

## UK SUPREME COURT RULES IN BRIBERY CASE

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

### **Introduction**

On 16 July 2014, the UK Supreme Court handed down its decision in *FHR European Ventures LLP & Ors v Cedar Capital Partners LLC* [2014] UKSC 45 in which a seven-member Court found that a bribe or secret commission received by an agent was held by that agent on trust for his principal and constituted a proprietary claim, thereby giving the principal priority over unsecured creditors and the ability to trace and follow it in equity.

### **Background**

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 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 and accordingly owed fiduciary duties to the claimants. Cedar had also entered into an “Exclusive Brokerage Agreement” dated 24 September 2004 with the Vendor, 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. The Vendor paid Cedar €10m on or about 7 January 2005.

On 23 November 2009 the claimants began the present proceedings for recovery of the sum of €10m from Cedar. The main issue was whether Cedar had made proper disclosure to the claimants of the Exclusive Brokerage Agreement.

At first instance, Simon J found against Cedar, 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 claimant, but refused to grant the claimants a proprietary remedy. The claimants successfully appealed to the Court of Appeal, which made a declaration that Cedar received the €10m fee on constructive trust for the claimants. Cedar appealed to the Supreme Court.

The issue for the Supreme Court was 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 was held on trust, the principal had a proprietary claim to it which would have the consequence that:

- if the agent becomes insolvent, a proprietary claim would give the principal priority over the agent's unsecured creditors.
- if the principal has a proprietary claim to a bribe or commission, he can trace and follow it in equity.

Cedar sought to argue that 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, and therefore was not a proprietary right.

The claimants' position was that it did have a proprietary right to the bribe or secret commission, 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.

## **Decision**

In a unanimous decision, the Supreme Court dismissed the appeal.

Lord Neuberger, giving the decision of the Supreme Court, noted:

- 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.
- 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.
- 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.
- Where an agent receives a benefit in breach of his fiduciary duty, 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.

The issue in dispute was the extent to which a proprietary remedy was available, in addition to a personal remedy, where the benefit is a bribe or secret commission obtained by an agent in breach of his fiduciary duty to his principal.

As a matter of legal authority, it was not possible to identify a clearly right or wrong answer. However, as a matter of simplicity and policy, the Supreme Court decided that a

bribe or secret commission accepted by an agent was held on trust for his principal. In particular:

- The claimants' position had the advantage of certainty, whereas Cedar's position could give rise to uncertainty.
- Policy considerations supported the view that the proceeds were held on trust - bribes and secret commissions undermined 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.
- The argument that the existence of a proprietary remedy would prejudice the agent's unsecured creditors had limited force in the context of a bribe or secret commission - the proceeds of a bribe or secret commission consisted of property which should not be in the agent's estate at all.
- The bribe or commission would very often have reduced the benefit from the relevant transaction which the principal would have obtained, and could therefore fairly be said to be his property.
- It was just that a principal whose agent had 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.

### **Concluding observations**

The decision will be welcomed by claimants seeking to recover from agents who have profited from a breach of their fiduciary duties by the receipt of bribes or commissions. It will provide for greater ability to trace and recover such amounts, and will be of particular use in circumstances where the agent pleads bankruptcy or where funds have been transferred to a third party.

19<sup>th</sup> August 2014