



16 July 2014

PRESS SUMMARY

FHR European Ventures LLP and others (Respondents) v Cedar Capital Partners LLC (Appellant)
[2014] UKSC 45
On appeal from [2013] EWCA Civ 17

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Sumption, Lord Carnwath, Lord Toulson, Lord Hodge, Lord Collins

BACKGROUND TO THE APPEALS

This appeal concerns the issue of whether a bribe or secret commission received by an agent is held by that 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. 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 important for two main reasons. First, if the agent becomes insolvent, a proprietary claim would give the principal priority over the agent's unsecured creditors. Secondly, if the principal has a proprietary claim to a bribe or commission, he can trace and follow it in equity.

On 22 December 2004, FHR European Ventures LLP purchased the issued share capital of Monte Carlo Grand Hotel SAM from Monte Carlo Grand Hotel Ltd (“the Seller”) 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. Cedar accordingly owed fiduciary duties to the claimants. Cedar had also entered into an “Exclusive Brokerage Agreement” with the Seller, which provided for the payment to Cedar of a €10m fee following a successful conclusion of the sale and purchase of the issued shared capital of Monte Carlo Grand Hotel SAM. The Seller paid Cedar €10m on or about 7 January 2005.

On 23 November 2009 the claimants began these proceedings for recovery of the sum of €10m from Cedar. The main issue at trial was whether Cedar had made proper disclosure to the claimants of the Exclusive Brokerage Agreement. Simon J found against Cedar on that issue, and made 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 ordered Cedar to pay that sum to the claimants. However, he refused to grant the claimants a proprietary remedy in respect of the monies.

The claimants successfully appealed to the Court of Appeal, who made a declaration that Cedar received the €10m fee on constructive trust for the claimants absolutely. Cedar now appeals to the Supreme Court on this issue.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Neuberger gives the judgment of the court. 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 general equitable rule (“the Rule”) is that he is to be treated as having acquired the benefit on behalf of his principal, so it is beneficially owned by the principal. The dispute in this case 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. While it is not possible, as a matter of pure legal authority, to identify any plainly right or plainly wrong answer to the issue of the extent of the Rule, considerations of practicality and principle support the case that a bribe or secret commission accepted by an agent is held on trust for his principal.

REASONS FOR THE JUDGMENT

The only point on this appeal is whether the claimants are entitled to the proprietary remedy in respect of the €10m received by Cedar from the Seller [4]. The following principles are not in doubt:

- 1) 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;
- 2) 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
- 3) 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, by putting himself in a position where his duty to one principal *may* conflict with his duty to the other [5].

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 profit by way of equitable compensation [6]. The principal's right to seek an account undoubtedly gives him a right in equitable compensation in respect of the bribe or secret commission, which equals the quantum of that bribe or commission. In cases to which the Rule applies, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies [7].

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 [9]. The appellant contends 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 [10]. The respondents argue 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 the fiduciary duty owed to his principal, the agent holds the benefit on trust for the principal [11].

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 [32]. 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. In contrast, the appellant's position is more likely to result in uncertainty [35]. 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. Bribes and secret commissions undermine trust in the commercial world, and 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 [42].

The argument that the respondents' version of the Rule will tend to prejudice the agent's unsecured creditors has 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. Secondly, 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. Finally, it is 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 [43-44].

Considerations of practicality and principle support the case that a bribe or secret commission accepted by an agent is held on trust for his principal. While the position is less clear when one examines the decided cases, taken as a whole the authorities support the respondents' case [46]. The cases, with the exception of *Tyrrell v Bank of London* (1862) 10 HL Cas 26, are consistently in favour of bribes or secret commissions being held on trust for the principal or other beneficiary until the decision in *Metropolitan Bank v Heiron* (1880) 5 Ex D 319, which was then followed in *Lister & Co v Stubbs* (1890) 45 Ch D 1. The domestic cases subsequent to *Lister* are explicable on the basis that the issue was either conceded, or decided on the basis that *Lister* was binding. 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 in so far as they relied on or followed *Heiron* and *Lister*, should be treated as overruled [47-50].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://www.supremecourt.uk/decided-cases/index.shtml>