

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF CC AUTOMOTIVE GROUP LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.

Date: 06/11/2019

Before:

HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

Between:

DANIEL ROBERT WHITELEY SMITH
(as the liquidator of CC Automotive Group Limited)

Applicant

- and -

(1) RETAIL MONEY MARKET LIMITED
(on its own behalf and as the representative of those
companies which are listed as Third Party Funders in
the Schedule to the Application Notice and which fall
within paragraph 2 of the court's order made on 6
August 2019)

(2) WALKER MORRIS TRUSTEES LIMITED
(as the representative of those who fall within the
definition of "Customer" in clause 1.1 of the
Declaration of Trust made by CC Automotive Group
Limited on 23 February 2015)

Respondents

Mark Cawson QC (instructed by **Addleshaw Goddard LLP**) for the **Applicant**
Benjamin Wood (instructed by **Harrison Clark Rickerbys Solicitors Limited**) for the **First**
Respondent
Hugo Groves (instructed by **Walker Morris LLP**) for the **Second Respondent**

Hearing dates: 18-19 September 2019

Judgment Approved

HH Judge Klein:

1. This is the judgment following the hearing of an application by the liquidator of CC Automotive Group Ltd., under section 112 of the Insolvency Act 1986, for directions about how he should administer one of that company's bank accounts.

2. Before entering into administration on 30 April 2015, CC Automotive Group Ltd. (“Carcraft”) traded as a multi-site used vehicle supermarket under the name “Carcraft”. In addition to selling vehicles, it offered its customers a product known as the “Drive Happy Package” (“the DHP”). Under a DHP, a customer obtained “free” MOT testing, vehicle servicing, warranty repairs and breakdown cover for a period of up to five years. Customers had the option of obtaining a DHP for a period of one year, three years, four years, or five years. Nothing had to be paid for a one-year DHP. A three-year DHP cost £995. A four-year DHP cost £1,495 and a five-year DHP cost £1,995. The majority of customers who obtained three- to five-year DHPs (“long-term DHPs”), did not pay for their DHPs in cash or by debit card. Instead, because their vehicle purchases were financed by lenders (“third party funders”) under a debtor-creditor-supplier agreement (“a section 75 agreement”), those customers’ purchase of their long-term DHPs was also financed (or intended by them to be financed) by the same third party funders which financed their vehicle purchases; sometimes under a separate section 75 agreement. The full price for a long-term DHP should have been paid before a customer obtained one; although, in practice, as I shall explain, that did not happen in all cases.
3. Historically, the payments received for long-term DHPs were used by Carcraft to fund its cash flow. In early 2015, concerned about its solvency, Carcraft consulted solicitors about how it should deal with payments for long-term DHPs. On 23 February 2015, Carcraft made a declaration of trust (“the Declaration of Trust”) which, amongst other matters, was intended to offer a measure of protection to future customers obtaining long-term DHPs.
4. The Declaration of Trust recites that:

“Given the financial position of the Group and based on legal advice received by the directors of [Carcraft’s] ultimate parent company, Carcraft Group Limited, Carcraft has agreed to constitute the Trust (as defined in clause 1 below) and hold the Trust Monies (as defined in clause 1 below) upon trust for the purposes set out in this deed.”
5. The Declaration of Trust contains the following definitions:

“...“Customer” means any person who purchases a DHP...during the Relevant Period, such persons to be identified in the Customer Trust Account Schedule.

“Customer Proportion” means, in respect of each DHP sold to a Customer during the Relevant Period, the amount listed opposite each Customer’s name in the Customer Trust Account Schedule less [certain deductions which are not relevant for present purposes].

“Customer Trust Account Schedule” means the schedule to be prepared and maintained on behalf of [Carcraft] identifying all Customers and DHPs and in the form set out in Schedule to this deed.

“DHPs” means [long-term DHPs] sold during the Relevant Period, for which those customers pay in advance.

“DHP Services” means the services which [Carcraft] contracts to provide pursuant to the DHPs...

“Failure Event” means failure by Carcraft to perform certain or all of the DHP Services in breach of the terms of a DHP purchased by a Customer.

“Failure Value” means the monetary value...of the substituted services that the Customer must purchase from a third party as a result of the Failure Event.

“Insolvency Event” means:...

(d) an administrator is appointed to [Carcraft]...

“Relevant Period” means the period from but excluding the date of this deed until the occurrence of...an Insolvency Event...

“Solvency Statement” means a statement by [Carcraft] that (i) [it] has net assets and (ii) [it] will be able to pay all of its debts as they fall due during the 12 months starting on and including the date of the statement...

“Trust Bank Account” means the account in the name of the Company held at the Bank with sort code 01-10-01 and account number 68189192.

“Trust Monies” means the monies standing to the credit of the Trust Bank Account at the relevant time...”

6. By clause 2.1 of the Declaration of Trust, Carcraft declared “that it shall at all times hold the Trust Monies upon trust for the purposes set out in this deed.”

7. Clause 2.2 of the Declaration of Trust provides:

“In the event that [Carcraft] makes...a Solvency Statement prior to an Insolvency Event: then...the purposes of the Trust shall be deemed to be discharged...the express Trust provided for in this deed shall be extinguished...and there shall be a resulting trust of the Trust Monies in favour of [Carcraft] which shall apply such Trust Monies as it shall see fit, in its absolute discretion.”

8. Clause 3 of the Declaration of Trust provides:

“If an Insolvency Event occurs and [Carcraft] does not make a Discharge Statement within 90 days of such Insolvency Event, all of the Trust Monies shall then be paid to the Customers in the Customer Proportions.”

9. Clause 5 of the Declaration of Trust provides:

“If a Failure Event occurs in respect of a DHP prior to an Insolvency Event, a proportion of the Trust Monies equal to the lesser of:...the Failure Value of that Failure Event...and the Customer Proportion in respect of that DHP on the date of the Failure Event shall be paid to the relevant Customer, provided always that any payment shall in any event be limited to the cost of the DHP paid by the Customer to [Carcraft].”

10. The Applicant (“the liquidator”) was appointed one of Carcraft’s administrators and then, on 9 July 2015, one of its liquidators; Carcraft having gone into a creditors’ voluntary liquidation. The liquidator is now Carcraft’s sole liquidator.
11. No Discharge Statement was made within 90 days after Carcraft entered into administration. Save that the liquidator claims that there is a resulting trust in Carcraft’s favour in relation to sums paid into the Trust Bank Account (“the trust account”) referable to long-term DHPs obtained by customers of Premium Credit Ltd. and All in One Finance Ltd., the parties are agreed that, under the Declaration of Trust, the customers (as defined) have become entitled to the balance (“the trust fund”) standing to the credit of the trust account. The concession by the liquidator (that only part of the trust fund is held for Carcraft on a resulting trust) and, more generally, the parties’ approach to the beneficial ownership of the trust fund (namely, that the customers are the beneficial owners of the trust fund save to the extent that the liquidator or the First Respondent satisfy me otherwise) may be significant, as will become clear in due course.
12. The liquidator has had a number of difficulties in administering the trust account.
13. One of the practical difficulties he has faced is that the Customer Trust Account Schedule which was contemplated by the Declaration of Trust has never been completed. In practice, during the Relevant Period, Carcraft calculated, on a weekly basis, the price of the long-term DHPs sold in that week, deducted from that total any refunds paid during that week, and then credited the trust account with the balance, by transferring funds from its own (non-trust) bank account.¹ As part of this exercise, Carcraft in fact credited amounts to the trust account which related to long-term DHPs sold before the Relevant Period began.²
14. Matters are further complicated because, in two cases (relating to multiple customers), on a weekly basis Carcraft credited the full price of long-term DHPs sold during the Relevant Period, even though it did not receive that price. In both cases, the purchase

¹ The numbers of customers in each class which I set out in this judgment are based on the liquidator’s analysis. In fact, the numbers I set out may be inaccurate because the liquidator has explained, in paragraph 34 of his first witness statement, that he has not counted those customers who obtained long-term DHPs in the last two weeks before Carcraft entered into administration, because Carcraft did not credit any sum to the trust account in those two weeks. No party has suggested that, in relation to this judgment, anything turns on that; although those customers may fall within the definition of “Customer” in the Declaration of Trust nevertheless.

² There may be a further 11 instances, in addition to the ones I refer to in this judgment, where Carcraft credited the “wrong” amount to the trust fund; thereby compounding the practical difficulties the liquidator has faced.

of the long-term DHPs was intended to be funded by a third party funder under section 75 agreements.

15. Mark Cawson QC (who appeared for the liquidator) explained that the first case concerned Premium Credit Ltd (“PCL”). He explained that, in the case of PCL’s customers, Carcraft provided long-term DHPs even though those customers only entered into one-year section 75 agreements. The expectation (and, perhaps, the historical practice) was that, when a section 75 agreement came to an end by lapse of time, a PCL customer was required to enter into a further one year agreement and, if they did not, their long-term DHP lapsed. During the Relevant Period, PCL effectively paid into the trust account £435 for each of its 235 customers who then obtained a long-term DHP and Carcraft paid into the trust account the balance of the full price of those PCL customers’ long-term DHPs (“the PCL balances”).
16. PCL has confirmed that it makes no claim to any of the trust fund and the liquidator accepts that, in principle, each of PCL’s 235 customers should receive a rateable proportion of £435 from the trust fund (taking into account the deficiency to which I will refer). There is a practical difficulty, in that, as estimated by the liquidator, the costs of distributing £435 (or a rateable proportion) to each of PCL’s customers is at least equivalent to the amount available for distribution to them, assuming that their share of the trust fund bears the distribution costs. Hugo Groves, who appeared for the Second Respondent, agreed that a procedure will need to be devised so that PCL’s customers can claim the sum which it is agreed is due to them but so that, if they do not do so, the sums in issue can fall into the general liquidation estate. I will need to hear further from counsel about the appropriate procedure.
17. So far as the PCL balances are concerned, relying on clause 3 of the Declaration of Trust, Mr Groves contended that that part of the trust fund attributable to them (“the PCL shares”) is held on trust for PCL’s customers. Mr Cawson contended that the PCL shares ought to be treated as belonging to Carcraft.
18. Mr Cawson explained that the second case concerned All in One Finance Ltd. (“AIOF”) (another third party funder) which was a related company to Carcraft. It too is in liquidation and the liquidator is its liquidator. During the Relevant Period, 66 of AIOF’s customers obtained long-term DHPs which they expected to pay for under section 75 agreements. AIOF did not credit Carcraft with any sum in relation to those long-term DHPs. However, Carcraft credited the trust account with the full price of those long-term DHPs. Mr Cawson told me that Carcraft and AIOF expected that AIOF would subsequently reimburse it. Some of AIOF’s customers did make a payment under their section 75 agreements to AIOF during the Relevant Period. However, the liquidator asks me to proceed on the basis that they have all since been reimbursed.³ Further, the liquidator (as AIOF’s liquidator) has resolved not to recover any sum under the relevant section 75 agreements from the customers in issue. If those customers receive any part of the trust fund, they will do so in circumstances where they have been fully reimbursed (I am asked to assume) and otherwise effectively discharged from their liabilities under the relevant section 75 agreements (so that, it may be said, those customers will receive a pure windfall (there being no evidence that the prices of the

³ Mr Cawson was instructed that all of AIOF’s relevant customers have been reimbursed but, very properly, he said that I should determine any issues in relation to AIOF’s customers on the footing that this was so, so that any comfort the liquidator gets from my decision is qualified to that extent.

long-term DHPs were not the market prices)). As in the case of PCL's customers, so in this case, relying on clause 3 of the Declaration of Trust, Mr Groves contended that AIOF's customers were entitled to part of the trust fund, whilst Mr Cawson argued that the part of the trust fund attributable to the sums paid in relating to AIOF's customers ("the AIOF shares") ought to be treated as belonging to Carcraft.

19. The balance of the trust account on 30 April 2015 was about £1.265 million. Had Carcraft credited the trust account with what it actually received for the long-term DHPs sold during the Relevant Period, the figure is likely to have been markedly different. Although slightly more stands to the credit of the trust account at present, the balance is likely to be reduced significantly because the court has previously made prospective costs order which entitle the parties to the application to be indemnified their litigation costs and the liquidator to be reimbursed related remuneration out of the trust account, so that there is likely to be a deficiency whatever the outcome of the application.
20. There is no dispute that, because the section 75 agreements are subject to section 75 of the Consumer Credit Act 1974, the third party funders in this case have been jointly and severally liable for the performance of the long-term DHPs; particularly since Carcraft entered into administration. In addition to a single customer who obtained a long-term DHP by credit card payment, the liquidator estimates that 468 customers of third party funders (in addition to PCL's and AIOF's customers) obtained long-term DHPs during the Relevant Period.
21. Conscious of their obligations under section 75 of the Consumer Credit Act 1974 in relation to their customers' long-term DHPs (Carcraft being unable to provide any of the DHP services after entering into administration), the third party funders of at least 327 customers obtained what are apparently at least equivalent packages ("alternative policies") for their customers. Those third party funders include the First Respondent ("RateSetter") which provides peer-to-peer lending. RateSetter also reimbursed its customers who had obtained long-term DHPs during the Relevant Period for expenditure they incurred between Carcraft's administration and the provision to them of alternative policies. About £19,000 was reimbursed in this way.
22. The circumstances in which RateSetter provided alternative policies is set out in its statement of case, in two witness statements filed by Mr Iain Purdy, who is RateSetter's financial controller and who was heavily involved in the provision of alternative policies for its customers, and in a witness statement from RateSetter's solicitor. Mr Purdy's later witness statement was made overnight between the first and second days of the hearing. Having taken instructions, Mr Groves did not object to RateSetter relying on it.
23. In his first witness statement, Mr Purdy said:

"In mid-May 2015 RateSetter, along with a number of the third party funders, established a working group to consider the issues that may arise as result of [Carcraft's] administration and the impact this may have on the affected customers...

As a result of the discussions which took place in the working group, a number of the third party funders decided to engage an alternative warranty provider to replace the DHP. This was in

order to ensure that all the affected customers could continue with equivalent cover despite [Carcraft's] insolvency.

Accordingly, a number of the third party funders, following a tender process, entered into a contract with Motorway Direct plc to cover the DHPs of the affected customers financed by that third party funder...

On the entry into the agreement, RateSetter sent letters to all of its affected customers to confirm that, in the light of [Carcraft's] insolvency, alternative and equivalent cover had been put in place...to replace the DHP cover...

During the period from when [Carcraft] entered into administration...and the date the agreement became effective (24 August 2015), RateSetter paid its affected customers directly for any costs incurred in paying for replacement services that would have been available under the DHP but had not been provided under the DHP as result of [Carcraft's] insolvency..."

24. RateSetter's solicitor said in his witness statement:

"[RateSetter] was not aware of the existence of the [Declaration of Trust]...or the trust at the time it was organising paying for the [alternative policies]. I am instructed by Mr Purdy that, by the time RateSetter entered into the agreement with a third party warranty provider, it was aware in general terms that, in the 2-3 months prior to its administration, [Carcraft] have been putting some money aside (into a separate bank account) in connection with the DHP. [RateSetter] was not aware either of the arrangements (nor specifically that a trust had been created) or of the sums involved. It was only following conversations with [the liquidator] (after the agreement with the third party warranty provider was agreed in June 2015 and concluded in August 2015) that [RateSetter] became aware of the sums in question and the nature of the trust arrangements."

25. In Mr Purdy's later witness statement, he said:

"Although RateSetter was aware in general terms of the existence of a separate bank account, neither [a letter from Eversheds (which had advised Carcraft at the time the Declaration of Trust was made) to the liquidator's solicitor], nor its contents, were known to RateSetter at the time (nor certainly up to the point of arranging [alternative policies] for our customers). In particular, RateSetter had no idea which (if any) of its customers were covered by the trust or the extent (if any) to which those customers stood to benefit.

RateSetter's primary objective in paying the ad hoc expenses and arranging the [alternative policies] was to ensure so far as

possible that its customers were not out of pocket or left high and dry as a result of Carcraft's insolvency.

Although it is difficult to speculate on events that did not actually happen, I believe that, if RateSetter had known that some or all of our customers had access to funds in a trust (and particularly a trust that would – in the words of Eversheds – “significantly reduce” or “extinguish” their exposure), we would have approached things differently. However, RateSetter mistakenly believed that, without RateSetter stepping in to assist its customers, those customers would have been left high and dry.

In terms of how things might have been approached differently, I believe that I would have proposed/accepted one of two alternatives for dealing with those customers who had interests in the Trust.

It might have been the case that RateSetter would have told those customers to make a claim directly on the Trust and then – to the extent that there was any shortfall – RateSetter would have offered to make up that difference.

However, if there was the prospect of this being administratively difficult or subject to delays or substantial inconvenience for RateSetter's customers, then I believe that RateSetter would instead have agreed to make those customers whole (by the provision of the [alternative policies] and the payment of ad hoc expenses), as in fact happened, but in exchange for an assignment of the customers' rights against Carcraft, including in respect of the Trust. In that way, the customers could continue to receive an equivalent to the DHP service, unaffected by and not having to deal with the consequences and risks of Carcraft's insolvency, which would have been for RateSetter to handle and take forward.

Given what has actually happened in terms of the delays in sorting out the Trust account and reconciling the information, and assuming that we had been told by the liquidator that a full distribution of the Trust was not imminent, I am confident that RateSetter would have adopted the second of the two courses described above (i.e. agree to set the [alternative policies] up for the customers in exchange for an assignment). I do not believe that we would have offered the customers a choice.

To be clear, I do not believe that RateSetter would had paid the sums that it did, without requiring anything from the customers, if it had known or expected that the customers would receive a distribution from the Trust as is now contended for on behalf of the customers.”

26. In its statement of case, RateSetter said:

“To the extent that the lenders organised and financed alternative warranties for their customers, they did so in the belief that the customers’ rights arising out of and in connection with the DHPs were worthless, in view of [Carcraft’s] insolvency...[That belief was] mistaken, because of the benefits and rights accruing to the customers under the [Declaration of Trust]. The mistaken [belief has] caused the lenders to confer a benefit on the customers and/or for the customers to be enriched the extent of the benefits and rights accruing to them under the [Declaration of Trust] (alternatively the extent and value of the benefits conferred by the lenders...)”

27. In his second witness statement, the liquidator explained that, in the administrators’ proposals to creditors dated 12 June 2015, Carcraft’s administrators referred to the fact that Carcraft’s directors had ring-fenced certain creditor funds and that about £1.3 million was then held in the ring-fenced account.
28. Because the liquidator was concerned that the third party funders who have provided alternative policies (“alternative policy funders”) may have a claim to the trust fund, he made the present application for directions. Annexed to this judgment is a copy of the schedule to the application notice which sets out the questions in respect of which the liquidator initially sought directions. Because the liquidator was coming to court for directions in relation to the claim, if any, of alternative policy funders to the trust fund, he thought it prudent to seek directions in relation to Carcraft’s claim, if any, to the PCL and AIOF shares. He also thought it prudent to seek directions in relation to other circumstances which have or, he thought, may have arisen.
29. On 24 January 2019, HH Judge Mark Raeside QC ordered that RateSetter represent all the third party funders identified in the schedule to the application notice. On the same occasion, he joined the Second Respondent (“Walker Morris”) as a party to the application to represent those falling within the definition of “Customer” in the Declaration of Trust.
30. During the course of the application it became clear that some of the third party funders may not have provided alternative policies to their customers. Because RateSetter relies on the provision of alternative policies to make its case, on 6 August 2019 HH Judge Davis-White QC ordered, by consent, that RateSetter should cease to represent PCL and those other third party funders which have not provided alternative policies to their customers.
31. I have already indicated that the liquidator was represented by Mr Cawson and Walker Morris was represented by Mr Groves. RateSetter was represented by Benjamin Wood. I am very grateful to them (as I am to their clients) for all the help they gave me during the hearing. Their written and oral submissions were models of brevity and clarity in a case which is somewhat complicated factually and which raises not entirely straight-forward legal issues. I am also grateful to them because, as a result of their submissions and their engagement with each other during the hearing, the liquidator only needs me to determine substantively (i) the dispute between Walker Morris on the one hand (on behalf of customers) and RateSetter on the other hand (on behalf of all alternative policy funders), (ii) the dispute between Walker Morris on the one hand and the liquidator on the other hand in relation to the PCL shares and (iii) their dispute in relation to the AIOF

shares. As I have already indicated, and as I note further in this judgment, it may be necessary to work out how, in practice, effect should be given to my decision. It may also be necessary to work out, in relation to those scenarios where the parties are agreed in principle on the course the liquidator should properly take, how, in practice, the liquidator should give effect to that agreement in principle. Counsel have agreed that these matters should be left until after I have handed down this judgment.

32. At the hearing, counsel approached the dispute between Walker Morris and RateSetter in this way. They proceeded on the basis that, unless any of RateSetter's grounds for opposing a distribution of the trust fund to alternative policy funder customers succeeded, those customers retain a beneficial interest in the trust fund; so that the resolution of the dispute between Walker Morris and RateSetter depends on whether RateSetter has made out any of those grounds.

Section 5 of the Mercantile Law Amendment Act 1856

33. The first ground on which RateSetter opposes a distribution of the trust fund to customers of alternative policy funders is based on section 5 ("Section 5") of the Mercantile Law Amendment Act 1856 ("Act"). The Preamble of the Act records:

"Whereas inconvenience is felt by persons engaged in trade by reason of the laws of England and Ireland being in some particulars different from those of Scotland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience is it expedient to amend the laws of England and Ireland as hereinafter is mentioned"

34. Section 5 provides:

"Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him:

Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the

just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.”

35. As to the effect of Section 5, Mr Wood argued as follows:

- i) The effect of Section 5 is wider than the mischief which the Preamble to the Act suggests was intended to be nullified by the Act;
- ii) Section 5 provides two cumulative rights to a co-obligor who performs the co-obligors’ duty;
- iii) The first right is the right to have assigned to it “every judgment, specialty, or other security which shall be held by the creditor in respect of such...duty” (“the first Section 5 right”);
- iv) Because of section 75 of the Consumer Credit Act 1974, the third party funders have been liable, with Carcraft, for performance of the long-term DHPs;
- v) By the provision of equivalent alternative policies, alternative policy funders have performed (which Mr Groves accepted, so long as the alternative policies are in fact equivalent to the equivalent DHPs);
- vi) Customers’ beneficial interests in the trust fund are in the nature of security interests;⁴
- vii) So that, under the first Section 5 right, so far as they relate to those customers who have been provided with alternative policies, those beneficial interests (or the rights those customers enjoy by the Declaration of Trust) have been assigned to those customers’ alternative policy funders;⁵
- viii) The second right is the right to use all the creditor’s remedies in order to obtain, from the other co-obligor “indemnification for...loss sustained by the [co-obligor] who shall have...performed [the co-obligors’] duty” (“the second Section 5 right”);
- ix) The second Section 5 right is in wide terms and is not limited to a right to sue the other co-obligor in respect of the duty which has in fact been discharged;

⁴ Mr Wood did not take me to any authority to support this proposition.

⁵ Mr Wood also argued that, if the customers obtain judgments against Carcraft, those are also capable of being assigned to the alternative policy funders. The short answer to this point is that no customer has a judgment against Carcraft. Nor was it suggested that any customer might have such a judgment. In those circumstances, at present, this argument does not assist the alternative policy funders, because no judgment can have been assigned to them on which they can rely as against Carcraft or the liquidator. In his skeleton argument, Mr Wood also suggested that customers’ beneficial interests in the trust fund are specialties even if they do not amount to security interests, simply because the Declaration of Trust is a deed. I did not understand him to pursue this point in his oral submissions. I think he was right not to do so. Having regard to the (limited) purpose of the Act, which I consider further below, I agree with Mr Groves that the specialties contemplated by Section 5 are limited to specialty debts (that is, “obligations under seal securing a debt” (see *R v. Williams* [1942] AC 541, 554, per Viscount Maugham); so that, ultimately, RateSetter’s case on the first Section 5 ground can only succeed if the Declaration of Trust created security.

- x) The second Section 5 right gives alternative policy funders the right to all causes of action their customers have against Carcraft in all its capacities;
 - xi) The second Section 5 right therefore entitles alternative policy funders to call for the liquidator to pay over to them their customers' shares of the trust fund, as their customers could;
 - xii) For the purpose of the second Section 5 right, it does not matter whether or not customers' beneficial interests in the trust fund are in the nature of security interests.
36. As to the first Section 5 right, Mr Groves argued that the Declaration of Trust did not create security.
37. Not having been taken, by counsel, to any authority which defines a security for the purposes of Section 5,⁶ I need to consider whether the Declaration of Trust created security, by applying first principles.
38. The authors of Fisher & Lightwood's Law of Mortgage (15th ed) explain, at paragraphs 1.1-1.2:

“...Personal security, or suretyship, consists of the contract of guarantee, whereby the guarantor promises to answer for the obligation of the debtor should the debtor default. The effect is to give the creditor a secondary contractual action against the guarantor in the event of default by the principal debtor...By contrast, real security gives the creditor rights over real or personal property appropriated to meet the debt or other obligation...

Real security may be created by contract or may arise by operation of law at common law, in equity or under certain statutes. When created by contract the security takes the form of mortgage, pledge or charge; when created by operation of law the security is called a lien.

Real securities fall into three classes:

(a) mortgages: these are real securities by which the creditor obtains proprietary rights over the subject matter of the security. Such securities do not depend for their validity on the creditor obtaining possession of the property at its grant. The creditor's proprietary rights give him various enforcement powers which he can, at common law, exercise outside the court, as of right because they arise from the nature of the security;

(b) pledge and possessory lien: there are real securities by which the creditor does not obtain proprietary rights over the

⁶ The only authority on the definition generally of security to which I was taken, in fact by Mr Groves, was *Re Cosslett (Contractors) Ltd.* [1998] Ch 495 at 508, to which I make brief further reference below.

property. The validity of such a security depends on the creditor obtaining possession of the property. It is from that possession that the security comes; and

(c) charges and non-possessory liens: these real securities do not depend for validity on the creditor obtaining either proprietary rights over or the possession of the property. The creditor simply has various enforcement rights by judicial process.

To each of the kinds of real security is incident:

(a) a right in the creditor to make the property which is subject to the security answerable for the debt or other obligation;

(b) a right in the debtor to redeem the property by paying the debt or performing the obligation; and

(c) a liability on the part of the creditor upon such payment or performance to restore the property to the owner.”⁷

39. In *Bristol Airport plc v. Powdrill* [1990] Ch 744, Sir Nicholas Browne-Wilkinson VC said at page 760, when considering the proper construction of the phrase “other security” in section 248 of the Insolvency Act 1986:

“...Mr. Crystal, for the administrators, submitted the following description of a security: “Security is created where a person (“the creditor”) to whom an obligation is owed by another (“the debtor”) by statute or contract, in addition to the personal promise of the debtor to discharge the obligation, obtains rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtor’s obligation to the creditor.”

Whilst not holding that that is a comprehensive definition of “security”, in my judgment it is certainly no wider than the ordinary meaning of the word...”

40. I have concluded that the customers’ beneficial interests in the trust fund are not in the nature of security and that the Declaration of Trust did not create security in the customers’ favour.

⁷ In *Cosslett*, Millett LJ said, at page 508: “There are only four kinds of consensual security known to English law: (i) pledge; (ii) contractual lien; (iii) equitable charge and (iv) mortgage. A pledge and a contractual lien both depend on the delivery of possession to the creditor. The difference between them is that in the case of a pledge the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of goods previously delivered to him for some other purpose. Neither a mortgage nor a charge depends on the delivery of possession. The difference between them is that a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an equitable charge does not.”

41. The provisions of the Declaration of Trust do not obviously create security in the customers' favour. The Declaration of Trust does not obviously display the features of a mortgage, charge, pledge or lien.
42. Generally, in practice, security interests are created contractually. In this case, the customers did not know about (let alone agree to) the Declaration of Trust before Carcraft entered into administration.
43. If it is RateSetter's case that the customers acquired security by operation of law, such security would be in the nature of a non-possessory lien. However, the Declaration of Trust confers on customers much more than enforcement rights by judicial process.
44. There are more fundamental reasons why the Declaration of Trust does not create security in the customers' favour and why customers' beneficial interests in the trust fund are not in the nature of security.
45. In truth, clause 3 of the Declaration of Trust was only expected to operate when Carcraft's obligations under the long-term DHPs became incapable of further performance by Carcraft or a third party. Clause 5 of the Declaration of Trust (the other clause which provides for payment to customers) was only intended to operate when Carcraft failed to perform its obligation under particular DHPs. The Declaration of Trust does not secure performance of those obligations. Rather, it provides mechanisms for compensating customers (in the case of clause 5, expressly, and in the case of clause 3, in practice) for non-performance of those obligations.
46. Nor does the Declaration of Trust secure performance of Carcraft's obligations under the DHPs in the event that Carcraft made a Discharge Statement.
47. Nor does the Declaration of Trust entitle Carcraft to "redeem" the customers' beneficial interests in every case. Suppose more than 90 days after an Insolvency Event, a third party undertook to perform Carcraft's obligations under the DHPs, so that a Discharge Statement could have been made but for the lapse of time. In this case, the Declaration of Trust contains no provisions for reversing the effect of clause 3 (for obtaining back from the customers their beneficial interests).
48. It follows that the Declaration of Trust does not display the three features of a security which Fisher & Lightwood list at the end of paragraph 1.2.
49. I turn to consider RateSetter's case on the second Section 5 right.
50. If Mr Wood's contention about the second Section 5 right is correct, Section 5 will have had a far-reaching effect. On RateSetter's case, the second Section 5 right divests or is capable of divesting beneficiaries of an obligation ("creditors") of all their remedies against a non-performing co-obligor, even if those remedies are wholly unrelated to the obligation which the co-obligor has failed to perform, in order that the other co-obligor, who has performed its pre-existing obligation, can be compensated by its co-obligor, even if the other co-obligor already has a remedy against the non-performing co-obligor.
51. By way of example, suppose a customer who had a long-term DHP obtained a car service and that, on collecting their car following the service, slipped in a pool of oil

negligently left at a Carcraft service centre, injuring themselves (against which risk Carcraft insured). Suppose too that Carcraft never entered into administration but, after the customer was injured, refused to perform its further DHP obligations so that, for this reason, RateSetter procured an alternative policy for the customer, the price of which equated to the value of the customer's personal injury claim. On RateSetter's case, the customer could be divested of their personal injury claim, so that, whilst the customer would continue to enjoy the benefit of an equivalent to a long-term DHP, they might be unable to obtain any compensation for their personal injury which might have otherwise been available to them. The beneficiaries of such an arrangement would be RateSetter and Carcraft. RateSetter would, in practice, have performed its pre-existing obligation under section 75 of the Consumer Credit Act 1974, in return for which it would have the benefit of two causes of action against Carcraft.⁸ Carcraft might, in practice, avoid having to compensate for the personal injury claim at all. Instead, if RateSetter sued in relation to the customer's personal injury claim, any compensation thereby recovered would be used to discharge Carcraft's pre-existing obligation to RateSetter.

52. In *Re Russell* (1885) 29 ChD 254, the Court of Appeal had to decide whether a landlord's right of distress amounts to security for the purpose of Section 5. Fry LJ said, at pages 265-6:

"...Is the right of distress for rent in arrear, a security held by a creditor in respect of a debt, within the meaning of this section? We think that it is not. In the first place, the right of distress is not in common parlance, nor we think, in legal phraseology, a security held for a debt, it is a particular remedy which arises on non-payment; in the second place, the section appears to be dealing with securities, which, according to the existing law, are in their nature assignable, which is not the case with the power of distress for rent in arrear, which, according to the Common Law, was only incidental to the immediate reversion; and, lastly, we think that the preamble is strong to shew that the Legislature had no intention of effecting a great change in the law regulating the relations of landlord and tenant, for it recites, "Whereas inconvenience is felt by persons engaged in trade by reason of the laws of England and Ireland being in some particulars different from those of Scotland in matters of common occurrence in the course of such trade, and, with a view to remedy such inconvenience it is expedient to amend the laws of England and Ireland as hereinafter is mentioned."

But if the right of distress is not a security within the meaning of the section, is it one of the remedies all of which the person paying the debt is entitled to use? The precise construction of the clause and the precise meaning of the phrase "all the remedies" is not easy to ascertain, but we think that the remedies are confined to proceedings at Law or in Equity in which, but for the

⁸ Including under section 75(2) of the Consumer Credit Act 1974.

statute, the payment might have been pleadable, and it is evident that payment could not have been pleaded to a distress.”

53. It seems to me clear that the Court of Appeal did not view the Act as effecting any radical change. Rather the Court of Appeal viewed the Act, as its Preamble suggests, as removing an inconvenient obstacle which existed in England and Ireland but not in Scotland.⁹ It would be surprising, therefore, if the effect of Section 5 was to deprive parties of rights unrelated to the underlying transaction which a co-obligor has performed, as Mr Wood contended.
54. Although the Court of Appeal, in *Re Russell*, was not referred to the decision of the Court of Common Pleas in *Batchellor v. Lawrence* (1861) 9 CB (NS) 543, the Court of Appeal’s thoughts about the effect of the relevant part of Section 5 (or, to put in another way, the nature of the second Section 5 right) were consistent with the earlier decision.
55. In *Batchellor*, Byles J said, at pages 555-556:

“...The only difficulty I have felt, is, that the words “co-contractor” and “co-debtor” are not repeated in that part of the clause which provides that the payment shall not be pleadable in bar of any action or other proceeding by the party making it. But it must be remembered that one who is liable jointly with others stands in the position of surety for their proportions of the debt, and, if he pays the whole, is entitled to call upon them for contribution. In all rational systems of law, where a surety pays the debt, he is entitled to the benefit of all securities which the creditor held. Such is the law of France where law and equity are blended. Such also is the law of Scotland. The preamble to the Mercantile Law Amendment Act recites the inconvenience of the law of England being in some particulars different from that of Scotland: and I apprehend that the enactment now under consideration was made with the intention of assimilating the law of this country with the Scotch law in this particular. In England, prior to the passing of this act, a surety or co-debtor who had been compelled to pay the debt for which he was liable, could not obtain the benefit of any securities held by the creditor without having recourse to a court of equity; and not always then. The section in question, I think, meant to afford the party at least the same remedy at law as he would have had in equity. This it does in two modes, first, by enacting that he shall be entitled to have the securities assigned to him, secondly, by taking away the technical difficulty that before existed to his making the security available, viz. that the remedy was taken away by payment. As to the first, it is clear that the provision applies not only to persons who stand in the position of sureties, but also to joint-debtors. Whether they stand in the relation of principal and

⁹ The first reason given by Fry LJ for a right of distress not being a security may support the conclusion I have already reached – that the customer’ beneficial interests in the trust fund are not in the nature of security interests – because the beneficial interests can only be resorted to to compensate customers for non-performance of the DHPs or likely non-performance (in the case of insolvency).

surety or not, is immaterial, provided there is a joint liability. And, as to the non-insertion of the words “co-contractor” and “co-debtor,” in the latter part of the clause, it seems to me that that objection has been sufficiently answered. I think a “co-debtor,” who pays the entire debt, is a surety in the sense in which that word is used here. Further, I agree with my Brother Williams, that whether a co-debtor is comprehended within the latter part of the section or not, he clearly is comprehended within the former, and that that alone entitles him to the assignment here sought to be enforced. And, lastly, seeing the manifest object and intention of the statute, if there be any difficulty in its construction, it ought to be construed, like all remedial statutes, so as best to advance the remedy and to suppress the mischief...”

56. In the light of these two authorities, I have concluded that the second Section 5 right is a right, for a co-obligor who has performed, to enforce the judgment, specialty debt, or security assigned under the earlier part of Section 5 (that is, the first Section 5 right), without facing a procedural bar to doing so because the co-obligors’ obligation has been discharged.
57. That, so far as the second Section 5 right is concerned, all that Section 5 does is to remove any procedural bars to the enforcement of the judgment, specialty or security assigned to the co-obligor who has performed the co-obligors’ duty is also the view of Andrews & Millett: Law of Guarantees (7th ed); at paragraph 11-021, where the authors say:

“Prior to the enactment of the Mercantile Law Amendment Act 1856, the common law position was that a surety was only entitled to be subrogated to the securities held by the creditor which had not been satisfied or extinguished by the payment. Thus payment by the surety who was jointly liable with the principal discharged the debt, and the surety had only his right of indemnity against the principal. That rule was abrogated by s.5 of that enactment, which provided that the surety who has paid the debt or performs the duty in full is entitled to have assigned to him all judgments, specialties or securities held in respect of the debt or obligation, whether or not such were deemed at law to have been satisfied or not by the payment or performance. He is further entitled, upon giving the creditor a proper indemnity, to use the creditor’s name in pursuing the principal to enforce such subrogated rights.”

58. For the reasons I have given, RateSetter (and the other alternative policy funders) cannot rely on Section 5 as a basis to claim an entitlement to the trust fund.¹⁰

Equitable subrogation

¹⁰ There may be other reasons why they cannot rely on Section 5. Mr Groves contended that there were, but I do not need to consider the merits of those contentions.

59. Relying principally on *Banque Financière de la Cité v. Parc (Battersea) Ltd.* [1999] AC 221 and *Menelaou v. Bank of Cyprus UK Ltd.* [2016] AC 176, RateSetter contended that the provision of alternative policies by alternative policy funders was mistaken, that the customers who benefited thereby have been unjustly enriched, that the alternative policies were therefore normatively defective transfers of the value and that the alternative policy funders are entitled to be subrogated, in equity, to their customers' beneficial interests in the trust fund.¹¹
60. Although I heard detailed oral submissions about whether customers have been unjustly enriched by the provision of alternative policies and whether there have been normatively defective transfers of value, as it happens I do not need to consider those matters at length in this judgment, in the light of the later of Mr Purdy's witness statements to which I have referred.
61. Mr Groves conceded (rightly, in my view) that, if I accept Mr Purdy's evidence that RateSetter would not have provided alternative policies in the way it did to its customers who obtained long-term DHPs during the Relevant Period had it known of the existence of the trust fund, then RateSetter will have provided those alternative policies under a mistake.
62. Although Mr Purdy did not say so in terms, considering his evidence as a whole, it is proper to infer that RateSetter assumed that, because of Carcraft's administration, its customers were committed to paying for long-term DHPs even though they were not going to obtain performance of them and might not obtain significant compensation for Carcraft's non-performance. That assumption turned out to be wrong, so far as RateSetter's customers in issue in this application are concerned, because, under the Declaration of Trust, they can look to the trust fund for compensation. Mr Purdy's evidence is, in effect, that, had RateSetter not made that mistaken assumption, it would not have provided alternative policies for the customers in issue in the way it did.
63. I do accept Mr Purdy's evidence. He was not cross-examined on it. Mr Groves pointed to what RateSetter accepts, and what the liquidator says, RateSetter did know about the arrangements Carcraft had put in place to protect its customers' interests. However, it does not follow from that that RateSetter did not make the mistaken assumption to which I have referred.
64. It follows that I am satisfied that RateSetter provided alternative policies to its customers who obtained long-term DHPs during the Relevant Period by mistake.
65. Mr Groves also accepted, for the purpose of the present application only, that, in those circumstances, RateSetter would have a restitutionary (unjust enrichment) claim against its customers in issue.
66. It must follow (for the purposes of this judgment), that the alternative policies provided by RateSetter were normatively defective transfers of value.¹² Although Mr Groves did

¹¹ Mr Wood also relied, in his skeleton argument, on *Re OT Computers Ltd.* [2004] Ch 317. That case is of no assistance because, as is clear from paragraph 6 of the judgment, the administrators of that company accepted that the funder in that case was subrogated to its customers' rights.

¹² The same cannot be said of the other alternative policy funders, because the detailed evidence provided by Mr Purdy during the hearing properly only extended to RateSetter's decision-making process. As I explain below, I have concluded that RateSetter is not subrogated to its customers' beneficial interests in the trust fund, even taking

not formally concede this, the point ought not to be controversial; in the light of what I have already said. As the Supreme Court explained in *Prudential Assurance Co. Ltd. v. Revenue and Customs Commissioners* [2018] 3 WLR 652, at [69]:

“When money is paid by mistake, the claimant normally provides a benefit directly to the defendant: he pays him the money. He normally does so at his own expense: he is less wealthy by virtue of the payment. The transaction is normatively defective: the benefit is provided as the result of a mistake. In those circumstances, an obligation arises immediately under the law of unjust enrichment to reverse the enrichment by repaying the money (or an equivalent amount). The cause of action accrues when the money is mistakenly paid.”

67. It does not follow from this that RateSetter is entitled to be subrogated to its customers’ beneficial interests in the trust fund.
68. It may be said that the majority of the Supreme Court Justices (Lord Carnwath excepted) in *Menelaou* took a more expansive view of when equitable subrogation might be available to a transferor of value than the Supreme Court took in the later decision of *Swynson Ltd. v. Lowick Rose LLP* [2018] AC 313; a case on which Mr Groves relied. In this context, it is perhaps interesting to consider Lord Sumption’s analysis, in *Swynson*, of *Menelaou*. Lord Sumption said, at [29], when discussing *Menelaou*:

“...The decision is authority for the proposition that a third party who pays the purchase price of property may be subrogated to the vendor’s lien for the purchase price, if the purchaser would otherwise have been unjustly enriched. The *Menelaou* parents proposed to sell the family home to release capital to be spent on (among other things) buying a house for their daughter. To enable this to happen, the claimant bank, to whom the family home was mortgaged, agreed to release its charges on condition that it would receive a charge over the house to be acquired for the daughter. This expectation was defeated because she was unaware of the arrangement and the signature on the charge was not hers. The daughter was enriched, not by the mere fact of acquiring a house, which she owed to the benevolence of her parents, but by the fact that she acquired it free of the charge which the bank expected to have and without which the transaction should not have proceeded. The main issue on the appeal was whether that enrichment occurred at the bank’s expense, given that the money to pay the purchase price had come from her parents out of the proceeds of sale of the family home, and not directly from the bank. Once that question was answered in the bank’s favour, it was held that the enrichment was unjust. This was because the bank’s consent to the use of the proceeds of the family home to buy the daughter a house had

into account Mr Purdy’s evidence. It must follow that the other alternative policy funders are not subrogated to their customers’ beneficial interests, on the available evidence.

been conditional on it obtaining a charge. That condition had failed and the daughter had consequently been enriched. To reverse the enrichment, the bank was subrogated to the vendor's lien, on the footing that the purchase price secured by that lien had in substance been paid with the bank's money. The daughter's intentions were irrelevant because the absence of a valid charge had been a windfall for her. As Lord Neuberger of Abbotsbury PSC pointed out, at paragraph 70, this was because she did not pay for it. If she had been a bona fide purchaser for full value it might well have been impossible to characterise any enrichment arising from the absence of the intended charge as unjust."

69. Lord Sumption's analysis of *Menelaou* reflects the way Lord Carnwath decided that case. In that case, Lord Carnwath said, at [107], [111], [140]:

"...In my view the respondent's case can be supported (contrary to the decision of the deputy judge) by a strict application of the traditional rules of subrogation, without any need to extend them beyond their established limits.

...A simple modern statement of the principle of subrogation, frequently adopted in later cases..., is that of Walton J in *Burston Finance Ltd. v Speirway Ltd.* [1974] 1 WLR 1648, 1652:

"where A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor...It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and, for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged, in whole or in part, by the money so provided by him..."

...It follows in my view that there is no difficulty in this case in finding the necessary "tracing link" between the bank and the money used to purchase the new property...The bank's interest in the purchase money was clear and direct. On this relatively narrow ground, I would hold that the appeal should be dismissed."

70. In *Swynson* at [30]-[31], [34], Lord Sumption explained the function of equitable subrogation thus:

"The cases on the use of equitable subrogation to prevent or reverse unjust enrichment are all cases of defective transactions. They were defective in the sense that the claimant paid money

on the basis of an expectation which failed. Many of them may broadly be said to arise from a mistake on the part of the claimant. For example, he may wrongly have assumed that the benefit in question was available or enforceable or that his stipulation was valid, when it was not. However, it would be unwise to draw too close an analogy with the role of mistake in other legal contexts or to try to fit the subrogation cases into any broader category of unjust enrichment. It is in many ways *sui generis*. In the first place, except in the case of voluntary dispositions, the law does not normally attach legal consequences to a unilateral mistake unless it is known to or was induced by the other party. But it does so in the subrogation cases. This is, as I have explained, because the windfall character of the benefit conferred on the defendant means that it is not unjust to give effect to the unilateral expectation of the claimant. Secondly, where money is paid under a contract, restitution is normally available only if the contract can be and is rescinded or is otherwise at an end without performance (e.g. by frustration). This is because the law of unjust enrichment is generally concerned to restore the parties to a normatively defective transfer to their pre-transfer position. Subrogation, however, does not restore the parties to their pre-transfer position. It effectively operates to specifically enforce a defeated expectation. Thirdly, as Lord Clarke of Stone-cum-Ebony JSC suggested in the *Menelaou* case, at paragraph 21, the rule may be equally capable of analysis in terms of failure of basis for the transfer. Restitution on that ground ordinarily requires that the expectation should be mutual, whereas this is not a requirement for equitable subrogation. But some cases, such as *Boscawen v Bajwa* [1996] 1 WLR 328 and *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291, cannot without artifice be analysed in any other way, since the payer does not seem to have been mistaken about anything. His expectation was simply defeated by some subsequent external event. What this suggests is that the real basis of the rule is the defeat of an expectation of benefit which was the basis of the payer's consent to the payment of the money for the relevant purpose. Mistake is not the critical element. It is only one, admittedly common, explanation of how that expectation came to be disappointed.

Two things, however, are clear. The first is that the role of the law of unjust enrichment in such cases is to characterise the resultant enrichment of the defendant as unjust, because the absence of the stipulated benefit disrupted a relevant expectation about the transaction under which the money was paid. The second is that the role of equitable subrogation is to replicate as far as possible that element of the transaction whose absence made it defective. This is why subrogation cannot be allowed to confer a greater benefit on the claimants than he has bargained for...

Unless the claimant has been defeated in his expectation of some feature of the transaction for which he may be said to have bargained, he does not suffer an injustice recognised by law simply because in law he has no right. Failure to recognise these limitations would transform the law of equitable subrogation into a general escape route from any principle of law which the claimant overlooked or misunderstood when he arranged his affairs as he did.”¹³

71. Mr Wood identified two matters which he said satisfied the requirement that, in order to be subrogated to its customers’ beneficial interests in the trust fund, RateSetter’s expectation of some feature of the transaction, by which alternative policies were provided, must have been defeated.
72. First, Mr Wood said, had RateSetter known of the trust fund, and turned its mind to its customers’ rights under the Declaration of Trust, it would have required the assignment of its customers’ beneficial interests in the trust fund in return for providing those customers with alternative policies (and paying ad hoc expenses). I have already indicated that I accept Mr Purdy’s evidence to this effect. What Mr Wood described is a hypothetical expectation which RateSetter would have had had it not been mistaken. However, what is required for a transferor of value to be subrogated in equity, following *Swynson*, is that it (RateSetter) in fact had an expectation, at the time of the normatively defective transfer of value, which has in fact been defeated. A hypothetical expectation is not enough.
73. Secondly, Mr Wood said, RateSetter expected to obtain “full rights” against Carcraft on the provision of alternative policies. He did not explain what he meant by “full rights”. Looking at the witness statements filed in support of RateSetter’s case, there is no evidence that RateSetter in fact bargained for or otherwise expected to receive anything from its customers in return for the provision of alternative policies.¹⁴
74. Perhaps to overcome the difficulties *Swynson* creates for RateSetter, Mr Wood prayed in aid the decision of the House of Lords in *Lord Napier and Ettrick v. Hunter* [1993] AC 713. In that case, Lord Templeman explained that an insurer who has settled an insurance claim is entitled to be subrogated to its insured’s cause of action against the wrongdoer for the wrong committed (the risk of which has been insured against), that, on an application by the insurer, the court will not allow any damages awarded to the insured to be paid out without satisfying the insurer’s claim and that the insurer has the benefit of a lien or charge over any damages made available by the wrongdoer, to make

¹³ To similar effect, see Lord Mance in *Swynson* at [86].

¹⁴ *Banque Financière* was a case in which the bank’s expectation was defeated and, as interpreted by the Supreme Court in *Swynson*, was a case in which the House of Lords acknowledged that a claimant can only be subrogated in equity if it is defeated in its expectation of some feature of the transaction in issue (see per Lord Sumption, in *Swynson*, at [24], [25], [30] and [31], and also Lord Mance at [70], [85] and [86] and Lord Neuberger at [118]). Indeed, that, to succeed, a claimant must establish a defeated expectation, is clear from *Banque Financière* itself; where the House of Lords considered whether the proposed remedy conferred a greater benefit on the bank than it had bargained for (see, for example, per Lord Hoffmann at page 234D-E). In the light of the conclusions I have already reached, *Banque Financière* does not assist RateSetter. In written submissions filed after the draft judgment was circulated, Mr Wood pointed out that, in *Banque Financière*, “the House of Lords was willing to grant a remedy for which the plaintiff had not bargained”. In that case, the bank was entitled to be subrogated. I have decided that the alternative policy funders are not entitled to be subrogated at all, so the court does not need to fashion a remedy for them.

good the insurer's payment to its insured, because otherwise "the right of the insurer to subrogation will be useless unless equity protects that right".¹⁵

75. I am afraid that, in my view, *Napier* does not assist the alternative policy funders.
76. It may be enough to say that, contrary to Mr Wood's argument, the alternative policy funders are not "insurers in all but name" (with no direct remedy against the wrongdoer). Under section 75 of the Consumer Credit Act 1974, the third party funders are jointly and severally liable, with Carcraft, to customers and they have a direct remedy against Carcraft.
77. It may also be enough to say that, in this case, RateSetter relies on equitable subrogation not an insurer's right of subrogation, which is a different concept. As Lord Hoffmann explained in *Banque Financière*, at pages 231-2:

"My Lords, the subject of subrogation is bedevilled by problems of terminology and classification which are calculated to cause confusion. For example, it is often said that subrogation may arise either from the express or implied agreement of the parties or by operation of law in a number of different situations: see, for example, Lord Keith of Kinkel in *Orakpo v. Manson Investments Ltd.* [1978] AC 95, 119. As a matter of current terminology, this is true. Lord Diplock, for example, was of the view that the doctrine of subrogation in contracts of insurance operated entirely by virtue of an implied term of the contract of insurance (*Hobbs v. Marlowe* [1978] AC 16, 39) and although in *Lord Napier and Etrick v. Hunter* [1993] AC 713 your Lordships rejected the exclusivity of this claim for the common law and assigned a larger role to equitable principles, there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract...Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution..."

78. However, the following points may also be made.
79. Even if RateSetter's obligation under section 75 of the Consumer Credit Act 1974, arising out of its customers' section 75 agreements, is an insurer's obligation "in all but name", the basis of RateSetter's case in this context is not any obligation arising out of

¹⁵ Per Lord Templeman at page 737F-G.

section 75 agreements or that have otherwise been owed under section 75 of the Consumer Credit Act 1974. Whilst their obligation under section 75 of the Consumer Credit Act 1974, arising out of customers' section 75 agreements, may explain why the alternative policy funders decided to procure the alternative policies, RateSetter's case in this context is based on a separate, normatively defective, arrangement; namely, the mistaken procurement of the alternative policies. A restitutionary claim would have equal success whether or not customers had the benefit of section 75 agreements.

80. Looked at from the insurer's perspective, the insurer's right of subrogation does not depend on a normatively defective transfer of value to its insured, whereas RateSetter's claim to be subrogated does.
81. RateSetter seeks to rely on the doctrine of equitable subrogation as a basis for its claim to its customers' beneficial interests in the trust fund. That claim falls squarely within the principles set out by the Supreme Court in *Swynson*. The principled approach demanded by Lord Sumption (see paragraph 34 of the judgment, quoted above) requires the alternative policy funders to satisfy the requirements of that case, which it is not possible to circumvent by praying in aid *Napier*.
82. For these reasons, I have concluded that the alternative policy funders are not subrogated to their customers' beneficial interests in the trust fund.

Constructive trust

83. RateSetter contended that the alternative policy funders' customers hold their beneficial interests in the trust fund on constructive trust for their alternative policy funders because "it would be unconscionable for the customers to receive or retain the rights and benefits [under the Declaration of Trust]" where "the customers could not reasonably have expected or believed that the [alternative policy funders] were...intending to make [a] gift to or confer a gratuitous benefit on them" by the provision of alternative policies.¹⁶ In support of this claim, Mr Wood relied on *Hughes v. Lloyd* [2008] WTLR 473.
84. In his skeleton argument, Mr Wood said:

"Although decided on very different facts, it is submitted that the present case bears comparison with and ought to be decided in the same way as *Hughes v. Lloyd*..., where HHJ Hodge QC...concluded that the element of the proceeds of a settlement of a personal injury claim, in so far as it related to the head of loss of gratuitous care provided by his late mother, was held by the claimant on trust for this state of his late mother..."
85. Mr Wood did not make any further substantive submissions in relation to this claim at the hearing. In my view, he was right not to do so.
86. In *Hunt v. Severs* [1994] AC 350, 363 Lord Bridge (with whom the other Law Lords agreed), approved the view of Lord Denning in *Cunningham v. Harrison* [1973] QB

¹⁶ See paragraph 34 of RateSetter's statement of case.

942, that damages recovered by a personal injury claimant for gratuitous care are held on trust for the carer.

87. In *Hughes*,¹⁷ counsel for the personal injury claimant's receiver contended that damages for gratuitous care are not held on trust for a carer. Judge Hodge concluded, at [27], that he was bound by *Hunt* to hold that damages for gratuitous care are held on trust for a carer. Because the House of Lords had not indicated the legal basis for the trust, Judge Hodge was invited to consider that issue and concluded that such a trust is a constructive trust. Inevitably, because of the law as it stands (and stood at the time of the decision), Judge Hodge concluded that that the constructive trust is an institutional constructive trust, but, he added, at [29]:

“...It is a peculiar form of constructive trust which falls outside any of the existing established categories of institutional constructive trust; but, nevertheless, its existence seems to me to be clearly established by the speech of Lord Bridge...in *Hunt*...and by the judgment of Kennedy LJ...in *H v. S*...”

88. In the light of Judge Hodge's recognition that the trust of gratuitous care damages is anomalous (or “peculiar”), *Hughes* is no authority for the imposition of a constructive trust in the present case.
89. In any event, it is difficult to see how customers (as defined in the Declaration of Trust) have always held their beneficial interests in the trust fund on constructive trust. In these circumstances, it is difficult to see how the constructive trust on which RateSetter relies can be an institutional constructive trust. Of such trusts, Lewin on Trusts (19th ed) says, at paragraph 7-011:

“...Constructive trusts of the first kind arise where persons have accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty. Such a constructive trustee really is a trustee. He does not receive the trust property in his own right, but by a transaction which was intended to create a trust from the start. The trustee's possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and any subsequent appropriation of the property to his own use is a breach of that trust...”

90. It is true that a constructive trust (described by Lewin as “of the second kind”, to distinguish it from constructive trusts of the first kind (institutional constructive trusts)) is imposed when there has been a mistaken payment, but the constructive trust is imposed in order that the mistaken payer can recover back the mistaken payment. As Lewin explains, at paragraph 7-028:

“If money is paid to someone by mistake and he knows of the mistake but retains the money, it seems that he is a constructive trustee of the money for the payer. The mistake may be of fact or law. The payee will not be a trustee of the money received for

¹⁷ See paragraph 22 of the judgment.

so long as he is ignorant of the mistake. A constructive trust is said to arise when the conscience of the payee becomes affected, but in the case of a mistaken payment this may be when the recipient is required to act, rather than when he learns of, or suspects, that the payment was mistaken.”

91. I do not see how such a constructive trust extends, in this case, to customers’ beneficial interests in the trust fund.
92. In *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] 669, Lord Browne-Wilkinson explained, at page 716, how what has become known as a purely remedial constructive trust would operate:

“...the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The Court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect...”

However, as the Supreme Court has confirmed, more recently, in *FHR European Ventures LLP v. Cedar Capital Partners LLC* [2015] AC 250 at [47], English law does not recognise a purely remedial constructive trust.

93. It seems to me that RateSetter is actually asking me to impose purely remedial constructive trusts on customers’ beneficial interests in the trust fund, which I cannot do. Whether or not that is right, on the basis of the arguments advanced on RateSetter’s behalf in the application, I am not satisfied that there are constructive trusts of those beneficial interests in favour of the alternative policy funders. In particular, *Hughes* cannot be relied on by RateSetter to establish the existence of such trusts.
94. It follows therefore that none of the bases advanced by RateSetter establishes that the alternative policy funders have an interest in, or entitlement or claim to, customers’ beneficial interests in the trust fund.
95. The liquidator is concerned (in paragraphs 22-25 of his second witness statement) that a distribution of any part of the trust fund to customers will be difficult and costly in practice; although he properly acknowledged that those concerns are not relevant in determining whether or not third party funders are entitled to any part of the trust fund. There was some discussion, at the hearing, about the procedure for any distribution to customers; in particular, whether an appropriate procedure analogous to that adopted by HH Judge Purle QC in *Re Equilift Ltd* [2010] BPIR 116 could be devised. In the light of the conclusions I have reached in relation to the alternative policy funders’ claims, as I have indicated I will need to hear further from counsel about the appropriate distribution procedure.¹⁸

¹⁸ Although I will need to hear further from counsel, it may be appropriate for me to direct advertisements for customers’ claims and, in relation to those customers who do not respond, to order that the liquidator is permitted

The PCL shares and the AIOF shares

96. The liquidator claims principally that Carcraft is entitled to the PCL shares and AIOF shares on the basis that the payments by Carcraft into the trust account of the PCL balances and of sums attributable to long-term DHPs obtained by AIOF's customers during the Relevant Period were by mistake and were normatively defective transfers of value and that Carcraft is subrogated, in equity, to the PCL shares and AIOF shares.
97. Even assuming that those payments into the trust account were mistaken and normatively defective transfers of value,¹⁹ I have concluded that Carcraft is not entitled to be subrogated to the PCL shares or the AIOF shares. When Carcraft made those payments it did not bargain for, or otherwise expect, anything in return from its customers. Indeed, the evidence indicates that its customers were wholly ignorant, at the time, of the payments by Carcraft into the trust account and of the Declaration of Trust.
98. An alternative, and straight-forward, basis which Mr Cawson advanced²⁰ for Carcraft's claim to the PCL shares and the AIOF shares was that, because Carcraft has never completed a Customer Trust Account Schedule, the trust in favour of customers declared by clause 3 of the Declaration of Trust is too uncertain or vague to be executed, so that the PCL shares and the AIOF shares result to Carcraft.²¹ I agree with Mr Cawson that, on the evidence before me, the PCL shares and the AIOF shares do result to Carcraft because the Customer Trust Account Schedule has never been completed.²²
99. As Lewin explains, at paragraph 8-005:

“If a person transfers property to a person to hold upon trusts that are to be declared in the future, a resulting trust will arise upon the transfer and will subsist until the trusts have been effectively declared. Thus, where, as occurred in the Vandervell litigation, A procured the grant to B of an option to purchase shares with the intention that the benefit of the option should be held upon such trusts as might thereafter be declared by A or B, it was held that, pending such a declaration, there was a resulting trust of the option in favour of A...”

100. In *Vandervell v. IRC* [1967] 2 AC 291, Lord Upjohn explained, at pages 313-314:

“If A intends to give away all his beneficial interest in a piece of property and thinks he has done so but, by some mistake or

to distribute on the footing that those customers have disclaimed any beneficial interest they have in the trust fund. The share of the trust fund treated as having been disclaimed would then be held on a resulting trust for Carcraft.
¹⁹ I have reservations about whether the evidence supports the conclusion that the payments were mistaken in the necessary sense.

²⁰ See, in particular, paragraph 62 of Mr Cawson's skeleton argument.

²¹ As I noted in paragraph 11 above, the liquidator deliberately limited this argument to the PCL shares and the AIOF shares.

²² Although Mr Cawson suggested, thirdly, that, in the circumstances of this case, the PCL shares and the AIOF shares are subject to a Quistclose trust, it is not necessary, and I am not sure that it is helpful, or indeed correct, to view matters in that way. It is difficult to see, for example, how the Declaration of Trust only gives Carcraft (or the liquidator) a power to pay PCL's or AIOF's customers in the event of insolvency (rather than imposing a duty to do so, in accordance with and, at least, following the completion of a Customer Trust Account Schedule).

accident or failure to comply with the requirements of the law, he has failed to do so, either wholly or partially, there will, by operation of law, be a resulting trust for him of the beneficial interest of which he had failed effectually to dispose. If the beneficial interest was in A and he fails to give it away effectively to another or others or on charitable trusts it must remain in him. Early references to Equity, like Nature, abhorring a vacuum, are delightful but unnecessary. Let me give an example close to this case.

A the beneficial owner informs his trustees that he wants forthwith to get rid of his interest in the property and instructs him to hold the property forthwith upon such trusts as he will hereafter direct; that beneficial interest, notwithstanding the expressed intention and belief of A that he has thereby parted with his whole beneficial interest in the property, will inevitably remain in him for he has not given the property away effectively to or for the benefit of others...”

101. The evidence before me is extremely limited and not entirely clear. There is no evidence before me about how Carcraft intended to complete the Customer Trust Account Schedule in relation to the PCL balances or in relation to the payments into the trust account referable to the long-term DHPs obtained by AIOF’s customers. There is evidence from the liquidator, however, which suggests that these payments into the trust account were a mechanical exercise which did not in fact involve any consideration, at the time, of the special arrangements relating to PCL’s customers and AIOF’s customers. On the evidence, in the case of PCL’s customers at least, I think it is inherently probable that, if anyone did turn their mind, at the time, to how the interests of those customers should be reflected in the Customer Trust Account Schedule, they did not intend to include more than £435 (PCL’s payment) as each customer’s proportion.
102. In the circumstances which have happened (when the Customer Trust Account Schedule has not been completed so that the Customer Proportions are not set out in it) and in the light of what I have just said in relation to Carcraft’s intention, the PCL shares and the AIOF shares do result to Carcraft.
103. During the course of the hearing, I speculated whether the liquidator could rescind the trust in favour of PCL’s and AIOF’s customers on the ground of mistake. Although Mr Cawson and Mr Groves helpfully provided me with submissions on this issue, I do not need to determine the issue (which is complicated), in the light of the conclusions I have already reached.

Disposal

104. For the reasons I have given, I have concluded that the bases on which RateSetter claims that the alternative policy funders have an interest in, or claim or entitlement to, their customers’ beneficial interests in the trust fund fail but that the PCL shares and the AIOF shares are held on resulting trusts for Carcraft.

Postscript

105. Immediately before I was due to hand down judgment, I learned that, after Carcraft went into liquidation, the trust account was closed by Carcraft's bankers and the liquidator opened a new bank account into which he transferred the credit balance of the trust account. The parties agreed that I should hand down judgment in the form I had intended nevertheless (that is, as above), subject to the addition of this postscript.

Annex

SCHEDULE TO THE APPLICATION NOTICE

The Applicant, as liquidator of the...CC Automotive Group Limited (“the Company”), seeks directions pursuant to s.112 of the Insolvency Act 1986 in respect of the following questions arising in the winding up of the Company, namely:

1. Whether the Company holds the monies (“the Monies”) standing to the credit of the “Trust Bank Account” (“TBA”) as defined in clause 1.1 of a Deed of Declaration of Trust made by the Company on 23 February 2015 (“the Trust Deed”) on the trusts declared by the Trust Deed and:
 - a. if so, how the Monies ought to be paid and applied;
 - b. if not, how the Monies ought to be paid and applied, and, in particular, whether the Monies ought to be applied for the benefit of the Company’s liquidation estate.
2. Whether such proportion of the Monies as is represented by monies paid for Drive Happy Packages (“DHPs”) by Customers (within the definition thereof contained in clause 1.1 of the Trust Deed) by way of cash and/or debit card (or a combination of both) should be paid and applied:
 - a. to the Customers in question in the proportions that they contributed thereto; or
 - b. in some other way, and if so, in which way.
3. Whether such proportion of the Monies as is represented by monies paid for DHPs by Customers using credit cards should be paid and applied:
 - a. to the credit card issuers in question, save to the extent that the relevant Customers have paid the credit card issuers and have not received refunds from the latter (whether as a result of the operation of s.75 of the Consumer Credit Act 1974 or otherwise), in which case, and to such extent, the appropriate proportion shall be paid to the Customer;
 - b. to the credit card issuers in question in any event;
 - c. to the Customers in any event; or
 - d. in some other way, and if so, in which way.
4. Whether such proportion of the Monies as is represented by monies paid for DHPs where the purchase price thereof is wholly funded by way of advances (paid directly to the Company) made to the relevant Customers by the third party funders as listed at the foot of this schedule (“TPFs”), should be paid and applied:
 - a. to the TPFs in question to the extent that the relevant Customers have not made payment to the TPFs in respect of the DHPs, and upon confirmation from the TPFs that they will not seek to pursue the relevant Customers, but to the Customers to the extent that the latter have made payments to the TPFs or such confirmation is not provided;

- b. to the Customers in any event;
 - c. to the TPFs in any event; or
 - d. in some other way, and if so, in what way.
5. Whether such proportion of the Monies as is represented by monies credited to the TBA in respect of sales of DHPs where TPFs advanced to the customers part of, but not the full purchase price of the DHPs, but where the Company ring fenced within the TBA (by causing monies to be credited thereto) amounts representing the balance of the purchase price of the DHPs, should be paid and applied:
 - a. as to the proportion thereof represented by monies paid by the TPFs, to the TPFs in question to the extent that the relevant Customers have not made payment to the TPFs in respect of the DHPs, and upon confirmation from the TPFs that they will not seek to pursue the relevant Customers, but to the Customers to the extent that the latter have made payments to the TPFs or such confirmation is not provided;
 - b. as to the proportion represented by monies ring fenced by the Company as aforesaid, to the Applicant, as liquidator of the Company, for the benefit of the liquidation estate;
 - c. in the alternative to sub-paragraph (b)...above, towards making up the deficiency in respect of the Monies that ought to be held in the TBA arising from the fact that the monies standing to the credit of the TBA are less than the sums that would have stood to the credit thereof had credit not been given against monies that would otherwise have been paid into the TBA in respect of DHPs that had been cancelled prior to the terms of the Trust Deed taking effect (“the Deficiency”);
 - d. in such other way for the benefit of the Customers, the TPFs, and/or the Company as the Court might determine; or
 - e. in some other way, and if so, in which way.
6. Whether such proportion of the Monies as is represented by monies credited to the TBA in respect of sales of DHPs where All In One Finance Limited (“AIOFL”) financed customers for the purchase price of DHPs but without paying the purchase price to the Company, but where the Company ring fenced within the TBA (by causing monies to be credited thereto) amounts representing the purchase price of the DHPs, should be paid or applied:
 - a. to the Applicant, as liquidator of the Company, for the benefit of the liquidation estate;
 - b. towards the Deficiency;
 - c. in such other way for the benefit of the Customers, AIOFL, and/or the Company as the Court might determine; or
 - d. in some other way, and if so, in which way.
7. Whether such proportion of the Monies as is represented by transactions involving the sale of DHPs where the DHPs were cancelled within seven days of the entry into the relevant

contract, but the monies standing to the credit of the TBA representing such sales were not accordingly debited to the TBA, and still stand credited thereto, ought to be paid and applied:

- a. to the Applicant, as liquidator of the Company, for the benefit of the liquidation estate;
 - b. towards the Deficiency;
 - c. in such other way for the benefit of the Customers, the TPFs, and/or the Company as the Court might determine; or
 - d. in some other way, and if so, in which way.
8. Whether such proportion of the Monies as is represented by transactions involving the sale of DHPs where, although the Company caused the relevant monies to be credited to the TBA, the TPFs did not make any payment to the Company, and the relevant cars have been recovered from the Customer, ought to be paid and applied:
- a. to the Applicant, as liquidator of the Company, for the benefit of the liquidation estate;
 - b. towards the Deficiency;
 - c. in such other way for the benefit of the Customers, the TPFs, and/or the Company as the Court might determine; or
 - d. in some other way, and if so, in which way.
9. In respect of monies credited to the TBA in respect of sales of DHPs where the Customers traded in an old car for a new car and transferred the residual terms of their DHPs to their new cars, whether:
- a. all of the monies credited to the TBA in respect thereof should be paid and applied as if the monies in question represented the sale of a wholly new DHP effected after the Trust Deed took effect, or is to be treated as having taken effect, and therefore paid and applied in accordance, as appropriate, with such directions as are given pursuant to paragraphs 1 to 7 above; or
 - b. whether only such part of the monies credited to the TBA as represents new monies paid to the Company in respect of the replacement DPHs should be paid and applied in accordance, as appropriate, with such directions as are given pursuant to paragraphs 1 to 7 above;
 - c. in the event that the Court finds for the alternative provided for by sub-paragraph (b) above, whether the balance of the monies standing to the credit of the TBA in respect of the relevant transactions should be paid and applied:
 - i. towards the Deficiency;
 - ii. to the Applicant, as liquidator of the Company, for the benefit of the liquidation estate;

- iii. in such other way for the benefit of the Customers, the TPFs, and/or the Company as the Court might determine;
 - iv. in some other way, and if so, in which way; or
- d. in the alternative, whether the monies credited to the TBA in respect of the transactions in question should be paid and applied in some other way, and if so, in which way.
10. In respect of monies credited to the TBA in respect of DHPs acquired prior 24 February 2015 (i.e. prior to the “Relevant Period” as defined by the Trust Deed), and being the subject of sweeps of funds from other bank accounts of the Company affected on 18 February 2015 and 27 February 2015, whether such monies should be:
- a. paid and applied in the same way that they would have been paid and applied had the DHPs in question been acquired on or after the date of the Trust Deed, and therefore in accordance with such directions as are given pursuant to paragraphs 1 to 8 above;
 - b. paid to the Applicant, as liquidator of the Company, for the benefit of the liquidation estate;
 - c. paid and applied for the benefit of the Customers, TPFs and/or the Company in such other way as the Court shall direct; or
 - d. paid and applied in some other way, and, if so, in which way.

Third Party Funders

Creation Consumer Finance
Creditas (FGA Capital)
First Response
GMAC Financial Services
Hitachi Capital
Marsh Tier 5
Motonovo finance
RateSetter
Santander Consumer (UK) plc
Startline Motor Finance Ltd.
Premium Credit Ltd.