

## Student Companion August 2014

*FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45

The question for the United Kingdom Supreme Court was whether a bribe or secret commission received by an agent could be held by the agent on trust for his principle, or whether the principle merely had a claim in equitable compensation for a sum equal in value to the bribe or the commission. This was a very important decision, not least because it has given rise to a great deal of academic commentary and judicial inconsistency over the last 200 years. The decision is also important in practical terms. If the bribe/commission is held on trust for the principle, then the principle has a proprietary claim to it, whereas if the claim results merely in equitable compensation, then there is no proprietary claim. This difference is important because if the agent becomes insolvent, then the proprietary claim would give the principle priority over the agent's unsecured creditors. Whereas if the claim were for equitable compensation, then the principle would rank equally with other unsecured creditors, or *pari passu*. Further, if there is a proprietary claim, then the principle may trace in equity, whereas an equitable compensatory claim will have no right to trace in equity.

The facts, briefly, are as follows. In December 2004, FHR European Ventures LLP purchased the issued share capital of Monte Carlo Grand Hotel SAM (which owned a long leasehold interest in the Monte Carlo Grand Hotel, the vendor, for €11.5m. Cedar Capitals Partners LLC provided consultancy services to the hotel industry and it acted as the claimant's agent during the negotiations of the property purchase. It was acknowledged that Cedar owed fiduciary duties to the claimant in that respect. Cedar also entered in to an agreement with the vendor in September 2004, which provided for the payment to Cedar of €10m fee following the successful conclusion of the sale and purchase of the issued share capital of Monte Carlo Grand Hotel SAM. Cedar was paid this fee in January 2005. This fee was not disclosed to FHR. The claimants sought to recover the sum of €10m from Cedar.

The Supreme Court affirmed that the following 3 principles were not in doubt. Firstly, that an agent owes a fiduciary duty to his principle. (*Bristol and West Building Society v Mothew* [1998] Ch 1). Secondly, as a result, an agent must not make a profit out of his position and must not place himself in a position in which his duty and his interest may conflict. (*Boardman v Phipps* [1967] 2 AC 46). Thirdly, a fiduciary who acts for two principles with potentially conflicting interests without the informed consent of both, is in breach of obligation of undivided loyalty. The informed consent is only effective after full disclosure. (*Dunne v English* (1874) LR 18 Eq 524. An additional point made by the Court was that where an agent receives a benefit in breach of his fiduciary duty, then that agent is obliged to account to the principle for that benefit. (*Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

Thus the central point for this case was that in some cases where an agent acquires a benefit that came about because of his fiduciary position, or pursuant to an opportunity that resulted from the fiduciary position, then the equitable rule (the Rule) is that he should be treated as having acquired the benefit on behalf of his principle. In other words, it is beneficially owned by the principle. In such a case, the principle has a proprietary remedy in addition to his personal remedy against the agent.

The Supreme Court stated that the respondent's formulation of the Rule had the merit of simplicity, in other words, any benefit acquired by an agent and in breach of his fiduciary duty is to be held on trust for the principle. However, whilst clarity and simplicity are highly

desirable qualities in law, there would be no right answer in this case, therefore, it seems appropriate to opt for the simple answer. Indeed, the Court believed it an unattractive option for the Rule NOT to apply to a bribe or secret commission received by an agent. The reason being that an agent should not accept a bribe or commission that would put him in conflict with his duty to the principle. This approach would also be inconsistent with long standing decisions of *Keech v Sandford* (1726 Sel Cas Ch 61, *Boardman v Phipps* and *Bowes v City of Toronto* (1858) 11 Moo PC 463. The respondent's case is also supported by wider policy considerations that bribes and secret commissions should be treated as property of the principle, as exemplified in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 330H, where it was highlighted that bribery is an evil practice that undermines the foundations of a civilised society. Such activities also undermine trust in the commercial world.

Therefore in conclusion, the Supreme Court held that a bribe or secret commission accepted by an agent is held on trust for his principle as overall the authorities favour the respondent's case.

This may not be a surprising outcome for New Zealand necessarily as a similar approach was taken by the Privy Council in *A-G for Hong Kong v Reid* some years ago. Whilst that case was concerned with a criminal situation, such a finding in the recent Supreme Court case entrenches the notion of the seriousness of bribes and secret commissions and their damaging consequences, and ensures that proprietary remedies for such breaches of fiduciary duties may be available in a wide variety of situations.