UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-21964-CMA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TCA FUND MANAGEMENT GROUP, CORP. and TCA GLOBAL CREDIT FUND, LTD.,

Defendants, and

TCA GLOBAL CREDIT FUND, LP; TCA GLOBAL CREDIT FUND, LTD.; TCA GLOBAL CREDIT MASTER FUND, LP,

Relief Defendants.
_____/

ARMAND ZOHARI, TRITIUM FUND, HSUEH-FENG TSENG, AND FIDE FUND GROWTH'S (1) PARTIAL JOINDER IN FOREIGN REPRESENTATIVES' MEMORANDUM OF LAW IN OPPOSITION TO RECEIVER'S MOTION FOR APPROVAL OF DISTRIBUTION PLAN AND FIRST INTERIM DISTRIBUTION AND REQUEST FOR HEARING [ECF NO. 240], (2) MEMORANDUM OF LAW IN OPPOSITION TO RECEIVER'S MOTION FOR APPROVAL OF DISTRIBUTION PLAN AND FIRST INTERIM DISTRIBUTION [ECF NO. 208], (3) NOTICE PURSUANT TO FED. R. CIV. PROC. 44.1, AND (4) REQUEST FOR ORAL ARGUMENT

Armand Zohari, Tritium Fund, Hsueh-Feng Tseng, and Fide Funds Growth (the "Unpaid Subscribers"), by and through undersigned counsel and pursuant to S.D. Fla. L. R. 7.1(c) and this Court's Order entered March 8, 2022 [ECF No. 215], file this Memorandum of Law in Opposition to the Receiver's *Motion for Approval of Distribution Plan and First Interim Distribution* [ECF No. 208] (the "Distribution Motion") and join in part in the *Foreign Representatives' Memorandum of Law in Opposition to the Receiver's Motion for Approval of Distribution Plan and First Interim Distribution and Request for Hearing* [ECF No. 240] (the "Opposition"), and rely upon the following facts and substantial matters of law:

1. As noted by the Foreign Representatives,[1] the Distribution Motion purports to distribute the funds in accordance with U.S. law, but the Unpaid Subscribers transferred their funds to a Cayman Islands bank account of a Cayman Islands entity (Feeder Fund Ltd.) with the reasonable expectation and understanding that Cayman laws and courts would govern their rights vis-à-vis that entity. In fact, the Unpaid Subscribers do not even reside in the United States, and some $4.2 million of Feeder Fund Ltd. funds currently held by the Receiver are only in his possession as he unilaterally took them from abroad notwithstanding the foreign insolvency proceeding. *See* Opposition at ¶19. In complete derogation of their rights under Cayman law, the Distribution Motion seeks to treat the Unpaid Subscribers – who never received any investment for their funds – as investors and subject them to having their funds distributed to others pursuant to an incorrect interpretation of U.S. law.

2. The Unpaid Subscribers are as follows:

   a. Armand Zohari ("Zohari"), an individual, executed the subscription documents for Feeder Fund Ltd. on December 23, 2019, for a subscription in the amount of $275,000.00.

   b. Tritium Fund ("Tritium"), a registered Cayman Islands mutual fund, executed the subscription documents for Feeder Fund Ltd. on December 31, 2019, for a subscription in the amount of $800,000.00.

   c. Hsueh-Feng Tseng (Vivian Tseng) ("Tseng"), an individual, transferred $100,000 on January 22, 2022, for a subscription in that amount with Feeder Fund Ltd.

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Distribution Motion, and if not defined therein, in the Opposition.

d. Fide Funds Growth ("Fide"), a Luxembourg specialized investment fund, transferred €300,000.00, in December 2019, for a subscription in that amount with Feeder Fund Ltd.

3. In January and February 2020, TCA Credit Management Ltd informed the Unpaid Subscribers that trades as of January 1, 2020, and February 1, 2020, were cancelled. None of these transfers provided the Unpaid Subscribers with investments in Feeder Fund Ltd.; instead, Feeder Fund Ltd. wrongfully refused to return their funds. The Distribution Motion recognizes that the Unpaid Subscribers did not receive any investments in return for their funds and proposes to return any "remaining" money to them. *See* Distribution Motion at pp. 30-31.

4. As these subscriptions were never consummated, the Unpaid Subscribers' funds are held in trust pursuant to Cayman law. *See Declaration of Katharine Lucy Bladen Pearson Regarding Issues of Cayman Islands Law in Relation to Receiver's Motion for Approval of Distribution Plan* ("Pearson Decl.") [ECF No. 241] at ¶46.[2] Accordingly, the Unpaid Subscribers must be repaid from their trust funds, and the Receiver's proposal to take funds held in trust to pay other classes of creditors, much less the investors, is contrary to Cayman law.

5. Rather than repaying these trust funds to the Unpaid Subscribers, the Distribution Motion seeks approval of an obscure and unfair tracing method, which somehow reduces the "remaining" trust funds down to $352,051 (plus about $194,741 held in foreign currencies), even though $4,256,546.99 (plus about $233,000 held in foreign currencies) was available in the Feeder

[2] The Unpaid Subscribers join in the Opposition except insofar as the Opposition and Pearson Declaration represent that (i) some portion of the Unpaid Subscribers' funds held in trust cannot be traced or (ii) any non-traceability of the Unpaid Subscribers' funds held in trust would result in trust claims not being capable of being honored as trust claims and only cognizable as creditor claims.

Fund Ltd. bank account to which subscriptions were paid. *See* Distribution Motion at Exh. "D"; *Receiver's First Quarterly Status Report* [ECF No. 48] at p. 33. According to the Distribution Motion, somehow only about 12% of the funds in this bank account are "remaining" trust funds. The Receiver has the burden of demonstrating the propriety of the proposed distribution method, but has failed to do so, leaving the Unpaid Subscribers with no means to investigate this tracing analysis. The Receiver's analysis is not contained in the Distribution Motion. It contains only the conclusions, and does not include any of the bank statements for the account in which the Unpaid Subscribers' funds were deposited. It appears that the Receiver has erroneously attributed withdrawals from the account to the Unpaid Subscribers' funds, rather than other sources, and may not have credited later deposits to the Unpaid Subscribers. *See* Distribution Motion at p. 30 (stating that the *pro rata* method assigns percentages to Unpaid Subscriber funds and other sources of funds, and then allocates withdrawals, without providing that later deposits from Unpaid Subscribers would replenish the "remaining" amount). Further, the Receiver declined to utilize a lowest intermediate balance analysis, even though doing so would protect the Unpaid Subscribers' funds held in trust as would be more equitable.

6. The proposed *pro rata* tracing analysis is somewhat illusory in any event. While the Receiver proposes to distribute some amount to the Unpaid Subscribers on account of the "remaining" funds, the Distribution Motion plans to use those distributions to correspondingly reduce the amounts payable to the Unpaid Subscribers as "investors" under the "Rising Tide" methodology. *See* Distribution Motion at p. 34. The proposal leaves the Unpaid Subscribers with less than what they are entitled to as trust claimants. For Fide Funds-Growth, the result is even worse (perhaps due to a records error), as the Distribution Motion does not propose to provide them any distribution as an "investor." *See* Distribution Motion at Exh. "C". The Distribution

Motion does list "Fide Capital SA" as an "investor," but only ascribes $38,927.48 in subscriptions to that entity, *see id.* at p. 8 of 23, while Fide Funds-Growth transferred €300,000 to Feeder Fund Ltd.

7. Under Cayman law, this tracing analysis is inapposite. Cayman law provides the Unpaid Subscribers with a proprietary claim sitting outside the liquidation estate (rather than a claim for equitable compensation or an ordinary creditor claim) that would trump other creditor claims even where a *res* may not be identifiable due to the misfeasance of the trustee, precisely due to that unconscionable conduct of the trustee. *See The Attorney General for Hong Kong v Reid (New Zealand) (UKPC)* [1993] UKPC 2; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.[3] The Unpaid Subscribers understand that the Foreign Representatives do not concur with this interpretation of Cayman law relating to trust claims, *see* Pearson Decl. at ¶47, but they are entitled to have a Cayman court apply Cayman law to the merits of their trust claims.

8. Even if the Unpaid Subscribers did not benefit from the priority of their trust claims, they would still be treated as creditors holding claims senior to the investors to the extent their claims cannot be satisfied from funds traceable to them. As the Foreign Representatives note, Cayman law provides for creditors such as the Unpaid Investors to be paid before investors. *See* Pearson Decl. at ¶¶47, 17, 19-20, 22-24; Cayman Islands Companies Act at §140; *Pearson v Primeo Fund* [2017] UKPC 19. This is the same priority scheme as exists under U.S. law. *See Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401, 407-08 (7th

[3] Annexed hereto as Exhibit A is a compendium of the foreign authorities cited in this brief.

Cir. 2011) ("creditors are usually paid ahead of shareholders in insolvency proceedings, whether the proceedings take the form of bankruptcy or receivership.") (citations omitted).

NOTICE PURSUANT TO FED. R. CIV. PROC. 44.1

9. Certain of the substantive issues involved in this proceeding will be governed by the laws of the Cayman Islands. The Unpaid Subscribers intend to rely on the laws of that foreign country.

CONCLUSION

10. As described more fully above, the Unpaid Subscribers have substantial rights under Cayman law to priority in distribution, as well as the right to have a Cayman court apply Cayman law to determine those rights. Accordingly, the Unpaid Subscribers respectfully request that the Court deny the Distribution Motion.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(b)(2) of this Court, the Unpaid Subscribers respectfully request that the Court schedule oral argument on the Distribution Motion at a date convenient to the Court and parties. In support of this request, the Unpaid Subscribers respectfully submit that the multiple issues raised and discussed above in this case of first impression are deserving of close consideration that would be aided by oral argument at which the Court can pose questions to counsel for the parties in interest and consider more fully the multinational legal and practical consequences of its decision in this case. The Unpaid Subscribers estimate the time required for argument is not more than one hour each for the Receiver and the Foreign Representatives, and not more than 30 minutes for the Unpaid Subscribers.

Dated: April 29, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2022, a true and correct copy of the foregoing was served via the Court's ECF system on those parties registered to receive ECF notices by the Court and via electronic mail to emcintosh@gjb-law.com.

/s/ Jeffrey P. Bast, Esq.
Jeffrey P. Bast

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-21964-CMA

SECURITIES AND EXCHANGE COMMISSION,

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COMPENDIUM OF FOREIGN AUTHORITIES

Foreign Authorities

CAYMAN ISLANDS

COMPANIES ACT

(2021 Revision)

Supplement No. 8 published with Legislation Gazette No. 4 of 12th January, 2021.

Material omissions from statement relating to company's affairs

137. (1) Where a company is being wound up, whether by the Court or voluntarily, a person who is or was a director, an officer, a manager or a professional service provider of the company, commits an offence if that person makes any material omission in any statement relating to the company's affairs, with intent to defraud the company's creditors or contributories.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine of twenty-five thousand dollars or to imprisonment for a term of five years, or to both.

(3) In this section —

"**officer**" includes a shadow director.

General provisions

Getting in the company's property

138. (1) Where any person has in that person's possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator.

(2) Where the official liquidator seizes or disposes of any property which that person reasonably believed belonged to the company, that person shall not be personally liable for any loss or damage caused to its true owner except in so far as such loss or damage is caused by that person's own negligence.

Provable debts

139. (1) All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.

(2) Foreign taxes, fines and penalties shall be admissible to proof against the company only if and to the extent that a judgment in respect of the same would be enforceable against the company pursuant to the *Foreign Judgments Reciprocal Enforcement Act (1996 Revision)* or any laws permitting the enforcement of foreign taxes, fines and penalties.

Distribution of the company's property

140. (1) Subject to subsection (2), the property of the company shall be applied in satisfaction of its liabilities *pari passu* and subject thereto shall be distributed amongst the members according to their rights and interests in the company.

(2) The collection in and application of the property of the company referred to in subsection (1) is without prejudice to and after taking into account and giving effect to the rights of preferred and secured creditors and to any agreement between the company and any creditors that the claims of such creditors shall be subordinated or otherwise deferred to the claims of any other creditors and to any contractual rights of set-off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multi-lateral set-off or netting arrangements between the company and any person or persons) and subject to any agreement between the company and any person or persons to waive or limit the same.

(3) In the absence of any contractual right of set-off or non set-off, an account shall be taken of what is due from each party to the other in respect of their mutual dealings, and the sums due from one party shall be set-off against the sums due from the other.

(4) Sums due from the company to another party shall not be included in the account taken under subsection (3) if that other party had notice at the time they became due that a petition for the winding up of the company was pending.

(5) Only the balance, if any, of the account taken under subsection (3) shall be provable in the liquidation or, as the case may be, payable to the liquidator as part of the assets.

Preferential debts

141. (1) In the case of an insolvent company, the debts described in Schedule 2 shall be paid in priority to all other debts.

(2) The preferential debts shall —

(a) rank equally amongst themselves and be paid in full unless the assets available, after having exercised any rights of set-off or netting of claims, are insufficient to meet them in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures secured by, or holders of any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

Secured creditors

142. (1) Notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce that person's security without the leave of the Court and without reference to the liquidator.

Trinity Term
[2014] UKSC 45
On appeal from: [2013] EWCA Civ 17

JUDGMENT

FHR European Ventures LLP and others (Respondents) *v* Cedar Capital Partners LLC (Appellant)

before

Lord Neuberger, President
Lord Mance
Lord Sumption
Lord Carnwath
Lord Toulson
Lord Hodge
Lord Collins

JUDGMENT GIVEN ON

16 July 2014

Heard on 17-19 June 2014

Appellant	*Respondent*
Matthew Collings QC Duncan McCombe (Instructed by Farrer and Co LLP)	Christopher Pymont QC (Instructed by Hogan Lovells International LLP)

LORD NEUBERGER, DELIVERING THE JUDGMENT OF THE COURT

1. This is the judgment of the Court on the issue of whether a bribe or secret commission received by an agent is held by the agent on trust for his principal, or whether the principal merely has a claim for equitable compensation in a sum equal to the value of the bribe or commission. The answer to this rather technical sounding question, which has produced inconsistent judicial decisions over the past 200 years, as well as a great deal of more recent academic controversy, is important in practical terms. If the bribe or commission is held on trust, the principal has a proprietary claim to it, whereas if the principal merely has a claim for equitable compensation, the claim is not proprietary. The distinction is significant for two main reasons. First, if the agent becomes insolvent, a proprietary claim would effectively give the principal priority over the agent's unsecured creditors, whereas the principal would rank pari passu, ie equally, with other unsecured creditors if he only has a claim for compensation. Secondly, if the principal has a proprietary claim to the bribe or commission, he can trace and follow it in equity, whereas (unless we develop the law of equitable tracing beyond its current boundaries) a principal with a right only to equitable compensation would have no such equitable right to trace or follow.

The facts

2. On 22 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) from Monte Carlo Grand Hotel Ltd ("the Vendor") for €211.5m. The purchase was a joint venture between the claimants in these proceedings, for whom FHR was the vehicle. Cedar Capital Partners LLC provided consultancy services to the hotel industry, and it had acted as the claimants' agent in negotiating the purchase. It is common ground that Cedar accordingly owed fiduciary duties to the claimants in that connection. Cedar had also entered into an agreement with the Vendor ("the Exclusive Brokerage Agreement") dated 24 September 2004, which provided for the payment to Cedar of a €10m fee following a successful conclusion of the sale and purchase of the issued share capital of Monte Carlo Grand Hotel SAM. The Vendor paid Cedar €10m on or about 7 January 2005.

3. On 23 November 2009 the claimants began these proceedings for recovery of the sum of €10m from Cedar (and others). The trial took place before Simon J, and the main issue was whether, as it contended, Cedar had made proper disclosure to the claimants of the Exclusive Brokerage Agreement. Simon J gave a judgment in which he found against Cedar on that issue – [2012] 2 BCLC 39. There was then a further hearing to determine what order should be made in the light of that

judgment, following which Simon J gave a further judgment – [2013] 2 BCLC 1. In that judgment he concluded that he should (i) make a declaration of liability for breach of fiduciary duty on the part of Cedar for having failed to obtain the claimants' fully informed consent in respect of the €10m, and (ii) order Cedar to pay such sum to the claimants, but (iii) refuse to grant the claimants a proprietary remedy in respect of the monies.

4. The claimants appealed to the Court of Appeal against conclusion (iii), and it allowed the appeal for reasons given in a judgment given by Lewison LJ, with supporting judgments from Pill LJ and Sir Terence Etherton C - [2014] Ch 1. Accordingly, the Court of Appeal made an order which included a declaration that Cedar received the €10m fee on constructive trust for the claimants absolutely. Cedar now appeals to the Supreme Court on that issue. There is and was no challenge by Cedar to the Judge's conclusions (i) and (ii), so the only point on this appeal is whether, as the Court of Appeal held, the claimants are entitled to the proprietary remedy in respect of the €10m received by Cedar from the Vendor.

Prefatory comments

5. The following three principles are not in doubt, and they are taken from the classic summary of the law in the judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18. First, an agent owes a fiduciary duty to his principal because he is "someone who has undertaken to act for or on behalf of [his principal] in a particular matter in circumstances which give rise to a relationship of trust and confidence". Secondly, as a result, an agent "must not make a profit out of his trust" and "must not place himself in a position in which his duty and his interest may conflict" - and, as Lord Upjohn pointed out in *Boardman v Phipps* [1967] 2 AC 46, 123, the former proposition is "part of the [latter] wider rule". Thirdly, "[a] fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal *may* conflict with his duty to the other". Because of the importance which equity attaches to fiduciary duties, such "informed consent" is only effective if it is given after "full disclosure", to quote Sir George Jessel MR in *Dunne v English* (1874) LR 18 Eq 524, 533.

6. Another well established principle, which applies where an agent receives a benefit in breach of his fiduciary duty, is that the agent is obliged to account to the principal for such a benefit, and to pay, in effect, a sum equal to the profit by way of equitable compensation. The law on this topic was clearly stated in *Regal (Hastings) Ltd v Gulliver (Note)* (1942) [1967] 2 AC 134, 144-145, by Lord Russell, where he said this:

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made."

7. The principal's right to seek an account undoubtedly gives him a right to equitable compensation in respect of the bribe or secret commission, which is the quantum of that bribe or commission (subject to any permissible deduction in favour of the agent – eg for expenses incurred). That is because where an agent acquires a benefit in breach of his fiduciary duty, the relief accorded by equity is, again to quote Millett LJ in *Mothew* at p 18, "primarily restitutionary or restorative rather than compensatory". The agent's duty to account for the bribe or secret commission represents a personal remedy for the principal against the agent. However, the centrally relevant point for present purposes is that, at least in some cases where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the equitable rule ("the Rule") is that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies.

8. Where the facts of a particular case are within the ambit of the Rule, it is strictly applied. The strict application of the Rule can be traced back to the well-known decision in *Keech v Sandford* (1726) Sel Cas Ch 61, where a trustee held a lease of a market on trust for an infant, and, having failed to negotiate a new lease on behalf of the infant because the landlord was dissatisfied with the proposed security for the rent, the trustee negotiated a new lease for himself. Lord King LC concluded at p 62 that, "though I do not say there is a fraud in this case" and though it "may seem hard", the infant was entitled to an assignment of the new lease and an account of the profits made in the meantime – a conclusion which could only be justified on the basis that the new lease had been beneficially acquired for the infant beneficiary.

9. Since then, the Rule has been applied in a great many cases. The question on this appeal is not so much concerned with the application of the Rule, as with its limits or boundaries. Specifically, what is in dispute is the extent to which the Rule applies where the benefit is a bribe or secret commission obtained by an agent in breach of his fiduciary duty to his principal.

10. On the one hand, Mr Collings QC contends for the appellant, Cedar, that the Rule should not apply to a bribe or secret commission paid to an agent, because it is not a benefit which can properly be said to be the property of the principal. This has the support of Professor Sir Roy Goode, who has suggested that no proprietary interest arises where an agent obtains a benefit in breach of his duty unless the benefit either (i) flows from an asset which was (a) beneficially owned by the principal, or (b) intended for the principal, or (ii) was derived from an activity of the agent which, if he chose to undertake it, he was under an equitable duty to undertake for the principal. Sir Roy suggested that "to treat [a principal] as having a restitutionary proprietary right to money or property not derived from any asset of [the principal] results in an involuntary grant by [the agent] to [the principal] from [the agent's] pre-existing estate" - *Proprietary Restitutionary Claims* in *Restitution*: *Past, Present and Future* (1998) ed Cornish, p 69 - and see more recently (2011) 127 LQR 493. Professor Sarah Worthington has advanced a slightly different test. She suggests (summarising at the risk of oversimplifying) that proprietary claims arise where benefits are (i) derived from the principal's property, or (ii) derived from opportunities in the scope of the agent's endeavours on behalf of the principal, but not (iii) benefits derived from opportunities outside the scope of those endeavours – *Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae* (2013) 72 CLJ 720.

11. On the other hand, it is suggested by Mr Pymont QC on behalf of the respondent claimants in this appeal, that the Rule does apply to bribes or secret commissions received by an agent, because, in any case where an agent receives a benefit, which is, or results from, a breach of the fiduciary duty owed to his principal, the agent holds the benefit on trust for the principal. This view has been supported by Lord Millett writing extra-judicially. In "Bribes and Secret Commissions" [1993] Rest LR 7, he suggested that, on grounds of practicality, policy and principle, a principal should be beneficially entitled to a bribe or secret commission received by his agent - and see more recently, (2012) 71 CLJ 583. He bases his conclusion on the proposition that equity will not permit the agent to rely on his own breach of fiduciary duty to justify retaining the benefit on the ground that it was a bribe or secret commission, and will assume that he acted in accordance with his duty, so that the benefit must be the principal's. This approach is also supported by Lionel Smith, "Constructive trusts and the no-profit rule" (2013) 72 CLJ 260, whose view, in short, is that the basic rule should be that an agent who obtains a benefit in breach of his fiduciary duty to his principal holds that benefit on trust for his principal.

12. The decision as to which view is correct must be based on legal principle, decided cases, policy considerations, and practicalities. We start by summarising the effect of many of the cases which touch on the issue; we then turn to the policy and practical arguments, and finally we express our conclusion.

The decided cases

13. There is a number of 19th century cases not involving bribes or secret commissions, where an agent or other fiduciary makes an unauthorised profit by taking advantage of an opportunity which came to his attention as a result of his agency and judges have reached the conclusion that the Rule applied. Examples include *Carter v Palmer* (1842) 8 Cl & F 657, where a barrister who purchased his client's bills at a discount was held by Lord Cottenham to have acquired them for his client. The Privy Council in *Bowes v City of Toronto* (1858) 11 Moo PC 463 concluded that the mayor of a city who bought discounted debentures issued by the city was in the same position as an agent vis-à-vis the city, and was to be treated as holding the debentures on trust for the city. *Bagnall v Carlton* (1877) 6 Ch D 371 involved complex facts, but, pared to a minimum, agents for a prospective company who made secret profits out of a contract made by the company were held to be "trustees for the company" of those profits (per James, Baggallay and Cotton LJJ).

14. In the Privy Council case of *Cook v Deeks* [1916] 1 AC 554, a company formed by the directors of a construction company was held to have entered into a contract on behalf of the construction company as the directors only knew of the contractual opportunity by virtue of their directorships. In *Phipps v Boardman* [1964] 1 WLR 993 (affirmed [1965] Ch 992, and [1967] 2 AC 46), where agents of certain trustees purchased shares, in circumstances where they only had that opportunity because they were agents, Wilberforce J held that the shares were held beneficially for the trust. More recently, in *Bhullar v Bhullar* [2003] 2 BCLC 241, the Court of Appeal reached the same conclusion on similar facts to those in *Cook* (save that the asset acquired was a property rather than a contract). Jonathan Parker LJ said this at para 28:

> "[W]here a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgment, is not whether the party to whom the duty is owed (the company, in the instant case) had some kind of beneficial interest in the opportunity: in my judgment that would be too formalistic and restrictive an approach. Rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule."

15. Turning now to cases concerned with bribes and secret commissions, the effect of the reasoning of Lord Lyndhurst LC in *Fawcett v Whitehouse* (1829) 1 Russ & M 132 was that an agent, who was negotiating on behalf of a prospective lessee and who accepted a "loan" from the lessor, held the loan on trust for his principal, the lessee. In *Barker v Harrison* (1846) 2 Coll 546, a vendor's agent had secretly negotiated a sub-sale of part of the property from the purchaser at an advantageous price, and Sir James Knight-Bruce V-C held that that asset was held on trust for the vendor. In *In re Western of Canada Oil, Lands and Works Co, Carling, Hespeler, and Walsh's Cases* (1875) 1 Ch D 115, the Court of Appeal (James and Mellish LJJ, Bramwell B and Brett J) held that shares transferred by a

person to individuals to induce them to become directors of a company and to agree that the company would buy land from the person, were held by the individuals on trust for the company. In *In re Morvah Consols Tin Mining Co, McKay's Case* (1875) 2 Ch D 1, the Court of Appeal (Mellish and James LJJ and Brett J) decided that where a company bought a mine, shares in the vendor which were promised to the company's secretary were held by him for the company beneficially. The Court of Appeal (Sir George Jessel MR and James and Baggallay LJJ) in *In re Caerphilly Colliery Co, Pearson's Case* (1877) 5 Ch D 336 concluded that a company director, who received shares from the promoters and then acted for the company in its purchase of a colliery from the promoters, held the shares on trust for the company. In *Eden v Ridsdale Railway Lamp and Lighting Co Ltd* (1889) 23 QBD 368, a company was held by the Court of Appeal (Lord Esher MR and Lindley and Lopes LJJ) to be entitled as against a director to shares which he had secretly received from a person with whom the company was negotiating. There are a number of other 19th century decisions to this effect, but it is unnecessary to cite them.

16. Inducements and other benefits offered to directors and trustees have been treated similarly. In *Sugden v Crossland* (1856) 2 Sm & G 192, Sir William Page Wood V-C held that a sum of money paid to a trustee to persuade him to retire in favour of the payee was to be "treated as a part of the trust fund". Similarly, in *Nant-y-glo and Blaina Ironworks Co v Grave* (1878) 12 Ch D 738, shares in a company given by a promoter to the defendant to induce him to become a director were held by Sir James Bacon V-C to belong to the company. In *Williams v Barton* [1927] 2 Ch 9, Russell J decided that a trustee, who recommended that his co-trustees use stockbrokers who gave him a commission, held the commission on trust for the trust.

17. The common law courts were meanwhile taking the same view. In *Morison v Thompson* (1874) LR 9 QBD 480, Cockburn CJ, with whom Blackburn and Archibald JJ agreed, held that a purchaser's agent who had secretly agreed to accept a commission from the vendor of a ship, held the commission for the benefit of his principal, the purchaser, in common law just as he would have done in equity – see at p 484, where Cockburn CJ referred to the earlier decision of Lord Ellenborough CJ to the same effect in *Diplock v Blackburn* (1811) 3 Camp 43. In *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109, Bowen J (albeit relying on equity at least in part) held that a contract between the vendor and a director of the purchaser, for a secret commission to be paid out of the purchase money, was to be treated as having been entered into for the benefit of the purchaser without proof of fraud.

18. It is fair to say that in the majority of the cases identified in the previous five paragraphs it does not appear to have been in dispute that, if the recipient of the benefit had received it in breach of his fiduciary duty to the plaintiff, then he held it on trust for the plaintiff. In other words, it appears to have been tacitly accepted that

the Rule applied, so that the plaintiff was entitled not merely to an equitable account in respect of the benefit, but to the beneficial ownership of the benefit.

19. However, many of those cases contain observations which specifically support the contention that the Rule applies to all benefits which are received by an agent in breach of his fiduciary duty. In *Sugden* at p 194, Sir William Page Wood V-C said that "it is a well-settled principle that if a trustee make a profit of his trusteeship, it shall enure to the benefit of his cestuique trusts". And in *McKay's Case* at p 5, Mellish LJ said that it was "quite clear that, according to the principles of a Court of Equity, all the benefit which the agent of the purchaser receives under such circumstances from the vendor must be treated as received for the benefit of the purchaser". In *Carling's Case* at p 124, James LJ said the arrangement amounted to a "a simple bribe or present to the directors, constituting a breach of trust on their part" and that "the company would be entitled to get back from their unfaithful trustees what the unfaithful trustees had acquired by reason of their breach of trust". In *Pearson's Case* Sir George Jessel MR said at pp 340-341 that the director as agent could not "retain that present as against the actual purchasers" and "must be deemed to have obtained [the benefit] under circumstances which made him liable, at the option of the cestuis que trust, to account either for the value … or … for the thing itself …". In *Eden*, Lord Esher said at p 371 that if an agent "put[s] himself in a position which the law does not allow [him] to assume … he commit[s] a wrong against his principal", and "[i]f that which the agent has received is money he must hand it over to his principal, if it is not money, but something else, the principal may insist on having it". Lindley and Lopes LJJ each said that they were "of the same opinion" as Lord Esher, and Lindley LJ observed at p 372 that it would be "contrary to all principles of law and equity to allow the plaintiff to retain the gift".

20. It is also worth noting that in *Morison* at pp 485-486, Cockburn CJ quoted with approval from two contemporary textbooks. First, he cited *Story on Agency*, para 211, where it was said that it could be "laid down as a general principle, that, in all cases when a person is … an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers." Secondly, he referred to *Paley on Principal and Agent*, p 51, which stated that "not only interest, but every other sort of profit or advantage, clandestinely derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for".

21. The cases summarised in paras 13-17 above and the observations set out in paras 19-20 above are all consistent with the notion that the Rule should apply to bribes or secret commissions paid to an agent, so that the agent holds them on trust for his principal, rather than simply having an equitable duty to account to his principal. It is true that in many of those cases there was apparently no argument as to whether the benefit obtained by the fiduciary was actually held on trust for the principal. However, in some of the cases there was a dispute on the nature of the

relief; in any event, the fact that it was assumed time and again by eminent barristers and judges must carry great weight.

22. However, there is one decision of the House of Lords which appears to go the other way, and several decisions of the Court of Appeal which do go the other way, in that they hold that, while a principal has a claim for equitable compensation in respect of a bribe or secret commission received by his agent, he has no proprietary interest in it.

23. The House of Lords decision is *Tyrrell v Bank of London* (1862) 10 HL Cas 26. The facts of the case are somewhat complex and the reasoning of the opinions of Lord Westbury LC, Lord Cranworth and Lord Chelmsford is not always entirely easy to follow. The decision has been carefully and interestingly analysed by Professor Watts, "Tyrrell v Bank of London – an Inside Look at an Inside Job" (2013) 129 LQR 527. In very brief terms, a solicitor retained to act for a company in the course of formation secretly arranged to benefit from his prospective client's anticipated acquisition of a building called the "Hall of Commerce" by obtaining from the owner a 50% beneficial interest in a parcel of land consisting of the Hall and some adjoining land. After the client had purchased the Hall from the owner, it discovered that the solicitor had secretly profited from the transaction and sued him. Sir John Romilly MR held that the solicitor had held on trust for the client both (i) his interest in (and therefore his subsequent share of the proceeds of sale of) the Hall, and (ii) with "very considerable hesitation", his interest in the adjoining land – (1859) 27 Beav 273, especially at p 300. On appeal, the House of Lords held that, while the Master of the Rolls was right about (i), he was wrong about (ii): although the client had an equitable claim for the value of the solicitor's interest in the adjoining land, it had no proprietary interest in that land.

24. Lord Westbury LC made it clear at pp 39-40 that the fact that the client had not been formed by the time that the solicitor acquired his interest in the land did not prevent the claim succeeding as the client had been "conceived, and was in the process of formation". He also made it clear at p 44 that, in respect of the profit which the solicitor made from his share of the Hall (which he described as "the subject matter of the transaction", and, later at p 45, "that particular property included in the [client's] contract"), the solicitor "must be converted into a trustee for the [client]". However, he was clear that no such trust could arise in relation to the adjoining land, which was outside "the limit of the agency", and so "there [was] no privity, nor any obligation", although the solicitor "must account for the value of that property" – p 46. Lord Cranworth agreed, making it clear that the financial consequences for the solicitor were no different from those that followed from the Master of the Rolls' order, although he had "thought that possibly we might arrive at the conclusion that the decree was, not only in substance, but also in form, perfectly correct" – p 49. Lord Chelmsford agreed, and discussed bribes at pp 59-60, holding that the principal had no right to a bribe received by his agent.

25. Although there have been suggestions that, with the exception of Lord Chelmsford's obiter dicta about bribes, the decision of the House of Lords in *Tyrrell* was not inconsistent with the respondents' case on this appeal, it appears clear that it was. If, as the House held, the solicitor was liable to account to the client for the profit which he had made on the adjoining land, that can only have been because it was a benefit which he had received in breach of his fiduciary duty; and, once that is established, then, on the respondents' case, the Rule would apply, and that profit would be held on trust for the client (or, more accurately, his share of the adjoining land would be held on trust), as in *Fawcett*, *Sugden*, *Carter*, *Bowes* and *Barker*, all of which had been decided before *Tyrrell*, and of which only *Fawcett* was cited to the House.

26. We turn to the Court of Appeal authorities which are inconsistent with the notion that the Rule applies to bribes or secret commissions. In *Metropolitan Bank v Heiron* (1880) 5 Ex D 319, the Court of Appeal held that a claim brought by a company against a director was time-barred: the claim was to recover a bribe paid by a third party to induce the director to influence the company to negotiate a favourable settlement with the third party. It was unsuccessfully argued by the bank that its claim was proprietary. Brett LJ said at p 324 "[n]either at law nor in equity could this sum … be treated as the money of the company", but he apparently considered that, once the company had obtained judgment for the money there could be a trust. Cotton LJ expressed the same view. James LJ simply thought that there was an equitable debt and applied the Limitation Acts by analogy. This approach was followed in *Lister & Co v Stubbs* (1890) 45 Ch D 1, where an agent of a company had accepted a bribe from one of its clients, and an interlocutory injunction was refused on the ground that the relationship between the company and its agent was that of creditor and debtor not beneficiary and trustee. Cotton LJ said at p 12 that "the money which [the agent] has received … cannot … be treated as being the money of the [company]". Lindley LJ agreed and said at p 15 that the notion that there was a trust "startle[d]" him, not least because it would give the company the right to the money in the event of the agent's bankruptcy. Bowen LJ agreed.

27. *Lister* was cited with approval by Lindley LJ in *In re North Australian Territory Co, Archer's case* [1892] 1 Ch 322, 338, and it was followed in relation to a bribe paid to an agent by Sir Richard Henn Collins MR (with whom Stirling and Mathew LJJ agreed) in *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11, 22, where the principal was held entitled to an account for the bribe, but not to a declaration that the bribe was held on trust. The same view was taken in the Court of Appeal in *Attorney General's Reference (No 1 of 1985)* [1986] QB 491, 504-505, where Lord Lane CJ quoted from the judgments of Cotton and Lindley LJJ in what he described as "a powerful Court of Appeal in *Lister*", and followed the reasoning. In *Regal (Hastings)*, the decision in *Lister* was referred to by Lord Wright at p 156, as supporting the notion that "the relationship in such a case is that of debtor and

creditor, not trustee and cestui que trust". However, that was an obiter observation, and it gets no support from the other members of the committee.

28. More recently, in 1993, in *Attorney General for Hong Kong v Reid*, the Privy Council concluded that bribes received by a corrupt policeman were held on trust for his principal, and so they could be traced into properties which he had acquired in New Zealand. In his judgment on behalf of the Board, Lord Templeman disapproved the reasoning in *Heiron*, and the reasoning and outcome in *Lister*, and he thought his conclusion inconsistent with only one of the opinions, that of Lord Chelmsford, in *Tyrrell*. In *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119, paras 75ff, Lawrence Collins J indicated that he would follow *Reid* rather than *Lister*, as did Toulson J in *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643, 668-672. But in *Sinclair Investments Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, in a judgment given by Lord Neuberger MR, the Court of Appeal decided that it should follow *Heiron* and *Lister*, and indeed *Tyrrell*, for a number of reasons set out in paras 77ff, although it accepted that this Court might follow the approach in *Reid*. In this case, Simon J considered that he was bound by *Sinclair*, whereas the Court of Appeal concluded that they could and should distinguish it.

Legal principle and academic articles

29. As mentioned above, the issue raised on this appeal has stimulated a great deal of academic debate. The contents of the many articles on this issue provide an impressive demonstration of penetrating and stimulating legal analysis. One can find among those articles a powerful case for various different outcomes, based on analysing judicial decisions and reasoning, equitable and restitutionary principles, and practical and commercial realities. It is neither possible nor appropriate to do those articles justice individually in this judgment, but the court has referred to them for the purpose of extracting the principle upon which the Rule is said to be based. In addition to those referred to in paras 10, 11 and 23 above, those articles include Hayton, "The Extent of Equitable Remedies: Privy Council versus the Court of Appeal" [2012] Co Law 161, Swadling, "Constructive trusts and breach of fiduciary duty" (2012) 18 Trusts and Trustees 985, Virgo, "Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?" (2011) 70 CLJ 502, Edelman "Two Fundamental Questions for the Law of Trusts" (2013) 129 LQR 66 and others listed by Sir Terence Etherton, "The Legitimacy of Proprietary Relief", (2014) Birkbeck Law Review vol 2(1), 59, at p 60. At p 62 Sir Terence refers to "this relentess and seemingly endless debate", which, in the Court of Appeal in this case, Pill LJ described as revealing "passions of a force uncommon in the legal world" – [2014] Ch 1, para 61.

30. The respondents' formulation of the Rule, namely that it applies to all benefits received by an agent in breach of his fiduciary duty to his principal, is explained on the basis that an agent ought to account in specie to his principal for any benefit he has obtained from his agency in breach of his fiduciary duty, as the benefit should be treated as the property of the principal, as supported by many judicial dicta including those in para 19 above, and can be seen to be reflected in Jonathan Parker LJ's observations in para 14 above. More subtly, it is justified on the basis that equity does not permit an agent to rely on his own wrong to justify retaining the benefit: in effect, he must accept that, as he received the benefit as a result of his agency, he acquired it for his principal. Support for that approach may be found in Mellish LJ's judgment in *McKay's Case* at p 6, and Bowen J's judgment in *Whaley Bridge* at p 113.

31. The appellant's formulation of the Rule, namely that it has a more limited reach, and does not apply to bribes and secret commissions, has, as mentioned in para 10 above, various different formulations and justifications. Thus, it is said that, given that it is a proprietary principle, the Rule should not apply to benefits which were not derived from assets which are or should be the property of the principal, a view supported by the reasoning of Lord Westbury in *Tyrrell*. It has also been suggested that the Rule should not apply to benefits which could not have been intended for the principal and were, rightly or wrongly, the property of the agent, which seems to have been the basis of Cotton LJ's judgment in *Heiron* at p 325 and *Lister* at p 12. In *Sinclair*, it was suggested that the effect of the authorities was that the Rule should not apply to a benefit which the agent had obtained by taking advantage of an opportunity which arose as a result of the agency, unless the opportunity "was properly that of the [principal]" – para 88. Professor Worthington's subsequent formulation, referred to in para 10 above, is very similar but subtly different (and probably more satisfactory).

32. Each of the formulations set out in paras 30 and 31 above have their supporters and detractors. In the end, it is not possible to identify any plainly right or plainly wrong answer to the issue of the extent of the Rule, as a matter of pure legal authority. There can clearly be different views as to what requirements have to be satisfied before a proprietary interest is created. More broadly, it is fair to say that the concept of equitable proprietary rights is in some respects somewhat paradoxical. Equity, unlike the common law, classically acts in personam (see eg Maitland, *Equity*, p 9); yet equity is far more ready to accord proprietary claims than common law. Further, two general rules which law students learn early on are that common law legal rights prevail over equitable rights, and that where there are competing equitable rights the first in time prevails; yet, given that equity is far more ready to recognise proprietary rights than common law, the effect of having an equitable right is often to give priority over common law claims – sometimes even those which may have preceded the equitable right. Given that equity developed at least in part to mitigate the rigours of the common law, this is perhaps scarcely

surprising. However, it underlines the point that it would be unrealistic to expect complete consistency from the cases over the past 300 years. It is therefore appropriate to turn to the arguments based on principle and practicality, and then to address the issue, in the light of those arguments as well as the judicial decisions discussed above.

Arguments based on principle and practicality

33. The position adopted by the respondents, namely that the Rule applies to all unauthorised benefits which an agent receives, is consistent with the fundamental principles of the law of agency. The agent owes a duty of undivided loyalty to the principal, unless the latter has given his informed consent to some less demanding standard of duty. The principal is thus entitled to the entire benefit of the agent's acts in the course of his agency. This principle is wholly unaffected by the fact that the agent may have exceeded his authority. The principal is entitled to the benefit of the agent's unauthorised acts in the course of his agency, in just the same way as, at law, an employer is vicariously liable to bear the burden of an employee's unauthorised breaches of duty in the course of his employment. The agent's duty is accordingly to deliver up to his principal the benefit which he has obtained, and not simply to pay compensation for having obtained it in excess of his authority. The only way that legal effect can be given to an obligation to deliver up specific property to the principal is by treating the principal as specifically entitled to it.

34. On the other hand, there is some force in the notion advanced by the appellant that the Rule should not apply to a bribe or secret commission paid to an agent, as such a benefit is different in quality from a secret profit he makes on a transaction on which he is acting for his principal, or a profit he makes from an otherwise proper transaction which he enters into as a result of some knowledge or opportunity he has as a result of his agency. Both types of secret profit can be said to be benefits which the agent should have obtained for the principal, whereas the same cannot be said about a bribe or secret commission which the agent receives from a third party.

35. The respondents' formulation of the Rule has the merit of simplicity: any benefit acquired by an agent as a result of his agency and in breach of his fiduciary duty is held on trust for the principal. On the other hand, the appellant's position is more likely to result in uncertainty. Thus, there is more than one way in which one can identify the possible exceptions to the normal rule, which results in a bribe or commission being excluded from the Rule – see the differences between Professor Goode and Professor Worthington described in paras 10 and 32 above, and the other variations there described. Clarity and simplicity are highly desirable qualities in the law. Subtle distinctions are sometimes inevitable, but in the present case, as mentioned above, there is no plainly right answer, and, accordingly, in the absence of any other good reason, it would seem right to opt for the simple answer.

36. A further advantage of the respondents' position is that it aligns the circumstances in which an agent is obliged to account for any benefit received in breach of his fiduciary duty and those in which his principal can claim the beneficial ownership of the benefit. Sir George Jessel MR in *Pearson's Case* at p 341 referred in a passage cited above to the agent in such a case having "to account either for the value … or … for the thing itself …". The expression equitable accounting can encompass both proprietary and non-proprietary claims. However, if equity considers that in all cases where an agent acquires a benefit in breach of his fiduciary duty to his principal, he must account for that benefit to his principal, it could be said to be somewhat inconsistent for equity also to hold that only in some such cases could the principal claim the benefit as his own property. The observation of Lord Russell in *Regal (Hastings)* quoted in para 6 above, and those of Jonathan Parker LJ in *Bhullar* quoted in para 14 above would seem to apply equally to the question of whether a principal should have a proprietary interest in a bribe or secret commission as to the question of whether he should be entitled to an account in respect thereof.

37. The notion that the Rule should not apply to a bribe or secret commission received by an agent because it could not have been received by, or on behalf of, the principal seems unattractive. The whole reason that the agent should not have accepted the bribe or commission is that it puts him in conflict with his duty to his principal. Further, in terms of elementary economics, there must be a strong possibility that the bribe has disadvantaged the principal. Take the facts of this case: if the vendor was prepared to sell for €211.5m, on the basis that it was paying a secret commission of €10m, it must be quite likely that, in the absence of such commission, the vendor would have been prepared to sell for less than €211.5m, possibly €201.5m. While Simon J was not prepared to make such an assumption without further evidence, it accords with common sense that it should often, even normally, be correct; indeed, in some cases, it has been assumed by judges that the price payable for the transaction in which the agent was acting was influenced pro rata to account for the bribe – see eg *Fawcett* at p 136.

38. The artificiality and difficulties to which the appellant's case can give rise may be well illustrated by reference to the facts in *Eden* and in *Whaley Bridge*. In *Eden*, the promoter gave 200 shares to a director of the company when there were outstanding issues between the promoter and the company. The Court of Appeal held that the director held the shares on trust for the company. As Finn J said in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 287 ALR 22, para 570, the effect of that decision, if *Heiron* and *Lister* were rightly decided, would appear to be that where a bribe is paid to an agent, the principal has a proprietary interest in the bribe if it consists of shares but not if it consists of money, which would be a serious anomaly.

39. In *Whaley Bridge*, a director of a company who negotiated a purchase by the company for £20,000 of a property was promised but did not receive £3,000 out of

the £20,000 from the vendor. The outcome according to Bowen J was that the vendor was liable to the company for the £3,000, because the company was entitled to treat the contract between the vendor and the director as made by the director on behalf of the company. Bowen J held that it "could not be successfully denied" that if the £3,000 had been paid to the director he would have held it on trust for the company. Mr Collings suggested that the decision was correct because, unlike in this case, the director and vendor had agreed that the £3,000 would come out of the £20,000 paid by the company. Not only is there no trace of such reasoning in Bowen J's judgment, but it would be artificial, impractical and absurd if the issue whether a principal had a proprietary interest in a bribe to his agent depended on the mechanism agreed between the briber and the agent for payment of the bribe.

40. The notion that an agent should not hold a bribe or commission on trust because he could not have acquired it on behalf of his principal is somewhat inconsistent with the long-standing decision in *Keech*, the decision in *Phipps* approved by the House of Lords, and the Privy Council decision in *Bowes*. In each of those three cases, a person acquired property as a result of his fiduciary or quasi-fiduciary position, in circumstances in which the principal could not have acquired it: yet the court held that the property concerned was held on trust for the beneficiary. In *Keech*, the beneficiary could not acquire the new lease because the landlord was not prepared to let to him, and because he was an infant; in *Boardman*, the trust could not acquire the shares because they were not authorised investments; in *Bowes*, the city corporation would scarcely have been interested in buying the loan notes which it had just issued to raise money.

41. The respondents are also able to point to a paradox if the appellant is right and a principal has no proprietary right to his agent's bribe or secret commission. If the principal has a proprietary right, then he is better off, and the agent is worse off, than if the principal merely has a claim for equitable compensation. It would be curious, as Mr Collings frankly conceded, if a principal whose agent wrongly receives a bribe or secret commission is worse off than a principal whose agent obtains a benefit in far less opprobrious circumstances, eg the benefit obtained by the trustees' agents in *Boardman*. Yet that is the effect if the Rule does not apply to bribes or secret commissions.

42. Wider policy considerations also support the respondents' case that bribes and secret commissions received by an agent should be treated as the property of his principal, rather than merely giving rise to a claim for equitable compensation. As Lord Templeman said giving the decision of the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, 330H, "[b]ribery is an evil practice which threatens the foundations of any civilised society". Secret commissions are also objectionable as they inevitably tend to undermine trust in the commercial world. That has always been true, but concern about bribery and corruption generally has never been greater than it is now – see for instance, internationally, the OECD

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1999 and the United Nations Convention against Corruption 2003, and, nationally, the Bribery Acts 2010 and 2012. Accordingly, one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission.

43. On the other hand, a point frequently emphasised by those who seek to justify restricting the ambit of the Rule is that the wide application for which the respondents contend will tend to prejudice the agent's unsecured creditors, as it will serve to reduce the estate of the agent if he becomes insolvent. This was seen as a good reason in *Sinclair* for not following *Reid* – see at [2012] Ch 453, para 83. While the point has considerable force in some contexts, it appears to us to have limited force in the context of a bribe or secret commission. In the first place, the proceeds of a bribe or secret commission consists of property which should not be in the agent's estate at all, as Lawrence Collins J pointed out in *Daraydan*, para 78 (although it is fair to add that insolvent estates not infrequently include assets which would not be there if the insolvent had honoured his obligations). Secondly, as discussed in para 37 above, at any rate in many cases, the bribe or commission will very often have reduced the benefit from the relevant transaction which the principal will have obtained, and therefore can fairly be said to be his property.

44. Nonetheless, the appellant's argument based on potential prejudice to the agent's unsecured creditors has some force, but it is, as we see it, balanced by the fact that it appears to be just that a principal whose agent has obtained a bribe or secret commission should be able to trace the proceeds of the bribe or commission into other assets and to follow them into the hands of knowing recipients (as in *Reid*). Yet, as Mr Collings rightly accepts, tracing or following in equity would not be possible, at least as the law is currently understood, unless the person seeking to trace or follow can claim a proprietary interest. Common law tracing is, of course, possible without a proprietary interest, but it is much more limited than equitable tracing. Lindley LJ in *Lister* at p 15 appears to have found it offensive that a principal should be entitled to trace a bribe, but he did not explain why, and we prefer the reaction of Lord Templeman in *Reid*, namely that a principal ought to have the right to trace and to follow a bribe or secret commission.

45. Finally, on this aspect, it appears that other common law jurisdictions have adopted the view that the Rule applies to all benefits which are obtained by a fiduciary in breach of his duties. In the High Court of Australia, Deane J said in *Chan v Zacharia* (1984) 154 CLR 178, 199 that any benefit obtained "in circumstances where a conflict …. existed … or … by reason of his fiduciary position or of opportunity or knowledge resulting from it … is held by the fiduciary as constructive trustee". More recently, the Full Federal Court of Australia has decided not to follow *Sinclair*: see *Grimaldi*, where the decision in *Reid* was preferred – see the discussion at paras 569-584. Although the Australian courts

recognise the remedial constructive trust, that was only one of the reasons for not following *Sinclair*. As Finn J who gave the judgment of the court said at para 582 (after describing *Heiron* and *Lister* as "imposing an anomalous limitation … on the reach of *Keech v Sandford*" at para 569), "Australian law" in this connection "matches that of New Zealand …, Singapore, United States jurisdictions … and Canada". As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.

Conclusions

46. The considerations of practicality and principle discussed in paras 33-44 above appear to support the respondents' case, namely that a bribe or secret commission accepted by an agent is held on trust for his principal. The position is perhaps rather less clear when one examines the decided cases, whose effect we have summarised in paras 13-28 above. However, to put it at its lowest, the authorities do not preclude us adopting the respondents' case in that they do not represent a clear and consistent line of authority to the contrary effect. Indeed, we consider that, taken as a whole, the authorities favour the respondents' case.

47. First, if one concentrates on the issue of bribes or secret commissions paid to an agent or other fiduciary, the cases, with the exception of *Tyrrell*, were consistently in favour of such payments being held on trust for the principal or other beneficiary until the decision in *Heiron* which was then followed in *Lister*. Those two decisions are problematical for a number of reasons. First, relevant authority was not cited. None of the earlier cases referred to in paras 13, 14 or 16 above were put before the court in *Heiron* (where the argument seems to have been on a very different basis) or in *Lister*. Secondly, all the judges in those two cases had given earlier judgments which were inconsistent with their reasoning in the later ones. Brett LJ (who sat in *Heiron*) had been party to the decision in *McKay's* and *Carling's Cases*; Cotton LJ (who sat in *Heiron* and *Lister*) had been party to *Bagnall* (which was arguably indistinguishable), James LJ (who sat in *Heiron*) was party to *Pearson's* and *McKay's Cases*, as well as *Bagnall*; Lindley LJ (who sat in *Lister*) had been party to *Eden*; and Bowen LJ (who sat in *Lister*) had decided *Whaley Bridge*. Thirdly, the notion, adopted by Cotton and Brett LJJ that a trust might arise once the court had given judgment for the equitable claim seems to be based on some sort of remedial constructive trust which is a concept not referred to in earlier cases, and which has authoritatively been said not to be part of English law – see per Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 714-716. Fourthly, the decisions in *Heiron* and *Lister* are difficult to reconcile with many cases not concerned with bribes or secret commissions paid to agents, such as those set out in paras 12, 13 and 15 above. If the reasoning in

Heiron and *Lister* is correct, then either those other cases were wrongly decided or the law is close to incoherent in this area.

48. As for the domestic cases subsequent to *Lister*, they are all explicable on the basis that it was either conceded or decided that the reasoning in the Court of Appeal in *Lister* was binding. Further, even after *Lister*, cases were being decided in which it seems to have been accepted or decided by Chancery Judges that where an agent or other fiduciary had a duty to account for a benefit obtained in breach of his fiduciary duty, the principal was entitled to a proprietary interest in the benefit – examples include Wilberforce J in *Phipps*, Lord Templeman in *Reid*, and Lawrence Collins J in *Daraydan Holdings Ltd*.

49. Were it not for the decision in *Tyrrell*, we consider that it would be plainly appropriate for this Court to conclude that the courts took a wrong turn in *Heiron* and *Lister*, and to restate the law as being as the respondents contend. Although the fact that the House of Lords decided *Tyrrell* in the way they did gives us pause for thought, we consider that it would be right to uphold the respondents' argument and disapprove the decision in *Tyrrell*. In the first place, *Tyrrell* is inconsistent with a wealth of cases decided before and after it was decided. Secondly, although *Fawcett* was cited in argument at p 38, it was not considered in any of the three opinions in *Tyrrell*; indeed, no previous decision was referred to in the opinions, and, although the opinions were expressed with a confidence familiar to those who read 19th century judgments, they contained no reasoning, merely assertion. Thirdly, the decision in *Tyrrell* may be explicable by reference to the fact that the solicitor was not actually acting for the client at the time when he acquired his interest in the adjoining land – hence the reference in Lord Westbury's opinion to "the limit of the agency" and the absence of "privity [or] obligation" as mentioned in para 24 above. In other words, it may be that their Lordships thought that the principal should not have a proprietary interest in circumstances where the benefit received by the agent was obtained before the agency began and did not relate to the property the subject of the agency.

50. Quite apart from these three points, we consider that, the many decisions and the practical and policy considerations which favour the wider application of the Rule and are discussed above justify our disapproving *Tyrrell*. In our judgment, therefore, the decision in *Tyrrell* should not stand in the way of the conclusion that the law took a wrong turn in *Heiron* and *Lister*, and that those decisions, and any subsequent decisions (*Powell & Thomas, Attorney-General's Reference (No 1 of 1985)* and *Sinclair*), at least in so far as they relied on or followed *Heiron* and *Lister*, should be treated as overruled.

51. In this case, the Court of Appeal rightly regarded themselves as bound by *Sinclair*, but they managed to distinguish it. Accordingly, the appeal is dismissed.

Trinity Term
[2017] UKPC 19
Privy Council Appeal No 0092 of 2016

JUDGMENT

Pearson (Appellant) *v* Primeo Fund (Respondent) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

6 July 2017

Heard on 24 and 25 May 2017

Appellant
Lord Goldsmith QC
Francis Tregear QC
(Instructed by Debevoise & Plimpton LLP)

Respondent
Tom Smith QC

(Instructed by Enyo Law LLP)

Ist Intervener
Lawrence Rabinowitz QC
Maximilian Schlote
(Instructed by Proskauer Rose (UK) LLP)

2nd Intervener
Stephen Atherton QC
Jonathan Allcock
(Instructed by Stephenson Harwood LLP)

Appellant
Michael Pearson (additional liquidator of Herald Fund SPC) (in official liquidation)

Respondent
Primeo Fund (in official liquidation)

Interveners
(1) Reichmuth & Co (the Late Redeemer)
(2) Natixis SA (the Later Redeemer)

LORD MANCE:

Introduction

1. The path to redemption is not always smooth. Herald Fund SPC ("Herald") issued quantities of participating non-voting shares, redeemable on terms set out in its articles, and placed the funds so raised with Bernard L Madoff Investment Securities LLC ("BLMIS"). On 11 December 2008, Mr Bernard Madoff confessed that BLMIS was a giant Ponzi scheme. At 5.00 pm (Luxembourg time) on 12 December 2008, Herald suspended the calculation of its NAV and, *inter alia*, all further payments to those who had invested in its redeemable shares. On 16 July 2013, the Grand Court made a winding up Order in respect of Herald pursuant to a petition presented on 14 February 2013 by the respondent, Primeo Fund (in official liquidation) ("Primeo"), with the consequence that Herald's liquidation was deemed to commence on 14 February 2013. On 8 January 2015, Herald received some USD259m by way of a first realisation of sums payable under a settlement with the Trustee for the liquidation estate of BLMIS ("Trustee"). Herald subsequently received further substantive distributions from the Trustee of several hundred million USD. These amounts and any future realisations would be sufficient to pay in full the sums claimed by the December Redeemers and the KYC Redeemers (defined below) - but would fall short of the total sums claimed in the liquidation by investors in Herald's redeemable shares.

2. In these circumstances, various interests are represented before the Board:

i) Herald, represented by its additional liquidator, advances the case that all investors who were unpaid at 5.00 pm on 12 December 2008 (and so, by reason of the suspension, also unpaid at the commencement of the liquidation on 14 February 2013) rank as ordinary members.

ii) Primeo represents investors who, under Herald's articles, either gave the necessary 35 days' notice, or had such notice period waived by Herald's directors, and had their shares redeemed either on 1 December 2008 ("the December Redeemers") or at some earlier redemption date ("the KYC Redeemers"), but were not paid the redemption proceeds before Herald suspended further payments. The KYC ("Know Your Client") Redeemers were redeemers who were owed the redemption proceeds, but to whom no payment was made, because Herald was awaiting proof of entitlement. No distinction has been drawn by any parties between the positions for present purposes of the December and KYC Redeemers. Primeo's primary case is that they are all the beneficiaries of simple debts owed by Herald and so rank as (although

immediately below other) ordinary creditors. The bracketed qualification is agreed to arise under section 49(g) of the Companies Law, because the debt owed to the December and KYC Redeemers by Herald originated in a shareholding interest as members. Alternatively, if contrary to its primary case, section 37(7) of the Companies Law has any relevance to the December and KYC Redeemers, Primeo submits that they satisfy the pre-conditions for the priority provided by that subsection.

iii) Reichmuth & Co appears, by leave of the Board, as first intervener representing the interests of investors ("the Late Redeemers") who, prior to 5.00 pm on 12 December 2008, gave notice under the articles of at least 35 days to redeem on a subsequent date (being, in Reichmuth's case, 2 February 2009). Reichmuth relies on section 37(7) of the Companies Law to give them a priority at least equivalent, if not superior, to any enjoyed by Primeo by virtue of its primary case.

iv) Natixis SA appears as second intervener representing the interests of investors ("the Later Redeemers"), who made requests to redeem after 5.00 pm on 12 December 2008. It joins with the additional liquidator for Herald in submitting that neither Primeo nor, at any rate, Reichmuth enjoys any special priority, and that both rank alongside Natixis as ordinary members.

3. The appeal is by Herald's additional liquidator, Mr Michael Pearson, against a judgment given on 12 June 2015 by Jones J in favour of Primeo. Reichmuth and Natixis did not intervene, and their interests were not separately represented, below. Jones J and the Court of Appeal both accepted Primeo's primary case, holding that Primeo's shareholding had been redeemed, for the purposes of the Companies Law as well as Herald's articles, on 1 December 2008, and that the fact that payment remained suspended and outstanding until the commencement of the winding up on 14 February 2013 was irrelevant. In the light of the interventions, the issues before the Board, outlined above, now also embrace the positions of those whose redemptions under the articles were not completed before the suspension took effect on 5.00 pm on 12 December 2008, either because (as in the case of those represented by Reichmuth) they only gave notices for a redemption date falling after that time or because (as in the case of those represented by Natixis) they only made requests for redemption after that time.

The Companies Law

4. The Companies Law (2007 revision) contained provisions permitting companies to issue redeemable shares as follows:

"Redemption and purchase of shares

37.(1) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder.

(2) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, purchase its own shares, including any redeemable shares.

(3)(a) No share may be redeemed or purchased unless it is fully paid.

(b) A company may not redeem or purchase any of its shares if, as a result of the redemption or purchase, there would no longer be any issued shares of the company other than shares held as treasury shares.

(c) Redemption or purchase of shares may be effected in such manner and upon such terms as may be authorised by or pursuant to the company's articles of association.

(d) If the articles of association do not authorise the manner and terms of the purchase, a company shall not purchase any of its own shares unless the manner and terms of purchase have first been authorised by a resolution of the company.

(e) The premium, if any, payable on redemption or purchase must have been provided for out of the profits of the company or out of the company's share premium account, before or at the time the shares are redeemed or purchased or in the manner provided for in subsection (5).

(f) Shares may only be redeemed or purchased out of profits of the company, out of the share premium account or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or purchase or in the manner provided for in subsection (5).

(g) Shares redeemed or purchased under this section shall be treated as cancelled on redemption or purchase, and the amount of the company's issued share capital shall be diminished by the nominal value of those shares accordingly; but the redemption or purchase of shares by a company is not to be taken as reducing the amount of the company's authorised share capital.

(h) Without prejudice to paragraph (g), where a company is about to redeem or purchase shares, it has power to issue shares up to the nominal value of the shares to be redeemed or purchased as if those shares had never been issued:

Provided that where new shares are issued before the redemption or purchase of the old shares the new shares shall not, so far as relates to fees payable on or accompanying the filing of any return or list, be deemed to have been issued in pursuance of this subsection if the old shares are redeemed or purchased within one month after the issue of the new shares.

(4)(a) Where, under this section, shares of a company are redeemed or purchased wholly out of either or both of the company's profits or share premium account, the amount by which the company's issued share capital is diminished in accordance with paragraph (g) of subsection (3) on cancellation of the shares redeemed or purchased shall be transferred to a reserve called the "capital redemption reserve" and the share premium account or company's profits, as the case may be, shall be adjusted accordingly.

…

(5)(a) Subject to this section, a company limited by shares … may, if so authorised by its articles of association, make a payment in respect of the redemption or purchase of its own shares otherwise than out of its profits or the proceeds of a fresh issue of shares.

…

(6)(a) A payment out of capital by a company for the redemption or purchase of its own shares is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business.

…

(7)(a) Where a company is being wound up and, at the commencement of the winding up, any of its shares which are or are liable to be redeemed have not been redeemed or which the company has agreed to purchase have not been purchased, the terms of redemption or purchase may be enforced against the company, and when shares are redeemed or purchased under this subsection they shall be treated as cancelled:

Provided that this paragraph shall not apply if -

(i) the terms of redemption or purchase provided for the redemption or purchase to take place at a date later than the date of the commencement of the winding up; or

(ii) during the period beginning with the date on which the redemption or purchase was to have taken place and ending with the commencement of the winding up the company could not, at any time, have lawfully made a distribution equal in value to the price at which the shares were to have been redeemed or purchased.

(b) There shall be paid in priority to any amount which the company is liable by virtue of paragraph (a) to pay in respect of any shares -

(i) all other debts and liabilities of the company (other than any due to members in their character as such); and

(ii) if other shares carry rights whether as to capital or as to income which are preferred to the rights as to capital attaching to the first mentioned shares, any amount due in satisfaction of those preferred rights,

but subject to that, any such amount shall be paid in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members.

…

Definition of member

38. The subscribers of the memorandum of association of any company shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned, and every other person who has agreed to become a member of a company and whose name is entered on the register of members, shall be deemed to be a member of the company.

…

Liability of present and past members of company

49. In the event of a company being wound up every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding up and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves:

Provided that -

(a) a past member shall not be liable to contribute to the assets of the company if he has ceased to be a member for

a period of one year or upwards prior to the commencement of the winding up;

(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member;

(c) a past member shall not be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them under this Law;

(d) in case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member except where such member or past member holds or held shares of a class which are expressly stated in the memorandum of association to carry unlimited liability, as provided in section 8(2);

(e) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association, except where the amount of the undertaking of such member is unlimited, as provided in section 9(2);

(f) nothing in this Law shall invalidate any provisions contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract; and

(g) no sum due to any member of a company in his character of a member by way of dividends, profits or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for

the purposes of the final adjustment of the rights of the contributions amongst themselves.

…

Avoidance of share transfers

125. Any transfer of shares, not being a transfer with the sanction of the liquidator, and any alteration in the status of the company's members made after the commencement of a voluntary winding up is void.

Provable debts

139.(1) All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.

…

Distribution of the company's property

140.(1) Subject to subsection (2), the property of the company shall be applied in satisfaction of its liabilities pari passu and subject thereto shall be distributed amongst the members according to their rights and interests in the company."

5. Herald's articles dated 24 March 2004 provided as follows:

"INTERPRETATION

… (24) 'Offering Memorandum' means any offering memorandum relating to the issue of Participating Non-voting Shares.

…

(29) 'Redemption Day' means such day or days as may be specified by the Directors from time to time, either generally or in relation to a Separate Class.

…

(49) 'Valuation Point' means such time or times as may be specified by the Directors from time to time, either generally or in relation to a Separate Class.

DETERMINATION OF NET ASSET VALUE

18. The Net Asset Value of each Separate-Class shall be determined by the Directors, except when determination of prices (relevant to such Separate Class) has been suspended under the provisions of article 19, separately by reference to the Segregated Portfolio designated by reference to that Separate Class and to each such determination the following provisions shall apply:

…

(h) for the purpose of this article 18 and paragraph (2) of article 20:

…

(ii) Participating Non-Voting Shares to be redeemed under article 20 shall be deemed to be outstanding until and including the Valuation Point as at which the Net Asset Value per Share is determined and after that time until paid the price thereof shall be deemed to be liabilities of the Company.

SUSPENSION OF DETERMINATION OF NET ASSET VALUE PER PARTICIPATING NON-VOTING SHARE

19. The Directors may declare a temporary suspension of the determination of the prices of Participating Non-Voting Shares of any Separate Class and may do so in the circumstances set out in the relevant Offering Memorandum. ... Whenever the Directors shall declare a suspension of the determination of the prices of Participating Non-Voting Shares under the provisions of this article 19, then as soon as may be practicable after any such declaration the Directors shall cause a notice to be given to the holders of the Participating Non-Voting Shares tendering their Shares for redemption stating that such declaration has been made, and at the end of any period of suspension the Directors shall cause another notice to be given to the same stating that the period of suspension has ended. …

REDEMPTION OF PARTICIPATING NON-VOTING SHARES

20(1) Subject to the provisions of the Statute and as hereinafter provided and except as otherwise agreed or determined by the Directors, the Company shall on receipt … of a written request or requests from a Shareholder for the redemption of all or any Participating Non-Voting Shares held by him accompanied by the share certificate or share certificates, if any, to which such request relates … redeem or repurchase such Participating Non-Voting Shares for an amount equal to Net Asset Value per Participating Non-Voting Share of the relevant Separate Class as may be determined in accordance with articles 14, 15 and 18 …

(2) Subject to the following provisions of this article 20 and unless otherwise agreed by the Directors the redemption or purchase of Participating Non-Voting Shares pursuant hereto shall take effect at the Net Asset Value per Share of the relevant Separate Class as may be determined calculated as at the relevant Valuation Point relating to that Redemption Day less any applicable Redemption Fee bank charges and other duties and charges referable to the redemption as the Directors determine appropriate provided such request (or requests) is received by such time as the Directors may determine) *[sic]* and the redemption or repurchase shall take effect on such Redemption Day. The time by which redemption requests must be received may be subject to such qualifications and contingencies as the Directors may

determine (including, without limitation qualifications or contingencies based on the size or proportion of a holding of shares of a Separate Class or Separate Classes redeemed). The Directors may apply a redemption fee on a 'first in first out' basis.

(3) Subject as in this article 20 provided, the Shareholder shall not be entitled to withdraw his request unless the Directors otherwise determine.

(4) If the determination of Net Asset Value per Share of the relevant Separate Class is suspended beyond the day on which it would normally occur by reason of a declaration of the suspension. of prices pursuant to article 19, the right of the Shareholder to have his Participating Non-Voting Shares redeemed or purchased pursuant to this article 20 shall be similarly suspended and during the period of suspension he may withdraw his request for redemption. Any withdrawal under the provisions of this paragraph shall be made in writing and shall only be effective if actually received by the Company during the period of suspension. If the request is not so withdrawn, the redemption or purchase of the shares shall be made at the Net Asset Value per Share of the relevant Separate Class as may be calculated at the. next relevant Valuation Point next following the end of the suspension less any applicable Redemption Fee bank charges and other duties and charges referable to the redemption as the Directors determine appropriate. In addition, the Directors shall have power to declare additional Valuation Points and Redemption Days for any reason, including without limitation in order to redeem shares the redemption of which has been deferred aforesaid.

…

22.(1) Any amount payable to the Shareholders in connection with the redemption or purchase of Shares pursuant to article 20 or 21 shall be paid in the currency of denomination of the relevant Separate Class which shall, at the risk of the Shareholder, as soon as reasonably practicable after the later of [sic] the date as at which the redemption or purchase takes effect, be cabled or telexed to a bank at the Shareholder's request and expense or otherwise as directed by the Shareholder and as may be agreed by the Directors. The Directors may make payments of redemption proceeds in connection with redemptions based on estimated Net Asset Value per Share calculations in circumstances where the value of any

> investment of the Company is not available on a timely basis pursuant to provisions of the relevant Offering Memorandum. In all cases, the Directors may suspend the payment of redemption proceeds in circumstances where the valuation of the net assets of the Company or of a Separate Class has been suspended pursuant to article 19.
>
> …
>
> 23. Upon the redemption of a Participating Non-Voting Share being effected the Shareholder shall cease to be entitled to any rights in respect thereof (excepting always the right to receive a dividend which has been declared in respect thereof prior to such redemption being effected) and accordingly his name shall be removed from the Register of Shareholders with respect thereto and the Share so redeemed shall be available for re-issue and until re-issue shall form part of the unissued capital of the Company."

6. Herald's Offering Memorandum in respect of the redeemable shares provided inter alia

> "DEFINITIONS
>
> 'Redemption Day' means the first Business Day of each month, or such other Business Day as the Directors may from time to time determine and notify to Shareholders. …
>
> 'Valuation Point' means the last Business Day in each month, or such other Business Day as the Directors may from time to time determine and notify to Shareholders.
>
> …
>
> Redemptions and Redemption Price
>
> Shareholders may request that Shares be redeemed on and with effect from any Redemption Day subject to the provisions relating to suspension of dealings referred to under 'Temporary Suspension of Dealings' below. The Shares shall be redeemed on a particular Redemption Day at the Net Asset Value per Share of the relevant

> class as at the Valuation Point immediately preceding the Redemption Day on which the redemption is effected as calculated in accordance with the Articles of Association …
>
> Requests for redemptions should be made on the Redemption Request Form … which must be sent so as to arrive at the Administrator's office by post or by facsimile (with original to follow immediately be post) no later than 5.00 pm (Luxembourg time) 35 calendar days prior to the relevant Redemption Day … or such later time as the Directors may from time to time permit. …
>
> Payment of Redemption Proceeds
>
> … Full payment shall be made generally within 20 Business Days of the relevant Redemption Day. …
>
> Temporary Suspension of Dealings
>
> The Fund may temporarily suspend the determination of the Net Asset Value the issue and redemption of Shares and delay the payment of redemption proceeds for Shares already redeemed during the whole or any part of any period:
>
> > (a) when any of the principal markets on which any significant portion of the investments from time to time are quoted, listed, traded or dealt in is closed … or during which dealings therein are restricted or suspended …"

Primeo

7. The key issue is whether the December and KYC Redeemers represented by Primeo fall within section 37(7) of the Companies Law. It is common ground that their shares were, under the terms of Herald's articles, redeemed either before or on 1 December 2008, notwithstanding that payment was deferred until a date "as soon as reasonably practicable" thereafter, explained in the Offering Memorandum as meaning "generally within 20 Business Days of the relevant Redemption Date" (ie by 29 December 2008). It is also common ground that the reference in section 37(7) to "any of its shares which are or are liable to be redeemed" is a shorthand reference back to the words in section 37(1) to "shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder". Section 37(7) expressly addresses

shares which "have not been redeemed" or "shares … which the company has agreed to purchase" but which "have not been purchased". In these circumstances, Primeo submits, and the courts below have accepted, that section 37(7) has no application, because the December and KYC Redeemer's shares had on or by 1 December 2008, and in any event prior to any suspension, actually been redeemed; the mere fact that payment of their proceeds was, under the articles, postponed for a short period or pending confirmation of identity was irrelevant.

8. At the core of the case advanced for Herald by Lord Goldsmith QC is the proposition that "redemption" in section 37 of the Companies Law bears a different meaning from its meaning in Herald's articles. It must be understood as embracing a whole process including payment of the proceeds, and this understanding must for present purposes prevail. On that basis, Lord Goldsmith submits that Proviso (i) in section 37(7)(a) applies; suspension affected the terms of redemption, so as to postpone payment of the proceeds until, ultimately, a date later than the date of the commencement of the winding up; and the December and KYC Redeemers were not therefore entitled to the priority contemplated by section 37(7)(b) and must be seen as falling back into the status of an ordinary member within the concluding words of section 140(1).

9. The validity of Herald's suspension of payment of the proceeds of redemption is accepted on all sides. The suspension was valid under the last sentence of article 22(1) and the provision in the Offering Memorandum titled "Temporary Suspension of Dealings", even though the shares had, under the terms of the articles, been redeemed. The case in this respect contrasts with *Culross Global Spc Ltd v Strategic Turnaround Master Partnership Ltd* [2010] UKPC 33, where the Board held that, under the particular articles there in issue, no power of suspension of payment of the proceeds of a redemption existed after redemption had occurred under the articles.

10. In response to Herald's case, Mr Tom Smith QC for Primeo submits that, if (contrary to their primary case) the December or KYC Redeemers fall within the opening part of section 37(7)(a), they escape the application of Proviso (i), because, pursuant to their notices to redeem, their terms of redemption provided for redemption to take place on 1 December 2008 and the suspension directed by Herald with effect from 5.00 pm on 12 December 2008 cannot be regarded as having affected those terms. In this submission, Primeo is, as will appear, joined by Reichmuth.

11. In support of his submissions relating to the significance of payment in the statutory context, Lord Goldsmith is able to rely on numerous references in section 37 to the payment to be made for redemption or purchase and to the profits, premium account, proceeds of a fresh issue or capital out of which redemption or purchase can permissibly be made: see eg section 37(3)(e) and (f), (4)(a), (b) and (c), (5)(f) and (6), as well section 37(7)(a) proviso (ii). Further, as he submits, there is nothing in section

37 which expressly addresses a situation in which the actual payment by a company of the redemption value, or the price of shares purchased, is postponed, for a short period. It is common ground however that such postponement is permissible under Cayman Islands law.

12. It is in this connection instructive to look back at provisions which appeared as sections 45 and 59 of the English Companies Act 1981, on which section 37 appears, loosely, to have been based. Section 37 was introduced into Cayman Islands law by the Companies (Amendment) Bill 1987, with the explanation, given both in the Bill's "memorandum of objects and reasons" and orally by the First Official Minister for Finance and Development, that section 37 "follows the recent changes in the United Kingdom's companies legislation". Sections 45 and 59 in the English Act appeared separately under the respective headings of "Power of company to issue redeemable shares" (section 45) and (after various intermediate sections) "Miscellaneous and supplemental - Effect of company's failure to redeem or purchase own shares" (section 59). Section 45(4) stated that "The terms of redemption must provide for payment on redemption". It is not, in these circumstances, surprising that section 37 of the Cayman Islands Companies Law does not focus directly on the possibility of delay in payment of the proceeds of redemption. But it is, as stated, common ground that, in contrast to the original English legislation, section 37 permits such a delay; and it does not follow from the English or the Cayman Islands statutory language that payment is by itself an inherent element of redemption.

13. In the Board's opinion, payment is, as a matter of general principle, clearly not an inherent element of the redemption or purchase by the company of its own shares. The provision in the articles for its deferral for a short time was, no doubt, a convenience to the company. The essence of redemption is, however, the surrender of the status of shareholder, with all attendant rights, just as the essence of purchase is the transfer of property. If this occurs, the deferral of payment of the price is no more than a grant of a short period of credit to the company, without any reservation of property or interest.

14. That redemption occurs on surrender of the status of shareholder, rather than on payment, is what the articles explicitly provide by articles 18(h)(ii) and 23. Article 18(h)(ii) makes clear that shares to be redeemed under article 20 continue outstanding up to and including the date of the Valuation Point, and redemption takes place, normally, on the day immediately after the date taken for the Valuation Point.

15. The Board is unable to accept Lord Goldsmith's general proposition that redemption has an autonomous statutory meaning that prevails over any definition found in or meaning to be derived from the articles. The essence of redemption or purchase being the moment when the prior shareholding interest is extinguished or acquired by the company, that is necessarily a moment which can be defined and shaped by the articles, which constitute the relevant agreement between all the members and

the company. There is no reason to treat the Companies Law as containing prescriptive provisions in this regard, which do not appear in its text. On the contrary, section 37(3)(c) provides that "Redemption or purchase of shares may be effected in such manner and upon such terms as may be authorised by or pursuant to the company's articles of association". That is a clear indication of the freedom that shareholders and a company have to shape their relationship as regards redemption or purchase of the company's shares.

16. Reference was made in the courts below to the Board's previous judgment in *Culross Global Spc Ltd v Strategic Turnaround Master Partnership Ltd* [2010] UKPC 33. Lord Goldsmith correctly points out that the issue there before the Board was different. The question was whether, under the particular articles, a power to suspend payment extended after redemption. The Board was concerned solely with the meaning of redemption under the articles. The Board did however, underline the general freedom which company law affords to shareholders and a company to frame their relationship inter se as they may think appropriate, noting:

> "16. … The existence and extent of any power to suspend the payment of redemption proceeds after the Redemption Date is a subject upon which the members were at liberty to make 'any contract inter se which they pleased', as the Earl of Selborne LC said in *Walton v Edge* (1884) 10 App Cas 33, 35 with regard to an issue regarding the effect of a provision allowing a member of a building society 'to withdraw (provided the funds permit) … by giving' either seven days' or one month's notice according to the amount. The discussion of the concept of redemption in the Australian case of *In re HIH Insurance Ltd (in liquidation)* [2008] FAC 623 … took place in a very different context to the present, and cannot obviate the need for a detailed examination of the … articles and documentation to answer the present issue. The issue is not to be approached on the basis of any a priori view that, until payment of the redemption proceeds, a shareholder must or should necessarily remain a member of a company which is (as the respondent was) due to make such payment upon or after a certain redemption date …"

This underlines the improbability that the Companies Law should have intended to impose, even in the context of winding up, a completely different meaning of redemption, without saying so.

17. Lord Goldsmith also argued strongly that, unless section 37 had the effect for which Herald contends, it could have no real application at all. In particular, the terms of redemption or purchase could never provide "for the redemption or purchase to take

place at a date later than the date of the commencement of the winding up" unless what was envisaged was that they postponed payment of the redemption value or purchase price until after the date of such commencement. The Board does not accept this. Section 37(7) envisages situations in which shares are to be redeemed or are liable to be redeemed at the commencement of the winding up, but the terms of redemption or purchase may remain enforceable. Such a situation would exist if the shares had a fixed redemption date, or if notice to redeem had validly been given for a date, prior to the commencement of the winding up, but the company had for any reason wrongly failed to take steps necessary to enable redemption at that date. This would be the case if, for example, redemption was, under the articles, only to take place against payment by the company of the proceeds (in a manner similar to that formerly contemplated by the English Companies Acts 1981, section 45(4) and 1985, section 159(1)). It is also possible to contemplate formalities that a company might be obliged, and might fail, to take in order to complete redemption. It is instructive that the title to section 59 of the English Companies Act 1981 indicated that it was addressing the "effect of company's failure to redeem or purchase its own shares", ie pursuant to terms of redemption or purchase which obliged the company to effect the redemption or purchase at a date prior to the commencement of the winding up.

18. Section 37(7) is thus addressing situations in which redemption or purchase ought to have been, but was not, effected by the company before the commencement of the winding up, and allows the relevant shareholder to enforce the terms of redemption or purchase notwithstanding the winding up. In this respect, it is elevating the shareholder to a priority it would not otherwise enjoy. The debts and liabilities of a company fall, as a matter of general principle, to be ascertained as at the date of its winding up - "the tree must lie as it falls": see eg *In re Dynamics Corp of America* [1976] 1 WLR 757, 762G-H, per Oliver J, quoting *In re Humber Ironworks and Shipbuilding Co* (1869) LR 4 Ch App 643, 646, per Selwyn LJ.

19. In these circumstances, section 59(2) of the English Companies Act 1981 expressly excluded any liability in damages on the part of the company for failure on its part to redeem or purchase any shares. It replaced it with the right of a shareholder to enforce the terms of any such redemption or purchase, which is substantially reproduced in section 37(7) of the Cayman Islands Companies Law. It is perhaps an oddity that the Cayman Islands Companies Law does not expressly address the question whether any right to damages could subsist. But both section 59 of the English legislation and section 37(7) of the Cayman Islands Companies Law were on any view designed to elevate the status of a shareholder where redemption or purchase had not taken place at the commencement of the winding up. In so doing, section 37(7) qualified the strictness of section 125 of the Cayman Islands Companies Law. Neither was designed to lower or reverse the status of a shareholder who had by a redemption or sale already become a creditor. Indeed, it is difficult to see any basis in the Companies Law or in Herald's articles whereby such a redemption or sale could be regarded as reversed, or a former shareholder reconverted to the status of shareholder. Articles 18(h)(ii) and 23 are in particular categoric.

20. The Board notes, finally in this connection, Lord Goldsmith's submission that Primeo's case means that the December and KYC Redeemers can prove in Herald's winding up on the basis of inflated valuations, based by Herald on a belief in the genuineness of BLMIS and its transactions, whereas BLMIS was in reality a Ponzi scheme of far less worth than appeared. In his submission, Primeo's case conflicts with the principle that the tree must lie as it falls. The Board has considered the operation of this principle in the context of another "feeder" fund to BLMIS in *Fairfield Sentry Ltd v Migani* [2014] UKPC 9. Lord Sumption, giving the judgment, said, para 3:

> "It is inherent in a Ponzi scheme that those who withdraw their funds before the scheme collapses escape without loss, and quite possibly with substantial fictitious profits. The loss falls entirely on those investors whose funds are still invested when the money runs out and the scheme fails. Members of the Fund who redeemed their shares before 18 December 2008 recovered the NAV which the Directors determined to be attributable to their shares on the basis of fictitious reports from BLMIS. The loss will in principle be borne entirely by those who were still Members of the Fund at that date."

21. *Fairfield Sentry* involved an attempt to recover redemption moneys which had already been paid. The present issue did not there arise, and it was not necessary to draw the precise line between "those investors whose funds are still invested" and "those who were still Members of the Fund" at the critical date, which is here the commencement of the winding up. That line falls now to be drawn, and the Board's conclusion is that the critical moment is when an investor has redeemed and so ceased to be a member of the fund, becoming instead a creditor owed the redemption proceeds. On this basis, the fact that the debt constituted by the redemption proceeds is provable together with - albeit subordinated by section 49(g) to - other debts owed by Herald is in no way incongruous. No basis has been suggested on which Herald could on this analysis disturb the valuation by reference to which such redemption proceeds were calculated. The Board only adds that, even on the case advanced by Lord Goldsmith, section 37(7) would itself have had some effect in enabling some shareholders, who were due to be but had not been redeemed and paid the proceeds before the commencement of the winding up, to enforce the company's obligation to redeem and pay such proceeds, and thereby to gain a measure of priority over the claims of ordinary members.

22. For all these reason, the Board concludes that the courts below were correct to reject the additional liquidator of Herald's case that the first part of section 37(7)(a) applies to Primeo. Primeo and the December and KYC Redeemers have redeemed and are entitled to prove in respect of their claims to the redemption proceeds under section 139(1), though they are, as former members, subject to having their claims deferred under section 49(g) to those claims of other ordinary creditors. It is in these circumstances irrelevant, in relation to Primeo, to consider the effect of Proviso (i),

which can await consideration until addressed (below) in relation to Reichmuth. The additional liquidator's appeal should be dismissed as against Primeo.

Reichmuth

23. Reichmuth's case is relatively simple. It accepts and asserts that it is within the first part of section 37(7). It accepts Primeo's construction of the concept of redemption for this purpose as well as under the articles. All that is necessary to fall within the first part of section 37(7) is, in Mr Rabinowitz QC's submission, that there should be redeemable shares. Support for this view is found in the words "shares which are or are liable to be redeemed" in section 37(7)(a). They echo the words "shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder" in section 37(1) which refer to all redeemable shares issued by the company. An alternative view might be that the first part of section 37(7) only bites when there is either a fixed date for redemption or purchase or a notice to redeem or an agreement to sell given prior to the commencement of the winding up, although this is not a view which could claim support in the (admittedly slightly differently worded) precursor of section 37(7) to be found in section 59(1) of the English Companies Act 1981. Which view is correct does not in fact matter in relation to Reichmuth. On either basis the first part of section 37(7) applies.

24. The critical question thus becomes whether Proviso (i) applies to take Reichmuth back out of section 37, and to leave it and the Late Redeemers who it represents with the status of ordinary contributory members. Mr Rabinowitz submits that there can be a disconnect between a Valuation and a Redemption Date. Here the Late Redeemers gave notice for a Redemption Date of 2 February 2009, meaning that payment would be expected around the end of February 2009. There is, in Mr Rabinowitz's submission, no reason why the terms of redemption should not provide and continue to provide for redemption on that date, even though the suspension announced on 12 December 2008 by Herald under article 19 and the last sentence of section 20(4) prevents any valuation or payment.

25. The Board cannot accept Mr Rabinowitz's submissions on this point, attractively though they were presented. The whole scheme involves a close link between valuation and redemption. Under article 19, the effect of a temporary suspension of valuations is to require the Directors to cause a notice to be given as soon as reasonably practicable to the holders of redeemable shares "tendering their shares for redemption". Under article 20(4), if there is such a suspension under article 19:

> "the right of the Shareholder to have his Participating Non-Voting Shares redeemed or purchased pursuant to this article 20 shall be

> similarly suspended and during the period of suspension he may withdraw his request for redemption."

Further:

> "If the request is not so withdrawn, the redemption or purchase of the shares shall be made at the Net Asset Value per Share of the relevant Separate Class as may be calculated at the next relevant Valuation Point next following the end of the suspension",

and

> "In addition, the Directors shall have power to declare additional Valuation Points and Redemption Dates for any reason, including without limitation in order to redeem shares, the redemption of which has been deferred aforesaid."

26. In the Board's view, the effect of the articles is that, once there is a suspension under article 19, the right to redemption is suspended and only revives if and when the suspension is lifted. The terms of redemption cannot be regarded as providing for redemption to take place on a date when the right to redeem is suspended under article 20(4). When as here the suspension continued until the commencement of the winding up, the terms of redemption must be regarded as having provided for redemption to take place at a date later than the date of the commencement of the winding up, within the language of Proviso (i) to section 37(7)(a). The reason why Proviso (i) is framed looking back to a past moment is not, as Mr Rabinowitz submitted, because the position was frozen or fell to be regarded as at the date when notice to redeem was given or when the suspension was ordered, but simply because Proviso (i) is (like Proviso (ii)) necessarily looking back, during the winding up, at a past period ending with the commencement of the winding up.

27. For these reasons, the Board concludes that Reichmuth and the other Late Redeemers fall within Proviso (i) in section 37(7)(a), and are so taken back outside the scope of the first part of section 37(7)(a). They remain accordingly within the category of members falling within the concluding words of section 140(1).

Natixis

28. It follows from the above that Natixis, if it is within the first part of section 37(7)(a) at all, is, a fortiori, also unable to satisfy Proviso (i). Whether Natixis is within

the first part of section 37(7)(a) at all is unnecessary to consider. Since the suspension was declared before Natixis requested redemption, it may be that Natixis's request for redemption was invalid, in circumstances where under article 20(4) the effect of the suspension was to suspend Natixis's right to have its shares redeemed. But the Board need not decide that point.

Priorities

29. It is in these circumstances also strictly unnecessary for the Board to address the nice question of the relative priorities of a former shareholder in Primeo's position who has redeemed but not been paid, and a shareholder who does fall within section 37(7)(a) and is entitled to the priority accorded by section 37(7)(b). It has been, as stated, common ground before the Board that section 49(g) includes former members. The ordinary meaning of member is a current member. This is the definition given in the section 38 of the Cayman Islands Companies Law, based no doubt on the similarly worded definition in section 25 of the English Companies Act 1948.

30. However, there is well-established English authority to the effect that the English statutory provisions (most relevantly, section 212(g) of the Companies Act 1948) from which section 49(g) of the Cayman Islands Companies Law no doubt derived, are to be read - when they refer to a "sum due to any member of a company in his character of a member by way of dividends, profits or otherwise" - as embracing any such sum due to a *former* member: *In re Anglesey Colliery Co* (1866) 1 Ch App 555; *In re Consolidated Goldfields of New Zealand* [1953] Ch 689 (Roxburgh J); *In re Compania de Electricidad* [1980] Ch 146, 170B-C per Slade J.

31. This, as Roxburgh J accepted in the second case, is an exceptional, rather than the ordinary, meaning of "member". Indeed, Roxburgh J accepted that the ordinary meaning would apply under the English equivalents of section 49(a) and (b). In the third case cited, the conclusion reached by Roxburgh J was simply recited and assumed as correct, first by counsel, Richard Sykes QC (p 152G) and then by Slade J (p 170B-C). Mr Sykes (p 152E) and Slade J (p 170D-E) both also accepted that the reference in the equivalent English provision to section 49(g) to any sum "due … by way of dividends, profits or otherwise" encompassed a sum claimed by way of return of capital (and so, necessarily, redemption proceeds). The Board sees no reason to question now that section 49(g) should be read as governing the priority of a former member claiming a return of capital, here by way of redemption proceeds.

32. On that basis, Primeo, as a former member, ranks after creditors who were not formerly members, but ahead of all current members. The claim of a shareholder entitled to enforce terms providing for redemption or purchase to take place before the commencement of winding up would, under section 37(7)(b), rank behind

(1) "all other debts and liabilities of the company (other than any due to members in their character as such)".

but, subject to that:

(2) "in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members".

33. This language raises some questions. Are the references to (1) debts and liabilities "due to members in their character as such" and (2) "amounts due to members in satisfaction of their rights (whether as to capital or income) as members" references to the same subject matter? Are both or either of (1) and (2) references to past and current members? The phrase "members in their character as such" in (1) might be seen as paralleling the later phrase "any member of a company in his character of a member" in section 49(g). But the two are not identical, and it should be borne in mind that ordinary redeemable shares only entered English law through section 45 of the Companies Act 1981, later consolidated as section 159(1) of the Companies Act 1985. Similarities with pre-existing language of the entirely different section 212(1) of the Companies Act may not be as significant as might at first glance appear. Further, the reasoning adopted in English authority on the English equivalent of section 49 shows that the significance of any reference to "member" is highly contextual.

34. If the answer to the questions posed in the previous paragraph is that both (1) and (2) refer to past and current members, the (on its face incongruous) result would be that section 37(7) claimants, who had not (due to the company's default) achieved redemption but were entitled to enforce it in the winding up would rank higher in priority than those like Primeo, who had achieved redemption, but had simply not been paid. The Board cannot contemplate such a result as the intended or actual effect of sections 37(7) and 49(g).

35. There are two alternative possibilities. One is to read both (1) and (2) as referring only to current members. The effect then is that section 37(7) claimants will, pursuant to (1), rank behind claimants like Primeo falling within section 49(g). That would not be incongruous. On the other hand, the Court of Appeal took a different view, considering, without detailed explanation, that claims such as Primeo's would rank equally with those of any section 37(7) claimants (see CA judgment, para 55). This could be achieved by reading (1) as referring to former as well as current members, but (2) as referring only to current members. This would involve reading in different senses two references to "members" in the same subsection, the latter of which ("members as … members") might or might not be seen as echoing, rather than differing from, the earlier ("members in their character as such"). However, the Board itself heard no detailed submissions on this possibility, and prefers in the circumstances to say no more

on the question of priorities as between section 49(g) and section 37(7) claimants. The likelihood in practice of successful section 37(7) claimants may well also be slight.

Conclusion

36. The Board will humbly advise Her Majesty that the appeal by the additional liquidator of Herald should be dismissed as against Primeo representing the December and KYC Redeemers, and that declarations should be made that Reichmuth representing the Late Redeemers and Natixis representing the Later Redeemers have no claims under section 37(7) of the Companies Law and rank as ordinary members in Herald's winding up. The parties should make any submissions as to the precise form of such declarations and as to costs, in each case if not agreed, within 14 days of the handing down of this judgment.

[1994] 1 AC 324 . [1994] 1 All ER 1 . [1994] AC 324 . [1993] UKPC 2 .

AG for Hong Kong v. Reid

Privy Council (Nov 1, 1993)

JUDGMENT

JISCBAILII_CASE_TRUSTS Privy Council Appeal No. 44 of 1992 The Attorney General for Hong Kong Appellant v.

(1) Charles Warwick Reid and Judith Margaret Reid and

(2) Marc Molloy Respondents FROM THE COURT OF APPEAL OF NEW ZEALAND JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST NOVEMBER 1993 Present at the hearing:-LORD TEMPLEMAN LORD GOFF OF CHIEVELEY LORD LOWRY LORD LLOYD OF BERWICK SIR THOMAS EICHELBAUM [Delivered by Lord Templeman] Mr. Reid. a solicitor and New Zealand national, joined the legal service of the Government of Hong Kong and became successively Crown Counsel, Deputy Crown Prosecutor and ultimately Acting Director of Public Prosecutions. in the course of his career Mr. Reid, in breach of the fiduciary duty which he owed as a servant of the Crown, accepted bribes as an inducement to him to exploit his official position by obstructing the prosecution of certain criminals. Mr. Reid was arrested, pleaded guilty to offences under the Prevention of Bribery Ordinance and was sentenced on 6th July 1990 to eight years' imprisonment and ordered to pay the Crown the sum of HK$12.4 million, equivalent to NZ$2.5 million, being the value of assets then controlled by Mr. Reid which could only have been derived from bribes. No part of the sum of HK$12.4 million has been paid by Mr. Reid. Among Mr. Reid's assets are three freehold properties in New Zealand. The trial Judge's finding that the Attorney General for Hong Kong had established an arguable case that each of the three properties was acquired with moneys received by Mr. Reid as bribes has not been challenged. Two of the freehold properties were conveyed to Mr. Reid and his wife and one to Mr. Reid's solicitor Mr. Molloy. The three New Zealand properties were purchased for approximately NZ$500,000. Their current value was not the subject of evidence before the New Zealand Court of Appeal. The total amount thought to have been received by Mr. Reid from bribes exceeds NZ$2.5 million. In the courts of New Zealand Mr. Reid and Mrs. Reid argued that part of the costs of the three New Zealand properties might not be derived from bribes. If so, the courts have ample means of discovering by means of accounts and inquiries the amount (if any) of innocent money invested in the properties and the proportion of the present value of the properties attributable to innocent money. It was also argued that Mrs. Reid might have a beneficial interest in the properties. This also could be investigated in due course but it does not appear that either Mrs. Reid or Mr. Molloy was a bona fide purchaser of a legal estate without notice. For present purposes this appeal proceeds on the assumption that the freehold New Zealand properties were purchased with bribes received by Mr. Reid and are held in trust for Mr. Reid subject to the claims of the Crown in these proceedings. A bribe is a gift accepted by a fiduciary as an inducement to him to betray his trust. A secret benefit, which mayor may not constitute a bribe, is a benefit which the fiduciary derives from trust property or obtains from knowledge which he acquires in the course of acting as a fiduciary. A fiduciary is not always accountable for a secret benefit but he is undoubtedly accountable for a secret benefit which

consists of a bribe. In addition a person who provides the bribe and the fiduciary who accepts the bribe may each be guilty of a criminal offence. In the present case Mr. Reid was clearly guilty of a criminal offence. Bribery is an evil practice which threatens the foundations of any civilised society. In particular, bribery of policemen and prosecutors brings the administration of justice into disrepute. Where bribes are accepted by a trustee, servant, agent or other fiduciary, loss and damage are caused to the beneficiaries, master or principal whose interests have been betrayed. The amount of loss or damage resulting from the acceptance of a bribe mayor may not be quantifiable. In the present case the amount of harm caused to the administration of justice in Hong Kong by Mr. Reid in return for bribes cannot be quantified. When a bribe is offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient. Money paid to the false fiduciary belongs to him. The legal estate in freehold property conveyed to the false fiduciary by way of bribe vests in him. Equity however which acts in personam insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe. The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed. In the present case, as soon as Mr. Reid received a bribe in breach of the duties he owed to the Government of Hong Kong, he became a debtor in equity to the Crown for the amount of that bribe. So much is admitted. But if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured. Two objections have been raised to this analysis. First it is said that if the fiduciary is in equity a debtor to the person injured, he cannot also be a trustee of the bribe. But there is no reason why equity should not provide two remedies, so long as they do not result in double recovery. If the property representing the bribe exceeds the original bribe in value, the fiduciary cannot retain the benefit of the increase in value which he obtained solely as a result of his breach of duty. Secondly, it is said that if the false fiduciary holds property representing the bribe in trust for the person injured, and if the false fiduciary is or becomes insolvent, the unsecured creditors of the false fiduciary will be deprived of their right to share in the proceeds of that property. But the unsecured creditors cannot be in a better position than their debtor. The authorities show that property acquired by a trustee innocently but in breach of trust and the property from time to time representing the same belong in equity to the cestui que trust and not to the trustee personally whether he is solvent or insolvent. Property acquired by a trustee as a result of a criminal breach of trust and the property from time to time representing the same must also belong in equity to his cestui que trust and not to the trustee whether he is solvent or insolvent. When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty. The courts of New Zealand were constrained by a number of precedents of the New Zealand, English and other common law courts which established a settled principle of law inconsistent with the foregoing analysis. That settled principle is open to review by the Board in the light of the foregoing analysis of the consequences in equity of the receipt of a bribe by a fiduciary. In Keech v. Sandford **(1726) Sel. Cas. T. King 61** a landlord

refused to renew a lease to a trustee for the benefit of an infant. The trustee then took a new lease for his own benefit. The new lease had not formed part of the original trust property, the infant could not have acquired the new lease from the landlord and the trustee acted innocently, believing that he committed no breach of trust and that the new lease did not belong in equity to his cestui que trust. The Lord Chancellor held nevertheless at page 62 that "the trustee is the only person of all mankind who might not have the lease"; the trustee was obliged to assign the new lease to the infant and account for the profits he had received. The rule must be that property which a trustee obtains by use of knowledge acquired as trustee becomes trust property. The rule must, a fortiori, apply to a bribe accepted by a trustee for a guilty criminal purpose which injures the cestui que trust. The trustee is only one example of a fiduciary and the same rule applies to all other fiduciaries who accept bribes. In **Fawcett v. Whitehouse** (l829) 1 Russ. & M. 132 the defendant Whitehouse intending to enter into partnership with the plaintiffs Shand and Fawcett negotiated for the grant of a lease by a landlord to the partnership. The landlord paid Whitehouse £12,000 for persuading the partnership to accept the lease. The Vice-Chancellor, Sir John Leach, said at page 149 that Whitehouse "was bound to obtain the best terms possible for the intended partnership ... and that all he did obtain will be considered as if he had done his duty and had actually received the £12,000 for the new partnership, as upon every equitable principle he was bound to do. I am of opinion, therefore, that this is what must be called in a court of equity a fraud on the part of the defendant. It was in fact selling his intended partner for £12,000" . The Vice-Chancellor made a declaration that Whitehouse "had received the £12,000 on behalf of himself and the plaintiffs Shand and Fawcett equally and that he was a trustee as to one-third part of that sum, for Shand, as to another third part ... for the plaintiff Fawcett". An appeal to the Lord Chancellor was dismissed by Lord Lyndhurst. Although in that case, there was no need to trace the sum of £12,000 into other assets, the bribe of £12,000 was plainly held to be trust property. In **Sugden v. Crossland** (l856) 3 Sm. & Giff. 192 a trustee was paid £75 for agreeing to retire from the trust and to appoint in his place the person who had paid the £75. The Vice-Chancellor, Sir John Stuart, said at page 194:- "It has been further asked that the sum of £75 may be treated as a part of the trust fund, and as such may be directed to be paid by Horsfield to the trustee for the benefit of the cestui que trusts under the will. It is a well-settled principle that, if a trustee make a profit of his trusteeship, it shall enure to the benefit of his cestui que trusts. Though there is some peculiarity in the case, there does not seem to be any difference in principle whether the trustee derived the profit by means of the trust property, or from the office itself." This case is of importance because it disposes succinctly of the argument which appears in later cases and which was put forward by counsel in the present case that there is a distinction between a profit which a trustee takes out of a trust and a profit such as a bribe which a trustee receives from a third party. If in law a trustee, who in breach of trust invests trust monies in his own name, holds the investment as trust property, it is difficult to see why a trustee who in breach of trust receives and invests a bribe in his own name does not hold those investments also as trust property. In **Tyrrell v. Bank** of London and Others **(1862) 10 H.L. Cas. 26** a solicitor acting for a bank in negotiating the purchase by the bank of a building known as the Hall of Commerce acquired for himself an interest in a larger property which included the Hall of Commerce and then sold the Hall of Commerce to the bank at a profit. The House of Lords held that the solicitor was a trustee for the bank of his interests in the Hall of Commerce but was not a trustee for the bank of that part of the retained property which the bank never had any intention of acquiring. The solicitor was obliged to bring into account the value of the retained property in calculating the profit which the solicitor had made at the expense of the bank. No difficulty arises from the decision in this case but at pages 59/60 Lord Chelmsford said that if the solicitor had been paid a sum of £5,000 to induce the bank to purchase the Hall of Commerce at an excessive price, the bank could have recovered damages from the solicitor but could not have obtained the £5,000 on the

grounds that it belonged to the bank. No reason was given and no authority cited for these observations which were unnecessary for the decision of the appeal before the House and which appear to be inconsistent with the authorities to which the Board have already referred. In In re Canadian Oil Works Corporation (Hay's Case) **(1875) L.R. 10** Ch. 593 the vendors of property to a company gave money forming part of the purchase price to a director of the company to enable him to subscribe for shares in the company. It was held that the money was the money of the company and that the shares registered in the name of the director were therefore unpaid. The judgment emphasised the rule that "no agent can in the course of his agency derive any benefit whatever without the sanction or knowledge of his principal;" per James L.J. at page 601. In In re Morvah Consols Tin Mining Company (McKay's Case) **(1875) 2 Ch.D. 1**, upon the application of the liquidator of an insolvent company a director was ordered to pay under section 165 of the Companies Act 1862 compensation for his misfeasance in accepting 600 paid-up shares in the company from the vendor of property to the company. Mellish L.J. said at page 5:- "Either as a matter of bargain or as a present to the agent of the purchaser, it was in consideration of a benefit which the vendor had received from the company's agents. Now it is quite clear that, according to the principles of a Court of Equity, all the benefit which the agent of the purchaser receives under such circumstances from the vendor must be treated as received for the benefit of the purchaser." A similar decision was reached in In re Caerphilly Colliery Company (Pearson's Case) **(1877) 5 Ch. D 336** where a director received paid-up shares from the vendor of property to the company. Jessel M. R. referring to Sir Edwin Pearson the director in question said at pages 340/341: - "That being the position of Sir Edwin Pearson, can he be allowed to say in a Court of Equity that he, having received a present of part of the purchase money, and being knowingly in the position of agent and trustee for the purchasers, can retain that present as against the actual purchasers? It appears to me that, upon the plainest principles of equity and good conscience, he cannot .... he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances. He must be deemed to have obtained it under circumstances which made him liable, at the option of the cestui que trust, to account either for the value at the time of the present he was receiving, or to account for the thing itself and its proceeds if it had increased in value." This is an emphatic pronouncement by the most distinguished equity judge of his generation that the recipient of a bribe holds the bribe and the property representing the bribe in trust for the injured person. Different reasoning and a different result followed m The **Metropolitan Bank v. Heiron** (1880) 5 Ex.D.

319. This was a decision of a distinguished Court of Appeal heard and determined on one day, 5th August, perilously close to the long vacation without citation of any of the relevant authorities. An allegation of the receipt of a bribe by director was considered m 1872 by the Board of Directors of the company and they decided to take no action. In 1870 the company sued to recover the bribe of £250 and it was held that the action was barred by the Statute of Limitations. James L. J. said at page 323:- "The ground of this suit is concealed fraud. If a man receives money by way of a bribe for misconduct against a company or cestui que trust, or any person or body towards whom he stands in a fiduciary position, he is liable to have that money taken from him by his principal or cestui que trust. But it must be borne in mind that that liability is a debt only differing from ordinary debts in the fact that it is merely equitable, and in dealing with equitable debts of such a nature Courts of Equity have always followed by analogy the provisions of the Statute of Limitations, in cases in which there is the same reason for making the length of time a bar as in the case of ordinary legal demands." This judgment denies that any proprietary interest exists in the bribe. Brett L.J. at page 324 said that:- "It seems to me that the only action which could be maintained by the company or by the liquidator of the company against this defendant would be an action in equity founded upon the alleged fraud of the

defendant. Neither at law nor in equity could this sum of £250 be treated as the money of the company, until the court, in an action by the company, had decreed it to belong to them on the ground that it had been received fraudulently as against them by the defendant." This is a puzzling passage which appears to mean that a proprietary interest in the bribe arises as soon as a court has found that a bribe has been accepted. Cotton L.J. at page 325 said:- "Here the money sought to be recovered was in no sense the money of the company, unless it was made so by a decree founded on the act by which the trustee got the money into his hands. It is a suit founded on breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud. It is very different from the case of a cestui que trust seeking to recover money which was his own before any act wrongfully done by the trustee." This observation does draw a distinction between monies which are held on trust and are taken out by the trustee and monies which are not held on trust but which the trustee receives in circumstances which oblige him to pay the money into the trust. The distinction appears to be inconsistent with Keech v. Sandford **(1726) Sel. Cas. T. King 61** and with those authorities which make the recipient of the bribe liable for any increase in value. The decision in **Metropolitan Bank v. Heiron** (1880) Ex. D. 319 is understandable given the finding that the fraud was made known to the company more than six years before the action was instituted. But the same result could have been achieved by denying an equitable remedy on the grounds of delay or ratification. It has always been assumed and asserted that the law on the subject of bribes was definitively settled by the decision of the Court of Appeal in **Lister & Co. v. Stubbs (1890) 45 Ch.D. 1**. In that case the plaintiffs, Lister & Co., employed the defendant, Stubbs, as their servant to purchase goods for the firm. Stubbs, on behalf of the firm, bought goods from Varley & Co. and received from Varley & Co. bribes amounting to £5,541. The bribes were invested by Stubbs in freehold properties and investments. His masters, the firm Lister & Co., sought and failed to obtain an interlocutory injunction restraining Stubbs from disposing of these assets pending the trial of the action in which they sought inter alia £5,541 and damages. in the Court of Appeal the first judgment was given by Cotton L.J. who had been party to the decision in **Metropolitan Bank v. Heiron** (1880) 5 Ex.D.

319. He was powerfully supported by the judgment of Lindley L.J. and by the equally powerful concurrence of Bowen L.J. Cotton L.J. said at page 12 that the bribe could not be said to be the money of the plaintiffs. He seemed to be reluctant to grant an interlocutory judgment which would provide security for a debt before that debt had been established. Lindley L.J. said at page 15 that the relationship between the plaintiffs, Lister & Co., as masters and the defendant, Stubbs, as servant who had betrayed his trust and received a bribe:- " ... is that of debtor and creditor; it is not that of trustee and cestui que trust. We are asked to hold that it is - which would involve consequences which, 1 confess, startle me. One consequence, of course, would be that, if Stubbs were to become bankrupt, this property acquired by him with the money paid to him by Messrs. Varley would be withdrawn from the mass of his creditors and be handed over bodily to Lister & Co. Can that be right? Another consequence would be that, if the appellants are right, Lister & Co. could compel Stubbs to account to them, not only for the money with interest, but for all the profit which he might have made by embarking in trade with it. Can that be right?" For the reasons which have already been advanced their Lordships would respectfully answer both these questions in the affirmative. If a trustee mistakenly invests moneys which he ought to pay over to his cestui que trust and then becomes bankrupt, the monies together with any profit which has accrued from the investment are withdrawn from the unsecured creditors as soon as the mistake is discovered. A fortiori if a trustee commits a crime by accepting a bribe which he ought to pay over to his cestui que trust, the bribe and any profit made therefrom should be withdrawn from the unsecured creditors as soon as the crime is discovered. The decision in **Lister v. Stubbs** is not

consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done. From these principles it would appear to follow that the bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured. A fiduciary remains personally liable for the amount of the bribe if, in the event, the value of the property then recovered by the injured person proved to be less than that amount. The decisions of the Court of Appeal m The **Metropolitan Bank v. Heiron (1880) 5 Ch.D. 319** and **Lister v. Stubbs** are inconsistent with earlier authorities which were not cited. Although over 100 years has passed since **Lister v. Stubbs**, no one can be allowed to say that he has ordered his affairs in reliance on the two decisions of the Court of Appeal now in question. Thus no harm can result if those decisions are not followed. The decision in **Lister v. Stubbs** was followed in Powell & Thomas v. Evans Jones & Co. **[1905] 1 K.B. 11** and A.G. v. Goddard **[1929] 98 L.J.K.B. 743**. In Regal

(Hastings) **Ltd. v. Gulliver** [1942] 1 All ER 378 shares intended to be acquired by directors at par to avoid them giving a guarantee of the obligations under a lease were sold at a profit and the directors were held to be liable to the company for the proceeds of sale, applying Keech v. Sandford. In Reading v. A.G. [1951] AC 507, the Crown confiscated thousands of pounds paid to an army sergeant who had abused his official position to enable drugs to be imported. The Crown was allowed to keep the confiscated monies to avoid circuity of action. Finally in Islamic Republic of **Iran Shipping Lines v. Denby [1987] 1 Lloyd's Report 367** Leggatt J. followed **Lister v. Stubbs** as indeed he was bound to do. The authorities which followed **Lister v. Stubbs** do not cast any new light on that decision. Their Lordships are more impressed with the decision of Lai Kew Chai J. in Sumitomo **Bank Limited v. Kartika Ratna** Thahir **[1993] 1 S.L.R. 735**. In that case General Thahir who was at one time general assistant to the President Director of the Indonesian State Enterprise named Pertamina opened 17 bank accounts in Singapore and deposited DM54 million in those accounts. The money was said to be bribes paid by two German contractors tendering for the construction of steel works in West Java. General Thahir having died, the monies were claimed by his widow, by the estate of the deceased General and by Pertamina. After considering in detail all the relevant authorities the judge determined robustly at page 810 that **Lister v. Stubbs** was wrong and that its "undesirable and unjust consequences should not be imported and perpetuated as part of" the law of Singapore. Their Lordships are also much indebted for the fruits of research and the careful discussion of the present topic in the address entitled "Bribes and Secret Commissions" delivered by Sir Peter Millett to a meeting of the Society of Public Teachers of Law at Oxford in 1993 and published in the Restitution Law Review **[1993] R.L.R. 7**. The following passage elegantly sums up the views of Sir Peter Millett :- "(The fiduciary) must not place himself in a position where his interest may conflict with his duty. If he has done so, equity insists on treating him as having acted in accordance with his duty; he will not be allowed to say that he preferred his own interest to that of his principal. He must not obtain a profit for himself out of his fiduciary position. If he has done so, equity insists on treating him as having obtained it for his principal; he will not be allowed to say that he obtained it for himself. He must not accept a bribe. If he has done so, equity insists on treating it as a legitimate payment intended for the benefit of the principal; he will not be allowed to say that it was a bribe." The conclusions reached by Lai Kew Chai J. in Sumitomo **Bank Limited v. Kartika Ratna** Thahir **[1993] 1 S.L.R. 735** and the views expressed by Sir Peter Millett were influenced by the decision of the House of Lords in Boardman v. Phipps [1967] 2 AC 46 which demonstrates the strictness with which equity regards the conduct of a fiduciary and the extent to which equity is willing to impose a constructive trust on property obtained by a fiduciary by virtue of his office. In that case a solicitor acting for trustees rescued the interests of the trust in a private company by negotiating

for a takeover bid in which he himself took an interest. He acted in good faith throughout and the information which the solicitor obtained about the company in the takeover bid could never have been used by the trustees. Nevertheless the solicitor was held to be a constructive trustee by a majority in the House of Lords because the solicitor obtained the information which satisfied him that the purchase of the shares in the takeover company would be a good investment and the opportunity of acquiring the shares as a result of acting for certain purposes on behalf of the trustees; see per Lord Cohen at page 103. If a fiduciary acting honestly and in good faith and making a profit which his principal could not make for himself becomes a constructive trustee of that profit then it seems to their Lordships that a fiduciary acting dishonestly and criminally who accepts a bribe and thereby causes loss and damage to his principal must also be a constructive trustee and must not be allowed by any means to make any profit from his wrongdoing. The New Zealand Court of Appeal in the present case declined to enter into the merits of Lister c. Stubbs, founding itself on a passage in the judgment of this Board delivered by Lord Scarman in **Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.** (1986) AC 80, 108 where his Lordship said the duty of the New Zealand Court of Appeal was not to depart from a settled principle of English law. While their Lordships regard the application of stare decisis in the New Zealand Court of Appeal as a matter for that Court, they desire to make the following remarks, in case Lord Scarman's comments in **Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.** have in any way been misunderstood. In the present case the Court of Appeal did not say and could not have meant that it was bound by a decision of the English Court of Appeal, since for many years the New Zealand courts have not regarded themselves as bound by decisions of the House of Lords, although of course continuing to pay great respect to them. The reasoning of the Court of Appeal, as their Lordships understand it, was rather that in the absence of differentiating local circumstances the Court should follow a decision representing contemporary English law, leaving its correctness for consideration by this Board. Without in any way criticising that approach in the circumstances of this case, where the decision in question was of such long standing, their Lordships wish to add that nevertheless the New Zealand Court of Appeal must be free to review an English Court of Appeal authority on its merits and to depart from it if the authority is considered to be wrong. Hart v. O'Connor [1985] AC 1000 to which Lord Scarman referred in the passage mentioned by the Court of Appeal concerned the very different situation of the Court of Appeal wishing to apply English law but, in the judgment of this Board, misapprehending the state of the contemporary law. In any case where the New Zealand Court of Appeal has to decide whether to follow an English authority, its own views on the issue, untrammelled by authority, will always be of great assistance to the Board. The Attorney General for Hong Kong has registered caveats against the title of the three New Zealand properties. He seeks to renew the caveats to prevent any dealing with the property pending the hearing of proceedings which, their Lordships are informed, have been initiated for the purpose of claiming the properties on a constructive trust. The respondents oppose the renewal of the caveats on the grounds that the Crown had no equitable interest in the three New Zealand properties. For the reasons indicated their Lordships consider that the three properties so far as they represent bribes accepted by Mr. Reid are held in trust for the Crown. Before parting with this appeal their Lordships wish to express their appreciation for the eloquent and well structured submissions made by Mr. David Oliver Q.C. on behalf of the Attorney General for Hong Kong and by Mr. Antony White on behalf of the respondents. Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed. Since an unfulfilled order has been made against Mr. Reid in the courts of Hong Kong to pay HK$12.4 million, his purpose in opposing the relief sought by the Crown in New Zealand must reflect the hope that the properties, in the absence of a caveat, can be sold and the proceeds whisked away to some Shangri La which hides bribes and other corrupt monies in numbered bank accounts. In these circumstances Mr. and Mrs. Reid must pay the costs of the Attorney

General before the Board and in the lower courts; as regards Mr. Molloy the costs orders in his favour in the High Court and in the Court of Appeal should be set aside and Mr. Molloy must repay any sums that have been paid to him. There will be no order against Mr. Molloy for the costs incurred by the Attorney General before the Board.