to the estoppel asserts as against the other a proprietary cause of action such as trover, this cannot avail the purchaser in a contest with a third-party creditor possessing a real proprietary interest in a real subject matter, whereas the purchaser has no more than a pretence of a title to a subject matter which does not actually exist.

Similar obstacles stand in the way of a more elaborate version of the same argument. This seeks to combine two principles: the first that a person who represents (by attornment or otherwise) that he has goods in his possession which he holds for a third party is in certain circumstances precluded from denying to that third party that he does so possess and hold the goods even if in fact he does not; the second that a bailee of goods is precluded, as

against the bailor, from denying that the bailor has a good title. The result is said to be that by acknowledging itself to be a bailee the company gave its customers a good title to that which they had agreed to purchase. Whilst acknowledging the ingenuity of this argument their Lordships are unable to accept it. If correct, it would entail that a customer, who chose to bring a proprietary action (such as trover, under the former law) rather than simply claiming damages for non-delivery would be entitled to an order for delivery-up of the goods which he had purchased. But which goods? Not a portion of the goods in store, for there was no representation and the customers cannot have believed that it was from these goods alone that by a process of separation their own orders would be fulfilled. And if not these goods, there were no others to which the title could attach since the source of supply was completely at large.

Their Lordships must also reject a further variant of the argument, whereby a trust in respect of bullion came into existence as an aspect of a bailment, so that even if title *stricto sensu* did not pass nevertheless the fruits of the breach of trust may be traced into the existing stock of bullion. In other circumstances it might be necessary to look more closely at those elements of the argument which seek to attach the characteristics of a trust to a relationship of bailment, which does not ordinarily have this character, and also at the feasibility of tracing. There is no need for this, however, since there was never any bailment, and no identifiable property to which any trust could attach.

IV. Title to after-acquired bullion

Having for these reasons rejected the submission that the non-allocated claimants acquired an immediate title by reason of the contract of sale and the collateral promises their Lordships turn to the question whether the claimants later achieved a proprietary interest when the company purchased bullion and put it into its own stock. Broadly speaking, there are two forms which such an argument might take.

According to the first, the contracts of sale were agreements for the sale of goods afterwards to be acquired. It might be contended that quite independently of any representation made by the company to the non-allocated claimants, as soon as the company acquired bullion answering the contractual description the purchaser achieved an equitable title, even though the passing of legal title was postponed until the goods were ascertained and appropriated at the time of physical delivery to the purchaser. In the event this argument was not separately pursued, and their Lordships mention it only by way of introduction. They will do so briefly, since it was bound to fail. The line of old cases, founded on *Holroyd v. Marshall* (1862) 10 H.L.C. 191 and

discussed in Benjamin on Sale of Goods, 3rd Edn. (1987), pages 80, 218-219, at paras. 106 and 357 which might be said to support it, was concerned with situations where the goods upon acquisition could be unequivocally identified with the individual contract relied upon. As Lord Hanworth M.R. demonstrated in *In re Wait, supra*, the reasoning of these cases cannot be transferred to a situation like the present where there was no means of knowing to which, if any, of the non-allocated sales a particular purchase by the company was related. Since this objection on its own is fatal, there is no need to discuss the other obstacles which stand in its way.

The second category of argument asserts, in a variety of forms, that the collateral promises operated to impress on the bullion, as and when it was acquired by the company, a trust in favour of each purchaser. Before looking at the arguments in detail it is necessary to mention a problem which is very little discussed in the judgments and arguments. It will be seen that the analysis to date has involved two markedly different assumptions. The first relates to the expectation of the customer in the light of the collateral promises. The customer is assumed to have believed that it would make no difference whether he took immediate delivery of the bullion and put it in a bank, or left it with the company - except that in the latter case he would avoid the trouble, risk and expense of storage. In law this expectation could be fulfilled only by a system under which the company obtained bullion either by an outside purchase or by transfer from its own stock, and immediately stored it separately in the name of the customer, leaving it untouched until the moment of delivery or re-purchase. The second assumption relates to the obligations which the company actually undertook. It has not been suggested that this matched the customer's expectation, for there is nothing in the collateral promises, either written or oral, entitling the customer to separate and individual appropriation of goods. Instead, as shown by the passage already quoted from the judgment of McKay J., the arguments proceed on the basis that the company promised to maintain bullion, separate from its own trading stock, which would in some way stand as security, or reassurance, that the bullion would be available when the customer called for delivery. But what kind of security or reassurance? If the scheme had contemplated that, properly performed, it would have brought about a transfer of title to the individual customer before that customer's appropriated bullion was mixed in the undifferentiated bulk, analogies could have been drawn with decisions such as *Spence v. Union Marine Insurance Co. Ltd.* (1868) LR 3 CP 427, *South Australian Insurance Co. v. Randell* (1869) 3 App.Cas. 101, *Indian Oil Corporation Ltd. v. Greenstone Shipping S.A. (Panama)* [1988] Q.B. 345, and the United States silo cases of which *Savage v. Salem Mills Co.* (1906) 85 Pacific Rep. 69 is an example. Since, however, even if the company had performed its obligations to the full there would have been no transfer of title to the purchaser before admixture, these cases are not in point. The only remaining

alternative, consistently with the scheme being designed to give the customer any title at all before delivery, is that the company through the medium of the collateral promises had declared itself a trustee of the constantly changing undifferentiated bulk of bullion which should have been set aside to back the customers' contracts. Such a trust might well be feasible in theory, but their Lordships find it hard to reconcile with the practicalities of the scheme, for it would seem to involve that the separated bulk would become the source from which alone the sale contracts were to be supplied: whereas, as already observed, it is impossible to read the collateral promises as creating a sale ex-bulk.

This being so, whilst it is easy to see how the company's failure to perform the collateral obligations has fuelled the indignation created by its failure to deliver the bullion under the sales to non-allocated purchasers, their Lordships are far from convinced that this particular breach has in fact made any difference.

Let it be assumed, however, as did McKay J. in his dissenting judgment, that the creation of a separate and sufficient stock would have given the non-allocated purchasers some kind of proprietary interest, the fact remains that the separate and sufficient stock did not exist.

The customers' first response to this objection is that even if the concept of an immediate trust derived from a bailment arising at the time of the original transactions cannot be sustained, the collateral promises created a potential or incomplete or (as it was called in argument) "floating" bailment, which hovered above the continuing relationship between each purchaser and the company, until the company bought and took delivery of bullion corresponding to the claimant's contract, whereupon the company became bailee of the bullion on terms which involved a trust in favour of the purchaser. Their Lordships find it impossible to see how this ingenious notion, even if feasible in principle, could be put into practice here, given that the body of potential beneficiaries was constantly changing as some purchasers called for and took delivery whilst others came newly on the scene, at the same time as the pool of available bullion waxed and waned (sometimes to zero as regards some types of bullion) with fresh deliveries and acquisitions. Even if this is left aside, the concept simply does not fit the facts. True, there is no difficulty with a transaction whereby B promises A that if in the future goods belonging to A come within the physical control of B he will hold them as bailee for A on terms fixed in advance by the agreement. But this has nothing to do with a trust relationship, and it has nothing to do with the present case, since in the example given A has both title to the goods and actual or constructive possession of them before their receipt by B, whereas in the present case the non-allocated claimants had neither. The only

escape would be to suggest that every time the company took delivery of bullion of a particular description all the purchasers from the company of the relevant kind of bullion acquired both a higher possessory right than the company (for such would be essential if the company was to be a bailee) and a title to the goods, via some species of estoppel derived from this notional transfer and re-transfer of possession. Their Lordships find it impossible to construct such a contorted legal relationship from the contracts of sale and the collateral promises.

Next, the claimants put forward an argument in two stages. First, it is said that because the company held itself out as willing to vest bullion in the customer and to hold it in safe custody on behalf of him in circumstances where he was totally dependent on the company, and trusted the company to do what it had promised without in practice there being any means of verification, the company was a fiduciary. From this it is deduced that the company as fiduciary created an equity by inviting the customer to look on and treat stocks vested in it as his own, which could appropriately be recognised only by treating the customer as entitled to a proprietary interest in the stock.

To describe someone as a fiduciary, without more, is meaningless. As Justice Frankfurter said in *S.E.C. v. Chenery Corporation* 318 U.S. 80, 85-86 (1943) cited in Goff and Jones on Restitution, 4th Edn. at page 644:-

> "To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"

Here, the argument assumes that the person towards whom the company was fiduciary was the non-allocated claimant. But what kind of fiduciary duties did the company owe to the customer? None have been suggested beyond those which the company assumed under the contracts of sale read with the collateral promises; namely to deliver the goods and meanwhile to keep a separate stock of bullion (or, more accurately, separate stocks of each variety of bullion) to which the customers could look as a safeguard for performance when delivery was called for. No doubt the fact that one person is placed in a particular position vis-à-vis another through the medium of a contract does not necessarily mean that he does not also owe fiduciary duties to that other by virtue of being in that position. But the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself. Their Lordships have not heard in argument any submission which went beyond suggesting that by virtue of being a fiduciary the company was obliged honestly and conscientiously to do what it had by contract promised to do. Many commercial relationships involve just such a reliance by one party on the other, and to introduce

the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences far exceeding those foreseen by Atkin L.J. in *In re Wait*. It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies.

Let it be assumed, however, that the company could properly be described as a fiduciary and let it also be assumed that notwithstanding the doubts expressed above the non-allocated claimants would have achieved some kind of proprietary interest if the company had done what it said. This still leaves the problem, to which their Lordships can see no answer, that the company did not do what it said. There never was a separate and sufficient stock of bullion in which a proprietary interest could be created. What the non-allocated claimants are really trying to achieve is to attach the proprietary interest, which they maintain should have been created on the non-existent stock, to wholly different assets. It is understandable that the claimants, having been badly let down in a transaction concerning bullion should believe that they must have rights over whatever bullion the company still happens to possess. Whilst sympathising with this notion their Lordships must reject it, for the remaining stock, having never been separated, is just another asset of the company, like its vehicles and office furniture. If the argument applies to the bullion it must apply to the latter as well, an obviously unsustainable idea.

Finally, it is argued that the court should declare in favour of the claimants a remedial constructive trust, or to use another name a restitutionary proprietary interest, over the bullion in the company's vaults. Such a trust or interest would differ fundamentally from those so far discussed, in that it would not arise directly from the transaction between the individual claimants, the company and the bullion, but would be created by the court as a measure of justice after the event. Their Lordships must return to this topic later when considering the Walker & Hall claimants who, the trial judge has held, did acquire a proprietary interest in some bullion, but they are unable to understand how the doctrine in any of its suggested formulations could apply to the facts of the present case. By leaving its stock of bullion in a non-differentiated state the company did not unjustly enrich itself by mixing its own bullion with that of the purchasers: for all the gold belonged to the company. It did not act wrongfully in acquiring, maintaining and using its own stock of bullion, since there was no term of the sale contracts or of the collateral promises, and none could possibly be implied, requiring that all bullion purchased by the company should be set aside to fulfil the unallocated sales. The conduct of the

company was wrongful in the sense of being a breach of contract, but it did not involve any injurious dealing with the subject-matter of the alleged trust. Nor, if some wider equitable principle is involved, does the case become any stronger. As previously remarked the claimants' argument really comes to this, that because the company broke its contract in a way which had to do with bullion the court should call into existence a proprietary interest in whatever bullion happened to be in the possession and ownership of the company at the time when the competition between the non-allocated claimants and the other secured and unsecured creditors first arose. The company's stock of bullion had no connection with the claimants' purchases, and to enable the claimants to reach out and not only abstract it from the assets available to the body of creditors as a whole, but also to afford a priority over a secured creditor, would give them an adventitious benefit devoid of the foundation in logic and justice which underlies this important new branch of the law.

V. Conclusion on property in bullion

For these reasons their Lordships reject, in company with all the judges in New Zealand, the grounds upon which it is said that the customers acquired a proprietary interest in bullion. In the light of the importance understandably attached to this dispute in the courts of New Zealand, and the careful and well-researched arguments addressed on this appeal, the Board has thought it right to approach the question afresh in some little detail. The question is not, however, novel since it has been discussed in two English authorities very close to the point.

The first is the judgment of Oliver J. (as he then was) in *In re London Wine Co. (Shippers) Ltd.* [1986] PCC 121. The facts of that case were not precisely the same as the present, and the arguments on the present appeal have been more far-reaching than were there deployed. Nevertheless their Lordships are greatly fortified in their opinion by the close analysis of the authorities and the principles by Oliver J., and in other circumstances their Lordships would have been content to do little more than summarise it and express their entire agreement. So also with the judgment delivered by Scott L.J. in *Mac-Jordan Construction Ltd. v. Brookmount Erostin Ltd.* [1992] BCLC 350 which is mentioned by Gault J. [1993] 1 N.Z.L.R. 257, 284, but not discussed since it was not then reported in full. This was a stronger case than the present, because the separate fund which the contract required the insolvent company to maintain would have been impressed with a trust in favour of the other party, if in fact it had been maintained and also because the floating charge which, as the Court of Appeal held, took priority over the contractual claim, expressly referred to the contract under which the claim arose. Once again, their Lordships are fortified in their conclusion by the fact that the reasoning of Scott L.J. conforms entirely with the opinion at which they have independently arrived.

VI. Proprietary interests derived from the purchase price

Their Lordships now turn to the proposition, which first emerged during argument in the Court of Appeal, and which was not raised in the *London Wine* case, that a proprietary interest either sprang into existence on the sales to customers, or should now be imposed retrospectively through restitutionary remedies, in relation not to bullion but to the monies originally paid by the customers under the contracts of sale. Here at least it is possible to pin down the subject-matter to which the proprietary rights are said to relate. Nevertheless, their Lordships are constrained to reject all the various ways in which the submission has been presented, once again for a single comparatively simple reason.

The first argument posits that the purchase monies were from the outset impressed with a trust in favour of the payers. That a sum of money paid by the purchaser under a contract for the sale of goods is capable in principle of being the subject of a trust in the hands of the vendor is clear. For this purpose it is necessary to show either a mutual intention that the monies should not fall within the general fund of the company's assets but should be applied for a special designated purpose, or that having originally been paid over without restriction the recipient has later constituted himself a trustee of the money: see *Quistclose Investments Ltd. v. Rolls Razor Ltd. (In liquidation)* [1970] A.C. 567, 581-2. This requirement was satisfied in *In re Kayford* [1975] 1 W.L.R. 279 where a company in financial difficulties paid into a separate deposit account money received from customers for goods not yet delivered, with the intention of making withdrawals from the account only as and when delivery was effected, and of refunding the payment to customers if an insolvency made delivery impossible. The facts of the present case are, however, inconsistent with any such trust. This is not a situation where the customer engaged the company as agent to purchase bullion on his or her behalf, with immediate payment to put the agent in funds, delivery being postponed to suit the customer's convenience. The agreement was for a sale by the company to, and not the purchase by the company for, the customer. The latter paid the purchase price for one purpose alone, namely to perform his side of the bargain under which he would in due course be entitled to obtain delivery. True, another part of the consideration for the payment was the collateral promise to maintain separate cover, but this does not mean that the money was paid for the purpose of purchasing gold, either to create the separate stock or for any other reason. There was nothing in the express agreement to require, and nothing in their Lordships' view can be implied, which constrained in any way the company's freedom to spend the purchase money as it chose, or to establish the stock from any source and with any funds as it thought fit. This being so, their Lordships cannot

concur in the decision of the learned President that the purchase price was impressed with a continuing beneficial interest in favour of the customer, which could form the starting point for a tracing of the purchase monies into other assets.

The same insuperable obstacle stands in the way of the alternative submission that the company was a fiduciary. If one asks the inevitable first question - What was the content of the fiduciary's duty? - the claimants are forced to assert that the duty was to expend the monies in the purchase and maintenance of the reserved stock. Yet this is precisely the obligation which, as just stated, cannot be extracted from anything express or implied in the contract of sale and the collateral promises. In truth, the argument that the company was a fiduciary (as regards the money rather than the bullion) is no more than another label for the argument in favour of an express trust and must fail for the same reason.

Thus far, all the arguments discussed have assumed that each contract of sale and collateral promises together created a valid and effective transaction coupling the ordinary mutual obligations of an agreement for the sale of goods with special obligations stemming from a trust or fiduciary relationship. These arguments posit that the obligations remain in force, albeit unperformed, the claimants' object being to enforce them. The next group of arguments starts with the contrary proposition that the transactions were rendered ineffectual by the presence of one or more of three vitiating factors: namely, misrepresentation, mistake and total failure of consideration. To these their Lordships now turn.

It is important at the outset to distinguish between three different ways in which the existence of a misrepresentation, a mistake or a total failure of consideration might lead to the existence of a proprietary interest in the purchase money or its fruits superior to that of the bank.

1. The existence of one or more of these vitiating factors distinguished the relationship from that of an ordinary vendor and purchaser, so as to leave behind with the customer a beneficial interest in the purchase moneys which would otherwise have passed to the company when the money was paid. This interest remained with the customer throughout everything that followed, and can now be enforced against the general assets of the company, including the bullion, in priority to the interest of the bank.

2. Even if the full legal and beneficial interest in the purchase moneys passed when they were paid-over, the vitiating factors affected the contract in such a way as to re-vest the moneys in the purchaser, and, what is more, to do so in a way which attached to the moneys an interest superior to that of the bank.

3. In contrast to the routes just mentioned, where the judgment of the court would do no more than recognise the existence of proprietary rights already in existence, the court should by its judgment create a new proprietary interest, superior to that of the bank, to reflect the justice of the case.

With these different mechanisms in view, their Lordships turn to the vitiating factors relied upon. As to the misrepresentations these were presumably that (in fact) the company intended to carry out the collateral promise to establish a separate stock and also that (in law) if this promise was performed the customer would obtain a title to bullion. Whether the proprietary interests said to derive from this misrepresentation were retained by the customers from the moment when they paid over the purchase monies, or whether they arose at a later date, was not made clear in argument. If the former, their Lordships can only say that they are unable to grasp the reasoning for if correct the argument would entail that even in respect of those contracts which the company ultimately fulfilled by delivery the monies were *pro tempore* subject to a trust which would have prevented the company from lawfully treating them as its own. This cannot be right. As an alternative it may be contended that a trust arose upon the collapse of the company and the consequent non-fulfilment of the contracts. This contention must also be rejected, for two reasons. First, any such proprietary right must have as its starting point a personal claim by the purchaser to the return of the price. No such claim could exist for so long as the sale contract remained in existence and was being enforced by the customer. That is the position here. The customers have never rescinded the contracts of sale, but have throughout the proceedings asserted various forms of proprietary interest in the bullion, all of them derived in one way or another from the contracts of sale. This stance is wholly inconsistent with the notion that the contracts were and are so ineffectual that the customers are entitled to get their money back. As a last resort the non-allocated claimants invited the Board to treat the contracts as rescinded if their claims for a proprietary interest in bullion were rejected. There is however no mechanism which would permit the claimants to pause, as it were, half-way through the delivery of the present judgment and elect at last to rescind; and even if such a course were open, the remedies arising on rescission would come too late to affect the secured rights of the bank under its previously crystallised floating charge.

Furthermore, even if this fatal objection could be overcome, the argument would, in their Lordships' opinion, be bound to fail. Whilst it is convenient to speak of the customers "getting their money back" this expression is misleading. Upon payment by the customers the purchase moneys became, and rescission or no rescission remained, the unencumbered property of

the company. What the customers would recover on rescission would not be "their" money, but an equivalent sum. Leaving aside for the moment the creation by the court of a new remedial proprietary right, to which totally different considerations would apply, the claimants would have to contend that in every case where a purchaser is misled into buying goods he is automatically entitled upon rescinding the contract to a proprietary right superior to those of all the vendor's other creditors, exercisable against the whole of the vendor's assets. It is not surprising that no authority could be cited for such an extreme proposition. The only possible exception is *In re Eastgate, Ex parte Ward* [1905] 1 K.B. 465. Their Lordships doubt whether, correctly understood, the case so decides, but if it does they decline to follow it.

Similar objections apply to the second variant, which was only lightly touched upon in argument: namely, that the purchase monies were paid under a mistake. Assuming the mistake to be that the collateral promises would be performed and would yield a proprietary right, what effect would they have on the contracts? Obviously not to make them void *ab initio*, for otherwise it would mean that the customers had no right to insist on delivery. Perhaps the mistake would have entitled the customers to have the agreements set aside at common law or under statute, and upon this happening they would no doubt have been entitled to a personal restitutionary remedy in respect of the price. This does not, however, advance their case. The monies were paid by the customers to the company because they believed that they were bound to pay them; and in this belief they were entirely right. The situation is entirely different from *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.* [1981] Ch. 105, to which much attention was given in the Court of Appeal and in argument before the Board. It may be - their Lordships express no opinion upon it - that the *Chase Manhattan* case correctly decided that where one party mistakenly makes the same payment twice it retains a proprietary interest in the second payment which (if tracing is practicable) can be enforced against the payees' assets in a liquidation ahead of unsecured creditors. But in the present case, the customers intended to make payment, and they did so because they rightly conceived that that was what the contracts required. As in the case of the argument based on misrepresentation, this version conceals the true nature of the customers' complaint: not that they paid the money, but that the goods which they ordered and paid for have not been delivered. As in the case of the misrepresentation, the alleged mistake might well have been a ground for setting aside the contract if the claimants had ever sought to do so; and in such a case they would have had a personal right to recover the sum equivalent to the amount paid. But even if they had chosen to exercise this right, it would not by operation of law have carried with it a proprietary interest.

Their Lordships are of the same opinion as regards the third variant, which is that a proprietary interest arose

because the consideration for the purchase price has totally failed. It is, of course, obvious that in the end the consideration did fail, when delivery was demanded and not made. But until that time the claimants had the benefit of what they had bargained for, a contract for the sale of unascertained goods. Quite plainly a customer could not on the day after a sale have claimed to recover the price for a total failure of consideration, and this at once puts paid to any question of a residuary proprietary interest and distinguishes the case from those such as *Sinclair v. Brougham* [1914] A.C. 398, where the transactions under which the monies were paid were from the start ineffectual; and *Neste Oy v. Lloyds Bank PLC* [1983] 2 Lloyd's Rep. 658, where to the knowledge of the payee no performance at all could take place under the contract for which the payment formed the consideration.

There remains the question whether the court should create after the event a remedial restitutionary right superior to the security created by the charge. The nature and foundation of this remedy were not clearly explained in argument. This is understandable, given that the doctrine is still in an early stage and no single juristic account of it has yet been generally agreed. In the context of the present case there appear to be only two possibilities. The first is to strike directly at the heart of the problem and to conclude that there was such an imbalance between the positions of the parties that if orthodox methods fail a new equity should intervene to put the matter right, without recourse to further rationalisation. Their Lordships must firmly reject any such approach. The bank relied on the floating charge to protect its assets; the customers relied on the company to deliver the bullion and to put in place the separate stock. The fact that the claimants are private citizens whereas their opponent is a commercial bank could not justify the court in simply disapplying the bank's valid security. No case cited has gone anywhere near to this, and the Board would do no service to the nascent doctrine by stretching it past breaking point.

Accordingly, if the argument is to prevail some means must be found, not forcibly to subtract the moneys or their fruits from the assets to which the charge really attached, but retrospectively to create a situation in which the moneys never were part of those assets. In other words the claimants must be deemed to have a retained equitable title (see Goff and Jones, *op. cit.*, page 94). Whatever the mechanism for such deeming may be in other circumstances their Lordships can see no scope for it here. So far as concerns an equitable interest deemed to have come into existence from the moment when the transaction was entered into, it is hard to see how this could co-exist with a contract which, so far as anyone knew, might be performed by actual delivery of the goods. And if there was no initial interest, at what time before the attachment of the security, and by virtue of what event, could the court

deem a proprietary right to have arisen? None that their Lordships are able to see. Although remedial restitutionary rights may prove in the future to be a valuable instrument of justice they cannot in their Lordships' opinion be brought to bear on the present case.

For these reasons the Board must reject all the ways in which the non-allocated claimants assert a proprietary interest over the purchase price and its fruits. This makes it unnecessary to consider whether, if such an interest had existed, it would have been possible to trace from the subject-matter of the interest into the company's present assets. Indeed it would be unprofitable to do so without a clear understanding of when and how the equitable interest arose, and of its nature. Their Lordships should, however, say that they find it difficult to understand how the judgment of the Board in *Space Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.* [1986] 1 W.L.R. 1072, on which the claimants leaned heavily in argument, would enable them to overcome the difficulty that the monies said to be impressed with the trust were paid into an overdrawn account and thereupon ceased to exist: see, for example, *In re Diplock* [1948] Ch. 465. The observations of the Board in *Space Investments* were concerned with a mixed, not a non-existent, fund.

VII. The position of the bank

The claimants have sought to contend that if they fail on everything else they are still entitled to an equitable right founded on wrongful dealing on the part of the bank. Thorp J. was prepared to go this far with the argument that the bank knew at least by June 1988, and probably before, that the company's obligations to supply bullion far exceeded its ability to do so. But the learned judge could not see, any more than the Board can see, how this could prevent the bank from claiming the normal benefits of its security. Much more than this would be required, and nothing has so far been forthcoming. Quite apart from the practical impossiblity of founding any conclusion on the fragmentary written material now available, it would be quite impossible for the Board to conclude any enquiry on its own account without the benefit of an investigation by the courts in New Zealand, in the light of the full discovery and extensive oral evidence which would be essential to doing justice in the matter. Understandably, Thorp J. did not consider an application by the receivers for directions to be a suitable vehicle for such an enquiry. All that the Board can say is that if there is material in support of the more serious allegations, nothing in this opinion will prevent its deployment in a proper manner.

VIII. Non-allocated claimants: Conclusions.

Their Lordships fully acknowledge the indignation of the claimants, caught up in the insolvency of the group of which the company formed part, on finding that the assurances of a secure protection on the strength of

which they abstained from calling for delivery were unfulfilled; and they understand why the court should strive to alleviate the ensuing hardship. Nevertheless there must be some basis of principle for depriving the bank of its security and in company with McKay J. they must find that none has been shown.

IX. The claim by Mr. Liggett

The claim by Mr. Liggett differs in only three respects from those of the non-allocated claimants as a whole. First, it is very much larger. He agreed to purchase 1,000 gold maple coins at a price of $732,000. While this entirely explains his special indignation at the conduct of the company, and his consequent decision to pursue a separate claim, it plainly makes no difference to the outcome.

The second ground of distinction concerns the circumstances of the purchase. In brief, what happened was this. On 11th February 1988 Mr. Liggett made a purchase for 52 maple coins. He handed over a cheque and was told that seven days would be needed to clear it before he could collect the coins. In the meantime, he decided to make a larger purchase and with this in mind he hired a safe deposit box from another company to store the 52 maples and the further maples which he proposed to purchase. He then called again at the offices of the company and was given a description of the method of making unallocated purchases on the same general lines as those given to the other claimants. This caused him to change his mind about taking physical delivery of the coins already bought and those which he intended to add. Instead, he made an agreement for the purchase of a further 1000 maples and did not call for delivery, relying on the collateral promises. He did not personally receive a certificate of deposit referring to the goods as unallocated, since he was abroad at the relevant time.

These facts are more favourable to Mr. Liggett's claim than those of the non-allocated claimants as a whole. Mr. Liggett was at least shown 52 coins in respect of which the court was later to find that there was an ascertainment and appropriation sufficient to pass the property, and the fact that the two transactions were closely linked could certainly have given Mr. Liggett the impression that their legal effect would be the same. Acknowledging this, their Lordships cannot find that the distinction makes any difference. Whatever Mr. Liggett may have thought, and whatever the special features of the transaction, the fact remains that it was an agreement for the purchase of generic goods. For the reasons already given such contract even when accompanied by the collateral promises could not create a proprietary interest of any kind.

The third ground of distinction from the case of the non-allocated claimants is as follows. Mr. Liggett's

purchase was so large by comparison with the company's ordinary retail bullion transactions that the company felt it prudent to reduce its "short" position in maples by buying-in a substantial quantity of extra coins. It was argued on behalf of Mr. Liggett that the coins so purchased were earmarked for Mr. Liggett's purchases and hence through ascertainment and appropriation became his immediate property, only afterwards being wrongfully admixed with the bulk of the bullion in the vault. If this argument were correct, it would follow that not only was the company not entitled to deal with the coins in any other way than to deliver them to Mr. Liggett when called, but also that it could not supply him with coins from any other source. No doubt if the facts were strong enough the court would be able to conclude that this was what the company had done with the implied consent of Mr. Liggett. In the event, however, the evidence of the bullion manager and clerk, upon which Mr. Liggett relied before Thorp J. to prove the appropriation, was (as the learned judge put it) "demonstrably against the proposition that the maples purchased by Exchange were purchased expressly for Mr. Liggett and therefore appropriated to his contract". The learned judge went on to give reasons for this opinion, and nothing in the analysis of the facts presented to the Board gives their Lordships any reason to doubt that the learned judge's conclusion was correct.

In these circumstances their Lordships are constrained to allow the appeal of the bank in respect of Mr. Liggett for the same reasons as those already given in relation to the non-allocated claimants.

X. The Walker & Hall claims

These claims are on a different footing. It appears that until about 1983 the bullion purchased by customers of the predecessor of Walker & Hall was stored and recorded separately. Thereafter, the bullion representing purchases by customers was stored en masse, but it was still kept separate from the vendor's own stock. Furthermore, the quantity of each kind of bullion kept in this pooled mass was precisely equal to the amount of Walker & Hall's exposure to the relevant categories of bullion and of its open contracts with customers. The documentation was also different from that received by the customers who later became the non-allocated claimants. The documents handed to the customer need not be quoted at length, but their general effect was that the vendor did not claim title in the bullion described in the document and that the title to that bullion, and the risk in respect of it, was with the customer. The document also stated that the vendor held the bullion as custodian for the customer in safe storage. These arrangements ceased when the shares of Walker & Hall were purchased by the company, and the contractual rights of the customers were transferred.

The features just mentioned persuaded Thorp J. at first instance to hold, in contrast to his conclusion in relation to

the non-allocated claimants and Mr. Liggett, that there had been a sufficient ascertainment and appropriation of goods to the individual contracts to transfer title to each customer; and that thereafter the customers as a whole had a shared interest in the pooled bullion, which the vendors held on their behalf. The *Dublin City Distillery case, supra,* was cited in support of this conclusion. It followed that when the company absorbed the hitherto separated bullion into its own trading stock upon the acquisition of Walker & Hall's business, and thereafter drew upon the mixed stock, it wrongfully dealt with goods which were not its own.

Thus far, the decision of Thorp J. was favourable to the Walker & Hall claimants. There remained, however, the question of relief. Here, the learned judge applied conventional principles of tracing and concluded that the proprietary recoveries of the Walker & Hall claimants and those in a similar position could not exceed the lowest balance of metal held by the company between the accrual of their rights and the commencement of the receivership: see *James Roscoe (Bolton) Ltd. v. Winder* [1915] 1 Ch. 62 and the passages from Ford and Lee's Principles of the Law of Trusts (1990) 2nd Edition, pages 738-768, paras. 1716-1730 and Goff and Jones, The Law of Restitution, 3rd ed. (1986), at page 74, cited by the learned judge.

Although the Walker & Hall claimants had succeeded on liability the bank was not unduly concerned, since the limitation of the claim to the lowest intermediate balance meant that it was of comparatively small financial significance. The bank therefore did not appeal against this part of Thorp J.'s judgment when the unsuccessful claimants appealed to the Court of Appeal against other aspects of that judgment. A rather confusing situation then arose. Because the bank had not appealed in relation to the Walker & Hall claimants the Court of Appeal had no occasion to consider whether these claimants really were, as the judge had held, in a different position from the non-allocated claimants and Mr. Liggett, although some brief observations by Gault J. in his judgment [1993] 1 NZLR 257 at page 277 appeared to indicate some doubt on this score. When, however, the court had turned to the question of quantum, and ordered that the non-allocated claimants and Mr. Liggett were entitled to charges on the remaining bullion assets of the company in priority to the charge of the bank, it concluded its declaration with the words "... and the successful claimants in the High Court are in the same position as the present appellants to the extent they cannot recover under the judgment of His Honour Mr. Justice Thorp". This enhancement of the remedy available to the Walker & Hall claimants made Thorp J.'s adverse judgment much more serious for the bank, and accordingly the bank desired to appeal to this Board not only on the ground that the Court of Appeal had wrongly enlarged the remedy but also (in case it should be held that in principle the decision of the court on the

availability of a remedy should be upheld) on the ground that Thorp J. had been in error when holding that the Walker & Hall claimants had any proprietary rights at all. To this the Walker & Hall claimants objected, on the ground that since the bank had never appealed to the Court of Appeal on the issue of liability it could not appeal to the Board. The bank responded that it was not they but the claimants who had set the appellate procedure in motion and if the judgment of Thorp J. was to be reopened at all, it ought to be reconsidered in full.

In the event, a lengthy investigation by the Board of what had happened in the Court of Appeal was avoided by a sensible arrangement between the parties, whereby the bank accepted its willingness to abide by the decision of Thorp J. on liability (although without making any concession upon it) in the event that the Board restored the learned judge's decision on the measure of recovery. To this issue, therefore, their Lordships will immediately turn.

On the facts found by the learned judge the company as bailee held bullion belonging to the individual Walker & Hall claimants, intermingled the bullion of all such claimants, mixed that bullion with bullion belonging to the company, withdrew bullion from the mixed fund and then purchased more bullion which was added to the mixed fund without the intention of replacing the bullion of the Walker & Hall claimants. In these circumstances the bullion belonging to the Walker & Hall claimants which became held by the company's receivers consisted of bullion equal to the lowest balance of metal held by the company at any time; see *James Roscoe (Bolton) Ltd. v. Winder* [1915] 1 Ch. 62.

The Walker & Hall claimants now seek to go further and ask the court to impose an equitable lien on all the property of the company at the date of the receivership to recover the value of their bullion unlawfully misappropriated by the company. Such a lien was considered by the Board in *Space Investments Limited v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.* [1986] 1 W.L.R. 1072. In that case the Board held that beneficiaries could not claim trust moneys lawfully deposited by a bank trustee with itself as banker in priority to other depositors and unsecured creditors. But Lord Templeman considered the position which would arise if a bank trustee unlawfully borrowed trust monies. He said at page 1074:-

> "A bank in fact uses all deposit moneys for the general purposes of the bank. Whether a bank trustee lawfully receives deposits or wrongly treats trust money as on deposit from trusts, all the moneys are in fact dealt with and expended by the bank for the general purposes of the bank. In these circumstances it is impossible for the beneficiaries interested in trust money misappropriated from their trust to trace their money to any particular asset belonging to the trustee bank. But equity allows the beneficiaries, or a new trustee appointed in place of an insolvent bank trustee

> to protect the interests of the beneficiaries, to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank."

These observations were criticised by Professor Goode in his Mary Oliver Memorial Address published in 103 L.Q.R. (1987) 433, at pages 445-7 as being inconsistent with the observations of the Court of Appeal in *In re Diplock's Estate* [1948] Ch. 465 at page 521 where it was said:-

> "The equitable remedies pre-suppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself. If the fund, mixed or unmixed, is spent upon a dinner, equity, which dealt only in specific relief and not in damages, could do nothing. If the case was one which at common law involved breach of contract the common law could, of course, award damages but specific relief would be out of the question. It is, therefore, a necessary matter for consideration in each case where it is sought to trace money in equity, whether it has such a continued existence, actual or notional, as will enable equity to grant specific relief."

In the case of a bank which employs all borrowed moneys as a mixed fund for the purpose of lending out money or making investments, any trust money unlawfully borrowed by a bank trustee may be said to be latent in the property acquired by the bank and the court may impose an equitable lien on that property for the recovery of the trust money.

The imposition of such an equitable lien for the purpose of recovering trust money was more favourably regarded by Professor Peter Birks in An Introduction to the Law of Restitution at pages 377 et seq. and by Goff and Jones on the Law of Restitution 4th Edition especially at pages 73 to 75.

The law relating to the creation and tracing of equitable proprietary interests is still in a state of development. In *A.G. for Hong Kong v. Reid* [1994] A.C. 324 the Board decided that money received by an agent as a bribe was held in trust for the principal who is entitled to trace and recover property representing the bribe. In *Lord Napier and Ettrick v. Hunter* [1993] A.C. 713 at 738-739 the House of Lords held that payment of damages in respect of an insured loss created an equitable charge in favour of the subrogated insurers so long only as the damages were traceable as an identifiable fund. When the scope and ambit of these decisions and the observations of the Board in *Space Investments* fall to be considered,

it will be necessary for the history and foundations in principle of the creation and tracing of equitable proprietary interests to be the subject of close examination and full argument and for attention to be paid to the works of Paciocco in (1989) 68 Can. Bar. Rev. 315, Maddaugh and McCamus "The Law of Restitution" (1990), Emily L. Sherwin's article "Constructive Trusts in Bankruptcy" (1989) U.Ill.L.Rev. 297, 335 and other commentators dealing with equitable interests in tracing and referring to concepts such as the position of "involuntary creditors" and tracing to "swollen assets".

In the present case it is not necessary or appropriate to consider the scope and ambit of the observations in *Space Investments* or their application to trustees other than bank trustees because all members of this Board are agreed that it would be inequitable to impose a lien in favour of the Walker & Hall claimants. Those claimants received the same certificates and trusted the company in a manner no different from other bullion customers. There is no evidence that the debenture holders and the unsecured creditors at the date of the receivership benefited directly or indirectly from the breaches of trust committed by the company or that Walker & Hall bullion continued to exist as a fund latent in property vested in the receivers.

In these circumstances the Walker & Hall claimants must be restored to the remedies granted to them by the trial judge.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be allowed, the judgment of the Court of Appeal of New Zealand of 30th April 1992 set aside and the judgment of Thorp J. of 17th October 1990 restored. Their Lordships were informed that the parties had been able to agree the matter of costs in any event and therefore make no order in that regard.