Neutral Citation No: [2025] NICh 5 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SCO12851** *ICOS No:* **25/053893/01** *Delivered:* **07/10/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

SOUTHSHORE MARINE & DIESEL LIMITED

Applicant/Debtor

-and-

SEAN O'DUGAIN trading as BÁDÓIRÍ AN BHLASCAOID TEO

Respondent/Petitioning Creditor

and

DUNAVERTY LIMITED

Notice Party

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Cathal Doran (instructed by Millar McCall Wylie, Solicitors) for the Applicant
Robert McCausland (instructed by the McCartan Turkington Breen, Solicitors) for the Respondent
William Gowdy KC (instructed by Carson McDowell LLP) for the Notice Party

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SCOFFIELD J

Introduction

[1] This is an application made by Southshore Marine & Diesel Ltd ("Southshore") for an order pursuant to Article 107 of the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order") permitting it to make a payment of £45,850.80 to Scania (Great Britain) Limited ("Scania") from its bank account. Validation from the court is required because a petition for the winding up of Southshore has been presented. The payment it seeks to make is the sum due for a diesel engine which Southshore agreed to purchase for Dunaverty Limited ("Dunaverty"), the company which operates the Rathlin Ferry providing daily transport between Rathlin Island and Ballycastle. Dunaverty operates the ferry as a

franchisee for the Department for Infrastructure ("the Department") which, I was told, provided the capital funding for the engine repair.

[2] Mr Doran appeared for Southshore; Mr McCausland appeared for Mr O'Dugain; and Mr Gowdy KC appeared for Dunaverty. I am grateful to all counsel for their oral submissions; and to Mr Doran for his written submissions.

Factual background

[3] The winding-up petition is dated 25 June 2025. It was presented and served by Sean O'Dugain trading as Bádóirí an Bhlascaoid Teo, the petitioning creditor and a notice party to the present application. The sum sought in the winding-up petition is £161,131.53. This arises from a High Court judgment against the applicant company of 24 February 2025. Although Southshore's deponent has averred that it disputes the amount claimed, it arose on foot of a default judgment obtained against Southshore and an assessment of damages in which it took no part. A statutory demand was served and no application was made to restrain the presentation of the petition.

[4] The winding-up proceedings have been adjourned by the Master because Southshore is currently preparing a proposal for a company voluntary arrangement. The evidence is that the total value of the company's unsecured creditors is over £950,000.

[5] The evidence in relation to the key transaction which forms the backdrop to this application, namely the sale of a marine engine to Dunaverty for the Rathlin Ferry, is set out in two affidavits of Mr Paul Quinn, the sole director and shareholder in Southshore. I return to that below.

[6] The winding-up petition was advertised in the *Belfast Gazette* on 15 August 2025 online; and in print on 18 August 2025. As a result of this advertisement, Southshore's bank account has been frozen by its bank. (Monies can be lodged into the account but no payments can be made out of it.) A copy of bank statements from the period of 15 July 2025 to 5 September 2025 have been provided to the court.

[7] On 27 August 2025, Dunaverty made a payment to Southshore in the sum of £52,218.72 by way of bank transfer. Mr Quinn has averred that Dunaverty was unaware that Southshore's bank account was frozen at that time. The averments in Mr Quinn's first, grounding affidavit in relation this payment were as follows:

> "The payment of £52,218.72 made to the Company on 27 August 2025 was for the supply of a Scania diesel engine for the Rathlin ferry which Dunaverty Limited had previously ordered from the Company. This Scania diesel engine is currently held by the supplier, namely Scania (Great Britain) Limited ['Scania']. Following the original

> order placed by Dunaverty Limited in late 2024, the Company in turn placed the order with Scania and paid an initial 10% deposit to Scania in the sum of £5,094.00. The total cost of the engine was £50,944.80, being the sum of £42,454.00 plus VAT of £8,490.80. Scania will only release the Scania diesel engine to Dunaverty Limited once the remaining balance of £45,850.80 on their invoice numbered PS04072025 and dated 04 July 2025 is discharged… For the purposes of clarity I confirm that the difference between the £52,218.72 recently paid by Dunaverty Limited and the total costs of the engine of £50,944.80 (being the balance of £1,273.92) represents the Company's profit in this transaction and that profit will remain in the Barclays Account."

[8] The initial affidavit did not make the case that the Dunaverty funds were impressed with a trust upon transfer to Southshore. That suggestion – which is now the mainstay of Southshore's application for validation – appears to have first emerged when legal submissions were being prepared in support of the application. The second affidavit of Mr Quinn dated 29 September 2025, lodged on the morning of hearing, provides some further detail in support of this argument and provides a range of correspondence between Southshore, Dunaverty and Scania. The affidavit notes that Southshore does not stock engines but orders in specific engines on a case-by-case basis. Customers are therefore advised that Southshore does not hold engines in stock and "they will be required to provide us with the funds to purchase those engines on their behalf". The arrangement with Dunaverty was no different. Mr Quinn avers that, "Dunaverty was always aware that they were required to put Southshore into funds in order to facilitate the purchase of the engine from the supplier and that timing for any overhaul would be impacted by delivery times from the supplier".

[9] The averment in relation to the parties' intentions as to their legal relationship (and the status of any funds transferred by Dunaverty) is, in my view, somewhat vague. It is in the following terms (with my italicised emphasis added):

> "*In the circumstances I am advised* by my Solicitors… and believe that the funds that were transferred to Southshore by Dunaverty were transferred subject to the understanding and agreement that they would be used solely to fund the purchase of an engine on behalf of Dunaverty. The funds were never for the benefit of Southshore."

[10] Assessment of this averment requires a closer look at what "the circumstances" are. From the averments and exhibited documentation, these appear to be as follows:

(a) In or around March 2024 Dunaverty approached Southshore in relation to options for overhauling the Rathlin Ferry. Dunaverty was considering a range of options and advice was provided by Southshore as to costs and timing.

(b) Dunaverty came back in November 2024 asking for an updated quote on fitting a new gearbox and engine and for a timeframe for delivery. Dunaverty then placed the order with Southshore in late 2024.

(c) Mr Quinn's first affidavit says that, following the order being placed by Dunaverty in late 2024, Southshore placed the order for the engine with Scania and paid an initial 10% deposit. The impression given is that this also occurred in late 2024 but correspondence exhibited to Mr Quinn's second affidavit (discussed further below) casts doubt on this and is more consistent with that happening in mid-2025.

(d) The Scania invoice provided, dated 4 July 2025, is made out to Southshore, rather than Dunaverty. The invoice notes the terms as being payment prior to delivery.

(e) In January 2025 Mr Quinn advised Dunaverty by email that the engine was ready for delivery: "just need to get the remainder of payment through to get it sent over". He indicated he was still waiting on the delivery of the gearbox.

(f) On 5 February, Dunaverty asked Southshore for an invoice for the remainder of the payment for the engine. No such invoice has been provided to the court. It is unclear whether one was ever issued. Indeed, there is nothing in writing by way of contemporaneous documentation, other than some email correspondence between the Southshore and Dunaverty, setting out the legal relationship or terms between them.

(g) By email in May 2025 Scania was asking Southshore for the 10% deposit in relation to "the attached quote" (although this does not appear to be provided with the exhibits) and said that it would then "raise an invoice and get the engine on order as soon as the deposit has cleared".

(h) On 23 May 2025, an employee of Southshore, Ms McCann, appears to have sent the 10% deposit of £5,094.00 to Scania. It further appears from Mr Quinn's affidavit evidence that Southshore paid the deposit from its own funds. That appears to be the most natural reading of paragraph 14 of Mr Quinn's first affidavit (quoted at para [7] above). It also appears to be supported by Ms McCann's email correspondence. However, perhaps most importantly in this regard, Southshore only received the payment from Dunaverty for the *full* purchase price of the engine (plus its own profit) in August this year: see again paragraph 14 of Mr Quinn's first affidavit. This

suggests that Dunaverty had to reimburse Southshore for the deposit which it had paid to Scania.

(i) Further to payment of the deposit, Scania was then owed £45,850.80 in order to complete payment for the engine.

(j) There was a telephone call between Mr Quinn of Southshore and a Mr Smith of Scania on 4 July 2025. By later email of the same date Mr Smith indicated that Scania would send out a final invoice and "if this can be paid asap we can arrange shipment before the factory shutdown…". The invoice was sent to Southshore later that day.

(k) As we know, Dunaverty paid Southshore a larger sum than the outstanding £45.850.80 on 27 August 2025, namely £52,218.72. At the date of this sum being paid in, the Southshore bank account was already in credit. There is no evidence at all as to what prompted that payment at that particular time. (No invoice to Dunaverty has been provided; nor any email correspondence seeking payment of that amount; nor any affidavit evidence as to communications which prompted payment then or in that amount.) In the meantime, of course, the winding-up petition had been advertised in the *Belfast Gazette.*

(l) By 4 September 2025, Dunaverty was aware of the problem and emailing Southshore's solicitors seeking return of its payment. The response referred to the proposal to make the current application.

(m) Correspondence from Dunaverty's solicitor of 10 September 2025 refers to Dunaverty making a balance payment in relation to the supply of both a diesel engine "and a gearbox for the Rathlin ferry". The other correspondence between the parties in relation to payment appears to relate only to the engine.

(n) On 25 September 2025, Scania was chasing Southshore for the outstanding balance before the engine could be released. By this stage, of course, Dunaverty was pressing Southshore to resolve the issue, principally by means of refunding the monies to it so that it could make a payment to Scania directly and pick up the engine itself. It seems that, at that point, Scania may have been unaware of the wider position relating to Southshore.

[11] Mr Quinn has also averred that the matter is extremely time sensitive and commercially sensitive as the engine was originally due in January 2025 and Dunaverty currently has no spare unit available for the Rathlin Ferry which presents it and the users of the ferry with a significant problem should the ferry break down. The urgency of the situation from Dunaverty's point of view was underscored by the submissions of Mr Gowdy on its behalf.

Article 107 and relevant legal principles

[12] There is little between the parties in relation to the legal principles which apply to the exercise of the court's discretion under Article 107 of the 1989 Order. It provides, in material part, as follows:

> "In a winding up by the High Court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the Court otherwise orders, void."

[13] Article 107 itself does not set out any particular principles which should govern the exercise of the court's discretion. However, authority establishes that it should be controlled by the general principles which apply to every kind of judicial discretion and that it should be exercised in the wider context of the 1989 Order. A significant authority in relation to the court's power to validate dispositions during winding-up proceedings is *Re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711. In that case it was explained that the overarching principle which the court must have in mind is ensuring that the interests of unsecured creditors will not be prejudiced by making the Order.

[14] In the later case of *Denney v John Hudson & Co Ltd* [1992] BCC 503, Fox LJ helpfully extracted the following eight principles from the decision in *Re Gray's Inn Construction*, which courts have since applied in applications for validation orders:

> "(1) The discretion vested in the court by [Article 107] is entirely at large, subject to the general principles which apply to any kind of discretion, and subject also to limitation that the discretion must be exercised in the context of the liquidation provisions of the statute (p. 717).
>
> (2) The basic principle of law governing the liquidation of insolvent estates, whether in bankruptcy or under the companies legislation, is that the assets of the insolvent at the time of the commencement of the liquidation will be distributed *pari passu* among the insolvent's unsecured creditors as at the date of the bankruptcy…
>
> (3) There are occasions, however, when it may be beneficial not only for the company but also for the unsecured creditors, that the company should be able to dispose of some of its property during the period after the petition has been presented, but

before the winding-up order has been made. Thus, it may sometimes be beneficial to the company and its creditors that the company should be able to continue the business in its ordinary course (p. 717).

(4) In considering whether to make a validating order, the court must always do its best to ensure that the interests of the unsecured creditors will not be prejudiced (p. 717).

(5) The desirability of the company being enabled to carry on its business was often speculative. In each case the court must carry out a balancing exercise (p. 717).

(6) The court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of the other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interest of the creditors generally. If, for example, it were in the interests of the creditors generally that the company's business be carried on, and this could only be achieved by paying for goods already supplied to the company when the petition is presented but not yet paid for, the court might exercise its discretion to validate payments for those goods (p. 718).

(7) A disposition carried out in good faith in the ordinary course of business at a time when the parties were unaware that a petition had been presented would usually be validated by the court unless there is ground for thinking that the transaction may involve an attempt to prefer the disponee – in which case the transaction would not be validated (p. 718).

(8) Despite the strength of the principle of securing *pari passu* distribution, the principle has no application to post-liquidation creditors; for example, the sale of an asset at full market value after the presentation of the petition. That is because such a transaction involves no dissipation of the

> company's assets for it does not reduce the value of its assets (p. 719).

[15] The principles set out above were considered by the English Court of Appeal in *Express Electrical Distributors Ltd v Beavis* [2016] EWCA Civ 765. It found that the principle set out at sub-para (7) above should no longer stand as a rule in itself (see, in particular, paras [36], [40] and [56] of the judgment of Sales LJ for the court). However, the Court of Appeal expressly approved the principle at sub-para (4) and the related statement in the Practice Direction for Insolvency Proceedings in that jurisdiction ([2014] BCC 502) to the following effect:

> "The court will need to be satisfied by credible evidence either that the company is solvent and able to pay its debts as they fall due or that a particular transaction or series of transactions in respect of which the order is sought will be beneficial to or will not prejudice the interests of the unsecured creditors as a class".

[16] The judgment in *Express Electrical* generally re-emphasizes the importance of the presumption in favour of application of the pari passu principle and how strong the reasons must be to justify departure from that principle in any particular case. At para [56] of the judgment, the matter is summarised thus:

> "The true position is that, save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after the presentation of a winding up petition if there is some special circumstance which shows the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle."

[17] As to the continued trading of the company, at para [21] of the judgment Sales LJ explained that:

> "Sometimes the court may be justified in making a validation order where the making of a payment or the supply of assets by the company is a way of, say, fulfilling its obligations under a particularly profitable contract where the eventual profits will exceed the consumption of the company's assets and will enure to the overall advantage of the general body of creditors… Sometimes the court may be justified in making a validation order simply to allow the company to carry on its business in the usual way; but, as Buckley LJ pointed out, it will be

> more speculative whether this is really desirable in the interests of the general body of creditors and this "will be likely to depend on whether a sale of the business as a going concern will probably be more beneficial than a break-up realisation of the company's assets"…"

Summary of the parties' positions

[18] Mr Doran's principal submission in support of Southshore's application was that the funds which are the subject of the application would not be available to any future liquidator for the benefit of unsecured creditors. That is because, in his submission, they are impressed with a trust in the circumstances of the arrangements between Southshore and Dunaverty. He further relies upon the *Pallant v Morgan* equity. In those circumstances the funds could never be utilised in any liquidation of Southshore and could not be used to pay any unsecured creditors of Southshore. On that basis, he contends that the validation of the payment to Scania and subsequent placement of the engine does not in any way prejudice the unsecured creditors of Southshore.

[19] Mr Gowdy for Dunaverty supported the application. He argued that the court, in exercising its discretion under Article 107, should not be blind to the broader public interest concerns arising by virtue of the risk to the service provided by the Rathlin Ferry. He relied upon section 28 of the Sale of Goods Act 1979 ("the 1979 Act") which provides that, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. He argued that since, at the time of payment of the funds by his client, Southshore was not in a position to perform by means of delivering the engine, this indicated that the moneys were held on trust by Southshore. He further contended that permitting Southshore to retain the funds would result in its unjust enrichment because of failure of consideration and Dunaverty having made its payment under unilateral mistake of fact. If there was unjust enrichment, he contended that this gave rise to a right to restitution and that the liquidator would have to repay the moneys to Dunaverty under the principle in *Ex parte James*. In those circumstances, he argued that it was better for creditors generally that the transaction was permitted to be completed so that Southshore could retain the (admittedly modest) profit.

[20] Mr McCausland for the petitioning creditor opposed the application. He drew attention to what, in his submission, was the reckless and unreasonable behaviour of Southshore towards his client, who runs a small family business, resulting in a substantial claim for damages which were due to him, which Southshore had been trying to obstruct. On the substance of the application, he agreed that a validation order would be permissible and appropriate if the moneys were held by Southshore on trust for Dunaverty; but he submitted that there was simply no evidence justifying the conclusion that the funds provided were impressed with a trust, rather than simply being an up-front payment in the normal way of commercial sales. He emphasised that the contract between Dunaverty and

Southshore had been formed before the issue of the winding-up petition; that there were no terms and conditions of sale available which supported the applicant's argument; that it was clear that Southshore had entered into its own, separate contract with Scania (which had not been disclosed), rather than simply facilitating a 'pass-through'; and that the contract with Dunaverty was not one where the profit outweighed the expenditure. He drew the court's attention to section 29 of the 1979 Act in response to Mr Gowdy's reliance on section 28. He further submitted that this was not a case of mistake but simply regret on the part of Dunaverty when it later came into further information about Southshore's circumstances.

Consideration

[21] The key issue is whether the funds which are the subject of this application can and ought to be utilised within the liquidation or voluntary arrangement for the benefit of the unsecured creditors as a whole. I am afraid I must reject the submission that there is some wider discretion available to the court whereby a decision can be taken in the public interest outside the principles established by the caselaw discussed in paras [13]-[17] above.

[22] Southshore faintly raised the suggestion that the sale of the engine to Dunaverty would be in the interests of creditors generally, since it would permit the company to continue trading (consistent with the third of the principles summarised in the *Denney* case). I reject that submission insofar as it was pursued. There is no suggestion, nor could there be, that this is a particularly profitable contract for Southshore where the profits will cancel out or significantly reduce its level of indebtedness. This is one transaction only which, whilst no doubt of importance to Dunaverty, is not critical to the company's survival or ongoing trading generally. In my view, the application can only be successful if the court is persuaded that the relevant moneys would be unavailable in any event for distribution between the unsecured creditors so that they are not prejudiced.

[23] That depends, in turn, on the suggestion that the funds provided to Southshore by Dunaverty on 27 August 2025 were impressed with a trust, rather than available to Southshore to use in the course of its business.

[24] The applicant company accepted that, in general, funds held in a company's bank accounts will usually form part of its assets for the purposes of a liquidation unless those funds are impressed with a trust. As appears further below, the authorities and texts in this area suggest that a requirement to keep customer monies separate is normally an indicator that they are impressed with a trust and the absence of such a requirement, if there are no other indicators, normally negatives a trust arising (see, for instance, *Lewin on Trusts* (20th edn, 2020, Sweet & Maxwell) (hereinafter simply "*Lewin on Trusts*"), Vol 1, para 9-065). The mere fact that Southshore was acting as Dunaverty's agent in purchasing the engine from Scania, if that be so, is not sufficient to establish a trust of the funds. Some of the submissions

in this case appeared to proceed on the basis that agency was sufficient. However, *Lewin on Trusts,* at para 1-022, states as follows:

> "Agency differs from trust in that (though it may be a fiduciary relationship) it is recognised by the common law and no property is necessarily involved. An agent may be a trustee for his principal of property received as an agent, but he is more often a mere bailee of the chattels so received. Whether he is an express trustee of money received as agent depends on the true construction of the agency agreement in the light of the surrounding circumstances including the intentions of the parties expressed or inferred, and in particular upon whether the agent is intended to keep the money separate from his own, when he is normally but not always a trustee, or whether he is not, when he is a mere contract debtor."

[25] Para 1-032 of *Bowstead & Reynolds on Agency* (23rd edn, 2024, Sweet & Maxwell), which compares and contrasts agents and trustees, is to similar effect.

[26] This is not a case where Southshore held customers' money in a separate account such as a 'client account', which is usually a clear indication that the money is held on trust for the customer. Nonetheless, where a company pays customers' funds into its own account, provided that account is in credit the company can still be taken to hold the money in trust. (If the account is overdrawn there is no fund on which a trust obligation or proprietary claim can bite and accordingly that customer remains no more than an ordinary unsecured creditor.) These issues are helpfully summarised in Baily & Grove, *Corporate Insolvency: Law & Practice* (2024, LexisNexis UK) ("Baily and Grove"), at para 22.2, on which Mr Doran relied in part.

[27] The applicant's case is that, in the circumstances described in paras [7]-[10] above, when the funds from Dunaverty arrived in Southshore's account the payment was impressed with a trust that those funds (save for Southshore's profit) should be applied solely in relation to the purchase of a Scania diesel engine for installation in the Rathlin Ferry. Given its trading arrangements, Southshore contends that in similar circumstances when payments are made to it or when a relevant engine is delivered to it, they are each impressed with the relevant trust that the funds or engine (as the case may be) is to be held by Southshore for the benefit of the customer and should only be applied in accordance with the specific agreement entered into with that customer.

[28] As noted above, the relevant monies were not paid into a separate account. They were simply paid into Southshore's bank account and mixed with other funds. Consideration of the bank statements exhibited to Mr Quinn's first affidavit indicate that this account is used for a wide variety of purposes on the part of Southshore: to make rates, bill and other payments by way of standing orders, direct debits or card

payments, including possibly wages payments; to receive monies from a range of customers or debtors; and to pay a variety of companies seemingly related to the course of Southshore's usual business. It has the appearance of an all-purpose business current account. This is obviously not a clear case of money being held (by way of example) in a dedicated client account or in escrow; or of a physical asset being held as trustee or subject to a retention of title clause.

[29] The commentary in *Baily and Grove* referred to above, which was provided to the court, includes the following significant observation (which, unsurprisingly, was not relied upon by Mr Doran):

> "The money received for his principal's account by an agent who becomes insolvent before accounting for it is not impressed with a trust in favour of the principal unless the relations between the parties were such as to make the agent the express trustee of such money; the money will form part of the agent's insolvent estate, and the principal must prove in the liquidation."

[30] I proceed on the basis, therefore, that the general rule is that moneys received by Southshore – even assuming that it is acting as agent for Dunaverty in the purchase of the engine from Scania – is not impressed with a trust in Dunaverty's favour *unless* the relations between the parties are such as to make Southshore the express trustee of the money. As Mr McCausland rightly pointed out, the onus is also on the applicant company in the present application to persuade the court that this is so, such that the company's unsecured creditors would not be prejudiced by the grant of validation. The mere fact that Southshore and Dunaverty now contend, with the benefit of hindsight, that this was the nature of the relationship between them is, of course, not determinative. The court must look at how relations between them were ordered at the time of the relevant dealings.

[31] I also note that, as a normal rule, a buyer who has pre-paid the price has no claim in equity to trace the money paid (see *Benjamin's Sale of Goods* (12th edition, 2024, Sweet & Maxwell) at para 5-065, relying on *Re Goldcorp Exchange Ltd* [1995] 1 AC 74). That text continues:

> "If the seller becomes insolvent, any claim by him for the return of the purchase price is a personal claim and not a proprietary claim ranking prior to other unsecured creditors of the seller. He will have pre-paid the price in order to perform his side of the bargain under which he would in due course have been entitled to claim delivery, and the money would have become, and been intended to become, part of the seller's general assets. The pre-paid price is therefore not impressed with a trust, nor, as a

> general rule, can any fiduciary relationship between buyer and seller be extracted from the contract of sale."

[32] This reflects the fact that, generally, the courts have been reluctant to introduce the intricacies and doctrines of trusts into ordinary commercial affairs (see *Lewin on Trusts*, at para 1-020).

[33] Whether or not in any particular case the funds provided by a principal to an agent will be impressed with a trust will generally be determined by their contractual relationship, although it may, in some cases, be determined from their conduct. There is a helpful discussion of the issue in *Bailey v Angrove's PTY Limited* [2016] UKSC 47, [2016] 1 WLR 3179 which, as a decision of the Supreme Court, is of the highest authority. At para [19], Lord Sumption said that:

> "An agent has a duty to account to his principal for money received on his behalf. It is, however, well established that the duty does not necessarily give rise to a trust of the money in the agent's hands. That depends on the intentions of the parties derived from the contract, or in some cases from their conduct. As a broad generalisation, the relations between principal and agent must be such that the agent was not at liberty to treat as part of his general assets money for which he was accountable to his principal. This will usually, but not invariably, involve segregating it from his own money. The editors of *Bowstead and Reynolds on Agency* (20th edn, 2014) p 219, para 6–041, put the matter in this way:
>
> > '[T]he present trend seems to be to approach the matter more functionally and to ask whether the trust relationship is appropriate to the commercial relationship in which the parties find themselves; whether it was appropriate that money or property should be, and whether it was, held separately, or whether it was contemplated that the agent should use the money, property or proceeds of the property as part of his normal cash flow in such a way that the relationship of debtor and creditor is more appropriate.'

[34] At para [26] of his judgment, Lord Sumption went on to explain (with my italicised emphasis added) that:

> "It is inherent in the statutory scheme of distribution in an insolvency that apparently arbitrary results may follow

from the adventitious timing of the commencement of the liquidation, especially in the case of deferred obligations. In principle, an advance payment to a company made before the commencement of the liquidation for an obligation performable afterwards will form part of the company's estate, notwithstanding that its supervening insolvency means that the obligation will not be performed, at any rate in specie. The payer must prove in the liquidation for damages for the breach of contract. Likewise, a contractor providing goods or services on credit will have to prove in the liquidation for the price if the other party becomes insolvent before paying. *The rule is the same for money received for his principal's account by an agent who becomes insolvent before accounting for it, unless (contrary to the unchallenged finding of the judge in this case) the relations between the parties were such as to make the agent an express trustee of money in his hands. The money will form part of the agent's insolvent estate, and the principal must prove in the liquidation*. In the nature of things, these consequences involve a detriment for the payer, attributable to the timing of the company's insolvency; and a windfall for the general creditors, since the estate available for distribution will be increased by the payment without being reduced by the cost of performance. As Professor Goode has remarked:

> 'It is when [scholars] seek to … argue for a proprietary right when there is no proprietary base that the line is crossed between what is fair and what is not, for it is the defendant's unsecured creditors who are then at risk. If the court wishes to show its disapproval of the defendant's conduct by making a personal restitutionary order, no harm is done. If the defendant is not in bankruptcy the order will be complied with and enforced for the plaintiff's benefit, if the defendant does become bankrupt before then, the plaintiff is properly required to compete with other unsecured creditors. To accord the plaintiff a proprietary right to the benefit obtained by the defendant, and to any profits or gains resulting from it, at the expense of the defendant's unsecured bankruptcy creditors seems completely wrong, both in principle and in policy, because the wrong done to the plaintiff by the defendant's

> improper receipt is no different in kind from that done to creditors who have supplied goods and services without receiving the bargained for payment.' (Goode 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433 at 444.)"

[35] Notably, *Neste Oy v Lloyd's Bank plc* [1983] 2 Lloyd's Rep 658, which held that a constructive trust arose in circumstances somewhat similar to the present case (where moneys were paid after the receiving company had become insolvent, such that it was argued to be unconscionable for the company to retain the funds because at the time of receipt it knew there would be a total failure of consideration because of its pending insolvency) was overruled by *Bailey.* The reasoning of Bingham J in *Neste Oy* had already been criticised by Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington LBC* [1996] AC 669 as smacking of a *remedial* constructive trust, which is not recognised by UK law. The Supreme Court held that, in that case, the prospect of a total failure of consideration, however inevitable, was not a circumstance which could have vitiated the intention of the customer to part with its entire interest in the money. The right to the restitution of money paid on a consideration which has wholly failed is simply a process of contractual readjustment, giving rise (like the contract itself) to purely personal obligations. If an actual total failure of consideration does not give rise to a proprietary restitutionary right, the court did not see how a prospective one could do so (see paras [30]-[31] of the judgment of Lord Sumption).

[36] Even assuming there is an agency relationship between Dunaverty and Southshore, I have not been persuaded that this was such as to impose the status of trustee on Southshore. I have not been persuaded that the payment was anything other than an advance payment. Up-front payment before particularly expensive goods are bought in is a frequent occurrence in commercial transactions without there being any suggestion that the supplier holds the funds on trust. In particular, there is insufficient evidence before me that Southshore was expected to keep the funds provided to it by Dunaverty separate from its own and use them exclusively by means of passing them on directly to Scania. Rather, it appears to me (at least on the basis of the present evidence) that the commercial intention was that Southshore would be entitled to treat the payment as part of its general assets in the course of its business. The obligation to account for the funds and/or to supply the engine were enforceable personal obligations, rather than giving rise to a proprietary claim over the funds.

[37] In reaching this view, I have taken account of the following matters. First, as I have emphasised, the funds from Dunaverty were simply paid into Southshore's normal bank account. They were mixed with other funds. This is a strong indicator that the funds were not held on trust and I have not found that indicator displaced by other evidence in this case. Second, it seems likely from the nature of the transactions carried out by Southshore through that bank account that it did not

keep any customer funds separate, including other significant payments made by customers which then appear to have been used simply to service Southshore's borrowing, outgoings and debts. Third, it seems significant that, on the evidence before me, Southshore paid the deposit on the engine itself, merely seeking reimbursement for that from Dunaverty at a later date. In addition, the funds later paid by Dunaverty included an element of profit, to which Southshore clearly only had a contractual right. Fourth, none of the contemporaneous documentation (such as it is) supports the suggestion that a trust was to be created. It is all equally consistent with the position being governed simply by contractual rights and/or any additional personal obligations arising as a result of an agency relationship, if indeed that is established. Fifth, it seems to me that the creation of a trust would create impediments to the operation of Southshore's commercial activities which it is unlikely to have intended or agreed to. The suggestion at this point that that is what occurred – such as that is (see para [9] above on the extent of Mr Quinn's evidence) – appears to me likely to be an ex post facto rationalisation in light of the unfortunate circumstances which have arisen. (I did not find the provisions of the 1979 Act of assistance in addressing this issue and note that section 28 is clear that it applies only unless otherwise agreed. In this case Dunaverty was aware that it was paying for the engine in advance and delivery would only be provided thereafter.) I accordingly reject the applicant company's primary case.

[38] Mr Doran also relied upon a *Pallant v Morgan* equity, so-called by reason of its origin in the case of *Pallant v Morgan* [1953] Ch 43. The text upon which Mr Doran relied in this respect, taken from Halsbury's Laws of England in relation to Trusts and Powers (Volume 98), indicates that the equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one of the parties to the arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to their being treated as a trustee if they seek to act inconsistently with it. It is necessary that the pre-acquisition arrangement or understanding should contemplate that the acquiring party will take steps to acquire the relevant property and that, if they do so, the other party will obtain some interest in that property; and also necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do or omit to do something which confers an advantage on the acquiring party in relation to the acquisition of the property, or which is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or the detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for themselves.

[39] Very limited to no argument was presented on this aspect of the applicant's case. I do not consider that it assists Southshore. In the first instance, the equity attaches to the property *once acquired*. In the present case, that is the engine, which has not been acquired by Southshore. Moreover, it is not the case that Southshore, having received the engine, has sought to act inconsistently with any arrangement it

had with Dunaverty. I do not consider that this argument adds anything to the primary case made by Southshore in relation to this application.

[40] That leaves two further matters mentioned briefly, without any significant analysis, in Mr Gowdy's oral submissions, namely the doctrine of mistake and the possibility of a *Quistclose* trust. These were raised as giving rise to unjust enrichment, such as to engage the principle in *Ex parte James* (1874) 9 Ch App 609; but I address them each in their own right.

[41] In the *Bailey* case which is discussed above, Lord Sumption left open the possibility that a post-petition transfer of funds may result in a trust on the basis of payment under a mistake (see para [32] of his judgment). In *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch), this had been suggested as perhaps being a better basis for the decision of Bingham J in *Neste Oy* (see paras [39]-[40] of the judgment of Mann J). The *Farepak* case involved payments to a Christmas savings scheme where some customers made ongoing payments to agents of Farepak even after the time when the directors of the company had determined that it would cease trading. The court was sympathetic to the attempt to have disappointed customers reimbursed with the funds they had been saving for Christmas; but found no proper basis on which to so direct, notwithstanding a range of arguments which were relied upon.

[42] If money is paid to someone by mistake and he knows of the mistake but retains the money, he may be a constructive trustee of the money for the payer. However, I have not been persuaded that this argument warrants the making of a validation order in the present case on the basis that it is clear-cut that no prejudice to Southshore's general creditors would result. The constructive trust through mistake was not raised or relied upon by Mr Doran. Although mistake it was mentioned in passing by Mr Gowdy, no substantial argument was addressed to me in relation to the establishment of a constructive trust as a result of mistake, much less the citation of any authority. Perhaps more importantly, no direct evidence whatever about the knowledge or state of mind of Dunaverty at or before the time of payment was before the court (there was merely a reference in an email from Mr Toombs of Carson McDowell that his client "unwittingly transferred the monies to the frozen bank account of Southshore Marine post issue and service of a Petition"). Nor is there any evidence about the position within Southshore, other than the fact that a winding-up petition had been served and advertised and its account frozen by its bank in consequence.

[43] This is not a case where, at the time of payment, Southshore had decided that it had ceased trading (unlike the position in *Neste Oy* or as suggested in relation to some of the payments in the *Farepak* case). Indeed, in recent communications between Dunaverty and Southshore's lawyers, Southshore maintains that it continues to trade positively and that the business is financially sound. It is not a case of Southshore, before the point of receipt, having decided that that it no longer intended to fulfil the contract and that it was going to cease trading, as well as having indicated that no further payments from customers should be received. In

Farepak, Mann J considered that the finding of a constructive trust on the basis of mistake in such a case could be reconciled with principle (albeit "somewhere close to the frontiers of the law of constructive trusts"). However, he appears to me to have limited that view to the extreme type of case just described, which was typified by the facts in *Neste Oy*, namely where the receiving company had already decided to cease trading at the time when the funds were paid over: see paras [40] and [41] of his judgment. Those facts do not appear to me to be reflected in the current case, where Mr Quinn was (and is) adamant that his company can and will trade on.

[44] Turning to the issue of a *Quistclose* trust, *Lewin on Trusts* at para 1-022 (quoted in part at para [24] above) goes on to say that even though an agent is not an express trustee, he may sometimes hold the money received on a *Quistclose* trust, although not a constructive trust on the ground of unconscionability. A *Quistclose* trust is one whereby A pays or transfers money or property to B so that B holds the money or property in trust for A subject to a power for B to apply the money or property for a stated purpose. A's beneficial interest in the money or property will remain, unless and until the money or property is applied in accordance with that power. If the purpose fails then the money or property is held on resulting trust for A freed from any power and so can be recovered by A by a proprietary claim whether or not B is solvent. The circumstances in which *Quistclose* trusts arise, and their character and effect, were considered in the case of *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

[45] Importantly, a *Quistclose* trust does not arise merely because money is paid for a particular purpose. *Lewin on Trusts* comments, at para 9-048, that "payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust". Generally, where such advance payments are made the money is intended to be at the free disposal of the supplier and may be used as part of his cashflow. Again, this is because of the practical difficulties in suppliers being required to keep money separate and the caution which courts exercise in importing wholesale into commercial law equitable principles which are inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs. In every case, the question is whether *the parties intended* the money to be at the free disposal of the recipient or whether the money provided should be used exclusively for the stated purpose. There is, accordingly, a requirement to look at similar factors as already considered above in relation to the funds being impressed with a trust. *Lewin* goes on to note that such trusts will only be found where there are some special arrangements which indicate that the payment concerned is not to form part of the recipient's general assets and is to be kept in a separate account pending application in accordance with the purpose (see paras 9-061 and 9-061).

[46] In *Farepak*, the suggestion that a *Quistclose* trust arose was also defeated. That was in part, again, because there was no suggestion that the agent was expected to keep the money separate from other money and it was mixed with other funds. That was not determinative of the matter; but it did not help. Crucially, there was no

suggestion that the money ought to have been "put on one side" pending the transmutation from credited money to goods. Again, for the reasons given above, I have not been persuaded that the intention of Dunaverty and Southshore was such that the moneys paid to Southshore would be held on a *Quistclose* trust with the beneficial interest remaining with Dunaverty. Yet again, the absence of any detailed evidence about the parties intentions immediately before and at the time of the relevant transfer simply precludes me from reaching a view that that was the parties' intention. If it were, one would have expected some material to make that plain.

[47] Finally, in *Farepak*, Mann J also considered an argument based on *ex parte James* (see para [53] of his judgment). He did not consider that the principle in that case could be used to override legal rights where he had held that the customer retained no beneficial interest in respect of the money they had paid over. In short, it added nothing if the proprietary claims failed.

Conclusion

[48] I have not been persuaded that any liability of Southshore to account for money paid to it by Dunaverty gave rise to a proprietary claim, rather than a personal liability sounding in debt. There is insufficient evidence to establish that the parties intended that the moneys be impressed with a trust on the variety of bases presented.

[49] I have very considerable sympathy for the position in which Dunaverty finds itself. I also fervently hope that those who use the Rathlin Ferry are neither endangered nor inconvenienced in any way as a result of the difficult situation in which the ferry operator finds itself because of Southshore's financial position. However, as Mann J commented in the *Farepak* case, its claim must be "based in law, not sympathy" and the court must be satisfied that the proprietary claim is made out to a sufficient level at this stage. Whilst I do not rule out that this might be reconsidered at a later stage by the liquidator, on the present evidence I do not consider that the grant of a validation order would be of no prejudice to the interests of the unsecured creditors as a class. On the contrary, I consider that it would be likely to result in Dunaverty being paid in full at the expense of the other creditors, rather than having to prove with them in the liquidation.

[50] The application is accordingly refused. I will hear the parties on the issue of costs.