

Breach Of Fiduciary Duty

By Clive H. Jones

The Law Reports are full of cases of directors taking advantage of their position both with and without an intention to act dishonestly. Often it is unnecessary to pursue the route of alleging dishonesty and is sufficient for the purposes of successful litigation to rely upon breaches of statutory duty concerning the enforcement of fair dealings (Note 1) and/or the principles enunciated in *Regal (Hastings) Limited-v-Gulliver* (Note 2), namely that:- a director must not place himself in a position in which his personal interest may conflict with his duty to the company. As a fiduciary, the director will be liable to account for any profit made by reason of his office unless he has obtained prior approval from the shareholders.

In the recent case of *Gencor ACO Ltd-v-Dalby* (Note 3) there was no defence to the obligation to account which had resulted from the fact that the director had diverted the benefit of business opportunities which had come to him as a director of the company. Neither dishonesty nor bad faith had to be shown. It did not matter whether the company could or would have taken up those business opportunities. It was irrelevant whether the business opportunities required personal skill or the use of the director's personal property. Equity prohibits a trustee from making any profit by his management, directly or indirectly.

Nor need dishonesty necessarily have to be shown in respect of third parties (Note 4). In the case of *Houghton-v-Fayers* (Note 5) Nourse LJ repeated the tests of knowing receipt as being (i) a disposal of assets in breach of fiduciary duty; (ii) the beneficial receipt by the third party of assets which are traceable as assets of the company and (iii) knowledge on the part of the third party that the assets he received are traceable to a breach of fiduciary duty (Note 6). This may but does not necessarily involve dishonesty (Note 7).

However dishonesty is required to be established in cases alleging knowing assistance. The test for dishonesty is objective and dishonesty means simply not acting as an honest person would in the circumstances (Note 8).

The Court of Appeal case of *Heinl-v-Jyske Bank (Gibraltar) Limited* (Note 9) concerned a former bank manager of the Gibraltar bank who had managed to syphon about £71.5 million from the bank over a two year period. He did so primarily by purportedly making loans on behalf of the bank to companies which were creatures of himself and his associates. The bank manager and an associate had transferred some £4.5 million of the bank's money through to Ireland and retained the appellant to assist in the management and investment of those monies. The appellant had been held by the trial judge to have acted dishonestly under the knowing assistance head of constructive trust (Note 10).

The first ground of appeal was that the monies did not belong to the bank because the money had been lent to third parties and the bank had affirmed the loans by retaining and seeking to enforce the security given in respect of them. The Court of Appeal revisited the decision of *Rolled Steel Products (Holdings) Ltd-v-British Steel Corporation* (Note 11). The Court of Appeal held that:-

- 1) no contract comes into existence where an agent is known by the other party to the purported contract to have no authority to bind the principal and therefore no property can pass under the purported contract to the third party; alternatively
- 2) the monies were misapplied and therefore the beneficial interest could never pass to the payee or transferee so that the monies always remained the bank's and could be traced.

However, those acting for the appellant were delighted that an alternative ground of appeal succeeded. The Court of Appeal overturned the finding of fact, namely that there had been knowing assistance. The appellant had played no part in the original misapplication of the monies from the bank. The Court of Appeal rejected the finding that there was anything inherently suspicious in the transactions which resulted in the monies coming under the appellant's management except for one

We believe that the information in this newsletter is correct at the time of going to press but we cannot accept any responsibility for any loss occasioned to any person as a result of action taken or not taken in reliance on anything contained in it. You should consult a lawyer in connection with any specific matter.

such transaction. In respect of that transaction, the Court of Appeal held that the answers given by the appellant to explain his acts were not so inherently improbable as to justify a finding of dishonesty. Dishonesty (or rather its absence) was a crucial element in this case.

Endnotes:

1. See Part X of the Companies Act 1985;
2. [1967] 2 A.C. 134n, [1942] 1 All ER 378, HL;
3. [2000] 2 BCLC 734;
4. See *Houghton-v-Fayers* [2000] 1 BCLC 511, 516 j-j, C.A.;
5. [2000] 1 BCLC 511;
6. See also *El Anjou-v-Dollar Land Holdings plc* [1994] 2 All ER 685;
7. Nourse LJ expressly referred to Buckley LJ in *Belmont Finance Corp-v-Williams Furniture Ltd (No.2)* [1980] 1 All ER 393, 405 on this point;
8. See *Royal Brunei Airlines Sdn. Bhd.-v-Tan* [1995] 2 AC 378;
9. [1999] Lloyd's Rep. Bank 511;
10. *Royal Brunei Airlines Sdn. Bhd.-v-Tan* (above);
11. [1986] Ch 246;

We believe that the information in this newsletter is correct at the time of going to press but we cannot accept any responsibility for any loss occasioned to any person as a result of action taken or not taken in reliance on anything contained in it. You should consult a lawyer in connection with any specific matter.