of "retention of equitable title" beyond its usual context and renders it even more problematic.

ARUNA NAIR

CONSTRUCTIVE TRUSTS AND THE NO-PROFIT RULE

THE decision of the Court of Appeal in *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17 is the latest instalment in the debate over whether an unlawful profit acquired by a fiduciary gives rise to a trust, or only to a personal obligation to disgorge the amount of the profit. In *A.-G. for Hong Kong v Reid* [1994] 1 A.C. 324, the Judicial Committee of the Privy Council refused to follow *Lister & Co v Stubbs* (1890) 45 Ch.D. 1, and held that a trust arises. In *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* [2011] EWCA Civ 347 [2012] Ch. 453, the Court of Appeal refused to follow *Reid*, and held that only a personal obligation was created. The Court in *FHR* was bound by its decision in *Sinclair*, but it distinguished that decision and declared a constructive trust over the secret profit. The law is left in an unclear state, as noted by Etherton C. ([116]).

The defendant Cedar Capital Partners LLC (Cedar), of which the principal was the defendant Mankarious, provided consultancy services. The claimants, together called the "Investor Group" in the judgments, were clients of Cedar, who were seeking to acquire a long leasehold interest in the Monte Carlo Grand Hotel. Cedar was in the position of an agent, owing fiduciary obligations to the Investor Group. After acquiring the leasehold for €211.5 million, the Investor Group learned that Cedar had also made another agency agreement with the vendor, to assist the vendor with the sale. The vendor knew that Cedar was acting for the Investor Group, but the Investor Group did not know that Cedar's agreement with the vendor provided for a fee of €10 million, payable to Cedar should the sale to the Investor Group take place. Cedar having received its fee from the vendor, the Investor Group brought these proceedings to claim it. They succeeded at trial before Simon J. ([2011] EWHC 2308), although their claim for a constructive trust was dismissed on the basis of *Sinclair* ([2011] EWHC 2999). It was that ruling that was reversed by the Court of Appeal.

Pill L.J. noted correctly (at [62]) that Cedar was clearly in a conflict of interest and duty, since its self-interest in acquiring the fee conflicted with the duty of loyalty that it owed to the Investor Group in advising the latter. However, the rules about conflicts were not the most important ones in this case. When a conflicted fiduciary enters into a contract or other legal act, through the use of legal powers held in

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a fiduciary capacity, the legal act may generally be rescinded by the beneficiary. But the Investor Group did not wish to rescind anything. For this reason, the relevant norm was the no-profit rule that also presumptively applies to all fiduciaries.

In *Sinclair*, Lord Neuberger M.R. (with whom the other judges agreed) reviewed many decisions, some of which had imposed a trust and some of which had not. He concluded (at [88]) that the cases establish:

> that a beneficiary of a fiduciary's duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary.

The judgments in *FHR* take this as the governing test. Etherton C. and, especially, Lewison L.J. review many of the authorities, in order to show that the "opportunity" part of Lord Neuberger M.R.'s formula must be widely read, if it is to be consistent with many of the cases in which trusts were declared. (And this is perhaps particularly true in relation to the declaration of constructive trust by the Judicial Committee of the Privy Council in *Bowes v City of Toronto* (1858) 11 Moo. P.C. 463, a case cited in neither *Sinclair* nor *FHR*.). Each of the judges concluded that those words were apt to catch the €10 million fee ([57]–59]; [72]–[73]; [110]), even though the Investor Group never had the opportunity to acquire the fee as such.

The real difficulty with the formula is that there is only one no-profit rule. The formulation of Lord Russell of Killowen in *Regal (Hastings) Ltd. v Gulliver* [1942] 2 AC 134, 144–5, is instructive:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action … The liability arises from the mere fact of a profit having, in the stated circumstances, been made.

The rule is not activated by wrongdoing (although wrongdoing there may be); it is a direct implication of the fact that a fiduciary acts, within a sphere of activity, for and on behalf of the principal. The implication is that whatever may be extracted from that sphere of activity is attributed, as between the fiduciary and the beneficiary, as a matter of

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primary right, to the beneficiary; including that which was extracted without authority, should the beneficiary so choose. It is not necessary to say that opportunities or information "belong" to the beneficiary in a legal sense; the rule is activated when opportunities or information are used to acquire rights, if they can be said to have been acquired from acting in the fiduciary role. Nor is it necessary to see the result as a remedy for wrongful conduct: profits are attributed to the beneficiary as an implication of the nature of the fiduciary relationship, not as a remedy for a wrong.

This understanding helps us to see a thread linking many features of this part of the law. The no-profit rule is, in a sense, merely the corollary of the rule that a fiduciary is entitled to be reimbursed for expenses properly incurred; just as the costs of fiduciary management are attributed to the beneficiary, so too are the profits. The no-profit rule may apply even in the absence of a profit. In *Soulos v Korkontzilas* [1997] 2 S.C.R. 217, an agent acquired an estate in land that his principal wished to acquire, by concealing the vendor's willingness to negotiate. The value of the estate later declined. Nonetheless, a constructive trust was declared, requiring the agent to convey the estate to the principal in exchange for the price he had paid. The rule is not only about profits; rather it attributes to the beneficiary rights acquired from the fiduciary role.

It also goes beyond rights, and helps us to understand the many obligations of fiduciaries relating to information. Subject to some exceptions, information about the sphere of fiduciary management is attributed to the beneficiary, and this is translated as a legal duty to provide information. This explains not only the basic duties of trustees to provide information about the trust, and the accounting duties of many fiduciaries, but also the duty that falls upon a fiduciary to disclose that he is in a conflict of self-interest and duty. The cases that address compensation for loss caused by breach of fiduciary duty are generally, on close inspection, about loss caused by non-disclosure: usually, the breach of a duty to disclose a conflict. There is a duty to disclose a conflict because, again, the fiduciary acts in the sphere of fiduciary management for the beneficiary, and it follows that the beneficiary is entitled to all relevant information.

Finally, how does all this relate to the basic question whether there is a trust or only a personal obligation? The no-profit rule holds that as between the beneficiary and the fiduciary, rights extracted from the sphere of fiduciary management are attributed to the beneficiary. A trust is a situation in which a person holds rights, but is obliged to hold the benefit of those rights for another. When the no-profit rule is activated, that is exactly what it brings about, so long as the profit is held by the fiduciary in the form of identifiable property. Because there is

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only one no-profit rule, there is really no question about whether some unlawful profits are held in trust and some are not. The interests of the fiduciary's creditors could only be addressed through the introduction of a discretionary constructive trust, because the traditional law decides whether or not there is a trust through analysis of the juridical relationship as between fiduciary and beneficiary; the existence of claims held by others is not material. If there is a trust, it follows that the creditors of the trustee cannot have the trust property.

This helps us to see that it is high time to put to rest the strange observation of Lindley L.J. in *Lister & Co v Stubbs* (1890) 45 Ch.D. 1, 15, that the claim for a trust was unsound "in confounding ownership with obligation". The judgments in *Lister* were criticised in *FHR* by Etherton C. (at [103]), but this particular argument of Lindley L.J. seems entirely misplaced; the whole history of the trust is a history of confounding ownership with obligation, since the law of trusts gives property-like features to beneficial interests, which interests are nothing but the rights that correspond to the obligations of the trustee with respect to the benefit of the trust property.

LIONEL SMITH

AN UNBALANCED SCALE: ANONYMOUS BIRTH AND THE EUROPEAN COURT OF HUMAN RIGHTS

OFFICIAL sanction of anonymous relinquishment of children in Europe dates back to the 12th century, when Pope Innocent II introduced foundling wheels to prevent babies being killed and left in the River Tiber. However, it has only been in the last century that such mechanisms have expanded greatly. Anonymous birth has been sanctioned in France, Luxembourg, Austria and Germany, while the mother is granted the right to keep her identity secret in the Czech Republic, Greece, Italy, Russia and Ukraine. The last century also saw the institution of hundreds of baby-hatches across Austria, Belgium, the Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia and Switzerland.

In 2003, the European Court of Human Rights (ECtHR) gave judicial approval to the practice of anonymous birth in the *Odièvre v France* ((Application no. 42326/98) [2003] E.C.H.R. 86). In this controversial decision, with seven of the 17 judges dissenting, the court found that the French system of anonymous birth legitimately balanced the rights of the mother and child. It held that since the mother was encouraged to leave non-identifying information for the child, and she was entitled to change her mind at a later date and reveal her

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