Privy Council Appeal No. 36 of 1994

Grant Adams *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST OCTOBER 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE
LORD BROWNE-WILKINSON
LORD WOOLF
LORD LLOYD OF BERWICK

*[Delivered by **Lord Jauncey of Tullichettle**]*

This appeal from the New Zealand Court of Appeal relates to the dramatic rise and fall of the fortunes of the Equiticorp group of companies. Equiticorp Holdings Limited ("EHL") which was the holding company of the group was formed in March 1984 and went public in June of that year. Its accounts, as at 31st March 1987, showed total assets of $2.167 billion and a group net profit after tax of $104.9 million. On 22nd January 1989 the whole group was placed into statutory receivership and the shares in EHL became worthless. Throughout the period Allan Robert Hawkins was the chairman of directors and managing director of EHL and from the outset he or companies associated with him controlled 40% of the shares in EHL. During the same period Grant Adams, the appellant, was deputy chairman of EHL and either chairman or director of other companies in the group. Maxwell Colin Taylor was initially company secretary of EHL and became a director in 1985. Russell John Curtayne joined EHL in September 1985 and became, on 1st April 1986, general manager of the Investment Group of Companies within the Equiticorp group. Kevin James Gil'espie and Ian Lindsay Gunthorp were also executive directors, the former until July 1987, the latter until the group was placed into statutory receivership. These six men formed what was known as the investment team which

dealt *inter alia* with all major investment projects for the group. There were in addition three other executive directors and three non-executive directors whom it is convenient to describe collectively as the independent directors. The solicitor to EHL was Robert Paul Darvell who was a senior partner in Rudd Watts and Stone ("RWS") one of the largest legal firms in New Zealand.

Consequent upon the collapse of EHL the Crown preferred an indictment containing thirteen counts against the six members of the investment team and Mr. Darvell. Not every individual was concerned in each count and it is sufficient for the purposes of this appeal to refer only to those in which the appellant was concerned. Nevertheless having referred by name to all the persons who were charged it is right to point out that Messrs. Taylor, Gillespie and Darvell were ultimately acquitted of all the counts relating to them.

The counts relating to the appellant were in the following terms:-

"COUNT 1 THE SOLICITOR GENERAL charges that ALLAN ROBERT HAWKINS, GRANT ADAMS, MAXWELL COLIN TAYLOR, RUSSELL JOHN CURTAYNE and ROBERT PAUL DARVELL between the 1st day of December 1986 and the 28th day of February 1988, at Auckland and elsewhere, did conspire with one or more of the others by deceit, falsehood and other fraudulent means to defraud any one or more of EQUITICORP HOLDINGS LIMITED, its subsidiary companies and others in that they did agree to use dishonestly a system of disguising the source and utilisation of moneys from legitimate inquiry by the use of off-shore companies and bank accounts and Rudd Watts and Stone.

COUNT 2 THE Solicitor-General further charges that ALLAN ROBERT HAWKINS, GRANT ADAMS, MAXWELL COLIN TAYLOR, KEVIN JAMES GILLESPIE, IAN LINDSAY GUNTHORP, RUSSELL JOHN CURTAYNE and ROBERT PAUL DARVELL between the 1st day of November 1986 and the 31st day of October 1987, at Auckland and elsewhere, did conspire with one or more of the others by deceit, falsehood and other fraudulent means to defraud any one or more of EQUITICORP HOLDINGS LIMITED, EQUITICORP FINANCE GROUP LIMITED, BEID PTY LIMITED, EQUITICORP TASMAN LIMITED and FELTEX INTERNATIONAL LIMITED in that they did agree to obtain dishonestly for themselves, other than ROBERT PAUL DARVELL or for associated interests, the benefit of funds derived from

the Equiticorp Group of companies, being management fees paid by EQUITICORP TASMAN LIMITED and FELTEX INTERNATIONAL LIMITED.

...

COUNT 4 THE Solicitor-General further charges that ALLAN ROBERT HAWKINS, GRANT ADAMS, MAXWELL COLIN TAYLOR, KEVIN JAMES GILLESPIE, IAN LINDSAY GUNTHORP, RUSSELL JOHN CURTAYNE and ROBERT PAUL DARVELL between the 1st day of October 1986 and the 30th day of November 1987, at Auckland and elsewhere, did conspire with one or more of the others by deceit, falsehood and other fraudulent means to defraud any one or more of EQUITICORP HOLDINGS LIMITED, EQUITICORP INDUSTRIES GROUP LIMITED and EQUITICORP INVESTMENTS (HONG KONG) LIMITED in that they did agree to obtain dishonestly for themselves, other than ROBERT PAUL DARVELL or for associated interests, shares and warrants in KEADY LIMITED and the benefits of their realisation."

After a six month trial before Tompkins J. sitting in the High Court without a jury the verdicts on these counts were as follows:-

Count 1 - Messrs. Hawkins, the appellant and Curtayne guilty, Messrs. Taylor and Darvell not guilty.

Count 2 - Messrs. Hawkins, Gunthorp and Curtayne guilty, the appellant and Messrs. Taylor and Gillespie not guilty.

Count 4 - Messrs. Hawkins, the appellant and Taylor guilty, the remaining accused not guilty.

The Court of Appeal quashed the convictions of Hawkins, the appellant and Taylor on count 4 but upheld their convictions on count 1. The appellant now seeks to have his conviction on that count quashed by this Board.

The facts giving rise to the counts are complex. Those relevant to count 1 centre around what became known as the Yeoman Loop and five transactions which made use of it. Count 2 arose from an abortive attempt by an EHL subsidiary to take over an Australian company, and count 4 from dealings in shares of a Hong Kong company in which another EHL subsidiary had acquired some 97% of the shareholding. Their Lordships are much indebted to counsel on both sides for the assistance which they gave in dealing with these complex matters. Mr. McLinden, who had the difficult task of opening the appeal, guided

their Lordships through the complexities of the various transactions and presented his arguments with considerable clarity and skill.

The Yeoman Loop

Some time prior to March 1987 Hawkins asked the appellant to set up an overseas structure to receive moneys which he, Hawkins, was expecting from overseas. Three companies were acquired and the shares therein were registered in the names of Darvell and another partner in RWS. They held as nominees for Hawkins and not as beneficial owners. Bank accounts were opened for each of the companies by RWS and their names, country of registration and bank accounts were as follows:-

> Barley Grange Ltd, Cook Islands, Bank of Canton in Singapore ("BGL")
>
> Mercantile Finance Corporation Ltd, Turks and Caicos Islands, Hong Kong and Shanghai Bank Corporation in Hong Kong ("MFC")
>
> Yeoman Ltd., Vanuatu, Bank of Canton Ltd in Hong Kong.

On 9th August 1987 Yeoman Limited changed its name to First Pacific Finance Ltd. and was referred to by Tompkins J. in his judgment as Yeoman-First Pacific ("YFP").

The appellant in evidence stated that the purpose of setting up the Yeoman Loop was to receive two sums of money known as the "H" fee and the "retreat" fee and subsequent payments from other transactions to which reference will be made later. He acknowledged that it was deliberately set up with the intention that ownership of the structure should be anonymous and incapable of being detected. The judge, after reviewing all the relevant evidence, concluded that the purpose of setting up and using the Yeoman Loop was for concealment. The use of the Yeoman Loop was described by him as follows:-

> "The structure was used on five occasions, referred to at the time and during the trial as transaction 1, transaction 2 etc. But for transactions 1 and 5, the method used was the same. The money to pass through the Yeoman Loop was converted into Singapore dollars, paid into the Barley Grange account in the Bank of Canton, Singapore, converted into Hong Kong dollars, paid into the account of Mercantile Finance at the Hong Kong and Shanghai Bank Corporation in Hong Kong, still in Hong Kong dollars, paid to Yeoman's account at the Bank of Canton in Hong Kong, converted into NZ dollars and paid on every transaction except transaction 2 to Rudd Watts and Stone's trust account, from where it was paid out. In the case of transaction 1, Barley Grange and Mercantile Finance were omitted. In the case of transaction 5, all three companies were used, but through various accounts in Australia."

The "H" fee

Before turning to the details of the five transactions which made use of the Yeoman Loop something must be said about the "H" fee which the judge found to refer to a sum of approximately A$70m to be paid from Australia. It was originally expected to arrive early in 1987 probably in time for some of it to be used by Hawkins and the other members of the investment team to take up their rights under a one for four cash issue by EHL, for which payment was due on 31st March 1987. In the event it was paid in two parts, the first on 12th January 1988 and the second on 7th September 1988, each by the same method.

Mr. Fitzgerald, the managing director of Equiticorp Australia ("EAL") in Sydney was instructed by Hawkins to set up foreign exchange transactions to deal with monies owing to Hawkins' companies from Elders IXL. The first operation took place in December 1987 and January 1988 and was deliberately contrived so that Elders IXL appeared to have lost A$39.5m and BGL to have gained A$39.1m, the difference of A$400,000 being the profit to the Bank of New Zealand ("BNZ") for constructing the transaction. Confirmation advice of this transaction was sent by BNZ to BGL marked for the attention of Fitzgerald. Thereafter the A$39.1m were passed in Australian dollars through MFC to YFP where it was divided as follows:-

(i) A$37.2m were paid into BNZ in Singapore, converted into NZ$39.9m and paid as to NZ$29.5m to Richardson Camway Limited ("RCL") (one of Hawkins' companies) thence to Equiticorp Finance Group Limited ("EFGL") and then back in two sums on different dates to RCL.

(ii) A$1.2m was converted into New Zealand dollars by the National Bank of New Zealand and then passed through RWS to another of Hawkins' companies for equal division between Gunthorp and the appellant, the latter's share being paid into his Australian trust which never paid any tax. This operation constituted transaction five.

(iii) A$0.8m was paid as to A$200,000 each to Messrs. Curtayne and Taylor and as to A$400,000 to EAL.

The second operation took place in September 1988 and involved a similar contrived transaction involving BNZ whereby Elders IXL appeared to have lost A$27m and Sharpers Mart, a Hong Kong company owned by EHL, to have gained A$26.6m, a difference of A$400,000 being once again the profit to BNZ. It is not necessary to follow the travels of the money from Sharpers Mart, suffice it to say that it did not pass through the Yeoman Loop.

The judge held that the Crown had been unable to establish what the "H" fee was, from whom it came, why it was paid or to whom it was payable. Although the appellant received the sum of A$200,000 from the "H" fee he professed ignorance as to what the fee was, a profession which the judge found to be incredible in view of the appellant's direct involvement in the complicated financing transaction. However, after analysing the evidence relating to it and remarking upon the A$800,000 cost of the contrived foreign exchange dealings, the judge concluded that despite the suspicions that surrounded it he could not make an affirmative finding that the "H" fee itself was fraudulent.

The five transactions.

Transaction 1. On 23rd April 1987 a sum of just over $6m was converted into Hong Kong dollars by Equiticorp Tasman ("ET") and paid into YFP's account with the Bank of Canton in Hong Kong. On 24th April 1987 it was paid out in two amounts namely (i) a sum which was converted back into New Zealand dollars and paid into the trust account of RWS on 28th April 1987 in the name of the members of the investment team other than the appellant, and (ii) a lesser sum which was converted into Australian dollars and paid to EAL for the credit of the appellant's trust, after which it was divided between him and Hawkins and Taylor. The appellant was unable to explain why the $6m had been paid through YFP rather than directly to RWS and EAL. The $6m was derived from transactions by the investment team in shares in a Hong Kong company which will be considered in more detail when dealing with count 4.

Transaction 2. On 20th May 1987 a bank draft for A$1.5m was received in the mail from the Netherlands by the Bank of Canton in Singapore for BGL's account. It was paid through MFC and YFP and thence to Equiticorp Investment Group Limited ("EIGL"). It was ultimately applied in part payment of existing YFP loans owing to a company Avant Garde Ltd. forming part of a chain of companies known as the Ewoch chain used by the Equiticorp Group for reasons relating to withholding tax. There was no suggestion by the Crown that the use of this chain of companies was dishonest. The sum of A$1.5m was known as the "retreat" fee but it remains shrouded in as much mystery as did the "H" fee. The appellant was unable or unwilling to explain why the sum had been paid from the Netherlands or why it was paid through the Yeoman Loop to EIGL. The judge concluded that the only feasible reason for paying it through the Yeoman Loop was to make it more difficult for an inquirer to find out what it was and whence it came.

Transaction 3. Between 20th and 28th May 1987 a sum of $869,272, which was the balance of an account in the name of Beid with Equiticorp Financial Group Limited ("EFGL") was moved round the Yeoman Loop into the trust account of RWS arriving there as $861,794. Between 2nd and 16th June 1987 this sum was divided by the investment team in the proportion of 7/12 to Hawkins and 1/12 to each of the

other five members. This sum represented part of management fees totalling $3,296,800 charged by EHL to ET and a company called Feltex International Limited, 49.9% of whose shares were owned by EHL, in connection with an unsuccessful but profitable attempt by ET to take over an Australian company. The remainder of the management fees had been used to purchase shares in EHL which were then divided among the investment team in the same proportions of 7/12 and 1/12. Thus the entire management fees charged by EHL to these two companies found their way into the hands of the investment team or their trusts or associated companies. The appellant was unable to explain why his share of what started as the sum of $869,272 was paid through the Yeoman Loop but the judge found that by having his share paid offshore through YFP he was evading tax. This transaction was the subject of count 2.

Transaction 4. On 7th August 1987 a sum of $1,325,600 was despatched from RWS trust account round the Yeoman Loop, arriving back six days later less some $37,000 in the trust account, whence it was passed along the Ewoch chain of companies to reduce the debt owed by YFP to Avant Garde Ltd. This money derived from further dealings in the shares and warrants of the Hong Kong company referred to in transaction 1 which will be described in more detail in relation to count 4. Although the appellant gave the instructions to RWS to send money round the Yeoman Loop he was unable to explain the reasons therefor. The judge again concluded that for reasons which are not apparent those involved, principally Hawkins and the appellant, wished to conceal the transactions.

Transaction 5. This has already been described in the context of the "H" fee.

It is now time to turn to the judge's conclusions in relation to counts 1, 2 and 4.

Count 1. The judge found in relation to each of the five transactions that concealment was their purpose. He concluded that the purpose of setting up and using the Yeoman Loop was apparent beyond reasonable doubt and that it was:-

> "... set up and used in order to conceal the payments that were intended to be, and were, made, and to make it difficult for any person who had cause to enquire, to find out what they were, and their source. The cumulative effect of all the evidence to which I have referred leads to the clear conclusion that the only reasonable inference that can be drawn is that that concealment was dishonest - that is, with intent to defraud. Concealment for innocent reasons is not a reasonably possible inference."

He went on to pose the question "was anyone defrauded?" and answered it in this way:-

> "If the purpose of the structure were dishonest concealment, the question answers itself. The persons the conspirators intended to defraud were those from whom it was intended to conceal. It is not necessary that these be specifically identified. But it is easy to see that they would embrace the directors of EHL (other than the conspirators), other employees of Equiticorp who may talk about these exceptional transactions, the auditors, who would be intensely interested in any of those transactions that did or may have involved an Equiticorp company, the Revenue, and enforcement agencies on both sides of the Tasman."

He might also have added creditors of Equiticorp.

Count 2. This count related to the appropriation by the investment team of the management fees charged by EHL to ET and Feltex International, already referred to in the context of transaction 3. The defendants, other than Hawkins, maintained that they honestly believed that the shares and cash given to them were bonuses for which Hawkins had obtained proper authorisation from the independent directors in accordance with the normal practice. The judge concluded that Hawkins stole the shares and the cash and that this was known to Gunthorp and Curtayne. In acquitting the appellant, Taylor and Gillespie he found it impossible to exclude as a reasonable possibility that they were told that the shares and cash were a bonus for which they were entitled to assume that Hawkins had obtained the authority of the independent directors. The appellant's acquittal on this count does not of course affect the judge's conclusions as to the reason why he made use of the Yeoman Loop for his cash share.

Count 4. In late 1986 EHL decided to expand into Hong Kong and the appellant and Taylor were placed in charge of the operation. A Hong Kong company was acquired by EHL, was renamed Equiticorp Investments (Hong Kong) Limited ("EIHK") and after certain further dealings became the owner of 1,945 million 10 cents shares (in all 97.25% of the capital) in a company called Keady Limited ("Keady"). In December 1986 the appellant and Hawkins decided that 60 million Hong Kong one dollar shares in Keady should be offered to the investment team at HK$1.50. After a rights issue the number of shares to be allocated was reduced to 45 million and the price increased to HK$2.00, this being 50% over net tangible asset value. However between 6th and 12th February 1987 and before the 2000 million 10 cent issued shares were consolidated into 200 million shares of HK$1.00, 20,440,000 shares and 111,000 warrants, being options to purchase shares, were sold for HK$37,456,876 and the proceeds paid to EIHK which deducted therefrom the cost price of 20 cents. From these net proceeds NZ$6m

reached ET which sum was later passed to YFP as transaction 1 and ultimately into the hands of the investment team or their interests. The balance of the net proceeds was used to purchase and later sell shares in ET for the benefit of the investment team. As a result of the sale of the above 10 cent shares and warrants and the transactions consequent thereupon the investment team made a very substantial profit of which the appellant's share was $1,427,587.

On 20th February 1987 the 2000 million 10 cent shares on issue were consolidated into 200 million shares of HK$1.00 each and on the same day a rights issue of HK$1.00 share for every two HK$1.00 share issued was announced. In April 1987 Hawkins and the appellant decided that the bulk of the shares still held by the investment team should be sold back to EHL at HK$2.50, being 50 cents more than the team had agreed to pay for them but about HK$1.50 below market price. The profit on the shares sold was to be used to pay for the remaining shares which the members held. Finally in July 1987 the balance of the shares held by the investment team were exchanged for warrants. Five members of the investment team other than Gillespie sold their warrants to ET for a consideration consisting of some $8.525m in cash and 1.5 million shares in EHL valued at $6.75m. Most of the cash was used to buy further shares in EHL with the result that the foregoing five members all ended up as owners of substantial numbers of shares in EHL, in the case of the appellant some 1,116,923 with a market value of $4.50m. The balance of the $8.525m amounting to some $1,325,600 was passed round the Yeoman Loop to Ewoch, constituting transaction 4.

The judge found that in the papers prepared for submission to the EHL Board and in the minutes of Board meetings between February and May 1987 there was no indication of any sale of Keady shares by EIHK to the investment team or their trusts. Indeed the Board papers showing the percentage of Keady shares held by or on behalf of EHL did not reflect the sale of any shares to or for the benefit of the investment team. At a Board meeting of EHL on 23rd February 1987 there was a discussion about the trading in the market of 44 million Keady shares at extraordinary prices but although all members of the investment team were present none of them mentioned the fact that they personally had sold half of that number. On 21st May 1987 EHL's auditors asked Hawkins to provide confirmation that the independent directors had approved the sale by EIHK of Keady shares to the investment team. The appellant at the request of Hawkins thereupon drafted a minute of a meeting of 28th January 1987 showing that two of the independent directors were present thereat and had approved the allocation of shares. In fact no such meeting took place and the two independent directors were at no time aware of the investment team's acquisition of and subsequent dealings in the shares, there having been no disclosure

formal or informal to them as directors. The minute was accordingly a deliberate piece of deception.

The judge concluded that the Crown had failed to prove that members of the investment team had not entered into binding agreements to purchase the shares or at least did not honestly believe that they had by 6th February 1987. It followed that it was not dishonest for them to sell some of their shares between 6th and 12th February.

The judge then went on to deal with the contention of the Crown that the defendants had dishonestly concealed from the EHL Board their acquisition of and dealings in Keady shares. He referred to the fact that Hawkins was wont to decide whether shares in the EHL group should be allocated to executive directors and that it was not the practice for such transactions formally to be notified to the Board nor for the transactions to be recorded with a disclosure of interest, albeit the practice contravened both section 199 of the Companies Act 1955 and EHL's Articles of Association. However the judge concluded that the allocation of Keady shares to the investment team was no ordinary share allocation to which past established practice could properly be applied since a glaringly obvious conflict of interest existed. After referring to the instances of concealment above referred to, as well as a number of similar instances, the judge said:-

> "What was required was not some figures from which an astute director might be able to deduce that some of his fellow directors were selling Keady shares. What was required was a full, frank and open disclosure to the other directors of what the investment team had done and was proposing to do. Given the pronounced conflict of interest, honesty demanded nothing less.
>
> Was there an agreement dishonestly to conceal?
>
> The conflict of interest, and the obligation that that imposed on honest directors to make disclosure to their fellow directors, were so clearly apparent that the only reasonable inference was that those intimately involved in the transaction agreed amongst themselves to keep it secret. And they did so dishonestly, with intent to deceive their fellow directors, and thereby defraud EHL."

Their Lordships entirely agree with the view that a full and frank disclosure was required of the investment team. The judge then went on to consider the effect of concealment from the independent directors and said that the Board of EHL:-

> "... could legitimately have considered that if profits were being made on the sale of Keady shares, that were still in the name of Equiticorp Investments (HK), some if not all of those profits should belong to EHL. Had they been aware of the later proposals for the investment team to sell some of their Keady shares back

> to EHL they would, having regard to the obvious conflict of interest, want to be informed about, and be satisfied as to, the terms. The same applies to the later shares for warrants swap. But the concealment of all of these transactions from the board deprived them of that opportunity."

The judge convicted Hawkins, Taylor and the appellant because they dishonestly concealed from the EHL Board their involvement in the Keady transaction and EHL was, or may have been, prejudiced as a result.

In relation to count 1 the Court of Appeal were satisfied that there was ample evidence enabling the inference to be drawn beyond reasonable doubt that Hawkins and the appellant had agreed, prior to March 1987, to set up and use the Yeoman Loop for the purpose of concealing the origin and use of money received and that such concealment was fraudulent. They concluded:-

> "Whoever took part in the agreement to use the Loop for them must be seen as intending to practise a fraud on at least the other directors of Equiticorp and its auditors, by making it difficult for them to conduct legitimate inquiries into the source of the moneys concerned to ascertain whether the Equiticorp group had any interest in them. The conviction of Messrs. Hawkins and Adams on Count 1 was inevitable." (Emphasis added)

In quashing the convictions of Hawkins, Taylor and the appellant on count 4 the Court of Appeal concluded that since it was implicit in the judge's conclusions that the investment team honestly believed that they held the shares pursuant to an allocation properly made and taken up there was no occasion for them to disclose to other directors and executives what was their personal business. The judgment referred to the practice whereby sales of shares to directors were not formally notified to the Board nor recorded with a disclosure of interest as supporting an honest belief that no disclosure to the Board was called for. The judgment criticised the judge for equating secrecy in respect of share dealings and breach of fiduciary duty with dishonesty and intent to deceive and thereby defraud EHL. The judgment referred to the following passage in the speech of Lord Wilberforce in *Reg. v. Governor of Pentonville Prison, Ex parte Tarling* (1978) 70 Cr.App.R. 77 at page 110:-

> "Breach of fiduciary duty, exorbitant profit making, secrecy, failure to comply with the law as to company accounts (I state these as assumptions) are one thing: theft and fraud are others."

and ultimately concluded that the investment team were entitled to the benefits of their realisation and under no obligation to disclose them to anyone.

Although it does not affect the position in relation to count 4 their Lordships take issue with these conclusions on two grounds. First Lord Wilberforce's observations in *Tarling* were made in the context of charges of conspiracy to defraud. The Divisional Court had already held that the evidence on these charges fell far short of setting up a *prima facie* case of dishonesty (page 96). Lord Wilberforce at page 111 said:-

> "The highest, in my opinion, that the evidence can be put is that the participants made a secret profit at the expense probably of HPBHK (but Mr. Tarling was not a director of HPBHK), possibly and indirectly of HPBIL and that they kept it secret: it would not otherwise be a secret profit. This by itself is no criminal offence whatever other epithet may be appropriate."

Lord Keith of Kinkel at pages 137-8, after stating that the alleged conspirators were in breach of their fiduciary duty to disclose the share dealings in question, continued:-

> "But that does not in itself constitute a crime under the law of England. The evidence, while clearly showing that Mr. Tarling and those of his co-directors who were party to the dealings missed a number of suitable opportunities for disclosing these dealings, does not indicate that positive steps were taken to conceal them."

Neither Lord Wilberforce nor Lord Keith of Kinkel went further than to say that non-disclosure *per se* amounting to breach of fiduciary duty did not amount to a crime. They were not dealing with a situation where there was a positive finding of dishonest concealment on the part of the defendants. In this case not only had the defendants sold both shares and warrants back to EHL and ET respectively without disclosing that they were the vendors but the Yeoman Loop, whose purpose the judge had found to be dishonest concealment, had been used on two occasions in connection with the transactions in Keady shares. Furthermore the appellant and Hawkins had prepared a minute of a meeting of the Board of EHL which had never taken place, with the clear intention as the judge found of "fraudulently misleading by indicating to the auditors that two independent directors at the time were aware of and had approved the sale to the Keady consortium". In these circumstances their Lordships consider that the situation obtaining in this case is significantly different from that which obtained in *Tarling* and that the dictum of Lord Wilberforce upon which the Court of Appeal relied does not apply. In the second place the existence of a practice of non-disclosure involving breach of fiduciary duty does not *per se* absolve those operating the practice from dishonesty. Actions which are basically dishonest are not rendered honest by repetition. Hawkins was chairman and managing director of EHL and the appellant deputy chairman throughout its life. They were both therefore substantially responsible for the practice of non-disclosure to the Board of share allocations to directors. If non-disclosure would

have been dishonest, but for the practice, they cannot rely on that practice which they had instituted to negative dishonesty. It must in any event be remembered that the practice as found by the judge was related only to allocation of shares to directors and not to resale by directors at a profit to EHL or its subsidiaries. Their Lordships cannot accept the proposition that a director of a company who acquires assets from that company, whether openly or clandestinely, is then entitled to trade those assets with the company without disclosing that he is so doing.

It is now time to turn to the arguments in relation to count 1. Mr. McLinden advanced four main arguments, namely (1) that the Court of Appeal had extended the ambit of a conspiracy to defraud beyond any limit which had previously been set, (2) that a conspiracy to defraud could only take place where there existed (i) an interest of the person to be defrauded, (ii) a fraudulent act or omission adversely affecting that interest, and (iii) dishonest concealment of the fraudulent act, in short double dishonesty, (3) that the Crown was required to prove that the appellant knew and agreed that the Yeoman Loop would be used to launder money stolen from Equiticorp and (4) that the Court of Appeal had failed to take into account the effect which their acquittal of the appellant on count 4 had upon his conviction by the judge on count 1.

(1) Mr. McLinden criticised the passage in the judgment of the Court of Appeal relating to count 1 which has already been referred to and in particular the words emphasised therein. This statement was, he submitted, in far too broad terms and would allow A to be convicted of defrauding B of moneys in which B had no interest whatsoever merely because A's actions made it more difficult for B to ascertain whether or not he had any interest therein. Their Lordships consider that there is force in that submission. In *Welham v. DPP* [1961] A.C. 103 Lord Radcliffe at page 124 said that:-

> "What [the law] has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person."

A person is not prejudiced if he is hindered in inquiring into the source of moneys in which he has no interest. He can only suffer prejudice in relation to some right or interest which he possesses. This was made clear in *Wai Yu-tsang v. The Queen* [1992] 1 A.C. 269, where Lord Goff of Chieveley, delivering the judgment of the Board, referred at page 276E to the expression "intent to defraud" and continued:-

> "In broad terms, it means simply an intention to practise a fraud on another, or an intention to act to the prejudice of another man's right."

Lord Goff further stated at pages 279-80:-

> "The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise a fraud on somebody. For this purpose it is enough for example that, as in *Reg. v. Allsop* and in the present case, the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk."

This passage must, of course, be read together with the earlier observations in the judgment made with reference to *Welham v. DPP* [1961] A.C. 103 which was followed in *Reg. v. Terry* [1984] A.C. 374 that conspiracies to defraud are not restricted to cases of intention to cause the victim economic loss. However where possible economic loss is concerned there can be no doubt that there must exist some right or interest in the victim which is capable of being prejudiced whether by actual loss or by being put at risk. It follows that the Court of Appeal have gone too far in overlooking the need for the existence of such a right or interest in the victim which must be prejudiced.

(2) Mr. McLinden submitted that, since the appellant was not found to have acted dishonestly in relation to the funds which formed the subject of any of the five transactions, one of the ingredients necessary to a conviction for conspiracy to defraud was missing. It was not enough that the use of the Yeoman Loop had been found by the judge to be dishonest. This submission, however, ignores the fact that the appellant as a director of EHL and some of its subsidiaries was throughout his tenure of these offices under a duty, when entering into a transaction with these companies or when using the resources of these companies for his own benefit, to act with perfect good faith and to make full disclosure to the company in question of all material circumstances. A director is in the same position as an agent (*Aberdeen Railway Company v. Blaikie Bros.* (1854) 1 Macq. H.L. 461 at page 471) and it is trite law that "no agent may enter into any transaction in which his personal interest might conflict with his duty to his principal, unless the principal, with full knowledge of all the material circumstances and of the exact nature and extent of the agent's interest, consents" (Bowstead on Agency 15th Ed. page 164). This proposition is further expanded in the above work at page 167:-

> "Where an agent enters into any contract or transaction with his principal, or with his principal's representative in interest, he must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject matter of the contract or transaction which would be likely to influence the conduct of the principal or his representative".

Furthermore an agent has a duty to obtain his principal's informed consent before he uses the latter's property for his own personal benefit (Bowstead op. cit. page 175). In applying these principles to conspiracy to defraud, regard must be had to the following dictum of Viscount Dilhorne in *Reg. v. Scott* [1975] A.C. 819 at page 840:-

> "... it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

Since a company is entitled to recover from directors secret profits made by them at the company's expense, it would follow that any dishonest agreement by directors to impede a company in the exercise of its right of recovery would constitute a conspiracy to defraud. In their Lordships' view a person can be guilty of fraud when he dishonestly conceals information from another which he was under a duty to disclose to that other or which that other was entitled to require him to disclose. It was the element of dishonest concealment which was absent in *Tarling*.

Taking transactions 1 and 4 together certain things clearly emerge. The appellant and the other defendants acquired Keady shares and warrants from EIHK without disclosure to the Board of EHL. They sold all these shares and warrants at a large profit, a substantial number of them being sold back to EHL or ET, once again without disclosure to the Board of EHL. Until the resales the shares appeared to be registered in the name of EIHK. Thereafter Hawkins and the appellant concocted a minute of a fictitious meeting in order to deceive EHL's auditors into thinking that the Board of EHL had sanctioned the allocation to the investment team of Keady shares. $6m from the February 1987 sale of some 20,440,000 10 cent Keady shares which had been received by EIHK was paid to ET in Australia and then for unexplained reasons by way of YFP's account in Hong Kong to RWS or EAL whence it found its way into the hands of the investment team or their various interests. After five members of the investment team sold their Keady warrants to ET at a very large profit they passed a substantial sum of money round the Yeoman Loop for unexplained reasons at a cost of $37,000. The appellant and his co-defendants were accordingly not merely failing to disclose their activities to the Board of EHL but they were taking positive steps whose only object was to make it more difficult for persons such as other directors, the shareholders and the auditors of EHL, who had a legitimate interest in the transactions, to discover what they were doing. The Board could, as the judge said:-

> "... legitimately have considered that if profits were being made on the sale of Keady shares, that were still in the name of Equiticorp Investments (HK), some if not all of those profits should belong to EHL. Had they been aware of the later proposals for the investment team to sell some of their Keady shares back to EHL they would, having regard to the obvious conflict of interest, want to be informed about, and be satisfied as to, the terms. The same applies to the later shares for warrants swap. But the concealment of all of these transactions from the board deprived them of that opportunity.
>
> There is a further aspect. The secrecy that surrounded the activities of Messrs Adams and Taylor on behalf of the investment team, and the lack of any documentary evidence in the hands of anyone other than Messrs Adams and Taylor, meant that they had effectively hedged their bets. If, contrary to all the indications, the February sales had not yielded a worthwhile profit, they could have decided that the shares sold were not theirs, but Equiticorp Investment (HK)'s. They were still in the name of Equiticorp Investments (HK). As no one else knew whose were the shares being sold, that could and would not be challenged. Leaving that option in their hands was also to EHL's detriment."

Although these observations were made in relation to count 4 they are equally applicable to consideration of transactions 1 and 4 in the context of count 1.

In the case of transaction 2 the Crown was unable to prove that the investment team derived any benefit from the "retreat" fee. The appellant would not or could not explain its origin nor why it was passed round the Yeoman Loop instead of being paid direct from BGL's account in Singapore to EIGL. The interposition of the Yeoman Loop between BGL and EIGL necessarily rendered more difficult legitimate inquiries into the origin of the money and the reason for its payment to EIGL. However, notwithstanding the unusual nature of the transaction their Lordships do not feel able to affirm that on the facts as found by the judge the investment team were under a duty of disclosure in relation to the "retreat" fee.

Transaction 3 was used to transfer monies payable against invoices issued by EHL for services performed by EHL from an account with EFGL around the Yeoman Loop and through RWS into the hands of the investment team or their trusts or companies at a cost of some $7,500. Even although the appellant may have thought that his share of the money was a bonus authorised by the independent directors, that did not absolve him from his duty of disclosure at least to the shareholders. Once again the interposition of the Yeoman Loop between EFGL and RWS's trust account impeded inquiries into money in which EHL had an undoubted interest.

The position in relation to transaction 5 is somewhat different from that obtaining in relation to the other four transactions in as much as it was not established that EHL or any of its subsidiaries had any interest in the "H" fee, nor was it proved that it was *per se* dishonest. However the resources of EHL in the form of EAL were used to set up a contrived foreign exchange transaction and the Yeoman Loop was then used to conceal what had gone before, as well as the origin of the benefits to the investment team. To whomsoever the "H" fee may have belonged in law Hawkins and the appellant at least were aware that the Yeoman Loop was being used to conceal the obviously dishonest foreign exchange transaction in Australia, a transaction which because of its use of EHL's resources they were under a duty to disclose. Thus transaction 5 was itself dishonest.

It follows that the appellant, having been party to the use of the Yeoman Loop in the case of four out of the five transactions for the purpose of dishonest concealment of information which, as a director, he was under a duty to disclose to EHL, was properly convicted on count 1. This conclusion also disposes of Mr. McLinden's third point. It only remains to say a word about Mr. McLinden's fourth submission to the effect that the Court of Appeal, in upholding the appellant's conviction on count 1, had failed to take into account their quashing of his conviction on count 4. Their Lordships have already indicated why they consider that the Court of Appeal were in error in concluding that the investment team were under no obligation to disclose their dealings with the Keady shares. Thus although the Court of Appeal order on count 4 must stand all the circumstances surrounding the dealings in the Keady shares can properly be looked at in the context of count 1 to which they are as already explained highly relevant.

For the foregoing reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.