

Summative Assessment Exercise - Outline Answer

In *A-G for Hong Kong v Reid* [1994] 1 All ER 1, the Privy Council held that whenever a fiduciary receives property of his principal in breach of his fiduciary duty, he is a constructive trustee of it, and of any traceable profit from and proceeds of it (as to tracing, see Chapter 18). Mr Reid was acting Director of Public Prosecutions in Hong Kong. In breach of his fiduciary duty to the Crown he received substantial bribes in consideration of which he obstructed the prosecution of certain criminals. The Crown was able to trace the bribe monies through to three freehold properties in New Zealand, and to assert a restitutionary claim to them under a constructive trust. Mr Reid failed in his assertion that the Crown should be limited to its claim against him personally, and that the personal claim should be limited to the value of the initial bribe. Lord Templeman held: 'Equity considers as done that which ought to be done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.'

The decision of the Privy Council in *Reid* has now been approved by the Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45. FHR purchased a Monte Carlo hotel company for €211.5 million. Cedar was FHR's agent in the negotiation, but Cedar had secretly entered into a brokerage agreement with the vendor under which it received €10m. FHR argued that any unauthorised benefit (such as a bribe or secret commission) that is received by an agent by reason of his agency and in breach of fiduciary duty should be held on constructive trust for the principal. Lord Neuberger approved FHR's argument as having 'the merit of simplicity' (para. [35]) and the Supreme Court confirmed the High Court's decision that Cedar held the €10m subject to a constructive trust in favour of FHR. The decision has the merit of ensuring that a fiduciary must disgorge any unauthorised gains in full. The most radical element of the decision is to regard the fiduciary as a constructive trustee of the principal's equitable property even though the principal had no prior proprietary interest in the 'bribe' (on this point their Lordships overruled the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347). The decision means that when a bribed fiduciary becomes insolvent, the fiduciary will be permitted to go to

the front of the queue to claim its property right in the bribe under a constructive trust while ordinary trade creditors of the fiduciary will have to fight between themselves over the remnants of the insolvent fiduciary's personal estate. Professor J.W. Harris doubted the justice of this. He asked: 'Why should the principal take a windfall in priority to those to whom the fiduciary owes purchased obligations?' (Property and Justice (Oxford: Clarendon Press, 1996) at 338). The answer given in *FHR* is that to remove wealth in the form of bribes and secret commissions does not reduce the insolvent fiduciary's estate because such assets should never have been considered part of that estate.