

LAST RITES FOR LISTER v STUBBS?

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I. INTRODUCTION

Suppose D receives a money bribe from X to do or refrain from doing some act, in breach of a fiduciary duty to P, his employer. What remedies are available to P to recover the bribe or its exchange product from D or those who knowingly receive the proceeds? Further, what interest, if any, does P have in any profits obtained from the bribe? For more than a century, *Lister & Co v Stubbs*¹ has provided a restrictive answer. Receipt of a bribe merely gives rise to a debtor-creditor relationship between D and P. In this limited setting, breach of fiduciary duty fails to kindle a trustee-beneficiary relationship. This reflects a strict proprietary analysis of the parties' interests: the bribe money is deemed the property of the dishonest employee and although he is liable to account for this secret commission to his employer, the resultant obligation is only a debt. The employer is unable to assert a proprietary claim and therefore cannot follow bribe money into substituted assets. Thus, P is confined to a personal claim against the fraudulent employee.² This may take the form of an action for money had and received³ or for recovery of an equitable debt.⁴ The viability of a claim in personam is of course dependent on D's solvency. If, as is not uncommon, the employee is improvident in his own financial affairs as well as dishonest, his employer's claim will be reduced to that of an unsecured creditor.

Critics have noted the unacceptable anomaly that the rogue who accepts a bribe is in a more favourable position than an "honest" fiduciary who makes an unauthorised profit.⁵ The preponderant academic view is that the supporting analysis has been outstripped by modern equitable doctrines.⁶ In particular, *Lister* has become increasingly difficult to reconcile with equity's enforcement of fiduciary obligations and the expansive application of constructive trusts.⁷ However, the judicial response has been more

1 (1890) 45 Ch D 1.

2 In the oft quoted words of Lindley LJ in *Lister*, to rule otherwise would mean "confounding ownership with obligation"; *ibid* at 15.

3 Where a bribe consists of property, there is authority for the view that the principal may claim the asset *in specie* or its value. See *Re Morvah Consols Tin Mining Co (McKay's Case)* (1875) 2 Ch D 1; *Re Caerphilly Colliery Co (Pearson's Case)* (1877) 5 Ch D 336 and *Eden v Ridsdales Railway Lamp & Lighting Co Ltd* (1889) 23 QBD 368.

4 Alternative claims in tort and contract are not considered here.

5 See, for example, *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (note) and *Boardman v Phipps* [1967] 2 AC 46.

6 See Goff and Jones, *The Law of Restitution* (3rd ed 1986) 656-657; Hanbury and Maudsley, *Modern Equity* (13th ed) 627-628; Hayton and Marshall, *Cases and Commentary on the Law of Trusts* (8th ed) 444-446; *Jacobs' Law of Trusts in Australia* (5th ed) 297-299; Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (3rd ed) 153-156; Oakley, *Constructive Trusts*, (2nd ed) 55-58; Pettit, *Equity and the Law of Trusts* (6th ed) 152. *Contra* Birks, *An Introduction to the Law of Restitution* (1989) 388-389; Burrows, *The Law of Restitution*, (1993) 409 et seq, and Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 LQR 433.

7 Sometimes with scant regard for traditional proprietary boundaries. This is particularly evident in the case of de facto relationships where the constructive trust performs a key function in redistributing assets upon separation of the parties. English decisions have tended to be more conservative than judgments in other Commonwealth jurisdictions: *Pettitt v Pettitt* [1970] AC 777; *Gissing v Gissing* [1971] AC 886; *Lloyds Bank Plc v Rosser* [1991] 1 AC 107; cf *Sorochan v Sorochan* [1986] 2 SCR 38; *Peter v Beblow* [1993] 1 SCR 980; *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 76 ALR 75; *Gillies v Keogh* [1989] 2 NZLR 327; *Phillips v Phillips* [1993] 3 NZLR 159.

conservative, and although regarded with reservations,⁸ the decision has not been overturned.⁹

Such, then, was the state of the law when the Attorney-General for Hong Kong commenced proceedings in New Zealand to recover the proceeds of bribes invested in this country by Charles Reid, a former employee of the Crown.

II. ATTORNEY-GENERAL FOR HONG KONG V REID

Background

The facts, in brief, were that Mr Reid held senior positions as a solicitor in the Legal Department of the Government of Hong Kong, where he was responsible for the prosecution of major commercial frauds. During that time he accepted bribes for obstructing the prosecution of certain offences. In 1990 he was convicted under the Prevention of Bribery Ordinance and ordered to pay the Crown HK\$12.4 million, which sum was presumed to be derived from bribes. Part of these funds were used by Reid to acquire three freehold properties in New Zealand, two of which were conveyed to Reid and his wife, the third being held by a solicitor as trustee for Mr and Mrs Reid.

The Attorney-General for Hong Kong lodged caveats against these properties on the grounds that they represented the proceeds of bribes received in breach of Reid's fiduciary duty to his employer, the Crown, for whom they were held on constructive trust.¹⁰ Proceedings were subsequently commenced to prevent the caveats from lapsing.

It was held at first instance that on the authority of *Lister v Stubbs*, Reid was accountable for the bribes on a debtor-creditor basis only. He was not a constructive trustee of the monies or their substituted assets and accordingly the Hong Kong Government had no proprietary interest in the New Zealand properties. This was affirmed by the Court of Appeal of New Zealand.¹¹ Richardson J, delivering the judgment of the Court, accepted that *Lister v Stubbs* was a settled authority which had been properly applied in this case. His Honour concluded that if there was to be any departure from this view, then "that decision is for the Judicial Committee".¹²

Constructive trust

On further appeal,¹³ the Privy Council essentially applied traditional principles of equity and affirmed the repugnance with which equity views illicit gains by a fiduciary. It was an approach shorn of the proprietary analysis that had provided refuge and rationalisation for an enduring anomaly.

8 *DPC Estates Pty Ltd v Grey* [1974] 1 NSWLR 443, 470-471; *Queensland Mines v Hudson* [1976] ACLC 28,658, 28,708.

9 *Lister* has been followed in *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11; *Attorney-General's Reference (No 1 of 1985)* [1986] 1 QB 491; *Daly v Sydney Stock Exchange* (1986) 160 CLR 371; *Islamic Republic of Iran Shipping Lines v Denby* [1987] 1 Lloyd's Rep 367; *Attorney-General for Hong Kong v Reid* [1992] 2 NZLR 385 (NZCA). A notable exception to this line of cases is the recent decision of the High Court of Singapore in *Sumitomo Bank Ltd v Tahir* [1993] 1 SLR 735, reviewed by Hans, "Rethinking the Personal and Proprietary Distinction" [1993] SJLS 198.

10 S 137(a) Land Transfer Act 1952 states: "Any person (a) claiming to be entitled ... under this Act by virtue of ... any trust expressed or implied ... may at any time lodge with the Registrar a caveat ..." (emphasis added).

11 [1992] 2 NZLR 385.

12 *Ibid*, 392.

13 [1994] 1 NZLR 1.

Lord Templeman, delivering the opinion of the Board, noted that Reid, as a servant of the Crown, stood in a fiduciary relationship to his employer.¹⁴ Although a bribe belongs in law to the recipient, equity, acting *in personam*, insists that it is unconscionable for the fiduciary to retain any benefit resulting from a breach of duty.¹⁵ Upon receipt of the bribe, it should have been transferred immediately to the Crown, being the party injured by the fiduciary's misconduct. From that moment Reid was a debtor in equity for the amount of the bribe and any increase in value of property representing the bribe.¹⁶ From this, the Board invoked a key principle which effectively overreaches a *Lister v Stubbs* type analysis. As equity regards as done that which ought to be done, as soon as the bribe money was received by the fiduciary, it was held on constructive trust for the principal. In line with such decisions as *Keech v Sandford*¹⁷ and *Boardman v Phipps*,¹⁸ it was irrelevant that the principal could not have obtained that particular benefit.¹⁹ Commenting on the latter decision, Lord Templeman voiced a recurrent theme, that

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 ... 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.²⁰

The accountability of "honest" fiduciaries and those whose conduct is clearly more venal is placed on the same footing. In the process a curious qualification is introduced. It is said that bribery causes loss and damage to the principal, although on the present facts such loss cannot be quantified.²¹ Insistence upon a loss in any form seems misplaced, for in the case of unauthorised profits the imposition of a constructive trust is not predicated upon loss to the principal.²² Why, then, should it be necessary in the case of bribery? Moreover, in *Reid* loss is equated with harm to the administration of justice.²³ From this it must be surmised that the abiding concern was to prevent the defendant from unjustly retaining the enrich-

14 A fiduciary relationship is readily inferred in such circumstances. See, for example, *Attorney-General v Goddard* (1929) 98 LJKB 743 (policeman) and *Reading v Attorney-General* [1951] AC 507 (army sergeant). See also *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93; *Bromley London Borough Council v Greater London Council* [1983] AC 768 and *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311.

15 Although the Board did not elaborate on the precise nature of the fiduciary duty, it clearly contemplated the classic principle that a fiduciary must not place himself in a position where duty and personal interest conflict (hereafter the "conflict rule") and must not make an unauthorised profit from his position (hereafter the "profit rule"). Acceptance of a bribe offends both rules; see the comments of Sir Peter Millett writing extra-judicially in "Bribes and Secret Commissions" [1993] RLR 7.

16 In *Reid* the real property acquired with bribe money had appreciated in value.

17 (1726) Sel Cas Ch 61. Although, on a narrow view, *Keech v Sandford* may be regarded as an independent doctrine of equity relating to the renewal of leases, the consensus is that it enshrines a more general principle regarding a fiduciary's liability to account for personal gains, and the Privy Council clearly viewed it this way. See Oakley, *op cit* n 6, at 66-70; *Snell's Equity* (29th ed) 245 et seq and *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* [1958] 100 CLR 342.

18 Above n 5.

19 In *Keech v Sandford*, the lessor refused to renew a lease for the benefit of the cestui qui trust. In *Boardman v Phipps*, the trust could not invest further in the holdings in question without a court order and the managing trustee was resolutely opposed to this initiative. See also *Regal (Hastings) v Gulliver*, above n 5. The principal's inability to pursue a gain is even more demonstrable as regards bribes, where the gain is unlawful.

20 [1994] 1 NZLR 1, 9.

21 *Ibid*, at 3.

22 See *Keech v Sandford* and *Boardman v Phipps* and the comments of Deane J in *Chan v Zacharia* (1984) 58 ALJR 353, 361-362.

23 There was no suggestion of any pecuniary loss to the Crown.

ment, not to compensate his employer for loss suffered.²⁴ It is submitted that what is being discussed here is not a loss, but a wrong, and this concept can be canvassed more appropriately within the framework of restitution.²⁵ Yet despite the emerging vigour of restitutionary analysis,²⁶ the Board adhered to established equitable doctrines. This is to be regretted in that *Reid* presented an intriguing opportunity for exploring the juristic basis of unjust enrichment in relation to wrongs.

However, this should not detract from the salutary effect of the decision. Regardless of approach, the imposition of a constructive trust repairs the long standing and morally inexplicable rift between bribes and unauthorised profits. Both offend the conflict and profit rules: *Reid* falling at one end of the spectrum and *Keech, Regal* and *Boardman* at the other. It bears emphasising that *Reid* does not establish liability where none was found before. It is common ground that bribery violates the bonds of fidelity and probity that lie at the core of fiduciary duty. The recognition of this view is simply given logical effect by according the appropriate measure of equitable relief.

In the result, their Lordships concluded that *Lister v Stubbs*²⁷ should not be followed. The exchange products of the bribe monies were held on trust for the Crown which could therefore sustain a caveatable interest in the New Zealand properties.

The proprietary argument

The Board was not receptive to perpetuating distinctions that have tended to obscure equity's traditional posture towards fiduciary obligations. Most notably, Professor Birks has argued that a constructive trust must be founded on a proprietary base²⁸ and there is therefore an essential distinction between an enrichment received by the defendant directly from the briber and an enrichment resulting from the defendant's misapplication of trust property.²⁹ On this view, *Lister* falls within the first category; the principal never acquired any property in the money and was thus confined to a personal claim.³⁰ *Reid*, on the other hand, subordinates such distinctions

24 Where D acts as agent for a vendor or purchaser, a bribe may be treated as an addition or subtraction from the purchase price (see *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256, 1263–1264). This is not the case where, as in *Reid*, it is received for tampering with the administration of justice.

25 See Birks, op cit n 6, at 39 et seq and 313 et seq; Goff and Jones, op cit n 6, at 654 et seq.

26 See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768.

27 And the earlier decision of *Metropolitan Bank v Heiron* (1880) 5 Ex D 319, which was followed in *Lister v Stubbs*.

28 Op cit n 6, at 378 et seq. Cf *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14.

29 See also Burrows op cit n 6 at 411. Professor Goode accepts that *Lister v Stubbs* was correct in refusing to recognise a proprietary claim. Building upon Professor Birks' model, Professor Goode suggests that a further distinction can be drawn between a deemed agency gain (such as exploitation of a business opportunity that D should have pursued on behalf of P) and gains resulting from conduct which should not have been engaged in at all (such as bribes). Professor Goode argues that proprietary relief is justified in the first situation but not the second. See Goode, "Property and Unjust Enrichment" in Burrows, (ed) *Essays on the Law of Restitution*, (1991) 216 and generally, Goode, op cit n 6. This view is robustly criticised by Millett, op cit n 15, at 14 et seq.

30 Cf Goff and Jones op cit n 6, at 654–658, who maintain that a proprietary remedy should be available where D has been unjustly enriched. See also Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 LQR 472. A similar approach is adopted by Millett op cit n 15, who suggests that where enrichment derives from a bribe, the remedy is intended to strip the fiduciary of the fruits of his wrongdoing. The implementation of this principle justifies the full range of equitable relief. Such views span the division between unjust enrichment by subtraction and unjust enrichment by a wrong.

to the unifying principle that relief should flow from the substantive wrong, not the manner of its execution. In this spirit, the Board discussed a number of 19th century cases without regard to the origin of the bribe.³¹ Indeed, Lord Templeman was explicit on the point:

If in law a trustee, who in breach of trust invests trust moneys 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.³²

Similarly, while some of these decisions involved money bribes,³³ and others, property bribes,³⁴ the Board did not distinguish between the two and assumed that both were subject to the same legal principles.³⁵ This purposive approach reflects the shifting emphasis of current thinking. In recent years equity has moved apace, particularly in the sphere of remedies. Just as doubts have been expressed as to the pre-condition of a fiduciary relationship for equitable tracing,³⁶ so too, judgments like *Reid* challenge the extent to which equitable relief should be circumscribed by proprietary doctrines.

The status of unsecured creditors

The Privy Council confronted two specific objections to imposing a constructive trust. First, the fiduciary cannot be both a debtor in equity and also a trustee of the bribe. This was readily dismissed, subject to the proviso that double recovery is not permissible.³⁷ Although there is authority for the view that in equity “restitution stopped where repayment began”³⁸ it is submitted that this argument is not particularly compelling in a modern context.³⁹

The second, and more controversial objection, was that a constructive trust is inappropriate because it would defeat the claims of the fiduciary’s unsecured creditors in the event of bankruptcy. This concern can be traced back to *Lister* itself. Lindley LJ asked whether it would be right to withdraw the proceeds of bribery from the defendant’s creditors in bankruptcy. His Lordship’s response was in the negative.⁴⁰ In *Reid* the question was revived and answered in the affirmative. Lord Templeman observed that

[T]he 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.⁴¹

31 For example, *Fawcett v Whitehouse* (1829) 1 Russ & M 132; *Sugden v Crossland* (1856) 3 Sm & Giff 192 (bribe received directly from briber) and *Re Canadian Oil Works Corp (Hay’s Case)* (1875) LR 10 Ch 593 (misuse of principal’s funds).

32 [1994] 1 NZLR 1, 5.

33 For example, *Re Canadian Oil Works Corp (Hay’s Case)*, above n 31; *Fawcett v Whitehouse*, above n 31 and *Sugden v Crossland*, above n 31.

34 For example, *Morvah Consols Tin Mining Co (McKay’s Case)* above n 3 and *Re Caerphilly Colliery Co (Pearson’s Case)* above n 3.

35 [1994] 1 NZLR 1, 5.

36 See Goff and Jones, *op cit* n 6, at 69 et seq.

37 A concern previously expressed by the Privy Council in *Mahesan v Malaysia Government Officers’ Co-operative Housing Soc Ltd* [1979] AC 374.

38 *R Leslie Ltd v Sheill* [1914] 3 KB 607, 618 per Lord Sumner, cited by Sealy, “Fiduciary Relationships” [1962] CLJ 69, 75.

39 See, for example, *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, where the House of Lords accepted that trust and debt may co-exist on the same set of facts.

40 (1890) 45 Ch D 1, 15.

Supporters of *Lister* may not quarrel with this proposition where the principal's claim is founded on a proprietary base. However, in the absence of a proprietary base, is it still tenable to assert that the fiduciary's misconduct confers a superior claim upon the principal?⁴² If this proposition is rendered secure, it becomes possible to argue consistently, that in the words of Professor Maudsley

The right of the creditors is to participate in the debtors estate. If the debtor obtains property wrongly, that is no reason to enrich the creditors with this windfall. They are entitled only to that which the debtor obtained properly.⁴³

The tenor of *Reid* leaves little doubt as to the response. The principal's rights are unaffected by the personal circumstances of the wrongdoer because property in his hands belongs in equity to the principal "whether he is solvent or insolvent".⁴⁴ The unexpressed corollary is that a proprietary remedy must therefore be available to give effect to the continued viability of the principal's interest. It is respectfully submitted that this aspect of the Board's judgment would have profited from elaboration, for in its general form, the argument presupposes a remedy to enforce a principle. Not surprisingly, the basis for imposing a constructive trust is unclear, although in a functional sense it seems to bear more affinity to a remedial than a substantive model.

Nevertheless, in its orientation to the problem, *Reid* poses the correct question. In the past it has been assumed that the principal is thrown into competition with the fiduciary's unsecured creditors and that their claims should be balanced on seemingly random criteria. For example, whether one or both have given value, or whether there is any substantive difference between the wrong of breaking a contractual promise and the wrong of violating a fiduciary obligation. Where the proceeds of a wrongful gain have appreciated in value, entitlement to these profits has been debated in terms of windfall to principal versus windfall to creditor. Such considerations are far removed from the fundamental question – reinstated by *Reid* – whether, as between principal and *fiduciary*, bribe money should form part of the fiduciary's estate. If it never belonged in equity to the fiduciary, then, on the Board's reasoning, unsecured creditors cannot assert any greater rights.⁴⁵

III. CONCLUSION

The isolation of bribery from other forms of unauthorised profit is patently untenable. It has long been difficult to justify why a party damned by a flagrant abuse of fiduciary duty should be confined to a personal remedy. The analysis of *Lister v Stubbs* has been a perennial target of scholarly criticism and the subject of cautious judicial debate. Its proponents have relied upon some precise distinctions. Whilst the internal logic of their argument is sometimes attractive, its consequences are not. *Reid* administers the *coup de grace* in robust fashion. It is essentially a philo-

⁴¹ [1994] 1 NZLR 1,4.

⁴² Or, from a restitution perspective, whether enrichment by wrongdoing entitles P to restitutionary proprietary relief.

⁴³ Maudsley, "Proprietary Remedies for the Recovery of Money" (1959) 75 LQR 234, 242. See also Millett, *op cit* n 15, at 16–17.

⁴⁴ [1994] 1 NZLR 1, 4.

⁴⁵ There are of course limits to this principle in relation to third parties, as where, prior to bankruptcy, D disposes of property to a bona fide purchaser for value without notice.

sophical decision which passes over the narrower refinements with a broad sweep. Although some may take issue with the generality of approach, there are few who will not applaud the outcome.