Introduction

Who is the rightful owner of a bribe or secret commission received by an agent? Is such sum held by the agent on constructive trust for his principal, so that the principal has proprietary interest over the sum? Or does the principal only have a personal claim against the agent for equitable compensation? In the case *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45, the UK Supreme Court decided that bribes and secret commissions are held on trust by an agent for his principal, thereby settling the century-old controversy in English law. In doing so, the Court overruled various earlier decisions including *Sinclair Investments Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 and aligned English law with the position in other common law jurisdictions.

Background

FHR European Ventures LLP ("FHR"), along with other companies in the same investment group, purchased the Monte Carlo Grand Hotel (the "Hotel"). Cedar Capital Partners ("Cedar") acted as FHR's agent in negotiating the purchase price of €211.5 million for the sale. But unknown to FHR, Cedar received a €10 million secret commission from the vendor of the Hotel, pursuant to an exclusive brokerage agreement, whereby Cedar had agreed to act as a facilitator in respect of the sale of the Hotel. FHR brought proceedings against Cedar to recover the secret commission.

At first instance, Simon J agreed that Cedar was in breach of the fiduciary duties it owed, as an agent, to FHR, by failing to obtain FHR’s informed consent to the commission fee. Accordingly, Cedar was liable to FHR in the sum of €10 million. The judge, however, declined to make the declaration sought by FHR that Cedar received the sum of €10 million on constructive trust for FHR absolutely. The question of whether FHR had acquired a proprietary interest in the commission fee mattered because it would allow FHR to better discover what had happened to the fee and who had benefited from it. Essentially, it is about following and tracing and amplifying FHR’s claim. On appeal, the Court of Appeal allowed the appeal and granted FHR the declaration sought. Cedar appealed to the Supreme Court.

The “Rule”

Lord Neuberger, who delivered the judgment, first referred to the well-established principle that where an agent receives a benefit in breach of his fiduciary duty, he is liable to account
for that benefit, which represents a personal remedy for the principal against the agent. His Lordship further noted that in some cases where an agent acquires a benefit which comes 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. The issue in dispute was whether the Rule applies where the benefit is a bribe or secret commission.

**Conflicting authorities**

Lord Neuberger reviewed a raft of conflicting authorities from 19th century onwards. On the one hand, a line of authorities suggests that any benefit received by the agent in breach of fiduciary duty was held by the agent on trust for the principal. On the other hand, the House of Lords took the opposite view in *Tyrrell v Bank of London* [1862] 10 HK Cas 26, in which the plaintiff company was held not to have a proprietary claim in respect of an interest in a piece of land, because it had been acquired by the company’s solicitor “outside the limit of the agency”. Similarly, in *Lister & Co v Stubbs* [1890] 45 Ch D 1, the Company was held to have no proprietary interest in a bribe received by its agent and in *Metropolitan Bank v Heiron* [1880] 5 Ex D 319, a claim brought by the company to recover a bribe received by its director was held not to be proprietary, because the sum could not be considered to be “money of the company”. More recently, in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, a Privy Council case involving a Hong Kong public official, Lord Templeman concluded that bribes received by a corrupt government legal officer were held on trust for his principal, and as such they could be traced into properties which he had acquired with the bribe money in New Zealand. But when the issue arose again before the Court of Appeal in *Sinclair v Versailles* [2011] EWCA Civ 347, Neuberger MR (as he was then) declined to follow Reid and concluded that a principal would not have a proprietary claim against an agent, unless the bribe or secret commission is or has been beneficially the property of the principal, or the agent derived the bribe or secret commission from some opportunity or right which was properly that of the principal.

**Supreme Court decision**

Having reviewed the conflicting authorities, the Court concluded that it was not possible to decide the case on the basis of clear legal authority. It is therefore necessary to consider the matter based on principle, practicality and policy.

First of all, the Court recognized that the position adopted by FHR is consistent with the fundamental principles of the law of agency. Secondly, FHR’s argument that the Rule applies to all unauthorized benefits which an agent receives had the merit of certainty and simplicity, which were said to be highly desirable qualities in the law. Thirdly, FHR’s position also aligned 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. Further, Lord Neuberger considered the suggestion that the Rule should not apply to a bribe or secret commission because the principal could not have received it to be “unattractive”, because there must be a strong possibility that the bribe had disadvantaged the principal. And it could lead to absurd result that a principal of an agent who received a bribe or secret commission is worse off than a principal whose agent obtains a benefit in far less opprobrious circumstances. Lastly, the Court agreed with Lord Templeman’s view in Reid that bribery and secret commissions are evil practice and it is appropriate that the law be particularly stringent when it comes to bribes and/or secret commissions, which “tend to undermine trust in the commercial world”. Accordingly, the appeal was dismissed. In finding for FHR, the Supreme Court overruled the decisions in Tyrrell, Heiron, Lister and Sinclair, saying that the law had taken a “wrong turn”. It is interesting to note that Lord Neuberger effectively overruled his own decision in Sinclair.

Implications

The decision has significant implications and provides a welcome clarification. The proprietary remedy now enables the principal to trace into the agent’s assets as well as into the hands of any third-party knowing recipients and claim any fruits of the fraud. More significantly perhaps, if the agent becomes insolvent, the principal will have priority over unsecured creditors. Also, it is now arguable that limitation period does not apply to such claim by virtue of section 20(1) of the Limitation Ordinance (Cap 347).

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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