Neutral Citation Number: **[2018] EWHC 3451 (Comm)**

CL-2018-000212

Case No: CL-2018-00212

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 13 December 2018

Before :

Mrs Justice Cockerill

- -

Between :

HPOR SERVICOS DE CONSULTORIA LTDA	**Claimant**
- and -	
(1) DRYSHIPS INC.	**Defendants**
(2) OCEAN RIG UDW INC.	

- -
- -

Ali Malek QC and Sophia Dzwig (instructed by **Michelet & Co Ltd**) for the **Claimant**
David Joseph QC and Adam Board (instructed by **Wikborg Rein LLP**) for the **Defendants**

Hearing date: 30 October 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE COCKERILL DBE

Cockerill J:

1. The application before me, brought by the Claimant ("HPOR") is an appeal under the Arbitration Act 1996 on a point of law. By this application HPOR seeks to set aside or vary the passages of two arbitral awards dated 7 March 2018 published by the distinguished Tribunal of Sir Bernard Eder, Sir Jeremy Cooke and Mr Richard Siberry QC ("the Awards").

2. The passages in question concern the majority of the Tribunal's decision that HPOR must forfeit pre- and post-termination remuneration. Mr Siberry QC dissented on this issue. The question of law defined in the application is this: "*[i]n what circumstances is it appropriate to order that an agent should forfeit and/or become liable to account for its own contractually earned/accrued remuneration by way of remedy for its breach of fiduciary duty*".

3. The question arises in very particular circumstances which require to be explained in some detail.

Factual Background

4. HPOR is a special purpose vehicle incorporated in Brazil and owned and controlled by Mr Hamylton Pinheiro Padilha Junior ('Mr Padilha'). Mr Padilha has worked in oil and gas for over 35 years and since 2002 has acted as a local agent and consultant for drilling companies in Brazil. His relationship with the Defendants began in September 2010.

5. The Defendants are companies incorporated in the Marshall Islands. The Second Defendant is the second-largest drilling contractor by market capitalisation, and is managed from Greece. It provides services for offshore oil and gas exploration, specialising in ultra-deepwater and harsh-environment offshore drilling. The First Defendant was a shareholder of the Second Defendant. which at the time of the contracts in question in the arbitration had 'a number of drilling units under construction'. I shall refer to the Defendants compendiously as "OR".

6. On 8 February 2011, OR entered into an agency agreement with a company called "URCA Offshore Ltda" ("URCA") to assist with two tenders by OR for the Drillships contracts for the rigs 'Corcovado' and 'Mykonos' with Petrobras. URCA was owned and controlled by a third party, but acted at all material times at the behest of Mr Padilha. In those circumstances, the Tribunal concluded that Mr Padilha owed fiduciary duties to OR from the outset of the URCA agreement.

7. The URCA Contract was agreed because at that time Mr Padilha had a conflict with another client (the conflict was disclosed to OR and the other client). Mr Carvalho, under Mr Padilha's direction, was therefore to be OR's main contact liaison in respect of that tender. At this time, HPOR was not involved in the tender process, as it had not yet been

incorporated as a legal entity. The drilling contracts were therefore obtained without any involvement of HPOR.

8. Under the URCA agreement, a 2% commission was to be paid by OR to URCA in the event that a drilling contract was obtained for each rig. URCA had a contract with another company of Mr Padilha's whereby it would pass on its 2% commission to Mr Padilha, less a fixed fee.

9. From February 2011, Mr Padilha and Mr Carvalho assisted with the tender for the Drillships. By an email dated 11 May 2011, Petrobras confirmed the award of the Drilling Contracts to the Drillships. Mr Padilha's potential conflict of interest ceased to be a problem in the summer of 2011 and thus the parties entered into the Agency Contracts with the URCA Contracts being terminated at the same time by agreement.

10. In October 2011, the agency between OR and URCA was 're-structured' to involve a company newly incorporated by Mr Padilha for his business with OR. To that end, HPOR was incorporated as a SPV, owned and controlled by Mr Padilha, and to which it was accepted by HPOR that Mr Padilha's knowledge and actions are to be attributed.

11. By contracts backdated to 1 October 2011, the existing agency agreement with URCA was terminated and two new Agency Contracts in respect of Corcovado and Mykonos were concluded between HPOR and OR ("the Agency Contracts"). Pursuant to the new agreements, HPOR was appointed as OR's agent and owed fiduciary duties in that capacity, in relation to two charter contracts and two services agreements between OR and Petrobras. The four contracts are referred to as 'the Drilling Contracts'. In return, under section 2 of the Agency Contracts, HPOR would receive 2% of the day rate Petrobras paid by way of hire, which entitlement would survive the termination of the Agency Contracts. HPOR was also to provide services to assist OR in their future dealings with Petrobras in relation to the two drilling contracts.

12. At the time the Agency Contracts were agreed, OR were aware that HPOR's alter ego, Mr Padilha, was concurrently acting for other drilling companies who were OR's industry competitors. OR were prepared to agree to this.

13. However, HPOR did not inform OR (as it should have done) that Mr Padilha had previously paid bribes to Petrobras executives and that these bribes were paid to advance the commercial interests of two of OR's competitors (i.e. Vantage and Pride).

14. Section 1 of the Agency Contracts set out the services to be provided by HPOR in the following terms:

> 'AGENT shall provide the following services on a continuing basis during the term of this Agreement ("the SERVICES"):
>
> AGENT will provide advisory and consulting services in order to assist OWNER secure [sic] a contract for the RIG including the preparation of proposals and any future negotiations to be held during the TENDER process.
>
> AGENT will contact and liaise with PETROBRAS as necessary in connection with the TENDER, at all time to be done in cooperation with the OWNER and CUSTOMER.
>
> AGENT will provide such other assistance as may reasonably be requested by CUSTOMER and OWNER, including but not limited to (i) preparing the offer on behalf of the owner, (ii) handling the follow up and any enquiries after submission of the offer, (iii) assisting in any contract negotiations, seeking to achieve the best terms possible for OWNER; (iv) keeping CUSTOMER and OWNER well informed and advised of any developments relating to the TENDER.
>
> In the event that a contract for the RIG is concluded as a result of the TENDER, AGENT shall continue to provide such assistance as may reasonably be requested by CUSTOMER and OWNER in relation to ongoing contractual or operational matters and use its reasonable endeavours to resolve any and all potential disputes between the OWNER and PETROBRAS including but not limited to any disputes over payments due from PETROBRAS to the OWNER.'

15. The Drillships entered into service under the Drilling Contracts in early 2012. From early 2012 until about March or April 2015 the Defendants paid HPOR the Fee. The total amount OR paid to HPOR was USD 7,994,611.04 for the Ocean Rig Corcovado and USD 8,671,418.46 for the Ocean Rig Mykonos. The Defendants made no payments thereafter and terminated the contract by a letter dated 25 September 2015 from Ince & Co LLP.

16. The Drilling Contracts and the Agency Contracts were all long-term contracts. The initial term of the Drilling Contracts was three years from the date the Drillships began operating (approximately March 2012) but Petrobras subsequently extended that term by a further three years to 2018.

17. As set out in the Reasons, for the four years after the conclusion of the Agency Contracts Mr Padilha continued to assist with the extension of the Drilling Contracts, operational incidents and price negotiations.

18. Since 2014 Petrobras has been the subject of a major investigation into corruption known as 'Operation Car Wash'. One Petrobras executive whom the Brazilian Federal Police have arrested as part of Operation Car Wash is Jorge Zelada, Director of Petrobras' International Division from 2008 to 2012.

19. By late 2014 or early 2015 the Defendants were concerned about the impact Operation Car Wash could have on them, initially because of the inadvertent rental of an apartment from a relative of a disgraced Petrobras official convicted of corruption in Brazil, and were in discussions with Mr Padilha about, in his words, the 'possible media crisis for OR'.

20. On 18 October 2014, Mr Padilha stated to OR that any involvement in 'Operation Car Wash' had the potential to "*jeopardise all the work we have done… in Brazil [i]n the past three years (including the contracts extensions … not yet signed)*." Despite this, HPOR did not reveal and deliberately concealed Mr Padilha's own involvement in establishing a corrupt relationship with Petrobras, which was subsequently revealed during the investigation.

21. In March 2015, Operation Car Wash resurfaced because the Brazilian authorities were investigating negotiations for the 'Sete Brasil' project in which Mr Padilha had assisted the Defendants. At the same time, OR asked HPOR to confirm whether Mr Padilha was involved in any acts of corruption under investigation in Operation Car Wash. HPOR's response, given by Mr Padilha, was emphatically: "no". That denial was a lie, as subsequent events ultimately demonstrated.

22. In June 2015, OR forwarded a press article identifying Mr Padilha as a lobbyist implicated in an overpriced contracts scandal involving Petrobras. HPOR was, once again, asked to comment. Mr Padilha, untruthfully, reassured OR that there was "*nothing to worry about*".

23. By the time of these exchanges, Petrobras was looking to terminate existing contracts following the corruption scandal. On 12 June 2015, Petrobras wrote to OR seeking to renegotiate the rates payable for each of the rigs. HPOR and Mr Padilha, continued to act for OR during these delicate negotiations on the false premise that Mr Padilha was not implicated in the allegations of corruption under investigation.

24. In July 2015, Mr Padilha confessed to at least one of his acts of corruption in connection with the Vantage investigation. HPOR did not, however, explain to OR that Mr Padilha had already admitted participation in two corrupt deals to the Brazilian authorities.

25. Even at this stage, HPOR was dishonest as to the true extent of Mr Padilha's involvement and the consequences of the investigations. On 20 September 2015, HPOR urged OR to remain calm and stated that none of Mr Padilha's other clients had elected to terminate their agency contracts. That assurance was untrue, as the Vantage contract had already been terminated. This could only have been a deliberate misstatement. Mr Padilha later admitted that he had lied in compliance interviews with Vantage's lawyers and had denied any irregularities with its drilling contracts. HPOR made no mention of this to OR at any time.

26. Likewise, on 20 September 2015, HPOR provided OR with a template response to a request for information made by Petrobras. This had been prepared by Ensco. HPOR did not reveal Mr Padilha's dishonest conduct concerning that contract. Subsequently, Mr Padilha admitted to prosecutors that: *"[when] interviewed by Pride's lawyers specifically regarding the contracting… he did not answer the compliance questions truthfully*".

27. By this stage, OR faced questions from Petrobras as to their dealings with Mr Padilha. They instructed that an 'audit' process be undertaken to investigate all payments made to HPOR. The relationship of trust and confidence in their agent had totally, and irretrievably, broken down. Ultimately, OR were "red-flagged" by Petrobras as an unacceptable compliance risk due to their relationship with Mr Padilha.

28. By 25 September 2015 Mr Padilha's past corruption and involvement with Operation Car Wash led the Defendants to the conclusion that the Agency Contracts could no longer continue and hence the Defendants terminated the Agency Contracts on that date.

29. The 13th Federal Criminal Court of Curitiba ('the Criminal Court') convicted Mr Padilha of bribery and money laundering by a judgment dated 1 February 2016. It found that in 2008 Mr Padilha had '"acted as intermediary", "negotiated" or "brokered"' payments to inter alios Petrobras officials totalling USD 31 million to secure a USD 1.816 billion contract for Vantage Drilling at the behest of a shareholder known as Mr Nobu Su who paid Mr Padilha remuneration of USD 10 million for his services as agent for Vantage Drilling in respect of this transaction. The Criminal Court found Mr Padilha's offences to be 'characterised by concealment and disguising of bribes' and 'the use of surreptitious transactions and the concealment of bribes in secret accounts abroad'. His testimony included an admission that he did not answer truthfully in internal investigations by Vantage Drilling and Pride.

30. Mr Padilha would have received a sentence of imprisonment of 12 years and two months. The Criminal Court commuted the prison sentence, because of his collaboration with prosecutors, to a 'special open system' of further collaboration, reporting and community service. It fined Mr Padilha USD 22.1 million. Mr Padilha has paid the fine and is shortly to

complete the community service. The further pending criminal actions in the Brazilian courts have not yet gone to trial.

The Tribunal's findings

31. This appeal proceeds on the basis of the findings of fact made by the Tribunal and so it is important to have those well in mind.

32. The short version of the Tribunal's findings is that they found that Mr Padilha's conduct was a repudiatory breach on the part of HPOR, destroyed the relationship of trust and confidence, disabled HPOR from future performance and entitled OR to terminate the Agency Contracts.

33. The Tribunal found that although the corrupt activities did not relate to the Drilling Contracts or the Agency Contracts and there was no evidence that HPOR acted corruptly in relation to those contracts, the prior corrupt relationship was material, was connected with the subject matter of the Agency Contracts, and created an irredeemable conflict of interest in at least three respects, "*both in the period up to and including the time when the Agency Contracts were entered into and at all material times thereafter*".

34. The Tribunal found that HPOR was in deliberate breach of its fiduciary duties immediately upon entering into the Agency Contracts. In particular, HPOR deliberately failed to disclose Mr Padilha's corrupt relationship with Petrobras executives. This breach placed HPOR in a conflict of interest. It was a breach committed in HPOR's own interests and for its own financial gain, in the form of remuneration payable by OR.

35. HPOR had, in any event, disabled itself from advising OR or negotiating on OR's behalf in a disinterested manner from the outset. Where the interests of Petrobras and OR were in conflict HPOR could be subjected to pressure and influence because of the corrupt relationships which Mr Padilha had had. As the majority observed: *"[w]hether… there was hope or expectation of some recompense or there was an expression of gratitude in awarding the [Drilling Contracts] can never be known. That is the insidious effect of bribery and an agent cannot be allowed to profit from it, directly or indirectly".*

36. The Reasons state that:

> "In outline, HPOR deliberately concealed that Mr Padilha had dishonestly facilitated the payment of bribes exceeding US$30m on behalf of other clients to obtain drilling contracts from Petrobras. Mr Padilha dishonestly received US$10m as commission in exchange for his lobbying services, which included the payment of bribes and money laundering. He has since been convicted of offences in Brazil as a result of this corruption, with further additional criminal

> proceedings yet to be heard. He was sentenced to 12 years and two months of imprisonment, which was commuted to a supervised community service order and a fine of US$22.1m."

37. They also state that:

> "the submission made on behalf of HPOR that Mr Padilha's past corruption was not material to or had no connection with the fiduciary relationship established by the Agency Contracts is both unrealistic and unsustainable".

38. However at the same time the Majority accepted Mr Padilha worked:

> "actively, extensively and closely with OR to secure the extension of the Drilling Contracts. This involved a series of meetings and discussions over a period of about 20 months commencing in early 2013 and lasting well into 2014. In the event, the extensions were finally approved by Petrobras in late November 2014. In addition, during 2013-2014, Mr Padilha assisted OR with regard to two separate operational incidents involving the rigs. Following the downturn in the oil market and in the course of May/June 2015, he was also requested by OR to provide advice and assistance with regard to a general attempt by Petrobras to accept rate reductions in their existing contracts. As requested, Mr Padilha provided comments and advice as to how OR should approach this matter throughout July 2015 until early September i.e. shortly before OR terminated the Agency Contracts."

39. This work was unanimously described as 'valuable'. As Mr Siberry QC said: '*There was no evidence that Mr Padilha's past corrupt relationship with certain of Petrobras' employees (or past employees) affected the manner in which he/HPOR dealt with Petrobras in relation to [ongoing performance under section 1(d)]*'.

Procedural Background

40. The Tribunal sitting as three arbitrators heard the dispute (in two parallel arbitration claims) at a hearing from 22 to 25 January 2018.

41. The Tribunal issued the Awards dated 7 March 2018, in which Sir Jeremy Cooke and Sir Bernard Eder ('the Majority') gave reasons for their decision ('the Reasons'), and Mr Richard Siberry QC wrote a dissenting opinion ('the Dissent').

42. That Dissent underpinned the application originally made and certain features of it need to be set out. Mr Siberry QC concluded:

    i) Mr Padilha could not have owed fiduciary duties to OR prior to the conclusion of the Agency Contracts.

    ii) Once the Agency Contracts were concluded HPOR was in a fiduciary relationship with OR and owed duties, including to inform OR of its past misdeeds.

    iii) If the URCA Agreement had not been terminated OR could not have terminated that contract on the basis of Mr Padilha's past misdeeds.

    iv) It was through Mr Padilha's efforts that a valuable extension of the Drilling Contracts was obtained and further assistance was provided.

    v) Upon signature of the Agency Contracts *"HPOR acquired an indefeasible right to commission at 2% on all day rate payments … a right which survives (lawful) termination of the Agency contracts by 'OR'".*

    vi) None of the authorities relied on by the majority in support of their conclusion that OR were entitled to repayment of fees already paid support "*the proposition that a principal who agrees to pay an agent commission on receipts under a contract which is (or in this instance, must be taken to have been) procured by the honest endeavours of the agent, must repay the commission honestly earned with the full knowledge and consent of the principal because the agent, in breach of fiduciary duty has failed to disclose past misdeeds which may affect (and in this case did affect) the ongoing relationship between the principal and the third party and which justified termination of the agency contract.*"

    vii) He considered that "*to disallow HPOR's claims for commission due under the Agency Contracts and to allow OR's counterclaim, would involve a significant and somewhat draconian extension of the law relating to remedies for breach of fiduciary duty*."

43. The Claimant issued an arbitration claim form on 29 March 2018 seeking permission to appeal the Awards on a point of law under section 69 of the Arbitration Act 1996.

44. On 20 April 2018 the Tribunal made corrections to amounts referred to in the Awards by two Memoranda of Correction of Award.

45. By an order dated 6 July 2018 I gave permission to appeal under section 69 of the Arbitration Act 1996. I noted: *"while the decision of the Majority may well be right, the authorities on which they rely do not*

seem to offer full support for the result arrived at; as the powerful dissenting reasons indicate". I also highlighted the fact that the argument seemed to have moved on somewhat with new authorities being cited and argued at length.

The essence of the argument

46. The essence of the argument advanced by HPOR echoes Mr Siberry's dissent and contends that the cases relied upon by the majority of the Tribunal do not concern the remedy of forfeiture of remuneration and/or deal specifically with bribes and secret commission, which are irrelevant.

47. HPOR submits that the authorities which do deal with forfeiture of contractual remuneration show that there is no rule that contractual remuneration is forfeit whenever there is a breach of duty.

48. In particular:

    i) Forfeiture is not engaged where there has been a deliberate concealment of breach of fiduciary duty rather than receipt of a bribe or secret commission.

    ii) There is no juridical basis in the laws of contract, restitution or equity for such a rule.

    iii) The court will not order forfeiture of remuneration where it would be disproportionate and inequitable to do so.

    iv) On any analysis, the outcome of the majority decision is punitive.

49. It is fair to say that these issues were to some extent in play before the Tribunal. However, it is quite apparent to me that, as is so often the case on appeals, with a number of other issues live and requiring attention the argument before the Tribunal on these issues was by no means the same or conducted with so much detailed reference to authority as the argument which I have had the benefit of hearing.

The first point: Account of Profits

50. The Majority came to the conclusion that OR was entitled to repayment of HPOR's fees in reliance on three authorities cited by the Defendants. That is clear from the Reasons which at paragraph 66(b)-(d) say:

> "Quite apart from the right to terminate, FHR European Ventures … is authority for the proposition that where an agent acquires a benefit as a result of breach of fiduciary duty the agent is to be treated as having acquired that benefit on behalf of its principal. The Judgment of the Supreme Court expressly stated that the rule applied to all unauthorised benefits …

> In our view the judgment of Millett J In Logicrose … is to similar effect …
>
> Although both cases were concerned specifically with bribes or secret commissions, the rule is not in our view, restricted to the receipt of a bribe or secret commission nor to the rescission of the transaction with the third party and recovery of the amount paid to the agent as secret commission. This is consistent with … the classic statement of Lord Cranworth in Aberdeen Railway Co v Blaikie Bros …"

51. HPOR's case is that none of these cases dealt with the jurisdiction to grant forfeiture of an agent's remuneration, nor do they provide any guidance for the court as to when such a question arises.

52. Accordingly, I have been taken to the relevant authorities. The first is the well known case of *FHR European Ventures LLP v Mankarious* [2014] UKSC 45*;* [2015] AC 250. HPOR points out that this deals at length with bribes, and secret commissions paid to an agent by a third party (see, e.g.: [21], [25], [26] and [34]), but not with contractual remuneration. HPOR say that it is an unacceptable read across to see the contractual remuneration in this case as unauthorised benefits 'acquired by an agent as a result of agency and in breach of his fiduciary duty' where the court can only, given the context of that case, have meant a bribe or secret commission. HPOR notes that no decisions on repayment of remuneration were cited in this decision.

53. OR submits in this context that *FHR* should not be so confined. It says that the issue before the Supreme Court was one which concerned the nature of the remedy. The relevance of the secret commission aspect went only to the issue of whether a proprietary remedy was available. In particular, the agent in *FHR* accepted that it was liable, on established principles, to account for the benefit in personam. The argument advanced was not that the agent need not account (*FHR* at [6]); but, rather, that the remedy was not proprietary because the secret commission had not originated from the principal (*FHR* at [10]).

54. OR points out that this issue was resolved in favour of the principal, on the basis that "all" unauthorised benefits acquired in breach of fiduciary duty were held on constructive trust; not just those that originated from the principal. It would, they submit, be an unprincipled application of *FHR* to conclude that the Supreme Court 'carved out' any aspect of the remedy of account as applicable only to secret commissions or bribes. To the contrary, they say that the ratio of *FHR* is to: (i) establish the existence of a proprietary remedy; and (ii) to confirm the simple, and certain, equitable principle that "all" unauthorised benefits acquired by an agent in breach of fiduciary duty are subject to an account. This includes, but is not limited to, bribes and secret commissions; whether

or not they originated from the principal. Indeed, by its very nature, a secret commission is unlikely to originate from the principal.

55. OR also relies on [5-6] of the judgment as indicating that the principle applies to repudiatory conflicts of interest and points to the first instance decision [2011] EWHC 2308 Ch; [2012] 2 BCLC 39 at [85] and [109] as indicating that remuneration was actually in issue in the case, albeit that that issue did not survive to the Supreme Court.

56. OR submits that FHR should be read as saying that the principle applies to all serious breaches, across the board; and that a repudiatory breach of fiduciary duty via a conflict of interest falls comfortably within its ambit.

57. The second authority referenced by the Tribunal was that of Millett J (as he then was) in *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256. In *Logicrose* the agent required the contractual counterparty to pay a bribe of £70,000 to an offshore account. The bribe was held to be recoverable by the principal whether the principal rescinded or affirmed the contract (1263C) because it was a secret profit (1264B). The relevant part for present purposes is that the judge indicated at 1260F-H, that rescission, in addition to other remedies, would be open to a principal whose agent arranges to or takes a secret commission or bribe.

58. HPOR says that this is a false point given that rescission of the Agency Contracts for breach of fiduciary duty was never an issue in the instant proceedings and OR abandoned its misrepresentation claim during closing submissions. HPOR also submits that the Majority was wrong to say that *Logicrose* and *FHR* were 'to similar effect' in that they consider wholly different remedies which should not be conflated. OR did not address submissions to this authority.

59. The third case relied on is *Aberdeen Rail Co v Blaikie Bros* (1854) 1 Macq 461 and in particular the classic statement by Lord Cranworth:

> 'it is a rule of universal application that no one having [fiduciary] duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which may possibly conflict with the interests of those whom he is bound to protect'.

60. HPOR says that this does not address the issue of forfeiture of contractual remuneration earned by the agent, being a case about whether a contract between the principal and another company in which the agent had a personal interest was unenforceable because of the conflict of interest.

61. OR, for its part, submits that this case, which concerned a sale to a company in which the director had an interest supports the contention

that the principles are not limited to cases of bribery or secret commissions. Another example of such circumstances is pointed to in *Global Energy Horizons Corp. v. Gray* [2012] EWHC 3703 (Ch).

62. The other authority cited by the Majority is Hollander, Conflicts of Interest (5th edn, 2016) 8-019. HPOR submits that this does not take the matter any further other than to confirm that the juridical basis of the Defendants' case is an account of profits. OR did not seek to persuade me that this passage was of material assistance to me.

63. HPOR further submits, moving away from the authorities relied on by the Tribunal, that an account of profits has no role to play in the forfeiture or retention of contractually agreed remuneration for a number of reasons.

64. HPOR points to the decision of the Supreme Court of New Zealand in *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384, which considered whether remuneration was a profit for which a fiduciary might be made to account, such that a party could not claim it at the same time as damages for loss. HPOR favours the majority judgment of Blanchard, McGrath and Gault JJ at [90] who held that profits in the sense required for the remedy of an account derived from the use of the principal's asset and that '*remuneration for services is not a profit of this kind*'. HPOR submits that this is evidently correct; the agent's performance of the contract is the valuable asset and it is not derived from the use of the principal's asset. It also points me to paras [12] and [103] as supportive of the distinction which it seeks to draw.

65. OR submits that too much weight is placed on this case, contending that the reference to remuneration for services not being a 'profit of this kind', is: (i) taken out of context, as the point being made is simply that forfeiture of fees does not result in double recovery; and (ii) the comment is, in any event, contrary to the position taken by the UK Supreme Court in *FHR*. OR notes that in *Stevens* the agent made similar submissions that no proprietary remedy should be available unless the benefit obtained originated from the principal. OR also says that any such distinction, between the types of benefits received or the persons from whom they were derived, was rejected as "*unattractive*" (at [37]) and "*artificial*" (at [38]).

Discussion

66. The argument before me has been extremely interesting, and has served to make quite clear the basis on which the Majority reached the conclusion which they did on this issue.

67. However, despite Mr Joseph QC's skilful argument I have come to the conclusion that insofar as the Majority's reasoning was based on a conclusion that an account of profits was available in this case, they were in error so to conclude.

68. I will start with *Logicrose* simply in order to clear it out of the way. The Tribunal identified this as one of a trinity of cases which justified the conclusion to which they came. The passage to which they referred was this:

> "It is well established that a principal who discovers that his agent in a transaction has obtained or arranged to obtain a bribe or secret commission from the other party to the transaction is entitled, in addition to other remedies which may be open to him, to elect to rescind the transaction ab initio or, if it is too late to rescind, to bring it to an end for the future: ….
>
> The remedy is not confined to cases where the agent has taken a bribe or secret commission in the strictest sense. It is available whenever, without his principal's knowledge and consent, the agent has put himself in a position where his interest and duty may conflict. A principal is entitled to the disinterested advice of his agent free from the potentially corrupting influence of an interest of his own. Any such private interest, whether actual or contemplated, which is not known and consented to by his principal, disqualifies him: ….. It is immaterial whether the agent's mind has been affected or whether the principal has suffered any loss as a result: "the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that:" ….. The principal, having been deprived by the other party to the transaction of the disinterested advice of his agent, is entitled to a further opportunity to consider whether it is in his interests to affirm it".

69. With the greatest of respect to the majority it is hard to see how this dictum, made in the context of a "surreptitious payment" case can assist in this case. Before me OR placed no reliance on it.

70. As for *FHR*, it was (in its Supreme Court incarnation) a case not just about secret commissions, but more particularly about the availability of a proprietary remedy in relation to a payment made by a third party. I would be reluctant, absent other supporting authority, to conclude that the court was there aiming at a very much wider target. What is in issue here is something very different indeed – it is not an unauthorised benefit from a third party but remuneration agreed and known to be coming to HPOR which can only even arguably be regarded as unauthorised by dint of a breach of fiduciary duty operating to unpick the parties' agreement.

71. I do not read the passages to which I was referred as purporting to do any such thing. The passage at [5-6] says this:

> "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 Phipps v Boardman [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 Jessel MR in Dunne v English (1874) LR 18 Eq 524, 533.
>
> 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…"

72. This passage comes directly under the heading "Prefatory Comments". It is fair to conclude that it is effectively setting the stage for what is to come in relation to the issues in the case, and it can be seen that the reference to conflicts of interest is in passing. The passage at [33] rehearses and comments on the position of the respondents. It says this:

> "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."

73. As I read this passage, while it certainly does refer to "*all unauthorised benefits*" it has to be read (particularly as a rehearsal/evaluation of the argument advanced by one party) in the context of the argument before the court, as relating to "all" contrasted to *"not just those that originated from the principal"*.

74. Nor do I consider that the matter is assisted by reference to the first instance decision. Mr Joseph QC took me to the passage at [85] which says:

> "If the agent is in breach of fiduciary duty in relation to the receipt of commission he will be bound to account for such sum to the principal, see Snell's Equity 31st Ed. §7-127 and Bowstead §6-082. In addition, the principal is entitled to refuse to pay contractual commission in respect of the transaction as to which the agent is in breach, and can bring to an end the contract of agency summarily, see Bowstead §7-047. The case of *Andrews v Ramsey & Co* (above) at p.636-8, approved and applied in a number of subsequent decisions of the Court of Appeal is clear authority for both of these consequences of an agent's breach of fiduciary duty."

75. However again context is all. The position in *FHR* was that the agent had taken a commission from a third party in breach of his fiduciary duty in relation to a specific transaction. That profit from a third party was one he was bound to account for and his contractual commission for that transaction could be refused to him. That is an entirely different situation from the present one, where what is in issue is (i) not any payment from any third party and (ii) earlier contractual payments not specific to a transaction in relation to which any such unauthorised payment was made.

76. What was perhaps more akin (though not analogous) to our situation was the question in *FHR* regarding contractual commissions for other transactions. That is found at [109-12]:

> "At this stage of the argument, Mr Mill accepted on the basis of clear and emphatic authority that Cedar was not entitled to a claim in debt or for damages on the basis of the contractual remuneration that it would have obtained in relation to work done in the purchase of the Hotel. However, he submitted that this should not preclude Cedar from recovering in respect of work done in relation to the 3 other hotels …
>
> Although the law does not permit the agent to recover sums due under the contract in respect of which the agent has acted in breach of fiduciary duty …, the Claimants accepted that Cedar would be entitled to be paid in relation to the work they did on the other three hotels. …
>
> In these circumstances it is unnecessary to decide whether, on the hypothesis that no contract had been concluded, Cedar could recover the like or similar sum by way of Quantum Meruit for what was valuable work albeit not work that led to an acquisition. In my view there is no authority or principle which would preclude such an award, …. There is little reason why a principle which applies to discourage fiduciaries from putting themselves in a position where their interest conflicts with their duty should apply to unrelated work, where the conflict does not arise and in respect of which no dishonesty, bad faith or surreptitious dealing has occurred."

77. That passage, it seems to me, is very much not in line with the broad approach which OR urges upon me. It reinforces my view that a cautious approach is called for in this context.

78. Nor do I find anything in the classic statement from *Aberdeen Railway Co* which requires any different conclusion. That is a broad statement made in a very different context – a direct conflict of interest in financial terms in that the director was a member of a firm contracting with his company. True it is that it is not a secret commission/bribe case; but it was also not concerned with an account of profits, nor did it concern the question of earned remuneration.

79. Also sitting uncomfortably with OR's approach is Snell's Equity (33rd edn, 2014) at 7-054 to 7-055 and 7-062 which does tend to support the view that the type of gain with which an account of profits is

concerned is very different from contractual remuneration. Examples in those passages include monetary profit obtained by selling the principal's property, or taking a bribe or a secret commission. Thus *'remuneration obtained by the fiduciary from someone other than the principal without the principal's consent can be stripped from the fiduciary using an account of profits, as it is a bribe or secret commission taken in breach of fiduciary duty'*.

80. In this unusual situation some (albeit limited) support is also gained from the *Stevens* case. The case is plainly not analogous: it concerned with an estate agent who concealed the "flipper" nature of a potential buyer from the seller (i.e. that the buyer did not want to buy to live in the house, but proposed to do some cosmetic works and turn a substantial profit – as indeed he did). However, at [90] the majority does indeed say this:

> "The remuneration is forfeited because it has not been earned by good faith performance in relation to a completed transaction. There is no inconsistency in awarding the principal both damages and the refund of commission as there would be for instance if a court were to order a defendant fiduciary both to pay damages and to account for profits made by the use of a principal's asset. Remuneration for services is not a profit of this kind, it is something to which an agent has no entitlement once he or she has committed a breach of fiduciary duty save in the circumstances described by Atkin LJ .."

81. This does indicate a line of authority for the account of profits as being a remedy directed to use of the principal's asset in some forbidden way. It may not be made in the same context as this case, but I do not accept that it is taken out of context. The passage also draws a line between the roles of forfeiture, account and compensation. This latter is echoed in the judgment of Elias CJ at [12] holding that forfeiture of remuneration is a *"stand-alone remedy … available irrespective of compensation for any loss"* and which does not *"fit comfortably into the mutually exclusive remedies of account of profits or compensation for loss"*. She specifically deprecates the argument, effectively advanced by OR here, that it may be properly characterised as 'unauthorised profit'.

82. All of these feed into an analysis whereby the remedy of account of profits is directed to sums which should have come to the principal, if to anyone. They are therefore sensibly to be seen as profits from misuse of the principal's property. That analysis does not sit comfortably when one turns to consider payments for contractually agreed remuneration where the contract has been performed and so the agent is contractually entitled to the sum paid to it. It makes sense that there should be some other way of dealing with such issues.

83. That essentially reflects what was said by Arden LJ (as she then was) in *Murad v Al-Saraj* [2005] EWCA Civ 959; [2005] WTLR 1573 at [85]:

> 'an account of profits […]is a procedure to ensure the restitution of profits which ought to have been made for the beneficiary and not a procedure for the forfeiture of profits to which the defaulting trustee was always entitled for his own account. […E]quity does not take the view that simply because a profit was made as part of the same transaction the fiduciary must account for it'.

84. I should add that I similarly find the approach of asking whether the benefit was authorised by the principal with fully informed consent one which sits ill in the context of contractual remuneration from the principal.

85. Accordingly, I do conclude that the Majority erred when they, as they apparently did, considered that this case concerned the remedy of an account of profits. The complaint in this case, which concerns when an agent is entitled to retain contractual remuneration (or has to repay it) is not one for which a remedy lies in an account of profits. To this extent the appeal succeeds.

Forfeiture

86. OR's second line of argument is to say that even if (as I have found) the Majority erred on the account of profits point, they were right for another reason, namely that (if – which is not accepted – HPOR acquired a right to the remuneration) HPOR's remuneration was forfeit.

87. The starting point is the classic statement of the remedy of 'forfeiture' is found in Atkin LJ's judgment in *Keppel v. Wheeler* [1927] 1 KB 557, 592 (CA):

> "Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration; and as in this case it is found that the agents acted in good faith, and as the transaction was completed and the appellant has the benefit of it, he must pay the commission".

88. OR submits that this remedy is available in "*practically every case*" where an agent acts in breach of fiduciary duty. In such cases, the agent is liable to "*forfeit any right to remuneration at all*", whether by contract

or otherwise. Likewise, once a conflict of interest is shown, an agent will invariably lose his right to remuneration, notwithstanding that the principal may have received a benefit from the agent: Halsbury's Laws, 'Agency' §95.

89. The remedy of forfeiture has been applied in a number of recent cases to which I have been referred. Only a few of these were cited to the Tribunal.

90. The first of these is *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91. This was cited to and referred to by the Tribunal. It was a case of a director approaching a supplier with proposals for the establishment of his own business in competition to that of his employer. The judge at first instance held:

> 'If Mr. Fassihi were entitled to the arrears of salary claimed, by virtue of the Apportionment Act, I do not think that his misconduct would prevent him from claiming it. In Horcal, the Court of Appeal held that the employee was entitled to his salary for a completed period, notwithstanding his breach of duty, unless this amounted to a failure of consideration, which has not been alleged. However, it may well be that, since Mr. Fassihi spent a great deal of his time both in this broken period and in earlier months working not for but against Item, that Item is entitled to claim part of any salary paid or still payable as damages'.

91. The second case is *Imageview Management Ltd v. Jack* [2009] EWCA Civ 63; [2009] 2 All ER 666. This was referred to in argument before the Tribunal but not relied on by them. An agent was employed by a footballer to negotiate his transfer to an English club, but also negotiated a secret commission from the club for obtaining Mr Jack's work permit. Although the contract provided for ongoing services [2(b)], there is no indication in the judgment that any were provided (Jacob LJ indicates at [47] that the benefit the player received was his contract with the club).

92. The key passage is at [44] where following a citation of Atkin LJ's dictum, Jacob LJ said:

> "I accept Mr Lopian's submission that there can be cases of harmless collaterality. And that there can be cases where there is just an honest breach of contract such as Keppel's cases [1927] 1 KB 577 . But this is simply not such a case. This is a case of a secret profit obtained because Mr Berry/Imageview was Mr Jack's agent. And there was a breach of a fiduciary duty because of a real conflict of interest. That in itself

> would be enough, but there is more: the profit was not only greater than the work done but was related to the very contract which was being negotiated for Mr Jack. Once a conflict of interest is shown, as Atkin LJ said in the last passage quoted, the right to remuneration goes."

93. The next case is *Bank of Ireland v. Jaffery* [2012] EWHC 1377 (Ch) [73], [370]-[373]. There Vos J (as he then was) said:

> "This is not a case such as Imageview … , where an agent has betrayed the trust of his principal in relation to the sole subject matter of the agency. As I have already said, Mr Jaffery was employed by the Bank in a senior position and betrayed the Bank's trust in respect only of the transactions involving the RGC Customers. In other respects, he seems to have been a valuable and diligent employee promoting the Bank's interests successfully. Of course, the Bank must be compensated on normal principles for the breaches of duty that I have found. The law applies the rules as to breach of fiduciary duty strictly for the reasons given by Jacob LJ in his judgment in Imageview, but it does not do so unfairly.
>
> … It would be unfair in my judgment, even taking into account the nature of Mr Jaffery's breaches, to require him to repay his salary and bonuses, or indeed any part of them. The breaches must, as I have already said, be looked at in the context of his employment as a whole. Mr Jaffery worked long hours over several years for the Bank. It would be both disproportionate and inequitable in the circumstances of this case to require Mr Jaffery to repay some 5 years of salaries and bonuses in addition to disgorging his profits or paying equitable compensation."

94. In *Wright Hassall LLP v Horton* [2015] EWHC 3716 (QB) [59], it was argued in the context of a strike out application that solicitors had been conflicted because they had previously acted for a client's landlord in relation to the same property. It was held that even where there is an arguable case of breach of fiduciary duty, '*the authorities make it clear that it does not automatically follow that any entitlement to remuneration is forfeit*' at [61]. At [60-62] Newey J highlights the importance of dishonesty and bad faith as well as breaches going to the whole of the contract, the effect of the breach on performance, and 'harmless collaterality'.

95. The final case is *Hosking v. Marathon Asset Management LLP* [2016 EWHC 2018 (Ch) [2017] Ch 157. That was a section 69 appeal (on whether executives' income share was remuneration for forfeiture purposes, which it was [44]). However, the judgment of Newey J at [7] to [9] records the arbitrator's decision on forfeiture. The arbitrator

found that Mr Hosking, who had a decades-long relationship with the company, should forfeit the part of his remuneration as executive director which was remuneration for performance of executive duties because *inter alia* there were a series of serious breaches involving trying to take other members of the LLP with him. The remuneration forfeited was only for the six-month period in which he had breached his fiduciary duty by discussing the establishment of a new competing business and producing a business plan.

96. OR submits that these cases demonstrate clearly that forfeiture is an appropriate and available remedy where there has been a serious breach going to the root of the agency and which destroys that relationship.

97. They say that forfeiture is plainly appropriate in this case given the unchallenged findings that: (i) HPOR was in repudiatory breach of fiduciary duty (ii) HPOR was in an irremediable conflict of interest from the outset of the Agency Contracts: (iii) HPOR deliberately concealed the corruption of its alter ego from OR, where that corrupt relationship was material to the agency relationship; and (iv) HPOR repeatedly told OR false information as part of that deliberate concealment.

98. HPOR submits that forfeiture, as an equitable remedy, must respect notions of fairness. It starts with *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 339 (CA) and the statement that commission earned and retained and salary already due at the time of the breach must normally be paid and then prays in aid not just the authorities relating to forfeiture itself, but also a variety of authorities in other contexts (restitution, proportionality, penalties etc) to this broad effect.

99. It submits that consideration of whether forfeiture is disproportionate or inequitable allows the courts to balance principled sanction of an agent in appropriate cases with the need to provide remuneration for (professional) services provided by an agent, for instance in long-term contractual relationships where those services have been valuable to the principal. The present case is, HPOR says, one in which the corrupt activities whose non-disclosure constituted the breach of fiduciary duty do not have any relation to this contract. It is also a case where there was performance and valuable performance by HPOR over a long period – akin to *Hosking*.

100. It submits that:

    i) Mr Padilha achieved not only entry into the Drilling Contracts (before the Agency Contracts) but also the later extension of them. This important extension was the result of many months of negotiations with Petrobras as recognised by the Tribunal.

    ii) Mr Padilha further assisted the Defendants in their negotiations with Petrobras when the latter attempted to push down prices and

there was no finding by the Tribunal that his performance in doing so was in any way unsatisfactory.

iii) He assisted the Defendants in dealing with two operational incidents. The Majority and the Dissent both describe the services Mr Padilha was employed to provide, and according to the Tribunal did provide, as 'valuable'.

101. It follows, it says, that the case is one in which it would be inequitable and disproportionate – indeed grotesque – to deprive the Claimant of its remuneration in respect of the valuable services which it rendered under the Agency Contracts.

Discussion

102. There is a certain amount of common ground. Unlike the position relating to an account of profits, it is plain on the authorities that the remedy of forfeiture is one which is applicable to an agent's remuneration and is applicable whether or not that fee has already been paid. It is available in all classes of breach, and is not limited to cases of secret commissions or bribes. The issue is only as to where the line falls, and falls in this case.

103. On my reading of the cases the line which the Court is seeking to draw in them is between serious breaches and relatively harmless ones – of which those described under the label of "harmless collaterality" are probably the archetype. The result will be fact dependent.

104. The outcome turns on the nature and seriousness of the breach, not upon harm; the principal need not demonstrate he has suffered any loss. As was said in *Imageview* at [50]:

> "The policy reason runs as follows. We are here concerned not with merely damages such as those for a tort or breach of contract but with what the remedy should be when the agent has betrayed the trust reposed in him–notions of equity and conscience are brought into play. Necessarily such a betrayal may not come to light. If all the agent has to pay if and when he is found out are damages the temptation to betray the trust reposed in him is all the greater. So, the strict rule is there as a real deterrent to betrayal. As Scrutton LJ said in Rhodes's case 29 Com Cas 19, 28, "The more that principle is enforced, the better for the honesty of commercial transactions"."

105. Bowstead and Reynolds (as might be expected) essentially reflects this approach. The 21st edn, (2017) paragraph 7–050 states that although

prima facie a serious breach of duty owed by an agent to a principal may justify refusing to pay a fee, "*commission earned, and retainer, salary or wages already due, at the time of breach must normally be paid. This is simply an application of the law as to discharge of contract by breach*". This proposition is advanced by reference to *Boston Deep Sea Fishing v. Ansell* (1888) 39 Ch D 339 (CA). But in that case the court did not comment on earned remuneration and the decision on the unearned commission was taken on the basis that it had not yet accrued. Bowstead & Reynolds paragraph 7-050 does however indicate that receipt of a bribe, misappropriation of the principal's property, or a breach of fiduciary duty going to the root of the contract might justify forfeiture.

106. The reality of the situation in this case is that the exercise in which the Tribunal engaged was one which related to the application of this principle; but they approached it not primarily as a question of forfeiture; and they approached it with a different slant on the facts as between the Majority and the Dissent.

107. In particular Mr Siberry QC plainly had much in mind the value of the services which Mr Padilha had provided. But he also diverged from the Majority on two points which impact at this stage. The first was that he disagreed with the Majority about the existence of fiduciary duties prior to the Agency Contracts. Secondly, and perhaps as a consequence, he saw the question of whether HPOR became entitled to remuneration as a point clearly determined in HPOR's favour (the Majority left this point open).

108. It was open to Mr Siberry QC as an arbitrator deciding questions of fact to take whatever view of the evidence seemed correct to him. I cannot. As a judge considering an appeal on a question of law I am bound by the findings of the Tribunal (insofar as they were in agreement) and the Majority (insofar as they were not).

109. I have set out those findings above. Looking carefully at them it seems plain to me that while the Tribunal considered that HPOR did perform valuable services they were also quite clear that the breaches which it (through Mr Padilha) committed were serious and were not collateral. Plainly the Tribunal as a whole was of the view that they went to the root of the contract; that is the very antithesis of collaterality. The Tribunal considered that from the very outset of the relationship HPOR disabled itself from providing disinterested advice; and indeed that it fraudulently concealed its own breach of duty. In terms of consequences there was a finding of fact that the association with HPOR caused OR to be "red-flagged" as an unacceptable compliance risk, meaning that they were excluded from tendering for Petrobras work for a period of time.

110. In those circumstances when I ask myself the question whether this case falls on the side of the line where the most serious breaches are punished (and sometimes over-punished for sound policy reasons) or the side where a breach which is harmless or collateral or both can

escape sanction, I have no difficulty in concluding that this is a case which falls into the former category. On the clear findings of the Tribunal HPOR committed serious breaches which went to the root of the contract, and did so from the very moment when the relationship began. This is exactly the kind of case where forfeiture of remuneration is appropriate.

111. In my judgment the fact of Mr Padilha's valuable services cannot affect this conclusion. He did provide value, but he provided it at the same time and alongside a serious continuing breach of duty. Furthermore, one might well say that his contributions (after the initial securing of the Drilling Contracts, well before the Agency Contracts) were intermittent; whereas the breach was not.

112. I should note that in this the case is distinct from the "innocent" transactions discussed in *FHR* at first instance. There one had three separate transactions which were unaffected by the breach of duty. Here although the breach of duty originated in relation to a separate matter and HPOR did provide value, the breach nonetheless affected every part of HPOR's relationship with OR and the value given was in a sense incidental, given that *"it could not give disinterested advice nor give OR its undivided loyalty."* Further it did affect OR's business.

113. So too is the case very different to *Hosking* or *Jaffery*; in both of those cases it was possible to carve out cleanly years of blameless work. Here the breach has been found to infect the relationship *ab initio*.

114. For the avoidance of doubt, I do not consider that the various "Respondent's Notice reply points" add anything to this analysis. It may well be that there has been no total failure of consideration; but I see no reason why that should preclude the principles of forfeiture, which is not a restitutionary claim, from operating. Indeed the forfeiture cases are replete with examples of situations where there was not a total failure of consideration. Of course the fact that there has been no total failure of consideration will be a matter which goes into the analysis when deciding whether the breach is minor or harmless – but it is not determinative.

115. Nor do I see the cases on proportionality as in any way creating a tension with this analysis; as can be seen from the fact that a number of the same cases were referenced in these sections of the submissions. In this context there was perhaps more emphasis on the idea of whether the contract was "one-off", with HPOR conceding that in the case of a "one-off" contract a breach would necessarily go to the root of the contract and justify forfeiture. But while this was not quite as obvious a "one-off" contract as the one in *Imageview v Jack*, nor either was it the type of general or broad ranging agency which gave rise to the decisions in *Hosking* and *Jaffery*. Again, when one comes to draw the line, the case partakes much more of the former class, since the retainer of HPOR was specific to certain transactions, albeit subsisting over a period; as can

be seen by the way in which remuneration was calculated – by reference to payments under specific contracts with one of the very parties to Mr Padilha's past bribery.

116. It follows from all of the above that I conclude that HPOR's past remuneration is forfeit, and I therefore uphold the result at which the Majority arrived, albeit I arrive at the same result by a slightly different route.